

# ADDRESSING DISCRETION AND DISCRIMINATION IN THE MEXICAN NATIONAL MIGRATION INSTITUTE

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## INTRODUCTION

On September 3, 2015 a bus in Querétaro traveling towards Sonora in Mexico carried among its passengers four family members: Pablo, Amy, Alberto, and Esther Juárez.<sup>1</sup> One family member was a minor, two lacked significant understanding of the Spanish language, and all four were members of the Tzeltal Indigenous community who hoped to find work as agricultural day laborers upon their arrival in Sonora.<sup>2</sup> Although Mexican law states that Mexican citizens need not carry identification documents when traveling within the country,<sup>3</sup> each member of the Juárez family traveled with identification documents that proved their Mexican nationality.<sup>4</sup> Despite carrying these documents, three of the four family members were pulled off the bus by agents of the Mexican National Migration Institute (“INM”) under suspicion of being undocumented Guatemalan

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1. LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 22/2016 ¶¶ 3, 6, 15 (May 22, 2016) (Mex.) [hereinafter RECOMENDACIÓN NO. 22/2016]. The family members’ real names have been changed to protect their privacy; this Note uses the same false names that were used by the media and a nonprofit to describe the family’s experiences. See GABRIELA DÍAZ PRIETO, EL COLEGIO DE LA FRONTERA NORTE, OPERATIVOS MÓVILES DE REVISIÓN MIGRATORIA EN LAS CARRETERAS DE MÉXICO 3 (2016) (Mex.), <http://unviajesinrastros.imumi.org/wp/wp-content/uploads/2016/08/Operativos-de-revision-migratoria-en-carreteras.pdf> [https://perma.cc/5QER-EET6] (using the names Pablo, Amy, Alberto, and Esther); Nina Lakhani, *Mexico Tortures Migrants—and Citizens—in Effort to Slow Central American Surge*, THE GUARDIAN (Apr. 4, 2016), <https://www.theguardian.com/world/2016/apr/04/mexico-torture-migrants-citizens-central-america> [https://perma.cc/PX26-QYQT] (using the surname Juárez to describe the family).

2. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶¶ 15, 17.3.4, 35.

3. Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. I, art. 11, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); Ley de Migración [LM] tít. 2, cap. 1, art. 7, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

4. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶ 6. Specifically, all four carried copies of their birth certificates and their Clave Única de Registro de Población (“CURP”); one also carried their voter credential. *Id.* Note that a CURP is the Mexican equivalent of a U.S. social security card. ANNA JOSEPH ET AL., INST. FOR WOMEN IN MIGRATION, MEXICAN TARJETAS DE VISITANTE POR RAZONES HUMANITARIAS AND FIRM RESETTLEMENT: A PRACTICE ADVISORY FOR ADVOCATES 9 (June 7, 2019) (citing ACUERDO para la adopción y uso por la Administración Pública Federal De la Clave Única de Registro de Población, Diario Oficial de la Federación [DOF] 23-10-1996 (Mex.)), <http://imumi.org/attachments/2019/Mexican%20Tarjetas%20de%20Visitante%20por%20Razones%20Humanitarias%20and%20Firm%20Resettlement%20-%20A%20Practice%20Advisory%20for%20Advocates.pdf> [https://perma.cc/DR7H-EPFQ].

migrants.<sup>5</sup> The National Human Rights Commission (“CNDH”), Mexico’s official, autonomous human rights body,<sup>6</sup> later concluded that the INM illegally detained Alberto, Amy, and Esther Juárez based on subjective presumptions regarding their appearances—specifically, their Indigenous ethnicities.<sup>7</sup>

The Juárez family spent eight days detained in an immigration detention center, which the government euphemistically calls a “migratory station.”<sup>8</sup> During their detention, INM officers tortured Alberto using kicks and electrical shocks to force him to say he was Guatemalan.<sup>9</sup> The INM released the three family members after the nonprofit Institute for Women in Migration (“IMUMI”) filed a complaint on behalf of the Juárez family.<sup>10</sup>

Four years after their detention, the Juárez family still fears future encounters with the INM.<sup>11</sup> Esther, who was fifteen at the time of her detention, stated in November 2019: “My younger brothers and

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5. *E.g.*, RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶¶ 6, 15.2; DÍAZ PRIETO, *supra* note 1, at 3. Note that the INM did not detain the fourth family member, who is related to the other three by marriage. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶¶ 7, 15.2. The INM provided various explanations for why they detained the three family members; for example, one INM agent stated that a member of the Juárez family admitted that their documentation was purchased rather than authentic; that copies of identification are not enough to determine their validity; and that the documents were invalid because they listed the birthdates of the victims’ parents inconsistently. *Id.* ¶¶ 11, 15.2, 17.1.

6. *¿Qué es la CNDH?*, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH): PREGUNTAS FRECUENTES, <https://www.cndh.org.mx/cndh/preguntas-frecuentes> [<https://perma.cc/9TJX-7XXA>].

7. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶ 134.

8. José Antonio Guevara, *Eufemismos y discriminación en el lenguaje migratorio*, EL ECONOMISTA (July 8, 2014), <https://www.economista.com.mx/opinion/Eufemismos-y-discriminacion-en-el-lenguaje-migratorio-20140708-0087.html> [<https://perma.cc/CKH9-3CKR>] (discussing the Mexican government’s use of euphemisms); RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶¶ 3–9, 17.3.13 (detailing the Juárez family’s experience in detention).

9. *Id.* ¶¶ 8, 12.

10. Interview with Gretchen Kuhner, Director of the Institute for Women in Migration (IMUMI) on July 20, 2020. The author of this Note interned in the summer of 2019 at IMUMI. For information on this organization, see *Quienes Somos*, EL INSTITUTO PARA LAS MUJERES EN LA MIGRACIÓN (IMUMI), <https://imumi.org/quienes-somos/> [<https://perma.cc/SNR4-DLQY>].

11. INM (@INAMI\_mx), TWITTER (Nov. 7, 2019 11:41 AM), [https://twitter.com/INAMI\\_mx/status/1192527540461678594](https://twitter.com/INAMI_mx/status/1192527540461678594) (on file with the *Columbia Human Rights Law Review*).

sisters also are going to want to work in the north [of Mexico], how do I know that this is not going to happen to them?”<sup>12</sup>

The Juárez family’s experience with the INM is not uncommon.<sup>13</sup> Countless Indigenous Mexicans<sup>14</sup> and Afro-Mexicans<sup>15</sup> have suffered detention, enforced disappearance,<sup>16</sup> and/or deportation at the hands of the INM.<sup>17</sup> The INM’s actions violate Afro-Mexicans’ and Indigenous Mexicans’ rights, such as their rights to nationality,<sup>18</sup>

12. *Id.*

13. TANYA DUARTE ET AL., INST. FOR WOMEN IN MIGRATION (IMUMI), “BECAUSE OF THE COLOR OF MY SKIN AND THE WAY I SPEAK SPANISH:” THE INM’S DETENTION AND DEPORTATION OF INDIGENOUS AND AFRO-DESCENDANT MEXICANS (forthcoming fall 2020) (manuscript at 2–3) (on file with the *Columbia Human Rights Law Review*).

14. In this Note, the term “Indigenous Mexicans” refers to Mexican nationals who self-identify as Indigenous. For more information on the nuances and constructions of Indigenous Mexican racial, cultural, and legal identity, see *Mexico: Indigenous People*, MINORITY RTS. GRP INT’L, <https://minorityrights.org/minorities/Indigenous-peoples-4/> [<https://perma.cc/TN9C-NBHD>]; CONSEJO NACIONAL DE POBLACIÓN, INFOGRAFÍA POBLACIÓN INDÍGENA 1, [https://www.gob.mx/cms/uploads/attachment/file/121653/Infografia\\_INDIFINAL\\_08082016.pdf](https://www.gob.mx/cms/uploads/attachment/file/121653/Infografia_INDIFINAL_08082016.pdf) (on file with the *Columbia Human Rights Law Review*).

15. The term “Afro-Mexicans” refers to Mexican nationals who are descendants of African men and women who were forcefully brought to the continent during the colonial period or those that migrated after Mexican independence. AFRODESCENDENCIAS EN MÉXICO INVESTIGACIÓN E INCIDENCIA A.C., DECÁLOGO PARA EL RECONOCIMIENTO DE LAS POBLACIONES AFROMEXICANAS Y SUS DERECHOS EN LA CONSTITUCIÓN POLÍTICA DE LA CIUDAD DE MÉXICO 1 (2016), <http://www.migrantologos.mx/es/images/pdf/reconocimientoafrocdmxfl.pdf> [<https://perma.cc/S9V8-C2TK>], translated in DUARTE ET AL., *supra* note 13 (manuscript at 1, n.4). For more information on Afro-Mexican identity, history, culture, and more, see MARÍA ELISA VELÁZQUEZ, AFRICANS AND AFRO-DESCENDANTS IN MEXICO AND CENTRAL AMERICA: OVERVIEW AND CHALLENGES OF STUDIES OF THEIR PAST AND PRESENT 4, UNESCO: THE SLAVE ROUTE PROJECT, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Maria\\_Elisa\\_Velazquez\\_Eng\\_01.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Maria_Elisa_Velazquez_Eng_01.pdf) [<https://perma.cc/2ZYF-FFUS>].

16. The term “enforced disappearance” refers to the act by which a government official, group, or individual acting on behalf of or with the direct or indirect support, acquiescence, or consent of the government deprives a person or persons of their liberty; this is followed by a refusal to disclose the location or fate of the person or persons concerned and/or a refusal to acknowledge the person’s deprivation of liberty. G.A. Res. 47/133, Declaration on the Protection of All Persons from Enforced Disappearance (Feb. 12, 1993).

17. DUARTE ET AL., *supra* note 13 (manuscript at 4–12).

18. For several legal sources outlining the right to nationality, see Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. I, art. 11, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); American Convention on Human Rights, *opened for signature*

personal liberty,<sup>19</sup> freedom of movement,<sup>20</sup> and freedom from discrimination,<sup>21</sup> under several national, regional, and international legal obligations including the Mexican Constitution,<sup>22</sup> the American Convention on Human Rights,<sup>23</sup> and the Universal Declaration of Human Rights.<sup>24</sup>

A complex web of social, historical, and political legacies and practices inform the INM's illegal detention, disappearance, and/or deportation of Afro-Mexicans and Indigenous Mexicans.<sup>25</sup> This Note focuses on one contributing factor: the legal framework providing INM agents with extensive discretion, which in turn leads to discriminatory practices. In recommending measures to restructure the discretion exercised by the INM and reduce the INM's

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Nov. 22, 1969, art. 20, O.A.S.T.S. No. 3, 1144 U.N.T.S. 143, 150 (entered into force July 18, 1978) [hereinafter American Convention]; G.A. Res. 217(III) A, Universal Declaration of Human Rights, arts. 15, 6 (Dec. 10, 1948) [hereinafter UDHR].

19. For sources protecting the right to personal liberty, see Constitución Política de los Estados Unidos Mexicanos, CPEUM, *tít. 1, cap. I, arts. 14, 16*, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); American Convention, *supra* note 18, art. 7; UDHR, *supra* note 18, art. 9.

20. For sources protecting the right to freedom of movement, see Constitución Política de los Estados Unidos Mexicanos, CPEUM, *tít. 1, cap. I, art. 11*, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); American Convention, *supra* note 18, art. 22; UDHR, *supra* note 18, art. 13.

21. For several documents protecting the right to freedom from discrimination, see Constitución Política de los Estados Unidos Mexicanos, CPEUM, *tít. 1, cap. I, art. 1*, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); American Convention, *supra* note 18, arts. 1.1, 24; UDHR, *supra* note 18, art. 7. For a full discussion of the many rights violated by the INM's actions, see LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 58/2015 (Dec. 31, 2015) (Mex.) [hereinafter RECOMENDACIÓN NO. 58/2015]; RECOMENDACIÓN NO. 22/2016, *supra* note 1; LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 31/2017 (Aug. 21, 2017) (Mex.) [hereinafter RECOMENDACIÓN NO. 31/2017].

22. Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.).

23. American Convention, *supra* note 18.

24. UDHR, *supra* note 18. For a discussion of the other national, regional, and international obligations to which Mexico is subject, see DUARTE ET AL., *supra* note 13 (manuscript at 24–46).

25. See DUARTE ET AL., *supra* note 13 (manuscript at 12–24).

discriminatory actions, this Note utilizes evolutionary learning.<sup>26</sup> Whether or not the solutions proposed in this Note are adopted by the INM and codified into law, the reforms can still be incorporated by and guide the actions of the CNDH and other government agencies, nonprofits, and NGOs in their efforts to address the INM's discretionary and discriminatory practices. This Note also aims to contribute to the existing literature on street-level actors: government agents whose on-the-ground work "effectively become[s] the public policies they carry out."<sup>27</sup>

Part I of this Note provides an overview of the legal framework that grants INM agents broad discretion, which in turn leads to their engagement in illegal, discriminatory behavior. This Part also describes the Mexican government's recent response to the INM's illegal activity and the strengths and shortcomings of this response. Part II introduces evolutionary learning as a mechanism for reform and provides an example of a public institution that has faced issues of discretion and discrimination similar to that of the INM: juvenile justice agencies across the United States that disparately impact racial and ethnic minorities. This Part explains how juvenile justice agencies successfully use principles of evolutionary learning to reduce disparate impact on minorities. Finally, Part III recommends ways to use evolutionary learning to reform the INM.

## I. OVERVIEW OF THE INM'S DISCRETIONARY AND DISCRIMINATORY ACTIONS AGAINST AFRO-MEXICANS AND INDIGENOUS MEXICANS

Section I.A of this Note describes the INM's long-standing practice of discrimination against Afro-Mexicans and Indigenous Mexicans. Section I.B analyzes one factor that contributes to the INM's discriminatory conduct: the extensive discretion afforded to

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26. Evolutionary learning is a mechanism for reform that emphasizes accountability and transparency, collaboration, contextualization, and continuous improvement. *See infra* Section II.A.

27. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* xiii (30<sup>th</sup> anniversary ed. 2010); *see also* Peter J. May & Søren C. Winter, *Politicians, Managers, and Street-Level Bureaucrats: Influences on Policy Implementation*, 19 J. PUB. ADMIN. RSCH. & THEORY 453, 454 (2009) (analyzing political and managerial influences in the implementation of policy by street-level actors); Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV., 761, 824–27, 839–54 (2007) (proposing that framing rules be used to combat "desk-clerk law," in which desk clerks shape government policy by frequently giving inaccurate or biased statements).

INM agents. Section I.C then analyzes the strengths and shortcomings of the Mexican government's efforts to reduce the INM's discriminatory conduct.

#### A. Discrimination Against Indigenous Mexicans and Afro-Mexicans by the INM

The Secretary of the Interior ("SEGOB")<sup>28</sup> created the INM in 1993 as a subordinate agency responsible for migration control.<sup>29</sup> Almost immediately after the INM's creation, the CNDH, the autonomous body responsible for monitoring human rights in Mexico, began documenting the INM's ongoing human rights violations by issuing recommendations.<sup>30</sup> Between 1994 and January 2019, the CNDH issued the INM fifty-six recommendations.<sup>31</sup> In these recommendations, the CNDH provides an overview of the legal violations, indicates the relevant authorities responsible for the violations, and sets out how the relevant authorities must make reparations for their harm to the affected individual(s).<sup>32</sup> Many of

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28. SEGOB facilitates relations between the federal executive power and other powers of the government and country "to promote harmonious coexistence, social peace, development and well-being of Mexicans in a Rule of Law." *¿Qué hacemos?*, GOBIERNO DE MÉXICO: SECRETARÍA DE GOBERNACIÓN, <https://www.gob.mx/segob/que-hacemos> [<https://perma.cc/7TBM-7Z4N>].

29. Sonja Wolf, *Migration Detention in Mexico: Accountability Limitations as a Factor for Human Rights Violations*, 10 UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO-INSTITUTO DE INVESTIGACIONES SOCIALES, REVISTA DE INVESTIGACIÓN SOCIAL 9, 22 (2015); see also Marianne H. Marchand, *Crossing Borders: Mexican State Practices, Managing Migration, and the Construction of "Unsafe" Travelers*, 8 LATIN AM. POL'Y 5, 12 (2017) ("The INM, which is dependent on the Secretary of the Interior (SEGOB), is the primary government agency in charge of implementing [immigration] controls, surveillance, and interdiction.").

30. COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), INFORME ESPECIAL SOBRE EL SEGUIMIENTO DE LAS RECOMENDACIONES DE LA CNDH 113 (Jan. 3, 2019), <https://www.cndh.org.mx/documento/informe-especial-sobre-el-seguimiento-de-las-recomendaciones-de-la-cndh> [<https://perma.cc/QD48-PXYJ>].

31. *Id.*

32. *¿Qué es una Recomendación?*, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH): PREGUNTAS FRECUENTES, <https://www.cndh.org.mx/cndh/preguntas-frecuentes> [<https://perma.cc/N8KM-AMTX>]; *Mexico's National Human Rights Commission: A Critical Assessment*, HUM. RTS. WATCH (Feb. 12, 2008), <https://www.hrw.org/report/2008/02/12/mexicos-national-human-rights-commission/critical-assessment> [<https://perma.cc/G5BM-4EHK>] [hereinafter *Mexico's National Human Rights Commission*] (explaining the role of the CNDH and the impact of its recommendations).



these recommendations remain “en trámite” (in progress) because the INM has not complied with the necessary measures.<sup>33</sup>

Three of the recommendations still “en trámite” address the INM’s discriminatory behavior against Indigenous Mexicans.<sup>34</sup> These recommendations conclude that INM agents detain and even disappear individuals based on their appearance and other subjective assumptions.<sup>35</sup> INM agents themselves have admitted to identifying potential migrants in irregular situations based, among other characteristics, on their “nervous behavior, the color of their skin, their dress, but above all by their smell.”<sup>36</sup>

The CNDH reports that the INM’s discriminatory conduct resulted in the 2015 illegal detention of sixteen Mexicans, some if not all of whom are Indigenous, and the forced disappearance of a seventeen-year-old female who, although not explicitly stated to be Indigenous, is likened to the Indigenous victims of the other two recommendations.<sup>37</sup> The total number of Indigenous Mexicans and Afro-Mexicans illegally detained, disappeared, and/or deported by the INM is unknown due to the agency’s opaque reporting practices<sup>38</sup> and

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33. *Mexico’s National Human Rights Commission, supra* note 32.

34. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶¶ 120–42 (describing the INM’s illegal treatment of the Juárez family); RECOMENDACIÓN NO. 58/2015, *supra* note 21, ¶¶ 196–216 (describing the INM’s illegal treatment of Indigenous Mexican citizens); RECOMENDACIÓN NO. 31/2017, *supra* note 21, ¶¶ 228–44 (describing the forced disappearance of a seventeen-year-old Mexican by the INM that was motivated by her physical appearance). To the author’s knowledge, no recommendations have addressed the INM’s discriminatory conduct against Afro-Mexicans. COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), *Recomendación*, [https://www.cndh.org.mx/tipo/1/recomendacion?field\\_fecha\\_creacion\\_value%5Bmin%5D=&field\\_fecha\\_creacion\\_value%5Bmax%5D=&keys=&items\\_per\\_page=10](https://www.cndh.org.mx/tipo/1/recomendacion?field_fecha_creacion_value%5Bmin%5D=&field_fecha_creacion_value%5Bmax%5D=&keys=&items_per_page=10) [https://perma.cc/7RDT-KCZQ] (type “Afro” into the search bar and hit “filtrar resultados.” Repeat this process with all six categories of reports available on the left side of the page under the heading “Índice”).

35. RECOMENDACIÓN NO. 22/2016, *supra* note 1, ¶ 134 (explaining that the Juárez family was detained based on their appearance and other subjective presumptions); RECOMENDACIÓN NO. 58/2015, *supra* note 21, ¶ 256 (stating that the victims were “detected” without the use of objective elements to determine their nationality); RECOMENDACIÓN NO. 31/2017, *supra* note 21, ¶¶ 238, 242–43 (explaining that the victim of the enforced disappearance was racially profiled).

36. DÍAZ PRIETO, *supra* note 1, at 4.

37. RECOMENDACIÓN NO. 31/2017, *supra* note 21, ¶ 238 (stating that the young woman was detained for reasons based on her physical appearance while traveling in a similar situation to that of the victims described in the 58/2015 and 22/2016 recommendations).

38. Wolf, *supra* note 29, at 11; see XIMENA SUÁREZ ET AL., WOLA, ACCESS TO JUSTICE FOR MIGRANTS IN MEXICO 6 (July 2017),

a fear among victims that reporting their experiences to the authorities will result in retribution.<sup>39</sup> The few individuals who have described encounters with the INM report undergoing similar experiences: INM agents stopped them on suspicion of not being Mexican;<sup>40</sup> declined to accept their documentation as establishing their citizenship; and, in many cases, required them to sing the Mexican National Anthem and name multiple state governors.<sup>41</sup> Many report that the INM transferred them to immigration detention centers to further review their nationality.<sup>42</sup> Others report that the INM went so far as to deport them to other countries.<sup>43</sup> The Director of the Gubernatorial Office on Afro-Mexican Issues in Oaxaca explains that two women were deported, “one to Honduras and the other to Haiti because the police insist that in Mexico there are no

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<https://www.wola.org/analysis/access-justice-migrants-mexico-right-exists-books> [<https://perma.cc/976N-SHQ6>] (“Statistics on violence against migrants are not gathered at the national level even though many federal and local cases may be related, making it difficult to obtain information . . . .”); *see also Boletín mensual de estadísticas migratorias 2020* at Índice, UNIDAD DE POLÍTICA MIGRATORIA, SECRETARÍA DE GOBERNACIÓN (June 2020), [http://www.politicamigratoria.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines\\_Estadisticos/2020/Boletin\\_2020.pdf](http://www.politicamigratoria.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines_Estadisticos/2020/Boletin_2020.pdf) [<https://perma.cc/6NE3-4WNV>] (providing statistics on those who enter the country and under what conditions; on foreigners presented before migratory proceedings and returned to their countries of origin; on the protection of migrants; and on Mexicans returned from the United States and Canada; but not providing information on Mexican citizens falsely detained, disappeared, and/or deported by the INM).

39. *See, e.g.,* DUARTE ET AL., *supra* note 13 (manuscript at 4, 6) (quoting Tanya Duarte, activist and director of the Afrodescendancy Project); Suárez et al., *supra* note 38, at 15 (suggesting that migrants were unwilling to report cases because of fear of retaliation); LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 37/2019 ¶ 7 (June 24, 2019) (Mex.) [hereinafter RECOMENDACIÓN NO. 37/2019] (explaining that non-Mexican migrant victims of INM abuse were afraid to speak with CNDH officials because the agents threatened to come back, hit them, and “disappear them”).

40. DUARTE ET AL., *supra* note 13 (manuscript at 4–13).

41. *Id.*; Luis Carlos Rodríguez, *México deporta a “afrodescendientes” a Haití solo por su color de piel*, MÉXICO NUEVA ERA (Feb. 20, 2017), <https://mexiconuevaera.com/nacional/estados/2017/02/20/deporta-mexico-afrodescendientes-haito-solo-pos-su-color-de-piel> [<https://perma.cc/U58R-TJH5>].

42. DUARTE ET AL., *supra* note 13 (manuscript at 4–13).

43. *Id.* The CNDH documented an instance in which the INM ordered the deportation of a dual Mexican-U.S. citizen who was stopped at a police control point while driving her car toward her home in Tijuana, Baja California. Although she showed her voter credential and indicated her dual nationality, she was detained and in less than 12 hours, deported to the U.S. LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 68/2017 ¶¶ 4–7, 74, 90 (Dec. 11, 2017) (Mex.).

Black people. Even though [the women] had documents showing their Mexican identity, they were deported.”<sup>44</sup> Afro-Mexicans are deported to Haiti so frequently that a Haitian news source started an online campaign calling on the Mexican Ambassador in Haiti to issue a statement clarifying “whether ‘looking like a Haitian’ is a crime in [Mexico].”<sup>45</sup> In spite of the criticism leveled at the INM by CNDH recommendations, news outlets, and other observers, the INM has continued to engage in this illegal behavior.<sup>46</sup>

#### B. Current Laws and Policies That Provide the INM with Discretion and Result in Discrimination

Many complex factors contribute to the INM’s discriminatory conduct, including agents’ own prejudices against Afro-Mexicans and Indigenous Mexicans.<sup>47</sup> This Note focuses on one of the many contributing factors that leads the INM to engage in discrimination: the structures, demands, and realities of Mexican immigration law and policy.<sup>48</sup> INM agents are classic examples of “street-level bureaucrats,” famously described by Michael Lipsky as “[p]ublic service workers who interact directly with the public in the course of

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44. Rodríguez, *supra* note 41 (quoting Clemente Jesús López, director of the Office of Afro-Mexican Affairs in Oaxaca).

45. *Black Mexicans Deported from Mexico to Haiti for “Looking Like a Haitian”*, HOUGAN SYDNEY: HAITI NEWS (Apr. 11, 2016), <http://hougansydney.com/whats-happening-in-haiti/black-mexicans-deported-from-mexico-for-looking-like-a-haitian-> [<https://perma.cc/6TM7-X9KQ>].

46. See *infra* note 116 and accompanying text for a discussion of the continued human rights abuses committed by the INM against Afro-Mexicans and Indigenous Mexicans.

47. See INSTITUTO PARA LA SEGURIDAD Y LA DEMOCRACIA, A.C. (INSYDE), DIAGNÓSTICO DEL INSTITUTO NACIONAL DE MIGRACIÓN 19 (2013), [http://insyde.org.mx/wp-content/uploads/2013/09/R\\_E\\_Diagnóstico\\_INM\\_final.pdf](http://insyde.org.mx/wp-content/uploads/2013/09/R_E_Diagnóstico_INM_final.pdf) (on file with the *Columbia Human Rights Law Review*) [hereinafter INSYDE] (attributing human rights abuses committed by INM agents to, among other factors, poor administration, poor training, corruption, and prejudice); Wolf, *supra* note 29, at 27 (explaining that INM agents are “members of a deeply classist, racist, and discriminatory society, [and they] reproduce the prevailing attitudes in their dealings with migrants”); Lindsey Carte, *Everyday Restriction: Central American Women and the State in the Mexico-Guatemala Border City of Tapachula*, 48 INT’L MIGRATION REV. 113, 138 (2014) (explaining that “an overarching climate of discrimination” contributes to the discriminatory conduct of the INM); see also LIPSKY, *supra* note 27, at 141 (explaining the role of discrimination in street-level bureaucrats’ decisionmaking). For additional factors that contribute to the INM’s discriminatory conduct, see generally MEXICO’S HUMAN RIGHTS CRISIS (Alejandro Anaya-Muñoz & Barbara Frey eds., 2019).

48. See LIPSKY, *supra* note 27, at 140–41.

their jobs, and who have substantial discretion in the execution of their work.”<sup>49</sup> Street-level bureaucrats, Lipsky notes, often exercise this discretion in inappropriate ways due to the policy environment in which workers operate.<sup>50</sup> The policy environment of the INM results from the widely dispersed, vague, and contradictory laws regulating immigration and human rights.<sup>51</sup> This legal framework, discussed in detail below, invites the exercise of “unfettered discretion,”<sup>52</sup> which frequently results in discrimination.<sup>53</sup>

### 1. The Relevant Laws Are Widely Dispersed

INM agents conducting migratory revisions must look to multiple legal sources to understand their roles and responsibilities,<sup>54</sup> including the Law of Migration;<sup>55</sup> the Regulation of the Law of Migration;<sup>56</sup> general administrative provisions;<sup>57</sup> the Constitution;<sup>58</sup>

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49. *Id.* at 3, 221, 223; cf. Lindsey Carte & Rebecca Torres, *Role Playing: A Feminist-Geopolitical Analysis of the Everyday Workings of the Mexican State*, 21 J. APPLIED STAT. 1267, 1281 (2014) (explaining how low-to-mid-level INM agents “practice a form of unsanctioned state-based regulation writ small” that operates as an invisible restriction and regulation on migrants’ rights).

50. LIPSKY, *supra* note 27, at 221, 223. Note that street-level bureaucrats are “[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work.” *Id.* at 3. INM agents fit into this category of street-level actors in that the “[g]lobal expectations for the agencies in which they work tend to be ambiguous, vague, or conflicting.” *See id.* For a more detailed description of the working conditions that define street-level bureaucrats, see *id.* at 27–28.

51. *See* RECOMENDACIÓN NO. 58/2015, *supra* note 21, ¶¶ 176–95 (citing the Constitution and other domestic laws, holdings by the Supreme Court, regional and international treaties to which Mexico is a party, and holdings by the Inter-American Court of Human Rights as sources of immigration and human rights law to explain how the INM violated the right to freedom of movement).

52. *See* James S. Liebman & David Mattern, *Correcting Criminal Justice Through Collective Experience Rigorously Examined*, 87 S. CAL. L. REV. 585, 593–94 (2014); LIPSKY, *supra* note 27, at 14.

53. LIPSKY, *supra* note 27, at 106, 108–11.

54. Ley de Migración [LM] tít. 5, cap. I, art. 77, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

55. *Id.*

56. Reglamento de la Ley de Migración [RLM], Diario Oficial de la Federación [DOF] 28-11-2012, últimas reformas DOF 23-05-2014 (Mex.).

57. *E.g.*, ACUERDO para el que se emiten las normas para el Funcionamiento de las Estaciones Migratorias y Estancias Provisionales del INM art. 14(III), Diario Oficial de la Federación [DOF] 08-11-2012 (Mex.) (describing the documents needed for processing individuals taken to migration detention).

jurisprudence from the Supreme Court of Justice of the Nation (“the Supreme Court” or the “SCJN”),<sup>59</sup> human rights and immigration conventions to which Mexico is a party,<sup>60</sup> particularly the American Convention on Human Rights<sup>61</sup> and the International Covenant on Civil and Political Rights;<sup>62</sup> and relevant judgments from the Inter-American Court of Human Rights.<sup>63</sup> Collectively, these laws dictate the INM’s authority and legal obligations.<sup>64</sup> However, because the laws are so widely dispersed, they are difficult for INM agents to follow.<sup>65</sup> Agents ultimately end up either unaware of the legal requirements of their job,<sup>66</sup> or following and enforcing laws selectively.<sup>67</sup>

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58. Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. I, art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.).

59. For an explanation of jurisprudence, see *infra* notes 125–30 and accompanying text; see also *¿Para quiénes es obligatoria la jurisprudencia de la SCJN? SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (SCJN): ¿QUÉ HACE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN?*, <https://www.scjn.gob.mx/conoce-la-corte/que-hace-la-scjn> [<https://perma.cc/6NFW-TGHK>].

60. The first article of the Constitution states that “all persons will enjoy the human rights recognized in this Constitution and in all international treaties to which Mexico is a party.” Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. I, art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.). These rights “cannot be restricted or suspended, except in the cases and under conditions established by this Constitution.” *Id.*

61. American Convention, *supra* note 18, ch. 1.

62. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, Parts II–III, 999 U.N.T.S. 171, 145–162 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

63. Stephen Meili, *Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?*, 32 HARV. HUM. RTS. J. 103, 118 (2019) (explaining that the decisions of the Inter-American Court of Human Rights are now binding precedent under Mexican domestic law); Víctor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 HUM. RTS. BRIEF 8–9 (2012) (describing the reforms to the Constitution that incorporated customary international law and human rights standards into Mexican law).

64. INSYDE, *supra* note 47, at 26.

65. Telephone interview with Dr. Ricardo García de la Rosa, Law Professor at the Instituto Tecnológico Autónomo de México and Law Clerk to SCJN Minister (Judge) Norma Lucía Piña Hernández (Dec. 2, 2019).

66. CONSEJO CIUDADANO DEL INSTITUTO NACIONAL DE MIGRACIÓN, PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, RESUMEN EJECUTIVO 10, 23 (July 2017), [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MEX/INT\\_CESCR\\_CSS\\_MEX\\_28755\\_S.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MEX/INT_CESCR_CSS_MEX_28755_S.pdf) [<https://perma.cc/98UX-GA3N>] [hereinafter PERSONAS EN DETENCIÓN MIGRATORIA]; see also Emens, *supra* note

The legal framework also causes INM agents to act with discretion because a fixed set of specific rules developed externally, whether by the legislature or other regulatory bodies, cannot adequately predict and specify rules for all possible scenarios that the INM agents encounter.<sup>68</sup> Faced with a legal framework that is difficult to understand and seemingly irrelevant to their day-to-day practices,<sup>69</sup> INM agents exercise discretion and adopt their own strategies for the myriad problems and situations they confront.<sup>70</sup> With that discretion and absent additional guidance and constraints, discrimination often follows.<sup>71</sup> The agents' discriminatory conduct is not necessarily devoid of pre-existing racial bias; rather, the widely dispersed legal framework and the unpredictable realities of the job help institutionalize the prejudicial tendencies INM agents may already have.<sup>72</sup>

## 2. The Relevant Laws Are Contradictory and Vague

The legal framework also leads INM agents to act with discretion and discrimination because the laws are contradictory and vague. The Constitution and the Law of Migration state that a Mexican citizen need not carry identification while traveling

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27, at 824, 826 (noting that most federal, state, and local government clerks “don’t know the law and are not expected to know the law,” and simply give “inaccurate, incomplete, contradictory or normative responses to specific questions about legal options”).

67. PERSONAS EN DETENCIÓN MIGRATORIA, *supra* note 66, at 10; *cf.* LIPSKY, *supra* note 27, at 14 (asserting that police officers’ actions are “so highly specified by statute and regulation,” that they are “expected to invoke the law selectively”).

68. See Michael C. Dorf & Charles Frederick Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 837 (2000) (“[I]n a complex and rapidly changing world it is manifestly impossible to write rules that cover the particulars of current circumstances in any sphere of activity.”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468, 475 (2001) (asserting that effective response to nuanced forms of bias cannot be reduced to a fixed code of specific rules or commands).

69. See LIPSKY, *supra* note 27, at 16.

70. See Liebman & Mattern, *supra* note 52, at 594 (explaining that local actors, when faced with problems, adopt strategies that “promote the actors’ personal values or interests” rather than the interests of the public policy they purport to carry out).

71. See LIPSKY, *supra* note 27, at 106.

72. See *id.* at 115.

domestically,<sup>73</sup> but also that the INM can solicit identification documentation from non-Mexicans within the country “to determine the migratory status of foreigners.”<sup>74</sup> The laws do not clarify, however, how an INM agent can distinguish a Mexican citizen from a non-Mexican citizen.<sup>75</sup> As stated by Supreme Court Justice Juan Luis González Alcántara Carrancá, the legal framework thus promotes the assumption that there exists a “Mexican phenotype,” through which authorities can distinguish Mexicans from non-Mexicans by looking to a person’s “skin color, language, accent, expressions, speech, clothing and race.”<sup>76</sup> This assumption promotes discriminatory conduct by INM agents, which in turn violates basic constitutional principles such as the right to privacy, the right to freedom of movement, and the right to be free from discrimination.<sup>77</sup>

The laws governing the detention of those deemed to be non-Mexicans are similarly contradictory and vague: the law simply requires that an agent determine “with cause” that someone is in an irregular migratory situation before detaining them.<sup>78</sup> The law provides no guidance as to what “cause” entails.<sup>79</sup> A 2018 training guide for INM agents proposes two admissible, non-discriminatory “causes” for which an agent can detain someone they suspect to be in an irregular migratory situation. First, agents can detain an individual for “reasonable suspicion” based on the person’s “atypical behavior.”<sup>80</sup> Second, agents can detain an individual if that person fits

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73. Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. I, art. 11, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.); Ley de Migración [LM] tít. 2, cap. 1, art. 7, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

74. Ley de Migración [LM] tít. 5, cap. IV, art. 97, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

75. Amparo en revisión 275/2019 Quejosos (y recurrentes) ¶ 341, 4 de septiembre de 2019 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2019-09/AR-275-2019-190924.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2019-09/AR-275-2019-190924.pdf) [<https://perma.cc/A6VP-MPJ3>] [hereinafter September draft of the Amparo] (“[T]he legislature has not established some phenotype that would serve as the parameter for the authority to know, by glancing at one’s physical features, clothing, and way of speaking, who can be considered a Mexican citizen and who is a foreigner.”).

76. *Id.* ¶ 339.

77. *Id.* ¶ 340; *see also supra* notes 18–24 and accompanying text (outlining the legal rights that the INM violates in their discretionary and discriminatory conduct).

78. Ley de Migración [LM] tít. 5, cap. IV, art. 98, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

79. *See id.* tít. 5, cap. IV.

80. MARÍA CARRASCO PUEYO & PAULA LEITE, CONSEJO NACIONAL PARA PREVENIR LA DISCRIMINACIÓN (CONAPRED), GUÍA PARA LA ACCIÓN PÚBLICA PARA

the description of a person suspected of being in an irregular migratory situation, so long as the information is up-to-date, specific, and from a reliable source.<sup>81</sup> Whether these techniques allow INM agents to effectively identify non-Mexicans in a non-discriminatory manner is unknown. Whether INM agents have received this guide and been adequately trained on it is also unknown but highly unlikely, given the INM's general lack of effective training; the INM's tendency to only train younger agents; and the INM's failure to update agents on new protocols and procedures.<sup>82</sup>

The ambiguities and contradictory nature of the framework, as well as the lack of training or widespread knowledge of practices designed to counteract discrimination thus create multiple opportunities for INM agents to engage in discretionary conduct.<sup>83</sup> This discretion in turn leads to discrimination because generalizations based on skin color and other subjective features help street-level actors such as the INM cope with the ambiguities and heavy demands of their jobs by falling back on preconceived notions of what persons in irregular migratory situations look like.<sup>84</sup> The INM agent's job is to enforce migration control while guaranteeing human rights.<sup>85</sup> The difficulty of maintaining this balance is exacerbated by increasing pressure to stop migrants from arriving at the U.S.-Mexican border.<sup>86</sup> INM officials prioritize data on the number of

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LA PREVENCIÓN DE PRÁCTICAS DE PERFILAMIENTO RACIAL 57 (2018), [http://www.conapred.org.mx/documentos\\_cedoc/GAP\\_Perfilamiento\\_web\\_2018\\_Ax.pdf](http://www.conapred.org.mx/documentos_cedoc/GAP_Perfilamiento_web_2018_Ax.pdf) [<https://perma.cc/R4PX-8JCE>].

81. *Id.*

82. PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, ¶¶ 171-73 (discussing the lack of training and the deficiencies of the trainings that do occur); INSYDE, *supra* note 47, at 26 (same).

83. See September draft of the Amparo, *supra* note 75, ¶ 340 (finding that the INM engages in unjustifiable discrimination when they identify someone as a foreigner based on that person's physical characteristics); RECOMENDACIÓN NO. 58/2015, *supra* note 21, ¶¶ 67, 72, 168, 170 (finding that INM agents employed arbitrary, inconsistent methods of determining the nationality of the individuals they detained); CARRASCO PUEYO & LEITE, *supra* note 80, at 40 (reporting that the INM engages in racial and ethnic profiling).

84. See LIPSKY, *supra* note 27, at 106-07.

85. Ley de Migración [LM] tít. 1, cap. 1, art. 2 ¶ 1, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

86. For examples of increasing pressure to stop migrants before they reach the U.S. border, see James Fredrick, *Honduran Mom Reunited With Her 5-Year-Old After Migrant Caravan Crackdown in Mexico*, NPR WORLD (Jan. 22, 2020), <https://www.npr.org/2020/01/22/798556492/honduran-mom-reunited-with-her-5-year-old-after-migrant-caravan-crackdown-in-mex> [<https://perma.cc/G6P4-4MK6>]; Alberto Pradilla, *No habrá salvoconductos ni visas de tránsito, advierte Segob ante*



individuals detained and deported, rather than data on the impact of migratory policy on human rights.<sup>87</sup> This culture promoting detention and deportation over human rights, the total lack of guidance as to how to guarantee human rights while conducting migratory revisions, and broad discretion result in illegal, discriminatory conduct.<sup>88</sup>

### 3. The Relevant Laws Leave the INM Largely Unregulated

Discretion and discrimination also result from the laws governing the agency, which provide for little transparency and accountability. Simply determining the prevailing governance structure of the INM is difficult due to the lack of transparency within the agency, which extends from the organization's leaders to its street-level agents.<sup>89</sup> Much of this opacity comes from the 2005 designation of the INM as a national security agency, which allows the INM to withhold information about its personnel and detention facilities from the public by claiming "probable harm to its operational capacity or national security" through the disclosure of this information.<sup>90</sup>

Aggravating the absence of transparency is the INM's limited oversight system.<sup>91</sup> The INM is divided into thirty-two autonomous federal delegations.<sup>92</sup> Delegates and other officials within the agency are often selected based on "cronyism and nepotism,"<sup>93</sup> and they are

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*nueva caravana migrante*, ANIMAL POLÍTICO (Jan. 15, 2020), <https://www.animalpolitico.com/2020/01/caravana-migrante-sanchez-cordero-operativos-especiales/> [<https://perma.cc/952V-GA2A>].

87. See PERSONAS EN DETENCIÓN MIGRATORIA, *supra* note 66, at 10.

88. See Carte, *supra* note 47, at 138 (speculating that internal and external pressures, as well as "resource scarcity, lack of training, [and] the pressures of their jobs" affect INM agents' conduct); see also LIPSKY, *supra* note 27, at 106–07 ("[D]iscretionary judgments are subject to routine abuse.").

89. Wolf, *supra* note 29, at 11.

90. *Id.* at 22.

91. For more information on the INM's limited accountability and oversight system, see PERSONAS EN DETENCIÓN MIGRATORIA, *supra* note 66, at 25; INSYDE, *supra* note 47, at 8; José Knippen et al., *An Uncertain Path*, WOLA 44 (Nov. 2015), [https://www.wola.org/sites/default/files/An%20Uncertain%20Path\\_Nov2015.pdf](https://www.wola.org/sites/default/files/An%20Uncertain%20Path_Nov2015.pdf) [<https://perma.cc/EJY3-XD9S>].

92. Wolf, *supra* note 29, at 22; see also Reglamento Interior de la Secretaría de Gobernación, cap. XV, sec. III, art. 77, Diario Oficial de la Federación [DOF] 04-02-2013 (Mex.) (providing the operational hierarchy of the INM).

93. Wolf, *supra* note 29, at 23; see also INSYDE, *supra* note 47, at 26 (explaining the normal hiring process of the INM, which is based less on merit and more on political and familial connections).

afforded great discretion.<sup>94</sup> The federal delegates are responsible for monitoring their subordinates' compliance with rules and regulations.<sup>95</sup> As a consequence of this discretion and limited oversight, the actions of the delegates and other officials depend more on their "personal style and interpretation of their powers, [rather] than on central migration management and policy."<sup>96</sup> The issues resulting from the wide dispersion, ambiguity, and contradictory nature of the legal framework are therefore compounded by the federal delegates' discretion on whether or not to guide or monitor their agents' actions.<sup>97</sup> Supervisors are often not present when INM agents conduct migratory revisions and thus are unaware of what occurs.<sup>98</sup> Even if supervisors are aware of and choose to punish their subordinates' misconduct, the INM's general practice is to reassign offending agents or ask for their resignation, rather than impose any "genuine sanctions" or provide retraining.<sup>99</sup> As a result, many INM agents continue to exercise discretion and engage in discriminatory conduct, knowing that the repercussions will likely be minimal.<sup>100</sup>

### C. The Strengths and Shortcomings of the Government's Response to the INM's Discriminatory Practices

The government has responded to the INM's discretionary and discriminatory conduct in two major ways: first, by the CNDH issuing recommendations to the INM; and second, by the Supreme Court hearing a case against the INM brought on behalf of the Juárez family discussed in the Introduction to this Note. While these two responses draw attention and even condemnation to the INM's conduct, these measures were attained only through the tenacity of nonprofits, such as the Institute for Women in Migration ("IMUMI"), which have pushed the government to acknowledge and rectify the

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94. Wolf, *supra* note 29, at 22; see also *Sexto Informe Sobre la Situación de los Derechos Humanos de las Personas Migrantes en tránsito por México*, BELÉN POSADA DEL MIGRANTE 25 (June 2010), <https://annunciationhouse.org/wp-content/uploads/2011/03/sextoinforme-migrantesenme.pdf> [https://perma.cc/RWU6-3H5V] (denouncing the way the INM acts with impunity).

95. Wolf, *supra* note 29, at 25.

96. *Id.* at 22.

97. *See id.*

98. INSYDE, *supra* note 47, at 19.

99. Wolf, *supra* note 29, at 26.

100. *See id.* ("The effect [of the lack of sanctions] is that cases of corruption and human rights violations remain in impunity, and nothing prevents similar irregularities from recurring in the future.").

discriminatory conduct of the INM.<sup>101</sup> Additional measures are therefore necessary to adequately reform the INM.

### 1. The CNDH Recommendations to the INM

In November of 2019, the Commissioner of the INM gave a public apology on behalf of the INM to the Juárez family.<sup>102</sup> This apology only occurred after several years of advocacy: first, the CNDH issued a recommendation in 2016 condemning the INM's actions against the Juárez family.<sup>103</sup> Then, IMUMI advocated for two years before the Executive Commission of Attention to Victims ("CEAV"), the federal body tasked with making reparations to victims of human rights violations.<sup>104</sup> CEAV then only issued a resolution on the Juárez family's behalf after IMUMI filed a lawsuit against it.<sup>105</sup> The resolution finally resulted in the apology,<sup>106</sup> which drew public

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101. See Laura Arana, *Deportan a indígenas 'por no parecer mexicanos,' van a Corte*, DIARIO CONTRA REPÚBLICA (Aug. 19, 2019), <https://www.contrareplica.mx/nota-Deportan-a-indigenas-por-no-parecer-mexicanos--van-a-Corte201919820> [<https://perma.cc/9NK7-UZGK>] (describing the role of organizations in pushing the INM to redress its discriminatory conduct); Interview with Gretchen Kuhner, *supra* note 10 (explaining that the Comisión Ejecutiva de Atención a Víctimas ("CEAV") took two years to issue a resolution, and only did so after IMUMI filed another lawsuit).

102. For an overview of the Juárez family's experience with the INM, see *supra* Introduction. For information on the public apology, see INM (INAMI\_mx), TWITTER (Nov. 7, 2019 11:34 AM), [https://twitter.com/INAMI\\_mx/status/1192525729704996865](https://twitter.com/INAMI_mx/status/1192525729704996865) (on file with the *Columbia Human Rights Law Review*); Isáin Mandujano, *El INM ofrece disculpa pública a indígenas chipanecos confundidos con migrantes*, EL PROCESO (Nov. 7, 2019), <https://www.proceso.com.mx/606080/el-inm-ofrece-disculpa-publica-a-indigenas-chipanecos-confundidos-con-migrantes> [<https://perma.cc/7UJF-GBQY>].

103. RECOMENDACIÓN NO. 22/2016, *supra* note 1.

104. See Interview with Gretchen Kuhner, *supra* note 10. For an overview of the functions and structure of the CEAV, see *Estructura y funciones del Sistema Nacional de Atención a Víctimas (SNAV) y la Comisión Ejecutiva de Atención a Víctimas (CEAV)*, CEAV 8 (May 29, 2019), <http://www.ceav.gob.mx/transparencia/uploads/2019/05/Cuadernillo%201-%20SNAV.pdf> [<https://perma.cc/YA38-RMTG>].

105. See Interview with Gretchen Kuhner, *supra* note 10.

106. *Ofrece INM disculpa pública a 4 indígenas de Chiapas*, HERALDO DE MÉXICO (Nov. 7, 2019), <https://heraldodemexico.com.mx/estados/migracion-ofrece-disculpa-indigenas-chiapas-acusados/> (on file with the *Columbia Human Rights Law Review*).

attention to the INM's discriminatory conduct and the human rights violations suffered by the Juárez family.<sup>107</sup>

The CNDH requires that the INM take additional steps to comply with the mandates of the three CNDH recommendations regarding the INM's discrimination against Indigenous Mexicans.<sup>108</sup> These steps include training more agents on topics such as "Legality and Human Rights" and "The Constitutional Reform of Human Rights in the Public Service."<sup>109</sup> INM officials are also collaborating with the National Electoral Institute and the National CURP (essentially, the Mexican version of a social security number)<sup>110</sup> Database to enhance agents' ability to corroborate the identification of Mexicans more efficiently while "guarantee[ing] human rights."<sup>111</sup>

In keeping with its general lack of transparency, the INM has not released information on the impact of these measures. As of November 2020, for example, a transparency request<sup>112</sup> filed with the

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107. See INSTITUTO NACIONAL DE MIGRACIÓN, *Ofrece comisionado del INM disculpa pública a cuatro indígenas del estado de Chiapas*, *Boletín No. 301/2019* (Nov. 7, 2019), <https://www.gob.mx/inm/prensa/ofrece-comisionado-del-inm-disculpa-publica-a-cuatro-indigenas-del-estado-de-chiapas-226590> (on file with the *Columbia Human Rights Law Review*).

108. To review this proof of compliance with the 58/2015 recommendation, see *Informe anual de actividades 2018: Búsqueda de recomendaciones*, CNDH: RECOMENDACIONES, <http://informe.cndh.org.mx/recomendaciones.aspx> [<https://perma.cc/Y2WW-CAZR>] (type in "2015/58" to the "Recomendación" field, then click the "buscar" button; then scroll down to view the proof of partial compliance). To review the proof of compliance with the 22/2016 recommendation, see *id.* [hereinafter *Informe anual de actividades 2018 (22/2016)*] (type in "2016/22" to the "Recomendación" field, then click the "buscar" button; then scroll down to view the proof of partial compliance). Finally, to see the proof of compliance with the 31/2017 recommendation, see *id.* (type in "2017/31" to the "Recomendación" field, then click the "buscar" button; then scroll down past the first two blocks of information provided until the "Autoridad" listed is "Instituto Nacional de Migración de la Secretaría de Gobernación"). This site only contains data from 2015–2018. *Id.*

109. See *Informe anual de actividades 2018 (22/2016)*, *supra* note 108; *Porcentaje de servidores públicos capacidades*, INSTITUTO NACIONAL DE MIGRACIÓN: DATOS ABIERTOS, <https://datos.gob.mx/busca/dataset/instituto-nacional-de-migracion/resource/70cf65f7-0656-4480-90f9-7d3d13ff94f6> (on file with the *Columbia Human Rights Law Review*) (listing the number of INM agents trained between January and August of 2018 by state).

110. A CURP is the Mexican equivalent of a U.S. social security card and number. JOSEPH ET AL., *supra* note 4, at 9.

111. See *Informe anual de actividades 2018 (22/2016)*, *supra* note 108.

112. Created by the General Law of Transparency and Access to Public Information, the National System of Transparency is an online portal through which anyone can submit questions to a public agency in Mexico. *¿Qué es?*,

INM requesting more information on the trainings has not received a response.<sup>113</sup> The efficacy of these trainings is dubious, however, given that the INM turned to the same agency that has conducted previous, reportedly ineffective trainings<sup>114</sup> to conduct these new trainings.<sup>115</sup> The continuing detention, disappearance, and deportation of Afro-Mexicans and Indigenous Mexicans<sup>116</sup> also suggests that these measures have not succeeded in preventing the use of discriminatory practices by the INM. Finally, the CNDH recommendations do not address the flaws in the legal framework discussed above, requiring no changes to or clarifications of the national law.<sup>117</sup> Thus the recommendations, even if fully adopted by the INM, do not guarantee adequate reform of the INM.

## 2. The Supreme Court Case

The illegal detention of the Juárez family and advocacy on their behalf has led the SCJN to review the constitutionality of certain articles of the Law of Migration in the case called the Amparo

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SISTEMA NACIONAL DE TRANSPARENCIA, <http://www.snt.org.mx> [<https://perma.cc/P8EL-TBR9>]. The agency is required to respond to the transparency request. See Ley General de Transparencia y Acceso a la Información Pública [LGTAIP], Diario Oficial de la Federación [DOF] 05-04-2015 (Mex.).

113. This transparency request was filed via the National Transparency Platform on December 16, 2019 and is on file with the *Columbia Human Rights Law Review*. *Solicitudes*, PLATAFORMA NACIONAL DE TRANSPARENCIA, <https://www.plataformadetransparencia.org.mx/web/guest/inicio> [<https://perma.cc/WCL6-RQZD>].

114. PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, ¶ 171 (asserting that the trainings provided by the INM do not explain how to uphold human rights while conducting migratory revisions); INSYDE, *supra* note 47, at 26 (discussing the general lack of trainings and the deficiencies of the trainings that do occur).

115. See Ley de Migración [LM] tít. 3, cap. II, arts. 23–4, Diario Oficial de la Federación [DOF] 05-25-2011, últimas reformas 04-21-2016 DOF (Mex.).

116. For a discussion of the continued mistreatment of Afro-Mexicans and Indigenous Mexicans by the INM, see DUARTE ET AL., *supra* note 13 (manuscript at 4–13); LUIS RAÚL GONZÁLEZ PEREZ, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (CNDH), RECOMENDACIÓN NO. 78/2019, ¶¶ 5–7 (Sept. 25, 2019) (Mex.) (describing the INM’s violation of the human rights of 130 migrants on September 9, 2018).

117. To review the CNDH’s recommendations, which do not address changing the federal law, see RECOMENDACIÓN NO. 58/2015, *supra* note 21, at 89–91; RECOMENDACIÓN NO. 22/2016, *supra* note 1, at 66–68; RECOMENDACIÓN NO. 31/2017, *supra* note 21, at 92–97.

en revisión 275/2019 (“the Amparo”).<sup>118</sup> The Court’s decision could provide another official response by the government to the INM’s discretionary and discriminatory behavior. According to Dr. Ricardo García de la Rosa, Law Professor at the Autonomous Institute of Technology of Mexico and SCJN Law Clerk, the amparo system is the mechanism through which citizens make significant changes in public policy.<sup>119</sup> He compares the impact of amparo cases in Mexico to those of the landmark cases of the United States Supreme Court addressing topics such as school desegregation.<sup>120</sup> Dr. García de la Rosa notes that important policy shifts in Mexico—relating, for example, to gay marriage<sup>121</sup>—have been achieved through the amparo process.<sup>122</sup>

Salvador Guerrero, the legal coordinator of the National Autonomous University of Mexico Legal Clinic, who helped bring the case before the SCJN, similarly describes the amparo process as an opportunity for the Supreme Court to establish “a very important precedent” regarding discrimination during migratory revisions.<sup>123</sup> Guerrero believes that a Supreme Court finding that certain articles of the Law of Migration are unconstitutional would repair harms

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118. Amparo en revisión 275/2019 Quejosos (y recurrentes), Suprema Corte de Justicia de la Nación (SCJN), 14 de agosto de 2019 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2019-07/A.R.-275-2019-190814.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2019-07/A.R.-275-2019-190814.pdf) [<https://perma.cc/Y8UP-2XMX>] [hereinafter August draft of the Amparo]. “Amparo” is a Mexican legal term of art. Norma Gutierrez, *Mexico: New Amparo Law is Enacted*, LIBR. OF CONG. (Apr. 30, 2013), <https://www.loc.gov/law/foreign-news/article/mexico-new-amparo-law-is-enacted/> [<https://perma.cc/6EVG-YARG>]. It refers to the “juicio de amparo,” in which an allegedly injured person files an action with the federal courts; the goal of the amparo is to grant such a person protection from laws or acts of authorities that violate human rights. Jose Gamas Torruco, *Constitutional Litigation: Procedural Protections of Constitutionalism in the Americas... And Beyond*, 49 DUQ. L. REV. 293, 296 (2011); see also Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos tít. 1, cap. X, art. 73, ¶ 1, Diario Oficial de la Federación [DOF] 02-04-2013, últimas reformas DOF 15-06-2018 (Mex.) (providing regulations to the Law of the Amparo).

119. Interview with Dr. Ricardo García de la Rosa, *supra* note 65.

120. *Id.*

121. Matrimonio entre personas del mismo sexo en el distrito federal. Pleno de la Suprema Corte de Justicia [SCJN], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXXIV, Agosto de 2011, Tesis P./J. 12/2011, página 875.

122. Interview with Dr. García de la Rosa, *supra* note 65.

123. Isaín Mandujano, *UNAM e Imumi piden a ministros frenar revisiones migratorias arbitrarias*, EL PROCESO (Aug. 12, 2019), <https://www.proceso.com.mx/595732/unam-e-imumi-piden-a-ministros-frenar-revisiones-migratorias-arbitrarias> [<https://perma.cc/B2QW-AULK>].

done to the Juárez family and provide a “first step towards non-repetition” of the INM’s illegal behavior.<sup>124</sup>

Despite its potential strengths as a pathway to change, the amparo process includes a number of procedural obstacles that must be surmounted before it can be relied upon to address the INM’s discriminatory conduct. First, of course, in the Juárez family’s case, the Supreme Court must vote to resolve the Amparo in their favor.<sup>125</sup> Second, the Amparo ruling would only apply to the Juárez family represented in the case.<sup>126</sup> That is because under the Mexican judicial system, a single judgment on a constitutional issue does not have binding precedential value.<sup>127</sup> Instead, the Supreme Court and the federal collegiate courts must issue five “consecutive and consistent decisions on a point of law” before it becomes binding precedent or “jurisprudencia” (jurisprudence).<sup>128</sup> In the event that jurisprudence is attained, which is by no means guaranteed,<sup>129</sup> the Legislature would have ninety days to modify or repeal the legal provisions declared unconstitutional by the jurisprudence.<sup>130</sup> However, repealing or modifying the laws does not guarantee that the changes will solve the

124. *Id.*

125. On November 27, 2019, the SCJN voted against the draft of the Amparo and thus it was sent to another judge to write a new draft of the Amparo for another vote. *Versiones taquigráficas*, SCJN 31–32 (Nov. 27, 2019), <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-11-28/27112019%20PS.pdf> [<https://perma.cc/7QP8-T63Y>].

126. For an explanation of the limits of an amparo ruling, see Gamas Torruco, *supra* note 118, at 297; César Alejandro Rincón Mayorga, *La Declaratoria General de Inconstitucionalidad, medio ineficaz de control de la constitucionalidad de normas generales*, 37 HECHOS Y DERECHOS 1, 10 (2017).

127. *General Structure of the Mexican Legal System*, JAMES E. ROGERS COLL. OF LAW, UNIV. OF ARIZ., <https://libguides.library.arizona.edu/law-library/mexicanlaw/legalsystem> [<https://perma.cc/4BFN-WKV6>].

128. *Id.*

129. Rincón Mayorga, *supra* note 126, at 15.

130. Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos tít. 1, cap. VI, art. 232, Diario Oficial de la Federación [DOF] 02-04-2013, últimas reformas DOF 06-15-2018 (Mex.) (explaining the legislative process after jurisprudence is attained); Constitución Política de los Estados Unidos Mexicanos, CPEUM, tít. 1, cap. IV, art. 107, frac. II, ¶ 3, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020 (Mex.) (same). If Congress fails to modify or repeal the relevant laws within this time frame, the SCJN could change the law itself with a General Declaration of Unconstitutionality, which requires a majority of at least eight votes. See Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos tít. 1, cap. VI, art. 232, Diario Oficial de la Federación [DOF] 04-02-2013, últimas reformas DOF 15-06-2018 (Mex.).

problems of the legal framework discussed earlier.<sup>131</sup> Rules developed and imposed by courts and other lawmakers often fail to deter street-level actors such as the INM from exercising discretion and, in turn, discrimination.<sup>132</sup> Declaring articles of the Law of Migration to be unconstitutional via the amparo system, therefore, is only the first step in a long trek towards reforming the INM. Thus, while the Amparo and the CNDH recommendations that preceded it constitute important steps towards addressing INM discretion and discrimination, neither comprehensively responds to the problems in the legal framework discussed above. The remainder of this Note considers measures that might more effectively address these problems.

## II. INTRODUCTION TO EVOLUTIONARY LEARNING: EXAMINING REFORMS TO ADDRESS DISCRETION AND DISCRIMINATION IN THE U.S. JUVENILE JUSTICE SYSTEM

In seeking ways to improve the Mexican government's response to the problem of INM discretion and discrimination, this Note suggests reforms grounded in evolutionary learning. Section II.A provides an overview of evolutionary learning. Section II.B provides an example of evolutionary learning used by lawmakers and policy advocates to successfully address the problem of discretion and discrimination exercised by street-level actors in the U.S. juvenile justice system. Section II.C then explains why the lessons learned from the reforms to the juvenile justice system can be used to reform the INM. Finally, Part III proposes how to apply evolutionary learning to the INM.

### A. Overview of Evolutionary Learning

As a mechanism for reform, evolutionary learning prioritizes continuous improvement, collaboration, contextualization, and accountability and transparency. Evolutionary learning proceeds from the conclusion that it is impossible for lawmakers to accurately predict, establish, and strictly enforce comprehensive rules for all situations in which street-level actors find themselves.<sup>133</sup> Rather than imposing a rigid framework that street-level actors cannot and do not

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131. See Sturm, *supra* note 68, at 468, 475.

132. See *supra* notes 68–72 and accompanying text.

133. Liebman & Mattern, *supra* note 52, at 593–94; Sturm, *supra* note 68, at 475.



follow,<sup>134</sup> evolutionary learning instead encourages lawmakers and other reform advocates to set general goals to tackle complex issues.<sup>135</sup> Lawmakers identify the ends that they would like to achieve—for example, the reduction of discrimination by the INM against Afro-Mexicans and Indigenous Mexicans—and then experiment with the means to achieve those ends. Thus evolutionary learning treats social policies as working hypotheses, subject to ongoing review and revision.<sup>136</sup> Through these cycles of policy review and revision, called “continuous improvement,”<sup>137</sup> evolutionary learning tackles nuanced problems.<sup>138</sup>

To achieve compliance with reforms, evolutionary learning also emphasizes accountability and transparency, through which central actors monitor, coordinate and publicize the efforts and results of local actors.<sup>139</sup> This model of accountability still allows for and encourages both contextualization and collaboration. Through contextualization, local actors adapt policies and procedures to fit their local conditions.<sup>140</sup> Through collaboration, street-level actors, their supervisors, lawmakers, and other parties that are connected to or have a direct stake in the realization of policy goals

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134. Liebman & Mattern, *supra* note 52, at 594.

135. James S. Liebman, *Perpetual Evolution: A School's-Focused Public Law Litigation Model for Our Day*, 117 COLUM. L. REV. 2005, 2010 (2017) (explaining the process of creating and implementing evolutionary learning-minded reforms); *see generally* Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1285–91(2012) [hereinafter *Contextualizing Regimes*] (providing an example of evolutionary learning in action).

136. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 202–03 (1946); *see also* Liebman, *supra* note 135, at 2016 (“Evolutionary learning is a process for self-consciously and rapidly using feedback from an organization’s everyday responses to problems to improve overall performance.”).

137. *See* Liebman & Mattern, *supra* note 52, at 598.

138. *See* Liebman, *supra* note 135, at 2016 (explaining that evolutionary learning was employed by organizations starting in the 1970s to respond to “increasingly diverse and perplexingly entangled” problems).

139. *Id.* at 2010.

140. *Id.* (discussing the role of contextualization in evolutionary learning); *Contextualizing Regimes*, *supra* note 135, at 1291 (“Local units should be encouraged to experiment with reforms adapted to their own circumstances and to compare their experiences for lessons that can be transported from other sites to theirs.”).

(“stakeholders”) communicate and engage in collective problem-solving.<sup>141</sup>

Evolutionary learning has guided effective reforms in the juvenile justice system across the United States.<sup>142</sup> These reforms, as Section II.B illustrates, exemplify accountability and transparency, contextualization, continuous improvement, and collaboration. Section II.C then explains why the lessons learned from these reforms in the U.S. can be applied to guide reforms to the INM.

## B. Evolutionary Learning and Juvenile Justice Reform in the United States

People of color, in particular Black and Latinx juveniles, have long been overrepresented in the U.S. juvenile justice system and systematically subjected to more severe treatment and outcomes than white juveniles.<sup>143</sup> The considerable discretion exercised by several distinct law enforcement officials such as police, judges, and probation officials at multiple points throughout a juvenile’s contact

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141. CHRISTOPHER K. ANSELL, PRAGMATIST DEMOCRACY: EVOLUTIONARY LEARNING AS PUBLIC PHILOSOPHY 167–68 (Oxford Univ. Press, 1st ed., 2011) (explaining that through collaboration, “public agencies engage with various stakeholders to jointly deliberate about public problems” and creatively solve problems together); Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability* 14, COLUM. L. SCH. PUB. L. & LEGAL THEORY WORKING PAPER GRP. (Aug. 2015) [hereinafter *The Duty of Responsible Administration*] (explaining the importance of collaboration and deliberative engagement between key stakeholders in solving problems).

142. For a discussion of the efficacy of these reforms, see *Contextualizing Regimes*, *supra* note 135, at 1287; Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 378, 407 (2007).

143. Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47(1) J. AM. ACAD. PSYCHIATRY L. 1, 1, 3 (2019) (documenting a continued trend of minority overrepresentation in the juvenile justice system); Shaun M. Gann, *Examining the Relationship Between Race and Juvenile Court Decision-Making: A Counterfactual Approach*, 17(3) YOUTH VIOLENCE & JUV. JUST. 269, 282 (2018) (finding that youth of color were 26% more likely to be confined post-adjudication compared to similarly situated white youth); W. HAYWOOD BURNS INST. FOR YOUTH JUST. FAIRNESS & EQUITY, REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 17 (2015), [http://www.burnsinstitute.org/wp-content/uploads/2015/09/Repairing-the-Breach\\_BI.pdf](http://www.burnsinstitute.org/wp-content/uploads/2015/09/Repairing-the-Breach_BI.pdf) [<https://perma.cc/2ZSS-59S5>] (finding that during one day in 2013, Black youth were more than four times as likely, Native American youth almost three times as likely, and Latinx youth almost twice as likely as white youth to be in residential placement and prison).

with the justice system<sup>144</sup> allows for and results in discrimination against minority youth.<sup>145</sup> This discretion and ensuing discrimination serve as one factor contributing to the juvenile justice system's issue of racial and ethnic disparities.<sup>146</sup>

In dealing with this problem of racial and ethnic disparities in the juvenile justice system, lawmakers did not propose a singular solution to the issue of discretion and discrimination by street-level actors and other decisionmakers in the justice system.<sup>147</sup> Instead, the federal Office of Juvenile Justice and Delinquency Prevention ("OJJDP")<sup>148</sup> uses evolutionary learning to experiment with and implement reforms to the Federal Juvenile Justice and Delinquency Prevention Act ("JJJPA" or "the Act") and to practices of state and county juvenile justice agencies nationwide.<sup>149</sup> Numerous foundations,

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144. Johnson, *supra* note 142, at 406 (arguing that the discretion exercised by law enforcement officials results in "gross racial disparities"); *Glossary: Decision Points in the Juvenile Justice System*, JUV. JUST. INFO. EXCH., <https://jjie.org/hub/racial-ethnic-fairness/glossary/> [<https://perma.cc/EKF8-89BX>] (defining key decision points as: arrest, juvenile court intake, pretrial detention, disposition or sentencing, probation, placement in a juvenile corrections assessment center, and community reentry); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 320 (2015) (observing that probation officers have wide discretion to report youth violations of electronic monitoring).

145. Alan J. Tomkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1635–36, 1650 (1996).

146. *Juvenile Justice and Delinquency Prevention Act (JJJPA) Fact Sheet Series, Core Protections: Racial and Ethnic Disparities*, ACT 4 JUV. JUST. 1 (Feb. 2019), <http://www.act4jj.org/sites/default/files/resource-files/Racial%20and%20Ethnic%20Disparities%20Fact%20Sheet.pdf> [<https://perma.cc/FY6L-QWY9>] [hereinafter *JJJPA Fact Sheet*] ("The JJJPA defines 'racial and ethnic disparities' as 'minority youth populations [being] involved at a decision point in the juvenile justice system at disproportionately higher rates than non-minority youth.'").

147. Johnson, *supra* note 148, at 411; 34 U.S.C. § 11133(a)(15) (2019) (requiring the implementation of practices and system improvement strategies at state, territorial, local, and tribal levels, but not specifying what specific policies be put in place).

148. The OJJDP was created to support state and county agencies in preventing juvenile delinquency and improving the juvenile justice system. Robles-Ramamurthy & Watson, *supra* note 143, at 1 (citing Juvenile Justice and Delinquency Prevention Act of 1974, 93 Pub. L. No. 415, 88 Stat. 1109 (codified as amended at 34 U.S.C. §§ 11101–11322 (2019))).

149. See *Contextualizing Regimes*, *supra* note 135, at 1286, 1287 (describing the process of experimentation and implementation utilized by reforms to the juvenile justice system); see also Johnson, *supra* note 142, at 408 (citing Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982 (codified in 34

state advisory boards, and other advocacy groups supplement these reform measures.<sup>150</sup> These reforms have successfully reduced racial and ethnic disparities in the juvenile justice systems of at least twenty different jurisdictions in the United States.<sup>151</sup> Many experts continue to regard the ongoing reforms to the JJDP to be the most promising framework for addressing racial and ethnic disparities in the U.S. juvenile justice system.<sup>152</sup>

These ongoing reforms promote accountability and transparency—key aspects of evolutionary learning—through the imposition of specific, mandatory measures on states seeking federal monetary support.<sup>153</sup> To receive federal funds, states must make and annually revise plans to reduce ethnic and racial disparities.<sup>154</sup> States must submit both these plans and performance reports explaining their success or lack thereof in reducing disparities to the OJJDP.<sup>155</sup> The OJJDP modifies and approves these annual plans and performance reports,<sup>156</sup> determining states' compliance with the requirements of the JJDP, offering technical assistance, and withholding funds as needed.<sup>157</sup>

While the OJJDP has withheld funds from states deemed non-compliant with the requirements of the Act, Professor Olatunde C. Johnson argues that the JJDP's success in reducing racial and ethnic disparities likely stems less from its coercive power over states and counties, and more from the JJDP's information collecting and sharing regimes.<sup>158</sup> The OJJDP publishes an annual report on the states that do not comply with the JJDP;<sup>159</sup> advocates also publish

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U.S.C. §§ 11101–11322 (2019))) (explaining that reforms to the Act expanded its requirements to measure all disproportionate minority contact, rather than only disproportionate minority confinement).

150. For a description of these supplemental efforts, see Johnson, *supra* note 142, at 410, 415–16; *Contextualizing Regimes*, *supra* note 135, at 1287.

151. Elizabeth Spinney et al., *Case Studies of Nine Jurisdictions That Reduced Disproportionate Minority Contact in their Juvenile Justice System*, DEV. SERV. GRP., INC. 1, 10 (2014), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/250301.pdf> [<https://perma.cc/6TZD-WW99>].

152. See *Contextualizing Regimes*, *supra* note 135, at 1287.

153. *Id.* at 1286; *JJDP Fact Sheet*, *supra* note 146, at 1–2 (explaining the more explicit requirements of the reformed JJDP).

154. *Contextualizing Regimes*, *supra* note 135, at 1286.

155. *Id.* at 1286–87.

156. 34 U.S.C. § 11133(a)–(b).

157. *Id.* § 11133(c)–(g); *Contextualizing Regimes*, *supra* note 135, at 1286.

158. See Johnson, *supra* note 142, at 413–15.

159. 34 U.S.C. § 11133(g)(2)(A)–(B).

data on the jurisdictions' levels of racial and ethnic disparities.<sup>160</sup> This transparency brings public credit to states and counties that diminish racial and ethnic disparities and draws public attention and even public shaming to those not in compliance with the JJDP. <sup>161</sup> The transparency also allows for the comparison of successes and challenges of juvenile justice systems across states.<sup>162</sup> Furthermore, transparency promotes clear standards,<sup>163</sup> which in turn promote fair processes, by informing states of the standards they must meet before potentially punishing them for lack of compliance.<sup>164</sup> Thus, the JJDP promotes transparency and accountability through central monitoring, coordination, and publicizing the efforts and results of state and county measures.<sup>165</sup>

Additionally, the reforms to the juvenile justice system incorporate contextualization. The JJDP requires that state and county juvenile justice agencies identify the occurrence of racial and ethnic disparities at each moment in which an agent of the juvenile justice system makes a decision about a juvenile with whom they are in contact.<sup>166</sup> These so-called decision points include arrest, intake, pre-trial detention, sentencing, placement in a juvenile corrections facility, reentry into the community, and/or probation.<sup>167</sup> After state and county agencies identify occurrences of racial and ethnic disparities at each decision point, they must assess the causes of the disparities<sup>168</sup> and develop and implement solutions inspired by those assessments.<sup>169</sup> Hence the proposed solutions to address disparities

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160. Johnson, *supra* note 142, at 415.

161. *Contextualizing Regimes*, *supra* note 135, at 1302.

162. *Id.* at 1287.

163. *Id.* at 1301.

164. *Id.*

165. See Dorf & Sabel, *supra* note 68, at 833–34 (explaining a governance regime in which the central unit monitors compliance and facilitates learning by collecting and sharing data about the challenges and successes faced by local units so that local units can learn from one another); Liebman, *supra* note 135, at 2010–11, 2030 (describing the accountability and transparency components of evolutionary learning as exemplified by consent decrees).

166. 34 U.S.C. § 11133(a)(15)(B).

167. See *Glossary: Decision Points in the Juvenile Justice System*, *supra* note 144.

168. Public agencies assess factors contributing to racial and ethnic disparities even where the juvenile justice agencies are not themselves responsible for the underlying condition. Johnson, *supra* note 142, at 412.

169. 34 U.S.C. § 11133(a)(7)(B)(viii), (15)(C); see also Johnson, *supra* note 142, at 411 (noting that the reforms are “designed to analyze how racial disparities arise and develop solutions stemming from those analyses”).

are closely tailored to fit the unique, local problems of every distinct juvenile justice agency. The JJDDPA incentivizes this contextualization by compelling local actors to experiment with reforms adapted to local conditions.<sup>170</sup> The JJDDPA grants states discretion to develop locally-tailored plans to comply with the Act, subject to certain uniform requirements.<sup>171</sup> This discretion acknowledges the reality that the causes of disparities vary from state to state, agency to agency, and case to case, and that solutions must also vary.<sup>172</sup> For example, a county in Portland, Oregon identified the occurrence of a racial and ethnic disparity in juvenile detention.<sup>173</sup> The local agency reviewed its practices and found that its risk assessment tool, which it used to determine whether or not to detain a juvenile, was disproportionately impacting immigrant youth who did not wish to disclose the addresses of their undocumented parents. As a result of these youths' non-disclosure, they were considered negatively by the agency for having "no known community ties" and were more likely to be detained.<sup>174</sup> In response to these findings, the county modified its risk assessment tool, reducing the weight that "no community ties" has on the decision of whether or not to detain youth, and continued to monitor the practice's impact on minority populations.<sup>175</sup>

The reforms to the JJDDPA also uphold a commitment to continuous improvement. The Act requires that states and counties identify the occurrence of racial and ethnic disparities, assess the causes of these disparities, and develop and implement plans to reduce them.<sup>176</sup> These plans must be revised every year to include new projects, activities, and programs.<sup>177</sup> Thus the JJDDPA regime requires ongoing study, assessment, and modification of state plans in order to effectuate the goal of reducing racial and ethnic disparities

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170. *Contextualizing Regimes*, *supra* note 135, at 1291.

171. Johnson, *supra* note 142, at 409; 34 U.S.C. § 11133(a).

172. Johnson, *supra* note 142, at 412; *see also* ANNIE E. CASEY FOUND., JUVENILE DETENTION RISK ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM 14 (2006), <https://www.aecf.org/resources/a-practice-guide-to-juvenile-detention-reform-1/> [<https://perma.cc/499J-QT2T>] [hereinafter JUVENILE DETENTION RISK ASSESSMENT] (explaining that risk assessment instruments, used to determine whether or not to detain a juvenile, "must be tailored to local laws, policies, and youth populations").

173. JUVENILE DETENTION RISK ASSESSMENT, *supra* note 172, at 47–48.

174. *Id.*

175. *Id.* at 48.

176. *See supra* notes 154–56 and accompanying text.

177. 34 U.S.C. § 11133(a).

in the juvenile justice system.<sup>178</sup> Sites that have successfully reduced disparities attribute their success to data from their own performance reports, which they relied on to alter plans,<sup>179</sup> thereby exemplifying the importance of the continuous improvement cycle that the JJDPA inspires.<sup>180</sup>

Continuous improvement manifests in state and county measures to reduce disparities, as well as in the OJJDP's ongoing reforms to the Act itself. After determining that the JJDPA was not adequately reducing disparities, the Juvenile Justice Reform Act of 2018 amended the JJDPA to explicitly require states to reduce racial and ethnic disparities; before, they had only been required to "address" racial and ethnic disparities.<sup>181</sup> Also, the OJJDP reorganized its office and implemented a new, streamlined process of evaluating states' and counties' plans and performance reports.<sup>182</sup> This process of evaluating impact and adapting reforms accordingly aligns with evolutionary learning and the OJJDP's own proclaimed belief in "less regulation and a greater focus on evaluating impact" to successfully reduce disparities.<sup>183</sup>

Finally, the Act requires collaboration.<sup>184</sup> Each state must create an advisory group consisting of a diverse group of individuals, including members of law enforcement and juvenile justice agencies, representatives of nonprofit organizations, and at least three members "who have been or are currently under the jurisdiction of the juvenile justice system."<sup>185</sup> This advisory group participates in the

178. See Johnson, *supra* note 142, at 412.

179. Spinney et al., *supra* note 151, at 16; see also Johnson, *supra* note 142, at 412 ("Solutions to the problem of racial disparity stem from ongoing study and assessment of successful interventions.").

180. *Contextualizing Regimes*, *supra* note 135, at 1287.

181. Juvenile Justice and Delinquency Prevention (JJDP) Act (Pub. L. No. 93-415, 34 U.S.C. § 11101 et seq.); see also *Core Requirements of JJDP Act*, OJJDP: RACIAL AND ETHNIC DISPARITIES, <https://ojjdp.ojp.gov/programs/racial-and-ethnic-disparities> [<https://perma.cc/V7QH-R523>] (noting the new requirements of the JJDPA).

182. Caren Harp, *OJJDP Is Simplifying Title II Work to Focus on DMC Reduction, Not Process*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION: OP ED (June 29, 2018), <https://ojjdp.ojp.gov/news/blogs/Simplifying-Title-II-Work-to-Focus-on-DMC-Reduction> [<https://perma.cc/YZT4-ZN7J>].

183. *Id.*

184. *Contextualizing Regimes*, *supra* note 135, at 1291 (describing the collaborative nature of the JJDPA regime); Johnson, *supra* note 142, at 422 (same).

185. 34 U.S.C. § 11133(a)(3)(A)(ii)(II); *id.* § 11133(a)(3)(ii)(IV); *id.* § 11133(a)(3)(A)(v).

development and review of the state's plans<sup>186</sup> and submits reports and recommendations to the state legislature regarding the state's compliance with the core requirements of the JJDP. <sup>187</sup> The diversity of the advisory board in turn promotes fruitful conflict, creative problem-solving, <sup>188</sup> and objectivity. <sup>189</sup>

In a case study of districts that successfully lowered the racial and ethnic disparities in their juvenile justice systems, all of the sites surveyed emphasized the importance of increasing collaboration with other agencies and/or with the community. <sup>190</sup> The sites credited their success in part to a diverse committee or task force focused on reducing racial and ethnic disparities. <sup>191</sup> The relationships between sites and nationwide juvenile justice system improvement efforts, such as those led by the nonprofit Annie E. Casey Foundation, proved particularly critical to the sites' success. <sup>192</sup>

The encouragement to collaborate marks one of the great strengths of evolutionary learning. Some states go beyond what is required under the JJDP, likely because of either pressure from nongovernmental organizations or because internal advocates "now have a hook to spur reform." <sup>193</sup> The collaborative nature of the JJDP empowers advocates concerned about racial disparities in the juvenile justice system. <sup>194</sup> The Annie E. Casey Foundation, for example, supports the reduction of racial and ethnic disparities in juvenile detention through the development of the Juvenile Detention Alternatives Initiative ("JDAI"). <sup>195</sup> This initiative focuses on limiting the previously "inarticulate discretion" of street-level actors such as police and probation officers in the juvenile justice system through

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186. *Id.* § 11133 (a)(3)(B); *id.* § 11133(a)(3)(D)(ii).

187. *Id.* § 11133(a)(3)(D)(ii).

188. See ANSELL, *supra* note 141, at 167.

189. *Contextualizing Regimes*, *supra* note 135, at 1289; Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism*, 100 GEO. L.J. 53, 91 (2011) [hereinafter *Minimalism and Experimentalism*] ("[C]ollaborative decisions require articulation, and the fact that the team members are diverse in backgrounds means that matters that might be taken for granted in a more homogenous setting have to be explained and subjected to examination.").

190. Spinney et al., *supra* note 151, at 17.

191. *Id.*

192. *Id.*

193. Johnson, *supra* note 142, at 415.

194. *Id.*

195. *Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., <https://www.aecf.org/work/juvenile-justice/jdai/> [https://perma.cc/7VYE-7CJ4].



the development of risk assessment instruments.<sup>196</sup> The JDAI also prioritizes collaboration, contextualization, accountability and transparency, and continuous improvement in its operations.<sup>197</sup>

The W. Haywood Burns Institute for Justice, Fairness and Equity (the “Burns Institute” or “the Institute”) has experienced similar success in working to support the goals of the JJDPa in reducing racial and ethnic disparities. For instance, the Institute recognized that Peoria County, Illinois was collecting data on racial disparities only to fulfill the reporting requirements of state and federal agencies.<sup>198</sup> The Peoria County Disproportionate Minority Contact Project (the “Peoria County DMC Project”) and the Burns Institute moved collaboratively toward gathering data to drive policy reform, “rather than retrieving ‘data for data’s sake.’”<sup>199</sup> Together, the Burns Institute and the Peoria County DMC Project reduced disparities by first realizing that a significant number of Black boys were being detained after school fights thanks to zero-tolerance policies in schools.<sup>200</sup> This analysis served not to allocate blame for the racial and ethnic disparities, but rather to understand and then appropriately respond to the nature of the disparity.<sup>201</sup> With this data, the Burns Institute and the Peoria County DMC Project worked with local schools to pilot a project that addresses school fights with a restorative justice model, rather than with the police.<sup>202</sup> This has resulted in a 43% reduction in school referrals to detention for Black youth.<sup>203</sup>

This collaboration, continuous improvement, contextualization, and accountability and transparency in the reforms to the U.S. juvenile justice system have resulted in the reduction of racial and ethnic disparities in several districts.<sup>204</sup> These ongoing reforms provide a promising example of using evolutionary learning

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196. *Contextualizing Regimes*, *supra* note 135, at 1289.

197. *Id.* at 1288–89, 1291.

198. JAMES BELL ET AL., W. HAYWOOD BURNS INST. FOR JUST., FAIRNESS AND EQUITY, COLLECTING AND ANALYZING DATA ON RACIAL AND ETHNIC DISPARITIES: THE PEORIA PROJECT 4 (Apr. 2009), <http://www.modelsforchange.net/publications/218> [<https://perma.cc/EDV7-22TD>].

199. *Id.*

200. *Id.* at 16.

201. *See Johnson*, *supra* note 142, at 413.

202. *Success*, W. HAYWOOD BURNS INST. FOR JUST., FAIRNESS AND EQUITY, <https://www.burnsinstitute.org/services/success/> [<https://perma.cc/QR9S-A8KD>].

203. *Id.*

204. Spinney et al., *supra* note 151, at 1, 11.

to address the problem of the discretion and discrimination of street-level actors.

C. The Applicability of Lessons Learned from Reforms to the U.S. Juvenile Justice System to the INM

There are, of course, many differences between the problem of racial and ethnic disparities in the U.S. juvenile justice system and that of discrimination in the INM. These problems take place in different countries, under different legal systems, and with different cultural and historical contexts. While Afro-Mexicans and Indigenous Mexicans discriminated against by the INM face many nuanced challenges unique to the Mexican context, this discrimination also poses issues similar to those of racial and ethnic disparities in the U.S. juvenile justice system. Both the U.S. juvenile justice system and the INM are far-flung, decentralized public institutions<sup>205</sup> that engage in activities that disparately impact minorities.<sup>206</sup> Many factors result in this disparate impact,<sup>207</sup> including the discretionary and subsequently discriminatory actions of street-level actors.<sup>208</sup> Furthermore, for both the INM and the U.S. juvenile justice system, this discretion results in part from the countless often-unpredictable situations that street-level actors must respond to with their own judgment.<sup>209</sup>

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205. See Leila R. Siddiky, *Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System*, 55 HOW. L.J. 205, 213 (2011) (explaining that there are fifty-one different juvenile justice systems in the United States, all with unique governance structures); DECRETO por el que se crea el Instituto Nacional de Migración como órgano técnico desconcentrado, dependiente de la Secretaría de Gobernación, Diario Oficial de la Federación, art. 1, [DOF] 19-10-1993 (Mex.) (creating the INM as a decentralized government body).

206. See *supra* Section II.B (discussing the disparate impact of the juvenile justice system on youth of color); see *supra* Introduction, Sections I.A–C (discussing the INM's discriminatory actions against Afro-Mexicans and Indigenous Mexicans).

207. Johnson, *supra* note 142, at 404–07 (describing the disparate impact of the U.S. juvenile justice system on racial and ethnic minority youth); DUARTE ET AL., *supra* note 13 (manuscript at 13–39) (discussing the disparate impact of migration proceedings on Afro-Mexicans and Indigenous Mexicans).

208. See *supra* note 144–46 and accompanying text (discussing the discretion of agents of the U.S. juvenile justice system and corresponding discrimination); *supra* Section 1.B (discussing the current laws and policies that afford the INM discretion and result in discrimination).

209. See LIPSKY, *supra* note 27, at 15 (explaining that police exercise discretion “because they cannot carry around instructions on how to intervene

The problem of discretionary and discriminatory actions is compounded by the fact that victims of racial and ethnic disparities in the juvenile justice system, like victims of the INM's discriminatory practices,<sup>210</sup> frequently interact with more than one street-level actor exercising discretion.<sup>211</sup> The 1989 report that first brought national awareness to the problem of racial and ethnic disparities in the U.S. juvenile justice system<sup>212</sup> explained that, “[i]n the total scheme of things, the discriminatory consequences are hidden within a maze of covert activities carried out by literally hundreds of different persons acting independently of one another.”<sup>213</sup> This makes identification of the source of the problem—and thus creation of a potential solution—challenging.<sup>214</sup>

Furthermore, the competing pressures to promote public safety and protect the rights of juveniles<sup>215</sup> parallel the challenges faced by the INM and Mexican lawmakers to balance both national security and human rights.<sup>216</sup> As consequence, racial and ethnic disparities in the U.S. juvenile justice system and the INM's discrimination against Indigenous Mexicans and Afro-Mexicans exemplify situations in which there exists uncertainty about the public intervention appropriate to address these inequities.<sup>217</sup>

Just as the Annie E. Casey Foundation and the Burns Institute work to supplement the JJDPa in reducing racial and

with citizens, particularly in potentially hostile encounters” and because they often work in situations that require responses to the unique circumstances of the situation); see also Adam D. Kamenstein, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2121 (1997) (discussing the discretion afforded to prosecutors in deciding whether and how to charge juveniles).

210. See *supra* notes 5–9 and accompanying text (explaining the multiple INM agents involved in the detention of the Juárez family).

211. See William H. Barton, *Discretionary Decision-Making in Juvenile Justice*, 22(4) CRIME & DELINQ. 470, 471–72 (1976) (“It is obvious that, at a number of points, wide discretion is exercised in the determination of the fate of the juvenile offender.”).

212. Johnson, *supra* note 142, at 407.

213. THE NAT'L COAL. OF STATE JUV. JUST. ADVISORY GRPS., A REPORT ON THE DELICATE BALANCE 7 (1989), <http://www.juvjustice.org/sites/default/files/resource-files/A%20Delicate%20Balance.compressed.pdf> [<https://perma.cc/52N7-5YUC>].

214. Johnson, *supra* note 142, at 375.

215. John D. Elliott & Anna M. Limoges, *Deserts, Determinacy, and Adolescent Development in the Juvenile Court*, 62 S.D. L. REV. 750, 756 (2017).

216. See *supra* notes 85–88 and accompanying text.

217. *Contextualizing Regimes*, *supra* note 135, at 1267–68.

ethnic disparities in the juvenile justice system, there are also numerous advocacy organizations in Mexico drawing attention to the discriminatory conduct of the INM against Afro-Mexicans and Indigenous Mexicans. This is particularly evident by the nonprofit Institute for Women in Migration filing the Amparo against the INM on behalf of the Juárez family.<sup>218</sup>

The U.S. juvenile justice system's issue of racial and ethnic disparities thus overlaps in many ways with the INM's issue of discriminatory activity against Afro-Mexicans and Indigenous Mexicans. The success of reforms to the juvenile justice system grounded in evolutionary learning thus serves not only as an example of evolutionary learning in action, but also as a promising framework for guiding reforms to the INM. Since the problem of discretion and discrimination in the INM is not identical to the problems of racial and ethnic disparities in the U.S. juvenile justice system, the proposed solutions are not identical either. Instead, the reforms proposed in this Note use evolutionary learning as a starting point, following the JJDP's goal of identifying the occurrence of discrimination, understanding the specific reasons why this discrimination occurs, and then experimenting with collaborative, contextual ways to reduce this discrimination.

### III. APPLYING EVOLUTIONARY LEARNING TO REFORM THE INM

This Part proposes reforms to the INM using evolutionary learning. Section III.A proposes a two-phase program of reforms: first, a pilot program, and second, the expansion of the pilot program and establishment of corresponding reforms to the legal framework governing the INM. Section III.B anticipates the strengths of this approach and responds to the expected challenges as well.

#### A. Designing, Implementing, and Evaluating Reforms to the INM Based in Evolutionary Learning

Adequate response to the INM's discretionary and discriminatory actions likely requires reform at every level, from reforming the manner in which INM agents conduct migratory revisions to reforming the immigration legal framework and its

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218. See Laura Arana, *Deportan a indígenas 'por no parecer mexicanos,' van a Corte*, DIARIO CONTRA REPÚBLICA (Aug. 19, 2019), <https://www.contrareplica.mx/nota-Deportan-a-indigenas-por-no-parecer-mexicanos--van-a-Corte201919820> [<https://perma.cc/A2XX-VPJZ>].

conflicting objectives.<sup>219</sup> However, as discussed earlier, imposing a rigid set of rules on INM agents from the top down, such as through Congress or the SCJN alone, will likely not succeed in addressing the agents' discrimination against Afro-Mexican and Indigenous Mexican individuals.<sup>220</sup> This Note instead proposes a two-part program of reform: first, the design and implementation of a pilot program driven by evolutionary learning to reduce discriminatory conduct; and second, the use of the lessons learned from the pilot program to implement reforms to both the INM agents' actual practices nationwide and to the INM's legal framework.

### 1. The Pilot Program

The INM Citizen Council (the "CC-INM")—the advisory support body to the INM consisting of thirteen counselors who propose specific actions to protect and defend migrants' rights<sup>221</sup>—is best equipped to oversee the pilot program. The CC-INM is currently implementing a national reform of the INM's practice of detaining migrant children and adolescents (the "Alternatives to Detention program"),<sup>222</sup> and thus has the experience necessary to implement additional reforms.

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219. INSYDE, *supra* note 47, at 40–49 (making specific recommendations to all levels of government as well as academics and nonprofits for how to reform the INM); PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, at 25–36 (same); *see also* LIPSKY, *supra* note 27, at 141–42 (suggesting that workers' attitudes and resulting discriminatory behavior can be addressed by changing the structures, demands, and incentives and sanctions systems of the job); Liebman & Mattern, *supra* note 52, at 602–03 (asserting that it is "misguided" to give local actors sole self-regulatory authority).

220. *See supra* Section I.C.

221. For more information on the CC-INM, see *Consejo Ciudadano del Instituto Nacional de Migración*, INSTITUTO NACIONAL DE MIGRACIÓN (INM) (July 8, 2019), <https://www.gob.mx/inm/acciones-y-programas/consejo-ciudadano-del-instituto-nacional-de-migracion> (on file with the *Columbia Human Rights Law Review*); Reglamento Interior de la Secretaría de Gobernación cap. XI, sec. II, art. 128, Diario Oficial de la Federación [DOF] 31-05-2019 (Mex.); *The Citizens Council of Mexico's National Migration Institute Exposes the Harsh Realities Faced by Migrants in Mexico*, WOLA: NEWS (Oct. 2, 2017), <https://www.wola.org/2017/10/citizens-council-mexicos-national-migration-institute-exposes-harsh-realities-faced-migrants-mexico/> [<https://perma.cc/5JL3-FDZG>].

222. For more information on the Alternatives to Detention program, see PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, at 3; INT. DET. COAL., LAS ALTERNATIVAS A LA DETENCIÓN, UNA OPORTUNIDAD PARA LA NUEVA ADMINISTRACIÓN EN MÉXICO 3 (Sept. 2018), <https://idcoalition.org/wp->

However, the CC-INM and the INM must first agree to take on the task of reducing the INM's discriminatory actions against Afro-Mexicans and Indigenous Mexicans. There are several routes through which the INM and the CC-INM could take on this task: the CC-INM and the INM could agree to this project of their own initiative and/or with pressure from nonprofits and NGOs,<sup>223</sup> and enact it through internal proceedings.<sup>224</sup> Alternatively, SEGOB could require the INM and the CC-INM to take on this project.<sup>225</sup> Finally, Congress could amend the Regulation of the Law of Migration to require the CC-INM and the INM to implement this pilot program.<sup>226</sup> Additionally, to strengthen the CC-INM's capacity to effect positive change in the INM through this program, Congress could amend the Internal Regulation of the Secretary of the Interior to grant the CC-INM more authority over migratory policy decisions.<sup>227</sup>

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content/uploads/2018/10/Propuestas\_Alternativas\_MEX\_2018-2024\_25oct.pdf [https://perma.cc/7NWF-X8TT] [hereinafter LAS ALTERNATIVAS A LA DETENCIÓN].

223. PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, at 37.

224. The INM Citizen Council can propose projects before the Migratory Policy Advisory Board, of which the Sub-Secretary of the Interior presides. Reglamento Interior de la Secretaría de Gobernación cap. XI, sec. I, art. 121, ¶ 2, Diario Oficial de la Federación [DOF] 31-05-2019 (Mex.). The Sub-Secretary of the Interior, as part of SEGOB, formulates and directs migratory policy in Mexico in accordance with the laws and policies set forth by other federal authorities such as the President and Congress. Ley de Migración [LM] tít. 3, cap. I, art. 18, fac. I, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.).

225. SEGOB can issue guidelines and accords regarding the execution, control, and supervision of migratory policy that migratory authorities (such as the INM and the INM Citizen Counsel) must follow. Ley de Migración [LM] tít. 3, cap. I, art. 19, Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas 21-04-2016 DOF (Mex.); *see also* INSYDE, *supra* note 47, at 25 (recommending that SEGOB issue guidelines and accords to clarify migration protocol and conform with human rights obligations).

226. These amendments could be brought about by Congress or by judicial action. They could be added to the Regulation in Article 213, which, in conjunction with Articles 22 and 97 of the Law of Migration, require public servants to conduct migratory revisions that are “founded and motivated” but also respect all human rights. Ley de Migración [LM] tít. 3, cap. II, art. 22 Diario Oficial de la Federación [DOF] 05-25-2011, últimas reformas 21-04-2016 DOF (Mex.); *id.* tít. 5, cap. IV, art. 97; Reglamento de la Ley de Migración [RLM], tít. XIII, cap. III, art. 213, Diario Oficial de la Federación [DOF] 28-09-2012, últimas reformas DOF 23-05-2014 (Mex.).

227. PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, at 36.

This pilot program overseen by the CC-INM should incorporate some version of the following four key phases: 1) collection of data, 2) identification of patterns and circumstances in which discrimination occurs, 3) local experimentation with new practices for INM agents in response to the data, and 4) continuous reassessment and revision of these practices.<sup>228</sup> The pilot program's timeline should be six months, with the flexibility to add a few extra months if needed.<sup>229</sup> Additionally, the pilot program should be run in two to three states.<sup>230</sup> Most critically, the pilot program should incorporate the elements of evolutionary learning in the design and implementation of every phase.

The pilot program should incorporate collaboration, for example, through the partnership of the CC-INM and the INM with various governmental agencies, NGOs, and nonprofits, all of which are connected to or have a direct stake in the mission of reducing the INM's discriminatory actions against Afro-Mexicans and Indigenous Mexicans.<sup>231</sup> This collaboration (the "collaborative team") should prioritize diversity of experience and expertise.<sup>232</sup> In particular, the collaborative team should include at least one member who is closely connected to the rights and experiences of Afro-Mexicans and Indigenous Mexicans. Collectively, the collaborative team should

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228. LAS ALTERNATIVAS A LA DETENCIÓN, *supra* note 222, at 8–9.

229. See CONSEJO CIUDADANO DEL INM, DESCRIPCIÓN DE PROGRAMA PILOTO DE CUIDADO Y ACOGIDA ALTERNATIVA DE NNA MIGRANTES NO ACOMPAÑADOS EN MÉXICO 1 (June 30, 2016), [https://www.gob.mx/cms/uploads/attachment/file/115687/Descripcion\\_del\\_Programa\\_Piloto.pdf](https://www.gob.mx/cms/uploads/attachment/file/115687/Descripcion_del_Programa_Piloto.pdf) (on file with the *Columbia Human Rights Law Review*) [hereinafter DESCRIPCIÓN DE PROGRAMA PILOTO].

230. See PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO, *supra* note 66, at 3–5. By conducting pilot programs in at least two states, data will be collected and measures experimented with under the authority of at least two different Federal Delegations and their subordinates. See *supra* notes 92–100 and accompanying text. Additionally, the states' proximity to Mexico's northern and southern borders, and/or to common migratory routes used by non-Mexicans should be considered when selecting the states in which to run the pilot program. See DUARTE ET AL., *supra* note 13 (manuscript at 22–23).

231. See LAS ALTERNATIVAS A LA DETENCIÓN, *supra* note 222, at 8 (requiring the collaboration of governmental authorities and members of nonprofits to develop, implement, and invest in programs designed to guarantee the non-detention of youth); DESCRIPCIÓN DE PROGRAMA PILOTO, *supra* note 229, at 1 (detailing the collaborative efforts of governmental agencies, national and international NGOs, and nonprofits to implement the pilot program).

232. See *Contextualizing Regimes*, *supra* note 135, at 1266–67.

oversee the pilot program's development, implementation, and expansion.<sup>233</sup>

The pilot program by its very nature also involves collaboration with INM agents and contextualization, because the program requires that street-level actors experiment, under the guidance of the collaborative team and oversight of the CC-INM, with different practices designed to fit their local contexts.<sup>234</sup> The pilot program operates with the understanding that what proves successful in one state may not work in another state.<sup>235</sup>

Additionally, the pilot program includes accountability and transparency measures. Though the INM is notorious for its lack of transparency,<sup>236</sup> the CC-INM already has some framework in place to collect and analyze data.<sup>237</sup> In 2016, the CC-INM conducted an investigation of seventeen migratory detention centers across the country.<sup>238</sup> Gaining unrestricted access to the centers allowed the CC-INM to conduct anonymous interviews with detainees and staff members.<sup>239</sup> Using the same mechanisms as they did in their 2016 investigation, the CC-INM and its collaborative team should focus on collecting data from migratory revisions in the states selected for the pilot.<sup>240</sup> The data should help the collaborative team identify the circumstances in which INM agents engage in discriminatory conduct.

In response to the patterns that emerge from this data, the collaborative team should propose measures designed to reduce the agents' discriminatory actions.<sup>241</sup> These measures may take the form of different trainings provided to INM agents,<sup>242</sup> increased sanctions for misconduct,<sup>243</sup> or something else entirely.<sup>244</sup> The collaborative team should develop, implement, and regularly test these and other

233. See *LAS ALTERNATIVAS A LA DETENCIÓN*, *supra* note 222, at 5.

234. See *id.* at 8.

235. See *Contextualizing Regimes*, *supra* note 135, at 1291.

236. See *supra* Section I.B (explaining the lack of transparency in the INM).

237. *PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO*, *supra* note 66, at 3.

238. *Id.*

239. *Id.*

240. *Id.*

241. See *LAS ALTERNATIVAS A LA DETENCIÓN*, *supra* note 222, at 8.

242. *INSYDE*, *supra* note 47, at 26, 40–41.

243. For recommendations on improving the use and efficacy of sanctions, see *id.* at 26–27; *PERSONAS EN DETENCIÓN MIGRATORIA EN MÉXICO*, *supra* note 66, at 27.

244. See *INSYDE*, *supra* note 47, at 40–49.



accountability and transparency measures to determine their efficacy in reducing discriminatory practices. Thus the pilot program revolves around continuous improvement: as new measures are implemented to reduce discriminatory conduct, data should be continually collected on their impact.<sup>245</sup> The collaborative team should investigate measures that do not succeed in reducing discrimination.<sup>246</sup> Similarly, the team should refine and strive to understand measures that do succeed in reducing disparate impact.<sup>247</sup> The successes and challenges encountered throughout this process should be shared across pilot sites.<sup>248</sup>

## 2. Expansion of the Pilot Program and Corresponding Reforms to the Legal Framework

As with the CC-INM's Alternatives to Detention program, the pilot program outlined above should ultimately be adapted for expansion nationwide.<sup>249</sup> Expansion logistics require studying the process of scaling up a pilot project nationwide,<sup>250</sup> in addition to learning from the successes and challenges faced by the pilot program and by the nationwide implementation of the Alternatives to Detention program. Expansion should also be accompanied by reforms to the legal framework governing the INM.<sup>251</sup> These reforms should codify the adapted version of the pilot program by establishing requirements for the collection and analysis of data<sup>252</sup> and collaborative, contextual, and iterative experimentation with practices that reduce INM agents' discriminatory conduct.<sup>253</sup> These reforms will likely require a specific funding system<sup>254</sup> and other

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245. See *supra* Sections II.A–B (explaining and providing examples of continuous improvement).

246. See *id.*

247. See *id.*

248. See *id.*

249. LAS ALTERNATIVAS A LA DETENCIÓN, *supra* note 222, at 6.

250. See Mary Burns, *The Myths of Scaling-Up*, GLOB. P'SHIP FOR EDUC. (Jan. 14, 2014), <https://www.globalpartnership.org/blog/myths-scaling> [https://perma.cc/89FR-DT2G].

251. See LAS ALTERNATIVAS A LA DETENCIÓN, *supra* note 222, at 6, 9, 11.

252. See INSYDE, *supra* note 47, at 31–32.

253. See *supra* Sections II.A–B (overviewing the necessary components of evolutionary learning, including experimentation with reform measures).

254. See Liebman & Mattern, *supra* note 52, at 599–600.

accountability measures<sup>255</sup> to ensure the program's implementation nationwide.

Congress already faces some pressure to reform the laws governing the INM thanks to the Amparo currently before the SCJN, the CNDH recommendations, and the research, reports, and general advocacy by national and international media and organizations condemning the INM's discriminatory actions.<sup>256</sup> These institutions should continue investigating the misconduct of the INM, bringing amparos challenging the constitutionality of articles of the Law of Migration,<sup>257</sup> and otherwise increasing awareness and pressuring the relevant authorities to generate a more rational and humane migratory policy grounded in evolutionary learning.<sup>258</sup>

## B. Anticipated Challenges and Strengths of this Approach

This Section addresses and responds to the likely challenges of reforming the INM using the principles of evolutionary learning. This Section also outlines the strengths of these reform measures.

Political will (or lack thereof) will likely provide the greatest challenge to this approach. As discussed earlier, the legal framework governing the INM contains several contradictions, in part due to the conflict between promoting national security and upholding human rights.<sup>259</sup> International relations between the U.S. and Mexico in many ways prioritize stopping migrants from reaching the U.S. border over guaranteeing human rights.<sup>260</sup> However, the reforms to juvenile justice prove that public safety and the promotion of human rights are not mutually exclusive.<sup>261</sup> The evolutionary learning approach proposed in this Note has the capacity to balance these two

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255. See INSYDE, *supra* note 47, at 28–30; see also *Minimalism and Experimentalism*, *supra* note 189, at 81 (acknowledging that to induce local actors to participate, the regime should use either “coercive sticks or enticing carrots”).

256. See *supra* Section I.C (exploring the current response to the INM's human rights violations).

257. Interview with Dr. García de la Rosa, *supra* note 65 (explaining the impact of amparos on promoting human rights-minded reform); INSYDE, *supra* note 47, at 50 (making specific recommendations to academic and nonprofit institutions to pressure the government into effecting meaningful reform).

258. See INSYDE, *supra* note 47, at 50.

259. See *supra* Section I.B.

260. DUARTE ET AL., *supra* note 13 (manuscript at 38–39); see *supra* notes 85–88 and accompanying text (describing the conflicting policy priorities of migration control and human rights).

261. See *supra* Section II.B.

goals by regularly collecting data on the migratory revisions, which can then be used to adjust the practices of INM agents to strike a better balance between the two goals.<sup>262</sup> Furthermore, as stated earlier, there are multiple national and international institutions calling for reform that can help overcome the obstacle of political will.<sup>263</sup>

A second anticipated challenge relates to the INM and SEGOB's willingness to reform the INM. Because INM agents are accustomed to working free of regulation,<sup>264</sup> many have come to act with impunity.<sup>265</sup> There will likely be great opposition by INM officials mistrustful of reforms and unwilling to give up their unbridled authority.<sup>266</sup> However, as evident by the reforms to U.S. juvenile justice, collaboration and contextualization can successfully induce stakeholders—such as INM officials—to participate in reforms.<sup>267</sup> Additionally, the benefit of evolutionary learning is that it takes a holistic approach, solving complex problems by setting goals and asking relevant stakeholders to continuously measure, explain, and develop locally-tailored plans to meet those goals.<sup>268</sup> The approach is flexible in that it allows for many different mechanisms to be tried and tested to address many issues, including that of uncooperative actors.

Additionally, the INM and SEGOB have already begun participating in measures designed to address discrimination within their immigration practices: in 2018, the INM, in collaboration with several governmental bodies, including the National Council for the Prevention of Discrimination and the CNDH, as well as anti-discrimination experts from national and international organizations,<sup>269</sup> created a guide intended to educate migration agents on the laws prohibiting and the consequences of racial profiling.<sup>270</sup> Although this guide has not succeeded in significantly changing INM practices,<sup>271</sup> it demonstrates the INM's willingness to

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262. *See id.*

263. LAS ALTERNATIVAS A LA DETENCIÓN, *supra* note 222, at 9.

264. *See supra* Section I.B.3.

265. Wolf, *supra* note 29, at 25.

266. *See* LIPSKY, *supra* note 27, at 19.

267. *See supra* Section II.B (explaining the role of collaboration and contextualization in reforming the U.S. juvenile justice system).

268. Liebman & Mattern, *supra* note 52, at 598.

269. CARRASCO PUEYO & LEITE, *supra* note 80, at 12–13.

270. *Id.*

271. *See supra* note 116 and accompanying text.

address reform and to consider alternative, non-discriminatory practices.

While the approach proposed by this Note will likely encounter many challenges, this approach also has many strengths that will likely ease the implementation process. The greatest strength of this approach is that the principles of evolutionary learning have been successfully applied in other contexts to address situations of similar uncertainty, in which a solution is not immediately clear.<sup>272</sup> Much of this success is grounded in the balance of flexibility and accountability that evolutionary learning provides.<sup>273</sup> This flexibility allows for multiple, diverse voices and contexts to shape the strategies used, while accountability requires that strategies be repeatedly evaluated and improved.<sup>274</sup> Rather than alienate key stakeholders, this approach serves to gain their insight and in turn, their commitment to the changes proposed by this approach.<sup>275</sup>

Thus, the measures proposed in this Note address the problems in the legal framework<sup>276</sup> by collectively, iteratively experimenting with practices to better understand why this discrimination occurs and what can be done about it. The lessons learned from the pilot project proposed above can help guide Congress or the SCJN to ultimately reform the law in a manner likely to positively impact the actions of street-level actors such as INM agents. Furthermore, even if the INM or lawmakers lag in implementing the reforms proposed, the CNDH and other government agencies, nonprofits, and NGOs can incorporate the elements of evolutionary learning into their own advocacy efforts. While continuing to push for reform, domestic and international institutions and organizations can further research the causes of discriminatory conduct and experiment with strategies effective in reducing this conduct.<sup>277</sup> The reforms proposed in this Note therefore are broadly applicable.

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272. Liebman & Mattern, *supra* note 52, at 599.

273. Dorf & Sabel, *supra* note 68, at 838.

274. *Minimalism and Experimentalism*, *supra* note 189, at 82.

275. ANSELL, *supra* note 141, at 172.

276. *See supra* Section II.B (explaining the flaws in the legal framework).

277. *See* Johnson, *supra* note 142, at 409.

## CONCLUSION

Many factors contribute to the INM's discriminatory practices against Indigenous Mexicans and Afro-Mexicans, one of which is the great discretion afforded to the INM through the legal framework. The laws governing the roles and responsibilities of the INM are widely dispersed, vague, and contradictory, and ultimately leave the INM operating largely unregulated. This Note proposes the use of evolutionary learning, as exemplified by the reforms to juvenile justice, to address the INM's discretionary and discriminatory behavior.

While there are many differences between the current situation in Mexico and that of juvenile justice in the U.S., this Note demonstrates that the INM's problems with discretionary and discriminatory conduct parallel those faced by street-level actors in the U.S. juvenile justice system. As such, this Note advocates for the adoption of similar measures in Mexico to those utilized by the juvenile justice system to reduce racial and ethnic disparities.

This Note suggests a two-part approach to reforming the INM by using evolutionary learning: first, the design and implementation of a pilot program that experiments with reforms to the INM to reduce discrimination; and second, the adaptation, expansion, and codification of the pilot program into national law and practice. The elements of evolutionary learning that inform this approach—contextualization, collaboration, accountability and transparency, and continuous improvement—are not limited to the INM and lawmakers. Rather, evolutionary learning can and should be used by national and international, governmental and nongovernmental institutions to guide their own advocacy efforts as they pressure the INM, Congress, and the SCJN to adequately respond to the INM's discriminatory conduct against Afro-Mexicans and Indigenous Mexicans like the Juárez family.