

IMMIGRANTS WITHOUT RIGHTS: QUESTIONING THE ROLE OF
INTERNATIONAL HUMAN RIGHTS LAW IN U.S. DETENTION AND
DEPORTATION POLICIES

by

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THESIS ABSTRACT

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Title: Immigrants Without Rights: Questioning the Role of International Human Rights Law in U.S. Detention and Deportation Policies

This thesis examines the role of international human rights law in U.S. immigration policies and, specifically, its role in U.S. immigration, detention and deportation policies. U.S. domestic immigration laws are complex and rigid, with limited judicial discretion in immigration proceedings and limited due process protections for immigrants. U.S. immigration policies prioritize detention and deportation as the main mechanisms to control and regulate immigration. Much of the academic legal literature looks outside of domestic laws to international human rights law as the solution to the human rights abuses immigrants face; however, although the United States is in stark violation of international human rights laws the federal government remains unwilling to comport with its obligations under international law. This thesis incorporates immigration attorney perspectives on the U.S. immigration system and human rights and attempts to shift the discourse away from international law as the solution to this human rights problem.

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CHAPTER I

INTRODUCTION

1. Sergio and Eduardo: Immigrant Stories from Detention

When I first met Sergio he had just turned 23 years old. I remember his age because while looking at his intake form, I saw that he was born on the same day and same year as my younger brother. Sergio had been detained by Immigration and Customs Enforcement (ICE) for over two years. He was born in Mexico but had lived in the United States for twenty years, almost his entire life. His mother brought him across the border illegally when he was only two years old. From the time he was two years old until the day I met him, Sergio had lived in the United States. Like any young person growing up in the United States, Sergio went to school, made friends and lived a relatively normal life; the only thing to distinguish him from any of his peers was the fact that Sergio and his mother had not been legally admitted to the United States.

At age 18, Sergio pleaded guilty to burglary; he and a friend broke into a stranger's house. Sergio's friend gave his name up to the police a year later and Sergio was arrested and charged. He pled guilty to second-degree burglary and was sentenced to eight months in prison. When he was released from prison, ICE immediately took Sergio into federal immigration custody. Because Sergio was in the U.S. illegally and because burglary is defined by the Immigration and Nationality Act (INA) as a crime involving moral turpitude (CIMT), Sergio was placed in a privately run, federally funded, immigration detention facility and faced mandatory detention and immediate deportation.

Because there is very little judicial discretion in immigration proceedings, Sergio has few options for fighting his deportation. Sergio had lived in the United States for over

twenty years and although he understands Spanish, does not speak the language. He has no family in Mexico; his mother and two siblings live in the United States, as do his grandparents. But the Immigration Judge (IJ) cannot consider all of Sergio's ties to the United States. The IJ cannot take into account that Sergio's mother and his two siblings, prior to Sergio's arrest for burglary, relied heavily on Sergio to support them financially. The IJ cannot consider the fact that Sergio has not been to Mexico since he was two years old, that he does not know how to speak Spanish and that he has no family or friends in Mexico; he has no home, outside of his home in the U.S., to go to. Under immigration law, Sergio is a "criminal alien" and therefore cannot challenge his detention or his deportation. Sergio has lived in the United States for 20 years, almost his entire life; but because he was convicted of a CIMT, he is inadmissible to the United States and because he is inadmissible, Sergio will face certain deportation.

Unlike in his criminal proceedings, Sergio is not eligible for parole because burglary is a CIMT for immigration purposes. According to immigration law, anyone convicted of a CIMT faces mandatory detention. Because the immigration laws require mandatory detention for individuals who have committed certain crimes, it doesn't matter whether the IJ determines that Sergio is not a flight risk or a danger to the community. The IJ cannot take into account that Sergio was convicted only months after he turned 19 years old, that Sergio has already served his time for his conviction and that Sergio has been rehabilitated according to the criminal justice system. The IJ cannot consider Sergio's ties to his mother and siblings, or that Sergio if ICE were to use its discretion to release Sergio, he would attend all future immigration proceedings.

Sergio is held in a detention facility that is indistinguishable from federal prison; he wears a jumpsuit, lives in a prison cell and his freedom of movement is restricted. Sergio is allowed very limited time outdoors; only one hour per day, and he faces punishments, such as solitary confinement, for misbehavior. Sergio is detained with people who have committed violent crimes such as murder and rape. He is not allowed to see his family except on limited occasions during approved visiting hours. Sergio is escorted to and from his cell every day; he is constantly surrounded by guards and lives under constant supervision.

Unlike in his criminal proceedings, Sergio does not have the constitutional right to a government-appointed attorney if he cannot afford one. Because Sergio cannot afford an attorney, he will have to represent himself *pro se*, against a Department of Homeland Security (DHS) trial attorney, who is a trained lawyer and skilled in immigration law and procedure. Sergio will have to write all of his motions and his briefs on his own, without the help of anyone trained in immigration law. Sergio must do all of his legal research on his own and must collect all the necessary documentation to fight his deportation. He must also do so from within the immigration detention facility. The detention facility has few computers and Internet access is very limited. Detainees must pay for each phone call they make, and they must also pay to make copies of their documents for the court and for DHS.

Because Sergio's detention is not considered 'punitive,' constitutional protections like the Eighth Amendment "right to be free from cruel and unusual punishment" or the Fourth Amendment "right to be free from unlawful searches and seizures" do not apply. The Fifth Amendment due process guarantees also will not apply to Sergio. He cannot

invoke any constitutional rights guaranteed to those in criminal proceedings because the Supreme Court has defined immigration proceedings as regulatory, not punitive, proceedings. Sergio is detained and facing permanent banishment from his only home, yet that isn't "punishment" in the criminal sense of the word. Sergio cannot use the Constitution to fight for humane treatment and his right to freedom; he cannot argue that the government is violating his constitutional rights. Sergio is outside of the protection of the Constitution.

Eduardo has a similar story. Eduardo grew up in Mexico and entered the United States without documentation. Like Sergio, Eduardo had lived in the United States for over twenty years. However, unlike Sergio, Eduardo entered the United States on his own; he was not brought across the border as a young child. Unlike Sergio, Eduardo was not in immigration detention because of his criminal history. Eduardo has never committed a crime and has never been charged with committing a crime. Instead, Eduardo ended up in immigration detention because he was pulled over by a police officer while on his way to work. When Eduardo couldn't present documentation demonstrating he was legally present in the United States, he was arrested and taken to the police station, where the officer checked his immigration status and determined he was in the country illegally. Eduardo was immediately turned over to ICE and placed in immigration detention.

Like Sergio, Eduardo's deportation is inevitable. Eduardo had only recently been transferred to the ICE detention facility when I met him. When I first asked Eduardo if he was married or had any children, he told me yes. He told me his partner is a legal permanent resident and her daughter, who he has raised from a young age, is a U.S.

citizen. Unfortunately, Eduardo and his partner never formally married. And although Eduardo considers himself to be a father, he has never legally adopted his U.S. citizen daughter. Even though Eduardo and his partner consider themselves to be married, and even though his partner's daughter considers Eduardo to be her father, the INA does not recognize these relationships. Because Eduardo, according to immigration law, has no formally recognized family in the United States, he is ineligible for any relief from deportation.

The IJ cannot consider the fact that Eduardo has a family and that he has never been arrested for violating a law in the United States. The IJ cannot take into account the hardship that Eduardo's partner and her daughter will face should Eduardo be deported. Nor can the IJ consider Eduardo's work history in the United States or that Eduardo will have to start over in Mexico. Eduardo's long term presence in the United States as a productive, tax-paying individual and Eduardo's family ties cannot be considered in his immigration case. The law is clear: because Eduardo did not formalize his relationship with his daughter or his partner, he is ineligible to apply for cancellation of removal. It doesn't matter that Eduardo didn't know he needed to formalize his relationship, nor does it matter that Eduardo and his partner are married in every sense of the word or that Eduardo is a father in every sense of the word.

Another difference between Eduardo and Sergio is Eduardo's eligibility for parole. Unlike Sergio, Eduardo is eligible for bond. When he was first detained, ICE set his bond at \$8,000. Considering that bond amounts are based on whether an individual is a flight risk or a danger to the community, \$8,000 is very high. Eduardo has family and community ties, which means his flight risk is low; Eduardo has never committed a crime

and is therefore not a danger to the community. But ICE often imposes arbitrary bonds and ICE retains the authority to raise or revoke a bond at any time. Because Eduardo cannot afford to pay such a high bond, like Sergio, Eduardo must fight his deportation from inside a detention center, an environment that is like a prison in every way.

Just as Sergio is unable to challenge the constitutionality of his detention and deportation, Eduardo is unable to challenge his detention. Even though Eduardo's ICE bond is absurdly high, ICE's decision to set a high bond is not governed by the Constitution. In fact, although Eduardo can request a bond hearing in front of the IJ, if he does so, he faces the risk that the IJ will raise the amount, or even worse, completely revoke it all together. If Eduardo doesn't agree with the IJ's bond determination, he cannot appeal to a higher authority. The IJ and ICE have sole discretion in determining the bond amount. In fact, just as ICE has the discretion to lower Eduardo's bond to the lowest amount, ICE has the discretion to release Eduardo without requiring him to pay a bond at all.

As in Sergio's case, Eduardo cannot challenge his detention or his impending deportation under the Constitution. His Fifth Amendment right to due process of law is limited; he cannot challenge his detention as cruel and unusual punishment in violation of the Eighth Amendment. Even if the police stopped Eduardo in violation of the Fourth Amendment, Eduardo cannot challenge the stop (and resulting arrest and detention) as a violation of his Fourth Amendment right against unlawful search or seizure. The Constitution does not protect Eduardo.

How is it that Eduardo and Sergio fall outside of the protection of the Constitution? Citizens of the United States are afforded more individual rights and

privileges than most people in the world. Those who have grown up as citizens in the United States expect constitutional rights to apply in every context. Americans learn about the Bill of Rights, the Founding Fathers, and about the Separation of Powers, and how those aspects of the government distinguish the United States from authoritarian governments. In the Preamble, “the People” refers to U.S. citizens and to people physically present within the United States. Membership in that category provides inalienable individual rights that the government cannot take away and cannot violate. So how is it, that Eduardo and Sergio, and countless others physically present within the United States, are not members of “We the People”? Why can the government take their rights away without question? Why doesn’t the Constitution protect them?

2. International Human Rights Laws in Immigration Proceedings and the Role of International Law in U.S. Immigration Policies

This thesis seeks to examine the role of international human rights law in U.S. immigration policies and, specifically, its role in U.S. immigration, detention and deportation policies. U.S. domestic immigration laws are complex and rigid, with limited judicial discretion in immigration proceedings and limited due process protections for immigrants. U.S. immigration policies prioritize detention, deportation and militarization of the border as the main mechanisms to control and regulate immigration. Because the U.S. immigration system is so rigid and the federal government has relatively unfettered control over immigration law, much of the academic legal literature (Kanstroom, Golash-Boza, Acer and Goodman, Cook) looks outside of domestic laws to international human rights law as the solution to the incredible human rights abuses immigrants face in the United States.

While the literature is clear that the United States is violating international human rights laws in the way it detains and deports immigrants, the United States federal government remains unwilling to change its deportation system. The Obama administration continues to focus on detention and deportation as the primary mechanisms for enforcing immigration laws and the government continues to increase spending for further militarization of the border and border enforcement. Even though the United States is violating its obligations under international law, and even though the literature is clear that the U.S. government must incorporate international human rights standards into its detention and deportation practices, the U.S. has yet to do so, and it appears it will not do so in the future.

The unwillingness of the United States to incorporate international human rights standards into its immigration policies led me to question what role international law has in immigration policy. Even though international laws governing the human rights of migrants apply to the United States (it is a signatory of a multitude of international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the U.N. Refugee Convention), I questioned what role international human rights laws can actually play in deportation and detention proceedings. Although many scholars point to international law as a solution (Kanstroom, Golash-Boza, Gilman), very few provide any insights into how U.S. laws could incorporate it. This leads me to wonder whether there are domestic laws already in place that could enable the U.S. to incorporate international law without actually formally sign international laws into new domestic legislation.

3. Methodology

For my research, I interviewed immigration attorneys working at a non-profit agency in Arizona, where I was also doing an internship in 2013. As someone studying the law in hopes of one day practicing law, I found that the literature lacked the valuable perspective of immigration attorneys. I conducted my research at a non-profit agency that provides legal services to immigrants in immigration detention who cannot afford an attorney. Because close to 86% of immigrants in detention are unable to afford a private attorney to represent them, the attorneys at this non-profit agency had a large caseload and considerable experience in immigration law. Through interviewing these immigration attorneys, I hoped to find concrete ways in which the United States could incorporate international human rights laws into its detention and deportation policies.

To fully understand the detention and deportation process, I applied for an internship with the non-profit agency where I planned to conduct my interviews. I wanted not only to gain valuable attorney insights into the detention and deportation system and the role of international law in that system, but also to learn firsthand about the detention system and the rights violations I had read about in the literature. Through the internship, I hoped to gain real-world experience in the way immigrants are treated in the U.S. detention and deportation system while, at the same time, learn potential ways to bring human rights protections to immigrants in this rigid and complex immigration system.

When I asked the Executive Director if I could interview the attorneys, she said that I could as long as I didn't use to the name of the agency. The non-profit agency has a crucial relationship with ICE and the detention centers. They are only allowed into the detention centers at ICE's permission and that permission has been revoked in the past.

For that reason, I will not include the name of the nonprofit, nor the name of the attorneys I interviewed.

Initially, I wanted to know what immigration attorneys thought of international law and its role in immigration law and policy. Did these attorneys, who work within the law on a daily basis, believe international human rights laws could bring about some change the U.S. immigration system? Did they use international law in arguing for an immigrant's release from detention or in arguing a stay of deportation? If the U.S. would not incorporate international human rights treaties like the ICCPR or CAT into its domestic laws, were there domestic legal mechanisms already in place that could be used to improve the human rights of immigrants in the United States?

I chose to conduct semi-structured interviews to answer these questions. I planned to ask the following questions:

1. Why did you decide to get involved with the Florence Immigrant and Refugee Rights Project?
2. What are some of your more frustrating experiences working in immigration law?
3. Where do you see immigration law in the future?
4. How do you think U.S. immigration policies could incorporate international human rights law?
5. What does a typical case look like?
6. Tell me about some cases that have troubled you or left you feeling discouraged.

7. If you could change one thing to make immigration law work better in the justice system, what would it be?¹

Through these questions, I hoped to gather concrete ways in which international law could be used to humanize the U.S. deportation system. In my mind, attorneys practicing immigration law were the best situated to analyze the deficiencies of the immigration system and to highlight key ways in which the system could change to provide for greater human rights protections.

A week into my internship at the non-profit agency, and before I could even interview the non-profit attorneys, it was clear that international law, as discussed in the literature, had no place in U.S. immigration proceedings. The attorneys focus only on the INA and immigration proceedings are completely based on that statutory code. None of the attorneys used international law to argue for their client's release, the IJ's did not consider international law in deciding individual cases, nor did the Board of Immigration Appeals (BIA), the Ninth Circuit Court, nor the Supreme Court use international law whatsoever.

My interviews revealed what I learned that first week. Immigration attorneys do not find international law useful; simply put, international law is not being used in the real world. I see this as an incredible gap in the legal (and social science) academic literature and the actual practice of immigration law. This realization led me to question not what role international human rights law could play in domestic immigration policies, but whether it had any role at all in changing current policies to be more humane and in line with international human rights standards.

¹ Appendix

My internship experience working with immigrants in detention and the long conversations I had with the attorneys fighting for immigrant rights led me to question the role of international law in U.S. immigration policy. Therefore, rather than comparing U.S. immigration policies with international human rights laws and standards and pronouncing the U.S. immigration policies do in fact violate international law and that the United States should incorporate international human rights laws into its policies, this thesis seeks to shift the discourse. Instead it examines the historical roots of immigration law and policy, highlighting the racism and xenophobia that continue to underlie U.S. immigration policies today. It also examines whether international law can play a role in current U.S. policies as well as the role international law has played, if any, in creating the current, rigid immigration policies the U.S. has today.

4. Chapter Overview

Although the United States prides itself on being “a nation of immigrants,” immigration policies are becoming increasingly restrictive and punitive. Current U.S. immigration policies focus on family reunification as the primary means for immigrating to the United States. Nevertheless, the country’s deportation policies are, at the same time, tearing families apart. Today, the United States government is detaining and deporting more noncitizens than ever before and the majority of those deported are people of color, specifically Latino immigrants. This thesis reviews the historical roots of immigration law and policy in the United States to illuminate why current U.S. immigration policies focus so heavily on detention and deportation, and why those policies disproportionately affect Latino immigrants and other immigrants of color.

Chapter Two acts as a framework for the subsequent chapters. It frames the issues this thesis addresses and the questions it seeks to answer. Chapter Two begins with a brief overview of U.S. immigration policy, detailing its historical roots and the current trend in U.S. immigration policy toward the criminalization of immigration, which is explained in later chapters. Chapter Two then briefly lays out the international human rights laws most relevant to how immigrants are treated within the U.S. detention and deportation system and questions whether international human rights laws are the solution to the human rights abuses immigrants face in the United States today.

Chapters Three and Four trace the history of U.S. immigration policy from the earliest immigration regulations to the current detention and deportation system. Both chapters explain the nativist and racist roots that underlie the changes in U.S. immigration law and policies. The first part of this history details the shift in immigration control from the state to the federal level and explains where the federal government's power to deport and regulate immigration originated. While it is important to discuss the evolution of the legal components of the immigration system, these chapters detail the racialization that influenced virtually all immigration policies passed in U.S. history. To get a complete picture of U.S. immigration history, it is important to note the racist discourse influencing the trajectory of U.S. immigration law and policy.

Chapter Three explores the history of the federal government's power to regulate immigration and the racist discourse used to justify exclusion of certain immigrant groups. Although U.S. immigration policy has changed drastically over the centuries, racism has played an influential role in these changes. This chapter begins with the first federal immigration regulations and ends with the 1965 Immigration and Nationality Act

(INA), which eliminated the infamous national origins quota system – a race-based immigration policy promoting immigration from Western Europe while excluding immigrants from non-European, developing nations. The enactment of the 1965 INA illustrates a significant shift in U.S. immigration policy; whereas all previous immigration laws had explicit racial restrictions on immigration, the 1965 INA was the first comprehensive immigration reform to eliminate explicit racial restrictions.

After detailing the history of the federal government’s power to regulate immigration and the racist discourse underlying the creation of immigration laws, Chapter Four focuses on the ever-increasing convergence of immigration and criminal laws. After the 1965 INA, there has been an increasing tendency to conflate immigration with crime. This shift can be traced back to the beginning of U.S. immigration law and the Chinese exclusion cases; however, in analyzing the convergence of immigration and criminal law, this chapter will look primarily at immigration laws enacted in the 1990s, which drastically altered U.S. immigration policy as we know it today. Two laws enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA), set the stage for an immigration policy that focuses primarily on increased border enforcement, national security, detention and crime control as a means to regulate immigration into the United States. While the 9/11 terrorist attacks also drastically changed U.S. immigration policy, the IIRIRA and the AEDPA laid the foundation for an immigration system focused primarily on crime control and national security.

Chapter Four also discusses the post-9/11 era and how the War on Terror has created an immigration policy that focuses exclusively on detention, deportation and

militarization of the border as the exclusive means to control immigration into the United States. The War on Terror and laws enacted post-9/11 built on the foundations of the IIRIRA and the AEDPA. The Bush Administration used the immigration system, in which immigrants already had very limited constitutional rights and protections, to further its war on terror. The immigration system was a convenient mechanism allowing the federal government to detain those it suspected of terrorism without having to provide due process.

Chapter Four concludes with the current U.S. immigration system, which focuses on detention and deportation of immigrants and militarization of the border. The racist and xenophobic foundations of U.S. immigration policy have contributed to the current immigration policies that deny immigrants vital constitutional protections. Immigrants facing detention and deportation in the United States cannot use the Constitution to challenge their detention or their deportation. The War on Terror and the earlier criminalization of immigration has led to a system where immigrants have few rights and where human rights violations run rampant.

Chapter Five focuses on the international laws governing the human rights of immigrants and U.S. obligations toward immigrants under international law. The last section of Chapter Five details the many ways in which the United States is violating international law through its immigration policies. Because the federal government has such power over immigrants and the regulation of immigration, and because the Judiciary defers to Congress and the executive in all immigration matters, immigrants cannot use U.S. constitutional laws to challenge their detention. As the limits on constitutional rights

in immigration proceedings are so concrete, many advocates and legal scholars look to international human rights laws as a means to challenge these human rights abuses.

Chapter Six analyzes international law and U.S. immigration policy from the perspective of international law's contribution to the current U.S. immigration system. Rather than argue that the United States should comport with its obligations under international law, as many scholars and advocates suggest, Chapter Six focuses instead on how international law has contributed to the subordination of immigrants in the United States. Through my analysis of the use of sovereignty in U.S. immigration jurisprudence, I am attempting to shift the discussion from international law as the solution to the immigrant human rights abuses in the United States.

The final chapter, titled "Final Thoughts and Considerations," incorporates my experience as an intern at the nonprofit agency in Arizona. These interviews changed my outlook on international law and its ability to help immigrants facing detention and deportation. This final chapter explains my motivation behind shifting the immigrant rights discussion away from promoting international law and questions how international law can help immigrants currently detained in the United States.

CHAPTER II
FRAMING THE ISSUES: U.S. IMMIGRATION POLICIES AND
INTERNATIONAL HUMAN RIGHTS LAWS

Immigrants in the United States have historically faced discrimination and unequal treatment under the law and immigrants today still face discrimination and unequal treatment. U.S. immigration law and policy has a long history of racial discrimination, anti-immigrant sentiment, and xenophobia. Historically, U.S. immigration policy was also heavily influenced by economic concerns, such as labor demand and international concerns including, foreign policy. Throughout U.S. history, different groups of people, primarily immigrants of color from developing nations, have experienced harsh and unequal treatment by the federal government. Because of the very narrow conceptions of ‘white’ in early U.S. immigration history, non-white immigrants included those from Italy, Ireland and other regions that are often considered ‘white’ today. However, attempts to exclude immigrants of color today focus primarily on immigrants from Latin America and those from the Middle East and South/Southeast Asia. From the very first federal regulations on immigration to our current immigration policy, the federal government has sought to exclude certain immigrants based on race.

The government has succeeded in excluding those it deems ‘undesirable’ in many ways. In the late 1700s, the government restricted immigration by refusing to admit people likely to become a public charge, those who were a danger to the public safety and those who were a threat to the public health. Of course, in denying entry to those groups, the government expressed a clear preference for white, Christian immigrants from Western Europe. In the 1800s, the government extended immigration restrictions to

people from specific countries, such as China and eventually extended restrictions on immigration from all of Asia. When immigration from other developing nations became a ‘threat,’ the government extended immigration restrictions to other developing nations, creating a national origins quota system, with an express racial preference for immigrants from white, Western-European countries. The quota system was explicitly designed to keep the country ethnically ‘white’ and Christian.

Eventually, the United States abolished the quota system, which explicitly limited the number of immigrants based on their ethnicity; however, the “race neutral” immigration system under the 1965 INA (the statute which forms the basis of our immigration laws today), continues to discriminate against immigrants (and citizens) of color from developing nations. Although no longer explicit, U.S. immigration policy continues to give preference to immigrants from white, Western-European nations. Current U.S. immigration policies continue to target non-white immigrants and citizens from developing nations, most notably, those who appear to be Latino and immigrants from predominantly Muslim or Arab countries. Although no longer racist on its face, U.S. immigration policy continues to disadvantage and exclude people of color from full membership in the American polity. U.S. immigration policies continue to erode constitutional rights of people labeled by the American public and the government as ‘undesirable,’ ‘unassimilable,’ or a ‘threat’ to American values and way of life.

Over the last 40 years, immigration policies have become progressively more restrictive and punitive. The War on Drugs and the War on Crime have contributed to an immigration system that heavily emphasizes crime control through the detention and

deportation of immigrants.² The criminal components of U.S. immigration laws scarcely distinguish between those who are long-term legal permanent residents (LPRs) and between those who are in the country without documentation. The immigration system in place today puts national security above individual human rights and emphasizes detention, deportation and militarization of the border as the primary means for regulating immigration in the United States.

The immigration system in place today, with its focus on immigrant detention, deportation and enhanced border security, is unprecedented. The United States is devoting more money and more resources to border enforcement than ever before. The current immigration system in the United States is becoming progressively more criminalized; immigration violations are now federal crimes that carry heavy prison sentences. Grounds for deportation are constantly expanding and include even misdemeanors such as shoplifting or possession of small amounts of marijuana. Mandatory detention is becoming the norm and Congress continues to expand the list of crimes that make an immigrant subject to mandatory detention and mandatory deportation.

The United States is also detaining and deporting immigrants in unparalleled numbers. In 2012, over 400,000 people were deported from the United States.³ This number is staggering when compared with the 70,000 people deported in 1997.⁴ The

² TANYA MARIA GOLASH-BOZA, *IMMIGRATION NATION: RAIDS, DETENTIONS, AND DEPORTATIONS IN POST-9/11 AMERICA* (Paradigm Publishers 2012).

³ Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 *FORDHAM INT'L L.J.* 243, 245 (2013).

⁴ GOLASH-BOZA, *supra* note 2 at 47.

Obama Administration has deported close to 2 million people: more people in six years than all people deported from the U.S. before 1997.⁵ The immense increase in deportations is a direct result of the government's emphasis on crime control and national security. Congress has continued to expand the list of crimes that make immigrants deportable, while at the same time, Congress has severely limited judicial discretion in immigration proceedings.

Not only is the government deporting more people than ever before, but the number of immigrants detained by the government has also skyrocketed. In 2011, the federal government detained 429,000 immigrants.⁶ When compared to the 209,000 people detained in the year 2001, the number of immigrants in detention has more than doubled in the past ten years.⁷ And the average number of immigrants detained on a daily basis is also increasing dramatically. In 1994, the government detained an average of 6,785 immigrants per day in detention facilities; by 2011, the daily average increased to over 33,000 immigrants per day.⁸ The number of detainees continues to increase as Congress expands the list of crimes making noncitizens deportable and expands the list of crimes requiring mandatory detention, while it also limits judicial discretion and limits the avenues for relief from deportation.

Although the emphasis on detention and deportation as a means to enforce immigration policy and control the border are applied uniformly to all immigrants, regardless of their nationality, the impact of these enforcement measures disparately

⁵ *Id.*

⁶ Gilman, *supra* note 3 at 245.

⁷ *Id.*

⁸ *Id.*

affect Latino immigrants. Immigration enforcement disparately affects Latino immigrants as well as citizens with Latino origins who have lived in the U.S. for generations. Latinos are more likely to be targeted by law enforcement because they “appear illegal.” For example, approximately 93 percent of immigrants arrested under the Secure Communities program, a government initiative that requires the FBI send fingerprints through the DHS database, were Latino.⁹ And even though the government, since 9/11, has ramped up efforts to detain and deport people from countries the U.S. associates with terrorism, most people deported are from Mexico and other countries in Latin America.¹⁰

Increased militarization along the southern border with Mexico likewise demonstrates the disparate impact U.S. immigration policies have on immigrants from Latin America. Although the United States also shares a border with Canada, the main thrust of border enforcement focuses solely on the U.S. border with Mexico. In the 1990s, the United States initiated a series of operations under the Secure Borders Initiative. The government aptly called the initiatives “Operation Gatekeeper,” “Operation Hold-the-Line” (originally “Operation Blockade” – however the name was changed after it sparked some controversy), and “Operation Safeguard.” Through these operations, the government sought to physically deter immigrants from crossing the border from Mexico into the United States. The government’s militarization of the southern border has led to a high number of immigrant deaths; some estimate that between 1994 and 2009, as many as 5,600 immigrants died attempting to cross the U.S.-Mexico border.

⁹ Julia Preston, *Latinos Said to Bear Weight of Deportation Program*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/19/us/latinos-said-to-bear-weight-of-deportation-program.html>.

¹⁰ GOLASH-BOZA, *supra* note 2 at 36.

Anti-immigrant and nativist sentiment in the public sphere also disproportionately centers on Latinos and those who appear to be Latino. ‘Illegal’ immigrants are often viewed by the public and in the media as Mexican or Latino. Not only does much of the immigration debate focus on the southern border with Mexico, but ‘illegal immigration’ is primarily associated with Mexican migration and migration from Latin America. Anti-immigrant sentiment directed at Latinos can even be seen through state initiatives like Proposition 187 in California and English Language-only laws, which many southern states are passing in an attempt to discourage future immigrants from settling in those states. Much of the anti-immigrant laws and sentiment is directed at the Latino community and Latino immigrants.

1. Federal Control: Exclusion and Limited Constitutional Protection

Why does the federal government have so much control over immigrants? Why do immigrants of color have so few constitutional protections and how is it that law enforcement officials can enforce immigration laws in a way that disparately impacts people of color? How is it that Congress can pass immigration laws that, if applied to citizens, would violate the Constitution? The immigration laws in place today have evolved over time to further exclude immigrants from constitutional protections. The government has justified excluding immigrants, and in some cases citizens, from the protection of the constitution in a number of ways yet most of the case law explaining what rights immigrants have in the United States was developed in the late 1800s with the Chinese exclusion cases. Although the Chinese exclusion cases are infamous for their absolute denial of rights to Asian immigrants primarily because of their race, most cases decided in this era have not been overruled. The Court’s interpretation of Congressional

and executive power, as well as its classification of immigration proceedings as distinct from criminal proceedings, created a system where immigrants have few constitutional protections in immigration proceedings and judicial discretion in immigration proceedings is minimal.

Because the Supreme Court determined that enforcement and regulation of immigration involved federal power over foreign affairs, the Court deferred to Congress and the executive in virtually all aspects of immigration regulation. This deference enabled Congress to enact overtly racist laws aimed at excluding immigrants based on their ethnicity and country of origin. Through its deference to the executive and legislative branches, the Court only examined the constitutionality of immigration laws with a low level of scrutiny. Because Congress and the executive were the branches of government best suited to passing laws to regulate foreign relations (and thus immigration), the Court would uphold laws passed by Congress so long as the laws were ‘rationally related’¹¹ to the regulation of immigration. According to the Court, “Congress... has broad power over immigration and naturalization and regularly makes rules regarding aliens that would be unacceptable if applied to citizens.”¹² However, laws that would be plainly unconstitutional as applied to citizens, may not be unconstitutional as applied to immigrants.

Additionally, constitutional due process protections do not apply to immigrants in deportation proceedings because during the late 1800s Chinese Exclusion era, the Court

¹¹ In constitutional law jurisprudence, the Court has developed three levels of scrutiny to determine whether a federal law that distinguishes between two classes of people is constitutional. The lowest level of scrutiny, rational basis, requires that a law be rationally related to a legitimate government interest in order for the law to be constitutional. More often than not, when the Court uses rational basis scrutiny, the law in question is upheld as constitutional.

¹² *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

held that deportation was not punishment. This proposition that immigration proceedings are distinct from criminal proceedings because deportation is not punishment is a legal fiction that still exists today. The Court's classification of immigration proceedings as legally distinct from criminal proceedings has led the Court to deny immigrants the constitutional protections afforded to criminal defendants. Because the Court held that deportation is not punishment, it was able to justify denying due process protections to immigrants in deportation proceedings, even though Fifth Amendment due process rights are foundational to the U.S. Constitution.¹³

The Court's classification of immigration proceedings as distinct from criminal proceedings and the Court's deference to Congress and the executive in all matters concerning immigration has resulted in a rigid and complex immigration system. Constitutional protections that apply in criminal proceedings do not apply in immigration proceedings, which are administrative and civil in nature. There is little judicial discretion because Congress continues to legislate mandatory detention and deportation for violation of a wide range of crimes. Immigration Judges are therefore forced to apply the law, regardless of individual and unique circumstances. Working within the system to restore rights to immigrants in detention and deportation proceedings is increasingly difficult because of the rigidity of the immigration system.

2. International Law as the Solution to Immigrant Human Rights Abuses

This rigid system and immigrants' inability to assert their rights have led legal scholars to look to international human rights laws and the U.S.'s obligations under

¹³ TANYA MARIA GOLASH-BOZA, *DUE PROCESS DENIED: DETENTIONS AND DEPORTATIONS IN THE UNITED STATES* 89 (Routledge 2012).

international law as a way to restore immigrant rights in the United States. The domestic laws governing immigration law and enforcement are currently unable to protect the human rights of immigrants. It has become well established under U.S. law that immigrants have few constitutional rights in their immigration proceedings. However, while the federal government has the authority to regulate immigration, its enforcement policies and enforcement practices must comport with international human rights standards. The United States has signed and ratified several international human rights treaties and because of that, it has an obligation to comport with international law in its immigration policy.

Of the treaties the United States has signed and ratified, the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the U.N. Convention Relating to the Status of Refugees (Refugee Convention) are the ones that pertain most to immigrant rights in the United States. There are many other international treaties that govern immigrant rights: the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of Discrimination Against Women (CEDAW), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities. Each of these treaties have provisions that protect immigrant rights; however, the U.S.'s obligations under those treaties are less clear, as the United States has not signed and/or ratified them.

The way the United States detains and deports immigrants is in direct violation of the right to liberty under the Universal Declaration of Human Rights (UDHR) and the

ICCPR.¹⁴ While the UDHR is not a binding legal document, the U.S. has signed and ratified the ICCPR, which is a binding international covenant. It therefore is obligated to comport with ICCPR provisions respecting an individual's right to liberty.¹⁵ The right to liberty also protects an individual's right to be free from arbitrary arrest or detention and declares that no person can be deprived of his liberty without due process.¹⁶

The way the U.S. treats immigrants in detention also directly violates international human rights laws that require the U.S. government to respect individuals' human dignity. As a signatory to the ICCPR, the U.S. is legally obligated to protect individuals from "cruel, inhuman or degrading treatment or punishment"¹⁷ and it must treat all people deprived of liberty with humanity and human dignity.¹⁸ Similarly, the U.S. is legally obligated under CAT to protect individuals from torture or other "acts of cruel, inhuman or degrading treatment or punishment"¹⁹ Torture is explicitly defined under CAT, the ICCPR nor CAT define "cruel, inhuman or degrading treatment or punishment" (CIDT). However, the Inter-American Court of Human Rights (IACHR) has clarified the parameters CIDT as it relates to detained people. As a member of the Organization of

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration], International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁵ *Id.* at art. 9(1).

¹⁶ *Id.*

¹⁷ *Id.* at art. 7.

¹⁸ *Id.* at art. 10(1).

¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 16, S. TREATY DOC. NO. 100-20, at 23 (1988), 23 I.L.M. 1027, 1031 [hereinafter CAT].

American States (OAS), the United States is, under international law, required to comply with IACHR decisions.

U.S. immigration policy, as a whole, violates the right to family and private life under the ICCPR. The ICCPR requires all member states to protect individuals from “arbitrary or unlawful interference with his privacy [or] family.”²⁰ International law recognizes family as the “fundamental group unit of society” and the law requires states to protect the family; the right to family and private life is a fundamental right just as the right to liberty and the right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment are fundamental rights. The IACHR has explained and defined the right to family and private life and how those rights relate to individual rights. As a member of the OAS and signatory to the ICCPR and CAT, the U.S. is legally obligated to respect the right to family and private life under international law.

Finally, the United States has signed and ratified the Refugee Convention, which explicitly defines a state party’s legal obligations to all refugees and asylum-seekers under international law. These legal obligations expressly limit the ways and means by which a state can deport refugees and asylum-seekers, and the ways in which a state can detain refugees and asylum-seekers.²¹ Currently, U.S. immigration policy is in violation of the international laws governing refugees and asylum-seekers. As a member of the Refugee Convention and even more importantly, because the U.S. has incorporated large portions of the Refugee Convention into its domestic laws, the United States is in violation of international law.

²⁰ ICCPR *supra* note 14 at art. 17(1).

²¹ U.N. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* (April 22, 1954) [hereinafter Refugee Convention].

3. International Law and Its Accessibility to Immigrants in Their Immigration Proceedings

Eduardo and Sergio cannot challenge the constitutionality of their detention, nor can they claim they are entitled to greater due process protections in their immigration proceedings. However, even though U.S. case law clearly excludes Sergio and Eduardo from protection under the U.S. Constitution, both Eduardo and Sergio, as human beings, are thus protected by international human rights laws. The United States, as a signatory and member of the ICCPR, CAT, the Refugee Convention and as a member of the OAS and bound by the IACHR, is legally obligated to respect Sergio and Eduardo's human rights as defined under international law.

However, Sergio and Eduardo are protected under international human rights laws. If the United States is in direct violation of international law, and those laws protect individuals like Sergio and Eduardo, can they challenge their detention and assert their rights in U.S. immigration proceedings? According to the courts, the resounding answer is no, they cannot. IJ's, DHS trial attorneys, the Board of Immigration Appeals (BIA), U.S. Circuit Courts and the Supreme Court have continuously refused to acknowledge international law in immigration proceedings. The administrative and civil nature of immigration proceedings leave little room for international laws and at best, U.S. courts view international law as persuasive, non-binding authority. Attorneys practicing immigration law do not use international law to argue for their clients' civil and political rights in immigration proceedings and IJ's do not acknowledge international law in their opinions. Legal briefs and memoranda are limited to domestic U.S. law, where immigrants have few rights.

Not only are Sergio and Eduardo excluded from protection by the Constitution, but they are also excluded from asserting their human rights, rights that they are legally entitled to under international law. In a time when international human rights discourse has become a prominent means of empowering individuals, people like Sergio and Eduardo, and countless others facing detention and deportation in the United States, are unable to argue that international law protects them. The 400,000 people deported, or forcibly removed, from the United States in 2012 were unable to challenge their deportation or their detention. The 2 million people forcibly removed from the United States between 1997 and 2014 were left with no recourse, no means to challenge their imprisonment and their banishment.

Arguing that the U.S. should comport with its international legal obligations may motivate Congress or the executive to change the way in which the government treats immigrants in the United States. However, international law has done little to help those currently facing deportation and those currently subject to deplorable detention conditions.²² Immigrants cannot use international law to challenge the legality of their detention in U.S. courts, nor can they use international law to claim the government is violating their human rights in U.S. courts.²³ Simply put, although the United States is in stark violation of its obligations under international law, international law cannot help immigrants in their deportation proceedings. Continuing to call on the United States to

²² Barbara MacGrady, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 *BROOK. J. INT'L L.* 271, (1997).

²³ *Id.* at 296. MacGrady notes that “[i]ndividuals do not have a right to bring claims for direct violation of treaty obligations in U.S. courts unless a treaty is ‘self-executing’ or Congress has passed legislation giving individuals the right to do so. No such rights currently exist that would be applicable to detention or conditions of detention.”

obey international law has not, and very likely will not, help people like Sergio and Eduardo.

4. Shifting the Discussion: The Importance of History to Help Us Understand and Change Current Immigration Policies

Instead of examining U.S. immigration policy by how it is violating international law, this thesis explores U.S. immigration policy from an historical legal perspective. It will examine the historical roots of immigration law and policy in the United States, placing particular emphasis on the role racism, nativism and xenophobia played in limiting immigrants' access to their constitutional rights in immigration proceedings. This historical legal analysis will also explore international law and its relation to immigration policy, but from a slightly different perspective. Rather than portraying international law as a tool for challenging immigrant detention and deportation in immigration courts, this thesis will analyze how international law has actually contributed to the current immigration system, where immigrants have so few rights in their immigration proceedings.

Recognizing and understanding the role of racism, xenophobia and nativism in shaping our current immigration policy will demonstrate how racism, nativism and xenophobia continue to play an important role in immigration law and policy. All too often, proponents of stricter immigration enforcement through the further criminalization of immigration and greater emphasis on detention and deportation, claim their position is based on national security and economic concerns. However, racism and xenophobia continues to underlie anti-immigrant sentiment in the United States. Even though the U.S. prides itself on being a "country of immigrants" and a country that has abolished overt

racism, racism and discrimination continue to plague our immigration policies and continue to inform our perceptions of immigrants in this country.

In declining to analyze U.S. immigration policies as a violation of international law and in choosing not to argue that the U.S. government should comport with its legal obligations under international law, I am attempting to shift the discussion away from international law as the solution to this problem. Instead, this thesis portrays international law from a different perspective. It discusses how international law has played a role in shaping our current immigration policies and thus has contributed to the rights crisis facing immigrants in the United States. Although today, international law has little weight in immigration proceedings in the United States, in early U.S. immigration policy history, the Supreme Court (and the executive) used international legal principles of sovereignty to justify federal control over immigration and to justify the exclusion of immigrants from membership and constitutional protection. The government used international law very strategically and this paper will portray this particular aspect of international law in immigration policy.

Through depicting international law as part of the problem, I do not mean to imply that international law has no meaning for immigrants in the United States. International human rights treaties and international law are vital to our understanding of human rights in an increasingly globalized world. The UDHR and human rights treaties like the ICCPR and the ICESCR provide a valuable framework for discussing and promoting the rights all human beings deserve. However, this thesis simply points out that people like Sergio and Eduardo cannot use international law to either challenge their detention or their deportation. Attorneys practicing immigration law do not use

international law to fight for their clients' right to stay in the United States. I am attempting to shift the immigrant rights discussion to other, more promising solutions. In doing so, I highlight racism and xenophobia to remind us that the way we perceive people from other cultures and backgrounds still influences the way we treat each other and the way we determine who belongs and who is excluded.

CHAPTER III

U.S. IMMIGRATION HISTORY: INITIAL FEDERAL IMMIGRATION REGULATION THROUGH IMMIGRATION AND NATIONALITY ACT (INA) OF 1965

1. Federal Control of Immigration Policy and Chinese Exclusion

From the U.S.'s birth in 1776 until the late 1880s, the United States had almost no immigration policy to speak of.²⁴ Although there were no federal restrictions on who was allowed to enter the country, the states enacted laws directed at excluding certain groups. The first federal restrictions on immigration were passed in 1882 and until that time, immigration was primarily state-regulated and the federal government had a small role in regulating immigration.²⁵ Each individual state had the power to admit or exclude immigrants based on its own policies.²⁶ Generally, immigrants were excluded on criminal grounds or due to poverty or disease.²⁷ Typically, states attempted to keep undesirable immigrants out through these restrictions. Immigrants who were excluded because of poverty or disease were immigrants of color from non-Western European nations. These restrictions exemplify the early connections between race and immigration in the United States.

²⁴ GOLASH-BOZA, *supra* note 2 at 33.

²⁵ DANIEL KANSTROOM, *DEPORTATION NATION* 92 (Harvard Univ. Press 2007).

²⁶ *Id.*

²⁷ *Id.*

In the late nineteenth-century, the federal government began to take more control of immigration enforcement; it did so through its powers under the Commerce Clause of the Constitution. For example, in the 1849 *Passenger Cases*, the Supreme Court invalidated certain State laws that required immigrants pay a “head tax” upon entering the state.²⁸ The Court based its power to invalidate state “head tax” laws on the Commerce Clause, which gives Congress the sole authority to regulate interstate and foreign commerce.²⁹ Because the majority of immigrants during this time came as slaves and indentured workers, the federal government’s power to invalidate state head taxes was thus held by the Supreme Court to be constitutional.³⁰ The 1849 *Passenger Cases* marked the shift toward federal control of immigration.³¹

After the 1849 *Passenger Cases*, immigration policy was controlled at both the state and federal levels. While each State still had the authority to deny immigration based on criminality, disease and poverty during this time period, the federal government greatly encouraged immigration and few immigrants were turned away.³² The federal government took away more State authority to regulate immigration through the Immigration Act of 1864, which in addition to encouraging Chinese immigration, created the commissioner of immigration under the authority of the secretary of state.³³

²⁸ *Id.*

²⁹ *Id.*

³⁰ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 202 (2002).

³¹ KANSTROOM, *supra* note 25 at 92.

³² *Id.* at 93.

³³ *Id.*

Although immigration was encouraged during the 1860s to keep up with labor demands, by the mid 1870s immigrants were less welcomed.³⁴ States became increasingly concerned with the growing number of immigrants, particularly those from China, and anti-Chinese/anti-immigrant sentiment led to the first federal exercise of its immigration exclusion power.³⁵ California in particular, was concerned about the influx of Asian immigrants and pushed the federal government to enact laws restricting immigration from China and other parts of Asia. Anti-immigrant sentiment toward the Chinese and other immigrants heavily influenced immigration policies during this period.

The Federal government responded to state concerns about Asian immigrants with the Page Act of 1875, which excluded people convicted of certain crimes, prostitutes and expressly excluded all Asian laborers who had been brought to the U.S involuntarily.³⁶ Underlying the federal government's explicit exclusion of prostitutes was the attempt to prohibit Chinese women from immigrating to the United States. Excluding Asian women was an attempt to keep the United States demographically white, and many white Americans feared that allowing Chinese women to immigrate would lead Chinese men to establish families and change the "Western" culture of the United States.³⁷

States with larger numbers of Asian immigrants were much more likely to resort to anti-immigrant violence and propaganda. Fears of the changing racial demographic led to virulent anti-immigrant sentiment, directed primarily at the Chinese and other

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 102.

“nonwhite” immigrants.³⁸ California, which had a large Asian population, lashed out violently toward Asian immigrants and the state legislature enacted laws aimed at curtailing Asian immigrants’ civil and human rights.³⁹ For example, the California Supreme Court upheld the extension to Asian immigrants, a law that prohibited African Americans and Native Americans from testifying in criminal proceedings.⁴⁰ Race played a prominent role in the decision; the court described the Chinese as “a distinct ... race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.”⁴¹ The public perception that the Chinese were “barbaric” and “inferior” was prominent on both the state and federal level. Concerns over Chinese competition for American laborers and fears of an Asian “invasion” led the states to push the federal government to enact greater restrictions on immigration from Asia.

In 1876, the federal government took total control of the immigration system and States no longer had the authority to regulate immigration.⁴² The rationale behind eliminating individual states’ power to regulate immigration came from the Supreme Court, which held that immigration was a regulation of commerce and thus exclusively under federal control through the Commerce Clause.⁴³ Because the mood in the United

³⁸ *Id.* at 108.

³⁹ Cleveland, *supra* note 30 at 114.

⁴⁰ *Id.*

⁴¹ *People v. Hall*, 4 Cal. 399, 404-05 (1854).

⁴² KANSTROOM, *supra* note 25 at 93.

⁴³ *Id.* at 94.

States had shifted from pro-immigration to concern over the numbers of immigrants (and the racial composition of immigrants) arriving in the U.S., states petitioned the federal government to restrict the number of immigrants allowed to enter the country.⁴⁴ The government responded with the Immigration Act of 1882, which was the first comprehensive immigration law in U.S. history.⁴⁵ In addition to the first comprehensive immigration laws, the Immigration Act of 1882, the first of what are known as the Chinese Exclusion acts, was the first official race-based limitation on immigration. The Immigration Act of 1882, in essence, barred all Chinese immigrants from entering the United States.⁴⁶

In addition to severely limiting Chinese immigration, the Act established a return certificate system for Chinese immigrants already living and working in the United States. The return certificates were issued to Chinese men who wished to travel abroad. In order to reenter the United States, Chinese immigrants had to apply for a return certificate or they would be barred from reentry. This certificate system made it difficult for Chinese immigrants to leave the country to visit family members who were denied entry to the United States. Before leaving the country, a Chinese immigrant had to apply for and be granted a return certificate; he would have to present the return certificate or he would be denied entry along with all other Chinese immigrants attempting to enter the U.S. for the first time. The return certificate system was an attempt to further limit

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 165, 168 (Juan F. Perea ed., New York Univ. Press 1997).

Chinese immigration to the United States and was used as a means to deny rights to Chinese immigrants already admitted.

Two things occurred during this particular shift from state immigration control to federal immigration control. First, from the initial state regulations on immigration to the federal Immigration Act of 1882, immigrants could be excluded from entering the United States; however, there were no laws in place to expel immigrants once they had entered the country.⁴⁷ Second, at this point in history the nation state's sovereign power to exclude aliens from its borders was well established.⁴⁸ In addition to the universally accepted international custom that a nation has the sovereign power to exclude anyone from its borders for any reason, the Supreme Court held in several cases that the federal government's exclusive power to regulate immigration came from the Commerce Clause of the U.S. Constitution.⁴⁹ In later cases, the Court moved away from the Commerce Clause as the rationale behind federal power to regulate immigration, however, sovereignty and powers inherent in sovereignty continued to play a key role in the expansion of the federal immigration power.⁵⁰

With the Immigration Act of 1884, the federal government solidified the federal government's sole authority to exclude immigrants from the United States. Although there was no question that the U.S. Constitution explicitly granted Congress this power,

⁴⁷ KANSTROOM, *supra* note 25 at 96.

⁴⁸ *Id.*

⁴⁹ *Id.* at 93.

⁵⁰ Cleveland, *supra* note 30.

the limits of that power had not been tested in the courts.⁵¹ In the Chinese Exclusion cases, decided in the late nineteenth century, the Supreme Court began to expand legislative and executive powers through the plenary power doctrine. The plenary power doctrine essentially granted the legislative and executive branches the power and authority to control immigration, with virtually no limitations or oversight from the Judicial branch. It was during this time that Congress began to not only pass laws excluding immigrants, but also began to pass laws that allowed the government to expel immigrants already admitted to the United States.

In 1888, six years after passing its first exclusionary immigration act directed at curtailing Chinese immigration, Congress passed the Scott Act, which not only prohibited all Chinese workers from immigrating, but also eliminated all return certificates and cancelled all outstanding return certificates.⁵² Eliminating the return certificate system and cancelling all outstanding return certificates meant that any Chinese resident, who was abroad when the Scott Act was passed, would be unable to reenter the country with his return certificate, even though when he left the country, the law allowed for him to reenter the country with his return certificate.⁵³

The Scott Act was challenged for its constitutionality and the Supreme Court further expanded the federal government's power to exclude in *Chae Chan Ping v. United States*.⁵⁴ In that case, the Court addressed the issue of whether Congress had the

⁵¹ KANSTROOM, *supra* note 25 at 96.

⁵² *Id.* at 113

⁵³ *Id.*

⁵⁴ *Id.*

authority under the Constitution to retroactively terminate the right of an immigrant resident to reenter the United States.⁵⁵ Chae Chan Ping had been a legal resident of the United States for twelve years. Prior to the enactment of the Scott Act, Chae Chan Ping had acquired a return certificate, allowing him to re-enter the United States after a temporary visit to China. While Chae Chan Ping was out of the country, the Scott Act was passed and as mentioned above, the act declared invalid all return certificates, even those still pending. When Chae Chan Ping arrived in the United States, he was denied entry. The Court held that Congress did have constitutional authority to expel a lawful immigrant resident.

The Court's decision in *Chae Chan Ping* also expanded Congress's power to enact domestic legislation that directly conflicted with foreign treaties. The Court held that the Scott Act trumped any prior treaty-based rights of travel.⁵⁶ This gave Congress the power to "legally abrogate a treaty by simply passing a contrary statute."⁵⁷ By giving Congress the power to pass a domestic statute and effectively override any treaty where there was a contradiction, the Court greatly expanded Congress's powers in the realm of foreign relations. Additionally, the Court upheld the constitutionality of the Act. Interestingly, the Court did not rely on the Commerce Clause, as it had in previous cases. Instead, the Court held that Congress's power to regulate immigration was "extra-constitutional, plenary, and 'inherent in sovereignty.'"⁵⁸ This meant "that, unlike other

⁵⁵ Cleveland, *supra* note 30 at 125.

⁵⁶ KANSTROOM, *supra* note 25 at 114.

⁵⁷ *Id.*

⁵⁸ *Id.*

actions of the government, which must be justified by reference to a specific source of constitutional authority and must comply with constitutional standards, such as those of due process, immigration laws would receive only the most minimal sort of judicial review, if any.”⁵⁹

Racism directly influenced the Court’s decision in *Chae Chan Ping*. Justice Field “described at painful length how Chinese immigrants came into competition with ‘our’ laborers and artisans, competed with ‘our’ people and how their immigration had ‘the character of an Oriental invasion.’”⁶⁰ Justice Field’s overtly racist depiction of Chinese immigrants was characteristic of the national discourse of immigration policy. Senate debates over further restricting rights for Chinese immigrants already admitted the United States demonstrate the racist ideologies that influenced immigration policies during this era. For example, Senator Felton from California proposed requiring all Chinese to carry certificates of residents and those found without a certificate after one year should be forcibly removed from the country. In support of resident certificates, the Senator explained “the Chinese come to the countries adjoining us, pass over the border, and the instant that they are here it is very difficult, almost impossible to distinguish one from the other.”⁶¹ He also asserted that “the Chinese have no morals, no regard whatever for the sanctity of an oath. With them the end justifies the means, and the end is to come in here

⁵⁹ *Id.*

⁶⁰ Daniel Kanstroom, *Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 300, 302 (Juan F. Perea ed., New York Univ. Press 1997), quoting *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁶¹ KANSTROOM, *supra* note 25 at 117, quoting Senator Felton.

and possess themselves of what we have and return to their own country with it, and let another herd come and take their place.”⁶²

Following the Supreme Court’s decision in *Chae Chan Ping v. United States*, the federal government’s power over immigrants increased substantially. Congress enacted laws aimed at further limiting the ability of immigrants to enter the country and began to look for ways to take rights away from Chinese and other Asian immigrants already admitted to the United States. In 1891, Congress passed another Immigration Act which expanded the list of immigrants who were categorically excluded from entering the United States.⁶³ In addition to the exclusion of Chinese immigrants through the 1882 Chinese Exclusion Act, the 1891 Immigration Act excluded polygamists, people with contagious diseases and any immigrants “likely to become a public charge.”⁶⁴ The Act also included the first reference to the federal government’s power not only to exclude, but also to expel, or deport noncitizens. The act provided that any immigrant who successfully entered the United States, but should have been excluded, could be deported if found within one year of entry.⁶⁵

Congress further expanded its power to expel immigrants through the passage of the Geary law in 1892. The Geary law required all Chinese in the United States to prove their legal status by applying for a certificate of residence.⁶⁶ Anyone of Chinese descent

⁶² *Id.*

⁶³ *Id.* at 115.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

who was found without a valid certificate could be deported unless he could prove he was legally present in the country and that his failure to have a certificate of residence was reasonable.⁶⁷ The Geary Act also required that to prove legal residence, every Chinese descendant must have one white witness testify on his behalf. Like the Scott Act, the constitutionality of the Geary Act was challenged and upheld by the Supreme Court.⁶⁸

In *Fong Yue Ting v. United States*, the Supreme Court upheld the constitutionality of the white witness provision of the Geary Act. Again, the Court pointed to the inherent sovereign right to expel and deport noncitizens and Congress's ultimate authority to determine who can enter the country and who can be expelled from the country.⁶⁹ The majority concluded that "the power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."⁷⁰ In both *Chae Chan Ping* and *Fong Yue Ting*, the Court found that Congress has not only the authority to pass laws excluding noncitizens from entering the United States, but that power also extends to expelling (or deporting) noncitizens who have already entered the United States.⁷¹ According to the Court, noncitizens "remain subject to the power of Congress to expel

⁶⁷ *Id.* at 116.

⁶⁸ *Id.*

⁶⁹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁷⁰ *Id.*

⁷¹ KANSTROOM, *supra* note 25 at 118.

them...whenever in [Congress's] judgment their removal is necessary or expedient for the public interest.”⁷²

In addition to holding that Congress has the ultimate authority to exclude and expel noncitizens as it sees fit, the Court held that a deportation proceeding was by no means a criminal trial or criminal proceeding.⁷³ This holding stretched Congress's power over noncitizens even further than in *Chae Chan Ping*. A deportation proceeding, according to the Court, is not punishment and is “in no proper sense a trial and sentence for a crime or offense.”⁷⁴ This is significant because defining a deportation proceeding as purely a civil proceeding, noncitizens do not have the same procedural or substantive due process rights that the constitution requires for criminal proceedings, such as the Sixth Amendment rights to counsel and a trial by jury, the Eighth Amendment right to be free from cruel and unusual punishment, and the Fourth Amendment right to be free from unreasonable search and seizure.⁷⁵ This is also significant because the Court's decision in *Fong Yue Ting* could be interpreted to apply to legal permanent residents in the same way it applies to immigrants who are in the United States without documentation.⁷⁶ A long-term legal permanent resident would have virtually no constitutional rights in immigration proceedings, regardless of their ties to the United States.

⁷² *Fong Yue Ting*, *supra* note 69.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ GOLASH-BOZA, *supra* note 2 at 95.

⁷⁶ KANSTROOM, *supra* note 25 at 119.

Like in *Chae Chan Ping*, the Court's decision in *Fong Yue Ting* rested heavily on racist anti-immigrant ideology. The law at issue in *Fong Yue Ting* was facially racist; the law allowed only white witnesses to testify on behalf of a Chinese immigrant's status as legal resident. Many in the legal community considered the law unconstitutional because it was overtly discriminatory.⁷⁷ The Supreme Court's decision to uphold the law was thus surprising and the precedent set in *Fong Yue Ting* has had great repercussions for deportation law even today.⁷⁸ The Fourteenth Amendment was passed nearly a quarter of a century before the Court's decision in *Fong Yue Ting*; however, the Court expressly held that Congress has the unbridled power to enact immigration laws it deems necessary to protect the public interest. This incredibly broad holding essentially removed noncitizens, whether legally present or not, from the reach of Equal Protection Clause of Fourteenth Amendment.

Although the Court upheld the white witness provision of the Geary Act, it invalidated another contested provision of the Act in *Wong Wing v. United States*. Under the contested provision, any Chinese immigrant found to be in the country illegally could be sentenced up to one year of hard labor.⁷⁹ The constitutionality of this provision was challenged due to the fact that an immigrant would be sentenced to a year of hard labor without a jury trial.⁸⁰ The Court found that temporary confinement or detention of noncitizens was constitutional "as part of the means necessary to give effect to the

⁷⁷ *Id.* at 118.

⁷⁸ *Id.*

⁷⁹ *Id.* at 122.

⁸⁰ *Id.*

provisions for the exclusion or expulsion of aliens.” But, the particular provision sentencing an immigrant to one year of hard labor was unconstitutional because it was not necessary. Rather, the Court labeled it “infamous punishment.”⁸¹ The Court distinguished between a detention that was necessary in order to give effect to provisions in the law that excluded or expelled noncitizens, and between punishment in the criminal sense. According to the Court, when Congress passes a law that subjects noncitizens to “infamous punishment at hard labor or by confiscating their property,” to be valid, the policy “must provide for a judicial trial to establish the guilt of the accused.”⁸²

Although the Court attempted to develop a bright-line distinction between the means necessary to enforce immigration laws and “infamous punishment,” the Court did not resolve the question of “how to draw the line between what might be termed regulatory deportation procedures and those punitive deportation procedures that require constitutional protections” afforded to criminal defendants like the right to a trial by jury, right to counsel and the right to be free from cruel and unusual punishment.⁸³ The Court held that “deprivation of liberty, absent more, is not necessarily punishment.”⁸⁴ The lack of a bright-line distinction between punitive deportation laws and regulatory deportation laws set the stage for the current convergence between criminal law and immigration law that we see today.

⁸¹ *Wong Wing v. United States*, 163 U.S. 228 (1896), KANSTROOM, *supra* note 25 at 122.

⁸² *Id.*

⁸³ *Id.* at 123.

⁸⁴ *Id.*

One other case in this era deserves mention. In *Yamataya v. Fisher*, the Supreme Court established the basic due process required in immigration proceedings.⁸⁵ The Court found that “an alien who has entered the country and has become subject to its jurisdiction and a part its population” deserves a process that complies with constitutional due process norms.⁸⁶ It is important to note that the Court held that noncitizens have the right to procedural due process only.⁸⁷ According to the Court, the deportation process “could not be ‘arbitrary,’ and the ‘alien’ must, at a minimum, be given an opportunity to be heard.”⁸⁸ This case has not been overruled and today, immigrants facing deportation receive only procedural due process; they have no substantive due process rights in deportation proceedings.

Racism, nativism and anti-immigrant sentiments during this era all played an important role in the Court’s denial of substantive constitutional rights to immigrants. Chinese immigrants were initially welcomed because demand for low-wage labor was high; the discovery of gold in California and the building of a transnational railway system created a need for cheap immigrant labor. As the racial composition of the country began to shift, fears that nonwhite immigrants would outnumber white Americans influenced the racist overtones in immigration law and policy during this period. Economic recessions fueled anti-immigrant sentiment and white laborers increasingly targeted Chinese immigrants, who became scapegoats for the economic

⁸⁵ Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1895 (2000).

⁸⁶ KANSTROOM, *supra* note 25 at 127 (quoting *Yamataya v. Fisher*, 189 U.S. 86 (1903)).

⁸⁷ Kanstroom, *supra* note 85 at 1895.

⁸⁸ KANSTROOM, *supra* note 25 at 127.

recession. Virtually all immigration laws passed during this period facially discriminated against immigrants of color. This overt racism can be seen not only in Supreme Court decisions, but also in the public and political discourse surrounding immigration regulation.

2. Twentieth-Century Immigration Policies: Extension of Racial Exclusion to Other Groups and Emergence of Deportation Regime

At the beginning of the twentieth century it was well established that the federal government had the power to deport and exclude noncitizens. Congress's power to pass immigration regulations came from inherent rights of sovereignty and was an extra-constitutional power. The Executive and Judicial branches of the government gave wide deference to any laws Congress passed regulating immigration. Although Congress passed the first exclusionary laws in 1882, it wasn't until 1892 that Congress passed laws that enabled the government to deport greater numbers of noncitizens. Relatively few deportations were actually carried out until years later.⁸⁹ Between 1892 and 1907, for example, the federal government deported only a few hundred people each year.⁹⁰ That number increased dramatically between 1908 and 1920, when the government deported between 2,000 and 3,000 people per year.⁹¹ The numbers of deportations continued to increase as Congress passed more restrictive immigration policies and by 1929, the annual deportations had risen to over 38,000 people.⁹²

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

As the U.S. began to develop a more regulated immigration system, the government began to put tighter restrictions on immigrants who had been legally admitted to the country. As was the case with immigration prior to federal control of the system, immigration was encouraged due to labor demands that required a large working class. The industrial revolution required a large pool of low-wage labor and because there was such a great need for immigrant labor, not all immigrants of color could be excluded. The United States needed cheap immigrant labor from developing countries to meet labor demands. Because it was unable to simply exclude all “undesirable” immigrants, the federal government began asserting its control over certain groups of immigrants through post-entry social control mechanisms.⁹³ Immigrants who did not abide by legal and moral expectations faced the threat of deportation. During the early to mid twentieth-century, the federal government began to focus more on deportation as a means to control the types of immigrants entering the country. Deportation was used as a way to control immigrants once they had already been formally (legally) admitted into the country.⁹⁴

Noncitizens faced deportation on two main grounds: poverty and criminal activity. The Scott Act of 1891 allowed the government to deport any immigrant who became a public charge within one year of entry. In 1917, that one-year period was increased to five years.⁹⁵ Any noncitizen who became a public charge within five years of entering the United States could face deportation, thus increasing the ability of the government to deport admissible immigrants. After 1917, the types of crimes requiring

⁹³ *Id.*

⁹⁴ *Id.* at 132.

⁹⁵ *Id.* at 133.

deportation were also expanded, further increasing the federal government's control over immigrants already admitted to the United States.⁹⁶ The Supreme Court's decisions in *Chae Chan Ping*, *Wong Wing*, and *Fong Yue Ting* facilitated the expansion of federal control over immigrants already living in the country. The restrictions on post-entry conduct applied to all immigrants, regardless of immigration status. Congress was able to expand deportability grounds with no judicial oversight because the Court had granted Congress and the executive branch such expansive powers over immigration and the judicial branch had established the federal power to deport which came from international principles of sovereignty.⁹⁷

Just as the first immigration policies were influenced by extreme racism toward Chinese and other Asian immigrants and overt discrimination, the immigration policies enacted in the early to late twentieth century were also motivated by racism and xenophobia. In 1924, Congress established the nation's first immigration quota system under the Johnson-Reed Act.⁹⁸ The quota system was designed to limit immigration from certain "undesirable" countries in Europe, while continuing to ban immigration from China, Japan, India and most other Asian countries.⁹⁹ Under the national origins quota system, immigrant visas were given out based on national origin (or race). Fewer visas were allocated for immigrants from "less desirable" countries like those in eastern and

⁹⁶ *Id.* at 134.

⁹⁷ Cleveland, *supra* note 30 at 142.

⁹⁸ *Id.*

⁹⁹ *Id.*

southern Europe. Congress wanted to encourage immigration from “desirable” western European nations and thus allocated more visas to immigrants from those countries.¹⁰⁰

By establishing a national origins quota system, race became the central feature in determining whether one would be excluded from the United States. In focusing on race as a way to regulate immigration, the federal government effectively “made racial exclusion a central component of twentieth-century immigration, naturalization, and deportation law.”¹⁰¹ Although the purported rationale for the national origins quota system was to preserve “American culture and values,” the quota system was actually motivated by fears of “nonwhite” immigrants “flooding” the country with poverty, disease and crime.¹⁰² This is evident by the fact that the immigration quotas were calculated based on the racial composition of the United States in the very early twentieth century, excluding Native Americans, descendants of African slaves, Asians and all countries in central and Latin America.

The national origins quota system was facially race-based. The government restricted visas based explicitly on the nationality or race of the immigrant seeking entry. The system was expressly discriminatory; however, it was upheld as constitutional and within Congress’s power to regulate immigration. The national origins quota system not only limited the number of immigrants of color from developing nations in Asia, Eastern Europe and Southern Europe, but the Act also restricted which immigrants would be

¹⁰⁰ *Id.*

¹⁰¹ KANSTROOM, *supra* note 25 at 133.

¹⁰² GOLASH-BOZA, *supra* note 2 at 34.

eligible to become U.S. citizens, a process called naturalization.¹⁰³ Under the Act, certain noncitizens were ineligible to naturalize. Not surprisingly, Asian immigrants and other “nonwhite” immigrants from Europe were excluded from citizenship.¹⁰⁴ The Supreme Court upheld the constitutionality of the ban on naturalization for immigrants of “less desirable” races.¹⁰⁵

Individual states continued to enact laws limiting the rights of noncitizens of color. Combined with the federal laws limiting citizenship to white immigrants primarily from Western Europe, thus immigrants of color were excluded even further from American society. For instance, many states passed “alien land laws” in the early twentieth century. These laws restricted land ownership to people eligible for citizenship. Combined with the federal restrictions on which immigrants could naturalize and become citizens, these “alien land laws” acted as a way to keep Asian immigrants from owning land.¹⁰⁶ As with other laws passed in this era, the “alien land laws” were supported primarily by racist propaganda aimed directly at Chinese, Indian and Japanese immigrants. Although the laws were racially motivated, the Supreme Court upheld these laws as constitutional.¹⁰⁷

¹⁰³ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1121 (1998).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Johnson notes that the denial of citizenship rights to immigrants harkens back to Dred Scott, where the Court held that a free black man was not a citizen of the U.S. and therefore outside the jurisdiction of the federal courts. Similarly, Native Americans were excluded from citizenship because of their ‘sovereign status.’ By denying constitutional rights to these groups, the federal government was able to avoid constitutional challenges to racist laws.

¹⁰⁶ *Id.* at 1122.

¹⁰⁷ *Id.*

3. Immigration from Mexico and Latin America

Asian immigrants and immigrants from southern and eastern Europe were not the only ethnic groups that experienced overt discrimination during the late-nineteenth century to mid-twentieth century. Although most of the immigration case law during this period focused on Chinese and Asian immigrant rights, immigrants from Latin America, particularly from Mexico, also experienced overt discrimination and were denied constitutional rights. The border between the United States and Mexico has an interesting history. Until the 1920s, immigration between the two countries was relatively unhindered. As the federal government began to enact laws restricting immigration from Asia, the border between Mexico and the U.S. became more defined. Because much of the case law focuses on Chinese and Asian immigration, this section explores the similar experiences Mexican immigrants faced in the early to mid twentieth century.

Prior to 1930, migration from Mexico was generally welcomed. Although the 1848 Treaty of Guadalupe Hidalgo created a definitive boundary between the U.S. and Mexico, movement across the border was relatively unhindered.¹⁰⁸ While U.S. immigration policies focused on stemming the flow of Chinese immigrants in the late 1800s, U.S. citizens saw Mexican migration as beneficial to the economy.¹⁰⁹ Mexican migrants were “ideal” laborers because they worked for several months in the U.S. and then returned to Mexico. In fact, because the government placed so many restrictions on Chinese and other Asian immigration, Mexican immigrants were recruited to fill the

¹⁰⁸ JOSEPH NEVINS, *OPERATION GATEKEEPER AND BEYOND: THE RISE OF THE ILLEGAL AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* 29 (2d ed. New York, Routledge 2010).

¹⁰⁹ Erlinda V. Gonzales-Berry & Marcela Mendoza, *Mexicanos in Oregon: Their Stories, Their Lives* 55-65 (Oregon State University Press 2010).

labor gap. Unlike other groups of immigrants, the majority of Mexican migrants did not settle permanently in the United States. Consequently, the tendency for Mexican migrants to return to Mexico helped to generate a perception that Mexican immigrants were more desirable than Chinese immigrants.¹¹⁰

With the increasing enforcement of the Chinese exclusion laws and the expansion of the agricultural industry, the federal government began to actively recruit Mexican workers.¹¹¹ Between 50,000 and 80,000 Mexicans immigrated to the Southwest. Although they received a mixed welcome from the U.S. public, Mexican migrants were generally more accepted than the Chinese. It was clear, however, that Mexican immigrants were in no way considered to be part of the American public. For example, Mexican immigrants were likened to Chinese immigrants in that their skill in agricultural work was “of a type ‘to which the oriental and the Mexican due to their crouching and bending habits are fully adapted.’”¹¹² Mexican immigrants and immigrants from Central and South America were, like the Chinese, considered to be an inferior race by much of the white population.

The initial acceptance of Mexican immigrants diminished over time as a changing economic climate and changing racial demographic created new concerns among the white majority over the “influx” of nonwhite immigrants. Violence toward Mexican immigrants was well documented during this period as anti-Mexican sentiment grew. As with anti-Chinese sentiment, the violence directed at Mexican immigrants was deeply rooted in racist and nativist attitudes of the American public.

¹¹⁰ *Id.*

¹¹¹ KANSTROOM, *supra* note 25 at 156.

¹¹² *Id.* (quoting Dr. George P. Clements in “Using Chinese Labor,” *Los Angeles Times*, Jan. 15 1920, 2.4).

Although there was a growing concern over Mexican immigration during this period, the federal government did not take steps to prohibit Mexican migration as it had with immigration from Asia and Southern/Eastern Europe.¹¹³ For example, the Johnson-Reed Act, which placed a numerical limit on Asian immigrants, contained no such restrictions on immigration from the Western Hemisphere.¹¹⁴ Mexican immigrants, along with Central and Latin American immigrants, thus continued to be a cheap source of immigrant labor. Migration from Mexico ebbed during times of racial strife but also increased in response to labor shortages in the United States.

While the 1924 Johnson-Reed Act did not expressly place a quota on immigration from Mexico, Congress enacted laws in the same year that were aimed at limiting extra-legal or undocumented immigrants. Those laws had a great effect on Mexican immigrants, which made up a large percentage of the undocumented immigrant population in the United States.¹¹⁵ In an attempt to penalize undocumented immigration, the federal government eliminated the statute of limitations on immigrants who had overstayed their visa. The government also began to enforce laws that penalized immigrants who entered the country without ever securing a valid visa. Eliminating the statute of limitations meant that anyone in the country without documentation or without current documentation was deportable, regardless of when he or she entered the country.

¹¹³ *Id.* at 157.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 158.

Many Mexican immigrants fell into this category and were subsequently deported from the United States.¹¹⁶

The federal government also used the public charge, health, and criminal provisions of immigration law to exclude Mexican immigrants.¹¹⁷ Large numbers of Mexican immigrants who attempted to enter the country through legal means were denied entry on the basis of their health, while others were denied because immigration officials found they would likely become a public charge.¹¹⁸ Additionally, Mexican immigrants were denied entry based on their criminal history. Thus, although the Johnson-Reed Act did not place a quota on immigrants coming from Mexico, the number of Mexican immigrants admitted dropped along with the number of Asian immigrants. For example, between 1923-1929, the number of Mexican immigrants admitted dropped from an annual average of 62,000 to just 2,500, and in 1930, no visas were issued to Mexican nationals.¹¹⁹

In 1924, the federal government created the U.S. Border Patrol. Although the border patrol began as a relatively small immigration enforcement agency, early Border Patrol agents were armed and directed to strictly enforce the flow of immigrants entering the United States. The Border Patrol focused primarily on the southern border, which is unsurprising considering the perceived “threat” of undocumented Mexican migration at

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

the time. The government and the public was also concerned with the entry of Chinese and other Asian immigrants from the southern border.

By creating a physical boundary through the establishment of a Border Patrol and through criminalizing undocumented immigration, the U.S. effectively defined Mexican immigrants and other immigrants of color as the “Other.”¹²⁰ Illegal immigration became a defined category of immigration and further facilitated the denial of constitutional rights to certain groups of immigrants. The Johnson-Reed Act prohibited virtually all immigration from non-western (non-white) countries. Coupled with the criminalization of undocumented immigration, these restrictions ensured that the only groups of people allowed to legally enter the United States were immigrants with visas from Western Europe. “Illegal” immigrants and immigrants of color were conflated in the eyes of the American public.

During the Great Depression, the government began to focus more on the deportation of noncitizens and Mexican migration during this period was characterized by massive deportations and voluntary expatriations. U.S. Citizen attitudes towards Mexicans became increasingly hostile as the Depression deepened. As unemployment increased, immigrants became scapegoats for the economic and social problems the U.S. faced. The period between 1929 and 1941 represents the first time in U.S.-Mexico history that large numbers of Mexicans were systematically deported and expatriated. During the years of the Great Depression, more than one million people of Mexican descent were forcibly deported from the United States.¹²¹ These massive deportations were a method

¹²⁰ NEVINS, *supra* note 108 at 67.

¹²¹ KANSTROOM, *supra* note 25 at 215-16. Kanstroom notes that “[t]he total number of aliens removed from the United States increased from 2,762 in 1920 to 38,795 in 1930. To conduct full

through which the United States attempted to remedy its economic problems. Throughout U.S. history, anti-immigrant sentiments have been at their most extreme during times of economic uncertainty.¹²²

After the start of World War II, Mexican migration was once again welcomed and even encouraged by the U.S. government. Because the war created severe agricultural shortages, the United States turned to Mexican labor as a means to stimulate the U.S. economy. Over 160,000 Mexicans, mostly farm workers from rural areas of Mexico, were recruited to work on U.S. farms in a program known as the *Bracero* Program. The *Bracero* Program was a guest worker program; it provided a way for Mexican immigrants to enter the country legally, but limited the duration of entry to one year.¹²³ Even though the U.S. government formalized this program through a bilateral treaty with Mexico, the demand for agricultural workers was so great that many farmers began to recruit migrants informally. Additionally, informal recruitment allowed employers to pay Mexican immigrants less and working conditions did not have to conform to the requirements of the program.¹²⁴ Informal recruitment became a common practice and facilitated future undocumented migration from Mexico to the United States.

hearings in such a large number of cases would be prohibitively expensive, however. Thus, many tens of thousands of these removals, especially those of Mexicans, were done ‘voluntarily.’ The advantages of voluntary departure were considerable for both the government and the deportee: no arrest warrant would issue, no records of a formal hearing were generated, and the individual did not face a legal bar to future reentry.”

¹²² DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 34 (New York, Russell Sage Foundation 2002).

¹²³ KANSTROOM, *supra* note 25 at 219.

¹²⁴ *Id.*

4. 1965 INA and the End of Race-Based Exclusion

The national origins quota system was in place for half a century. The Civil Rights Movement in the 1960s influenced immigration policy in that race-based restrictions on immigration came under scrutiny. 1965 marked a shift in U.S. immigration law and policy; Congress passed the 1965 Immigration and Nationality Act, which abolished all national origins quotas on immigrant visas.¹²⁵ This act was significant in that it ultimately shaped the basis for the U.S.'s current immigration policy.

Under the 1965 Immigration and Nationality Act, immigrants were no longer excluded based solely on their country of origin. Instead of race, family ties and skills became the primary bases for deciding who to admit and to exclude.¹²⁶ Because of concerns that too many immigrants would be admissible to the United States, the government capped immigrant visas at 120,000 annually.¹²⁷ Labor demands meant that initially, the ceiling on the number of immigrants did not include Mexico and other countries in Latin America because immigrants from those regions¹²⁸ were a large low-wage labor source. It wasn't until 1976 that the annual ceiling on immigrant visas extended to all nations.¹²⁹ After 1976, all countries had an annual limit of 20,000 visas.

¹²⁵ GOLASH-BOZA, *supra* note 2 at 35.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

The 1965 Immigration and Nationality Act, and its 1976 amendment changed not only U.S. immigration policy, but modified the flow of immigrants as well.¹³⁰ Through the elimination of a race-based quota system and the implementation of an immigration system based on family ties and employment skills, the government opened the door to a diverse group of immigrants. Those who had been unable to immigrate because they were nationals of an “excluded” country or region, like China and most of Asia, were suddenly allowed to apply for a visa based on ties to family members already living in the United States. The emphasis on family ties changed the racial composition of immigrants entering the country. Fewer people emigrated from Western European nations and more immigrants from Asia and Latin America were admitted.¹³¹

The switch from a race-based quota system to an immigration policy that focused on employment needs and skills also drastically changed the nature of immigration in the United States. Because there was a high demand for low-wage, low-skilled labor, immigrants from Mexico and Latin America were allowed to enter the country temporarily. As mentioned above, the 1965 Act instituted a ceiling of 120,000 visas per year. However, this ceiling did not apply to Latin America.¹³² By exempting Latin American immigrants from this limit, more immigrants from that region entered the country. Additionally, immigration from India increased substantially, primarily migrants with high skills seeking employment.¹³³

¹³⁰ *Id.* at 36.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

The 1976 extension of the immigrant visa ceiling to all countries, including Mexico and Latin America, also drastically altered the flow of immigrants. All countries had a maximum number of visas and that maximum was the same across all countries. In creating a cap of 20,000 visas for all countries, regardless of the higher demand for certain types of labor and the number of immigrants of that country already living in the United States, the government inadvertently influenced the levels of undocumented migration.¹³⁴ The result of these automatic ceilings was a sharp rise in undocumented migration, mainly from Mexico and Central America. Because of its proximity to the United States, the inherent demand for low-wage labor, the desire many Mexican migrants had to earn a higher wage in the U.S., and the family ties already established in the United States, undocumented migration from Mexico skyrocketed.

¹³⁴ *Id.*

CHAPTER IV

U.S. IMMIGRATION HISTORY: 1965 INA THROUGH CURRENT U.S. IMMIGRATION POLICIES

As undocumented migration became more prevalent, media attention to the issue of undocumented migration became more frequent. Before 1950, the media rarely covered immigration issues. Between 1970 and 1972, the *New York Times* published only 16 articles referencing immigration.¹³⁵ However, between 1973 and 1980, the number skyrocketed; *The New York Times* published more than 57 articles referencing immigration issues each year.¹³⁶ This increase in media coverage influenced public opinion on immigration and contributed to the growing national awareness of immigration as a problem.¹³⁷ The late 1960s marked a period in U.S. history in which the public began to perceive the border “as dangerously out of control, as a porous line of defense against unprecedented numbers of potentially threatening unauthorized migrants.”¹³⁸

In the 1970s, undocumented migration first became part of the public debate and by the 1980s, public opposition to undocumented migration developed.¹³⁹ The “tightening of the economy combined with an increasing number of arrivals of immigrants from

¹³⁵ NEVINS, *supra* note 108 at 141.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 77.

¹³⁹ GOLASH-BOZA, *supra* note 2 at 37.

Latin America generated waves of anti-immigrant sentiment.”¹⁴⁰ With increasing media attention and public outrage, politicians were forced to address the issue of undocumented immigration. The public concern over undocumented immigrants and concern over general U.S. immigration policy led Congress to pass the 1986 Immigration Reform and Control Act (IRCA).

IRCA aimed to deter undocumented migration in four ways. First, it instituted employer sanctions for any U.S. employer who knowingly hired an undocumented worker. Second, IRCA significantly expanded Border Patrol resources in an attempt to block undocumented migrants from physically crossing the southern border. Third, undocumented immigrants living in the U.S. were granted amnesty, which provided them with a path to citizenship. Ironically, this method led to a large increase in family reunification visas, which in turn, raised the number of Mexican citizens petitioning for legal status. And lastly, IRCA gave the President ultimate authority to declare an immigration emergency. IRCA essentially legalized the foundation for another Operation Wetback, where vast numbers of Mexican immigrants were deported.¹⁴¹

Virtually all immigration policies following IRCA further criminalized undocumented migration by expanding border enforcement budgets, by instituting more serious penalties on the hiring of undocumented workers, as well as by increasing the criminal severity of attempting to cross the border without inspection. Even legislation aimed at deterring crime and drug abuse had severe effects on immigration policy and further blended immigration regulation with the criminal justice system.

¹⁴⁰ *Id.*

¹⁴¹ MASSEY ET AL., *supra* note 122 at 89.

In 1988, Congress passed the Anti-Drug Abuse Act (ADAA). Although not specifically directed at immigration and the further criminalization of immigration, the ADAA did contain provisions that substantially impacted immigration regulation and the further criminalization of immigration violations. The debates within the House of Representatives prior to passing the ADAA demonstrate that the legislature was concerned with crime rates, particularly drug and weapons offenses committed by noncitizens.¹⁴² Therefore, the ADAA created a new category of deportable offenses: the aggravated felony.¹⁴³ Under the ADAA, only murder and trafficking of drugs or weapons were classified as aggravated felonies.¹⁴⁴ If a noncitizen was convicted of a crime defined as an aggravated felony at any time after admission to the United States, he or she was deportable and barred from entering the country for at least ten years.¹⁴⁵

Two years later, the Immigration Act of 1990 further criminalized immigration by expanding the list of crimes defined as aggravated felonies.¹⁴⁶ The Immigration Act of 1990 expanded the list of aggravated felonies to include “money laundering, crimes of violence for which the [noncitizen] received a sentence of more than five years in prison, and any conspiracy to commit these acts.”¹⁴⁷ Although the purpose of the Immigration

¹⁴² Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 299 (2003).

¹⁴³ *Id.* at 299.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 481 (2001).

¹⁴⁷ *Id.* at 481.

Act of 1990 was to add to the list of “serious” crimes rendering a noncitizen deportable, the crimes added to the list were much less serious than those listed in the ADAA.¹⁴⁸ As with the ADAA, there is evidence to suggest that the legislature was concerned with immigration, crime and national security.¹⁴⁹

The Immigration Act of 1990 also increased the bar on reentry for any noncitizen convicted of an aggravated felony from ten years to twenty years. The Act also limited discretionary relief for aggravated felons. Where previously, anyone facing deportation had the option to ask for a discretionary waiver of deportation, the Act made anyone convicted of an aggravated felony who served more than five years in prison ineligible for a waiver of deportation.¹⁵⁰ The Immigration Act of 1990 also authorized INS officers to carry firearms and make arrests, blurring the distinction between law enforcement and immigration enforcement.¹⁵¹

At the same time that Congress passed increasingly punitive immigration policies focused on interior enforcement of immigration regulations, the government also looked to border control as a means to enforce immigration laws. While the Immigration Act of 1990 increased deportability grounds for noncitizens legally admitted to the United States, the government also sought to beef up border enforcement and increased funding for border enforcement. In addition to making more noncitizens already in the country deportable, the government also sought to physically prevent immigrants from entering

¹⁴⁸ Cook, *supra* note 142 at 300.

¹⁴⁹ See Statement on Signing the Immigration Act of 1990, Pub. Papers 1717-18 (Nov. 29, 1990).

¹⁵⁰ Cook, *supra* note 142 at 302.

¹⁵¹ Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639 (2003).

the country without inspection. The majority of government resources was spent along the southern border, as immigration from Mexico was seen as more of a problem.

In 1993, a series of “operations” were set in place to physically block immigrants from crossing the U.S.-Mexico border. Operation Blockade (later renamed Operation Hold the Line) in El Paso, and Operation Gatekeeper in San Diego were the first in a series of intense enforcement efforts aimed at preventing illegal border crossing. Both operations dramatically increased the number of Border Patrol agents on patrol, and funds were spent to fortify the border with an eight foot steel fence and high-intensity floodlights.¹⁵² The government also used funds to install motion detectors, heat sensors, trip wires and infrared scopes.

Although the serious prevention efforts did deter migrants from attempting to cross in heavily monitored areas, these methods did not actually stop undocumented migration. Rather, migrants chose to cross in more remote areas along the 2,000-mile border. While the border appeared to be more under control, the flow of undocumented migration was merely shifted to more remote and more dangerous areas.¹⁵³

The measures taken by the government to reduce crime through stricter enforcement of immigration regulations reflects public perception during this time that immigrants were responsible not only for crime but for a range of social problems. During the 1980s and 1990s, immigrants were increasingly blamed for rising unemployment, drug addiction and abuse, and the increasing cost of social services.¹⁵⁴ The growing number of non-white, particularly Latino, population also led to concerns

¹⁵² MASSEY ET AL., *supra* note 122 at 93-95.

¹⁵³ *Id.*

¹⁵⁴ Cook, *supra* note 142 at 306.

over immigration regulation. The government responded to public anti-immigrant sentiment by increasing border enforcement while at the same time constricting legal avenues to immigrate. In order to deal with the rising number of immigrants already in the United States, the government enacted harsher penalties on immigrants with criminal histories, making increasing numbers of immigrants already in the United States, deportable.

1. IIRIRA and the AEDPA: Ramping Up the Criminalization of Immigration

Beginning in 1996, the convergence of immigration policy and the criminal justice system accelerated substantially. Congress passed two noteworthy reforms in that year, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Both acts drastically changed immigration detention and deportation in the United States by expanding even further the list of crimes that made noncitizens deportable. Additionally, IIRIRA and the AEDPA required mandatory detention for noncitizens that had committed certain crimes and completely eliminated judicial review for a large percentage of deportation orders.¹⁵⁵ It is with these acts that the criminalization of immigration gained considerable momentum. These laws also set the stage for the post-9/11 era of immigration policies and the War on Terror.

The AEDPA was passed in the wake of the Oklahoma City bombing. Although it was later reported that American citizens were responsible for the bombing, immediately following the incident, much of the public believed noncitizens from the Middle East

¹⁵⁵ GOLASH-BOZA, *supra* note 2 at 38.

were responsible.¹⁵⁶ IIRIRA was passed just six months later; together, both acts essentially eliminate all forms of relief from deportation for aggravated felons and greatly expanded the list of crimes deemed aggravated felonies.¹⁵⁷

IIRIRA focused heavily on deterrence and further accelerated the build-up of border enforcement. Penalties on smugglers, undocumented migrants and visa overstays were increased. The Act also focused on immigration policy within the United States and effectively denied undocumented immigrants (and even some categories of legal immigrants) the ability to access social services and other public programs. This law was passed largely as a means to de-incentivize migrants from coming to the United States and to deport noncitizens already in the country.¹⁵⁸

Before 1996, there was a significant amount of judicial discretion in deportation hearings. The Immigration and Nationality Act (INA) allowed the immigration judge to consider mitigating circumstances for noncitizens facing deportation due to a criminal conviction that made the noncitizen deportable.¹⁵⁹ For example, an immigration judge could suspend, or in many cases waive, a deportation if the noncitizen could show that the deportation would result in extreme hardship.¹⁶⁰ Additionally, a provision in the INA allowed the immigration judge to consider family ties in determining whether to order a

¹⁵⁶ Cook, *supra* note 142 at 303.

¹⁵⁷ *Id.* at 312.

¹⁵⁸ MASSEY ET AL., *supra* note 122 at at 95-96.

¹⁵⁹ Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82 (2005).

¹⁶⁰ *Id.* at 82; allowed for suspension if deportation would result in extreme hardship, § INA 212(h) allowed certain noncitizens who had been convicted of a CIMT to waive deportation by showing extreme hardship (both were repealed by IIRIRA).

deportation.¹⁶¹ All of these provisions allowing an immigration judge to use discretion in determining whether to order deportation were repealed or amended by IIRIRA.¹⁶²

Prior to 1996, immigration judges used a two-step process in determining whether to deport a noncitizen in a deportation proceeding.¹⁶³ The immigration judge would first determine whether the noncitizen was deportable.¹⁶⁴ As mentioned above, the list of crimes that made a noncitizen deportable has steadily expanded since the country's first deportation regulations. The immigration judge would, therefore, consider whether the noncitizen had been convicted of an aggravated felony for immigration purposes.¹⁶⁵ After ascertaining whether the noncitizen had been convicted of a crime making him deportable, the immigration judge would look to extenuating circumstances before ordering the deportation.¹⁶⁶ The immigration judge would consider all the circumstances of the case, including whether the noncitizen had been rehabilitated, the hardship his deportation would have on his family and the noncitizen's ties to the United States.¹⁶⁷

After Congress passed IIRIRA and the AEDPA, the avenues for deportation relief virtually disappeared for any noncitizen convicted of an aggravated felony. Additionally,

¹⁶¹ *Id.*;

¹⁶² *Id.*

¹⁶³ Dawn Marie Johnson, *supra* note 146 at 481.

¹⁶⁴ *Id.*

¹⁶⁵ An aggravated felony does not necessarily mean a state felony conviction. The term 'aggravated felony' denotes a more 'serious' crime under the INA and the classification of a crime as an aggravated felony increases immigration consequences. Whether a crime is an aggravated felony depends on the language of the criminal state statute and the elements required for conviction. Even a misdemeanor can be considered an 'aggravated felony' for immigration purposes and can result in mandatory detention and deportation for a noncitizen.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

the list of crimes classified as an aggravated felony expanded substantially and the re-classification of crimes constituting an aggravated felony were held by the courts to apply retroactively. The effect of a retroactive application of the laws meant that an immigrant who was convicted of a crime, which prior to 1996 was not an aggravated felony, could be deported after 1996 if the crime he was convicted of was re-classified as an aggravated felony for immigration purposes.¹⁶⁸

The AEDPA added crimes, such as gambling, alien smuggling and passport fraud to the list of aggravated felonies and IIRIRA added rape, sexual abuse of a minor to the list of crimes making noncitizens automatically deportable.¹⁶⁹ Before IIRIRA and the AEDPA, money laundering and theft offenses required a certain monetary value before those convictions could be considered aggravated felonies for immigration purposes.¹⁷⁰ IIRIRA and the AEDPA lowered the threshold monetary requirements for all theft and fraud offenses to \$10,000.¹⁷¹ By drastically lowering these amounts, Congress ensured that a much greater number of people convicted of theft offenses would be deportable.

Along with expanding the list of crimes and lowering monetary thresholds for certain crimes, IIRIRA and the AEDPA decreased the length of sentences and expanded

¹⁶⁸ Cook, *supra* note 142 at 310. According to Cook, “[m]any critics of IIRIRA argued the retroactive application of the Act created an unconstitutional ex-post facto law; however, because immigration proceedings had long been held to be civil and non-punitive, the ex-post facto clause in Article I of the U.S. Constitution does not apply in this context.” Additionally, Miller notes that the Court has consistently held that Congress has the authority to pass retroactive laws in the context of immigration regulations.

¹⁶⁹ Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, (1996) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, (1996).

¹⁷⁰ Dawn Marie Johnson, *supra* note 146 at 482.

¹⁷¹ Dawn Marie Johnson, *supra* note 146 at 482. Johnson notes that before 1996, the threshold for money laundering was \$100,000, the threshold for fraud and deceit was \$200,000, and the threshold for tax evasion was \$200,000.

the definition of “conviction.”¹⁷² Prior to 1996, crimes of violence, theft offenses, counterfeiting and forgery offenses were only deportable offenses if the person convicted served a five-year sentence.¹⁷³ That five-year sentence was lowered to a possible one-year sentence, making a conviction for a crime with a *possible* sentence of one year a deportable offense under the INA. This means that even if the noncitizen served only 3 months, if the crime he was convicted of carried a potential sentence of one year or more, that crime is considered an aggravated felony rendering the noncitizen automatically deportable. Following IIRIRA, the definition of “conviction” also expanded to include suspended sentences. By expanding “conviction” in this way, a noncitizen “convicted of a crime that carried a possible sentence of one year or more, [but] that sentence was never carried out, that person is deportable.”¹⁷⁴

As mentioned above, IIRIRA and the AEDPA significantly limit an immigration judge’s ability to use discretion in determining whether to issue a final deportation order. IIRIRA repealed INA § 212(c), which allowed the immigration judge to consider extreme hardship and the individual circumstances of each individual’s case. INA § 212(c) was replaced by what is now called “cancellation of removal.”¹⁷⁵ An aggravated felon is ineligible to apply for cancellation of removal under the INA, no matter the circumstances. By repealing INA § 212(c), Congress effectively denied relief from removal for anyone convicted of an aggravated felony and denied any judicial discretion in determining whether deportation is appropriate. All of these changes created a system

¹⁷² *Id.* at 482-83.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 483.

¹⁷⁵ Cook, *supra* note 142 at 312.

where a noncitizen (even a long-term legal permanent resident) could be deported if convicted of a single misdemeanor offense carrying a possible sentence of one year or more.¹⁷⁶

Another result of the AEDPA and IIRIRA was the increased involvement of state and local law enforcement agencies with the INS. Prior to 1996, local and state law enforcement officers had little to do with enforcing civil immigration violations. IIRIRA and the AEDPA amended the INA to include provisions increasing the role state and local law enforcement play in regulating immigration.¹⁷⁷ AEDPA § 439 allows state agencies to apprehend and detain noncitizens with a criminal record who have been previously deported.¹⁷⁸ IIRIRA and the AEDPA also allow the Attorney General to enter into agreements with state and local law enforcement agencies to investigate, arrest and detain noncitizens suspected of simple immigration violations such as overstaying a visa.¹⁷⁹ Essentially, these provisions of the AEDPA and IIRIRA allow INS to work with local law enforcement agencies in the regulation of purely civil violations.

To counteract the harshness of the AEDPA and IIRIRA and the elimination of judicial discretion in immigration proceedings, the government encourages prosecutorial discretion. Prosecutorial discretion “gives prosecutors discretion to determine whether to file charges against an immigrant and whether to commence immigration proceedings

¹⁷⁶ Miller, *supra* note 159 at 85.

¹⁷⁷ Miller, *supra* note 151 at 638.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

against an immigrant.”¹⁸⁰ The prosecutor can consider factors like length of residence in the United States, family ties in the United States, ties to native country, U.S. military service, immigration history and criminal history and humanitarian concerns.¹⁸¹ These factors are similar to the factors an immigration judge could use prior to IIRIRA and the AEDPA to determine whether deportation was appropriate in each individual immigration case. By allowing prosecutors to use discretion in deciding whether to institute immigration proceedings against a noncitizen, individual circumstances could still be weighed in deportation proceedings.

In actuality, prosecutorial discretion did little to minimize the harshness of the AEDPA and IIRIRA. First, prosecutors often declined to use their discretion in a particular case and often prosecutors and immigration enforcement agents even encourage criminal prosecutors to seek sentences that would result in deportation. For instance, an INS memo “encouraged ‘prosecutors to seek plea bargains and sentences that [would] result in deportation, and to not agree to sentences or pleas which may allow immigrants to avoid deportation.’”¹⁸² The memo also directed prosecutors to avoid reducing sentences from twelve months to eleven months because “‘by reducing the sentence, the alien may avoid removal.’”¹⁸³ Second, prosecutorial discretion puts immigrants at risk of future immigration proceedings and this risk instills a constant fear of being deported. By giving prosecutors and government agents the authority to use or

¹⁸⁰ Dawn Marie Johnson, *supra* note 146 at 488.

¹⁸¹ *Id.*

¹⁸² *Id.* at 489 (quoting INS PROSECUTORIAL DISCRETION GUIDELINES (November 28, 2000), available at INS Fact Sheet, <http://www.ins.esdoj.gov/graphics/publicaffairs/factsheets/Prosecut.htm>).

¹⁸³ *Id.*

not use prosecutorial discretion, immigrants who are deportable are unable to leave the country and live in an indeterminate state.¹⁸⁴

The 1996 laws also profoundly affected asylum-seekers. After the enactment of IIRIRA and the AEDPA, people fleeing persecution in their home country were required to prove they had a credible fear of persecution if returned to that country. IIRIRA and the AEDPA require all asylum-seekers, upon crossing the border, to prove a credible fear of persecution to the satisfaction of a border patrol agent.¹⁸⁵ If the border patrol agent does not believe the asylum-seeker has a credible fear of persecution, the asylum-seeker faces immediate deportation and has no right to a hearing before an immigration judge.¹⁸⁶ If the border patrol agent does believe there is a credible fear of persecution, the asylum-seeker is promptly detained until he or she can have their credible fear interview with an asylum officer. Often asylum-seekers are detained for months before they have their credible fear interview and asylum-seekers who have not had a credible fear interview are not eligible for parole. The result of this system is that even if an asylum-seeker has a credible fear of persecution, he faces mandatory detention for months while he waits to start the asylum process.

2. Post-9/11 and Immigration Policy: The War on Terror and Immigration

The terrorist attacks on September 11, 2001 mark an important point in U.S. immigration policy and the trajectory towards increased criminalization of immigration. While the 9/11 attacks profoundly altered U.S. immigration policy and the public attitude

¹⁸⁴ *Id.* at 488.

¹⁸⁵ GOLASH-BOZA, *supra* note 2 at 39.

¹⁸⁶ *Id.* at 39.

toward immigrants in general, it is important to note that the convergence between criminal law and immigration law began well before 2001.¹⁸⁷ In fact, legislators capitalized on pre-9/11 immigration laws that embraced limited judicial discretion, enhanced penalties for criminal convictions, and relied on the well-established concept that immigration proceedings were not criminal proceedings but rather regulatory proceedings, and thus constitutional rights in deportation proceedings were very limited.¹⁸⁸

Part of the government's response to the 9/11 attacks was to take advantage of the harsh immigration consequences that resulted from IIRIRA and the AEDPA.¹⁸⁹ The government "capitalized on immigration law's utility as a mechanism for crime control and social control to confront the 'hypercrime' of terrorism."¹⁹⁰ In fact, the War on Terror and all laws passed following 9/11 that attempted to combat terrorism have expanded to "encompass the incarceration and removal of noncitizens who have committed unrelated criminal offenses."¹⁹¹ The post-9/11 era of immigration policy approaches immigration regulation from the perspective of national security and public safety. In using national security and the War on Terror as justification for harsh immigration policies, the United States has effectively created an immigration system whereby noncitizens, whether they are undocumented or legal permanent residents, have severely limited constitutional rights.

¹⁸⁷ Miller, *supra* note 159 at 82.

¹⁸⁸ *Id.* at 83.

¹⁸⁹ *Id.* at 85.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Immediately following 9/11, the government used the immigration system to detain people suspected of terrorism.¹⁹² Because the immigration system was already set up to allow for the detention of noncitizens and because criminal constitutional protections do not apply in immigration proceedings, the government was able to detain noncitizens it deemed “terror suspects” and to legally deprive them of constitutional protections.¹⁹³ Instead of using the criminal justice system, which to be constitutional would require the law enforcement agencies to obtain arrest and search warrants based on probable cause, to Mirandize those facing criminal charges, to provide counsel, and to provide the right to a jury trial, the government used the immigration system to detain noncitizens (and sometimes even citizens) without providing them with the basic rights guaranteed under the U.S. Constitution.¹⁹⁴

In addition to using the immigration system’s detention mechanisms to detain suspected terrorists, the Attorney General expanded INS’s power to detain noncitizens by increasing the time-limit on detention; whereas prior to 9/11 INS was allowed to detain noncitizens for up to 24 hours before having to either release them or charge them with violating an immigration regulation or a crime, following 9/11, Attorney General Ashcroft increased the 24 hour period to 48 hours.¹⁹⁵ That period was expanded even further to allow for “emergency or extraordinary circumstances,” agencies could detain

¹⁹² Miller, *supra* note 151 at 644.

¹⁹³ *Id.*

¹⁹⁴ U.S. CONST. amend. IV-VI.

¹⁹⁵ Miller, *supra* note 151 at 644.

noncitizens for an additional “reasonable period of time” without filing criminal or immigration charges against them.¹⁹⁶

Following 9/11, Congress passed the USA PATRIOT Act and the Homeland Security Act.¹⁹⁷ Both acts were passed as an attempt to protect “national security” and were supplemented by presidential directives, new agency rules and regulations intended to reinforce these new laws.¹⁹⁸ Much of the discussion surrounding these acts has centered on increased government surveillance of people it suspects may be a threat to national security or public safety; however, these acts and the accompanying changes to the law were also used as a means to expand detention and deportation of noncitizens and to enhance security along the U.S. border.¹⁹⁹ The government chose immigration regulation as a mechanism for protecting national security; it used strict immigration enforcement to detain and deport noncitizens that “threatened” public safety.²⁰⁰

Congress passed the USA PATRIOT Act in 2001, immediately following the terrorist attacks. The USA PATRIOT Act increased INS’s budget to enforce immigration regulations at the border as well as within the United States.²⁰¹ This increase in budget led to an increase in the number of noncitizens detained by immigration enforcement agents. The USA PATRIOT Act also increased the government’s ability to surveil, detain and deport noncitizens suspected of aiding in the terrorist attacks.

¹⁹⁶ *Id.*

¹⁹⁷ Miller, *supra* note 159 at 87.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ GOLASH-BOZA, *supra* note 2 at 40.

In 2002, Congress passed the Homeland Security Act. This Act not only established the Department of Homeland Security (DHS) but it also consolidated what was previously known as the INS under the newly created DHS. Through the Homeland Security Act, INS was divided into three subdivisions: Immigration and Customs Enforcement (ICE); Customs and Border Patrol (CBP); and Citizenship and Immigration Services (CIS). ICE's responsibility was to focus on interior enforcement of immigration regulations; that is, finding and instituting deportation proceedings against any noncitizen that had been convicted of a deportable offense, who had entered the country without documentation, or who had overstayed a visa. CBP would focus on border protection, keeping out "dangerous" people and preventing undocumented entries into the United States. CIS's role was to regulate the visa process; all noncitizens wishing to enter the United States must first secure a visa and CIS determined which noncitizens were admissible to the United States.

After 2002, with the creation of DHS and the division of INS into three separate immigration enforcement regimes, the budget to regulate immigration at the border and within the border skyrocketed; in merging immigration regulation with homeland security, the government was able to put forward greater resources for the arrest, detention and deportation of noncitizens.²⁰² The Act was used as a means to strengthen national security through stricter enforcement of immigration laws.²⁰³

²⁰² *Id.*

²⁰³ Miller, *supra* note 159 at 87.

The Homeland Security Act also increased cooperation between other law enforcement agencies and immigration officials.²⁰⁴ Section 403 of the Act provides immigration officials with access to the National Crime Information Center; this access allows immigration officials to check for criminal convictions for any noncitizen in detention. This coordination makes it easier and more efficient for immigration officials to detain and deport noncitizens. Additionally, the Act provides for the development of new technologies that can work between all law enforcement agencies; through this sharing of technology and information systems, all government law enforcement agencies and officials can share intelligence more rapidly and efficiently.²⁰⁵ This streamlining led to a rapid expansion in the number of noncitizens detained and subsequently deported.

Immigration also began to work with state and local law enforcement agencies following 9/11. While previously, the federal government retained the sole power to enforce immigration regulations, after 9/11, states began to take up more of a role in immigration enforcement. In 2002, Florida deputized all of its law enforcement officers, giving them the ability to enforce immigration regulations through the arrest and detention of noncitizens in violation of federal immigration laws.²⁰⁶ Other states followed suit and today, all state and local law enforcement agencies have some hand in regulating immigration through seeking out, arresting and detaining noncitizens. In effect, police officers can hold and detain a person they suspect has violated an immigration law, even though the person is not suspected of breaking a state criminal law. Sharing technology allows local and state law enforcement agencies to check the

²⁰⁴ Miller, *supra* note 151 at 645.

²⁰⁵ *Id.*

²⁰⁶ Miller, *supra* note 159 at 91.

immigration status of any individual they suspect to be in violation of an immigration law and also allows law enforcement agencies to detain that individual until an ICE officer arrives.

The federal government also began to enforce immigration regulations more strictly following September 11th. With the cooperation of local and state law enforcement agencies, the government implemented a zero-tolerance approach to immigration law enforcement.²⁰⁷ This was done in several ways. First, just three months following the attacks, the government instituted an Absconder Initiative Program; its goal was to “locate, apprehend, interview and deport” several hundred thousand noncitizens who had previously been ordered removed but had not yet left the country.²⁰⁸ The program was largely criticized because it focused primarily on immigrants of Arab descent and because it involved law enforcement agencies in the enforcement of civil, not criminal laws.²⁰⁹

Another example of the zero-tolerance enforcement strategy involves the crackdown on immigration laws that, prior to 2002, had rarely been enforced. The government used immigration laws to increase the number of noncitizens it could detain and deport following the terrorist attacks. For example, the Department of Justice (DOJ) began to strictly enforce the address change provision in § 265 of the INA, which had virtually never been enforced since its adoption in 1952.²¹⁰ This section requires all

²⁰⁷ *Id.* at 87.

²⁰⁸ *Id.* (quoting Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, Wash. Post, Feb. 8, 2002).

²⁰⁹ *Id.* at 88.

²¹⁰ *Id.*

noncitizens, regardless of their legal status, to report any address change to the government within ten days of moving.²¹¹ By suddenly enforcing this provision, the government was able to not only penalize noncitizens for not complying with the statutory requirements under the INA, but to also increase surveillance and detention of noncitizens.

3. Current U.S. Immigration Law and Policy

Today, U.S. immigration policies center on detention and deportation of noncitizens and on enhanced enforcement of the nation's borders. The consolidation of the INS with DHS following 9/11 greatly increased funding for border security and the enforcement of immigration regulations. Immigration laws are continuing to converge with the criminal justice system and the result is that the United States is detaining and deporting more noncitizens than ever before. In 2012, over 400,000 people were deported from the U.S.. According to immigration scholar, Tanya Golash-Boza, if the government continues on this trajectory, the Obama Administration will have deported over 2 million people by 2014: more people in six years than all people deported before 1997.²¹²

Congress has chosen to focus almost exclusively on two classes of noncitizens: those with a criminal history and those suspected of terrorist-related activities.²¹³ “Consequently, the most criminally punitive treatment with the fewest avenues for relief has been reserved for noncitizens with criminal convictions and those suspected of ties

²¹¹ *Id.*

²¹² Tanya Golash-Boza, *Obama's Unprecedented Number of Deportations*, counterpunch, Jan. 25, 2013, <http://www.counterpunch.org/2013/01/25/obamas-unprecedented-number-of-deportations/> [hereinafter *Obama's Unprecedented Number of Deportations*].

²¹³ Miller, *supra* note 151 at 632.

with organized terrorism.”²¹⁴ The term “criminal alien” is commonly used to describe a particular group of immigrants and refers to noncitizens who have been convicted of a deportable crime. Not all criminal convictions result in immigration consequences and the crimes that do are divided into three categories: crimes involving moral turpitude (CIMTs), aggravated felonies, and specific offense-related crimes.²¹⁵

A CIMT is a broad category of criminal activity and not precisely defined in the INA. A conviction for a CIMT generally carries lighter immigration consequences than a conviction for an aggravated felony. Because CIMTs are not listed out in the INA, it can be difficult to determine whether a conviction was for a CIMT or a non-deportable crime. CIMTs are generally understood to be crimes involving acts that are “inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.”²¹⁶ Thus, whether a crime is classified as a CIMT depends not on acts that are statutorily prohibited but on whether the crime is considered intrinsically or morally wrong.²¹⁷ Traditionally, crimes like robbery, voluntary manslaughter, assault with intent to inflict serious bodily injury and child abuse have been considered CIMTs.²¹⁸ A conviction for a CIMT does not automatically preclude a noncitizen from deportation relief but it does make a noncitizen deportable. Additionally, a noncitizen convicted of a CIMT is subject to mandatory detention without the possibility for parole.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012).

²¹⁷ *Miller*, *supra* note 151 at 632.

²¹⁸ *Id.*

The second category of deportable offense is an aggravated felony. As mentioned above, the INA specifically defines which crimes are aggravated felonies for immigration purposes, and the list of crimes has steadily expanded since the creation of the aggravated felony in 1988 under the ADAA. A conviction for an aggravated felony has much greater immigration consequences than a conviction for a CIMT; a noncitizen convicted of an aggravated felony is ineligible to apply for cancellation of removal, which means he will be deported. Like a conviction for a CIMT, a conviction for an aggravated felony subjects the noncitizen to mandatory detention without the possibility of parole.

Certain offense-specific crimes, like suspected terrorism, are the third category of deportable crimes. The AEDPA added terrorism to the list of crimes that make a noncitizen deportable and those provisions were strengthened by IIRIRA and laws enacted following the 9/11 attacks. Today, noncitizens suspected of terrorism face very different removal proceedings than do other noncitizens.²¹⁹ “Under special removal procedures for suspected terrorists, the government bears a lesser burden of proof on the issue of deportability, discovery is limited, even prohibited in the case of classified information, judicial review is expedited, and the customary forms of relief from removal are unavailable.”²²⁰

The ADAA, IRCA, the Immigration Act of 1990, the AEDPA, IIRIRA and all laws further criminalizing immigration and expanding the ability of the government to detain noncitizens following 9/11 have created an immigration system based solely on detention and deportation as mechanisms for immigration regulation. All changes the AEDPA and IIRIRA made to the aggravated felony provisions of the INA and the

²¹⁹ *Id.* at 635.

²²⁰ *Id.*

retroactivity of the IIRIRA are still in place today. Avenues for relief from deportation for any noncitizen convicted of a crime are minimal and any noncitizen convicted of an aggravated felony has virtually no hope to fight his or her deportation.

Additionally, mandatory detention provisions of IIRIRA and the ADAA are still in place and the number of noncitizens subject to mandatory detention has steadily increased since 9/11.²²¹ Today, any noncitizen convicted of a CIMT, an aggravated felony or an offense-specific crime is subject to mandatory immigration detention, regardless of family hardship, ties to the United States, or any other consideration. This has drastically increased the number of noncitizens in immigration detention as well as the length of time noncitizens are detained.²²²

4. Conclusion

The current state of the U.S. immigration system has prompted many human rights organizations and activists to question the United States' commitment to well-established human rights principles. Even the United Nations has expressed grave concerns as to the way the U.S. government treats its noncitizens. The next chapter will detail how U.S. immigration policies that focus primarily on detention and deportation violate several international human rights laws.

²²¹ *Id.* at 636.

²²² *Id.* at 637.

CHAPTER V

INTERNATIONAL LAW AND U.S. IMMIGRATION POLICY: U.S. OBLIGATIONS UNDER THE ICCPR, CAT, AND THE REFUGEE CONVENTION AND HOW THE U.S. IS VIOLATING INTERNATIONAL LAW

This section explores international human rights laws, U.S. obligations under those laws, and how current U.S. immigration policies are violating international law. The first part of this section focuses on the current international human rights laws and standards and how those laws apply to all immigrants, asylum-seekers and refugees. While there exist a multitude of treaties that protect the human rights of immigrants, this section emphasizes only those conventions that are most applicable to immigrants in the U.S.: the ICCPR, CAT, and the Refugee Convention. While there exist a multitude of treaties that pertain to immigrant rights, this section focuses only on the treaties the United States has signed and ratified, primarily because U.S. obligations under treaties it has signed and ratified are clearer. This first part of this section will explain immigrant rights in the United States according to international law.

This section will then discuss how the United States is failing to comply with its obligations under the ICCPR, CAT and the Refugee Convention. Current U.S. immigration policy is in direct violation of several fundamental international laws. The way the United States detains and deports immigrants violates the right to liberty under the ICCPR and the right to be free from arbitrary detention under the ICCPR. The way the government treats immigrants in detention also directly violates the right to be free from cruel, inhuman and degrading treatment or punishment under the ICCPR as well as

the right of detained people to be treated with humanity and human dignity. U.S. immigration detention conditions also violate the right to be free from torture or other acts of cruel, human or degrading treatment or punishment under CAT. U.S. immigration policy also directly violates the right to family and private life under the ICCPR. Finally, the way refugees and asylum-seekers are treated in the United States directly violates the Refugee Convention, which the United States has not only signed and ratified, but has signed into domestic law.

1. U.S. Obligations Under International Law

A. The Right to Liberty and the Right to Be Free From Arbitrary Detention

The right to liberty is a well-established international human right. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) refer to an individual's right to liberty. Article 3 of the UDHR explicitly provides that "[e]veryone has the right to life, liberty and security of person,"²²³ while Article 9 adds that "[n]o one shall be subjected to arbitrary arrest, detention or exile."²²⁴ While the UDHR is a non-binding document, the ICCPR, a binding international covenant, incorporates the right to liberty in Article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."²²⁵

²²³ Universal Declaration, *supra* note 14.

²²⁴ *Id.*

²²⁵ ICCPR, *supra* note 14.

The right to liberty and security of person applies to all human beings regardless of their immigration or other status.²²⁶ And the right to liberty applies to all deprivations of liberty, including detention for immigration purposes.²²⁷ While the right to liberty is not absolute and Article 9 does not expressly prohibit detention for immigration purposes, Article 9 does protect immigrants from unlawful and arbitrary detention.²²⁸ Although the ICCPR does not define unlawful or arbitrary detention, human rights jurisprudence has developed definitions of arbitrary and unlawful detentions.

The U.N. Human Rights Council (HRC) has five criteria developed to assist in determining whether a detention is arbitrary or unlawful. The first criteria requires detention be in accordance with, or authorized by, law.²²⁹ Detention must not only be lawful but must not be arbitrary; in determining whether detention is arbitrary, courts look to the last four criteria: reasonableness, necessity, proportionality, and non-discrimination.²³⁰ These five criteria are essential in determining whether detention violates the right to liberty. Although a detention may be lawful, that is, in accordance with or authorized by law, if the detention is arbitrary because it is not proportional, reasonable, necessary and non-discriminatory, then it violates the individual's right to liberty under international human rights law.

²²⁶ Alice Edwards, U.N. High Comm'r For Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* [hereinafter *Back to Basics*] 8 (2011).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

a. Lawfulness Criterion

The first criterion, lawfulness, includes not only domestic and national legislation but also includes international law. Although a state may have domestic legislation authorizing detention, if the domestic legislation is in conflict with international human rights laws and standards, then the detention is unlawful.²³¹ Additionally, elements of foreseeability and predictability of the law and its consequences exist within the lawfulness requirement.²³² A person subject to detention must have been able to foresee to a reasonable degree the consequences of his actions.²³³ Where a law's consequences are imprecise in this way, detention may be unlawful. Foreseeability and predictability also require that the lawful purposes of detention be expressed clearly in legislation.²³⁴

b. Arbitrariness: Reasonable, Necessary and Proportionate Criteria

Detention must not only be lawful, it must not be arbitrary; the HRC has clarified this concept:

'Arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable* in all the circumstances. Further, remand in custody must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.²³⁵

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Van Alphen v. The Netherlands*, HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8. (emphasis added).

For detention to be reasonable in all circumstances and necessary in all circumstances, there must be some level of proportionality.²³⁶ In this sense, the reasonableness and necessary criteria blend with the proportionality criterion; detention cannot be reasonable and necessary without being proportional. To be proportional, detention must be absolutely necessary to achieve the state's objective.²³⁷ In terms of immigration detention, where detention is used in the interest of national security, an individual's detention must be necessary to achieve the state's goal of protecting national security. Where it is necessary to achieve national security, the proportionality criterion may be satisfied.

The concept of proportionality also applies to the length of detention, in addition to the initial detention order. According to the HRC, "detention should not continue beyond the period for which the state can provide appropriate justification."²³⁸ This requires the State make a periodic review of each individual's case to ensure that the detention by the State is still necessary to achieve its goals. And although the HRC has not established a precise acceptable period of detention, clearly, indefinite detention is arbitrary under this proportionality concept. The U.N. Working Group on Arbitrary Detention (WGAD) has suggested states adopt a maximum period of immigration detention to ensure detention is not arbitrary.²³⁹

²³⁶ BACK TO BASICS, *supra* note 226.

²³⁷ *Id.*

²³⁸ Human Rights Comm., *A v. Australia Communication No. 560/1993*, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997), para. 9.4 [hereinafter *A v. Australia*].

²³⁹ Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights Rep. on its Thirteenth Sess., U.N. Doc. A/HRC/13/30 (2010) para. 61 [hereinafter 2010 Report of the Working Group on Arbitrary Detention].

For the detention to comply with the reasonable, necessity and proportionality criteria, there must be an individual assessment of the merits of each individual case. For states that use detention as a means to regulate migration, there must be a system in place to assess each individual's case and the necessity of detention before that individual is detained.²⁴⁰ According to the ICCPR, "every detention must be justified and assessed on its merits."²⁴¹ Mandatory detention is arbitrary in this respect because an individual is detained automatically, without an individual assessment of his case.

The ICCPR does not provide a list of accepted grounds for detention, and as mentioned above, detention for immigration purposes is not expressly prohibited. However, to comply with the ICCPR, every detention must be justified and assessed on its merits. The HRC has established accepted reasons for detention, and those include likelihood of absconding and lack of cooperation.²⁴² The HRC has further clarified that illegal entry, without more, is an insufficient reason to detain an individual.²⁴³ Similarly, a detention is arbitrary if the decision to detain is made with an improper purpose.²⁴⁴ For instance, although detention for immigration purposes is not explicitly arbitrary, using detention to deter migration may be an improper purpose and therefore arbitrary under international law.²⁴⁵ Under the 1951 Refugee Convention, detention as a means to deter asylum-seekers amounts to punishment and is an improper purpose under the

²⁴⁰ BACK TO BASICS, *supra* note 226.

²⁴¹ *Id.*

²⁴² *A. v. Australia*, *supra* note 238 at para. 9.4.

²⁴³ *Id.*

²⁴⁴ BACK TO BASICS, *supra* note 226.

²⁴⁵ *Id.*

ICCPR.²⁴⁶ According to the WGAD, immigrant detention can be justified if the purpose is proper and relates specifically to immigration reasons.²⁴⁷

Alternatives to detention are an important requirement to ensure detention is lawful and not arbitrary under international law. The HRC has held that the right to freedom incorporated in Article 9 of the ICCPR requires a state to consider a “less invasive means of achieving the same ends.”²⁴⁸ Principles of proportionality, necessity and reasonableness require a state to investigate alternative options before relying on detention.²⁴⁹ Additionally, a state may not simply point to its inability to provide alternative options to detention as justification for its reliance on detention. Especially in terms of immigration detention, where deportation is unlikely or unrealistic, the HRC has held that a state has an obligation to explore alternatives to continued immigration detention.²⁵⁰

c. Arbitrariness: Non-Discrimination Criterion

Non-discrimination is the final criterion in assessing with a deprivation of freedom is arbitrary. No state may detain an individual based on race, sex, nationality, religion, political or other opinion, property, birth or other status.²⁵¹ According the HRC, international human rights laws apply to all individuals and a state is required to respect

²⁴⁶ *Id.*

²⁴⁷ 2010 Report of the Working Group on Arbitrary Detention, *supra* note 18 at para. 28.

²⁴⁸ *C v. Australia*, Human Rights Committee, 76th Sess., Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999, (Oct. 28, 2002) at para. 8.2.

²⁴⁹ *BACK TO BASICS*, *supra* note 226.

²⁵⁰ *Id.*

²⁵¹ *Id.*

these rights “without discrimination between citizens and aliens.”²⁵² This means that the right to liberty under Article 9 of the ICCPR applies to non-citizens and citizens in the same way.

Article 9(3) of the ICCPR sets forth additional procedural guarantees under the right to liberty: [a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.²⁵³ According to the WGAD, the following procedural guarantees apply to immigration detention under the ICCPR:

1. All immigrants in detention, including asylum-seekers, must be brought promptly before an immigration authority,
2. The grounds for detention must be established by law and based on legality,
3. There must be a maximum period of detention established by law and detention can never be unlimited or excessive in length,
4. All immigrants and asylum-seekers must be notified, in a language he or she understands, of the conditions for applying for judicial review,
5. All immigrants and asylum-seekers who seek judicial review of their detention must have their petitions heard and decided promptly on the lawfulness of the detention,
6. States must place immigrants and asylum-seekers in premises separate from persons imprisoned under criminal law; and
7. UNHRC and ICRC, and, where appropriate, non-governmental organizations must be granted access to places of custody.²⁵⁴

Article 9(4) of the ICCPR guarantees the right to judicial review of any decision to detain. The review must be prompt and there must be a realistic possibility of successfully challenging one's detention. A formal review process, with no meaningful

²⁵² HRC, General Comment No. 15: The Position of Aliens under the Covenant, CCPR/C/21/Rev. 1, 11 April 1986, para. 2.

²⁵³ ICCPR, *supra* note 14 at art. 9(3).

²⁵⁴ WGAD Deliberation No. 5, E/CN.4/2000/4, annex II; WGAD Report 1998, E/CN.4/1999/63, paras. 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10.

opportunity to truly challenge detention, does not satisfy the procedural guarantees of the right to liberty under international law. An opportunity to effectively challenge detention may mean the State must provide legal assistance to immigrants or asylum-seekers who wish to challenge their detention. Additionally, the State must have the burden to prove detention is necessary in each individual case. A state must justify reasons for continued detention in light of the alternatives to detention and its goals.²⁵⁵

B. Right to Be Free From Torture and Other Forms of Cruel, Inhuman, Degrading Treatment (CIDT)

Along with the right to freedom of liberty, the UDHR declares that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁵⁶

This right is encapsulated in the Article 7 of the ICCPR, which provides that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”²⁵⁷

The ICCPR also provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁵⁸ According to the Special Rapporteur on the Human Rights of Migrants, this provision of the ICCPR dictates that “migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs.”²⁵⁹

²⁵⁵ BACK TO BASICS, *supra* note 226.

²⁵⁶ Universal Declaration, *supra* note 14, at art. 5.

²⁵⁷ ICCPR, *supra* note 14, at art. 7.

²⁵⁸ *Id.* at art. 10(1).

²⁵⁹ U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, para. 50, 65, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) [hereinafter 2008 Report of Special Rapporteur].

Similarly, the Convention Against Torture (CAT) protects individuals from torture; Article 16 provides that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁶⁰ The right to be free from torture and other forms of cruel, inhuman, and degrading treatment is, like the right to liberty, a well-established human rights principle under international law.

Under CAT, torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted.”²⁶¹ For the act to be torture as defined by CAT, the pain or suffering must be at the hands of, or with acquiescence of, a public official.²⁶² Although the definition of torture is relatively clear, neither CAT, nor the ICCPR define CIDT. However, according to the HRC, the prohibition against CIDT includes physical pain as well as mental suffering.²⁶³

Both the ICCPR and CAT require State parties to not only refrain from torture and infliction of CIDT, but also to ensure that all individuals within their borders, regardless of citizenship or legal status, are protected against torture and CIDT.²⁶⁴ This protection extends to prohibit state governments from returning any individual to a

²⁶⁰ CAT, *supra* note 19 at art. 1.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L LAW & DISPUTE RES. 270, 293 (2008).

²⁶⁴ CAT, *supra* note 19 at art. 16.

country where he or she is likely to be at risk of torture.²⁶⁵ This protection also extends to require all State parties ensure government officials are complying with CAT obligations, especially in the context of detention and imprisonment.²⁶⁶

Because neither CAT nor the ICCPR define CIDT, the Inter-American Commission on Human Rights (IACHR) has developed specific restrictions on member states' ability to detain individuals, especially in the context of immigration detention.²⁶⁷ These restrictions were developed to clarify the right to liberty and the right to be free from torture and CIDT under the ICCPR and CAT, as those rights are incorporated into the American Convention. All states that are members of the ICCPR, CAT and the American Convention are bound by the IACHR's clarifications of what constitutes the right to liberty and the right to be free from torture and CIDT.

The IACHR recently developed guidelines to aid in the determination of whether the right to be free from torture and CIDT are violated. The guidelines, entitled "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas," (IACHR Principles) outline basic requirements for individuals in detention. Some of the basic provisions include that all people detained receive food, water, medical treatment, adequate sleeping quarters, and additionally, that all detained individuals have the right to religious freedom, clothing, educational and recreational activities.²⁶⁸

²⁶⁵ *Id.* at art. 3.

²⁶⁶ *Id.* at art. 10, 11.

²⁶⁷ Inter-American Comm'n on Human Rights, Report on Immigration in the United States: Detention and Due Process 11-33 (2010) [hereinafter IACHR Report on Detention].

²⁶⁸ *Id.*

The IACHR has developed specific rights, in addition to the basic provisions listed above. Those specific rights include the right to medical care, which encompasses the right to “an impartial and confidential medical or psychological examination” upon arrival at a detention center.²⁶⁹ Principle 10 of the IACHR Principles clarifies the range of medical services that detainees must have access to, including physical, psychiatric and dental services.²⁷⁰ Principle 10 requires there be informed consent, patient confidentiality and autonomy in all cases.²⁷¹

Psychological care is especially important, and the UN Special Rapporteur on the Human Rights of Migrant Workers highlighted the importance of interpreters for all detained immigrants seeking medical treatment, as well as the importance of having doctors available with appropriate training in psychological treatments.²⁷² Even more importantly, the IACHR has special regulations for solitary confinement, especially for detainees with mental disabilities. Solitary confinement must be “authorized by a competent physician; carried out in accordance with officially approved procedures; recorded in the patient’s individual medical record; and immediately notified to their family or legal representatives.”²⁷³

²⁶⁹ *Id.* at 31.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Special Rapporteur on the Human Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, U.N. Doc. E/CN.4/2003/85Add.1 (Jan. 30, 2003) (by Gabriela Pizarro) [hereinafter Special Rapporteur Report 2002].

²⁷³ Organization of American States, American Convention on Human Rights art. 22(3), *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

Solitary confinement for disciplinary purposes is limited.²⁷⁴ Solitary confinement is only permitted as a last resort and must be only for a limited period of time. Use of solitary confinement as a disciplinary measure is allowable only to protect the detention center's internal security and to protect fundamental human rights of others in the institution. According to the IACHR, the protection of fundamental rights includes protection of the right to life and integrity of persons.²⁷⁵

The IACHR Principles also dictate that international principles of humane treatment require that individuals detained for civil purposes have the right to be separated from criminal inmates.²⁷⁶ The IACHR explicitly requires that asylum-seekers, refugees and those being held for immigration-related violations should be housed in a separate facility from those who are being detained for criminal violations. In addition to separating civil detainees from criminal detainees, the IACHR also directs member states to separate men and women, children and adults, and the elderly.²⁷⁷

Humane treatment also requires that individuals who are detained receive notice of transfer to other detention centers.²⁷⁸ Principle 9(4) requires that state officials “take into account the need of persons to be deprived of liberty in places near their family, community; their defense counsel or legal representative; and the tribunal or other State

²⁷⁴ IACHR Report on Detention, *supra* note 267.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* Principle 9(4).

body that may be in charge of their case.”²⁷⁹ Principle 9(4) further prohibits transfers made in an attempt to punish and prohibits transfers “conducted under conditions that cause physical or mental suffering.”²⁸⁰ For those held in immigration custody, the IACHR Principles require that the individual be promptly informed of his right to communicate with his consulate.²⁸¹

Specifically, the IACHR notes the problems surrounding transfer and the ability of the individual to fight his case. According to the IACHR, immigrants who have an attorney or legal representative should never be transferred from the jurisdiction where they were apprehended unless there exist exceptional circumstances.²⁸² Additionally, the IACHR Principles prohibit transfers to jurisdictions where the immigrant’s removal is more likely.²⁸³ This requirement on transfers comes from the concern over immigrant detainees’ right to due process, as well as the concern for humane treatment in detention.

The right to humane treatment also includes the requirement that detention facilities have qualified personnel and independent supervision.²⁸⁴ For immigration detention, this includes proper training for detention center guards in

psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at Principles 16(2) and 16(3).

²⁸² *Id.* at 34.

²⁸³ *Id.*

²⁸⁴ *Id.* Principle 20.

supervision to ensure the application of international and national human rights law.²⁸⁵

Lastly, the IACHR Principles state that detention institutions are obligated to investigate any deaths that occur during detention.²⁸⁶ This requirement extends to deaths that occur shortly after release from detention, if warranted under the circumstances.²⁸⁷ The investigation must be prompt, impartial and the investigation's findings must be available upon request.²⁸⁸

C. Right to Protection of the Family and the Right to Private Life

Fundamental human rights under international law also include the right to protection of the family and the right to private life. The right to family was first articulated in article 12 of the UDHR, which states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”²⁸⁹ The ICCPR incorporated the right to family in Article 23 and Article 17 of the ICCPR expands this right, stating “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence...”²⁹⁰ Because the family is the “fundamental group unit of society” international law requires states to protect the family and holds the right to family as a fundamental right on par with the right to liberty, and the right to be free from torture and CIDT.

²⁸⁵ Special Rapporteur Report 2002, *supra* note 272 at para. 75(j).

²⁸⁶ IACHR REPORT ON DETENTION, *supra* note 267 at Principle 23(3).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Universal Declaration, *supra* note 14 at art. 12.

²⁹⁰ ICCPR, *supra* note 14 at art. 17(1).

The American Declaration has also adopted the right to family and privacy. According the IACHR, the right to family is “a right so basic to the [American] Convention that it is considered to be non-derogable even in extreme circumstances.”²⁹¹ The main objective of the right to private life and the right to family is protection from arbitrary State interference in individuals’ private lives.²⁹² This right ultimately “protects home and family life from unnecessary intrusion by the State.”²⁹³

The right to family and private life has important implications for immigration detention because the right to family limits the state in its enforcement of immigration laws.²⁹⁴ First, a state may not enforce immigration laws in an individual’s private home unless it has probable cause to suspect that person has violated immigration law.²⁹⁵ Probable cause requires the state have reliable information and know the location of the person in violation.²⁹⁶ Additionally, in order to invade a home, the risk that individual poses to the community must be great.²⁹⁷ Lastly, invasion of the home by the state must be the last alternative means of enforcing its immigration laws.²⁹⁸

²⁹¹ IACHR, X & Y, (Argentina), Report No. 38/96 (Merits), Case No. 11.506, para. 96 (October 15, 1996).

²⁹² IACHR Report on Detention, *supra* note 267.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

Another important implication of the right to family relates to parental rights.²⁹⁹ The IACHR has held that the State is forbidden from using a parent's immigration violation or detention as a means to permanently take away that parent's legal custody of his or her children.³⁰⁰ Similarly, the IACHR highlights the importance of the immigrant child's best interests in a state's decision to remove his or her parent.³⁰¹ If the child's best interest is taken into account and the parent is still removed, the immigrant parent must have access to due process in determining who will have custody of his or her child following removal.³⁰²

The IACHR Principles also highlights the right to family under the ICCPR. According to these principles, a detained person has the right to communicate freely with his or her family. Communication includes the right to visitation by family members. Additionally, a detained individual shall have the right to communicate freely with the outside world and this right is subject to limitation only in limited circumstances.³⁰³

D. Specific Rights Under the Refugee Convention

The Convention and Protocol Relating to the Status of Refugees (Refugee Convention) is a consolidation of the rights and liberties refugees are entitled to under international human rights law. The 1951 Refugee Convention entered into force in 1954

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Skinner, *supra* note 263 at 279.

and was later expanded by the 1967 Protocol.³⁰⁴ Initially, the 1951 Refugee Convention limited refugee status to certain individuals; however, the 1967 Protocol extended refugee rights to all refugees from all countries fleeing persecution on account of race, religion, nationality, political opinion or membership in a particular social group.³⁰⁵ The Refugee Convention binds all member states to respect refugee human rights, regardless of whether an individual has formally been recognized as a refugee under the Refugee Convention.³⁰⁶

The Refugee Convention defines a refugee as a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” and “who is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”³⁰⁷ The Refugee Convention also sets forth a State party’s legal obligations to all refugees under international law; these obligations explicitly limit ways in which the state can detain and deport refugees and asylum-seekers.

Article 31(2) prohibits State parties from restricting refugees’ movements “other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.”³⁰⁸

Further, Article 31(2) requires a state allow all refugees “a reasonable period of time and

³⁰⁴ *Id.* at 277.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 278.

³⁰⁷ Refugee Convention, *supra* note 21.

³⁰⁸ *Id.* at art. 31(2).

all the necessary facilities to obtain admission into another country.”³⁰⁹ Additionally, Article 31(1) of the Refugee Convention requires that State parties

shall not impose penalties on account of [a refugee’s] illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.³¹⁰

The Refugee Convention also limits a State’s ability to deport or return refugees who seek asylum. Article 33 prohibits a state from expelling or returning “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³¹¹

Although the Refugee Convention has explicit rules regarding how member states are to treat asylum-seekers and refugees, standards of detention and deportation of asylum-seekers and refugees is clarified in the UNHRC Detention Guidelines.³¹² These guidelines set forth specific requirements for States to conform under the Refugee Convention, in addition to setting forth the requirements for the right to liberty and the right to be free from CIDT in the detention context.

The requirements that detention be lawful and not arbitrary apply equally to asylum-seekers as to any individual who is detained for immigration purposes. The same principles of reasonableness, necessity, proportionality and non-discrimination apply in the context of refugee and asylum-seeker detention. Asylum-seekers are also guaranteed

³⁰⁹ *Id.*

³¹⁰ *Id.* at art. 31(1).

³¹¹ *Id.* at art. 33(1).

³¹² Skinner, *supra* note 263 at 279.

the right to due process while in detention, as well as the right to be free from CIDT and torture. The UNHRC Detention Guidelines have explicit rules regarding asylum seekers, however, because of their protected status under the Refugee Convention.

First and foremost, the Detention Guidelines clarify that detention of asylum-seekers should be avoided and used only as a last resort.³¹³ In all cases where an immigrant is seeking asylum, the presumption should be against detention.³¹⁴ Guideline 1 explains that all human beings have the right to seek asylum from persecution and as such, the act of seeking asylum is not in violation of law.³¹⁵ Therefore, those seeking asylum should not be punished for illegal entry into the country in which they are seeking protection.³¹⁶ This particular guideline, which forbids a state to punish an asylum-seeker based on illegal entry, explains that asylum-seekers are often forced to flee without documents; asylum-seekers are thus fundamentally different than regular migrants.³¹⁷ Guideline 1 also notes that asylum-seekers are often victims of trauma and should be treated differently than ordinary migrants.³¹⁸ Additionally, this section of the guidelines makes clear that using detention to deter asylum-seekers is absolutely forbidden under the Refugee Convention.³¹⁹

³¹³ U.N. High Comm’r for Refugees, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012) [hereinafter UNHRC Detention Guidelines], *available at* <http://www.UNHRC.org/refworld/docid/503489533b8.html>.

³¹⁴ *Id.* at para. 11.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

Guideline 2 of the UNHRC Detention Guidelines sheds light on the Article 33(2) of the Refugee Convention, which prohibits states from limiting the free movement of refugees and asylum-seekers.³²⁰ The fact that every human being has the right to seek asylum, coupled with the fundamental right to liberty and security of person and freedom of movement, requires that detention of those seeking asylum should be a last resort.³²¹ In all cases, liberty should be the presumption for those seeking asylum.³²²

Alternatives to detention are a focus of the UNHRC Detention Guidelines. As detention of asylum-seekers and refugees should be a last resort, states must have alternatives to detention in place to comply with international law. Some alternatives include “self or family-reporting; the maintaining a specific address; residing at ‘collective accommodation centers’ where individuals are free to come and go and live as normal; providing a guarantor or surety; or posting bail in some situations.”³²³ The UNHRC Detention Guidelines specify that alternatives to detention must “not be used as alternative *forms of* detention; nor should alternatives to detention become alternatives to release.”³²⁴

The UNHRC Detention Guidelines set forth special circumstances and the unique needs of asylum-seekers who are often victims of torture and trauma. Guideline 9 requires that emotional and psychological trauma should be taken into account when a

³²⁰ *Id.* at para. 13.

³²¹ *Id.*

³²² *Id.*

³²³ Skinner, *supra* note 263 at 280.

³²⁴ UNHRC Detention Guidelines, *supra* note 313 at Guideline 4.3.

state decides to detain an asylum-seeker.³²⁵ Because detention can aggravate emotional trauma, those who present with symptoms of anxiety, depression, aggression or psychological illness should be treated with special care.³²⁶ This particular guideline also requires a periodic assessment or review of a detainee’s mental and physical wellbeing should detention be required.³²⁷

Guideline 9 of the UNHRC Detention Guidelines singles out several groups of asylum-seekers that should be treated with care and special consideration. It lists children, women, victims of potential trafficking, elderly asylum-seekers, asylum-seekers with disabilities and lesbian, gay, bisexual, or transgendered asylum-seekers as types of asylum-seekers that need special protection should the state decide to detain them.³²⁸

According to the UNHRC Detention Guidelines, children should not be detained. If there is a reason to detain a child, the detention must comport with the Convention for the Rights of the Child (CRC).³²⁹ Among the rights enunciated in the CRC are a child’s right to life, survival and development, the right to family unity, the right to special protection and assistance and right to education.³³⁰ The UNHRC Guidelines specify that an “ethic of care – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child as the

³²⁵ *Id.* at Guideline 9.1.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at Guideline 9.2.

³³⁰ *Id.*

primary consideration. The extreme vulnerability of a child takes precedence over the status of an ‘illegal alien’.”³³¹

The UNHRC Detention Guidelines also state that pregnant women and nursing mothers should not be detained.³³² In cases where detention is necessary, women should be protected from sexual and gender-based violence; separate facilities for women and families should exist and where those facilities do not exist, alternatives to detention should be pursued.³³³ Alternatives to detention should also be pursued for victims of trafficking.³³⁴

Similarly, older asylum-seekers and those with mental and physical disabilities should be treated with care and detention should be the last resort.³³⁵ Like all detained individuals, those with mental and physical disabilities have the right to medical care while in detention. The UNHRC Detention Guidelines note that as a general rule, asylum-seekers with long-term mental or physical disabilities should not be detained and alternatives to detention should be pursued.³³⁶

Finally, asylum-seekers who identify as gay, lesbian, bisexual, transgender or intersex should be afforded every protection possible to ensure that the detention “avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse.”³³⁷

³³¹ *Id.*

³³² *Id.* at Guideline 9.3.

³³³ *Id.*

³³⁴ *Id.* at Guideline 9.4.

³³⁵ *Id.* Guidelines 9.5 and 9.6.

³³⁶ *Id.* Guideline 9.5.

³³⁷ *Id.* Guideline 9.7.

This includes the right to counseling and medical care and requires that detention guards be trained and qualified in international human rights standards of non-discrimination.³³⁸ In the event that an asylum-seekers safety is at risk, an alternative to detention must be established. Further, the guidelines expressly forbid solitary confinement as a means to protect these individuals.³³⁹

2. U.S. Immigration Policies: How the U.S. Is Violating International Law

United States immigration policies are in stark violation of international law. The way the U.S. detains and deports noncitizens, specifically, immigration policies requiring mandatory detention and limiting judicial discretion, directly violates the right to liberty and the right to be free from arbitrary and unlawful arrest or detention under the ICCPR. Similarly, U.S. conditions of immigration detention as well as deportation procedures and policies more generally, violate the right to be free from torture and other cruel, inhuman and degrading treatment or punishment under both CAT and the ICCPR. Further, U.S. immigration policies, both detention and deportation policies, and immigration policy in general, violate the fundamental and well-established right to family and the right to private life under the ICCPR (and several other international conventions). Lastly, U.S. immigration policies violate important provisions in the Refugee Convention, as well as the right to seek asylum encapsulated in the UDHR and the ICCPR.

A. The Right to Liberty and U.S. Detention and Deportation Policies

U.S. detention policies that require mandatory detention and deportation of certain classes of immigrants violate the right to liberty under the ICCPR. The ICCPR states that

³³⁸ *Id.*

³³⁹ *Id.*

all people “have the right to liberty and security of person” and that all people have the right to be free from “arbitrary arrest or detention.”³⁴⁰ This right applies to all deprivations of liberty, including administrative detentions, and it applies to all people, regardless of nationality or immigration status.³⁴¹

According to international law, a detention is arbitrary where it is not necessary in all the circumstances, nor reasonable in all the circumstances.³⁴² To determine whether a detention is necessary and reasonable, international law requires “that the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual.”³⁴³ Mandatory detention policies in the United States are arbitrary because there is no case-by-case determination of whether there is in fact a need to detain a particular individual. Mandatory detention is the exact opposite of an individual, case-by-case determination; mandatory detention ensures that large classes of people are automatically detained without an individual determination.

For those immigrants who do not face mandatory detention due to their criminal history, they still face arbitrary detention in violation of international law. ICE officials have extensive authority over immigrant bond determinations and over the decision of whether an immigrant qualifies for bond. ICE officials can refuse to give a bond to an immigrant in detention and ICE officials can arbitrarily raise or revoke an ICE bond at any time. Immigrants cannot appeal the ICE bond until they have a bond hearing before an IJ. At that hearing, the IJ can raise or revoke the ICE bond completely. Although bond

³⁴⁰ ICCPR, *supra* note 14 at art. 9(1).

³⁴¹ BACK TO BASICS, *supra* note 226 at 8.

³⁴² *Id.*

³⁴³ 2008 Report of Special Rapporteur, *supra* note 259 at para. 10(23).

determinations should be based on an individual's flight risk or whether the individual is a danger to the community, ICE officials and IJ's often impose arbitrarily high bonds or completely deny bonds to detainees. The detainee cannot appeal to a higher authority because there is no higher authority than the IJ in bond determination hearings. An immigrant who wishes to appeal the IJ's initial bond determination must appeal to that same IJ. And if he asks for a bond redetermination hearing he risks losing his bond completely. Thus, many detainees settle for the initial bond determination, even if they are unable to pay it, because they fear the IJ will completely revoke their bond on appeal. This absolute discretion and the arbitrary way in which bonds are decided, violates due process under international law and results in arbitrary detention in violation of international law.

The bond determination process violates fundamental due process rights under international law. The right to liberty and the right to be free from arbitrary detention entitle an individual to be heard in order to determine whether detention is justified and not arbitrary. Similarly, due process under international law requires a prompt judicial determination of whether a detention is lawful. Immigrants are taken into ICE custody and spend weeks in detention before they are allowed to see an IJ. This is not prompt under international law and thus violates due process.

U.S. detention and deportation policies also violate the due process right to fair deportation procedures under the ICCPR. According to Article 13 of the ICCPR, any immigrant lawfully within a state may only be removed by procedures in accordance with law and the immigrant facing removal has the right to "submit evidence against his

expulsion and to have his case reviewed by” a competent authority.³⁴⁴ Under current U.S. immigration policy, immigrants who have been convicted of certain crimes face mandatory detention; mandatory detention prohibits an immigrant from submitting evidence against his expulsion and thus violates this particular procedural due process right under international law. Immigrants who have been convicted of an ‘aggravated felony’ for immigration purposes have no way to fight their deportation because U.S. mandates their removal. By denying immigrants the ability to submit evidence against their removal, like family ties and evidence of rehabilitation, U.S. law violates Article 13 of the ICCPR.

Due process under international law also requires access to legal counsel. While immigrants in the United States have the right to counsel in their immigration proceedings, that right is not absolute. According to the government, the Sixth Amendment right to counsel does not apply to deportation proceedings because they are civil proceedings. Therefore, immigrants who cannot afford an attorney are not provided with government appointed counsel and must represent themselves in immigration proceedings. As the majority of immigrants in detention cannot even afford to pay their bond, most detainees also cannot afford a private attorney. Nearly 86% of immigrants in detention cannot afford counsel and thus represent themselves.³⁴⁵

The remote location of most detention centers is another barrier to the right to counsel. Immigrants are typically held in rural areas, miles away from the nearest city. The remote location of detention centers makes it difficult for attorneys to meet with their clients and the cost for private attorney services includes the time it takes to travel to and

³⁴⁴ ICCPR, *supra* note 14 at art. 13.

³⁴⁵ Obama’s Unprecedented Number of Deportations, *supra* note 212.

from the detention center. Not only do attorneys have to travel hours to get to their clients, but they charge for that time. For immigrants who can barely afford the cost of legal representation, paying an attorney for travel time is almost impossible. Furthermore, detainees are often transferred to detention centers located thousands of miles away from their family and their community. This makes it even more difficult for them to find an attorney to represent them, even if they can afford one.

B. The Right to Be Free From Torture and CIDT and Conditions in U.S. Detention Centers

Conditions in immigration detention centers violate the right to be free from torture and other forms of cruel, inhuman and degrading treatment under both CAT and the ICCPR. Each convention not only prohibits state parties from inflicting torture or other forms of CIDT, but they also require state parties ensure that all people within its borders are protected against torture and CIDT. The IACHR has defined torture and CIDT with regards to detention, and those definitions extend to immigrant detention in the U.S. The IACHR Principles establish certain detention conditions that can amount to torture and or CIDT under international law, including the use of shackles, solitary confinement and other prison-like detention conditions. The way the United States detains immigrants and the way it treats immigrants in detention violate both prohibitions on torture and CIDT under international law, especially as defined by the IACHR guidelines.

The IACHR Principles outline basic requirements for individuals in detention, including the right to food, water, medical treatment, adequate sleeping quarters, privacy,

and the right to religious freedom, clothing, and educational and recreational activities.³⁴⁶

U.S. immigration detention violates several of these basic requirements. Detention centers are overcrowded and overcrowding creates problems with providing basic necessities like food, appropriate medical treatment and appropriate sleeping conditions. Privacy is minimal. ICE detains hundreds of immigrants on a daily basis and new arrivals are constantly flooding into detention centers. Most detention facilities are ill equipped to handle such high numbers and overcrowding is the inevitable result.

According to international law and detention standards, human treatment also requires that individuals who are detained receive notice of transfer to other detention centers. In practice, immigrants typically do not receive such notice. It is not uncommon for immigrants to be transferred to a detention center hundreds of miles from their attorney. Detainees are often denied communication with their consulate, which according to international law, is required to constitute human treatment. Denying detainees access to their legal counsel and their consulate is not only a due process violation under international law, but also a violation of the right to be free from CIDT.

Medical care, including psychological treatment, is lacking in U.S. detention centers. Although the IACHR Principles dictate that human treatment includes qualified medical personnel, especially for psychological treatment, U.S. detention centers rarely provide adequate counseling and psychological services to detainees. Many detainees suffer from depression and anxiety, and the prison-like detention conditions exacerbate those mental health issues. However, rather than provide counseling or medication for depression and anxiety, if a detainee expresses feelings of depression, they are often put

³⁴⁶ IACHR Report on Detention, *supra* note 267.

into solitary confinement. Not only is solitary confinement expressly prohibited by the IACHR Principles, but solitary confinement also rises to the level of torture as defined in CAT and the ICCPR.

Under international law, including the IACHR Principles and the UNHRC Detention Guidelines, immigration detention should not be punitive detention, and alternatives to detention should be pursued if at all possible. U.S. policies regarding immigrant detention directly violate this principle. Immigrants wear jumpsuits, live in cellblocks identical to prison cellblocks, their freedom of movement is restricted at all times, they are reprimanded with punishments like solitary confinement or loss of outdoor recreation time and many immigrants are detained alongside criminal inmates. For all intents and purposes, immigrants in immigration detention are in prison; for those who had been convicted of a crime and served their sentence in prison, immigration detention is indistinguishable from where they served their criminal sentence. The use of prisons to detain immigrants directly violates fundamental human rights and the constitutes torture and CIDT under international law.

C. The Right to the Protection of the Family and the Right to Private Life and U.S. Immigration Policies

U.S. detention and deportation policies violate the right to family and the right to private life under international law. On a basic level, any unlawful or arbitrary detention that separates an individual from his or her family violates the right to family. Because U.S. detention policies require mandatory detention and because there is no individual, case-by-case determination of the state's need to detain, the majority of individuals detained in immigration facilities are arbitrarily detained and separated from their

families in violation of international law. Similarly, deportation policies that forbid an IJ to take family ties and family hardship into account in the decision to deport directly violate the right to family.

U.S. immigration policies that promote transferring detainees to remote detention facilities, far from their families also violate the right to family, as do restrictions on visitation for immigrants in detention. Every detained person has the right to family visitation and family correspondence. U.S. detention policies, which restrict family visitation and policies that transfer detainees to detention facilities hundreds, and sometimes even thousands, of miles away from their families, are in direct violation of international law. Family visitation is also severely restricted in detention centers; not only are most family members so far away that they cannot visit the detention center regularly, but visitation times are also limited. Furthermore, many family members of immigrants in detention are undocumented, and cannot visit their loved one for fear that they will also be detained and deported.

Moreover, the right to family and private life protects an individual from arbitrary interference by the state. This right corresponds to international due process rights and the right to liberty in that a state may not enforce immigration laws in ones home unless the state has probable cause to believe an individual has committed an immigration violation.³⁴⁷ The government, in its ‘crackdown’ on ‘illegal’ immigration, instituted a policy whereby ICE officials would raid the homes of people suspected to be in the country illegally.³⁴⁸ Although these raids are less common today, ICE continues to raid people’s homes and terrorize immigrant communities. Although international law would

³⁴⁷ IACHR Report on Detention, *supra* note 267.

³⁴⁸ GOLASH-BOZA, *supra* note 2.

require probable cause to enter a private residence, ICE officials conducted home raids without probable cause to believe the residents were undocumented. These raids violate the right to family and private life under international law.

U.S. detention conditions also violate the right to family and private life. Families in detention, according to international law and the Detention Guidelines, should be separated from the rest of the detained population and alternatives to detention should be pursued if at all possible.³⁴⁹ The U.S., however, continues to detain families in prison-like detention conditions and more often than not, families are separated from each other.

D. The Refugee Convention and U.S. Treatment of Asylum-Seekers

Asylum-seekers face mandatory detention in the United States. When an asylum-seeker presents himself at the border as someone seeking asylum, he must convince the immigration official on duty that he has credible fear of persecution. If the immigration official finds the story implausible or unconvincing, the asylum-seeker is immediately placed in expedited removal proceedings and detained until the government can deport him. The asylum-seeker in this case cannot appeal to a higher authority; the immigration official has sole discretion and authority to place an asylum-seeker in expedited removal proceedings.

Even if the immigration official finds the asylum-seeker's story to be plausible or convincing, the asylum-seeker still faces mandatory detention until he can have a more formal credible fear interview with an asylum officer. The length of time one must wait for a credible fear interview with an asylum officer varies; however, many are detained

³⁴⁹ UNHRC Detention Guidelines, *supra* note 313.

for several months while they wait for the interview. Asylum-seekers are not eligible for parole or bond during this time, thus making their detention mandatory.

After the credible fear interview, many asylum-seekers are forced to remain in detention for the duration of their asylum application. Although technically eligible for release from detention, if the IJ determines the individual seeking asylum does not have sufficient contacts in the United States, he is deemed a flight risk and must remain in detention for the duration of the asylum application process. Similarly, asylum-seekers who cannot afford to pay their bond are also forced to remain in detention for the duration of the application process. Applying for asylum is a lengthy process that requires extensive documentation. Many asylum-seekers spend months in detention while they complete the application and gather documents necessary to prove they faced persecution and fear future persecution in their home country.

If the IJ determines the applicant does not qualify for asylum, the asylum-seeker can appeal, and must remain detained for the duration of the appeals process. IJ's deny the majority of asylum applications and a large percentage of asylum-seekers appeal the initial IJ decision. If the individual seeking asylum is not eligible for parole or cannot afford to pay his bond, he must remain in detention until the appeals process is complete. The first appeal goes to the BIA and if the BIA affirms the IJ's decision, then the asylum applicant must appeal to the Ninth Circuit. This process can take many months or even years; the asylum-seeker remains detained, without the possibility of parole, for the entire time.

The Refugee Convention is clear that refugees and asylum-seekers should not be penalized or punished for seeking asylum. Article 31(1) forbids a state to penalize

refugees or asylum-seekers who enter the country without documentation or authorization.³⁵⁰ As long as asylum-seekers and refugees present themselves to immigration officials within a reasonable period of time and who good cause for their delay or illegal entry, state governments are prohibited from punishing illegal entry or entry without documentation.³⁵¹ This article is important for most refugees and asylum-seekers because the large majority of those fleeing their country must do so hastily and most do not have time to gather important documentation. Others are forced to flee under false names so as to avoid detection by their home government. This particular provision of the Refugee Convention acknowledges the extreme and dire circumstances under which refugees and asylum-seekers are forced to flee.

By detaining all asylum-seekers, without the possibility of release prior to a credible fear interview with an asylum officer, the United States is directly violating Article 31(1). Through requiring that all asylum-seekers face mandatory detention, the United States is punishing asylum-seekers. Those who present themselves at the border without proper documentation are immediately placed in immigration detention, where they live in a prison-like setting, segregated from the rest of the U.S. population and often housed with criminal offenders. Mandatory detention is the very punishment the Refugee Convention forbids, however, the United States continues to detain all asylum-seekers. Furthermore, these detentions are not short but prolonged; a large number of asylum-seekers wait months before they have their credible fear interview with an asylum officer, and many are detained for over six months, or even years if they are denied bond or parole. Detention in this context is punishment and violates the Refugee Convention.

³⁵⁰ Refugee Convention, *supra* note 21 at art. 31(1).

³⁵¹ *Id.*

Article 31(2) of the Refugee Convention prohibits unnecessary “restrictions on refugees’ movements.”³⁵² Through requiring mandatory detention of asylum-seekers, without a case-by-case review of the necessity of such detention, the United States is violating this particular provision of the Refugee Convention. As mentioned in the previous section, although the Refugee Convention itself does not define exactly what ‘necessary’ means under this provision, the UNHRC Detention Guidelines have explained what restrictions on refugees’ and asylum-seekers’ movements are ‘necessary,’ and therefore, proper under international refugee law. For example, a state would not violate the Convention if it were to detain an asylum-seeker who posed a legitimate threat to national security or the public order.³⁵³

As it is U.S. policy to detain all asylum-seekers, regardless of whether they pose a threat to national security or the public order, U.S. policies cannot possibly be in accordance with Article 31(2) of the Refugee Convention. According to U.S. law, anyone seeking asylum must be detained until he or she passes a credible fear hearing with an asylum officer. This is not a necessary detention under international law. And further, since 9/11, the United States has expanded grounds for detaining asylum-seekers at the border. For example, Operation Liberty Shield requires mandatory detention for all asylum-seekers from thirty-three countries that the U.S. government has determined Al Qaeda has been known to operate.³⁵⁴ Just this policy alone violates Article 31(2) of the Refugee Convention.

³⁵² *Id.* at art. 31(2).

³⁵³ UNHRC Detention Guidelines, *supra* note 313 at Guideline 3.

³⁵⁴ GOLASH-BOZA, *supra* note 2.

The Detention Guidelines express a clear preference against detaining asylum-seekers and refugees. According to the Detention Guidelines, international law requires there be a presumption against detention³⁵⁵ and that detention of asylum-seekers is “inherently undesirable.”³⁵⁶ In the United States, and contrary to international law, the general presumption is not against detention but rather, it is to detain asylum-seekers and refugees; this preference for detention is evidenced by the mandatory detention policies that keep asylum-seekers and refugees detained for months and even years. While the UNHRC Detention Guidelines clearly state that asylum-seekers should not be detained while their cases are pending, the United States typically keeps asylum-seekers in detention for the duration of the application and appeals process. Mandatory detention and detaining asylum-seekers through out the lengthy asylum application process violates the Refugee Convention and international law.

The UNHRC Detention Guidelines also outlines classes of asylum-seekers and refugees who should not be detained. According to the Guidelines, the elderly, pregnant women, children, people with mental and physical disabilities, survivors of trauma, victims of trafficking and lesbian, gay, bisexual or transgendered people should not be detained.³⁵⁷ If, in the rare instance where detention is necessary, the Detention Guidelines delineate clear requirements for the special treatment and consideration of these more vulnerable groups. Special treatment and consideration includes regular access to medical treatment, periodic assessment or review of mental/physical wellbeing, counseling and

³⁵⁵ UNHRC Detention Guidelines, *supra* note 313 at Guideline 3.

³⁵⁶ *Id.* at Guideline 2.

³⁵⁷ UNHRC Detention Guidelines, *supra* note 313 at Guideline 9.

other resources. Additionally, the state should pursue alternatives detention wherever possible for these groups, and should provide separate facilities for women and families.

U.S. detention centers do not comport with international law in this respect. Asylum-seekers are not only detained in prison-like settings, but they are also detained with convicted criminals. There is limited access to medical treatment and often no access to counseling. There are no resources for survivors of torture or trauma and the government does not pursue alternatives to detention for these groups, as it is directed to do under international law. Those with mental and physical disabilities are provided minimal treatment and not separated from the general detained population. The groups who should be afforded special treatment, according to international refugee law, are not afforded any special treatment or consideration in U.S. immigration detention centers.

3. United States Immigration Policies Violate Well-Established International Human Rights Laws

Not only does U.S. detention and deportation policy violate well-established human rights laws like the right to liberty, the right to be free from torture and CIDT, the right to family and several key provisions of the Refugee Convention, but the way the United States treats its immigrants more generally violates international law. Although the United States has signed and ratified the ICCPR, CAT, the Refugee Convention and although the United States is a member of the OAS and thus bound by IACHR decisions, the government continues to enact immigration policies that violate international law.

This section was by no means an exhaustive list of the ways U.S. immigration policies violate international law, nor did it detail all the international laws the United States is violating with its immigration policies. Rather, this section was meant to point

out key ways in which the United States is failing to comply with its obligations to respect the human rights of immigrants (including refugees and asylum-seekers) under international law. U.S. immigration policies are rife with human rights violations and are in direct conflict with fundamental human rights laws.

The contrast between U.S. obligations under international human rights law and U.S. immigration policy is not a new phenomenon, nor is the gap between human rights law and U.S. immigration detention and deportation practices is shrinking. In fact, U.S. immigration policies are increasingly punitive and discriminatory and are more in violation of international law today than they were even twenty years ago. Congress continues to expand the list of crimes that subject noncitizens to detention and deportation while it simultaneously reduces the avenues for relief from deportation and reduces the legal ways through which immigrants can enter the country. U.S. immigration policies, rather than converging with human rights laws, are continuing to further diverge from international law.

The legal community has advocated for immigrant rights by calling on the United States government to amend its immigration policies so that they are more in line with international laws. Unfortunately, the United States government continues to promote detention, deportation and increased militarization of the border as the primary means through which it regulates immigrants. Furthermore, immigration courts, the BIA, federal circuit courts and the Supreme Court, refuse to acknowledge international law in immigration proceedings. Immigrants cannot use international law to challenge their detention or their deportation. Immigrants cannot use international law to challenge the disparately adverse impact immigration policies have on immigrants of color. Simply put,

international law is not the solution to the human rights crisis facing immigrants in the United States.

The next chapter will explore international law from a different perspective. Instead of promoting international law as the key to challenging U.S. detention and deportation policies, the next chapter will illustrate how international law played a key role in the development of the current immigration system in the United States. Although the judiciary rarely uses international law today, the Court very frequently cited to international law to justify federal power over immigration regulation and to justify the denial of constitutional rights and protections to immigrants both inside and outside of the territorial United States. International law, instead of promoting immigrant human rights, actually facilitated the exclusion of immigrants from the protection of the Constitution.

CHAPTER VI

INTERNATIONAL LAW AND ITS ROLE IN THE DEVELOPMENT OF U.S. IMMIGRATION POLICY: POWERS INHERENT IN SOVEREIGNTY TO JUSTIFY FEDERAL PLENARY POWER OVER IMMIGRATION

1. Introduction

International human rights law has been hailed by those in the academic community as the solution to the rights crisis immigrants face in the United States today; however, international law is not a viable solution for immigrants currently facing mandatory detention and deportation. Although it is clear that the United States is violating international law in the way it treats immigrants and the way it enforces its immigration policies in general, the U.S. continues to detain and deport immigrants in a way that directly violates human rights laws. Even though the U.S. is in stark violation of their obligations under the ICCPR, CAT and the Refugee Convention, immigrants are unable to use international human rights laws in their immigration proceedings. Immigrants cannot challenge the validity of their detention or their impending deportation under these international laws and immigrants in the United States cannot use international law to challenge the way they are adversely impacted by immigration policies.

Rather than proclaim that international law is the answer to the rights crisis that immigrants face in the United States today, this section will instead discuss the role international law has played in *contributing* to the development of the current immigration system, where immigrants are virtually excluded from asserting

constitutional rights in immigration proceedings. The United States used international law to help create an immigration system where immigrants have few constitutional rights, where the federal government has almost exclusive control over immigrants and immigration policy and where the legislative and executive branches operate outside of the Constitution. Instead of using a traditional enumerated powers analysis to justify congressional and executive action in the realm of immigration regulation, the Court instead looked to international law and principles of sovereignty to not only justify expanding federal power over immigration regulation, but also to justify excluding immigrants from the constitutional protections afforded to U.S. citizens.

This section discusses the role international law played in the historical development of U.S. immigration policy and how the government used international law to take rights away from immigrants while simultaneously justifying expansive legislative and executive power over immigration policy. The government used international law and sovereignty very strategically; principles of sovereignty justified enhanced federal power over immigrants and those same principles also justified denying constitutional rights to immigrants in immigration proceedings.

Today, U.S. courts use international law sparingly. However, international law was a driving force in the early development of the federal plenary power over immigration. International laws relating to sovereignty and powers inherent in sovereignty led the Court to develop the plenary power doctrine. The plenary power doctrine still operates in full force and requires extreme judicial deference to any and all congressional and executive decisions regarding immigration policy. Under the plenary power doctrine, immigrants are excluded from most constitutional protections in

immigration proceedings and the denial of due process to immigrants facing detention and deportation was a direct result of the Court's use of international law in early immigration case law.

As the federal government was attempting to expand its authority to regulate immigration and to justify taking constitutional rights away from immigrants, the government was also working to expand its authority over Native American tribes and to justify taking rights away from Native Americans as individuals. The case law during this period in history, where the government was looking to expand federal power over immigration and over Native American territory, rationalized this expansion of power and denial of rights in much the same way. The Court used principles of sovereignty to justify asserting federal authority over immigrants and used those same international principles in order to justify taking rights and land away from Native Americans.

The Court also used principles of sovereignty to exclude both Native Americans and immigrants from asserting their constitutional rights against the government. The Court employed membership theories, in conjunction with international law, to deny Native Americans and immigrants constitutional protections; the Court determined that both groups were outside of the social contract between the government and the people, and therefore, neither group could assert claims against the government for violating their constitutional rights. The Court's decisions regarding Native American land rights and constitutional rights directly influenced the Court's decisions regarding immigrant rights. Conceptions of sovereignty found both in case law relating to Native Americans and immigration in general led directly to the development of an immigration system that is

“estranged from public law, where the Constitution operates in full force.”³⁵⁸ Unlike public law, immigration law has developed into a separate legal system, where immigrants have very few, if any constitutional rights.

This section will trace international law’s contribution to the creation of the federal plenary power over immigration. In exploring the historical roots of international law in immigration policy, this section will also explore how the plenary power doctrine and principles of sovereignty were used by the Court and the federal government to justify the denial of constitutional rights to Native Americans and how early nineteenth century Native American case law relates to immigration law and policy today. The government used international legal principles of sovereignty at a time when it was trying to exert power of groups of people it deemed “racially inferior,” “unassimilable,” a threat to national security and ultimately, to groups seen as the “other.” Because the Court used principles of sovereignty to expand federal power over “undesirable” immigrants and also over Native Americans, it is important explore the use of sovereignty in both Native American and immigration case law. The cases build on each other and treat both immigrants and Native Americans in much the same way: excluded from membership in the American polity and subject to absolute federal control.

2. Sovereignty Defined

Sovereignty can be defined as a set of international rules that dictate how a nation state can and should interact with other nation states.³⁵⁹ Sovereignty also defines a government as a nation state. There are certain powers inherent in sovereignty that all

³⁵⁸ Johnson, *supra* note 103.

³⁵⁹ Cleveland, *supra* note 30.

nation states possess, simply by their status. According to Emer de Vattel, an eighteenth-century philosopher and legal scholar famous for his work in international law, “all nations possess certain powers inherent in their existence as nations. These powers [are] defined, shared and recognized by all members of the family of nations and were essential to a nation’s identity as an independent state.”³⁶⁰ Vattel further explained that a nation’s “[s]overeign powers were not subject to any external or positive constraints, save the rights of other sovereigns under international law, and any effort to limit these powers would undermine the nation’s independence and equal status in the international community.”³⁶¹ Vattel’s work influenced many American legal scholars and jurists in the late nineteenth century.

Sovereignty can be an amorphous concept, however, in this context, sovereignty refers primarily to a “recognized set of international rules regarding the definition and authority of a nation-state and its interactions with other states.”³⁶² Sovereignty, according to its legal definition in international law, is an essential element of statehood.³⁶³ This definition of sovereignty widely influenced American jurisprudence in the area of immigration regulation and Native American relations, in particular Fifth Amendment Takings of Native American land. The Court repeatedly relied on Vattel and other international legal philosopher’s conceptions of sovereignty and the rights and

³⁶⁰ *Id.* (quoting EMER DE VATTEL, *THE LAW OF NATIONS* (Joseph Citty ed., T. & J.W. Johnson & Co. 1876) (1758)).

³⁶¹ EMER DE VATTEL, *THE LAW OF NATIONS* (Joseph Citty ed., T. & J.W. Johnson & Co. 1876) (1758).

³⁶² Cleveland, *supra* note 30 at 107.

³⁶³ ANNE ORFORD, *A jurisprudence of the limit in INTERNATIONAL LAW AND ITS OTHERS* 1, 7 (Anne Orford ed. Cambridge Univ. Press 2006).

powers inherent in sovereignty to define federal power over immigrants and Native Americans in the nineteenth century.

According to international law, a nation has the sovereign power to exclude foreigners from entering the country and it also has power over foreigners already admitted into the country. Both of these powers derive from the powers inherent in sovereignty. The nation, as a sovereign entity, has the power to exclude, as well as the power to defend itself from threats to security and it has the power to enforce and uphold its domestic laws. Through the power to exclude immigrants, the nation is exercising its inherent powers of exclusion and power to defend itself; a nation can keep those it deems dangerous or a threat to national safety out. A nation's power over immigrants already admitted into the country involves the power to defend and the power to enforce or uphold domestic laws. International law dictates that a nation has the power to expel those immigrants who have broken a law or who are in some way a threat to security.

Although principles of sovereignty provide that nations have the power to protect themselves from immigrants seeking to enter, that power is not absolute; the nation cannot simply treat immigrants in any way it sees fit. According to Vattel, the sovereign “cannot, without particular and important reasons, refuse permission, either to pass through or reside in the country, to foreigners who desire it for lawful purposes.”³⁶⁴ In other words, in order to exclude an immigrant from entry, the sovereign must have a valid and lawful reason for denying entry. Vattel also expressed the sovereign state's obligation to immigrants it admits; a nation, upon admitting immigrants, “engages to protect them as his own subjects, and to afford them perfect security, as far as depends on

³⁶⁴ VATTEL, *supra* note 316.

him.”³⁶⁵ International law thus requires the sovereign to protect admitted immigrants and requires that exclusion of immigrants be based on particular and substantial reasons.³⁶⁶

3. Social Contract and Membership Theories

Theories of membership and social contract were used in conjunction with international laws of sovereignty to restrict the rights of Native Americans and immigrants and ultimately led to the development of the plenary power doctrine and the immigration laws in place today. Membership theory or social contract theory is still used as a means to deny constitutional protections to certain groups of people who are not considered part of the “national community.” It is thus important to analyze how membership theories played a role in the development of the plenary power doctrine and ultimately how conceptions of membership were used to deny rights to immigrants and Native Americans.

On a basic level, social contract theory or membership theory considers “whether an individual is one intended to be protected by the Constitution.”³⁶⁷ It emphasizes a contractual relationship between the federal government and the people of the United States. The people of the United States consent to be governed and the national government agrees to uphold the people’s individual rights as laid out by the Constitution. In other words, the Constitution is a contract between the national government and the people, whereby the people consent to be governed by the national government, so long as the national government does not infringe upon individual

³⁶⁵ *Id.*

³⁶⁶ Cleveland, *supra* note 30 at 110.

³⁶⁷ *Id.*

freedoms explicitly defined in the Constitution. If an individual is a party to the contract, he is an intended beneficiary of the contract and can assert his constitutional rights against the government. However, if an individual is not a party to the constitutional contract, the government is free to act outside of the contract's restraints (can infringe upon individual constitutional rights without repercussions).³⁶⁸

Membership theory attempts to define who is a party to the contract. The language of the Constitution refers to "we the people." However, that particular phrase is not explicitly defined and thus "we the people" can be defined broadly or very narrowly. For example, "we the people" could be broadly defined as including any person who is physically present within the territorial jurisdiction of the United States. That would mean that any individual, regardless of citizenship, who is physically within the United States, is a party to the social contract and the government is constrained by the Constitution. Conversely, "we the people" could be narrowly defined to include only citizens physically present within the territorial jurisdiction of the United States. That would mean that any noncitizen is outside of the social contract and is not an intended beneficiary of the Constitutional contract. Thus, the government is not restricted by the Constitution in its treatment of immigrants and immigrants, because they are not beneficiaries, are not entitled to claim constitutional protects that other beneficiaries to the Constitution can assert.

Social contract and membership theories played a central role the development of U.S. immigration law and policy. In the late-nineteenth century, when the Court was establishing the limits of the federal plenary power, membership was defined narrowly. During this period, "social contract approaches resolved the question of membership in

³⁶⁸ *Id.*

favor of a white, male, Protestant vision of the national identity. Entitlement to constitutional protection was determined on the basis of the ascribed characteristics of race, gender, nationality, and religion.”³⁶⁹ Because Anglo-Saxon, Christian heritage was the ideal for membership in the American community, membership was used to deny constitutional protections to “non-white” immigrants and Native Americans. The denial of rights was justified because these groups were not intended beneficiaries of the social contract; they lacked membership and therefore, did not have the same rights as members.³⁷⁰

Native Americans and immigrants were denied access to constitutional protections because they were “outside” of the U.S. Although physically present within the territorial United States, Native American tribes were sovereign and individual Native Americans, therefore, owed their allegiance to a sovereign other than the United States. Similarly, immigrants were excluded from membership because of their connections to other sovereign nations. For those immigrants seeking to enter the United States, they faced an additional hurdle to membership because they were not physically within the country. By defining immigrants and Native Americans as non-members or “outside” whether literally or figuratively, the government was better able to justify increasing federal control over these two groups. And because both groups were not members of the United States, they had no rights to challenge the government’s authority through the Constitution.

Racism and xenophobia were also central to the Court’s definition of who was excluded from membership in the national community. In early nineteenth century case

³⁶⁹ *Id.* at 21.

³⁷⁰ *Id.*

law, the Court was very open with its racist and discriminatory opinions of Native Americans and immigrants (of color). Both were considered by the government and much of the predominantly white American public to be “barbaric,” “uncivilized,” “unassimilable,” a “danger” to national security and innately “inferior.” Nativism and racial discrimination were prevalent in court opinions, congressional debates and within the public sphere generally. Laws enacted during this time were openly justified by racism and ultimately upheld by the courts. The overt racism and xenophobia during this period directly influenced the membership debate over whether to allow Native Americans and immigrants to become part of the social contract. Because Native Americans and immigrants were considered racially inferior and because both groups were considered to be “outside” of the sovereign United States, both groups were denied membership in the American polity and therefore denied vital constitutional protections.

4. From Limited, Enumerated Powers to Inherent Plenary Power: Using International Law and Conceptions of Sovereignty to Justify Federal Plenary Power

When the Framers drafted the Constitution, they envisioned a government that was shared and divided.³⁷¹ In order to prevent authoritarian control, power was divided between the federal government, the states and the people. To keep the federal government’s power in check, its powers were not only divided among three branches, the judicial, legislative and executive, but its powers were also limited to those powers expressly granted to it by the Constitution.³⁷² The Court in *McCulloch v. Maryland*

³⁷¹ *Id.*

³⁷² *Id.*

explained these constraints on the national government's power as limited and enumerated; the government may only exercise the powers explicitly granted to it by the Constitution and only "those implied powers 'necessary and proper' to the exercise of the delegated powers."³⁷³ All powers not expressly delegated by the Constitution to the federal government were powers reserved to the states and to the people of the United States.³⁷⁴

The perception of sovereignty, at the time of framing, was collective; sovereignty was divided and shared between the three branches of the federal government, the states, and the people.³⁷⁵ In giving the federal government authority to act only through the powers expressly granted to it by the Constitution and only those implied powers necessary and proper to exercise the powers expressly delegated to the government, the framers intended to limit the federal government's power.³⁷⁶ This vision of collective sovereignty faltered as interactions between the U.S. and other foreign nations became more frequent. The Constitution was largely silent as to the specific powers the federal government had with regard to foreign relations.³⁷⁷ Because the government could only act where the Constitution authorized government action, the federal government looked to sources outside of the Constitution to justify its actions in the realm of foreign relations.

³⁷³ *Id.* (quoting *McCulloch v. Maryland* 17 U.S. 316 (1819)).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

The Court resorted to international legal principles of sovereignty as a way to avoid the question of whether it was acting within the Constitution's boundaries. Over time, the Court justified increasing the federal government's power over what it labeled "foreign" or "external" relations through incorporating customary international law into its constitutional analyses.³⁷⁸ Sovereignty was used as a way to rationalize giving more power to the federal government, power that the language of the Constitution did not explicitly grant to the government. The original vision of the national government as one of enumerated powers evolved into a vision of a national government that, because of its status as a sovereign nation state, had absolute authority in all of its external relations.³⁷⁹ When the government acted in the international sphere, it acted through powers outside of those granted to it in the Constitution itself.

International customary law and principles of sovereignty as justification for expanding federal power beyond the Constitution directly influenced U.S. immigration policy. The Court used international legal principles of sovereignty to not only enable the national government to act in the international realm, but also as a way to limit the Constitution's applicability to individuals within the nation's borders.³⁸⁰ Native Americans and immigrants were severely and negatively impacted by the Court's willingness to resort to international conceptions of powers inherent in sovereignty as the justification for government action.³⁸¹ International law was used to justify taking Native American land and denying citizenship to Native Americans. International law was also

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

used to justify excluding and expelling “undesirable” immigrants (a term which applied only to immigrants of color from developing nations). This is significant because both of these groups were considered racially, culturally and religiously inferior and both groups were denied citizenship and thus denied the constitutional protections afforded to citizens.

The Court’s willingness to use international legal principles of sovereignty to justify disparate treatment of Native Americans and “undesirable” immigrants was greatly influenced by racist and nativist perceptions of Native Americans and Asian immigrants. Because both of these groups were considered culturally different, “unassimilable,” and a threat to American Anglo-Saxon culture, the Court was less concerned with their individual constitutional rights.³⁸² Because the Court was less concerned with protecting Native American and immigrant rights, the Court rationalized a huge expansion of federal power in the realm of Native American relations and immigration law. That rationalization led to the current immigration system and continues to influence the further denial of immigrant rights in the United States.

The Court’s willingness to rely on international customary law in its justification of granting the federal government extra-constitutional power led to the development of the plenary power doctrine.³⁸³ The plenary power doctrine has greatly influenced U.S. immigration law and has justified, and continues to justify, the denial of constitutional

³⁸² *Id.*

³⁸³ Also referred to as the inherent powers doctrine because unlike the traditional enumerated powers doctrine in constitutional jurisprudence, which limited the federal government’s ability to act where the Constitution was silent, the plenary power doctrine allowed the federal government to act where the Constitution was silent if it were acting in the realm of foreign or external relations. Government action outside of the domestic or internal realm was an *inherent* power of the federal government because the U.S. government was a sovereign nation. Powers inherent in sovereignty, and not the Constitution, governed U.S. power in international relations. *Id.*

protections to immigrants. The plenary power doctrine gives the legislative and executive branches of the federal government ultimate authority to enact immigration laws. The doctrine represents a stark contrast with the enumerated powers doctrine, articulated by the Court in *McCulloch v. Maryland* in 1819, because it allows the federal government to act where the Constitution is silent. Although the doctrine developed as a way to justify government action with respect to international or foreign affairs, the doctrine was ultimately used to deny constitutional protections to certain groups (namely immigrants and Native Americans) within the borders of the U.S.

By 1936, the Court had fully developed the plenary power doctrine. In *United States v. Curtiss-Wright Export Corp.*, the Court articulated, for the first time, the three key elements of the doctrine: First, the federal government has extra-constitutional powers that derive, not from the Constitution, but rather, from international law; second, because these powers are extra-constitutional, there is relatively little constitutional constraint; and third, the courts have a limited ability to review “legislative or executive decisions that extend from that power.”³⁸⁴ The Court used a theory of inherent powers, derived from international legal conceptions of sovereignty and sovereign power, to divide the Constitution into two parts: internal and external powers.³⁸⁵ The Court applied the traditional enumerated powers doctrine only to internal, domestic relations, while it found that external powers were extra-constitutional – meaning not limited by the traditional restraints on federal power.³⁸⁶ Instead, limits on federal power when the

³⁸⁴ Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, (2004).

³⁸⁵ Cleveland, *supra* note 30 at 135.

³⁸⁶ *Id.*

government exercised its external powers came from “concepts of sovereignty shared, recognized and defined by the community of nations. The traditional enumerated powers analysis applie[d] only to U.S. domestic, internal relations.”³⁸⁷

The plenary power doctrine and its three key components: extra-constitutional source of government power, absence of substantive constitutional limitations on that power, and judicial deference to the executive or legislative branches, was derived from early nineteenth century case law.³⁸⁸ The development of this doctrine demonstrates how the United States used international legal principles of sovereignty, specifically, well-established powers like the sovereign power to exclude, the sovereign power to defend and the sovereign power to enforce domestic law. The Court’s use of sovereignty and international law demonstrate how international law helped to create the current immigration system and helps to explain why individuals facing deportation have few constitutional rights.

Not only did the Court resort to sovereignty as a means to justify denying constitutional rights to Native Americans and immigrants but it also used principles of membership to limit the ability of Native Americans and immigrants to challenge laws as unconstitutional.³⁸⁹ Theories of membership were combined with international principles of sovereignty to exclude Native Americans and immigrants from the American polity and thus exclude them from the scope of the Constitution. The Court “described both Native Americans and immigrants as aberrant states, existing within but apart from the

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

nation.”³⁹⁰ The Court, in developing the plenary power doctrine, also relied on membership theory to justify denying constitutional rights to immigrants and Native Americans. Thus international rules regarding sovereignty and theories of membership worked in conjunction to justify unbridled federal power over Native Americans and immigrants and to justify removing Native Americans and immigrants from the reach of the Constitution.³⁹¹

5. Principles of Sovereignty and Membership Theory to Justify Denying Rights to Native Americans

Early nineteenth-century case law established that federal control over Native Americans came from inherent powers of sovereignty as well as Native Americans’ “inferior” status.³⁹² Because Native Americans were excluded from the American polity due to their status as a “sovereign” entity, the Court justified expansive federal power over Native Americans through the treaty power, war power and power to regulate interstate commerce.³⁹³ Because Native American tribes were equated with “foreign states” and because the Constitution explicitly granted the federal government power to act through the three powers of war, treaty and commerce, the federal government had large control over Native American tribes as an entity.³⁹⁴ However, the Constitution was

³⁹⁰ Stumpf, *supra* note 384.

³⁹¹ Cleveland, *supra* note 30.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

silent as to Native Americans as individuals – did Native Americans have individual constitutional rights?³⁹⁵

The Court denied Native Americans membership in the American polity due to their status as “savage” or “barbaric” and because of their “inferiority” and inability to assimilate.³⁹⁶ Because of their perceived inferior status, Native Americans were openly denied rights that “civilized” white citizens held, like the right to own property and the right to vote.³⁹⁷ The Court justified this denial of rights through international legal principles of sovereignty, and the sovereign right deriving from discovery.³⁹⁸ The Court also found that Native Americans were an “incomplete” sovereign; the tribes were heavily dependent on the U.S. government and therefore were treated as wards of the state. According the Court, as incomplete sovereigns, dependent on the United States government, Native American tribes were subject to greater federal control. Rather than look to the war, treaty and commerce power to justify denying property rights to Native Americans, the federal government used principles of sovereignty under international law as a justification for expanding federal power over Native Americans as tribes and as individuals.³⁹⁹

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

³⁹⁹ *Cleveland*, *supra* note 30.

Interestingly, although the Court determined that Native American tribes were sovereign, the Court later denied Native American tribes the right to sue in U.S. courts.⁴⁰⁰ The Court, in the *Cherokee Cases*, denied the Cherokee Nation the right to sue in federal court, and found that even though the tribe “had the character of a state, the tribe was not a foreign state” and thus not subject to U.S. jurisdiction.⁴⁰¹ This decision, which explicitly denied Native tribes the status of a “foreign state” within the meaning of Article III of the Constitution, was based on the premise that Native Americans were dependent on the government. Justice Marshall explained the relationship between Native Americans and the government as “that of a ward to its guardian.”⁴⁰² Native Americans were sovereign, but they were an incomplete sovereign due to their dependence on the U.S. government. This dependence justified the “stronger” sovereign’s power over the “weaker” sovereign. This distinction put Native Americans in a state of limbo – they were neither citizens of the United States, nor were they a separate sovereign, entitled to all the rights inherent in sovereignty under international law.⁴⁰³

The Court further excluded individual Native Americans from Constitutional protections in *Elk v. Wilkins*. In that case, the Court interpreted the Fourteenth Amendment, which granted citizenship to all persons born in the United States, as applying only to those persons who, at the time they were born, were completely subject

⁴⁰⁰ *Id.* at 30.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

to U.S. jurisdiction.⁴⁰⁴ As the Court had previously held that Native American tribes were sovereigns (albeit “incomplete” ones), Native Americans were not “completely” subject to U.S. jurisdiction at birth.⁴⁰⁵ According to the Court, although Native American tribes were physically within the jurisdiction of the United States, Native Americans born in the United States did not qualify for citizenship under the Fourteenth Amendment because they were “distinct political communities.”⁴⁰⁶ The Court heavily emphasized Native Americans’ sovereign and autonomous status in order to justify denying birthright citizenship.⁴⁰⁷

The decisions in *McIntosh*, the later *Cherokee cases*, and *Elk v. Wilkins* relied on principles of sovereignty to both justify federal power over Native Americans, while at the same time, justifying the denial of constitutional rights to Native Americans. In *United States v. Kagama*, the Court further excluded Native Americans from the protection of the Constitution and further expanded the federal government’s power over Native Americans. The Court, in *Kagama*, established the first prong of the plenary power doctrine – the government, as a sovereign nation, has powers inherent in sovereignty; and therefore, “Congress has inherent sovereign power to govern the [Native American] territories.”⁴⁰⁸ According to the Court, these federal powers originate, not from

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Elk v. Wilkins*, 112 U.S. 94 (1884).

⁴⁰⁷ Cleveland, *supra* note 30.

⁴⁰⁸ *Id.*

the powers granted to the federal government by the Constitution, but from powers inherent in the United States' status as a sovereign nation.

In *Cherokee Nation v. Hitchcock*, the Court expanded federal plenary power over Native Americans in *Kagama*, and held that Congress's exercise of that power was not subject to review by the courts.⁴⁰⁹ This extension represents the third prong of the plenary power doctrine – limited judicial review of legislative and executive decisions. According to the Court, “[t]he power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and its not one for the courts.”⁴¹⁰ The Court, in classifying federal power over Native American land rights as administrative and political in nature, justified the federal government's denial of land rights to Native Americans and at the same time, established limited judicial review of those decisions.

After *Kagama* and *Cherokee Nation*, it was well-established that Congress and the executive held broad powers over Native American affairs; those powers originated not from the Constitution, but rather, from international legal principles of sovereignty, and those powers were subject to minimal, if any judicial review. While the Court did recognize some constitutional constraints on legislative power over Native Americans, the Court held that “Congress has ‘wide discretion’ in determining what was reasonably essential, and ‘its action, unless purely arbitrary, must be accepted and given full effect

⁴⁰⁹ *Id.*

⁴¹⁰ *United States v. Kagama*, 118 U.S. 375 (1886).

by the courts.”⁴¹¹ So long as Congress’s exercise of its power “does not go beyond what is reasonably essential” to protect the Native Americans and is “not purely arbitrary, but founded on some reasonable basis” Congress has authority to act and those actions will be given wide judicial deference.⁴¹²

The Court’s decisions regarding Native Americans and congressional power over Native American affairs influenced the development of immigration law and policy. In the cases discussed above, the Court began to use international law to justify extensive federal control over a group of people who were labeled as “racially inferior,” “barbaric,” “unassimilable,” and beholden to a sovereign other than the United States. This case law developed in a time where immigrants were also experiencing discrimination and a denial of their basic constitutional and human rights. The Court, in later cases concerning immigrants, built on the principles outlined in *Kagama, Elk v. Wilkins*, and *Cherokee Nation* to justify excluding immigrants from constitutional protection and to justify expanding federal power, with little judicial deference, over immigration regulations. In both the Native American case law and immigration case law, the court used international legal principles of sovereignty to exclude immigrants and Native Americans from membership in the American polity, and thus from vital constitutional protections.

⁴¹¹ Perrin v. United States, 444 U.S. 37 (1979).

⁴¹² *Id.*

6. Principles of Sovereignty and Membership Theory to Justify Denying Rights to Immigrants

International law and principles of sovereignty and sovereign power were prominent in nineteenth century case law regarding immigration and the federal immigration power.⁴¹³ The Court “ultimately took the position that international law gave nations absolute power to exclude aliens seeking admission and to deport aliens no longer deemed admissible.”⁴¹⁴ This reliance on extra-constitutional, inherent sovereign power largely explains why immigrants today do not have constitutional protections in immigration proceedings. The federal government’s near-absolute control over immigration policy, and the judicial deference through which the Court analyzes immigration regulations, are a direct result of the Court’s use of international law in early nineteenth century immigration cases.

The Constitution is relatively silent as to whether the federal government has the power to regulate immigration. Although the Naturalization Clause references Congress’s authority to “establish a uniform rule of Naturalization,” this clause has been understood to refer to issues of citizenship, not to the admission or expulsion of noncitizens.⁴¹⁵ Similarly, the Migration Clause, although it suggests that Congress has the power to prohibit migration of people, it does not explicitly refer to federal authority to regulate migration; most understand the Migration Clause to refer to the regulation of the slave

⁴¹³ Cleveland, *supra* note 30.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

trade only.⁴¹⁶ The foreign commerce, treaty and war powers are the only other federal powers, explicitly referenced in the Constitution, which could be extended to immigration regulation more broadly.⁴¹⁷ These three powers: the war, treaty and commerce power, were initially used to justify early federal regulation of immigration. Because immigration was tied to labor, regulating immigration fell under the power to regulate foreign commerce. The Constitution's silence as to the federal immigration power is ultimately what led the Court to reach to international law in order to justify federal control over the admission and expulsion of immigrants. This use of international law, and sovereignty in particular, had a profound impact on immigrant rights and forms the foundation of current U.S. immigration policies.

In the early stages of federal immigration regulation, the commerce power and the taxing power were the primary justifications for federal power over immigration. For example, between 1875 and 1886, the Court consistently held that the federal government had the authority to impose head taxes on newly arriving immigrants and that the federal government also had the power to inspect immigrants upon entry.⁴¹⁸ During this time, the Court used an enumerated powers analysis, locating the federal power immigration in federal power to regulate foreign commerce. In upholding the federal government's authority to impose head taxes on immigrants and in denying the states that authority, the Court relied only on the Constitution.⁴¹⁹

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

It wasn't until *Chae Chan Ping v. United States* that the Court began to look outside of the Constitution to locate the federal government's power to exclude immigrants from entering the country. Chae Chan Ping was not just an immigrant seeking entry, but he was seeking re-entry; he had already been admitted to the United States and had left the country only briefly. *Chae Chan Ping* thus involved more than the government's power to tax or inspect immigrants upon entry; the case involved the government's power to exclude. In order to justify excluding Chae Chan Ping, the Court would need to find a new rationale for excluding returning immigrants.

In the government's brief, the Solicitor General used international law to argue that *Chae Chan Ping* should be excluded from reentry. The government quoted Vattel in its argument, suggesting that international law allowed the government, as a sovereign nation, to exclude immigrants outside of the country from entering the country.⁴²⁰ According to the government, because Chae Chan Ping was outside of the territorial United States, the government, as a sovereign nation and endowed with all the rights of sovereignty, had the ultimate power to exclude him from entry.⁴²¹ The government further argued that the right to exclude "arose from government collective powers over foreign relations, which embraced the full sovereign powers enjoyed by independent states."⁴²²

Ultimately, the Court sided with the government, invoking international principles of sovereignty in order to justify the government's exclusion of Chae Chan Ping.

According to the Court, international law and powers inherent in sovereignty allow a

⁴²⁰ *Id.* at 105.

⁴²¹ *Id.*

⁴²² *Id.* at 129.

nation the sole authority to prohibit anyone from entering its borders.⁴²³ In the opinion,

Justice Field wrote:

[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce...are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of civilized nations.⁴²⁴

According to Justice Field, the federal government's immigration power was a central component of sovereignty, a power held by all sovereign nations:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one...

The Court, thus located the government's immigration power, not in the Constitution itself, but in international legal principles of sovereignty. As in *Kagama*, the Court found this federal power to be inherent in international law and inherent in sovereignty.⁴²⁵ Further, the Court explained that this power, inherent in sovereignty, was to be given limited judicial review. According to the Court, because the power to exclude immigrants was a political one, Congress's exercise of that power was "conclusive upon the judiciary."⁴²⁶

⁴²³ *Id.* at 130.

⁴²⁴ *Chae Chan Ping*, 130 U.S. at 604, 606.

⁴²⁵ Cleveland, *supra* note 30.

⁴²⁶ *Chae Chan Ping*, *supra* note 424 at 606.

The government...is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers...

Not only did the Court reference the sovereign right to exclude people at the border but it also referenced a nation's sovereign right to defend itself and the sovereign right to self-preservation.⁴²⁷ Justice Field explained:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth...If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.⁴²⁸

Overt racism and xenophobia were key components of the Court's decision to deny Chae Chan Ping reentry. Because of the intense anti-immigrant sentiment, directly primarily at the Chinese and other Asian immigrants, the Court looked to international law in order to justify exclusion of Chinese and Asian immigrants. Although the Court had used the commerce clause to justify exclusion of Asian immigrants up until this point, the power to exclude Chae Chan Ping and others like him was too broad to be justified by the commerce clause alone.⁴²⁹ Thus, the Court reached to principles of

⁴²⁷ Cleveland, *supra* note 30.

⁴²⁸ Chae Chan Ping, *supra* note 424 at 606.

⁴²⁹ Cleveland, *supra* note 30 at 132.

international law and sovereignty to exercise a power that was beyond the scope of the Constitution.⁴³⁰

Although the Court concluded that sovereign powers, derived from international law, allowed the federal government to exclude immigrants, the Court did not explain how the enumerated powers doctrine limited this federal power, or whether it even applied.⁴³¹ The Court, in choosing not to rely the Constitution but instead on international law, radically changed the way the Court approached federal immigration regulation.⁴³² In the cases that follow *Chae Chan Ping*, the Court continues to use international law and sovereignty as a justification for expanding federal power over immigration regulation. The Court repeatedly references the sovereign right to exclude and the right to defend as the key powers inherent in sovereignty that justify exclusion of immigrants.

In *Nishimura Ekiu v. United States*, the Court extended the federal government's power over immigration regulation and further eroded immigrant rights. Unlike *Chae Chan Ping*, *Nishimura Ekiu* involved an immigrant seeking entry into the United States for the first time. Under the Immigration Act of 1891, immigration officials had near-unlimited authority to deny an immigrant entry and that decision was to be final, subject to only limited administrative judicial review.⁴³³ *Nishimura* was denied entry and she challenged the constitutionality of the Act.⁴³⁴ Interestingly, in challenging the

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 134.

⁴³³ *Id.*

⁴³⁴ *Id.*

constitutionality of the Act, Nishimura did not challenge Congress's authority to exclude, but rather, she challenged whether deference to the executive and limited judicial review of the decision to exclude was consistent with due process.⁴³⁵

As in *Chae Chan Ping*, the government's brief cited Vattel and the government argued that the federal government, as a sovereign nation, had the power to exclude.⁴³⁶ It also argued that because Nishimura was physically outside of the territorial United States, she was not entitled to due process under the Constitution.⁴³⁷ The government, in essence, was arguing that because Nishimura was physically outside of the U.S., she was not entitled to constitutional due process protections. She was not a member to the contract, and as such, she could not claim its benefits. The Court agreed, stating:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe...In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations...⁴³⁸

In addition to relying on powers inherent in sovereignty as the sole justification for excluding Nishimura and denying the traditional Constitutional due process protections to immigrants seeking entry at the border, the Court again reaffirmed the extreme level of deference the judiciary should give to Congress and the executive:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659.

to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, *the decisions of the executive [and of Congress], are due process of law.*⁴³⁹

The Court had thus enunciated all three prongs of the plenary power doctrine: the source of the government's power to regulate immigration was inherent and came from international law, there would be very limited judicial review of congressional and executive exercise of this inherent power, and individual due process protections would not limit this power.⁴⁴⁰ The federal government's power to regulate immigration and to exclude immigrants was no longer constrained by the Constitution and the specific rights delineated therein. The Court rationalized the government's control over immigration through international law and rights inherent in sovereignty. The government's power is not limited by individual due process rights, nor are Congress's or the executive's decisions subject to strict judicial scrutiny. As the Court explained, "the decisions of the executive [and Congress] are due process of law."⁴⁴¹

In *Fong Yue Ting v. United States*, the Court used international law to extend the denial of constitutional due process protections to an immigrant legally and physically present in the United States. While *Nishimura Ekiu* involved an immigrant outside of the territorial United States, seeking entry into the country for the first time, *Fong Yue Ting* was an immigrant who was lawfully present in the country as a lawful resident.⁴⁴² And unlike *Chae Chan Ping*, who the court treated as an immigrant seeking entry, even though

⁴³⁹ *Id.* at 660 (emphasis added).

⁴⁴⁰ *Cleveland*, *supra* note 30 at 132.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

he had previously been admitted to the United States, Fong Yue Ting was both physically present and legally admitted. However, the Court was able to justify denying Nishimura and Chae Chan Ping entry because it held that Congress and the executive were authorized to exclude them based on powers inherent in sovereignty. But *Fong Yue Ting* presented a different issue: whether Congress could expel an immigrant who was not only physically present within U.S. territory, but who had also been legally admitted as a resident.

Nonetheless, the Court extended the inherent powers analysis to Fong Yue Ting, stating that “the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.”⁴⁴³ In the opinion, Justice Gray pointed solely to international law and powers inherent in sovereignty as the basis for this broad federal power.⁴⁴⁴ According to the Court, international law was the sole location of this power; the federal government’s immigration power was not located in the Constitution, nor was any attempt made to reference the Constitution’s grant of this power to the government.⁴⁴⁵ Because the source of this power was derived from international law and principles of sovereignty, the government’s immigration power was subject to very limited judicial review and superseded individual rights to due process.⁴⁴⁶

⁴⁴³ *Fong Yue Ting*, *supra* note 69.

⁴⁴⁴ *Cleveland*, *supra* note 30.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

CHAPTER VII

FINAL THOUGHTS AND CONSIDERATIONS

1. Initial Thoughts

Throughout the process of researching and writing this thesis, I have struggled with the rigidity of immigration law and the near-absolute denial of human rights to immigrants in the United States. The racist foundations of U.S. immigration law have led to a system where the executive and legislative branches have complete control over the lives of immigrants. The federal government rationalizes its harsh treatment of immigrants by claiming that current policies protect the American people and American way of life from criminals and terrorists. The government claims its treatment of immigrants and denial of rights is legitimate and necessary to protect national security and the public. The government claims its immigration policies have nothing to do with race and everything to do with security and upholding the rule of law.

In reality, U.S. immigration policies further the racist tendencies of the ‘white’ American public. Although current immigration policies are facially race neutral, the laws are designed to oppress immigrants of color – primarily immigrants from Latin America and those of Muslim or Arab descent. Even though Congress, the executive, political leaders and many in the American public claim that stricter immigration laws are not racially driven, the ‘crackdown’ on ‘illegal’ immigration targets immigrants of color. Mexico and Latin America are repeatedly referenced in the ‘illegal immigration’ debate and proponents of stricter immigration enforcement intend to target Arab and Muslim immigrants because of their ‘ties’ to terrorism. Intense racial discrimination underlies the

immigration debate in the United States, even though proponents of strict immigration policies pretend their aims are not racially motivated.

I chose to write a thesis on immigrant rights in the United States because I believe that immigrants are more powerless than most other disadvantaged groups. Immigrants in the United States have fewer civil and political rights than U.S. citizens and immigrants also have fewer economic and social rights than U.S. citizens. Immigrants who have not naturalized cannot vote in federal elections and therefore have little say in the laws the government passes or in who is elected to represent them. Many immigrants are denied access to social services like Medicare, Medicaid, or Social Security because of their status. Additionally, many immigrants' movements are restricted; they must be physically present within the United States for certain, very delineated time periods in order to keep their legal status. These requirements prohibit immigrants from leaving the country for extended periods to visit their families and their native countries.

Immigrants who are undocumented face even more difficulties because of their 'illegal' status. Undocumented immigrants are completely powerless in American society. Not only do they lack the power to vote and the ability to apply for social services, but undocumented immigrants have no voice at all. Undocumented immigrants live in the shadows of society: they have no rights, no ability to protect themselves, because they aren't 'supposed' to be here. They live in constant fear that they will be reported to immigration authorities and they are often the scapegoats for society's economic and social problems. Anti-immigrant sentiment is particularly virulent during times of economic strife and undocumented immigrants are easy targets because they have no ability to defend themselves.

Without the ability to vote or the ability to voice their opinions in any meaningful way, immigrants, both documented and undocumented, are forced to abide by the laws that the rest of society dictates. Immigrants have no ability to influence immigration laws or immigration policy, and must simply abide by the laws that Congress and the executive enact. Not only do immigrants have virtually no voice in immigration law and policy, but the historical development of immigration policy has led to a body of law that is nearly exempt from judicial discretion. Immigrants cannot exert their limited political power to fight for their constitutional rights in the context of immigration law, nor can the judiciary analyze immigration laws under a traditional constitutional rights analysis. The system today prevents immigrants from challenging the constitutionality of immigration laws and prevents the courts from overturning immigration laws because of their discriminatory or racist underpinnings.

Furthermore, the sharp rise in detention and deportation of immigrants has profound impacts, not only for those individuals who face detention and permanent banishment, but also for their families. The federal government uses detention and deportation to enforce and regulate immigration into the United States. The focus on crime and punishment, combined with the focus on militarization of the border, has created a system in which immigrants have few rights and human rights abuses are prevalent. The way immigrants are treated in the United States is a major cause for concern. Militarization of the border has created a human rights crisis: immigrants are literally dying as they try to cross the border into the United States. Immigrants in immigration detention face severe abuse and the majority of those in detention do not

need to be there. Deportation separates families and leads to a repetitive cycle of unauthorized entry and re-entry.

As the immigration policies in the United States are so rigid and so immune from judicial discretion, immigration scholars and legal advocates look outside U.S. domestic law to international laws in their attempt to bring constitutional or human rights to immigrants in the United States. Much of the initial research I found centered primarily on the international laws that apply to immigrant rights and in particular, the conventions the U.S. has signed and ratified. Many scholars also pointed to other international conventions such as the CRC or the UN Convention on the Rights of Migrant Workers and their Families in their analysis of international law and U.S. immigration policy. Regardless of whether the focus was solely on international conventions the U.S. has signed and ratified or whether it was on international human rights laws more broadly, the majority of the literature laid out the international laws and pointed to the many ways in which U.S. immigration policies violated those laws.

The consensus in the literature was clear: U.S. immigration policies are in direct violation of fundamental international human rights laws. Even more importantly, the United States is in direct violation of several treaties that it has signed and ratified, including the Refugee Convention, which it not only signed and ratified, but also signed into domestic law. The U.S. is violating the right to liberty and the right to be free from arbitrary detention, the right to be free from torture and CIDT, the right to family and the right to privacy, and several fundamental refugee rights. This list simply refers to the violations of treaties that the U.S. has signed and ratified. International legal scholars

have pointed to many other violations of fundamental rights under treaties that the U.S. has not signed or ratified.

Studying international law, especially in the context of how international law can or does influence U.S. jurisprudence, is often frustrating. The United States does not give much weight to international law, unless it can use international law to its advantage. Although the U.S. has signed and ratified international treaties, it rarely incorporates those laws into its domestic law and policy. Rather, when the United States signs and ratifies a treaty, it often declares the treaty non-self-executing, which means that should any provision of the treaty conflict with U.S. domestic law, U.S. domestic law trumps international law. This process, quite obviously, renders international laws relatively meaningless in the context of the domestic judicial system. Where international human rights laws conflict with domestic laws, domestic laws are the ultimate authority.

This refusal to give weight to international law, especially international human rights laws, makes it difficult for individuals or advocates to argue in court that the United States should comport with its obligations under international law. Where a treaty has been declared non-self-executing, U.S. courts do not have to analyze domestic laws through the lens of international law. Such is the case with domestic immigration laws and international human rights laws that pertain to immigrant rights. Where U.S. immigration policies conflict with human rights under treaties like the ICCPR or CAT, U.S. domestic law reigns supreme. U.S. immigration policies, in particular detention and deportation policies, directly conflict with U.S. obligations under international law. However, as the majority of those treaties are not self-executing, domestic laws are the

sole source of authority in immigration proceedings and any proceedings that challenge the constitutionality of particular provisions of immigration law.

2. Incorporating Attorney Perspectives into Discussions of International Law and U.S. Immigration Law

Although the immigration literature is clear that U.S. immigration policies violate international law, I found it lacked a very valuable perspective: immigration attorneys and other practitioners who work within the immigration system. The literature I encountered was mostly theoretical and abstract and I wanted to analyze the issue from a more practical perspective. In order to add to the literature on international law and immigration, I interviewed immigration attorneys to gain a better understanding the rights crisis facing immigrants in the United States. I wanted to research U.S. detention and deportation policies through experience and I wanted to include the viewpoints of practicing attorneys in the field.

I accepted an internship with a non-profit in Arizona that provides legal services to immigrants in immigration detention. While I did not specifically choose Arizona, it was a prime location to conduct my research. Arizona not only shares a physical border with Mexico, but Arizona also has a long and complicated history of anti-immigrant sentiment. It had recently ramped up that anti-immigrant sentiment through the passage of Arizona Senate Bill (SB) 1070 – a bill designed to target ‘illegal’ immigrants through racist enforcement of immigration laws. SB 1070 was enacted to penalize undocumented immigration from Mexico and Latin America and its force was directed at Latino immigrants and communities. Because Arizona is such a hotspot for anti-immigrant sentiment, nativism and discrimination, advocates for immigrant rights in Arizona are

working on the front lines, so to speak. Arizona was, therefore, the perfect place to research anti-immigrant sentiment, international law and human rights violations in U.S. detention and deportation policies.

From the first day of my internship, I could see that international human rights law had little, if any relevance to immigration law and immigrant detention in practice. International law is not useful because immigration courts do not recognize international law as binding authority. Immigration proceedings are based on statute and there is little judicial discretion involved in deportation proceedings. In order to advocate for an immigrant facing deportation, one must cite directly to the INA, the statutory code that governs all immigration proceedings. The INA is comprehensive and lengthy; if there is no relief under the INA, there is no relief from deportation period. International law is not even a factor in the IJ's decision. In the words of one attorney, "immigration law is so complex, there's no room for international human rights laws. They are going to laugh at you, if you mention [international law] in a motion or to a judge."⁴⁴⁷

In fact, all of the non-profit attorneys expressed the futility of using international law in immigration proceedings. They referenced the court's treatment of international law as persuasive, non-binding authority and how "that puts international law really low on the totem pole in terms of precedent to follow."⁴⁴⁸ Although many of the attorneys thought it would be beneficial for immigrants if the U.S. were to incorporate terms of key international treaties into immigration laws, they didn't believe "that international law

⁴⁴⁷ Interview with E., in Ariz. (July 26, 2013).

⁴⁴⁸ Interview with T., in Ariz. (July 26, 2013).

[would] necessarily be a huge motivating factor to the courts in deciding cases ever.”⁴⁴⁹

Furthermore, several attorneys discussed the very real possibility of “getting laughed out of court” for using international law in any argument in front of an IJ.

I heard again and again from the nonprofit attorneys that, although they believed the U.S. should incorporate international human rights standards into immigration law and policy, international law simply had no relevance in immigration proceedings. As an intern, even I could see how futile international laws were to immigrants facing abusive detention conditions or immigrants seeking to challenge their deportation. The lack of judicial discretion doesn’t allow an IJ to consider international law in his or her decision to deport or detain someone. The rigidity of the laws and strict statutory code also make it virtually impossible for international law to play a role in immigration proceedings.

Additionally, the sheer numbers of immigrants arriving at the detention centers in Arizona on a daily basis and the heavy workload of all nonprofit attorneys and staff make it almost impossible to incorporate new legal strategies, especially those as outside-of-the-box as using international laws and conventions to challenge immigrant detention or deportation. The attorneys are struggling just to argue for an immigrant’s release under the complexities of the INA and attempting to argue for immigrant rights under international law is unrealistic. There is such a high demand for free legal representation that nonprofit attorneys are inundated with cases. Fighting for immigrants under domestic law is hard enough with so few resources and so many people who need legal help.

The nonprofit attorneys had so few resources that they were unable to fully represent the majority of immigrants in need of legal services. Because such a large number of immigrants need legal help but cannot afford legal services and because the

⁴⁴⁹ *Id.*

nonprofit has limited resources, the vast majority of immigrants had to proceed without an attorney, or *pro se*. What this meant was that although there was an attorney or other staff member working on a *pro se* case, the immigrant would still have to appear in court and represent him or herself. The attorneys could help with forms, legal briefs, bond petitions and other essential court documents, but there were not enough resources for every single immigrant to have full legal representation. The result is that most immigrants in detention fight their detention and their deportation on their own.

3. Widespread Human Rights Abuses in Immigration Detention Centers

The utter widespread human rights abuses within U.S. detention centers makes the futility of using international law as a mechanism to fight for immigrant human rights even more frustrating. Having researched international laws and standards relating to detention before beginning my internship, I was amazed at the level of human rights abuses prevalent in the detention centers. The prevalence of such extreme abuses of human rights and the true lack of accountability for those abuses caused me to question even further the applicability of international law to U.S. immigration policy.

Arizona is a border state and because of that, many immigrants held in Arizona detention centers are refugees and asylum-seekers. There are many areas of Latin America and specifically Mexico, where violence is high and people are displaced because of that violence. A large number of detainees that I worked with through my internship were asylum-seekers and the majority had experienced extreme violence. Although the Refugee Convention is clear that asylum-seekers, especially those who have survived or witnessed severe violence, should not be detained period, it is U.S. policy to detain *all* asylum-seekers and refugees until they have a credible fear interview with an

asylum officer. The wait period for most was between three and six months. For someone who has witnessed the murder of his family or for someone who has been subjected to extreme torture, confinement in a detention center can be detrimental to his physical and emotional wellbeing.

The detention centers themselves were like prisons. In fact, most of the detention centers housed immigrants alongside criminal convicts. Because so many immigrants are subject to detention, immigrants were even held in county jails because detention centers were too crowded. The environment in the detention centers was completely indistinguishable from federal prison: immigrants wore prison jumpsuits, their freedom of movement was continuously restricted, they had limited time outdoors, limited access to the telephone or the internet, were subjected to ‘count’ each day, and some were even shackled during their immigration proceedings.

Conditions inside the detention centers were also appalling. In fact, one of the detention centers was not climate controlled. In Arizona, when the temperatures can exceed 120 degrees, lack of air conditioning can be dangerous and even deadly. That same detention center had no actual outdoor area for immigrants or criminal detainees. The ‘outdoor’ area consisted of a chain link fence ceiling in a small corner of the building. To try and distinguish immigration detention from prison or other forms of imprisonment is absurd. Trying to explain to immigrants in detention (some of whom were transferred directly from jail or prison) that they aren’t imprisoned or in jail, that they are only ‘detained’ is impossible. They are imprisoned and they feel as though they are being treated like criminals.⁴⁵⁰

⁴⁵⁰ Interview with M., in Ariz. (July 26, 2013).

Access to proper health care was minimal. With such high numbers of asylum-seekers fleeing torture and persecution, detention facilities should have an established system in place to provide medical treatment, either physical or psychological treatment. However, most immigrants had little or no access to mental health support like a counselor or therapist. Many immigrants had severe physical and mental disabilities from the torture they were subjected to before arriving at the border. The medical services available for immigrants was inadequate and most did not receive any treatment whatsoever for their extreme post-traumatic stress or anxiety. Even more disturbing than the lack of medical services was the use of segregation. Segregation was used as a punishment for immigrants who ‘misbehaved’ and it was also used for immigrants who expressed suicidal thoughts or who showed signs of depression.

4. Widespread Human Rights Abuses and the Irrelevance of International Law for Immigrants Facing Deportation

With all of the human rights abuses within the detention centers and the irrelevancy of international human rights laws in immigration proceedings, I found it difficult to reconcile the academic literature with what I was seeing and experiencing at the nonprofit. Although I had originally planned to discuss the intricacies of international law and how those laws could be applied and implemented in U.S. immigration law and policy, most of my interviews centered around the attorneys’ frustrations with immigration law and their more discouraging cases. As I heard from the attorneys about the cases that most disturbed them, I questioned even further how international law could help immigrants in the United States.

One attorney recounted the story of a detainee he was working with who was seeking protection from the United States under CAT:

He was granted protection under CAT and won it before the IJ. The government reserved appeal [and] kept him detained while the appeal was going on. He won his appeal and thought that he would get released but he is still detained. Now DHS is trying to deport him to another country and they are keeping him detained while that is going on. He is seven or eight months past the time he actually won his case the first time. There is nothing we can do aside from writing letters to ICE begging they release him.⁴⁵¹

Often, if a torture survivor is seeking protection under CAT and the government cannot deport him back to his native country (where he will face almost certain torture or death) DHS instead tries to deport him to another country. In this particular case, the man seeking protection won in front of the IJ and again in front of the BIA. Although ICE has ultimate authority to release him from detention, it will not allow his release. Because ICE has discretion and refuses to exercise it, this man, who has faced severe torture, is confined in a prison-like setting for the foreseeable future, even though he could be released at any time.

ICE's refusal to exercise its wide discretion to release immigrants who do not need to be detained is another frustration for many attorneys and advocates working in immigration law. The social services coordinator at the nonprofit explained the refusal to exercise discretion and total lack of accountability was one of her biggest frustrations:

ICE has the discretion to release anybody that shouldn't be in detention. And the way they use that discretion does not line up, or there is this big black hole that 'we do what we want, when we want because of security and confidentiality reasons.' It creates a really unsafe situation for people in custody and after they're released. It's a horribly managed agency. And I believe that the vast majority of people in ICE custody do not need to be detained, but they are. Detention is not needed. But it's already so ingrained, not just in our way of thinking, but in our

⁴⁵¹ Interview with B., in Ariz. (July 26, 2013).

legal system, our enforcement system, that this is the way we deal with immigration.⁴⁵²

Another attorney expressed her frustration with ICE discretion and its refusal to exercise its wide discretion to release immigrants from detention. In particular, she expressed her concern for the cases where the detainee had a health issue:

One of my clients had cancer and he was in [detention] because his ex-wife had called the cops and turned him, saying he had committed fraud. And he hadn't really, but being in [detention] for months trying to prove he didn't commit fraud – [ICE] wouldn't let him out. [When they found out] he had cancer, they immediately let him out because they didn't want to deal with him. They refused to let him out, but then found out he had cancer and didn't want to pay for his treatment. Those are the most frustrating cases to me – making the client or even us jump through hoops because they have so much power.⁴⁵³

ICE more often than not declines to release an immigrant who obviously posed no danger to the community and had sufficient ties to demonstrate he was not a flight risk. Although ICE has the discretion to release anyone, ICE does not use that discretion and immigrants who should not be in detention for varying reasons are detained for months and even years. Immigrants have no recourse to challenge ICE's refusal to exercise discretion under domestic immigration laws. Nor can immigrants use international laws to challenge their detention in front of an IJ at a bond determination hearing.

Although an immigrant could potentially challenge his detention outside of the immigration process, through human rights proceedings with the IACHR for example, for the large majority of immigrants in detention, that possibility is an unlikely one. First, although the United States is a member of the OAS and therefore subject to its jurisdiction, the government does not have to release an immigrant who successfully challenges his detention through the IACHR. Second, and perhaps more importantly,

⁴⁵² Interview with C., in Ariz. (July 26, 2013).

⁴⁵³ Interview with M., *supra* note 450.

most immigrants in immigration detention cannot afford legal representation even for their immigration proceedings. The inability to afford legal representation and the government's authority and refusal to incorporate international law into its immigration policies, leaves the vast majority of immigrants in detention without any recourse in the international realm.

It's not only asylum seekers and refugees who are experiencing human rights abuses. Immigrants who have been convicted of crimes, often minor crimes, face mandatory detention and deportation. For one attorney, her most discouraging case involved a 'criminal alien' who was an LPR and had been detained for over four years when she met him:

He had two shoplifting convictions: one was for stealing a pair of tennis shoes and the other for stealing a coat from a homeless guy. He didn't have to serve time on either of those. He was just somebody who was kind of a loner in the world. He worked in the fields, moved around a lot and he didn't have a community or a family and so no one submitted really anything for his cancellation application. And so he lost his case and was still detained the last time I checked. We managed to get his bond reduced to the minimum but it looked like the family was going to have a hard time paying. That was a really hard case, I cried for three days straight. I never cry in this job but for some reason it really struck a chord. It was so sad and just so wrong and it seemed to really sum up everything. All of the permanent residents that we see have varying degrees of records and just unfair it is how we decide who gets to stay and who doesn't. I think the judge just saw him as a loser who didn't have any family and didn't have anyone who cared about him and who had committed crimes.⁴⁵⁴

This story is all too common and throughout my internship I saw many similar cases of long-term LPRs who had committed a crime and faced mandatory detention. Even for those who did have strong families ties, some could not fight their deportation because the crime, under the INA, was labeled as an 'aggravated felony.' Others, although they had strong families ties, were forced to remain in detention because their

⁴⁵⁴ Interview with T., *supra* note 448.

crime was a CIMT. And still others, who were eligible for bond but their families could not afford to pay it.

Another attorney expressed her frustration at the arbitrariness of the immigration system:

I had one client who did have a money laundering conviction, but I was looking into the case to see what argument could be made [about the classification of his conviction under the INA]. But he was older, in his 70s and he had a hard time understanding, you could tell. He was just mentally slower. I don't think he fully understood everything that was going on, even though I tried to explain it to him. And he also had a heart condition. We were trying to see the record of conviction, to see what was there in his criminal background. And the next thing I knew, he was deported and I don't know what happened. I don't know if he took a deport or if he ever got the record of conviction. But the last time I talked to him, I told him to get his record of conviction. Sometimes not knowing what happens to these people is kind of rough. And again, it's the way he was treated, being older, not really understanding what was going on.⁴⁵⁵

These stories demonstrate the complexity of the U.S. immigration legal system and the lack of accountability and unfettered discretion of the government. Immigrants in immigration detention face abusive treatment and degrading detention conditions. They cannot challenge their detention successfully because there is so little judicial discretion in the detention system. Although ICE has discretion to release any immigrant who is not facing mandatory detention, ICE rarely exercises that discretion and when it does, it does so arbitrarily. The bond determination process is also arbitrary, with the IJ's setting bonds at absurdly high levels or arbitrarily revoking bonds. ICE also sets bonds arbitrarily, without taking into account the flight risk or danger the individual poses to the community.

These stories also demonstrate the insignificance of international law in immigration proceedings on a practical level. Although academics continue to argue that

⁴⁵⁵ Interview with M., *supra* note 450.

the United States must incorporate international human rights standards into its detention and deportation policies, the United States has yet to do so. The government continues to advocate for harsher immigration policies as a means to deter future immigration and to regulate immigration. Advocates working directly with immigrants and attorneys who help immigrants who cannot afford legal services place absolutely no emphasis on international law as the solution to the rights crisis facing immigrants in the United States today.

5. Final Thoughts

My internship with this immigration nonprofit and the interviews I conducted lead me to conclude that international law is *not* key to restoring rights to immigrants in the United States. Through this internship, I found that while the academic world focuses on international human rights laws, those advocating for immigrants on the front lines do not see international law as the solution to this human rights crisis. This realization led me to question how international law and immigration law fit together. Rather than write about international law in the way that others in the academic community have written about it, I chose to write about how international law contributed to the immigration problem.

My only real conclusion is that immigration laws in the United States are broken. I chose not to promote international law as a solution and chose instead to focus on the complex racial and xenophobic underpinnings of the current U.S. immigration policies. In this historical account, international law and conceptions of sovereignty helped justify the development of the immigration system in the United States today. The current immigration policy in the U.S. was built on racist foundations. Sovereignty and powers inherent in sovereignty were used to create today's immigration policies. The U.S.

government continues to pick and choose when to use international law based on whether it can use international law to its advantage.

Through analyzing international law as part of the problem, I hope to shift the discussion away from international law to something else. We need to seek alternative solutions to the immigration ‘problem’ in the United States. Instead of claiming that the solution (international law) is there and we just need to implement it, we must change the discourse through which we argue for immigrant rights in detention and deportation proceedings because in the real world, immigration attorneys are not using international law to argue for immigrants’ human rights.

APPENDIX

ATTORNEY INTERVIEW QUESTIONS

1. Why did you decide to get involved with this non-profit agency?
2. What are some of your more frustrating experiences working in immigration law?
3. Where do you see immigration law in the future?
4. How do you think U.S. immigration policies could incorporate international human rights law?
5. What does a typical case look like?
6. Tell me about some cases that have troubled you or left you feeling discouraged.
7. If you could change one thing to make immigration law work better in the justice system, what would it be?

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