THE UNITED STATES IMMIGRATION SYSTEM, GOVERNING THROUGH CRIME, AND HUMAN RIGHTS

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ABSTRACT

The research examines the contemporary import of criminal enforcement categories, approaches, and resources into United States immigration laws, policies, and practices using Jonathon Simon's 'governing through crime' theory. It looks at alterations to U.S. detention and deportation procedures from the late-1980s through 2012 and evaluates them using the international human rights standards defined in the International Covenant on Civil and Political Rights (ICCPR). It reveals that numerous changes, which are connected to criminal enforcement processes, have resulted in detention and deportation of non-citizens without adequate consideration for their human rights. The human rights standards deviated from include: the right to raise a defense to deportation (Article 13), the right to a fair trial (Article 14), the right to court control of detention (Article 9(4)), and the right to family unity (Articles 17(1) and 23). It is concluded that contemporary detention and deportation practices in the United States have diverged from international human rights standards as reforms that were related to a governing through crime strategy occurred.

KEY WORDS: HUMAN RIGHTS/ US IMMIGRATION/ US CRIMINAL JUSTICE

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CHAPTER I
INTRODUCTION

The following story is not unique. It embodies many similar stories of non-citizens deported from the United States every year. Howard was a lawful permanent[1] non-citizen[2] who lived in the United States for 23 years. He has two U.S. citizen children and a U.S. citizen wife. He moved to the United States from Jamaica in 1989 at the age of 17. Once in the United States, Howard completed his high school education. After high school he joined the U.S. Navy and served in the Gulf War. In 1995, shortly after he returned home from service, some acquaintances sent Howard a package containing marijuana. Federal agents were tracking the package and arrested him. Howard's lawyer recommended he take a guilty plea and serve a 15 month sentence (Immigration Justice Network 2013).

Once Howard completed his criminal sentence he restarted his life. He married, had two children, bought a home, and started a small business. In 2005 he applied for U.S. citizenship, and following a delay of five years, his application was denied. After his citizenship application was rejected, immigration officers handcuffed Howard in front of his family and placed him in deportation proceedings due to his previous criminal conviction (Immigration Justice Network 2013). Howard spent nearly two years in several immigration jails far from his home and family. He tried to fight his case against deportation. However, under current immigration law he was unable to raise a fair defense. His previous criminal offense prevents the immigration judge from considering Howard's individual circumstances in determining his deportation. The judge could not take into account that Howard was an armed service veteran, a lawful permanent resident who owned a business and

[1] A lawful permanent resident is any person not a citizen of the United States who is residing in the country under legally recognized and lawfully recorded permanent residence (Department of Homeland Security 2013).

[2] Non-citizen refers to any person living in the United States who is not a citizen or national of the United States. 'Alien' is the official parlance for a non-citizen in United States government documents and law. Nevertheless, non-citizen is utilized except when directly quoting a source that uses 'alien'.

employed several people, and a husband with a wife and two children who were dependent on him. Consequently, the immigration judge had no choice but to order Howard's detention and deportation based solely on his drug-related conviction from 1995. Additionally, he was permanently barred from returning to the United States[3].

Howard was deported to Jamaica in 2012, a place he had not visited since 1989. He now lives in Jamaica where he can neither support his family nor return to the United States to visit them. According to the Immigration Justice Network, Howard's home is in foreclosure, his business is shut down, and his two children are struggling to deal with their father's absence (2013).

1.1 Criminal enforcement, detention and deportation in the U.S.: the heart of the issue

The research examines the contemporary import of 'criminal enforcement'[4] categories, approaches, resources, and rationales into United States immigration laws, policies, and practices using Jonathon Simon's 'governing through crime' theory. The research specifically looks at alterations to the laws and policies regulating detention and deportation of non-citizens, from the late-1980s through 2012, and evaluates them using the international human rights standards defined in the International Covenant on Civil and Political Rights (ICCPR). It reveals that numerous changes, which are connected to criminal enforcement processes, resulted in detention and deportation of non-citizens without consideration for their human rights. It is concluded that contemporary detention and deportation practices in the United

[3] The current definition of 'drug trafficking' in immigration law refers to *any* transfer or attempted transfer of a drug, no matter how small the amount or how insignificant the role of the individual is in the alleged transfer (Morawetz 2000, p.1957). A 'drug trafficking' conviction makes Howard an aggravated felon for immigration purposes. Under immigration law this requires pretrial immigration detention, deportation, and a permanent ban from returning to the United States.

[4] Following Stephen Legomsky's example, 'criminal enforcement system' is used instead of 'criminal justice system'. Stephen Legomsky argued that rather than the importation of the criminal justice model, a more appropriate observation is that immigration law absorbed the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model and the necessary procedural safeguards associated with it (2007).

States diverged from international human rights standards as reforms related to a governing through crime strategy[5] occurred.

The examination is confined to non-citizens already living in the United States (both lawfully present and undocumented[6]). The research does not evaluate the entire US immigration system. It does not study, for instance, the laws and policies governing who may enter the United States and/or apply for citizenship status. Also, it does not look at immigration enforcement activities along the border which attempt to deter unauthorized entry. The research focuses on the immigration laws that regulate which non-citizens are eligible for detention and deportation. It also looks at the policies and practices involved in these activities. 'Criminal enforcement' is used rather than 'criminal justice' because it reflects ascendancy in the value of enforcement over the value of protecting individuals' rights, specifically related to being charged and sentenced for a crime. In addition, the terms 'crime' and 'criminal offense' refer to non-immigration related criminal offenses. That is, crimes which are not connected to immigration status such as possession of a controlled substance, driving under the influence of alcohol, theft, disorderly conduct, etc.[7]. It is true a number of immigration offenses (including unauthorized entry and unauthorized re-entry) were re-categorized as criminal offenses. This makes the distinction between immigration and criminal offenses ambiguous in some situations. Nevertheless, 'crime' and 'criminal offense' throughout the thesis refers to non-immigration related criminal infractions.

As the story of Howard illuminated, non-citizens living in the United States may be separated from their homes, families, and communities due to a single

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[5] The use and meaning of 'strategy' throughout the thesis mirrors Simon and Feeley's use of the term (1992). In using strategy, they did not mean a conscious agenda employed by a set of government officials. Instead, Simon and Feeley intended strategy to reflect the merging of interconnected developments which shaped the way power was exerted (Feeley & Simon 1992, *supra* note 1, p. 449).

[6] An undocumented non-citizen is a person living in the United States who does not have formal authorization by the government to reside in the country. This includes any non-citizen in the United States without legal authorization regardless of whether the non-citizen entered the country without inspection or entered with a visa but subsequently lost legal status (i.e. overstayed a visa or has an old deportation order).

[7] In comparison, immigration offenses are traditionally civil violations and not criminal violations. Immigration offenses include: non-citizens who entered the country without lawful authorization, non-citizens who entered with lawful authorization but who violated conditions of their entry (i.e. overstaying visa, failure to indicate change in address, or being employed without a work visa etc.), and non-citizens with an outstanding deportation order from an immigration court – known as 'fugitive' non-citizens.

criminal offense. Effectively, this situation results in an extra layer of punishment where individuals are penalized twice for the same crime. This is in contradiction to international human rights standards (ICCPR, Article 14[8]). Yet, this is what occurs when a non-citizen is deported from the United States based solely on a crime like possession of marijuana, shoplifting, or assault[9]. According to contemporary immigration laws, non-citizens living in the U.S. (lawfully or otherwise) who interact with the criminal justice system are frequently subjected to additional punishment (Wellek 2013). They are detained and deported for a criminal offense for which they already completed their lawful punishment. This is unjust and incompatible with international human rights standards. Significantly, this situation is related to the phenomenon of importing criminal enforcement processes into United States immigration laws and polices.

The incorporation of criminal enforcement categories, approaches, rationales, and resources resulted in substantial increase to the detention and deportation of non-citizens without adequate safeguards or avenues for relief. International human rights standards provide a benchmark to assess when detention and deportation laws and policies extend beyond acceptable conduct. Not only do criminal enforcement-related reforms negatively affect the detained and deported non-citizens, but it also impacts their families, friends, and the communities they live in. The absorption of criminal enforcement processes (i.e. categories, approaches, rationales, and resources) can be conceptualized as a strategy of governing through crime. It is argued that a strategy of governing through crime contributed to U.S. detention and deportation procedures that deviate from international human rights standards.

1.2 The research problem

[8] Article 14(7) states: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

[9] Assault is defined as the act of intentionally putting another person in reasonable apprehension of an imminent harmful or offensive contact. No intent to cause physical injury needs to exist, and no physical injury needs to result.

Since the 1980s, the number of non-citizens deported from the United States substantially increased. In fiscal year[10] 1980 approximately 18,000 non-citizens were deported. In comparison, about 30,000 non-citizens were deported in 1990, about 188,000 in 2000, and around 385,000 by 2010 (Chacon 2012, p. 634). In the twenty years between 1990 and 2010, the total number of non-citizens removed increased more than twelvefold[11]. Equally important was a growth in the number of individuals in immigration detention. The overall number of non-citizens detained in fiscal year 1994 compared to fiscal year 2008 rose from approximately 81,000 to around 380,000 (Kalhan 2010, p. 44-45 *supra* note 13). In 2011, the Immigration and Customs Enforcement agency held a record number of 429,000 non-citizens in detention facilities across the country (ACLU 2013b).

Not only is there an unprecedented level of non-citizens detained and deported in the contemporary period, there is also a lack of adequate rights defending them from arbitrary and excessive action. How did the United States arrive at an immigration system capable of detaining and deporting so many non-citizens without essential protections? This research argues that the phenomenon of using criminal enforcement categories, approaches, resources, and rationales in U.S. immigration laws and policies significantly contributed to this situation. This is particularly true because these processes were absorbed without consideration for whether their impact aligned with international human rights standards.

Despite scholarly research on the phenomenon of criminal enforcement processes in United States immigration laws and policies, international human rights standards are rarely (if ever) used to evaluate the consequences of such processes. Additionally, human rights standards are almost never employed as an analytical tool to temper the import of criminal enforcement categories, approaches, resources, and rationales. Furthermore, there is a limited amount of scholarship which considers the phenomenon of criminal enforcement processes in United States immigration laws

[10] The federal government's fiscal year spans from October 1 through September 30 of the following year. For example, fiscal year 2010 covered the period of 1 October 2009 through 30 September 2010.
[11] About 30,000 non-citizens were deported in 1990 and around 385,000 by 2010 (Department of Homeland Security Office of Immigration Statistics 2011).

within a broader theoretical context, such as the governing through crime theory[12]. The following research attempts to reduce these deficiencies.

Traditionally, the United States immigration system should not be a crime control or public safety institution[13] (Wellek 2013). Instead, the conventional purpose is intended to regulate the entry of non-citizens into the country; provide pathways for academic study, employment, and naturalization; deter unauthorized entry; and deport individuals who are in the United States without authorization (Aleinikoff, Meyers & Papademetriou 1998, p.3). Since the late-1980s the growing import of criminal enforcement categories, objectives, and approaches into immigration laws and policies has been documented[14]. Generally, these reforms contributed to a more severe immigration system (Bergeron, Chishti, Kerwin & Meissner 2013; Chacon 2008). For example, immigration judges lost their capacity to consider family relationships and community ties when determining deportation for large numbers of non-citizens (Grussendorf 2013). In addition, minor criminal offenses were added into immigration law triggering deportation for non-citizens living in the United States (Morawetz 2000).

In comparison, the 1950s, 1960s, and 1970s were characterized as a period of more liberal immigration policies which, among other things, provided undocumented non-citizens with some due process rights and favored family reunification for resident non-citizens (Miller 2005, *supra* note 207, p. 119). Civil rights concepts also contributed to the discourse shaping U.S. immigration policies in the 1960s and 1970s (Delaet 2000). Starting in the late-1980s and continuing through the 2000s substantial changes in the strategies and objectives of U.S. immigration policy transpired (Miller 2005). Policy reforms mirrored the approaches of a punitive system of criminal enforcement – a system that values retribution over rehabilitation, prescribes harsh treatment for non-violent crimes, and has a burgeoning prison population. The 2001 attacks on the World Trade Center and Pentagon exacerbated this and justified the continued incorporation of criminal enforcement processes into

[12] The two notable exceptions are Miller 2003 and Inda 2013

[13] This is not to say that national security and crime control did not influence immigration throughout history (see Chapter II). Rather, it is to say the overall objective of the immigration system is not to achieve public safety or crime control.

[14] See e.g. Bergeron, Chishti, Kerwin & Meissner 2013; Chacon 2008; Chavez, Kohli & Markowitz 2011; Human Rights Watch 2009; Miller 2005; Morawetz 2000.

the immigration laws and policies associated to detention and deportation (Chacon 2008; Miller 2005; Stumpf 2006).

Governing through crime is a theory developed by Jonathan Simon. Essentially, governing through crime characterizes the tendency for criminal enforcement processes to infiltrate institutions outside the criminal enforcement system. It conceptualizes the phenomenon of using crime and the processes associated to crime – i.e. criminal enforcement categories, resources, and approaches – in a variety of situations and institutions. For instance, measures **e**mployed by schools across the United States which treat students as potential criminals provide one illustration. These measures include school police officers, metal detectors, and policies which require students to be dealt with by the police for acting against school rules (Simon 2007, p. 4-5). Markedly, when criminal enforcement processes are used in new contexts, it makes a number of tools and techniques of the criminal enforcement system available where it would otherwise be inappropriate (Simon 2007).

Governing though crime is not about safety but about the way crime and its processes influence and shape actions (Simon 2007). This theory provides a useful medium to capture the phenomenon of importing the criminal enforcement system's categories, resources, rationales, and approaches into contemporary procedures related to detention and deportation of non-citizens in the United States. It also portrays the way crime increasingly serves as the occasion and justification for immigration enforcement. For example, a lawful permanent non-citizen with a criminal offense, such as possession of a controlled substance, increasingly acts as the occasion for deportation from the United States[15]. This situation illustrates the way crime served as the reason for deportation and reveals a strategy of governing through crime.

International human rights standards can bring attention to problematic aspects of the United States immigration system as they provide an internationally accepted guideline to evaluate its conduct. For instance, under U.S. immigration law large numbers of non-citizens in deportation proceedings (including lawful permanent

[15] See e.g. Human Rights Watch 2009 and Chavez, Kohli & Markowitz 2011

residents) are subjected to mandatory detention[16]. The use of mandatory detention is in contrast to the human right enshrined in Article 9(4) of the International Covenant on Civil and Political Rights. It prevents the detention of non-citizens from being evaluated by a court body. In addition, the right to raise a defense to deportation for nearly all non-citizens with a previous criminal offense is impermissible under current immigration law[17]. This means numerous non-citizens are deported based on minor crimes, like shoplifting $15 worth of baby clothes, without an opportunity to fairly argue their case before a judge (Immigration Justice Network 2013b). This is contrary to the human right to raise a defense against deportation which is protected in the International Covenant on Civil and Political Rights (Article 13).

International human rights standards offer a criterion to evaluate the conduct of the U.S. immigration system – particularly the laws and policies associated to detention and deportation. Application of human rights standards in this manner provides an analytical tool that can be used in countries beyond the United States. Furthermore, they provide a conduit to generate an alternative model that keeps in balance the import of criminal enforcement categories, approaches, resources, and rationales with individual rights. This produces a moderate option which considers both states' need to detain and deport some non-citizens and the human rights of these individuals.

1.3 Objectives of research

1. To analyze criminal enforcement categories, resources, approaches, and rationales in the United States immigration system using the governing through crime theory.

[16] 8 U.S.C. section 1252 – 'The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction'. 8 U.S.C. section 1226(c)(1)(A) - (D) – describing the detention of non-citizens with a criminal offense.

[17] 8 U.S.C. section 1252(a)(2)(c) – barring the judicial review of any removal order if the noncitizen is deportable based on most crime-related grounds. See also 8 U.S.C. section 1229a(a)(3) and 1229a(b)(1)(C) – describing impermissibility for the cancelation of deportation to anyone who committed an offense under the aggravated felony grouping.

2. To evaluate reforms to U.S. detention and deportation laws, policies, and practices since the late-1980s using the human rights standards defined in the International Covenant on Civil and Political Rights.

1.4 Research questions

1. What aspects of the United States immigration system reflect a governing through crime strategy during the late-1980s through 2012?

2. In what ways do contemporary United States detention and deportation laws, polices, and practices deviate from the human rights standards defined in the International Covenant on Civil and Political Rights?

3. What are some specific examples of consequences of current detention and deportation practices for non-citizens living in the United States?

1.5 Methodology

This research is based on documentary research. The documentary research comes from a variety of sources including: the International Covenant on Civil and Political Rights and related General Comments; United States immigration law; academic articles; reports from non-governmental organizations; the Immigration and Customs Enforcement[18] agency's memorandums, statements made before Congress, and website; etc. The specific method used for each research objective is described below.

1.5.1 Objective one: governing through crime

The first objective is to analyze criminal enforcement processes in the United States immigration system using the governing through crime theory. This is accomplished by drawing parallels from the criminal enforcement system to reforms in the immigration system throughout the late-1980s to 2012. Alterations in

[18] The United States Immigration and Customs Enforcement agency is an agency under the Department of Homeland Security. It is responsible for carrying out and enforcing immigration and customs law.

immigration legislation and immigration enforcement policies and practices related to detention and deportation are examined. The laws looked at include: the Immigration Reform and Control Act of 1986, the Anti-Drug Abuse Act of 1988, the Immigration Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and the USA PATRIOT Act of 2001. In addition to legislative changes, transformations in the way enforcement of immigration law is carried out in the 2000s through 2012 are also considered. Transformations in enforcement policies and practices are determined using the Immigration and Customs Enforcement agency's memorandums, statements made before Congress, and website; academic articles; and reports from non-governmental organizations. Both Jonathan Simon and Teresa Miller's work related to the governing through crime theory are used as the framework for analysis.

1.5.2 Objective two: human rights standards

The second objective is to evaluate contemporary U.S. immigration detention and deportation laws, policies, and practices using the human rights standards defined in the International Covenant on Civil and Political Rights. This is done by evaluating these laws, policies, and practices using the standards in the ICCPR and related General Comments. The United States ratified the International Covenant on Civil and Political Rights in 1992. Upon ratification, the U.S. is obliged to comply with and implement the provisions of the treaty (Burgenthal, Shelton & Stewart 2002, pp. 48-49). Legally, this obligation is limited by reservations, understandings, and declarations entered when the treaty was ratified[19]. Though the reservations, understandings, and declarations may limit some of the legal authority of the ICCPR in the United States, the human rights standards in this research are used predominantly for their normative power as an internationally accepted standard. General Comments are also used to provide interpretations of provisions in the International Covenant on Civil and Political Rights (Burgenthal, Shelton & Stewart

[19] Generally the reservations, understandings, and declarations do not pertain specifically to the articles discussed in the research (with the exception of 14(7), see Chapter V *supra* note 96).

2002, p. 55). General Comments are published explanations by the Human Rights Committee, the body that monitors state compliance with the ICCPR.

The analysis looked at the immigration reforms from the late-1980s through 2012 that bore similarity to criminal enforcement processes. The laws, policies, and practices examined include: detaining and deporting large numbers of non-citizens annually, targeting non-citizens with a criminal offense for deportation; mandatory immigration detention for non-citizens with a criminal offense, mandatory deportation for non-citizens with an aggravated felony offense[20], and partnerships between the Immigration and Customs Enforcement agency and state/local criminal enforcement departments. These laws, policies, and practices are measured against the standards in the ICCPR. In addition, eight short case studies are used. The case studies were purposely selected because they illustrated situations where the import of criminal enforcement processes resulted in diminished human rights for the individuals described. They are not intended to be representative of all non-citizens subjected to deportation. The information in the case studies come from Human Rights Watch, the American Civil Liberties Union, the Applied Research Center, the Immigration Justice Network, and the documentary film *Dying to Get Back* by John Carlos Frey.

1.6 Ethical issues

There are very limited ethical issues within the scope of the research as it relied on documentary research methods. Subsequently, it involved minimal risk to the researcher or the subjects of the research. Also, because the case studies used were already published, there are no issues related to consent.

1.7 Structure of Thesis

[20] An aggravated felony in this context is a category of crimes which is used in immigration law. A non-citizen with an offense that falls into this category is subjected to mandatory detention and deportation. This category includes serious violent crimes in addition to non-violent crimes and even misdemeanor offenses (Johnson 2000).

The ensuing thesis is divided into four primary chapters. Chapter II lays the background and foundation for the research. The first section, Section 2.1, provides the framework of Jonathan Simon's governing through crime theory and Teresa Miller's application of it. Section 2.2 discusses why human rights standards are used and what value they add to the immigration context in the United States. The last section in Chapter II, Section 2.3, describes an overview of the history and changes in immigration laws and policies from the 19th century through the 1970s. It provides the context and foundation necessary to appreciate the contemporary importation of criminal enforcement categories, approaches, and resources in the immigration system.

Chapter III looks at contemporary immigration reforms from the late-1980s through 2012 using the governing through crime theory. It draws parallels between changes in immigration laws and policies to the criminal enforcement system's categories, approaches, and rationales. It seeks to explain the presence of a governing through crime strategy in practices related to detention and deportation during this period. Importantly, Chapter III also provides the necessary groundwork to evaluate these contemporary laws, policies, and practices using international human rights standards.

Chapter IV and Chapter V evaluate current detention and deportation laws, policies, and practices via the human rights standards defined in the International Covenant on Civil and Political Rights. Chapter IV assesses reforms in immigration detention and deportation laws. It uses one case study to exemplify what deviations from human rights standards can mean at the individual level. Chapter V assesses practices in the U.S. immigration system. It illustrates the way numerous detention and deportation policies in practice create situations that deviate from human rights standards. This chapter provides seven short case studies to capture the personal impact diminished human rights may have on individuals living in the United States.

The last chapter, Chapter VI attempts to illustrate how human rights standards can be utilized as an analytical tool to moderate the import of criminal enforcement processes. It also discusses limitations to the research and potential areas for future research.

CHAPTER II
FRAMEWORK AND BACKGROUND

2.1 Governing through crime, Teresa Miller, and the new penology

The following thesis utilizes Jonathan Simon's governing through crime theory to conceptualize the phenomenon of the increasing employment of criminal enforcement categories, approaches, resources, and rationales in U.S. immigration laws and polices associated to detention and deportation. In 2003, Teresa Miller applied components of this theory to the United States immigration system in her article, 'Citizenship & Severity: Recent Immigration Reforms and the New Penology'. Miller's work is important because it was the first application of the governing through crime theory in the immigration context[1]. A brief explication of the 'new penology' is necessary to understand and use the governing through crime theory. Importantly, discussion of the new penology identifies crucial transformations in the criminal justice system – many of which permeated immigration laws and policies. The new penology and its relationship to governing through crime are discussed first. This is followed by an account of Simon's governing through crime theory and Miller's 2003 article.

The 'new penology' was the name Jonathan Simon and Malcolm Feeley used in 1992 to describe a novel strategic[2] formation in the enforcement and sentencing of criminal offenders during the 1970s and 1980s. This strategy, they argued, focused on identifying and managing 'unruly groups' of people categorized as 'criminals' (Feeley and Simon 1992). It was a distinct shift away from trying to normalize and rehabilitate criminal offenders, which was the dominant model from the

[1] The only other known work relating to the U.S. immigration system and the governing through crime theory is a paper written by Jonathan Xavier Inda in February 2013. Inda's paper is not discussed in this section as it was not discovered until late in the research process. Subsequently, the theoretical application the governing through crime theory relies on Simon and Miller's work.

[2] As mentioned in Chapter I, the use of strategy by Simon and Feeley was not intended to mean a conscious agenda employed by criminal enforcement agents. To them strategy reflected developments which shaped the way power was exercised in defining, enforcing, and sentencing criminal activity (Feeley & Simon 1992, *supra* note 1, p. 449)

early 19th century until the last third of the 20th century[3]. Simon and Feeley identified changes of conception (discourse, objectives, and techniques) in the criminal enforcement and sentencing process. They believed these components coalesced to form a new configuration of social control aimed at classifying and dealing with 'unruly groups' (Feeley and Simon 1992). Jonathan Simon, in later work, expanded the theoretical insights of the new penology. He developed a broader theory on the role crime and criminal enforcement processes increasingly played in exercising power over others, both inside and outside the criminal enforcement system. He termed this phenomenon 'governing through crime'[4]. In essence, governing through crime conceptualizes the exportation of changes associated to the new penology into novel institutions.

An important transformation described by the new penology was a change in criminal law jurisprudence. There was a distinct shift in focus away from individual consideration, situation-specific factors, and discretionary power toward strict rules and standards with little room for interpretive judgment (Simon 2001). Mandatory minimum sentencing is one example of this[5]. Mandatory minimum sentencing precludes judges from giving a sentence lower than the fixed minimum sentence regardless of the individual situations of each case. These situations could include, for instance, the defendant's role in the offense or their likelihood of committing a future crime.

Similarly, another change in the new penology that occurred was use of an approach which Simon called the 'waste management model' (2001, p. 34). From this

[3] During this period, the primary assumption among professional penologists was that penal discipline could produce transformation in the individual. There was belief in rehabilitation and reintegration of criminal offenders. For example, there was an emphasis on treatment and education in the prison system (Simon 2001).

[4] Governance is typically a term applied to agencies of a political state and its subdivisions. However, Simon used the terms governance and governmental to talk about a broader array of power including both public and private. He used Michel Foucault's depiction where 'government' designates the way in which the conduct of individuals or groups might be directed. It covers not only the forms of political or economic power but also modes of action that influence the possibilities of action of other people. Thus, to govern in this sense is to structure the possible field of action of others (Foucault 2000, p. 341 cited in Simon 2001, p. 8). Simon and Foucault's conceptualization of governance extends beyond government institutions. However, for the purpose of the research, the term governance will remain within the domain of government institutions.

[5] The most frequently applied federal mandatory minimums were enacted by Congress in the 1986 and 1988 anti-drug bills. Mandatory minimum drug sentences start at five and 10 years, and are based on the weight of the drug.

perspective, offenders formed a kind of 'waste' which could not be reformed and threatened to impose costs on the community. Because this 'waste' was deemed unchangeable, it could only be managed to prevent the least harm to the community. This was in contrast to the previous belief that criminal offenders could be reformed and reintegrated into society. Subsequently, pragmatic approaches developed in the objectives, practices, and policies of the criminal enforcement system which sought to manage offenders through longer incapacitation even if doing so imposed a risk harm to the persons deemed 'dangerous' (Simon 2001, pp. 34-35). 'Three strikes and you're out' laws are a clear example of this. These laws require severe sentencing for an individual's third criminal offense[6]. Effectively, they create situations where an individual could be subjected to life in prison for a broad range of low level felony convictions. These convictions could comprise crimes such as 'shoplifting a pair of work gloves from a department store, pilfering small change from a parked car, or passing a bad check'(Staples 2012). Meting out long prison sentences minimizes risk to the general public even though it requires significant costs to the persons classified as criminals.

Fundamentally, strategies in the new penology focused on maximizing social control and minimizing risk to the larger public rather than individualized justice and attempts at rehabilitation (Welch 2000, p. 74). Many of the strategies and methods associated to the new penology permeated new institutions. This is captured by the governing through crime theory. According to Jonathan Simon:

> When we govern through crime, we make crime and the forms of knowledge historically associated with it – criminal laws, popular crime narratives, and criminology – available outside their limited original subject domains as powerful tools with which to interpret and frame all forms of social actions as a problem for governance (Simon 2007, p. 17).

We are governed through crime whenever crime and crime control processes become the occasion or opportunity for exercising power over others. Governing through crime characterizes the exportation of approaches, objectives, and rationales, from the criminal enforcement system to novel settings. In doing so, it

[6] 'Three strikes and you're out' laws vary in statute by state, and not all states use them. California is a well-known example. Its 'three strikes and you're out' law is viewed as one of the harshest (non-capital) sentencing schemes in the United States (Stanford Three Strikes Project 2013).

makes a number of tools and techniques available that would otherwise be inappropriate (Simon 2001).

Simon advanced his governing through crime theory in the 2007 book, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear.* In this book, he argued that the problem of crime gaining such status in American society had 'enormous' consequences (Simon 2007, p. 6). The burgeoning prison population was one illustration[7]. Currently, the United States contains 25 percent of the world's prison population even though it comprises only 5 percent of the world's population (ACLUe 2013). Furthermore, it has the highest rate of incarceration in the world surpassing Russia, China, and Iran[8] (Alexander 2010, p. 6).

In 2003, Teresa Miller's article, 'Citizenship & Severity: Recent Immigration Reforms and the New Penology', explained how the new penology was at work in reforms in U.S. immigration law. Even though Miller focused on the new penology literature, her paper fit into the broader governing through crime conceptualization described by Simon[9]. In essence, Miller's article demonstrated that Simon's governing through crime theory was at work in the immigration system. She showed the increasing use of crime as the occasion and opportunity to detain and deport non-citizens. These changes, she maintained, resulted in a system of social control to manage 'unwanted populations' of non-citizens[10]. She argued that the reforms, based increasingly on crime control processes, displaced the social-liberal

[7] Since the 1980s the portion of the U.S. population held in custody for crimes greatly expanded. Following the 1980s, the proportion of Americans in the custody of the state and federal governments climbed from the relatively consistent base of around 100 prisoners per 100,000 people to 470 per 100,000. The rate of imprisonment was roughly five times the rate it was prior to the 1980s (Simon 2007, *supra* note 3 p. 285). According to legal scholar Michelle Alexander (2010), the rate was about 750 per 100,000 adults if you counted all persons under penal supervision including people on probation.

[8] Markedly, there is a prominent racial and economic skew to this population signifying biased application of the criminal enforcement system. Michelle Alexander argued that the United States imprisoned a larger percentage of its black population than South Africa during the height of apartheid (Alexander 2010, p. 6).This population lives, on a more or less permanent basis, in a state of legal non-freedom – either because of a single life sentence, repeated incarceration, or the long-term consequences of a criminal conviction (Simon 2007).

[9] Miller did discuss governing through crime to some degree. However, her work mainly referenced the new penology literature. The reason for this could be related to the available literature at the time of her 2003 paper. Simon's governing through crime theory was not comprehensively explained until his 2007 book.

[10] Miller described the system of social control as a hybrid of crime and immigration which reconfigures both the crime and immigration systems (2003, p. 667).

governing approach of the 1950s, 1960s, and 1970s with a strategy that detained and removed unwanted non-citizens (Miller 2003). Though both Simon and Miller detailed some harms associated to governing through crime, they did not take into account implications from a human rights perspective.

2.2 Human rights: reason and value for use

Human rights standards provide an internationally accepted guideline for highlighting problematic practices in the detention and deportation of non-citizens from the United States. It provides a potent way to evaluate reforms that use criminal enforcement categories, approaches, resources, and rationales. It also provides a tool to generate an alternative model to the one currently employed. International human rights standards were established to define rights protecting the individual against coercive state powers (Cole 2006; HRW 2007). Non-citizens are an especially vulnerable group as the United States' power to detain and deport non-citizens is vast and there are few protections against abuses[11]. As legal scholar David Cole aptly stated: 'the rights identified and protected in international human rights treaties derive from human dignity, and dignity does not turn on the type of passport or visa a person holds' (Cole 2006, p. 629). This makes international human rights a useful way to advance non-citizens rights in the United States and illuminate troubling practices related to detention and deportation.

The attacks on the World Trade Center and Pentagon in 2001 led to a new wave of anti-immigration sentiment and abuses conducted in the name of national security. In part, this was because the nineteen suicide bombers were all non-citizens. However, it is also attributed to the fact that non-citizens rights are easier to sacrifice for the purported security of the nation (Cole 2006). Throughout the history of the United States non-citizens were incarcerated, and in many cases deported, during periods of alleged national security crises[12] (Chacon 2008). The action taken against

[11] For example, in *Fong Yue Ting v. United States* (1893) the Supreme Court ruled that the U.S. Constitution did not constrain the state's power to deport non-citizens.

[12] See e.g. Johnson (2004, pp. 20-22 & 62-69) discussing the internment of Japanese and Japanese Americans as a response to Pearl Harbor; the deportation of Eastern and Southern European non-citizens in the wake of the Palmer Raids of 1919-1920; and the exclusion and deportation of 'politically

non-citizens following 9/11 illustrated another example of this. International human rights can be a useful medium to reveal abuses and advocate against injustices conducted in the name of national security.

Despite injustices done to non-citizens after the 11 September 2001 bombings, it is important to understand that U.S. detention and deportation polices deviated from international human rights standards prior to 2001 and endured in the decade following. Rather, the rhetoric of national security was used as one justification for the ongoing expansion of immigration enforcement and for using practices that increasingly criminalized non-citizens (Chacon 2008, p. 146). Thus, international human rights standards in the context of non-citizens in the United States need to extend beyond abuses conducted in the name of national security. The application of international human rights standards to evaluate the consequences of contemporary immigration reforms from the late-1980s to 2012 satisfies this need. International human rights provide a way to expose problematic aspects of contemporary detention and deportation laws and policies – particularly those steaming from criminal processes. Non-citizens in deportation hearings, for instance, do not have full or equal facilities for pursuing remedies against deportation. This is in contradiction to the right to a fair and equal trial prescribed by the International Covenant on Civil and Political Rights (Article 13; Article 14).

International human rights standards have normative power and can be valuable for advocacy and to draw attention to troublesome practices and laws. One way human rights can do this is by facilitating international moral and legal pressure. The reality of a globalized world underscores some need for global legitimacy by the United States. The way the United States treats other countries' nationals is covered extensively in the foreign media (Cole 2006). Arguably, some anti-American sentiment is attributed to the perception that the United States does not give these individuals the dignity and respect international human rights demand (Cole 2006). Illegitimate behavior conducted by the U.S. against non-citizens can potentially be detrimental to the image of the country and aid in anti-American perceptions worldwide (Cole 2006). It also provides legitimacy for other countries to behave in a

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undesirable' non-citizens during the Red Scare of the 1950s. See also Cole (2003) discussing the use of the Sedition Act to punish perceived 'enemy aliens' in the United States during World War I.

similar manner. When allegations are framed in terms of human rights standards, it is done in internationally recognized concepts, a 'transnational language' (Cole 2006). Subsequently, human rights claims are more likely to be understood worldwide. In contrast, foreign observers are less likely to understand a rights claim when one charges the United States government with violating the Fifth Amendment to the United States Constitution. Thus, evaluating the U.S. immigration system using human rights standards facilitates international moral and legal pressure on troubling practices (Cole 2006).

The trend towards globalization suggests adoption of a more international perspective is inevitable in terms of both legal and ethical arguments and advocacy (Cole 2006, pp. 639-643). This is demonstrated by non-governmental organizations using human rights language worldwide. International non-governmental organizations, such as Human Rights Watch and Amnesty International, frequently use human rights standards to critique governments across the globe. Additionally, several prominent United States based organizations, which advocate for non-citizens' rights, are incorporating human rights language into their advocacy activities. The Center for Constitutional Rights is a well-known non-governmental legal and educational organization in the United States. Their mission statement says: '[t]he Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the *Universal Declaration of Human Rights*' (Center for Constitutional Rights 2013). The American Civil Liberties Union (ACLU)[13] and National Day Labour Organizing Network (NDLON)[14] also use human rights to advocate on behalf of non-citizens. The use of human rights language and standards by non-governmental organizations is prevalent internationally and is growing in use in the United States. Non-governmental organizations often influence public opinion; in turn, this public opinion puts pressure on states to act according to their demands. The more human rights are used by the public at large, the more stress

[13] The Human Rights Program within the American Civil Liberties Union uses '*human rights* standards and strategies to complement ACLU legal and legislative advocacy and to advance social justice in the area of *immigrants' rights*' (ACLU 2013a).

[14] The NDLON mission statement says: 'NDLON improves the lives of day laborers in the United States. To this end, NDLON works to unify and strengthens its member organizations… in order to protect and expand their civil, labor and *human rights*…' (NDLON 2013).

states feel to abide by these demands. This provides support for applying international human rights standards to critique United States detention and deportation practices.

Arguably, there are obstacles to using human rights standards as a legal authority in the United States. The United States has a poor record for ratifying international human rights conventions[15] even though the U.S. government and its citizens are drafters and supporters of many of these treaties (Ignatieff 2005). Human rights claims frequently receive skeptical reception in the United States as American legal culture generally assumes human rights standards are unlikely to work or provide greater guarantees than the U.S. Constitution (Cole 2006).

Despite skepticism to using international human rights law in domestic courts, the trend appears headed in the opposite direction (Koh 2004, p. 56). Furthermore, as legal scholar David Cole pointed out, the 'plenary power' doctrine, which is often used to limit due process rights for non-citizens in the U.S., is derived from international law itself[16]. This doctrine was premised on the notion that immigration was a component of sovereignty – that is, 'an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare' (*Fong Yue Ting v. United States*1893). Importantly, the Supreme Court decision in *Fong Yue Ting v. United States* (1893) ruled the Constitution did not constrain the ability of Congress to expel non-citizens lawfully present in the country (Chacon 2008). This decision recognized that the Congress had almost unlimited discretion to establish all aspects of the nation's immigration policy, including the rules and procedures for non-citizen registration and deportation (Chacon 2008).

In the early days of international law, power over immigration was viewed as an inherent part of sovereignty. But the evolution of international human rights now places important restrictions on sovereignty related to the rights of non-citizens

[15] As of 2013, the United States ratified three main human rights treaties. They are the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, the United States ratified two optional protocols to the Convention on the Rights of the Child.

[16] See e.g. New York district court ruling on *Beharry v. Reno* (2002) – citing Supreme Court decisions that demonstrated immigration power stems from international law concepts of sovereignty, including *Nishimura Ekiu v. United States* 1882. The *Beharry* ruling was reversed related to other grounds in the Second Circuit Court in 2003.

(Cole 2006). Because the plenary power doctrine comes from international law, the development and changes in international law standards have the potential to restrict the power of the United States with regard to non-citizens (Cole 2006). A similar argument was used by Judge Jack Weinstein in the district court ruling on *Beharry v. Reno* (2002). He wrote:

> The Supreme Court has repeated that the basis for Congress's extremely broad power over aliens comes not from the Constitution itself, but from international law . . . Since Congress's power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms . . . It is inappropriate to sustain such plenary power based on a 1920 understanding of international law, when the 2002 conception is radically different (cited in Cole 2006, p. 643).

International Human rights standards are perhaps unlikely to be used as an independent source in U.S. domestic courts in the near future. Still, they can be applied as a guide to the interpretation of statutory or constitutional questions in domestic courts (Cole 2006).

Regardless of the legal power of human rights in the United States, international human rights standards have normative power for advancing social justice. Rights claims framed by human rights facilitate international pressure, and in a highly globalized world this pressure is difficult to ignore. Human rights are increasingly used in both international and domestic promotion for non-citizens rights adding to their normative power. They provide a guideline to assess when the conduct of the U.S. immigration system extends beyond acceptable behavior. International human rights standards supply a medium to evaluate reforms in detention and deportation laws. They also offer an analytical tool to moderate the use of criminal enforcement approaches, categories, resources, and rationales in shaping laws and policies.

2.3 History of immigration laws and policies in the United States prior to the 1980s

It would be a misnomer to claim that immigration policies before reforms in the late-1980s were based solely on humanitarian principles and individual rights. There were also some criminal grounds for deportation present during this time. Nevertheless, immigration enforcement in the post-1980 era increased in severity, scope, and use. To unpack this, it is necessary to have a historical sense of immigration laws and policies in the United States prior to the 1980s. This section provides an overview of the history and changes from the late-19th century through the 1970s. It lays the foundation to recognize the increased use of criminal enforcement processes in immigration reforms in the post-1980 era.

Before 1920, very few people were deported from the United States. According to Mae Ngai, between 1892 and 1907 only a few hundred non-citizens were deported each year and between 1908 and 1920 around two or three hundred a year (2004, pp. 59-60). In early American history, Congress made little effort to regulate immigration through federal statute until the last third of the 19th century[17]. In 1882 Congress made the first general federal immigration legislation, the Immigration Act of 1882. The Act created the Office of Immigration within the Department of Treasury and permitted the deportation of people who entered the United States without authorization[18] (Chacon 2008, p. 148). The legislation also authorized the exclusion of 'idiots, lunatics, convicts, and persons likely to become a public charge' from entering the United States (Chacon 2008).

The 1918 Anarchist Act authorized the exclusion of 'subversive' non-citizens and legalized their deportation without consideration for time limits[19] (Chacon 2008, p. 150). As a result, any non-citizen deemed to be a 'subversive' could be deported even if they lived in the United States for an extended period of time. The negative implications of this were demonstrated during the 1919 and 1920 Palmer Raids. The Palmer Raids were conducted by the U.S. Department of Justice in

[17] There were two exceptions to this, namely the Alien Friends Act of 1798 (which was never enforced and expired after two years) and the Enemy Alien Act 1789 (which remains part of the law presently). The Enemy Alien Act authorizes the president to detain, expel, or otherwise restrict the freedom of any person from a country which the U.S. declared war on (Chacon 2008, p. 147).

[18] Congress also made the Chinese Exclusion Act of 1882, suspending all future immigration of Chinese laborers.

[19] This meant there was no limitation to the amount of time after the event occurred that legal proceedings based on that event could be initiated.

response to a series of violent domestic attacks and raids[20]. They resulted in between 4,000 and 10,000 non-citizens arrested and approximately 500 people deported. Markedly, the detentions and deportations were done without evidence connecting the majority of the apprehended non-citizens to the acts that prompted the raids (Chacon 2008, *supra* note 34, p. 373). This was possible because immigration detention and deportation are not viewed as punishments by the Supreme Court[21] and they do not have the procedural protections necessary in the criminal justice system. Thus, the detention and deportation of non-citizens did not require protections against unreasonable searches and seizures without probable cause[22] or the rights to a public trial and due process of law[23].

In the Immigration Act of 1924, strict racial quotas were added to U.S. immigration law. This legislation also eliminated the statute of limitations on deportation for nearly all forms of unauthorized entry without a valid visa[24]. This legislation allowed deportation of any non-citizen who entered without authorization regardless of how long ago this event occurred. In 1929, the act of illegal entry itself was criminalized (Ngai 2004, pp. 59). This made entry at a point not designated by the U.S. government, or by means of fraud or misrepresentation, a misdemeanor offense. Moreover, it made unauthorized re-entry (the attempted return of a previously deported individual) a felony offense. Subsequently, the action of immigration itself, when completed without authorization from the U.S. government, became a violation of criminal law for the first time (Ngai 2004, pp. 59-60).

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[20] The Palmer Raids occurred following a series of mail bombs aimed at government officials and after May Day riots and explosions in several major cities in the spring of 1919. In response, the Department of Justice, at the direction of J. Edgar Hoover, launched a series of raids aimed at deporting non-citizens.

[21] The Supreme Court found deportation was not a criminal punishment but an administrative function of Congress (*Fong Yue Ting v. United States* 1893). The distinction between deportation and criminal punishment was reinforced in *Wong Wing v. the United States* (1896).

[22] Probable cause is the amount and quality of information police must have before they can search or arrest an individual. Typically, police must present their probable cause to a judge or magistrate and ask for a search or arrest warrant. Information meets the standard of probable cause if it shows that it is *more likely than not* that a crime occurred and the evidence sought exists at the place named in the search warrant, or that the suspect named in the arrest warrant committed a crime (Nolo's Plain-English Law Dictionary 2009).

[23] See Fourth, Fifth, and Six Amendments in the U.S. Constitution's Bill of Rights.

[24] Statute of limitations is an enactment in a legal system that sets the maximum time after an event where legal proceedings based on that event may be initiated.

In contrast to the immigration practices of the first half of the 20th century, the period of the 1950s, 1960s, and 1970s was generally characterized as a time of liberal immigration policies (Delaet 2000; Shuck 1998). During this period, undocumented non-citizens were commonly viewed as a problem of labor regulation rather than crime control. On the whole the country was sympathetic to the plight of non-citizens who crossed the border without authorization to work (Miller 2003). Furthermore, civil rights played a central part of the discourse shaping the debate over U.S. immigration policies since at least the 1960s (Delaet 2000). According to Debra Delaet, the idea that fairness and non-discrimination needed to shape immigration policies dominated immigration discussions in Congress from the 1960s through the 1980s (2000).

The Immigration and Nationality Act of 1965, for instance, abolished the strict racial quota system. This system was replaced by a preference system that focused on non-citizens' skills, the preservation of families, and the reunification of separated families (LeMay 1987, pp. 111-112). Largely, the 1965 Act was a by-product of the civil rights revolution. At the height of the civil rights movement, the racial quota system was viewed as an embarrassment by some. For example, President John F. Kennedy called the racial quota system 'nearly intolerable' in a 1963 speech to delegates of the American Committee on Italian Immigration (Kennedy 1963).

During the period of the 1960s and 1970s a number of federal courts applied restrictions on the deportation process based on constitutionally-derived criminal protections (Miller 2003). Non-citizens in deportation hearings were only detained in a narrow range of circumstances. They were afforded relief from pretrial detention on a basis of personal considerations including age, health, family and community connections, employment status, prior appearances at hearings, and elapsed time of detention (Miller 2003). In addition, non-citizens subjected to deportation were provided an opportunity to contest their deportation based on their individual situations. This was possible through the various waivers from deportation available. Waivers, in certain circumstances, have the ability to grant relief from deportation to non-citizens who trigger a ground for deportation (Immigration Justice Network 2013b). Waivers are only available to individuals who meet the

requirements of the waiver. Important among the available waivers were the Immigration and Nationality Act Section 224 waiver and the Immigration and Nationality Act Section 212 (c) waiver. The 212(c) waiver allowed lawful permanent residents living in the United States for at least seven years to seek relief from deportation by showing the negative factors (such as seriousness of their crimes) were outweighed by positive ones (such as family ties and evidence of rehabilitation). Comparably, the 224 waiver allowed deportation to be suspended for all non-citizens of 'good moral character' and whose deportation would result in extreme hardship to themselves or to their citizen or lawful permanent resident spouses, parents, or children (Human Rights Watch 2009). Both the 212(c) and 224 waivers were premised on individual situation-specific factors.

Though international human rights standards were not legally or discursively used in shaping immigration laws and policies during the 1950s, 1960s, and 1970s, the immigration system was more compatible with them. Non-citizens had the right to raise a defense against deportation by applying for waivers. They could also use individual mitigating factors such as family ties to contest their deportation. Furthermore, immigration detention was regulated by a court body, and it was only used in exceptional situations. It is true immigration laws could, and sometimes did, impose hardships on deportable[25] non-citizens. Nevertheless, immigration during the Civil Rights era was much less severe than it was prior to and following this particular period (Chacon 2008).

[25] A deportable individual is a non-citizen in the United States subject to any grounds of removal specified in the Immigration and Nationality Act (see e.g., INA section 237 or INA section 240(e)(2)). This includes lawful permanent residents who committed an offense which authorizes their deportation, non-citizens who entered legally and subsequently lost legal status, and non-citizens who entered the country without authorization (Department of Homeland Security 2013).

CHAPTER III
U.S. IMMIGRATION AND CRIMINAL ENFORCEMENT

3.1 Immigration reforms from the late-1980s through the 1990s

It is generally accepted by scholars that immigration legislation passed in the late-1980s and through the 1990s increasingly incorporated criminal enforcement processes and pioneered a more punitive immigration system[1]. Furthermore, academics agreed there was increasing propensity by Congress to see immigration control as a public safety and crime control issue during this period[2]. Thus, there was a shift from a time in which courts and Congress permitted non-citizens some procedural and substantive rights to an era in which the rights of non-citizens were progressively restricted.

The Immigration Reform and Control Act of 1986 (IRCA) was the first legislation passed by Congress in a series of reforms that authorized broad use of criminal penalties for immigration-related conduct and increased immigration enforcement efforts. The IRCA is best known for criminalizing the hiring of undocumented workers[3], increasing the resources to patrol the nation's borders, and providing undocumented non-citizens with a path toward 'legalization' (Inda 2013). This legislation also contained a clause that obliged the U.S. Attorney General to expedite deportation of non-citizens convicted of deportable offenses as. According to legal scholar Jonathan Xavier Inda, this provision helped set in motion the contemporary practice of targeting non-citizens with a criminal conviction for deportation (2013, p. 7).

The second important legislation passed by Congress in the 1980s was the Anti-Drug Abuse Act of 1988. The Act created the category of 'aggravated felonies' for immigration purposes. Aggravated felonies according to the 1988 Anti-Drug

[1] See e.g. Chacon 2008; Legmosky 2007; Miller 2003; Stumpf 2006
[2] Ibid.
[3] 'Criminalizing' the hiring of undocumented non-citizens means the legislation authorized criminal sanctions to be placed against employers for knowingly hiring undocumented non-citizens.

Abuse Act included murder, drug trafficking crimes, and illegal trafficking in firearms or destructive devices (Johnson 2001). The Anti-Drug Abuse Act of 1988 also established presumption against release from immigration detention prior to deportation hearings for all non-citizens with an aggravated felony offense[4]. This created mandatory detention for non-citizens with such an offense. Before 1988, the majority of non-citizens ordered deported based on criminal grounds were granted bond from pretrial detention unless they were determined to be a threat national security, likely to abscond, or posed high bail risks (Miller 2003). In order to determine appropriateness of bail, immigration judges exercised discretion by considering the individual situation-specific factors of each case[5]. This aided immigration judges in evaluating the necessity of detention. Following the Anti-Drug Abuse Act, these discretionary considerations were impermissible in determining appropriateness of detention for non-citizens with an aggravated felony conviction.

Notably, the legislative reforms of the late-1980s exhibited similarities to reforms in the criminal enforcement system. Reforms in the criminal enforcement system omitted individual considerations when determining criminal sentencing, increased the severity and length of sentencing, and focused on heightened enforcement efforts for persons deemed 'dangerous' (Simon 2001). Likewise, immigration legislation in the late-1980s omitted previously available individual considerations in the detention of a particular category of non-citizens. It also added the crime category of aggravated felonies to immigration law. This category was used as the occasion to trigger detention and deportation for non-citizens living in the United States. Finally, the amplified resources, allocated by Congress, for border control and immigration enforcement inside the U.S. showed heightened emphasis on the deportation of 'unwanted' non-citizens. Reforms during the late-1980s started to exhibit importation of categories and approaches of the criminal enforcement system.

Legislation in the 1990s continued the trend established by the immigration policies set in the late-1980s. The Immigration Act of 1990, for instance,

[4] 8 U.S.C. section 1252(a)(2) – relating to the presumption against release on bond for all non-citizens with post-entry aggravated felony conviction.

[5] The factors included: local family ties, prior arrests, prior convictions, prior appearances at hearings, employment status, membership in community organizations, manner of entry and length of time in the U.S., immoral acts or participation in subversive activities, and financial ability to post bond.

added more criminal offenses to the aggravated felonies category in immigration law. The additions were money laundering, crimes of violence for which a non-citizen received a prison sentence of at least five years, and conspiracy to commit the acts defined as aggravated felonies in immigration law (Chacon 2008). Furthermore, the 1994 Violent Crime Control and Law Enforcement Act mandated a previously unprecedented level of federal resources to deport undocumented non-citizens and non-citizens with a criminal conviction (McDonald 1997). The 1994 law delegated $1.2 billion for specialized immigration enforcement initiatives. This included initiatives for deportation of non-citizens with a criminal offense and a tracking system targeted at identifying non-citizens with a criminal offense[6] (McDonald 1997, p. 6).

The two most prominent immigration related laws of the 1990s were the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). According to legal scholar Teresa Miller, the 1996 legislation represented 'a sharp detour away from a civil, regulatory notion of immigration law enforcement, and an exponential uptick in the use of criminal theories, processes, and punishment' (2010, p. 234). Together, the AEDPA and IIRIRA resulted in a significant change to detention and deportation laws. These laws altered prior policies by adding more criminal offenses which triggered detention and deportation and created mandatory deportation for non-citizens with an offense categorized as an aggravated felony.

Significantly, the AEDPA and the IIRIRA transformed both the definition and repercussion for an aggravated felony offense for immigration purposes. They expanded the litany of offenses included in the aggravated felony category[7] and established mandatory detention and deportation without the access to reprieve previously available[8]. In addition, non-citizens deported based on an aggravated felony offense were permanently barred from reentering the United States[9]. In total, approximately 50 different crimes are categorized as aggravated felonies in

[6] The initiatives also included border control and asylum reforms (McDonald 1997),

[7] Regarding the commission of crimes see e.g. AEDPA section 441(e) codified at 8 U.S. C. section 1101(a) – expanding the aggravated felony definition to include gambling, alien smuggling, and passport fraud; IIRIRA section 321 codified at 8 U.S.C. section 1101 (a) (43) – adding crimes and lowering the sentence requirement of deportable violent crimes to one year.

[8] 8 U.S.C. section 1229b(a)(3) – barring the cancellation of removal for aggravated felons.

[9] 8 U.S.C. section 1326 (a) and 1326 (b)(2). The exception is if the non-citizen received special permission from the Attorney General.

immigration law, many of which were added by the AEDPA and IIRIRA (Bergeron, Chishti, Kerwin & Meissner 2013, p. 98). Offenses classified as aggravated felonies include: bribery, car theft, counterfeiting, drug possession, forgery, perjury, prostitution, simple battery, tax evasion, unauthorized entry following a previous deportation, gambling, passport fraud, and petty theft[10] (Inda 2013, p. 9). Additionally, under the AEDPA and IIRIRA, a conviction of a crime for which a criminal sentence of one year or more *may* be imposed is sufficient to trigger detention and deportation even if a lighter criminal sentence is allotted (Miller 2005, p. 101). Thus, a single misdemeanor conviction for a crime such as shoplifting a $10 video game could subject a noncitizen to mandatory detention and deportation[11] (Immigration Justice Network 2013).

The new offenses added to the aggravated felonies category in the 1990s resulted in considerable growth from the four crimes this category comprised in 1988. It showed both the growing import of criminal categories in the immigration law and the increasing use of crime as the justification for deportation. Prior to the implementation of the 1996 laws, non-citizens with a criminal offense could apply for a waiver from deportation. Following 1996, non-citizens with an offense under the broad aggravated felony grouping are barred from using waivers. Consequently, they can not receive relief from deportation[12] (Chacon 2008, p. 153). Furthermore, obtaining a waiver for a non-citizen with a criminal offense that is not categorized as an aggravated felony is very difficult (Vargas 2011, p. 33).

In summary, the reforms during the 1990s substantially expanded the group of non-citizens subject to deportation for the commission of a criminal offense. They also created mandatory detention for nearly all non-citizens with a previous criminal offense and mandatory deportation for non-citizens with an aggravated felony[13]. This omitted previously available discretionary and individual considerations when determining the detention and deportation for many non-citizens in the United States. These reforms mirrored earlier changes in criminal law which employed more

[10] 8 U.S.C. section 1101(a)(43)(A); 8 U.S.C section 1101(a)(43)(F)&(G)
[11] This occurs because some states give a one-year sentence for misdemeanors. Consequently, these crimes are elevated to felonies for immigration purposes (Johnson 2001, p. 6).
[12] 8 U.S.C. section 1229a(a)(3); 1229a(b)(1)(C). See also, 8 U.S.C. section 1229b(a)(3) – barring the cancellation of removal for aggravated felons
[13] See e.g. 8 U.S.C. section 1252(a)(2)(c); 8 U.S.C. section 1229a(a)(3); and 1229a(b)(1)(C)

severe punishments, used mandatory minimum sentencing, and generally diminished judicial discretionary power. The added criminal offenses also illustrated the exercise of crime as the rationale for deportation from the United States. This trend was further displayed by federal resources for specialized immigration enforcement goals aimed at deporting non-citizens with a criminal offense. Finally, the increasing ease by which a non-citizen could be detained and deported bore similarity to the 'waste management model' of the criminal enforcement system.

3.2 Immigration reforms in the wake of the 11 September 2001 attacks

In response to the 11 September 2001 attacks on the World Trade Center and Pentagon, the United States Congress enacted a range of legislations including: the USA PATRIOT Act[14] (2001), the Homeland Security Act (2002), the Enhanced Border Security and Visa Entry Reform Act (2002), the Intelligence Reform and Terrorism Prevention Act (2004), and the REAL ID Act (2005). Many of these laws served to increase the ease with which the government could regulate non-citizens. For instance, the PATRIOT Act, the Homeland Security Act, and the Enhanced Border Security and Visa Entry Reform Act expand the deportation, detention, and surveillance of non-citizens who ostensibly threatened national security (Miller 2005, p. 87).

Within the varied pieces of legislation passed in response to 9/11, Congress made several new laws governing the permissible removal of non-citizens. The PATRIOT Act (2001) expanded the definition of non-citizens who could be subject to deportation based on 'terrorist' grounds. The Act broadened the definition of individuals acceptable for deportation on 'terrorist' grounds to include non-citizens who provide material support to 'terrorist organizations'[15]. This includes support to organizations that were not specifically designated as terrorist organizations by the government but who were deemed to have engaged in 'terrorist activity' (Chacon

[14] USA PATRIOT is an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.
[15] USA PATRIOT ACT subsection 411 (codified in 8 U.S.C. section 1226a(a)(3) (2001)).

2008, p. 155). Terrorist activity, according to the PATRIOT Act, comprises the use of a 'dangerous device' for anything other than 'personal monetary gain'[16]. The REAL ID Act (2005) further expanded the definition of terrorist organization to involve 'a group of two or more people, whether organized or no, which engages in or has a subgroup which engages in any form of terrorist activity'[17]. As noted by Jennifer Chacon (2008), the provisions in the PATRIOT Act and REAL ID Act are extremely broad. These provisions imbue immigration agencies with tremendous power in deciding who fit the confines of 'terrorist activity' – and accordingly who could be detained and deported based on this justification (Chacon 2008, p. 155).

In addition to expanding the permissible grounds for the deportation of non-citizens, immigration laws and regulations were altered in ways that diminished procedural protections in immigration-related arrests and detentions when compared to criminal law (Chacon 2007, p. 1871; Cole 2002). Title IV of the PATRIOT Act permits the arrest and detention of a non-citizen if there are 'reasonable grounds to believe' the individual may be a threat to national security[18]. This power extends beyond traditional criminal laws governing legal procedures for arrests and detentions. Criminal arrests must be predicated on probable cause to justify apprehension. Conversely, arrests for immigration violations may be pursued on the lower standard of 'reasonable suspicion'[19] of an immigration violation. This includes reasonable suspicion the individual may be a threat to national security. In addition, non-citizens may be held for seven days prior to a criminal or immigration charge[20]. This is in contradiction to the usual stipulation that a person be charged within 48 hours of arrest (Chacon 2007, p. 1872). Moreover, according to the PATRIOT Act non-citizens may

[16] Ibid.
[17] REAL ID Act section 103 (codified in 8 U.S.C. section 1882(3)(B)).
[18] USA PATRIOT ACT section 412 codified in 8 U.S.C. section 1357(a)(2) – authorizing immigration officers to arrest any non-citizen if he has reason to believe that the non-citizen is in the United States in violation of immigration law; see also 8 U.S.C. section 1226a(a)(1) – authorizing the Attorney General to take into custody any non-citizen if he has reason to believe that the non-citizen is 'engaged in any other activity that endangers the national security of the United States'.
[19] Reasonable suspicion exists when a reasonable person under the circumstances would, based upon specific and articulable facts, suspect that a crime has been committed. This is a lower standard than probable cause. In criminal law it can justify less intrusive searches (such as 'stop and frisk') but not a full search and/or arrest (Legal Information Institute 2013).
[20] USA PATRIOT Act section 412 (codified in 8 U.S.C. section 1226a(a)(5)).

be detained for extended periods of time if their release 'will threaten the national security of the United States or the safety of the community or any person'[21].

To a certain extent, the response to the events of 11 September 2001 resulted in legislation modifying immigration laws in ways that further diminished rights for non-citizens in the United Sates. Procedural protections in immigration detention and deportation were weakened and legal grounds for detention and deportation were enhanced. These stipulations gave considerable authority to immigration officials to arrest and detain non-citizens based on tenuous (if any) connection to 'terrorist activity' (Chacon 2008). Overall, these provisions added immigration consequences and diminished individual rights for 'suspect non-citizens' in attempt to enhance national security and public safety. Again, this approach bore similarity to the 'waste management model' used in the criminal enforcement system.

In addition to legislative changes, another response to the 11 September attacks on the World Trade Center and Pentagon was a range of policy initiatives undertaken to pursue investigation into the attacks and prevent future attacks from occurring. The Federal Bureau of Investigations, under then Attorney General Ashcroft, led an investigation which accused 19 men of hijacking the planes responsible for the 11 September attacks[22]. During this time, both immigration and criminal law enforcement officials worked closely together to investigate the 9/11 attacks. The utilization of immigration laws and programs to investigate these attacks were an important part of these initiatives. This was exhibited by a 2001 statement made by then Attorney General, John Ashcroft. He said:

> [l]et the terrorist among us be warned: if you overstay your visa by even one day we will arrest you. If you violate local law, you will be put in jail and kept in custody as long as possible (cited in U.S. Department of Justice Office of the Inspector General 2003 p. 12).

This showed propensity to use immigration laws and enforcement to achieve national security goals in the wake of 9/11.

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[21] USA PATRIOT Act section 412 (codified in 8 U.S.C. section 1226a(a)(6)) – the detention of the individual shall be reviewed every six months. The non-citizen may be released on conditions deemed appropriate by the Attorney General, see 8 U.S.C. section 1226a(a)(7).

[22] The investigations linked the 19 individuals to the terrorist organization of al Qaeda and to Osama bin Laden. The FBI's investigation into the 11 September attacks was called PENTTBOM, short for the 'Pentagon/Twin Towers Bombing Investigation'.

Immigration initiatives in the immediate period following the 11 September 2001 attacks applied stricter enforcement of immigration laws to apprehend, control, and interrogate suspected non-citizens. During this time immigration and criminal law enforcement officials used a 'zero-tolerance' approach to non-compliance with immigration laws (Chacon 2008). This allowed them to apprehend and detain large numbers of non-citizens based on minor immigration violations such as overstaying a visa or failing to report a change in address. Importantly, immigration and criminal law enforcement officials could arrest non-citizens without using the criminal law standard of probable cause. Many of the initiatives taken in response to 9/11 were already permissible under immigration law prior to 2001 (Chacon 2008). However, there was a shift in the reasoning behind their use. That is, they were applied to investigate the attacks on the World Trade Center and Pentagon and to prevent possible future attacks (Chacon 2008, p. 157).

In the weeks and months that followed the 11 September attacks, the Attorney General and Federal Bureau of Investigations conducted broad investigations that led to the arrest and detention of non-citizens, mostly men of Middle Eastern and South Asian origin. According to legal scholar David Cole, then Attorney General John Ashcroft summoned 80,000 non-citizens to be registered, fingerprinted, and interviewed based on their nationality from Middle Eastern or South Asian countries. He later called another 8,000 non-citizens for interviews by the Federal Bureau of Investigations. Ultimately, in the two years following 9/11 the Attorney General oversaw the detention of more than 5,000 'suspect' non-citizens, none of who turned out to be terrorists (Cole 2005, pp. 24-26 & 47-51). These non-citizens were arrested and detained based predominantly on immigration charges (Department of Justice Office of Inspector General 2003). However, they were held for the transparent objective of investigating the 9/11 attacks and preventing future attacks.

The government justified the large amount of non-citizens arrested and detained by claiming that future acts of terrorism could be prevented if 'terrorists and terrorist sympathizers' were incapacitated (cited in Miller 2005, p. 90). Once again, this approach reflected the criminal enforcement system's 'waste management method'. Immigration in the wake of the 11 September 2001 attacks exacerbated many of the laws and policies established in the 1980s and 1990s. In part, new

legislations were made which expanded the power to deport and detention non-citizens. Equally important was the way immigration enforcement was carried out and the reason for its use.

3.3 General reforms in the U.S. immigration system from 2001 through 2012

More generally in the decade following 2001, there was increased immigration enforcement leading to high numbers of non-citizens detained and deported. This is problematic because of the limited protections and inadequate waivers available for non-citizens in these situations. In fiscal year 2001, 178,026 individuals were deported compared to 409,849 in fiscal year 2012 – the largest annual number in U.S. history to date (Democracy Now 2012). As of 2008, the Immigration and Customs Enforcement agency operated the largest detention and supervised release program in the country (Schriro 2009, p. 2). This section is broken into two parts. The first part discusses structural changes in the immigration system which enabled increased immigration enforcement in the decade after 9/11. The second section profiles immigration enforcement during the first term of the Obama administration (2009-2012). The Obama administration is notable for two trends – deporting a record number of non-citizens and prioritizing the deportation of non-citizens with a criminal offense. These are important trends because they show the large number of non-citizens affected by deportation. In addition, non-citizens with a criminal offense have the fewest human rights protections in regards to their detention and deportation (see Chapter IV).

3.3.1 Enhanced immigration enforcement capacity

The growth in immigration enforcement in the 2000s and early-2010s is contributed to several alterations after 2001. They included information sharing between different governmental agencies, partnerships between immigration and state/local law enforcement agencies, and increased budget allocation. These changes

expedited the growth in deportation by enhancing the capacity and range of immigration enforcement (Bergeron, Chishti, Kerwin & Meissner 2013).

Following 2001, there was more information exchange between immigration, criminal enforcement, and national security agencies. The creation of the Department of Homeland Security (DHS) in 2003 was an example of this. The Homeland Security Act (2002), the legislation that created the DHS, combined federal immigration agencies with other security-related agencies under one governmental department. The Department of Homeland Security increased the exchange of information across the newly consolidated departments (Department of Homeland Security 2013; Miller 2005, p. 87). Another example was the efforts and resources devoted to developing interoperable data systems (Bergeron, Chishti, Kerwin & Meissner 2013, p. 66). Interoperable data systems permitted an easy and systematic way to transfer information across agencies such as the Federal Bureau of Investigations, Immigration and Customs Enforcement, and state/local criminal enforcement agencies. Prior to 9/11 these agencies did not share information in a systematic way (Bergeron, Chishti, Kerwin & Meissner 2013, p. 66).

Data sharing between government agencies was a crucial part of increased deportation during the mid- to late-2000s (Bergeron, Chishti, Kerwin & Meissner 2013, p. 66). The immigration program Secure Communities, for instance, relies on data sharing technology between criminal enforcement departments and the Immigration and Customs Enforcement agency. Within the Secure Communities program, the finger prints of every individual booked into a local jail are electronically shared with Immigration and Customs Enforcement officials. The prints received are checked against the Automated Biometric Identification System (IDENT) to determine if the individual is deportable based on U.S. immigration law. This information exchange allows the Immigration and Customs Enforcement agency to identify more deportable non-citizens (Chavez, Kohli & Markowitz 2011).

Another prominent and related trend during this period was the utilization of partnerships between the Immigration and Customs Enforcement agency and local/state criminal enforcement departments. The three most well-known immigration programs based on these partnerships are: the Criminal Alien Program (CAP), Secure Communities, and Delegation of Immigration Authority Section

287(g). The Criminal Alien Program identifies potentially deportable non-citizens incarcerated in state/local jails and prisons throughout the United States. The 287(g) programs are based on Memorandums of Agreement with state/local criminal enforcement agencies. These agreements delegate authority to police departments to conduct certain immigration enforcement activities within their jurisdictions[23] (Immigration and Customs Enforcement 2012b). All three immigration programs are predicated on resource and information exchange between criminal enforcement agencies and the Immigration and Customs Enforcement agency. The concept behind these partnerships is that they operate as a 'force multiplier' for immigration enforcement (Immigration and Customs Enforcement 2009). They use state/local criminal enforcement personnel and resources to identify and apprehend non-citizens for deportation.

The cooperation between criminal enforcement agencies and the Immigration and Customs Enforcement agency substantially expanded the reach of this agency leading to more deportations (Chavez, Kohli & Markowitz 2011). According to the Immigration Justice Network, due to the local/state police partnerships, interaction with the criminal enforcement system is the now the primary conduit into the deportation process for non-citizens (2013b). Notably, the partnerships between the ICE agency and state/local criminal enforcement departments absorb criminal enforcement techniques and resources into immigration practices. In addition, the partnerships are premised on the use of crime as the reason and occasion to exercise deportation.

Finally, increased budget for immigration enforcement was another alteration in the immigration system in the decade after 11 September 2001. According to Jennifer Chacon (2008), the most practical changes to immigration policies after 9/11 were appropriation bills in which Congress steadily increased the budget of the Immigration and Customs Enforcement agency. The expansion in budget for immigration enforcement started prior to 9/11. Nevertheless, it accelerated after the attacks on the World Trade Center and Pentagon in 2001 (Chacon 2008).

[23] The characteristic of the partnerships vary depending on the Memorandum of Agreement for each jurisdiction that participates. The legality of partnerships between the federal immigration agency and the non-federal state and local law enforcement agencies was authorized by a provision of the 1996 IIRIRA (Chacon 2012, p. 642). Nevertheless, the first agreement did not occur until 2002.

Since the creation of the Immigration and Customs Enforcement agency in 2003, the budget for this agency progressively grew. For instance, between fiscal years 2005 and 2012, funding for the Immigration and Customs Enforcement agency increased from $3.1 billion to $5.9 billion (Bergeron, Chishti, Kerwin & Meissner 2013). Accordingly, the increased budget permitted necessary resources to detain and deport more non-citizens in the decade following 2001 (Chacon 2008).

3.3.2 Immigration enforcement during the Obama administration (2009-2012)

The first tenure of the Obama administration is noteworthy for attaining historic deportation numbers and for prioritizing the deportation of non-citizens with criminal offenses. During President Obama's first term, the Immigration and Customs Enforcement agency deported 1.5 million noncitizens from the United States – more than any other president in a single term (Jain 2012). Table 3.1 shows statistics of non-citizens deported during the Obama administration compared to the previous two terms of the Bush administration (fiscal years 2001-2008). On average, President Obama's government deported 1.5 times the monthly rate of noncitizens removed during President Bush's administration (Khimm 2012).

In addition to the overall growth in deportations between 2009 and 2012, there was also an increase in the number of 'criminal removals' – that is, non-citizens convicted of *any* crime prior to their deportation from the country (Immigration and Customs Enforcement 2012). In fiscal year 2012, nearly 55 percent of the 409,849 individuals deported were convicted of a criminal offense prior to their departure (Table 3.1). This was almost double the number of 'criminal removals' in fiscal year 2008. Significantly, the number of non-citizen deported with a criminal offense in 2012 was threefold the number in 2001. This is a concern because non-citizens with a criminal offense have the least human rights in relation to detention and deportation proceedings in the United States (see Chapter IV). Furthermore, studies indicate that the majority of 'criminal removals' are for individuals with minor and non-violent crimes (see e.g. Human Rights Watch 2009; Chavez, Kohli & Markowitz 2011).

Miller in 2003 indicated that high deportation numbers, especially undocumented non-citizens and non-citizens with a criminal offense, supported a

strategy of governing non-citizens through crime. She argued that large deportation numbers revealed an approach of 'purging' troublesome or unwanted non-citizens from the United States. Kanstroom in 2000 made a similar claim. He believed contemporary deportation policy aimed progressively at 'permanently cleansing' society of individuals with undesirable qualities, such as criminal behavior (p. 1892). Essentially, increased deportation, especially when directed at 'criminal' non-citizens, was described by both Miller and Kanstroom as a means to regulate unwanted non-citizens through deportation. This trend employs a methodology used in the criminal enforcement system.

Table 3.1: ICE total removals and criminal removals (fiscal years 2001 through 2012)

Fiscal year & corresponding president administration[24]	Total removals[25]	Criminal removals	Non-criminal immigration removals[26]	Percent of criminal removals (rounded to nearest whole number)
2001 Bush	178,026	72,679	105,347	41 percent
2002 Bush	165,168	73,429	91,739	45 percent
2003 Bush	211,098	83,731	127,367	40 percent
2004 Bush	240,665	92,380	148,285	38 percent
2005 Bush	246,431	92,221	154,210	37 percent
2006 Bush	280,974	98,490	182484	35 percent
2007 Bush	291,060	102,024	189,036	35 percent
2008 Bush	369,221	114,415	254,806	31 percent
2009 Obama	389,834	136,343	253,491	35 percent

[24] The fiscal year and the president administration do not fully correspond during changes between administrations. The fiscal year spans from 1 October through 30 September of the following year and the presidential term spans from 20 January to19 January.

[25] Removals are the compulsory and confirmed movement of deportable non-citizen out of the United States based on an order of removal. This does not include non-citizens' apprehended and removed while trying to enter the U.S. by the Customs and Border Protection agency (Immigration and Customs Enforcement 2012).

[26] This category includes: non-citizens who entered without lawful authorization, non-citizens who entered with lawful authorization but who violated conditions of their admission and non-citizens with an outstanding removal order.

2010 Obama	392,862	195,772	197,090	50 percent
2011 Obama	396,906	216,689	180,208	55 percent
2012 Obama	409,849	225,390	184,459	55 percent

Source: fiscal years 2001-2006 (Department of Homeland Security Office of Immigration Statistics 2008, table 37, pp. 96-102).
Source: fiscal years 2007-2011 (Immigration and Customs Enforcement 2012)
Source: fiscal year 2012 (Immigration and Customs Enforcement 2013b)

In addition to deporting more non-citizens with a criminal offense, reports indicate that the Immigration and Customs Enforcement agency, during Obama's first term, had a policy that prioritized the deportation of non-citizens with a criminal offense. Precedence for deporting non-citizens with a criminal offense was interspersed widely throughout the Immigration and Customs Enforcement website in 2012. For example, the ICE website in 2012 claimed:

> Because the [Obama] administration is committed to using immigration enforcement resources in the way most beneficial to public safety, *the primary focus is on convicted criminals, with a priority on aggravated felons* (Immigration and Customs Enforcement 2012b, italics added).

Similarly the website in 2012 also said:

> Under the Obama administration, ICE has set clear and common-sense priorities for immigration enforcement focused on identifying and removing those *aliens with criminal convictions* … These priorities have led to significant results… ICE *removed more convicted criminal aliens* from our country than ever before (Immigration and Customs Enforcement 2012c, italics added).

An official policy memorandum by ICE Director John Morton also illustrated a priority for deporting non-citizens with a criminal offense[27]. This memorandum titled, 'Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens' was the most explicit and authoritative indication

[27] This was first issued in June 2010. It was amended and reissued under the same title on 2 March 2011. The policy contained in both memorandums was the same. The only difference between the two was the addition of a 'no private right statement' which said the memorandum 'may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter'.

of the ICE agency's enforcement priorities during Obama's first tenure. It identified the removal of non-citizens 'who posed a danger to national security or public safety' as the highest civil immigration enforcement priority (Morton 2010, p. 1). Included in this group were five categories: 1) non-citizens '*convicted of crimes*, with a particular emphasis on violent criminals, felons, and repeat offenders'; 2) non-citizens 'engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security'; 3) non-citizens who 'participated in organized *criminal gangs*'; 4) non-citizens 'subject to outstanding *criminal* warrants'; and 5) non-citizens who 'otherwise pose a serious risk to public safety' (Morton 2010, pp. 1-2 italics added). This memorandum clearly delegated the removal of non-citizens with a criminal offense (and those who posed an alleged threat to public safety or national security) as among the highest immigration priorities.

Finally, a 2013 statement made by ICE Director John Morton before Congress aptly reaffirmed the agency's goals over the first term of the Obama government[28]. He said:

> Over the past four years, ICE has transformed the immigration enforcement system …ICE's immigration enforcement statistics from the last fiscal year (FY) highlight the Administration's success in *focusing the enforcement system efforts on removing from the country convicted criminals, public safety threats,* recent illegal border entrants and other priority individuals… (Morton 2013, pp. 1-3, italics added).

The above examples showed prioritization for deporting non-citizens with a criminal offense during the Obama administration. They illustrated increased propensity to use crime as the occasion and reason for immigration enforcement. This was reinforced by the 'criminal removal' numbers from 2009 through 2012 (Table 3.1).

[28] Morton's statement was made, before the United States House of Representatives Committee on Appropriations Subcommittee on Homeland Security. Morton also made a similar statement before the U.S. Senate.

CHAPTER IV
IMMIGRATION LAW AND HUMAN RIGHTS

4.1 United States immigration law and the International Covenant on Civil and Political Rights

The following analysis evaluates contemporary changes in U.S. immigration law related to detention and deportation using the human rights standards defined in the International Covenant on Civil and Political Rights. The assessment reveals that provisions in immigration law are incompatible with these standards. The international human rights standards, which immigration law is inconsistent with, include the right to court control of detention (Article 9(4)), the right to submit a defense against deportation (Article 13), the right to a fair trial (Article 14), and prohibition of retroactive application of law (Article 15(1)). Significantly, the laws that deviate from international human rights standards are generally related to the incorporation of criminal enforcement approaches and resources. This demonstrates the negative impact criminal enforcement processes have on United States detention and deportation procedures.

According to Article 2(1) of the International Covenant on Civil and Political Rights, all individuals without distinction of any kind are entitled to the rights protected in the Covenant[1]. This is reaffirmed in General Comment 15 where the Human Rights Committee explicitly states non-citizens are included in the rights proscribed by the ICCPR. Regarding Article 2, the Human Rights Committee said:

> the general rule is that each one of the rights of the Covenant must be *guaranteed without discrimination between citizens and aliens*. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in

[1]Article 2(1) says: '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

> article 2 thereof. This guarantee applies to aliens and citizens alike[2] (General Comment 15, italics added).

It is true the International Covenant on Civil and Political Rights only recognizes the right for non-citizens to enter the territory of the state in exceptional circumstances, such as situations where respect for non-discrimination, prohibition of inhuman treatment, and family life arise (General Comment 15, para 5). Nevertheless, once a non-citizen is permitted to enter the territory of a state party they are entitled to the rights in the Covenant (General Comment 15, para 6). All non-citizens lawfully present in the United States are subjected to these rights. In addition, undocumented non-citizens are entitled to some of the rights in the ICCPR[3].

A fundamental right of the International Covenant on Civil and Political Rights is the right to liberty and security of persons. Article 9(1) says:

> 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 procedure as are established by law.

Equally, Article 17(1) of the International Covenant on Political and Civil Rights protects individuals' from arbitrary interference with their 'privacy, family, home or correspondence'[4].

Importantly, when a person's liberty and security is interfered with, every individual has the right to protection of the law against this. Article 9(4) of the ICCPR states:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

This right is upheld for *all* individuals irrespective of their status.

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[2] The exception to this rule is where the rights recognized in the Covenant are expressly applicable to citizens only (i.e. Article 25).

[3] For example, Article 9(4) requires the right of access to courts and equality before them for *all* individuals (General Comment 32, para 9). The general human rights standard of non-discrimination also pertains to *all* individuals regardless of their immigration status.

[4] Article 17(1) says no one shall be 'subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'.

> [t]he right of access to courts and tribunals and equality before them is not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party (General Comment 32, para 9).

Significantly, the Human Rights Committee affirmed that Article 9 (including the important guarantee laid down in Article 9(4)) applies to all forms of deprivation of liberty, including immigration control (General Comment 8, para 1). Court control of detention must also be available in the case of preventative detention[5] (General Comment 8, para 4; General Comment 15, para 9). This is vital in the context of immigration detention in the United States because all immigration detention is civil and considered a form of preventative detention[6].

Under contemporary U.S. immigration law, large numbers of non-citizens in immigration proceedings (including lawful permanent residents) are subjected to mandatory detention[7]. Consequently, these individuals are not permitted the right to have a court evaluate and decide the lawfulness of their detention. The use of mandatory detention in the U.S. immigration system is contrary to the right enshrined in Article 9(4); it precludes the detention of certain non-citizens from being reviewed by a court body. According to the Detention Watch Network (2013), 70 percent of people in immigration detention were there because of mandatory detention laws. By 2011, the Immigration and Customs Enforcement agency held a record number of 429,000 non-citizens in detention (ACLU 2013b). In consideration of the large

[5] General Comment 15 stated that if preventative detention was used in determining the removal of non-citizens the safeguards of the Covenant relating to deprivation of liberty (Articles 9 and 10) may also be applicable (para 9).

[6] *Wong Wing v. United States*1896, see also Cole 2002 and Kanstroon 2000. The immigration system has no legal authority to detain a non-citizen for the purpose of punishment (Cole 2002). Nevertheless, the Supreme Court permitted a form of civil 'preventative detention' when it is deemed necessary to effectuate the deportation process (Legomsky 2007).

[7] 8 U.S.C. *5* 1252 – mandatory detention for aggravated felonies; 8 U.S.C. section 1226(c)(1)(A) - (D) – describing the detention of non-citizens with a criminal offense; 8 U.S.C. section 1226(c)(2) – the Attorney General may not release a non-citizen subject to detention on criminal grounds except in a narrow exception relating to the witness protection program. In *Demore* v. *Kim* 2003, the Supreme Court upheld the constitutionality of mandatory detention.

number of non-citizens detained over the past two decades, numerous individuals were in custody without having a court body evaluate the lawfulness of their detention.

Though immigration detention is civil and not part of the criminal enforcement system, approaches and resources of criminal detention are used. For example, many non-citizens in immigration detention are actually housed in criminal detention facilities (Schriro 2009). Even those who are detained in separate facilities are subjected to the same types of treatment as criminal defendants. Generally, non-citizens in immigration detention are locked up in facilities regulated by penal norms, sent to disciplinary segregation when they break rules of the facility, stripped of their property, forced to wear prison garb, and guarded by personnel trained to treat them as security threats (Miller 2010, p. 236).

Immigration detention also experiences many of the same chronic problems present in criminal detention including sub-standard medical care, deaths in detention, inadequate mental health care, and custodial sexual abuse (Miller 2010). It is important to emphasize that non-citizens in immigration detention are *not* there to serve a punishment but to ensure their presence at an immigration hearing or to await deportation after a removal order is given (Legomsky 2007). Even non-citizens who are in deportation proceedings based on a criminal offense are not part of the criminal justice system as they already completed their punishment. Significantly, a 2009 report by then Senior Department of Homeland Security Official, Dora Schriro found that immigration detainees were held in unjustifiably punitive situations given the noncriminal purposes of immigration detention. The punitive conditions of immigration detention is exacerbated by the fact that many non-citizens are not permitted the right to have a court evaluate and decide the lawfulness of their detention. Both mandatory detention and the use of criminal detention resources and approaches produce a more severe immigration system which is in contrast to the rights in the International Covenant on Civil and Political Rights.

As previously mentioned, a principal purpose of human rights law is to define rights protecting individuals against coercive state powers. Deportation, which removes non-citizens from their families, jobs, and communities, is a state power that comprises inherent severity and needs to be guarded against abuses (HRW 2007, p. 45). The United States' power to detain and deport non-citizens is vast and there are

limited protections. Nevertheless, deportation is restricted by human rights standards. Although international human rights law supports every state's right to set deportation criteria, it does not allow unfettered discretion (HRW 2007, p. 45).

According to the human rights standards in the International Covenant on Civil and Political Rights, all lawfully present non-citizens are entitled to the right to submit reasons against their removal and have this be reviewed by a competent authority. This right is protected by Article 13. It states:

> An Alien lawfully in the territory of a State Party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be *allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority* or a person or persons especially designated by the competent authority (Article 13, italics added).

The Human Rights Committee clarified that a non-citizen 'must be given full facilities for pursuing his remedies against expulsion so that this right will in all the circumstances of his case be an effective one' (General Comment 15, para 9). Additionally, the Human Rights Committee explicitly interpreted the phrase 'lawfully in the territory' to include non-citizens who want to challenge the validity of the deportation order against them (General Comment 15, para 9). Arguably, this could include undocumented non-citizens living in the United States as they have claims under U.S. immigration law to remain in the country[8]. Undocumented non-citizens in the United States can apply for waiver from deportation and adjustment of status under U.S. law based on a variety of personal factors[9]. The Human Rights Committee affirmed that the right of access to courts and equality before them must be available to *all* non-citizens who may find themselves in the territory or subject to the jurisdiction of the state party (General Comment 32, para 9). Because some

[8] See 8 U.S.C. section 1229b(b) – describing the cancellation of removal and adjustment of status for certain non-permanent residents and 8 U.S.C. section 1255(a) – an individual who entered the United States after being inspected may seek to adjust their status without leaving the U.S., even if their status has since expired.

[9] Ibid. These factors include the length of their presence here, their family ties to the U.S., their status as crime victims, or their fear of being persecuted or tortured if they are returned to their home country.

undocumented non-citizens have legal claims to remain in the U.S., they are subject to the jurisdiction of the U.S. and are entitled to the human right to submit reasons against their deportation.

According to current immigration law, nearly all non-citizens with a previous criminal offense (including those lawfully present in the United States) are unable to raise a defense to their deportation. This occurs because non-citizens facing deportation based on a criminal offense are either subjected to mandatory deportation or have inadequate avenues of relief from deportation where reasons against their expulsion can be fairly evaluated. Consequently, many non-citizens are deported without a fair opportunity to argue their case before a judge (Wellek 2013). This is inconsistent with the human rights standards defined in the International Covenant on Civil and Political Rights.

Over the past two decades, the discretion of immigration judges to evaluate deportation cases and grant relief to deserving non-citizens was severely curtailed (Grussendorf 2013). As mentioned in Chapter III, all non-citizens with a criminal offense categorized as an aggravated felony are automatically barred from relief from deportation. This prevents immigration judges from considering any individual factors, other than the aggravated felony offense, in determining the deportation of this category of non-citizens. As a result, an aggravate felony conviction triggers mandatory deportation despite the fact that this group contains misdemeanor offenses and crimes involving no violence.

Diminished judicial discretion is also exhibited by the tough criteria necessary for accessing waivers to deportation. According to the Immigration Justice Network[10]:

> [m]any criminal convictions disqualify someone from even asking for a waiver. Even if eligible, waivers are tough to get. For example, Immigration Courts handled nearly 400,000 cases in 2012, but

[10] The Immigration Justice Network is a coalition of three immigrants' rights groups: the Immigration Defense Project, the National Immigration Project, and the Immigrant Legal Resource Center. The Immigration Justice Network works to protect and defend the rights of immigrants who are exposed to the criminal justice system and advocates for policies that expand judicial discretion and strengthen due process.

less than 8,000 people were granted the most common type of waiver from deportation called 'cancellation of removal' (2013b).

Waivers are particularly difficult to obtain following the 1996 AEDPA and IIRIRA laws, which eliminated the 212(c) waiver and replaced the 224 waiver with the narrower 240A(a) waiver. Originally, the 224 waiver was available for all non-citizens living in the U.S. for at least five years, even if they had a criminal offense[11]. In contrast, the narrower 240A(a) waiver is only available to non-citizens who: (1) have been lawfully admitted for permanent residence for not less than five years; (2) have resided in the United States continuously for seven years after having been admitted in any status; and (3) have not been convicted of an aggravated felony[12]. Not only are aggravated felons barred from this waiver but in effect the majority of non-citizens with a previous criminal offense are also excluded. The reason is because the required seven year period of residence does not count if the non-citizen committed a deportable criminal offense during that period (Vargas 2011, p. 33). Because nearly all criminal offenses make a non-citizen deportable[13], most non-citizens with a criminal offense are prohibited from accessing this waiver[14] (Immigration Justice Network 2013b). When non-citizens are ineligible for waivers, immigration judges do not have the power to evaluate the merits of their deportation.

Both strict eligibility requirements for waivers and mandatory deportation for aggravated felonies diminish the judges' power to fairly evaluate reasons against deportation. Significantly, this precludes individuals' from their human right to submit a defense to deportation and have their case reviewed before a competent authority. Decreased judicial discretion draws parallel to reforms in the criminal enforcement system. Likewise, the import of criminal categories into immigration law shows the absorption of criminal enforcement processes into the immigration system.

[11] The 224 waiver allowed deportation to be suspended for non-citizens of 'good moral character' who were present in the United States for a minimum of five years, and whose deportation would result in extreme hardship to themselves or to their citizen or lawful permanent resident spouses, parents, or children.

[12] 8 U.S.C. section 1229b. In addition to satisfying the above statutory requirements, an applicant for cancellation must also establish that he or she warrants relief from deportation. According to reports, this is very difficult to accomplish (Immigration Justice Network 2013b).

[13] See e.g. 8 U.S.C. section 1227 a(1)(E-H) and 8 U.S.C. section 1227 a(2).

[14] If the offense was not an aggravated felony and was committed more than seven years before the period in which they applied for the waiver, the non-citizen may be eligible. In addition, if the non-citizen resided continuously for seven years before their non-aggravated felony criminal offense they may also be eligible.

Both trends contribute to a more austere immigration system that deviates from international human rights standards.

A related standard to the right to raise a defense against deportation is the right to a fair trial. This is protected in Article 14 of the ICCPR. Regarding Article 14, the Human Rights Committee said:

> [i]nsofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in [the ICCPR], and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable (General Comment No. 32, para 62).

The right to a fair trial is valid in both criminal and civil trails including civil hearings governing the removal of non-citizens from the state (General Comment 32, para 13 & para 62). International human rights standards require the right to a fair deportation hearing for all non-citizens subjected to a deportation hearing (General Comment 32, para 9). As a minimum, the right to a fair trial include: the right to be heard by a competent, independent and impartial tribunal; the guarantee of equality for all persons before the courts; and the principles of fairness and equality of arms. The Human Rights Committee in General Comment 32 stated that 'deviation from fundamental principles of fair trial, including presumption of innocence, *is prohibited at all times*' (para 6 italics added).

Yet, current U.S. immigration law in many situations does not permit a fair trial for non-citizens in deportation proceedings. As mentioned above, non-citizens facing deportation based on a criminal offense are either subjected to mandatory deportation or legal constraints that limit a judge's ability to grant relief from deportation. Though many of these individuals receive a hearing before a judge, these provisions disqualify them from a fair trial in which their human rights can be weighed. In addition, non-citizens who are eligible to raise a defense to deportation do not have guaranteed equality of arms inhibiting their right to a fair trial. Equality of arms means the ability to participate in the proceedings on equal terms by all parties in the hearing[15] (General Comment 32, para 13). Equality of arms is a necessary

[15] The principle of equality between parties applies to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence presented by the other

component for the right to a fair trial (General Comment 32, para 13), and non-citizens are entitled to this and to 'full facilities for pursuing his remedies against deportation'[16] (General Comment 15, para 9).

Non-citizens in deportation hearings in the United States do not have guaranteed equality of arms or full facilities for pursuing remedies against deportation. For instance, non-citizens are not provided with state funded representation if they are unable to afford it. This is inconsistent with the human right to representation[17] (Article 13) and impedes access to a fair trial for indigent individuals. According to reports, representation from attorneys in immigration proceedings range in the thousands of dollars (Immigration Justice Network 2013b). Absence of state funded representation leaves many non-citizens to face one of the most complex legal systems in the United States without legal counsel (Grussendorf 2013). Notably, in 2010 the American Bar Association affirmed that a lack of adequate representation hindered the rights of non-citizens to raise a defense in immigration hearings. The American Bar Association (2010, pp. 5-8) stated:

> [t]he lack of adequate representation diminishes the prospects of adjudication for the non-citizen, delays and raises the costs of proceedings, *calls into question the fairness of a convoluted and complicated process*, and exposes non-citizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios' (cited in Grussendorf 2013, p. 8, italics added).

According to the Executive Office for Immigration Review Statistical Yearbooks, only half of the non-citizens in deportation proceedings – and about 15 percent of non-citizens in immigration detention – in fiscal years 2011 and 2012 were represented by legal counsel (cited in Bergeron, Chishti, Kerwin & Meissner 2013, p. 121). Without guaranteed representation, many non-citizens in deportation proceedings do not have equality of arms and access to a fair trial.

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party. In exceptional cases, it might also require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined (General Comment 32, para 13).

[16] General Comment 15 states that a non-citizen 'must be given full facilities for pursuing his remedies against expulsion so that this right will in all the circumstances of his case be an effective one'.

[17] Article 13 of the ICCPR states that non-citizens shall 'be represented ... before ... the competent authority'.

Immigration detention also impacts non-citizens' ability to have a fair trial (Human Rights Watch 2013). Immigration detention separates individuals from their families, limits access to counsel (particularly when they are transferred to detention centers far from home), and leads to financial hardship. These situations make it more arduous to raise a defense and have a fair trial. This was exemplified by the small percentage of detained non-citizens who were represented by legal counsel in fiscal years 2011 and 2012. The challenges faced in raising a defense while in immigration detention is especially problematic in view of the 429,000 non-citizens held in immigration detention in 2011 (ACLU 2013b). In consideration of the inherent severity of deportation, it is essential that non-citizens have access to a fair trial. Nevertheless, under current immigration law, detention is mandatory for individuals who are deportable on almost any crime-related grounds. Rather than ensuring non-citizens attend deportation hearings, immigration detention unfairly impedes their ability to receive a fair hearing (Human Rights Watch 2013).

In addition to the rights to raise a defense to deportation and to have a fair deportation hearing, proportionality is another human rights standard that U.S. detention and deportation laws deviate from. In the context of proportionality and interference with an individual's liberty and security, the Human Rights Committee explained:

> [t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances (General Comment 16).

Essentially, interference with an individual's liberty and security (as is the situation in both immigration detention and deportation) must be reasonable and proportional.

Immigration law diverges from this standard when changes in the permissible grounds for deportation are applied retroactively resulting in stricter and disproportional consequences. The retroactive application of law is explicitly prohibited by Article 15 of the ICCPR. Article 15(1) says:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

Markedly, several provisions in the 1996 IIRIRA and AEDPA laws, related to deportation, are applied retroactively to non-citizens[18]. As a result, non-citizens can be deported for crimes that were not a deportable offense at the time of their commission. Consequently, a heavier penalty than the one that was applicable at the time of the criminal offense is applied. For instance, a person who pled guilty for any number of crimes (including shoplifting, possession of stolen property, or possession of marijuana) in the 1980s or 1990s is now subject to deportation based on alterations to immigration law in 1996. There is no consideration of how long ago the offenses occurred or what the individual did since. This creates disproportional consequences for the offense. It is incompatible with the standard of proportionality and is contradictory to Article 15(1) of the ICCPR.

The story of Ramon H (a pseudonym) described by Human Rights Watch (2009, pp. 30-31) demonstrates the negative effects the retroactive application of immigration laws can have on individuals. In 1990 Ramon married a U.S. citizen. In 1993 he pled guilty to lewd or lascivious acts with a minor. According to Ramon's niece, in a sworn affidavit submitted during his deportation hearing, Ramon patted her 'lightly on the butt…for no apparent reason'. The niece mentioned the incident to a friend at school which eventually resulted in the school calling the police and Ramon's conviction. Ramon received no prison time but was sentenced to probation. According to an account by his probation officer, this was completed 'in an exemplary fashion'. Over ten years later Ramon was deported based on his 1993 guilty plea which was re-categorized as an aggravated felony following enactment of the 1996 laws (Human Rights Watch 2009, pp. 30-31).

This story highlights two important points related to the human rights standard of proportionality. First, at the time of Ramon's guilty plea his offense was not a deportable one. Yet, the retroactive application of law made Ramon eligible for

[18] See e.g. 8 U.S.C. section 1101(a)(43)(U).

deportation. Second, nearly ten years after Ramon completed his criminal sentence he was removed from his home in the United States. This was a severe consequence which separated him from his U.S. citizen wife and permanently barred him from legally re-entering the country. The deportation of Ramon, a lawful permanent resident, illustrated a disproportional consequence for the minor criminal offense he was charged with. Immigration laws which permit deportation for a range of offenses that were not deportable by law at the period of their commission are incompatible with international human rights standards.

CHAPTER V
HUMAN RIGHTS AND IMMIGRATION ENFORCEMENT IN PRACTICE

5.1 U.S. immigration practices and the International Covenant on Civil and Political Rights

This chapter assesses immigration enforcement practices in United States using the human rights standards in the International Covenant on Civil and Political Rights. It demonstrates how numerous detention and deportation laws and policies in practice violate international human rights standards for non-citizens in the United States. This chapter also provides seven short case studies to capture the personal impact these laws and policies have on individuals living in the United States. These case studies illustrate how equality and non-discrimination (Articles 2(1) and 26), proportionality and prohibition of double jeopardy (Article 14(7)), and family unity (Articles 17(1) and 23) are not respected for non-citizens in the United States. The research revealed that absorption of criminal enforcement categories, resources, rationales, and approaches contributed to detention and deportation practices that deviate from international human rights standards.

Among the most fundamental standards of international human rights are those of equality and non-discrimination[1]. Despite this, certain U.S. detention and deportation policies create situations that result in discrimination and inequality before the law for non-citizens living in the United States. The presence of racial profiling in the immigration context is a prime example of this. Racial profiling is the practice of using 'racial, ethnic, or religious appearances as one factor, among others, to decide

[1] The right to equality and non-discrimination is recognized in a range of human rights instruments. Several examples include: Article 2 of the Universal Decoration of Human Rights, Articles 2 and 26 of the ICCPR, Article 2(2) of the International Covenant on Economic Social and Cultural Rights, Article 2 of the Convention on the Rights of the Child, Article 7 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In addition, the human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination was established explicitly to prohibit discrimination on the ground of race.

who to stop, question, search, or otherwise investigate' (Harris 2012, p. 2). The existence of racial profiling in the United States immigration system is an unjust practice in contradiction to international human rights standards. It exacerbates the already inadequate rights for non-citizens in contemporary U.S. immigration law. Article 2(1) of the International Covenant on Civil and Political Rights states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the *rights recognized in the present Covenant, without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (italics added).

Additionally, Article 26 of the ICCPR says:

> All persons are e*qual before the law* and are entitled *without any discrimination to the equal protection of the law*. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (italics added).

When individuals are targeted by law enforcement officials based on their race, color, presumed place of origin, and/or religion, this practice is incompatible with the human rights standards of equality before the law and non-discrimination. The events of 11 September 2001 in addition to partnerships between the Immigration and Customs Enforcement agency and state/local criminal enforcement departments facilitated the use of racial profiling in the immigration context.

The justification for racial profiling is that using racial, ethnic, or religious appearance as a clue will make law enforcement more targeted and therefore more successful and efficient. Contrary to this assumption, there is limited (if any) evidence suggesting such policies make law enforcement more accurate. In fact, evidence indicates the opposite (see e.g. Harris 2012, pp. 7-11). Prior to 11 September 2001, racial profiling as a strategy was challenged and discredited by the general public and

public officials. It was viewed as an ineffective and discriminatory policy[2] (Tumlin 2004, p. 1184; Department of Justice Civil Rights Division 2003). Nevertheless, racial profiling re-emerged as a strategy employed by criminal and immigration law enforcement officers following the World Trade Center and Pentagon bombings in 2001 (Harris 2012). This profiling targeted non-citizen men of Middle Eastern or South Asian descent for investigation related to the 11 September attacks. Arrests made in the weeks and months following 9/11 were premised largely on individuals' ethnicity, place of origin, and religion without concrete evidence of suspect behavior (Cole 2002 pp. 974-976; Harris 2012; Tumlin 2004, pp. 1184-1191).

This practice was discriminatory and resulted in abuses against non-citizens' human rights. For example, plaintiffs in the *Turkmen v. Ashcroft* case were targeted for law enforcement based on their race and religion[3] (Center for Constitutional Rights 2004). According to the Center for Constitutional Rights, eight plaintiffs were held in immigration detention for up to nine months even though they were only charged with minor immigration violations. Furthermore, some of the plaintiffs were placed in solitary confinement, blocked from communicating with their attorneys and families, and subjected to physical and verbal abuse (Center for Constitutional Rights 2004). None of the detainees were charged with connections to terrorism and there was no reason beyond their race and religion to consider these individuals dangerous. Yet, they were held based on immigration violations, viewed as 'suspected terrorists' until cleared by the FBI, and then deported from the United States (Center for Constitutional Rights 2004).

Markedly, racial profiling continued to be a problem in identifying and deporting non-citizens in the ensuing decade. In particular, the immigration programs which partner with local/state law enforcement agencies are criticized for racial

[2] Public polling data in 1999 indicated that 81 percent of all Americans understood what racial profiling was and wanted it to stop (Newport 1999). Additionally, President George W. Bush, in his first State of the Union address in 2001 (prior to 9/11), identified the approach as problematic. He said racial profiling 'is wrong, and we will end it in America' (Bush 2001 cited in Harris 2012, p. 2). Racial profiling emerged as a high-profile issue in criminal law enforcement practice in the 1980s when it was routinely employed in the War on Drugs.

[3] *Turkmen v. Ashcroft* is an ongoing class action civil lawsuit filed by the Center for Constitutional Rights against the then-Attorney General John Ashcroft, FBI Director Robert Mueller, former INS Commissioner James Ziglar, and employees of the Metropolitan Detention Center (MDC) in Brooklyn, New York. See also Center for Constitutional Rights website at <http://ccrjustice.org/ourcases/current-cases/turkmen-v.-ashcroft> viewed 25 May 2013.

profiling (Gardener and Kohli 2009, p. 5; Kohli & Varma 2011; Southern Policy Law Center 2009). Available data indicates that some law enforcement departments disproportionately target Latinos for minor violations and pre-textual arrests with the actual goal of initiating immigration checks to determine if the non-citizen is deportable based on immigration law (Chacon 2012, p. 650; Inda 2013, pp. 10-11; NDLON 2011, p. 10). As law enforcement agencies are increasingly involved in identifying and apprehending non-citizens for deportation, inevitably some officials target persons for arrest based on their race, color, and/or presumed national origin (Harris 2012). Consequently, United States citizens, lawful permanent residents, and undocumented non-citizens were and will continue to be targeted for harsh law enforcement to instigate immigration checks. This practice is particularly common in areas with high levels of discrimination towards non-citizens.

Maricopa County Sheriff Joe Arpaio and the Maricopa County Sheriff's Office in Arizona provide well-known examples of racial profiling. Both citizens and non-citizens alike have claimed to being stopped, detained, and arrested on the basis of race, color, and/or national origin (Department of Justice Office of Public Affairs 2012). Manuel Ortega Melendres, a plaintiff in *Ortega Melendres, et al. v. Arpaio, et al.*, provides one illustration[4]. He was a passenger in a car stopped by officers from the Maricopa County Sheriff's Office (ACLU 2013c). According to reports the driver was pulled over for speeding. However, the driver who was a Caucasian male was not given a citation or taken into custody. Rather, the officer requested Mr. Ortega and the other Latino passengers provide identification. Though Mr. Ortega gave the required identification, he was arrested and spent hours in the county jail. Eventually he was brought to an Immigration and Customs Enforcement official who confirmed that Mr. Ortega had proper documentation to be in the United States. Only then was Mr. Ortega released from custody.

In a similar situation, David and Jessika Rodriguez were stopped by officers from the Maricopa County Sheriff's Office in 2007 (ACLU 2013c). The

[4] The plaintiffs are represented by ACLU and Covington and Burling, LLP in a class action lawsuit against Maricopa County Sheriff Joe Arpaio, the Maricopa County Sheriff's Office, and Maricopa County for racial discrimination against Latinos. See *Ortega Melendres, et al. v. Arpaio, et al*. The lawsuit claims that Sheriff Arpaio and the Maricopa County Sheriff's Office unlawfully instituted a pattern and practice of targeting Latinos for discriminatory law enforcement actions.

couple was pulled over and ticketed for driving on a closed road. Remarkably, several other drivers who were driving on the same road and were not Latino were allowed to leave with merely a verbal warning. Mr. Rodriguez was treated unequal before the law. He was ticketed for the same behavior as the other non-Latino drivers who received no charge at all. Furthermore, during the stop, Mr. Rodriguez was required to present his social security card even though he already showed his valid driver's license, registration, and proof of insurance.

The stories of Mr. Ortega, Mr. Rodriguez, and the *Turkmen* plaintiffs demonstrated situations were individuals were targeted and treated unequal before the law based on their race, color, national origin, and/or religion. They were unfairly subjected to minor violations, pre-textual stops, and arrests. This is incompatible with the human rights standards of non-discrimination and equality before the law. Significantly, their stories also illustrated how the absorption of criminal enforcement processes and national security goals enabled the practice of racial profiling to occur in the immigration context. The rationale of national security following 9/11 justified the previously discredited use of racial profiling in the investigations of the World Trade Center and Pentagon attacks. In addition, relationships between criminal enforcement departments and the ICE agency facilitated situations where police officers targeted individuals for minor violations and pre-textual stops/arrests with the actual goal of initiating immigration checks. When criminal enforcement processes and national security rationales influence the priorities of the immigration system, it aids in the use of techniques and methods that deviate from international human rights standards.

As revealed in Chapter IV, the standard of proportionality is a human right which is breached by the retroactive application of the 1996 AEDPA and IIRIRA laws. In practice, the implementations of U.S. deportation and detention policies also frequently deviate from this standard. This occurs when non-citizens are detained and deported based solely on a criminal offense for which they already completed their criminal sentence. In such situations, the immigration consequence of detention and deportation is added on top of the lawful punishment authorized for the criminal offense. Essentially, non-citizens who come into contact with the criminal enforcement system face extra layers of punishment (Wellek 2013). They serve their

criminal sentence and then, with few exceptions, are detained and deported without an opportunity to argue their case before a judge. The stories of Howard (Chapter I) and Ramon (Chapter III) demonstrated this. Both individuals completed their criminal sentence and continued with their lives in the United States. Years later they were deported based solely on their criminal infraction. They were punished twice for the same crime.

International human rights standards require that interference with an individual's liberty and security be reasonable and proportional (General Comment 16). Adding additional punishment for non-citizens is not compatible with this. For instance, Article 14(7) of the International Covenant on Civil and Political Rights states:

> [n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

This article guarantees the substantive freedom to remain free from being tried or punished twice for an offence in which an individual was already convicted. Yet, under the current U.S. immigration system this is essentially what occurs for non-citizens with a criminal offense in the United States[5].

The standard of proportionality is particularity infringed on in situations where the deportation based on a crime far surpasses the severity of the lawful criminal sanction received. The story of Roland illustrates this. He faced a disproportional consequence based on a single mistake he made in 2001. Roland came lawfully to the United States from Haiti in 1985 when he was seven years old (Immigration Justice Network 2013c). Roland now has four U.S. citizen children and a U.S. citizen wife. He also has a large extended family living in the United States who he is very close with. Roland is the sole financial provider for his wife and children. He worked as a lab technician for 15 years at a chemical company. Along

[5] Technically, because immigration detention and deportation are not viewed as punishments by the Supreme Court, adding immigration consequences for a criminal conviction in not viewed as double jeopardy. Furthermore, the United States made an 'understanding' to Article 14(7) of the ICCPR which states that the prohibition on double jeopardy applies only when the judgment has been rendered by a court of the same governmental unit. This allows the U.S. government to charge a non-citizen in criminal court and use this conviction to deport a non-citizen in immigration court. Nevertheless, such situations in effect result in double jeopardy.

with Roland's fulltime job, he and his wife started a small business taking kids on ski trips and other outdoor adventures. They donated most of the proceeds to a school in Haiti.

In 2001, Roland was pulled over for speeding when he was driving to visit his parents with his cousin and uncle. At the time his license was suspended because he owed money on a previous ticket. Roland panicked and signed his cousin's name instead of his own. He then told the police officer what he did. Roland was arrested and charged with forging public records. He received a 1.5 year suspended sentence and served no jail time (Immigration Justice Network 2013c).

In 2011, Roland and his extended family took a week-long cruise for the Fourth of July. When they returned to Florida, an immigration official took Roland's finger prints and immigration information. Due to shared government databases Roland's previous criminal offense was brought to the attention of the Immigration and Customs Enforcement agency. In 2012 Roland was placed in immigration detention and deportation proceedings based solely on his mistake made in 2001. Under current immigration law, forging public records is categorized as an aggravated felony. Consequently, the immigration judge cannot consider any other circumstances surrounding his case or his life situation. The judge does not have the power to waive Roland's deportation. He will be returned to Haiti and be permanently barred from re-entering the United States. According to the Immigration Justice Network, Roland's ordeal is a huge financial and emotional strain on his entire extended family (2013c). Not only was Roland punished twice for the same offense but the consequence of deportation far succeeded the 1.5 year suspended punishment he received for his criminal offense. This is a disproportionate consequence and it is inconsistent with human rights standards.

In practice, contemporary U.S. detention and deportation laws frequently imposes punishments disproportionate to the crime by adding immigration consequences on top of sentences received in the criminal enforcement system. As more and more crimes, which make non-citizens deportable, are added to immigration law this occurs more often. This is particularly the case for the wide range of offenses under the aggravated felony category as they entail mandatory detention and deportation. Finally, this situation is exacerbated by information exchange between

criminal and immigration enforcement agencies and by current immigration policies which target non-citizens with a criminal offense for deportation. Criminal enforcement categories, approaches, and resources in the immigration system create a harsher system that departs from international human rights standards.

The international human rights standard of family unity is the last standard discussed. Article 17(1) of the International Covenant on Political and Civil Rights protects individuals' from arbitrary interference with their 'privacy, family, home or correspondence'[6]. Additionally, Article 23 of the ICCPR says: '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state', and all men and women have the right 'to marry and found a family'. The Human Rights Committee interpreted the right to found a family to include the right to 'live together' (General Comment 19). The Committee also explicitly stated that family unity imposes limits on states' power to deport (General Comment 15).

Nevertheless, pursuant contemporary immigration law immigration judges, in most cases, are not allowed to take family ties into account when adjudicating the deportation of non-citizens[7]. Nor does immigration law allow immigration judges the discretion to release a non-citizen from preventative detention based on family factors for non-citizens with a criminal offense. When family considerations are unable to be respected in relation to the detention and deportation of individuals, immigration law diverges from human rights standards. The reforms in immigration law that omitted previously available individual considerations, such as family unity, are related to a strategy of governing through crime (see Chapter III).

Importantly, the implementation of U.S. immigration laws and policies frequently create situations that diverge from the standard of family unity. In practice, contemporary immigration policies, which detain and deport large numbers of non-citizens, ensure separation of many families without the ability to raise family unity as a reason against their removal. According to Human Rights Watch, in fiscal years 2011 and 2012 alone the U.S. government carried out over 200,000 deportations of

[6]Article 17(1) of the ICCPR says that no one shall be 'subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'.

[7] For example, nearly all persons in deportation hearings with a criminal offense are ineligible for a waiver from deportation where their family unity could be considered. Additionally, waivers are extremely difficult to get even for eligible non-citizens (Immigration Justice Network 2013b).

people who said they had U.S. citizen children[8] (2013, p. 6 *supra* note 11). Equally, immigration detention substantially increased over the last two decades (Sapp & Simanski 2012).

High detention and deportation rates have negative impacts on families in the United States. They lead to a person losing their ability to live with family members in a country they consider home, and they cause emotional and financial strain. Furthermore, persons deported are barred (either for decades or for the rest of their lives) from legally re-entering the United States making it difficult to re-unit with their families. The story of Alfonso Martinez Sanchez, a 39-year-old father of five U.S. citizen children, provides one illustration of the detrimental impact deportation had on his U.S. family (Frey 2013, video documentary at 12-25 min). Alfanso lived in the United States with his U.S. citizen wife and children for more than 20 years before he was stopped by police in a convenience store and asked for his identification. The police arrested Alfanso for not having proper immigration documents and handed him over to the Immigration and Customs Enforcement agency which deported him. In an effort to re-unit with his family Alfonso tried to return the United States through the Arizona desert. While attempting to return he suffered heat stroke and died in the desert. According to reports, Alfanso felt pressured by Immigration and Customs Enforcement officials to give up his rights to a deportation hearing – a practice known as 'voluntary removal'[9] (Democracy Now 2013). Furthermore, according an interview with investigative reporter John Carlos Frey, Alfonso was deported 'en masse' with hundreds of thousands of other individuals who had no opportunity to have a judge evaluate their case and consider their family ties to the United States[10] (Democracy

[8] It was also estimated that one in four people deported have at least one U.S. citizen child under 18 years old. See John Carlos Frey's 2013 documentary 'Dying to Get Back', at approx 10 min.

[9] 'Voluntary' removals are signed statements in which a non-citizen agrees to waiver their rights to a hearing before an immigration judge, acknowledges removability, and agrees to a final order of deportation (ACLU 2010, p. 9). A lawsuit filed by ACLU on 4 June 2013 claims the 'systematic' misuse of 'voluntary' removals by immigration officials. The lawsuit, *Lopez-Venegas v. Napolitano,* alleges that 'as a matter of regular practice, Border Patrol agents and ICE officers pressure non-citizens to sign away their rights to a hearing before an immigration judge'(ACLU 2013d). This is done without a full understanding of the consequences of their action and without being informed that the individual has a right to a trial and may be able to gain legal residence in the U.S.

[10] Interview with John Carlos Frey on the news show Democracy Now (13 June 2013). John Carlos Frey is an investigative reporter working on behalf of the Investigative Fund at the Nation Institute. His piece, *Dying to Get Back*, aired on PBS's *Need to Know* 17 May 2013. The transcript of the interview with Democracy Now is available at <http://www.democracynow.org/2013/6/13/a_mexican_migrants_death_portends_dangers>

Now 2013). Significantly, if Alfanso had a fair deportation hearing he would have had a high probability to stay legally in the United States based on his length of stay and family ties. Yet in practice he was not afforded this chance, violating his human rights.

Alfanso was deported from the United States and separated from his family and home. Regrettably, his attempt to re-unit with the people he loved resulted in his death leaving his wife and five kids without a father. Alfonso's deportation was linked to the partnerships between state/local criminal enforcement departments and the Immigration and Customs Enforcement agency. Alfonso was targeted and apprehended by local police who handed him over to immigration officials. Alfonso was not charged with a criminal offense but was subjected to a pre-textual stop to effectuate an immigration check. In addition, Alfanso did not receive a fair immigration hearing where a judge could consider his individual situation before authorizing his detention.

Like Alfonso's children, many other children living in the United States are negatively impacted by current U.S. immigration policies which detain and deport high numbers of individuals annually. Parents lose their ability to place their children with relatives when they are apprehended and placed in deportation proceedings (CAMBIO 2013). As a result, thousands of children are placed in the foster care system if their parents are detained by the Immigration and Customs Enforcement agency. According to American Civil Liberties Union more than 5,000 American children were sent to foster care as a result of a parent being deported during fiscal year 2012 (ACLU 2013b). The story of Fernando and his children provide one example of this. Fernando lived in North Carolina for a decade before he was deported. Fernando was pulled over by the police for driving without a license[11]. The police transferred him to the Immigration and Customs Enforcement agency where he was eventually deported. As a result of his deportation, Fernando's children were put in foster care because their mother could not afford rent or other basic needs without Fernando's help (Applied Research Center 2011 p. 31). Fernando was the primary

[11] Fernando drove to work without a license because he was an undocumented non-citizen and was unable to obtain a driving license due to North Carolina law.

caretaker for his children and his deportation resulted in him being unable to support them.

Equally, Clara and Josefina and their children present another instance of the negative results deportation has on families living in the U.S. Clara and Josefina, sisters who lived together in a small New Mexico town, were detained and deported by Immigration and Customs Enforcement officials in 2010. At the time Clara had a six year old and a one year old and Josefina had a baby who was nine months. All three children were placed in foster care when Clara and Josefina were detained (Applied Research Center 2011, p. 5). According to reports, agents from both the Immigration and Customs Enforcement agency and the Drug Enforcement Administration came to their home looking for drugs but found none[12]. In the end, the Immigration and Customs Enforcement agency detained and deported the two sisters because of their undocumented immigration status. Consequently, their three young children were placed in foster care in the United States and the two mothers were unable to contact their children for over a year (Applied Research Center 2011, p. 5).

The three stories of Alfanso, Fernando, and Clara and Josefina illustrate the negative impacts deportation can have on families in the United States. Distinctly, all of these individuals came into contact with the immigration system because of the relationship between immigration and criminal enforcement agencies. Their three stories showed involvement of criminal enforcement processes and personnel in their apprehension and deportation. In practice, immigration policies which detain and deport large numbers of non-citizens guarantee many families are being separated without the ability to raise family ties as a reason against their removal. Family unity is a human rights standard protected by Articles 17 and 23 in the International Covenant on Civil and Political Rights and the implementation of current U.S. immigration policies frequently diverge from this standard.

[12] According to reports Clara believed a neighbor called in a false report about drug use to the Immigration and Custom Enforcement agency to produce an immigration check (Applied Research Center 2011, p. 5).

CHAPTER VI
THE WAY FORWARD

This research illustrates how categories, resources, rationales, and approaches from the criminal enforcement system negatively influenced behavior in U.S. detention and deportation procedures for non-citizens. It draws parallels between deviations in human rights standards and the import of criminal enforcement processes. It is recognized that there are limitations to the research. First, the research does not consider external factors which may have influenced changes to immigration laws and policies in the United States from the late-1980s to 2012. Such external factors include the U.S. economy, increased migration to the United States, and the political response to migration. It is likely that all of these dynamics contributed to immigration reforms during this period. Second, the research does not take into account potential benefits to using criminal enforcement processes in immigration laws and policies. Finally, the research is confined solely to the United States and does not compare the detention and deportation procedures to other states around the world.

The reason for using the governing through crime theory is to explain the significance of changes to detention and deportation laws and policies by describing the way crime and the processes associated to it shape U.S. institutional practices. In essence, this research argues that a strategy of governing through crime contributes to more non-citizens being detained and deported without adequate protections. Another important aspect of the governing through crime theory is the increasing propensity to generate new behaviors as ‘crime’ and to use more and more criminal enforcement categories and approaches in new situations. The following chapter demonstrates how human rights standards can be utilized as an analytical tool to reduce the negative impact of using criminal enforcement processes in detention and deportation procedures in the United States. It also introduces potential areas for future research.

Jonathan Simon observed that a troubling draw back with exporting criminal enforcement processes into novel contexts is its 'inevitable tendency to escalate, to identify and even generate new behaviors as crimes…'(2007b). In part, the research illustrated this by showing the continued increase of criminal categories, approaches, and resources in detention and deportation laws and policies since the late-1980s (see Chapter III). It also depicted an inclination to progressively use minor crimes to trigger detention and deportation. Simon's expectation of an unavoidable tendency to escalate and generate new behaviors as crime is particularly relevant in a period where the United States Congress is once again debating immigration reform. Predictably, the 2013 proposed bills in the United States Senate and House of Representatives add new 'criminal' behaviors to immigration law that would elicit deportation for non-citizens. For instance, the House of Representatives' proposed bill, Strengthen and Fortify Enforcement Act[1] (SAFE Act), creates more 'crimes' that trigger deportation. The SAFE Act adds the use of false Social Security Numbers and other identity documents to the broad list of deportable crimes. In addition, this bill further inflates the aggravated felony category in immigration law. It adds offenses like consensual sex between a 17 and 18-year old and a second misdemeanor driving under the influence to the aggravated felony category (Immigration Justice Network 2013e). If this bill becomes law, these minor crimes will trigger mandatory detention and deportation for non-citizens living in the United States.

Similarly, the Senate bill, the Border Security, Economic Opportunity, and Immigration and Modernization Act, also adds more crimes that trigger deportation[2]. Under this bill a non-citizen may be deported for three or more convictions 'related to' driving under the influence (DUI) (Senate Immigration Bill 744). According to the Immigration Justice Network, the language of this provision is very broad and will contain offenses such as being drunk in the car but not driving (2013d). Potentially, it could also include other lesser driving infractions that are not considered DUIs (Immigration Justice Network 2013d). Both of the bills in the Senate and the House of Representatives add more minor crimes to immigration law which activate detention

[1] The House Judiciary Committee panel approved this bill on 18 June 2013. At the time of this research the bill was not voted on in the House of Representatives.

[2] The Border Security, Economic Opportunity, and Immigration and Modernization Act passed the Senate on 27 June 2013.

and deportation. Markedly, they demonstrate the continued and inevitable escalation predicted by Jonathan Simon.

International human rights standards, such as the International Covenant on Civil and Political Rights, provide a way to guide detention and deportation laws and policies preventing more severe procedures from developing. Using human rights as a guide would also remedy many existing problems. International human rights standards offer a way to generate a moderate alternative to the current model in the United States. It would create detention and deportation laws and policies that acknowledge both states' need to detain and deport some non-citizens and the rights of the individual. Applying human rights standards as a guide does not mean rejecting the application of all criminal enforcement processes in immigration laws and policies, rather it tempers their impact by ensuing individual rights are respected.

In order to align contemporary United States detention and deportation practices with the International Covenant on Civil and Political Rights, several modifications are necessary. First, deportation laws and policies need to be adjusted to allow all non-citizens the right to raise a defense to deportation – including non-citizens with a previous criminal offense. This means eliminating mandatory deportation laws for non-citizen with an aggravated felony and restoring judicial discretion so immigration judges have the capacity to evaluate the merits of deportation based on individual factors. Such factors need to take account of family ties to the United States, the impact deportation would have on the family, and consideration for whether deportation is a proportional outcome for the offense that triggered it.

Second, immigration detention laws in the United States need to ensure all non-citizens have the right to court control of their detention. Again, this means removing mandatory detention laws for non-citizens with a criminal offense and reinstating judicial discretion when it comes to evaluating the necessity of pre-trial detention. Third, both detention and deportation laws must provide non-citizens with access to a fair trial where their rights can be justly weighed. This entails state-funded representation for indigent non-citizens. It also requires that pre-trial detention is limited in use to exceptional circumstances where the individual is determined to be a threat national security, likely to abscond, or pose high bail risk. Fourth, reforms in

immigration law which add new criminal offenses (that trigger deportation) may not be applied retroactively to individuals who committed the relevant offense before it was added to immigration law. Finally, aligning detention and deportation policies with human rights standards compels a re-evaluation of partnerships between the Immigration and Customs Enforcement agency and state/local criminal enforcement departments. This does not necessarily mean elimination of all partnerships. Rather, it demands an assessment of whether partnerships can continue without resulting in discriminatory practices, such as racial profiling. And, if this is possible, determining what measures may be implemented to reduce such practices.

The above modifications are a starting point. Additional research which generates a more detailed model of U.S. detention and deportation laws and policies using human rights standards would be constructive for future study. Furthermore, research that evaluates the relationship between external factors and changes to immigration laws and policies premised on criminal enforcement approaches would be advantageous. It would also be valuable to compare U.S. immigration laws and polices to states around the world. How does the United States measure up to other states in terms of detention and deportation procedures? Are there states that do not utilize criminal enforcement processes in immigration laws and policies? What do these systems look like? Finally, it would be constructive to test human rights standards as an analytical tool by using them to evaluate and generate alternative detention and deportation models in states around the world.

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