ARTICLE

POST-DEPORTATION HUMAN RIGHTS LAW: ASPIRATION, OXYMORON, OR NECESSITY?

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INTRODUCTION

Deportation (also called "removal") is a major law enforcement system that looms over the tens of millions of non-citizens who live, study, and work in this country.[1] Since harsh changes to the system were implemented in 1996,

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1. The most recent best estimates indicate a population of some 33.5 million foreign-born persons in the United States. LUKE J. LARSEN, U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003 1 (2004). Within this group, less than half of those who have entered the United States since 1980 have become naturalized citizens. *Id.* at 4, fig. 5. The current undocumented population is estimated at approximately twelve million.

millions of non-citizens—many undocumented and hundreds of thousands with legal immigration status—have been ordered to leave. Tens of thousands are barred by law from ever returning.[2] Those who might have a legal path of return face an arcane system governed by judges and administrators who exercise largely unreviewable discretion. Those who discover that they were wrongly deported are confronted with an array of almost insurmountable jurisdictional hurdles to judicial review of their cases. Because the U.S. has chosen to rely on deportation in such substantial and rigid ways, the need to examine the post-deportation system is timely and compelling. At present, that system is an anachronistic embarrassment. This essay seeks to underscore the need for attention to this problem and the legal difficulties it raises.

The size of the deportation system is impressive. From 2001 through 2004, the total number of people formally removed from the United States was over 720,000, while those who left pursuant to a grant of "voluntary departure" (an often informal procedure that is voluntary in name only, as the alternative is forced removal) exceeded four million.[3] The system grows larger each year. According to the Executive Office for Immigration Review (EOIR), the total number of cases received for formal processing by immigration courts has increased in each of the past five years, growing from 282,396 in 2001 to 368,848 in 2005.[4] The percentage of those in proceedings who are ordered removed has also increased each year, from 78 percent in 2001 to 84 percent in 2005.[5] It is difficult to gauge exactly how many of these deportees are long-term legal residents.[6] We may, however, roughly deduce the numbers of

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JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE UNITED STATES 2 (2006) (estimating population of "unauthorized" migrants at 11.5-12 million). Also, large numbers of persons live in tenuous, "quasi-legal" statuses. *See generally* DAVID A. MARTIN, MIGRATION POLICY INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION (2005).

2. Reversal of a final removal order by a reviewing court may, under certain circumstances, permit the affected person to return, though the law is complex and the procedures unclear in such cases. *See* TRINA REALMUTO, AM. IMMIGRATION LAW FOUND., PRACTICE ADVISORY: RETURN TO THE UNITED STATES AFTER PREVAILING ON A PETITION FOR REVIEW (2007).

3. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS 159 (2006).

4. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK B2 (2006). All of these cases involve people who face removal from U.S. soil by government action, though some are cases formerly known as exclusion. Since April 1, 1997 all such proceedings are called "removal." EOIR does not clearly disaggregate internal removals from inadmissibility cases. The number of removal cases (plus what were formerly called "deportation cases") has risen from a total of some 237,000 in 2001 to nearly 328,000 in 2005. *Id.* at C3.

5. *Id.* at D2. These statistics incorporate extremely wide divergences across regions and across immigration judges, however.

6. The *Statistical Yearbook* combines its reports of interior removals of long-term residents with removals of border-crossers who may be caught at or near the border. *Id.*

"interior" deportations from cases in which there were applications for discretionary relief (rarely available to those caught at entry). That number was 82,993 in FY 2005.[7] A 2006 study analyzed the use of the most serious, "aggravated felony" charges[8] in formal removal proceedings against 156,713 people and found that some 70 percent of those charged had lived in the United States for more than a decade. The median length of residence was fourteen years.[9]

Government statistics also reveal important demographic information about non-citizens caught in the deportation system. Although 222 nationalities are tabulated in the records of formal removal proceedings, ten countries account for some 80 percent of removals. No European country makes the list. Indeed, the top ten have not changed in five years: Mexico, El Salvador, Guatemala, Honduras, Haiti, Dominican Republic, Cuba, China, Colombia, and Brazil.[10]

The website of ICE, the Immigration and Customs Enforcement Agency, offers intriguing clues about the purpose of deportation. Perfectly accurate statistics are hard to gather, but ICE proudly reported that in FY 2006, it had set a "New Record for Alien Removals" by removing "more than 186,600 *illegal aliens* from the country . . . , a record for the agency and a ten percent increase over the number of removals during the prior fiscal year."[11] The agency does not define exactly what it means by "illegal aliens," which is in fact as much a pejorative as a legal term of art. Those who are deported actually include the undocumented, visa "overstayers," violators of various non-immigrant statuses, and many thousands of lawful permanent residents ("green card" holders). ICE also reported that it had increased its detention bed space by 6,300, bringing the current number of "funded beds" (another notable euphemism) to 27,500 immigration detainees.[12]

Visitors to ICE's website are treated to a spectacular and revealing rogue's gallery.[13] One after another, the faces and tattooed bodies of swarthy evil-doers appear as symbols of success stories for the invigorated removal system. They are almost all people of color, mostly Latino men (though one Serbian war

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7. *Id.* at N1.

8. These charges are the most serious in terms of consequences, but very minor crimes, such as petit larceny and drug possession, can be aggravated felonies. *See* 8 U.S.C. § 1101(a)(43) (2000).

9. TRAC IMMIGRATION, HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006), *available at* http://trac.syr.edu/immigration/reports/158.

10. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, *supra* note 5,at E1.

11. Fact Sheet: Executive Summary ICE Accomplishments in Fiscal Year 2006, http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm (last visited March 23, 2007) (emphasis added).

12. *Id.* (emphasis added)

13. ICE Detention and Removal Operations (DRO) Multimedia Gallery, http://www.ice.gov/pi/dro/multimedia/index.htm (last visited Mar. 12, 2007).

criminal and a couple of women made the cut). The screaming headlines read like those of 1950s "true crime" magazines:

> ICE repatriates former Mexican police officer wanted for role in Sinaloa drug "massacre"[14]
>
> ICE nabs Argentinean wanted for murder in home country[15]
>
> ICE deports illegal alien convicted of kidnapping, 1st degree sex crime [16]
>
> ICE deports Colombian woman convicted of vehicular hijacking, mutilating corpse, during 2-day crime spree that left two dead [17]
>
> ICE Arrests Woman Convicted Of Murdering A Pregnant Woman In Panama [18]

On closer inspection, however, the inflammatory and often misleading nature of the headlines becomes clearer. Consider, for example, this teaser: "A murderer, 4 rapists among 71 deported by ICE."[19] Who were the other sixty-five deportees? We may never know. Clues are found in the full press release, linked to the headline but obscured: of the seventy-one transported to the U.S.-Mexico border, thirty-one had criminal convictions for "such crimes as: forgery, drug offenses, theft, escape from custody, drunken driving, aiding an accomplice, criminal sexual conduct and murder."[20] Thus, less than half of the deportees in this group actually had criminal convictions, and many of those appear to be relatively minor crimes. Policy-makers and the public might want considerably more accurate information about the objects of ICE's enforcement strategy. But, to date, it is impossible to gather much more from government statistics than generalities, such as the fact that of 167,700 "aliens" removed in FY 2005, 84,300 were "criminal aliens."[21] It is clear, however, that many of the criminal offenders are removed for relatively minor crimes. In a recent brief to the Supreme Court, the government asserted that this year some 8,000 non-citizens await removal from the Ninth Circuit alone for "theft offenses."[22] A

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. U.S. Immigration and Customs Enforcement, News Release (June 22, 2006), http://www.ice.gov/pi/news/newsreleases/articles/060622bloomington.htm.
21. *Id.*
22. Petition for Writ of Certiorari at 15, Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007) (No. 05-1629).

2005 GAO Report concluded that of some 55,000 "illegal aliens" incarcerated for criminal charges in federal prisons in the United States, more than 90 percent had been previously convicted of violations of drug or immigration laws.[23]

The conflation by ICE and others of "illegal aliens," "criminal aliens," and even "terrorists" obscures the scope and function of the deportation system. Such blurring is not new. J. Edgar Hoover, who began his storied career as a deportation agent, often engaged in similar verbal legerdemain.[24] In May 2006, President Bush offered an inflammatory insight that is either tautological or untrue:[25] "Illegal immigration . . . brings crime to our communities."[26] The President's statement is tautological in the sense that illegal immigration *by definition* brings those who have violated immigration law to various communities. But, contrary to much public opinion, in terms of other sorts of crime, it is untrue.[27] Still, politicians have long engaged in criminal alien-bashing. Congressman Lamar Smith, a main proponent of the harsh 1996 immigration laws, opined in 2003, "We should not give criminals who are not U.S. citizens more opportunities to further terrorize our communities."[28] A decade ago, Senator Orrin Hatch connected crime and terrorism in this way: "When these criminal aliens get convicted, the minute their sentence is over, . . . we get them out of this country so they cannot just waltz out of the jail and . . . start doing further terrorist activities."[29] Senator Joe Biden more colorfully connected deportation procedures with anti-terrorism laws in 1996, saying, "What is good enough for the Mafia ought to be good enough for a bunch of whacko terrorists."[30]

It is easy to see the dangers of viewing undocumented non-citizens as equivalent to dangerous criminals or terrorists. But in many respects the

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23. U.S. GOV'T ACCOUNTABILITY OFFICE, INFORMATION ON CERTAIN ILLEGAL ALIENS ARRESTED IN THE UNITED STATES: BRIEFING FOR CONGRESSIONAL REQUESTERS 19 (2005), *available at* http://www.gao.gov/new.items/d05646r.pdf. The report did highlight a seemingly high arrest rate among this population, but more research needs to be done on this question to consider the causes of such arrests. More than 50 percent of federal arrests of "illegal aliens" were for drug, immigration or traffic offenses. *Id.* at 18.

24. *See generally,* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY, chs. 4-5 (2007).

25. *See infra* Part II(A) for discussion of the relationship between illegal immigration and crime.

26. President George W. Bush, Address to the Nation on Immigration Reform And Border Security (May 15, 2006) ("Illegal immigration puts pressure on public schools and hospitals. It strains state and local budgets, and brings crime to our communities.").

27. *See infra* Part II(C).

28. *Immigration and Naturalization Service Decisions Impacting the Agency's Ability to Control Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 13 (1999) (statement of Rep. Lamar Smith, Member, H. Subcomm. on Immigration on Claims).

29. 142 CONG. REC. S3,456 (1996) (statement of Sen. Hatch).

30. 142 CONG. REC. S3,369 (1996) (statement of Sen. Biden).

deportation system itself embodies a similar conflation. This essay will sketch the outlines of a structured approach to understanding and, one hopes, reforming deportation. First, we must better define the purposes and methods of deportation. This requires investigation into a series of questions considered in Part II: What are the possible and actual functions of deportation? How does the system really operate? How is it justified? How does it fit (if it does) within our legal system? How well are its purposes and procedures connected?

Second, as discussed in Part III, we must carefully examine the actual effects of deportation on individuals, families, and communities, domestically and internationally. From these inquiries emerge further legal and normative questions considered in Part IV: Where does the rule of law end? Do deportees have any rights to return or even to an orderly process to govern the possibility of return? What role do constitutional and international human rights norms play, if any? Is it contradictory or naïve to speak of the development of a regime of post-deportation human rights law? The basic argument of this essay is that it is essential.

I. THE FUNCTION(S), OPERATION, AND LEGITIMACY OF DEPORTATION

A. The Function(s) of Deportation

The function of deportation is not as obvious as it might seem. A major treatise on immigration history states that

> [d]eportation, like exclusion, is an instrument of immigration policy, not a policy in itself; but . . . like exclusion it is a means of implementing a policy of selecting those allowed to become and remain residents of the United States..[31]

This view, though not incorrect, is too narrow. Deportation is now, and always has been, considerably more than an "instrument of immigration policy." Put bluntly, it is a key component of a system that has done "little to reduce illegal inflows and much to drive the illegals [sic] into an underclass that degrades them and offends our moral sensibilities."[32] It is worth considering whether deportation is realistically capable of actually controlling illegal immigration. One recent study has concluded that it would cost the American taxpayer between $206 and $230 billion over five years to deport the population of "illegal aliens" in the United States.[33] This figure would exceed the entire annual budget for the Department of Homeland Security. If one adds

31. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 443 (1981).

32. Jagdish Bhagwati, *Getting Policy Wrong*, BOSTON REV., Oct.-Nov. 1998, *available at* http://bostonreview.net/BR23.5/Bhagwati.html.

33. RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT (2005).

to this the cost of deporting all those otherwise legal non-citizens (students, workers, permanent residents, refugees, asylees, etc.) who may have violated an immigration or deportation law, the astronomical costs of such a program are clear. Such a massive system would also amount to a police state for non-citizens, their families, and anyone who might look like a non-citizen. Thus, at best, deportation as immigration policy appears to be a rather inefficient finger in a leaking dike. The complex problem of illegal immigration requires a much more creative, comprehensive, and nuanced solution.

Further, when one considers the effects of the deportation regime on the targeted population, it appears to be a powerful tool of discretionary social control, a signal feature of the nascent national security state, and a prominent part of the recurrent episodes of xenophobia that have bedeviled our "nation of immigrants." It functions as a mechanism of scapegoating, ostracism, family and community separation, and banishment,[34] in odd equipoise with our relative openness to legal immigration, our powerful protections for *certain* rights of non-citizens,[35] our grant of birthright citizenship to virtually all born on U.S. soil, and (relatively) easy naturalization.[36]

Two distinct types of deportation laws operate against three general classes of non-citizens: lawful permanent residents, legal entrants, and undocumented entrants.[37] Important practical, normative, and legal consequences follow from the type of deportation at issue and against whom it is directed.

One type of deportation law, which I term the extended border control model, vindicates two basic attributes of sovereignty: the control of territory by the state and the legal distinction between citizens and non-citizens. If (and, of course, this is a big *if*) one accepts the legitimacy of nation-states and borders,[38] this acceptance leads logically not only to laws of admission and exclusion but also to some mechanism to deal with those who evade those laws. These extended border control deportation laws have two variants. First, laws mandate the deportation of persons who have evaded border controls, either physically (that is, by surreptitious entry into the United States) or by fraud or

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34. It is one of the ways that we may "make foreign those whom we persecute." Bonnie Honig, *A Legacy of Xenophobia*, BOSTON REV., Dec. 2002-Jan. 2003, *available at* http://bostonreview.net/BR27.6/honig.html.

35. *See, e.g.*, Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) ("alienage lies at the nexus of two . . . worlds.").

36. U.S. CONST. amend. XIV; 8 U.S.C. § 1401-1409 (2000). *But see* KANSTROOM, *supra* note 25, introduction (describing the difficulties of naturalization in recent years); CATHOLIC LEGAL IMMIGRATION NETWORK, CITIZENSHIP AT RISK (2000).

37. Refugees, technically in a kind of "parole" status, may also face removal proceedings both before, during, and after applying to become lawful permanent residents. *See, e.g.*, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000) (non-citizen who entered the U.S. as a refugee held deportable).

38. Of course, there is much more to be said about this. *See* Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POLITICS 251 (1987); *see also* Kevin R. Johnson, *Law and the Border; Open Borders?*, 51 UCLA L. REV. 193 (2003).

misrepresentation. Second, there are laws that permit the deportation of persons who violate an explicit condition upon which they were permitted to enter. For example, a person who enters the United States as a student may be required to maintain a full course load. A person on a work visa must work for a particular employer. A fiancé must get married, and so on. The legitimacy of such laws also derives largely from border control and sovereignty. But the contractual aspect of the deal that permitted entry is also an important factor. The non-citizen's status and right to remain depends upon a positive act to fulfill a condition. Failing that, the government, in effect, says, "The deal is off."[39]

Extended border control laws may create deep normative problems: discriminatory enforcement, insufficient flexibility for changed circumstances, hardship, disruption of strong family claims, or the possibility that a border violation was motivated by fear of persecution. And, of course, if one is uncomfortable with the legitimacy of the border regime itself—as many surely are in the case of Mexico—then extended border control laws are mere adjuncts to an unjust historical structure.

But deportation law involves much more than these problems. Some laws combine extended border control with post-entry social control.[40] Thus, deportation laws may prohibit certain conduct from the time of admission into the United States for a specific period of time. An immigrant may be told, for example, not to obtain public benefits or not to commit a "crime involving moral turpitude" for five years. And pure post-entry social control laws, often without any time limits, apply to all non-citizens within the United States. There is no requirement that the non-citizen be informed of them at the time of entry. Indeed, they may be changed retroactively. A non-citizen may be deported for conduct that was not a deportable offense when it occurred. Post-entry social control deportation laws derive from what might be termed an "eternal probation" or, perhaps, an "eternal guest" model. The strongest version of this model would suggest that the millions of non-citizens among us, including long-term lawful permanent residents, are harbored subject to the whim of the government and may be deported for any reason, whenever the government so desires. A more constitutionally refined variant of this model might impose some limits on this power, perhaps requiring that substantive deportation decisions at least be made pursuant to duly-enacted statutes rather than in the unfettered discretion of the executive branch. Historically, however, U.S. courts have imposed virtually no substantive limits on the post-entry social control deportation power.[41] The basic idea has been that all non-citizens are subject to an ever-shifting—or even a retroactive—regime of deportation.

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39. *See generally*, HIROSHI MOTOMURA, AMERICANS IN WAITING (2006).

40. *See* ROSCOE POUND, SOCIAL CONTROL THROUGH THE LAW 16 (1942) ("I begin with the ideas of civilization, of social control as the means of maintaining civilization, and of law as an agency . . . of social control.").

41. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1892) (deportation power held to be "absolute and unqualified").

Procedural rights have fared somewhat better in this realm, though significant due process problems remain.[42]

Post-entry social control deportation, like its historical antecedent banishment, offers an alluring promise: the permanent elimination of "bad" people from our communities. The attractiveness of this proposition throughout history has been impossible for many governments to resist. Australia exists in its current demographic form in large measure because of it. The Americas, too, were largely peopled with those exiled by European governments.[43] The British Piracy Act,[44] for example, created a government-subsidized banishment regime that endured for many decades. Its formal title—indicating its desired crime-control function—was "An act for the further *preventing* of robbery, burglary, and other felonies, and for the more effectual transportation of felons."[45] Its proponents also sometimes justified it in compassionate terms. In 1773, Sir John Fielding wrote that transportation out of the country was

> the wisest, because most humane and effectual, punishment we have . . . which immediately removes the evil, separates the individual from his abandoned connexions [sic], and gives him a fresh opportunity of being a useful member of society.[46]

So far as I am aware, no current supporters of post-entry social control deportation make such arguments.

Indeed, unlike our current laws, some banishment laws of the past did pay attention (albeit not humanitarian attention) to what would become of the transported criminals abroad. Thus, the British law not only allowed courts to order convicts to the colonies for up to fourteen years, "as soon as conveniently may be."[47] It further permitted offenders to be ordered "to the use of any person or persons, who shall contract for the performance of such transportation . . . ." The ostensibly public scheme thus rewarded private interests. If the banished were miserable in the New World (and many were), their options were severely limited, however. The penalty for a premature return from transportation abroad was often death.[48]

The modern tide of crime-based deportations has been steadily rising by any historical measure. A 2003 investigation concluded that more than 500,000

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42. *See, e.g.,* Demore v. Kim, 538 U.S. 510 (2003); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) [hereinafter Reno v. AADC] .

43. *See* KANSTROOM, *supra* note 25, c. 1.

44. 4 Geo., c. II (1717).

45. *Id.* (emphasis added).

46. ABBOT EMERSON SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607-1776, at 128 (Peter Smith 1965) (1947) (quoting IV CALENDAR OF HOME OFFICE PAPERS OF THE REIGN OF GEORGE III 1760-1775 no. 39 (Joseph Redington ed., Longman & Triibner 1878-1899).

47. *Id.* at 111.

48. This was largely due to the fact that transportation was punishment for conviction of a felony, the penalty for which was death. *See id.* at 117; J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, AT 473 (Princeton Univ. Press 1986).

immigrants with criminal records had been deported to 160 countries since 1996. The number of criminal deportees in 2002 alone exceeded the total between 1905 and 1986.[49]

Still, such deportations have long been criticized. First, there is a humanitarian critique: the punishment is said to be unduly harsh to the individual and to his or her family. This is especially true when the deportee is a refugee, a bread-winner, or a long-term legal resident who is deported for a relatively minor or long-past crime, leaving behind a family of U.S. citizens.

Beyond inhumane harshness, however, comes a question of societal responsibility. Indeed, a 1953 Presidential Commission concluded that the criminal deportation laws of that era should be radically revised in many cases. As the Commission noted,

> Each of the aliens is a product of our society. Their formative years were spent in the United States, which is the only home they have ever known. The countries of their origin which they left - in two cases during infancy, in another, at the age of 5 years - certainly are not responsible for their criminal ways. . . . If such a person offends against our laws, he should be punished *in the same manner as other citizens and residents of the United States* and should not be subject to banishment from this country.[50]

Similarly, in courts around the world, criminal deportation is increasingly seen as a double punishment when it is combined with other criminal sanctions.[51]

A different and more pragmatic critique has two common variants. First, it is often observed that banishment may actually *increase* criminality as the deracinated are left with few other options. As Voltaire once put it,

> Not long ago one banished . . . a petty thief, a petty forger, a man guilty of an act of violence. The result was that he became a big robber, a forger on a big scale, and murderer within the sphere of another jurisdiction. . . . It is as if we threw into our neighbours' fields the stones which incommode us in our own.[52]

Current studies of increasing gang violence in Central America make much the same point.[53]

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49. Randall Richard, *AP Investigation: 500,000 Criminal Deportees from America Wreak Havoc in Many Nations*, A.P., Oct. 25, 2003.

50. PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 202 (1953).

51. *See* discussion of European Court of Human Rights case law *infra* Part IV.

52. VOLTAIRE, *Banishment, in* THE PHILOSOPHICAL DICTIONARY (H.I. Woolf trans., A.A. Knopf 1924).

53. *See e.g.*, WASH. OFFICE ON LATIN AM. (WOLA), YOUTH GANGS IN CENTRAL AMERICA 2 (2006) (noting that deportation of Central American youth led to increasingly violent, U.S.-style youth gangs in Central America); *see also* NIELAN BARNES, TRANSNATIONAL YOUTH GANGS IN CENTRAL AMERICA, MEXICO AND THE UNITED STATES 4 (2007) (noting how deportation contributed to rise of youth gangs in El Salvador).

Second, of course, those on the receiving end of such systems inevitably complain. This has been true throughout history. In response to the British practice of "transporting" criminals to the New World, the Virginia Gazette opined in 1751, "When we see our Papers fill'd continually with accounts of the most audacious Robberies, the most Cruel Murders, and infinite other Villanies perpetrated by Convicts transported from Europe, what melancholy, what terrible Reflections must it occasion!"[54]

The same year, Ben Franklin noted that rattlesnakes, "Felons-convict from the Beginning of the World," were to be put to death "by Virtue of an old Law." He sarcastically suggested, however, that "this is a sanguinary Law, and may seem too cruel," especially as the creatures "may possibly change their Natures, if they were to change the Climate." Thus, he suggested that they might have their death sentences changed to transportation, in this case *to* England, and particularly that they be

> carefully distributed in St. James's Park, in the Spring-Gardens and other Places of Pleasure about London; in the Gardens of all the Nobility and Gentry throughout the Nation; but particularly in the Gardens of the *Prime Ministers*, the *Lords of Trade* and *Members of Parliament*; for to them we are *most particularly* obliged. [55]

When the British resumed the practice of transportation after the Revolutionary War, Franklin wrote:

> We may all remember the Time when our Mother Country, as a Mark of her parental Tenderness, emptied her Jails into our Habitations, "*for the* BETTER *Peopling*," as she express'd it, "*of the Colonies*." . . . The Felons she planted among us have produc'd such an amazing Increase, that we are now enabled to make ample Remittance in the same Commodity . . . .[56]

It is something of a historical irony that the development of early American legal systems of exclusion and deportation was motivated in large part by concerns over the effects of forced removal of criminals from Europe. Indeed, on September 16, 1788, the Continental Congress resolved: "That it be and it is hereby recommended to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries

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54. SMITH, *supra* note 46, at 130.

55. Benjamin Franklin, *Felons and Rattlesnakes*, PA. GAZETTE, May 9, 1751, *reprinted in* 4 THE PAPERS OF BENJAMIN FRANKLIN 132 (Leonard W. Labaree ed., Yale Univ. Press 1961).

56. BENJAMIN FRANKLIN, *On Sending Felons to America*, *in* WRITINGS 1142, 1142 (J.A. Leo Lamay ed., Library of Am. 1987). Franklin proposed that "every English Ship arriving in our Ports with Goods for sale, should be obliged to give Bond . . . engaging that she will carry back to Britain at least one Felon for every Fifty Tons of her Burthen." *Id.* at 1143-44.

into the United States."[57] Most of the states did so.[58] A 1789 Pennsylvania law not only banned the entry of convicts, but required the persons responsible for bringing the convict into the state to remove the convict from the United States at their own expense.[59]

B. How Deportation Works

A non-citizen might be arrested by government agents as a suspected undocumented "alien," a visa "overstay," a violator of certain terms of legal residence, or a "criminal alien." The arrest of a non-citizen might be precipitated by an anonymous tip, a workplace raid, a call from a probation officer, or even a belief that he or she "look[ed]" undocumented on the street.[60]

What are the rights of a person arrested for deportation within the United States?[61] As to the arrest itself, his or her rights will be minimal. Suppression of evidence that may have been seized in violation of the Fourth Amendment will be virtually impossible in most cases.[62] Put more graphically, immigration agents may well enter a home without a warrant and rifle through personal belongings for evidence. If a non-citizen believes that he has been selected for deportation because of political opinions or affiliations, he will not generally be permitted to raise a "selective prosecution" defense.[63] He will not be read Miranda rights.[64] Indeed, he may not even be advised that he has the right to

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57. MARILYN C. BASELER, "ASYLUM FOR MANKIND": AMERICA, 1607-1800 164 (Cornell Univ. 1998) (emphasis added) (quoting XXXIV JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 528 (Worthington C. Ford et al. eds., 1904-1937)).

58. *See e.g.*, Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1843 (1993) (citing Act of Oct. 1788, 1788 Conn. Acts & Laws 368).

59. Act of Mar. 27, 1789, ch. 1414, 1789 Pa. St. L. 261 (repealed 1860), *available at* http://www.palrb.us/statutesat large/17001799/1789/0/act/1414.pdf.

60. HANNAH GLADSTEIN ET AL., MIGRATION POLICY INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004, at 10-11 (2005) (describing concerns about local enforcement of immigration laws).

61. Those caught at the border or near the border or who have entered without inspection face regimes of even more radically depreciated rights. *See generally* KANSTROOM, *supra* note 25, at ch. 2.

62. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) ("exclusionary rule" generally "does not apply in a deportation proceeding").

63. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.").

64. *See, e.g.*, United States v. Silva, 715 F.2d 43, 46 (2d Cir. 1983) (Miranda warnings need not be given to one detained at the border and subjected to a routine customs inquiry); Bustos-Torres v. I.N.S., 898 F.2d 1053, 1056-57 (5th Cir. 1990) (Miranda warnings are not required in the deportation context because deportation proceedings are civil, not criminal, in nature, and the Sixth Amendment safeguards are not applicable); *see also* 8 U.S.C. 1357(a)(1)-(a)(2) (1996) (describing arrest powers of immigration agents).

obtain a lawyer (at his own expense) until *after* a government agent has interrogated him.[65] He will never have the right to appointed counsel.[66] He will never have a right to a jury trial. If he has a formal hearing before an immigration judge,[67] he will have certain due process rights: to be heard, to examine evidence, to obtain a written decision. He may, however, find that the burden of proof will be shifted to him, once the government has made a showing of "alienage."[68] And that showing may be as minimal as a birth certificate from a foreign country with a name on it that is the same as his.[69]

One who seeks an appeal of the immigration judge's decision may face incarceration during the length of that appeal—which could easily be many months or even years.[70] She may then receive a summary decision by a single member of the understaffed and overwhelmed Board of Immigration Appeals after a ten-minute review of her case.[71] If she seeks a further appeal to a federal

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65. 8 C.F.R. § 287.3 (2004).

66. *See* 8 U.S.C. 1362 (2000) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."); 8 C.F.R. § 1292.2 (2004) (allowing for non-attorney accredited representatives). *But see* Escobar-Ruiz v. I.N.S., 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) ("The fifth amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel"); Aguilera-Enriquez v. I.N.S., 516 F.2d 565 (6th Cir. 1975) (holding that due process requires assigned counsel for indigent when necessary for fundamental fairness, but lack of counsel did not prevent full administrative consideration, since respondent was clearly deportable).

67. Many deportees do not. *See* KANSTROOM, *supra* note 25, intro.

68. 8 U.S.C. § 1361 (1994); *In re* Ponce-Hernandez, 22 I. & N. Dec. 784 (B.I.A. 1999); Matter of Castro, 16 I. & N. Dec. 81 (B.I.A. 1976).

69. Corona-Palomera v. I.N.S., 661 F.2d 814 (9th Cir. 1981) (upholding immigration judge's determination of deportability because petitioners were presumed aliens upon introduction of foreign birth certificates matching their names); Matter of Gonzales, 16 I. & N. Dec. 44, 47 (B.I.A. 1976) ("The birth certificate accompanying the Form I-130 indicates that the respondent was born abroad. One born abroad is presumed to be an alien."); Matter of Lugo-Guadiana, 12 I. & N. 726, 728-29 (B.I.A. 1968) (An official, contemporaneous record of respondent's birth in Mexico, supported by his prior admissions of birth in that country, satisfies the clear, convincing and unequivocal test to establish alienage.).

70. *See* Demore v. Kim, 538 U.S. 510, 568 (2003) (Souter, J., dissenting) (describing potential for several months of confinement while appeals are exhausted); *see also*, Zadvydas v. Davis, 533 U.S. 678 (2001) (establishing further six-month period as reasonable for post-order detention).

71. For a thorough analysis of the recent problems at the Board of Immigration Appeals, see DORSEY & WHITNEY, RE: BOARD OF IMMIGRATIONS APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf. *See also* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481 (2005); Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9 BENDER'S IMMIGR. BULL. 91 (2004); Bradley J. Wyatt, *Even Aliens Are Entitled to Due Process: Extending*

court she may well find that court declining review of "discretionary" questions such as her potential eligibility for "relief" from removal.[72]

C. Legitimacy

Leaving formality aside, there can be little doubt that the deportation of long-term lawful residents for post-entry conduct is a form of punishment.[73] It serves an incapacitating function[74] to the deported and is justified as a deterrent to others. It is retribution by virtually any measure.[75] Still, the dominant U.S. legal view, as Justice Scalia has asserted, is that "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment."[76] This conclusion derives from a more general idea that non-citizens have no substantive claim to remain in the United States. They are, in effect, eternal guests until they naturalize, if they can.[77] They are thus not being punished; they are simply being regulated. Many find this logic troubling. As Justice Ginsburg has noted,

> Deportation has a far harsher impact on most resident aliens than many conceded 'punishment[s].' . . . Uprooting the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these attachments inflicts more pain than preventing them from being made.[78]

Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reforms, 12 WM. & MARY BILL RTS. J. 605 (2004).

72. *See generally*, Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 164 (2006).

73. *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45-55 (1976) (discussing the concept of desert as applied to criminal sanctions); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. UNIV. L. REV. 453, 471-76 (1997) (discussing the moral credibility of the criminal law and community perceptions of justice).

74. *See* JAMES Q. WILSON, THINKING ABOUT CRIME 145 (1983) ("When criminals are deprived of their liberty, as by imprisonment [or banishment, or very tight control in the community], their ability to commit offenses against citizens is ended.").

75. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-39 (1968) ("The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts.").

76. Reno v. AADC, 525 U.S. 471, 491 (1999).

77. Naturalization has become significantly more difficult in recent years as well. About one-third of naturalization cases were denied from 2001-04 and new testing requirements promise to make the hurdle still harder to overcome. OFFICE OF IMMIGRATION STATISTICS, *supra* note 4, at 143.

78. *AADC*, 525 U.S. at 498 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS BORDERS AND FUNDAMENTAL LAW 162 (1996) (internal quotation marks omitted)).

Still, the system endures, unencumbered by any significant judicial piercing of the traditional, formalist veil. Reform efforts would benefit from consideration of a grid, based upon the way each system is exercised against each group:

Status	*Extended Border Control*	*Post-Entry Social Control*
Undocumented	**primary**	**secondary**
Short-term non-immigrants	**primary**	**secondary**
Long-term non-immigrants	**primary**	**secondary**
Permanent residents	**secondary**	**primary**

To develop a richer theory of non-citizens' rights and a more just deportation system the next step would be a more complex "legitimacy" grid using these categories and embellishing them with other factors (on the vertical of the grid) such as length of residence, legality of status, claims of hardship, potential eligibility for permanent residence or citizenship, or family ties. On the horizontal, one might measure: retroactivity, weight of the government interest to deport for a particular reason, the reason for selective enforcement, etc. The goal of such an enterprise would be, first, substantive—we might consider eliminating certain inherently unjust forms of deportation, such as retroactive deportation of long-term permanent residents for petty crime. Second, it would inform procedural due process calculations in other types of cases. All this will undoubtedly seem unduly unpredictable, cumbersome, and judicially-centered to some.[79] However, the legal history of deportation indicates a recurrent, implicit recognition of the propriety of this model, if not at the constitutional level, then at a sub-constitutional level that often embodies what Hiroshi Motomura has aptly called "phantom" constitutional norms.[80] Indeed, one of the most important themes of modern deportation history—the rise of discretionary forms of relief from deportation—is perhaps best understood in this way. Still, as Bill Ong Hing has noted, our recent deportation laws have largely adopted a rigid, "antiseptic uniformity" that leaves little room for compassion or even "for the voice of the respondent and his or her family and community to be heard."[81] Rather than re-introducing such considerations in the unpredictable guise of discretionary relief, they should be central to the deportation grounds themselves.

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79. Indeed, the idea that immigration laws presented a "political question" was an important feature of Justice Field's *Chae Chan Ping*, opinion. Chae Chan Ping v. U.S., 130 U.S. 581 (1889) (as discussed in Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,* 100 HARV. L. REV. 853, 857 (1987).

80. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Constitutional Interpretation,* 100 YALE L.J. 545 (1990).

81. Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891, 959-60 (2005) (arguing for a relational or restorative approach).

Most fundamentally, one might well ask why we deport non-citizens—particularly long-term legal residents—who commit crimes, instead of simply punishing them in the criminal justice system as we do citizens. Even though we have grown accustomed to this modern, post-entry social control deportation idea, it is far from self-evident that it makes sense.

A series of recent studies has cast considerable doubt on the wisdom of the post-entry social control deportation enterprise as a crime-fighting strategy.[82] Such data appear to contradict widely-held public attitudes. A 2000 survey found, for example, that nearly three-fourths of respondents believed that it was "somewhat likely " or "very likely" that "more immigrants cause higher crime rates."[83] But sociologists have determined in one key study that foreign-born immigrants were 45 percent *less* likely to commit violent crimes than were third-generation Americans. Second-generation immigrants were 22 percent less likely.[84] Another study using data from the 2000 census concluded that the incarceration rate of U.S.-born males aged 18 to 39 (3.51 percent) was four times the rate of foreign born males in the same age group (0.86 percent).[85] In other words, put bluntly, it is not immigrants that cause violent crime, so much as living in the United States. For every group in the study, "the longer immigrants . . . had resided in the United States, the higher . . . their incarceration rates."[86] This trend was especially clear for Mexican immigrants, whose incarceration rate increased more than eightfold from foreign-born to the native-born.[87] But similar increases are seen for all immigrant groups.[88]

The system of criminal deportation is part of a radical upward swing in the implementation of harsh criminal sanctions. The incarceration rate in the United States is already the highest of any country in the world, as the number of incarcerated adults has more than quadrupled from about 500,000 in 1980 to over 2.2 million in 2005.[89] But deportation for crime raises unique doctrinal difficulties. It is double punishment by any reasonable, non-formalistic

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82. *See, e.g.*, Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* (Fed. Reserve Bank Chicago, Working Paper No. 2005-19, 2005); Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration,* (Nat'l Bureau of Econ. Research, Working Paper No. 6067, 1997).

83. RUBÉN G. RUMBAUT ET AL., MIGRATION POLICY INST., DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST-AND SECOND-GENERATION YOUNG MEN (2006), *available at* http://www.migrationinformation.org/Feature/display.cfm?id=403.

84. *See* Robert J. Sampson, Jeffrey D. Morenoff, & Stephen Raudenbush, *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 224-32 (2005); Robert J. Sampson, *Open Doors Don't Invite Criminals*, N.Y. TIMES, Mar. 11, 2006, at A27.

85. RUMBAUT ET AL., *supra* note 84, at tbl. 1.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

measure; it embodies questionable assumptions about the meaning of "permanent" residence in the United States; it strongly undermines family unity and stability in the service of questionable law enforcement goals; and it disproportionately affects racial minorities in the United States. If proportionality is a fundamental component of justice, then the deportation and banishment for life of a long-term legal permanent resident with family here and no contacts in her country of birth who commits a single minor crime is surely a profound challenge to our justice system.

The current use of deportation as a form of extended border control raises other problems. How has that system actually worked, especially as to its primary targets, Mexicans and Central Americans? Despite the rhetoric of border control and the rule of law that emanates from such groups as the Minutemen, deportation has always been about much more than sovereign control of the border. It has long functioned as a labor control device, an extra tool in the hands of large businesses (and, for that matter American families seeking nannies, gardeners, etc.) to provide a cheap, flexible, and largely rightless labor supply.[90]

Moreover, in practice, the extended border control system has been used in selective ways, especially post-September 11, 2001. This selective use implicates three separate issues: the importance of selective prosecution defenses in deportation law, the difference between nationality and race or ethnicity, and the distinction between immigration law discrimination on the one hand and entry and deportation enforcement discrimination on the other.

The Supreme Court dealt with selective prosecution in the deportation case of *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"),[91] when Justice Scalia reached a First Amendment selective prosecution issue, in dicta, without even having permitted briefing on that question.[92] Writing for the

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90. *See, e.g.*, LAWRENCE A. CARDOSO, MEXICAN EMIGRATION TO THE UNITED STATES, 1897-1931 (1980); JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 23-61 (1980); CAREY MCWILLIAMS, ILL FARES THE LAND: MIGRANTS AND MIGRATORY LABOR IN THE UNITED STATES (1942); MIGRATORY LABOR IN AMERICAN AGRICULTURE: REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR (1951).

91. Reno v. AADC, 525 U.S. 471, 471 (1999).

92. *Id.* at 511 (Souter, J., dissenting). A selective prosecution claim "is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 463 (1996). *See generally* Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L.J. 1229, 1236 (2001). The Court's deference to the political branches has resulted in strict limitations on such claims, including a high burden of proof even to permit discovery, and a requirement of proof of discriminatory intent by the government. *See* Wayte v. United States, 470 U.S. 598 (1985) (holding that, to prove selective prosecution, a defendant must show both disparate treatment and that the prosecution was improperly motivated). In cases involving race, the Court has stated, "The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law." *Armstrong*, 517 U.S. at 469.

Court, Justice Scalia concluded that "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the *additional* reason that it believes him to be a member of an organization that supports terrorist activity."[93]

Of course, the issue was never really whether an additional reason violates the Constitution. It was whether the selection of one person from among millions of potential deportees raises a serious question when that choice was a political one made by the executive branch. The opinion, however, begins with the accurate observation that, "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*."[94] Such claims, wrote Justice Scalia, invade a "special province of the Executive—its prosecutorial discretion."[95] As commentators have noted, there are specific, non-trivial reasons why we might not want courts second guessing agency decisions about whom to deport. In particular, there might be special foreign policy and security concerns.[96] But do such worries support a general rule against allowing selective prosecution claims? The vast majority of deportation cases, as we have seen, have absolutely nothing whatsoever to do with foreign policy or national security. Those few that do might legitimately be dealt with differently, just as a criminal case might be approached differently if it raises national security concerns.

Justice Scalia also made strong arguments about deportation and delay. He first pointed out, "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of

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93. *AADC,* 525 U.S. at 491-92 (emphasis added).

94. *Id.* at 489.

95. *Id.* at 489-490

> This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Id. (quoting *Wayte*, 470 U.S. at 607).

96. As Justice Scalia wrote, "What will be involved in deportation cases is not merely the disclosure of normal domestic law-enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals." *Id.* at 490-91.

United States law."[97] He then concluded that

> [e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act . . . but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end [an ongoing violation of United States law]. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.[98]

How should one respond to this? First, the phrases "ongoing violation" of law and "merely being held to the terms under which he was admitted" require some serious qualification. The non-citizens in *AADC* included lawful permanent residents, and all of those arrested had entered the United States legally.[99] Permanent residents generally face deportation only for reasons of post-entry social control. In that context it is simply wrong to describe the case as involving "an ongoing violation of United States law."[100] Indeed, whether there has been any violation at all, and whether the person may be ordered to leave the country are the very questions that can only be decided *after* a constitutionally adequate hearing. Further, even if a person, legally resident or otherwise, is found deportable, there remains in many cases the question of possible waivers and discretionary relief. Still, overstays and the undocumented border-crossers who just stay on raise important questions. Should they be able to resist deportation simply because they were allegedly targeted for some improper reason? This is concededly a tougher call. But, in the end, such cases are best adjudicated by balancing the non-citizen's alleged violation, mitigating factors, if any, and the nature of the government's targeting. Otherwise, there is no mechanism to restrain dangerous government practices whose effects are not felt solely by the deportees themselves.[101]

Against the Court's concerns about delay and an "ongoing violation" consider the "chilling effect" of depriving non-citizens of the possibility of

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97. *Id.* at 490. As Gerald Neuman has noted, this reasoning is reminiscent of that in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), where the Court held the exclusionary rule generally inapplicable to remedy Fourth Amendment violations in deportation proceedings. In *Lopez-Mendoza*, however, the Court "did 'not condone any violations of the Fourth Amendment that may have occurred in the arrests,'" and noted the existence of other remedies to deter Fourth Amendment violations. Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 337-38 (2000) (quoting *Lopez-Mendoza*, 468 U.S. at 1050).

98. *AADC*, 525 U.S. at 491.

99. Six of the eight respondents in *AADC* were temporary residents who had entered the United States legally. Two were legal permanent residents who had lived in the United States lawfully for more than twenty years. *See* David Cole, *Supreme Court Denies First Amendment Rights to Legal Aliens*, LEGAL TIMES, Mar. 8, 1999, at 19. Three of the other six became permanent residents by the time the case got to the Supreme Court. *Id.* at 20.

100. *See* NEUMAN, *supra* note 98, at 342-43.

101. Perhaps dismissal of all charges might not be the only available remedy. *See, e.g.*, Armstrong, 517 U.S. 456, 461, n.2 (1996).

challenging substantive deportation laws or raising selective prosecution defenses. Such a rule, in effect, largely overrides the free speech rights of non-citizens long recognized by the Court[102] and would contradict some of the most eloquent critiques made of the Alien and Sedition Acts by Jefferson and Madison.[103] Indeed, even in the Cold War case of *Harisiades v. Shaughnessy*[104]—which allowed the retroactive deportation of certain former members of the Communist Party—the Court declined to rule that non-citizens have reduced First Amendment protection. Instead, the Court applied to the non-citizens in that case the same contemporary standard granted citizens.[105] Such concerns are surely no less important today than they were in the 1790s or the 1950s. As David Cole has recently highlighted, "chilling effects are particularly severe in immigrant communities, partly because immigrants are less likely to have grown up with a strong First Amendment tradition, and partly because they have so much to lose from the INS."[106] But how, exactly, would such a chilling effect be confined to non-citizens? Everyone in any group containing citizens and non-citizens—including political groups, school groups, and families—would live in fear of deportation.[107] As Justice Souter, dissenting in *AADC*, put it:

> This interest . . . is not attenuated because the deportation is not a penalty for a criminal act or because the violation is ongoing. If authorities prosecute only those tax evaders against whom they bear some prejudice or whose protected liberties they wish to curtail, the ongoing nature of the nonpayers' violation does not obviate the interest against selective prosecution.[108]

The preceding discussion also helps to conceptualize why discrimination in immigration law based on country of origin differs from enforcement discrimination. Generally speaking, "distinctions in federal law among aliens on the basis of their country of current nationality are not constitutionally suspect."[109] But we should not conflate two types of discrimination that should be kept separate. It is one thing to *favor* nationals of selected foreign countries. It is more problematic to explicitly *disfavor or bar* others. And it is most

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102. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135 (1945).

103. *See* KANSTROOM, *supra* note 25, at ch. 1.

104. 342 U.S. 580 (1952).

105. See Dennis v. United States, 341 U.S. 494 (1951), which upheld the criminal convictions of certain U.S. citizen Communist Party leaders.

106. David Cole, *Damage Control? A Comment On Professor Neuman's Reading Of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 347, 348 (2000).

107. I suspect that all of this explains why, in the end, the *AADC* majority declined to "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." *Id.* at 360. It is hard to imagine such a case, however, when the Court concluded on the facts of *AADC* that "the general rule [against allowing a selective prosecution defense] certainly applies here." *Id.* (quoting Reno v. AADC, 525 U.S. 471, 491 (1999)).

108. *AADC*, 525 U.S. at 511 (Souter, J., dissenting).

109. NEUMAN, *supra* note 98, at 339-40.

problematic of all to disfavor one group through selective enforcement of punitive deportation laws. This difference between positive and negative discrimination has been recognized in retroactivity analysis, an approach that would be very sensible in the deportation realm.[110] This is even more important in times of fear, like the present, when the government tends to rely on administrative processes instead of the formal criminal system and to target individuals for action based on often questionable predictions about what they might do.[111] Rather than simply accepting nationality discrimination in deportation laws, we should be prepared to dig deeper into the government's motivations for them. This is especially true because non-citizens cannot vote, and thus have less access to the political processes for protection.[112]

II. THE EFFECTS OF DEPORTATION

A. Effects Within the U.S.

Those who face deportation surely harbor few illusions about its nature. Consider this poignant description of the effects of deportation on one family:

> [M]y husband (father of our 2 kids) was deported in 2003. My son was 11 at the time and he was in the immigration courtroom at the time the judge told Martin he was to be deported and not allowed to come back for at least ten years. I had not seen my son cry too often but I saw his heart break that day. . . . Martin was deported for a crime that was a misdemeanor he committed 6 years prior and spent 30 days in jail for. Martin is a great father and husband he is not a criminal, so when we went to court I thought everything would be ok but our lives have changed forever. Martin was the sole supporter of our family . . . I lost our apt. in Feb. and since I have no family that would help us I took my kids to Mexico and we stayed there with Martin and his family. My kids have missed school and lived in poverty that most people could never comprehend.[113]

Such cases are distressingly common. But a widely-reported tragedy that took place in Boston illustrates even more sharply how the crime-control ethos of much deportation law may be terribly counter-productive. In October 2004, Elary Jeffers was deported from Boston to Nevis after the police discovered an outstanding deportation order against him. His four-year-old son, Dontel, had lived primarily with his father, but Dontel, a U.S. citizen by birth, stayed

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110. *See* Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR.. L.J. 413, 455-62 (2002).

111. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003)

112. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980).

113. Letter from "C.R." to author (on file with author).

behind. Dontel's mother took custody of the boy, but he was soon placed in foster care due to his mother's drug abuse. Four months later, the face of Dontel Jeffers appeared on the front page of the Boston Globe: he had been beaten to death by his foster parent.[114]

Such stories suggest that deportation has an enormous negative impact on families and communities within the United States. What may seem a workable system in theory—grounded in a strong rule of law discourse—often turns out to be quite messy in operation. One is reminded of Aldous Huxley's observation that "tidiness is undoubtedly good—but a good of which it is easily possible to have too much and at too high a price."[115]

Within the United States, there is mounting evidence and concern about the negative effects of deportation on families and communities. The Catholic Legal Immigration Network issued a powerful report in 2000 that highlighted how deportation laws have devastated families in the United States, with virtually no hope of discretionary relief and often no hope of return for the deported parent, child or spouse of a U.S. citizen.[116] The report concluded that, although our nation's very identity and well-being depend upon immigrants and their families, our laws and policies "too often divide, impoverish, and keep immigrant families unsettled."[117] The American Bar Association (ABA) has reached similar conclusions. In a major report issued in 2004, the ABA determined that current laws create "devastating consequences that tear apart families and communities."[118] Human Rights Watch has noted that "[e]ach day, deportations . . . separate U.S. citizen children from their parents, spouses from each other, and generally disrupt the fabric of American communities."[119]

Scholars have also become increasingly concerned about the effects of deportation within the United States. As Nancy Morawetz has written, the deportation and detention system places families in crisis from the moment a family member is arrested and incarcerated. The family may lose a breadwinner; those left behind may face eviction; and the family "suffers from the emotional toll of having a loved one in detention, often thousands of miles

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114. John Ellement & Patricia Wen, *Foster Mother Charged in Death of Boy, 4*, BOSTON GLOBE, July 1, 2005, at A1.

115. ALDOUS HUXLEY, PRISONS: THE "CARCERI" ETCHING BY THE PIRANESI 13 (1949), *quoted in* Kai T. Erikson, *The Sociology of Deviance, in* DEVIANCE AND SOCIAL CONTROL (Ronald Weitzer ed., 2002) at 33.

116. CATHOLIC LEGAL IMMIGRATION NETWORK, THE IMPACT OF OUR LAWS ON AMERICAN FAMILIES (2000)

117. *Id.* at 1.

118. AM. BAR ASS'N COMM'N ON IMMIGRATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 109 (2004).; *see also* Nina Bernstein, *A Mother Deported and A Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1.

119. ALISON PARKER & DANIEL KANSTROOM, TIME TO RETHINK THE DEPORTATION OF LONG-TIME LEGAL NON-CITIZEN RESIDENTS WHO COMMIT LOW-LEVEL OFFENSES, *available at* http://hrw.org/english/docs/2006/09/25/usdom14258.htm.

from home."[120] Then comes permanent separation. David Thronson has delineated the powerful contradictions between the best practices of family law and conceptions of children's rights versus the rule of deportation law. [121] As he notes, "The vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws . . . . This is especially true when immigration law reaches different conclusions about the legal rights of parents and children to remain in the United States."[122]

Bill Ong Hing has written passionately about the realities of deportation for Cambodian refugees who managed to survive the unspeakable crimes of Pol Pot's Khmer Rouge regime from 1975 to 1978, when some two million people were murdered in the "killing fields."[123] Today, thousands of their children, many of whom came to the U.S. as infants, face deportation to a land about which they may know nothing beyond horror stories. The *New York Times* reported the case of Loeun Lun, who had escaped the killing fields as a baby and was brought to the U.S. As a teenager he had fired a gun in a shopping mall as he fled a group of teens who he thought were attacking him.[124] Convicted of assault, he served eleven months, and then he lived a model life, marrying, starting a family and working steadily. He decided to apply for citizenship, and innocently walked into an INS office to inquire about his case after a two-year delay. He was arrested on the spot, separated from his wife and children, and incarcerated and held for deportation. Louen was deported to Cambodia in 2003, after more than two decades in the United States, virtually his entire life. Under current laws, he will be banished from this country forever, permanently separated from his elderly mother, his wife, and his two young daughters.[125]

Such deportations implicate more than humanitarian concerns about the deportees and their families. They compel us to consider the responsibility of the United States for the situations that created such refugees in the first place and that created the conditions that cause criminality. Professor Hing writes,

> Cambodian refugees would not have had a reason to be refugees but for U.S. policy. . . . That these refugees were placed in a community

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120. Nancy Morawetz, *Understanding The Impact Of The 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1954 (2000).

121. David Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1165-1166 (2006); *see also* David Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005); David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

122. Thronson, *Choiceless Choices*, *supra* note 122, at 1165.

123. Hing, *supra* note 82, at 900; *see also* BILL ONG HING, DEPORTING OUR SOULS (2006).

124. *See* Deborah Sontag, *In a Homeland Far from Home,* N.Y. TIMES, Nov. 16, 2003, § 6, at 48.

125. *Id.*

> that did not provide any long-term resources is the fault of U.S. policy. . . . Now, because these refugees are not model citizens, they are punished through the deportation process.[126]

And then there is Somalia. In 2005, a five-member majority of the Supreme Court allowed the government to resume deportations to that dangerous, war-torn, anarchic country despite the well-known fact that there is no functioning Somali government.[127] Some 4,000 Somali nationals, many of whom have lived in the United States for many years, now face removal. The case of Mohamad Rasheed Jama is typical.[128] A 46-year-old grocery clerk who had lived in New York for 28 years, Mr. Jama was hustled by government agents onto a plane to Mogadishu before his lawyers could get a judge to issue an emergency order against the deportation. By the time the case got to court, jurisdiction was lost. Having left behind a nine-year-old daughter, Mr. Jama, who had worked in Jewish youth camps in New York, remains in a city controlled by Al Qaeda-linked Islamic militias and a country riven by warring clans. Why was he deported? He admits to a drinking problem, and had a string of minor convictions: marijuana possession and selling beer without a license. His most serious offense was apparently misdemeanor assault and possession of a gun.[129]

B. Effects in Countries of Deportation

The effects of deportation have been felt especially acutely in the countries to which deportees are sent. [130] To call such countries "home" for many of the deportees is at best a cruel joke. Many deportees know no one in the countries to which they are removed and do not speak the native language. The problem has been especially serious in the Caribbean and Central America.[131] Indeed, in Jamaica, it is estimated that one out of every 106 males over the age of 15 is now a criminal deportee.[132] In Honduras, Interpol has reported that murders increased from 1,615 in 1995 to 9,241 in 1998, after the first wave of criminal deportations. Honduran police concluded that the guns, drugs, and gangs brought by the deportees from the U.S. are largely responsible.[133] As one U.S. prosecutor has noted, "We're sending back sophisticated criminals to

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126. Hing, *supra* note 82, at 956.

127. Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005).

128. See Nina Bernstein, *A Deportation to Somalia Sets Off a Wave of Concern Over Safety*, N.Y. TIMES, Nov. 22, 2006, at B2.

129. *Id.*

130. *See, e.g.*, MICHAEL MCBRIDE, THE EVOLUTION OF U.S. IMMIGRATION AND REFUGEE POLICY: PUBLIC OPINION, DOMESTIC POLITICS AND UNHCR 23 (1999).

131. *See generally*, MARGARET TAYLOR & T. ALEXANDER ALEINIKOFF, INTER-AMERICAN DIALOGUE, DEPORTATION OF CRIMINAL ALIENS: A GEOPOLITICAL PERSPECTIVE 3 (1998).

132. *See* Richard, *supra* note 50.

133. *Id.*

unsophisticated, unindustrialized societies." The result of such a policy is completely predictable: "They overwhelm local authorities."[134]

The numbers of such deportations continue to rise. Consider El Salvador. From 1998 through 2004, the U.S. government deported tens of thousands of non-citizens to El Salvador.[135] Deportation courts completed more than 39,000 cases involving Salvadorians in 2005 alone.[136] Most of these deportees were young men, many of whom were brought to the U.S. as infants and toddlers with refugee parents, fleeing the brutal civil wars of the early 1980s.[137] The reception they received in their "home" country grew increasingly harsh. Major newspapers began to sound a chilling alarm about the arrival of "criminal deportees."[138] The national police began a program of detaining, interviewing and recording information about the deportees. Fear of these Americanized young men and social prejudice have impeded their ability to find jobs and to integrate into Salvadoran society. Vigilante violence has targeted many deportees. As one reporter has written,

> In El Salvador and Honduras, many of the deportees become victims before they can become victimizers. Regarded as pariahs in their native lands, they are hunted by vigilante squads, some shot down within days of stepping off the unmarked U.S. Marshal's Service jetliners that carry them into exile several days every week.[139]

In a further tragic and ironic twist, the deportation of young men from the United States seems to have fueled not only a dramatic increase in gang violence in Central America, but a new stream of illegal entrants into the United States: asylum-seekers who fear persecution by the U.S. deportees.[140] In the past year, asylum applications by people from El Salvador, Honduras, and Guatemala have almost doubled, primarily due to fear of gang violence.[141]

Moreover, researchers have found that deportation works hardships on the families of the deportees in El Salvador. Remittances form a major component of the income of many such families. The deportation of their relatives from the U.S. thus causes substantial financial difficulties for them.[142]

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134. *Id.*

135. OFFICE OF IMMIGRATION STATISTICS, *supra* note 4, at 172-73.

136. OFFICE OF PLANNING, ANALYSIS & TECHNOLOGY, *supra* note 5, at E1.

137. Nestor Rodríguez & Jacqueline Maria Hagan, *Fractured Families and Communities: Effects of Immigration Reform in Texas, Mexico, and El Salvador*, 2 LATINO STUDS. 328, 344 (2004).

138. *Id.* at 343.

139. *See* Richard, *supra* note 50; *see also* Margaret Swedish, *Gang Violence Spreads Through Central America*, CENTRAL AMERICA/MEXICO REPORT, Nov.-Dec. 2003.

140. *See* N.C. Aizenman, *More Immigrants Seeking Asylum Cite Gang Violence*, WASH. POST, Nov. 15, 2006, at A8.

141. *Id.*

142. Rodriguez and Hagan, *supra* note 138, at 345.

The return of deportees to Haiti has resulted in particularly difficult and tragic consequences.[143] A policy adopted by the Haitian government in 2000 imposes mandatory, indefinite detention on all criminal deportees arriving from the United States. Its ostensible goal is to provide a "warning" to the criminal deportees not to commit crimes in Haiti.[144] However, as U.S. courts have recognized, "[t]he conditions of Haitian prisons are atrocious."[145] Prisoners and detainees "suffer from a lack of basic hygiene, malnutrition, poor quality health care, and, in some facilities, 24-hour confinement. Most prisons periodically suffered from lack of water, especially in the provinces. Many prisoners also suffered from diseases, including 'preventable diseases such as beriberi, AIDS, and tuberculosis.'"[146]

In its 2001 report, the State Department described a pattern of brutal mistreatment:

> Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and *kalot marassa* (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.[147]

The case of Kervence Video Carry, a Haitian man with minor criminal convictions who was deported to Haiti, imprisoned, returned to the United States for his appeal, and then finally re-deported to Haiti, offers a painfully clear look at the horrors awaiting deportees who have already completed their U.S. prison sentences, if any.[148] As Carry's lawyers described in their brief to the Eleventh Circuit Court of Appeals, uniformed Haitian officials, armed with automatic weapons and clubs, boarded the airplane as the deportees arrived.[149]

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143. *See generally*, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES - 2002: HAITI (2003); ANNE FULLER, VERA INST. OF JUSTICE, PROLONGED PRETRIAL DETENTION IN HAITI (2002); HUMAN RIGHTS WATCH, *Haiti, in* WORLD REPORT 147 (2003); RES. INFO. CTR., U.S. CITIZENSHIP & IMMIGRATION SERV., HAITI: INFORMATION ON CONDITIONS IN HAITIAN PRISONS AND TREATMENT OF CRIMINAL DEPORTEES (2ND RESPONSE) (2002).

144. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *supra* note 144.

145. Francois v. Ashcroft, 343 F. Supp. 2d 327, 329 (D.N.J. 2004), *vacated,* 488 F.3d 645 (3d Cir. 2006).

146. *Id.* (quoting BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 144).

147. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, *supra* note 144.

148. Note that one may be deported as an "aggravated felon" even with a suspended sentence. *See* 8 U.S.C. § 1101(a)(48)(B) (2000).

149. Petition for Review of a Final Decision of the Board of Immigration Appeals at 8,

They called out the names of the deportees, removed their handcuffs and tied their hands with plastic rope.

Mr. Carry was brought to a jail and locked in a cell measuring approximately 10 by 12 feet together with 13 other deportees. The cell was filthy and completely bare: no mattresses, chairs, beds, washbasins, or toilets. The only source of light and ventilation was a small hole in the wall. After sundown the cell was completely dark. Due to overcrowding, the detainees had to sleep sitting up. They were provided with plastic bags in which to urinate and defecate. Sometimes these bags remained uncollected for several days at a time and overflowed onto the floor of the cell. The detainees were then forced to urinate on the floor of the cell. If it rained during the day they would be attacked by swarms of mosquitoes at night. The cell was full of vermin including roaches, rats, mice and lizards. Detainees who got sick vomited all over the floor of the cell.

The detainees were only let out of the cell for five minutes every two to three days. They were given two minutes to defecate into a hole in the ground and 3 minutes to wash themselves with collected rain water. They were provided no food, water, or medical attention. Mr. Carry was forced to beg other detainees for juice and water. On the second day after he arrived, he drank rain water from the courtyard and became violently ill after a few hours with vomiting, uncontrollable diarrhea, and a fever. The skin on his feet also became severely infected from the filth he was forced to step in. When Mr. Carry requested medical attention guards mockingly told him, "You gotta be halfway dying . . . before they take you . . . to see a doctor." He witnessed a detainee dying of AIDS. This person was barely able to move or even talk and was vomiting profusely. He was given no medical attention and was left to die in the cell.

Mr. Carry also witnessed guards and police officers beating detainees frequently. One detainee was clubbed on the head by a police officer. He had a big gash on his forehead and was bleeding on the concrete floor of the cell. He was not given any medical attention. At night Mr. Carry would hear the screams of inmates being beaten and tortured. Mr. Carry was held for weeks in such conditions. Others have been held for as long as ten months.[150]

Carry v. Ashcroft, No. 02-11752-DD (11th Cir. Aug. 6, 2002). I am grateful to Jenny Landau and Jennifer Moore for bringing this brief to my attention.

150. *See* RES. INFO. CTR., U.S. CITIZENSHIP AND IMMIGRATION SERV., *supra* note 144.

III. WHERE DOES THE RULE OF LAW END?

A. The Human Rights of Deportees

The ABA House of Delegates resolved in 2006 that the United States must develop an immigration enforcement plan that respects domestic and international legal norms. The current system does neither. To be sure, international human rights law recognizes that non-citizens have powerful rights claims against being deported to countries where they may face persecution and torture, and many of these norms have been incorporated into U.S. law. But even the most compelling asylum claims are frequently denied if the non-citizen has even a minor criminal record.[151] And, as we have seen, some U.S. courts have concluded that although the conditions in Haitian prisons are "atrocious,"[152] they do not rise to the level of torture required for relief under the Convention Against Torture (CAT).[153] Moreover, even CAT claims that are granted do not allow the family of a deportee to remain in the U.S. As Lori Nessel has noted, the United States' failure to allow for family reunification under CAT is inconsistent with international and U.S. norms that favor family unity. She concludes that the denial of such family reunification rights "can be explained by both the (mis)perception that links such protection with the 'undesirable' or 'criminal alien' and as part of the larger restrictionist movement aimed at deterring immigration." For these reasons, the interpretive trends in CAT claims in the U.S. are towards increasingly restrictive interpretations.[154]

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151. *See* 8 U.S.C. § 1158(b)(2)(A)(3) & § 1158(b)(2)(B)(i) (2000); *see also* 8 U.S.C. § 1231(b)(3)(B) (2000) (barring withholding of removal).

152. Francois v. Ashcroft, 343 F. Supp. 2d 327, 329 (D.N.J. 2004), *vacated,* 488 F.3d 645 (3d Cir. 2006).

153. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). Article 3 of the Torture Convention mandates that signatory states shall not return a person to a country in which there is a substantial likelihood that he or she would be tortured. The Convention protects non-citizens from U.S. deportation via its incorporation into the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242(b), 112 Stat. 2681-822 (1998). CAT requests for asylum and withholding of removal need not involve claims of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion because proof of torture, not simply persecution, is required. To obtain relief, an applicant must show that it is more likely than not that he would be tortured if returned to his home country. 8 CFR § 208.16-18 (2007).

154. *See* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMPLE L. REV. 897, 900 (2005) (suggesting that the narrow construction placed on CAT may be attributed to the view that the claimants are undesirable); Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States Interpretation of Article 3 of the United Nations Convention Against Torture,* 89 MINN. L. REV. 71, 113 (2004).

Moreover, under U.S. law, virtually all possibility for discretionary relief from deportation has been eliminated for the vast majority of criminal deportees. Those lucky deportees who may be eligible for discretionary relief face a chaotic, often arbitrary administrative system that has been effectively insulated from most meaningful judicial review.[155]

Although international law recognizes the power of the state to deport non-citizens, international human rights law has also long recognized the importance of procedural regularity, [156] family unity, and proportionality.[157] When such norms are violated the State may well be obligated to provide a remedy.[158]

As to family unity, the Universal Declaration of Human Rights (UDHR) Article 16 provides that, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[159] Implicit in this right is the right of family members to live together.[160] UDHR Article 12 states, "No one shall be subjected to arbitrary interference with his privacy, family, home . . . . Everyone has the right to the protection of the law against such interference . . . ."[161]

Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party, is similar, protecting against "arbitrary or unlawful interference with . . . privacy, family, home or correspondence."[162]

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155. *See* Kanstroom, *supra* note 73.

156. *See* G.A. Res. 40/144, U.N. Doc. A/RES/40/144 (Dec. 13, 1985) ("An alien lawfully in the territory of a State may be expelled therefrom 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 why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited").

157. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct. H.R. (Ser. A) No. 18 (Sept. 17, 2003). *See generally* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (noting the inconsistency of international law regarding protection of family unity but identifying a "patchwork of treaty provisions and the glimmerings of a developing customary norm against the involuntary separation of families").

158. *See* Starr & Brilmayer, *supra* note 158, at 242, 278.

159. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st. plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 23(1), at 52, U.N. Doc. A/6316 (March 23, 1976); Organization of American States, American Convention on Human Rights, art. 17(1), Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123.

160. *See* Human Rights Comm., *General Comment: Protection of the Family, the Right to Marriage and Equality of the Spouses*, U.N. Doc. CCPR/C/21/Rev. 1/Add.2 (Sept. 19, 1990).

162 Universal Declaration of Human Rights, supra note 160.

162. International Covenant on Civil and Political Rights, *supra* note 160. *See also* Organization of American States, American Convention on Human Rights, *supra* note 160,

An emerging body of interpretive law grapples with the definition of arbitrariness in this context.[163] It is clear that "the 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*."[164] Notwithstanding important concerns about how protection of "the family" may facilitate and obscure violence and oppression within families,[165] it would surely be a dangerous over-reaction to suggest that international (or domestic) law should not seek to protect the family, especially when the issue is forced separation caused by deportation.[166] The United Nations Human Rights Committee has explicitly recognized that deportation from a country in which close family members reside can constitute an interference with family life. [167]

Various treaty provisions specifically protect the rights of children to remain with their families. The Convention on the Rights of the Child (CRC)[168] mandates that states must consider the "best interests of the child," a standard derived from U.S. family law which has now been widely applied internationally.[169] The Preamble to the Convention cites the family as the "natural environment for the growth and well-being of all its members and particularly children." Article 7(1) of the CRC protects "as far as possible, the

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at art. 11; Convention on the Rights of the Child, G.A. Res. 44/25, art. 16, U.N. Doc. A/44/49/Annex (1989); Organization of African Unity, African Charter on the Rights and Welfare of the Child, art. 10, Nov. 29, 1999, O.A.U. Doc. CAB/LEG/24.9/49; Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. The African Commission on Human and Peoples' Rights has held that family separation under certain circumstances may constitute inhuman and degrading treatment. *See* Modise v. Botswana, Afr. Comm'n Human & Peoples' Rights, Comm. No. 97/93 (2000).

163. The African Commission on Human and Peoples' Rights has indicated that it:

> does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter [the African Charter of Human and Peoples' Rights] and international law.

Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola, African Comm'n Human & Peoples' Rights, Comm. No. 159/96, ¶ 20 (Nov. 11, 1997).

164. General Comment 16, U.N. Human Rights Committee, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (emphasis added).

165. Starr & Brilmayer, *supra* note 158, at 231.

166. *Id.*

167. *See* Aumeeruddy-Cziffra v. Mauritius, Communication No. R.9/35, U.N. Human Rights Comm., U.N. Doc. No. A/36/40 at 134 (1981).

168. The United States is not a party to this Convention.

169. *See generally* Hendriks v. Netherlands, App. No. 8427/78, 5 Eur. Comm'n H.R. Dec. & Rep. (1982); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J. L. & FAM. 1, 4 (1994).

right to know and be cared for by his or her parents," and Article 8(1) recognizes the "right of the child to preserve his or her identity, including . . . family relations . . . without unlawful interference." Most particularly, Article 9(1) bars the separation of children from their parents except under specifically delineated circumstances:

> State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. [170]

Under the CRC, if parents and children are separated due to "any action initiated by a State Party, such as . . . detention, imprisonment, exile, deportation, or death," the state must furnish the parents or children with any available information regarding their family members' whereabouts.[171] Further, states must allow sufficient freedom of movement to enable the family members to see one another regularly.[172] They also must act in a "positive, humane, and expeditious manner" upon applications by children or parents "to enter or leave a State Party for the purpose of family reunification."[173]

To be sure, international human rights law does not unequivocally protect families from separation as a result of deportation. However, the U.N. Human Rights Committee has long recognized that deportation can interfere with family life in violation of the ICCPR.[174] Thus, what is required is a balance between the interests of the state and that of the individual and his or her family.[175]

In the European human rights system, Article 8 (2) of the European Convention clearly limits the conditions under which the state may interfere with family life:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is

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170. Convention on the Rights of the Child, G.A. Res. 44/25, art. 9, ¶ 4, U.N. Doc. A/44/49/Annex (1989).

171. *Id.*

172. *Id.* at art. 10, ¶ 2.

173. *Id.* art. 10, ¶ 1. Article 10 does not explicitly require states to permit entry for the purpose of family reunification, however. Article 10(2) grants children whose parents reside in different countries the right of "personal relations and direct contacts with both parents." States must also "respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country."

174. See Aumeeruddy-Cziffra, *supra* note 168 (construing ICCPR art. 17).

176. *See also* G.A. Res. 45/158, art. 56(3), U.N. Doc. A/RES/45/158 (Dec. 18, 1990) (stating that when deciding "whether to expel a migrant worker or a member of his or her family account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment").

> necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[176]

As the European Court of Human Rights (ECHR) has held,

> It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must . . . [be] justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.[177]

Thus, the task of a reviewing court is to ascertain whether a deportation order "struck a fair balance between the relevant interests, namely the applicant's right to respect for her private and family life, on the one hand, and the prevention of disorder or crime, on the other." The outcome of such balancing is not necessarily favorable to the deportee,[178] but the fact that it must take place preserves an important measure of respect for human rights norms.

Such balancing also takes place in the European system pursuant to Article 3 of the European Convention, which may preclude Member States from deporting a person who could be exposed to torture or inhuman treatment in the receiving country. [179] The ECHR recognizes that the "decision to expel, or indeed not to admit a family member. . . [to its territory may constitute] an interference with the right to respect for family life." The Court places the burden of establishing that the family could relocate on the expelling authorities before assessing the proportionality of the interference.[180]

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176. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 U.N.T.S. 222.

177. Dalia v. France, 1998-I Eur. Ct. H.R. 52-53.

178. *See e.g.*, Stewart v. Canada, Communication No. 538/1993, U.N. Human Rights Committee, U.N. Doc. No. CCPR/C/58/D/538/1993 (1996) (affirming the deportation of a person convicted of various offenses, most petty, despite separation from his entire family).

179. *See, e.g.*, Bensaid v. United Kingdom, 33 Eur. Ct. H.R. 205, 217-18 (2001) (considering applicant's schizophrenia, but finding that the risk that his condition would deteriorate if he was deported to Algeria was speculative); D. v. United Kingdom, 24 Eur. Ct. H.R. 423, 447-48 (1997) (finding that it would violate Article 3 to deport applicant with AIDS to St. Kitts). *See generally*, Ann Sherlock, *Deportation of Aliens and Article 8 ECHR*, 23 EUR. L. REV. 62 (1998).

180. *See* Mehemi v. France, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 750-51, 753 (1997); Beldjoudi v. France, App. No. 12083/86, 14 Eur. H.R. Rep. 801, 830-31, 833-34 (1992); Moustaquim v. Belgium, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 813-15 (1991); Nicola Rogers, *Immigration and the European Convention on Human Rights: Are New Principles Emerging?*, 2003 EUR. HUM. RTS. L. REV. 1, 53-64.

In the U.S., which of course is not a party to the ECHR or the CRC, claims against disproportionately harsh sanctions and family separation fare poorly. Indeed, they are essentially unrecognized by U.S. courts.[181] The "plenary power" doctrine effectively insulates deportation law from substantive constitutional review. Thus, U.S. courts will not consider claims of undue hardship, disproportionality, or family separation if applicable statutes do not empower them to do so.

B. Possible Remedies Under U.S. Law

Once a person is actually deported from the U.S., further impediments to meaningful judicial oversight of the deportation system arise. Until 1996, the Immigration and Nationality Act (INA) expressly precluded jurisdiction after deportation.[182] Except for unusual situations,[183] most U.S. courts acceded to the statutory mandate.[184] Although current statutory law does not bar all such

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181. *See, e.g.*, Beharry v. Reno, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002) (customary international law requires that, under 8 U.S.C. § 1182(h), the Attorney General grant a "compassionate hearing" prior to deporting certain lawful permanent residents who have resided in the United States for more than seven years, who have been convicted of a crime that was categorized as an aggravated felony only after its commission, and whose families would suffer "extreme hardship" if the deportation were carried out), *rev'd for failure to exhaust administrative alternatives sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003); *criticized by* Guaylupo-Moya v. Gonzales, 423 F.3d 121, 124-25 (2d Cir. 2005) ("we now find that the *Beharry* decision, while commendable for its efforts and concern for human interests, cannot support the remedy it attempted to provide. In its most doctrinally sound form, *Beharry* urges that where a statute is ambiguous, we should construe the statute to conform to the principles of international law. Congress, however, plainly provided that IIRIRA's restriction on 212(h) relief and expanded definition of an aggravated felony should apply retroactively. Because Congress's intent is clear, it displaces any inconsistent norms of customary international law or prior treaty obligations.").

182. *See* 8 U.S.C. 1105(a) (1988) (repealed in 1996).

183. The Ninth Circuit held that the court may exercise jurisdiction when a deportation was unlawful or was not "legally executed." *See* Singh v. Waters, 87 F.3d 346 (9th Cir. 1996) (allowing habeas petition for unlawful deportation); Estrada-Rosales v. I.N.S., 645 F.2d 819 (9th Cir. 1981) (allowing case to be re-opened where deportation based upon an invalid conviction was not "legally executed" because the underlying conviction was based upon a misdemeanor guilty plea for which counsel was not provided); Mendez v. I.N.S., 563 F.2d 956 (9th Cir. 1977) (jurisdiction found where non-citizen was deported without opportunity to contact legal counsel).

184. *See* Baez v. I.N.S., 41 F.3d 19, 20 (1st Cir. 1994) (construing former 8 U.S.C. § 1105(a) (1988) and holding that departure from the United States, whether voluntary or involuntary, deprives the federal courts of jurisdiction to entertain challenges to an antecedent order of deportation); Terrado v. Moyer, 820 F.2d 920, 921 (7th Cir. 1987) (where petitioner already had been deported, court held that she was no longer "in custody," court never acquired jurisdiction, and there was no "case or controversy"). When the statutory bar to post-deportation review was repealed in 1996, it created a more complex set of issues for reviewing courts confronting habeas petitions. *See* Miranda v. Reno, 238 F.3d 1156, 1158-59 (9th Cir. 2001) (habeas corpus petition is moot if filed after deportation because non-citizen is not "in custody" at the time of filing). *But see* Gutierrez v. Ashcroft, 289 F. Supp. 2d 555 (D.N.J. 2003) (ineffective assistance of counsel amounted to a colorable

review,[185] a variety of practical and technical impediments mean that not only the harshness of many deportations, but even *wrongful* deportations, are largely insulated from judicial scrutiny, leaving the affected individuals and families with no effective remedies.

The Post-Deportation Human Rights Project (PDHR) at Boston College Law School has begun to grapple with this phenomenon.[186] We have identified certain general classes of cases that warrant judicial review:

- claims of wrongful deportations of U.S. citizens;
- claims of fear of torture or persecution brought by deportees;
- claims of clear error or ineffective assistance of counsel in deportation proceedings that were not addressed by courts;
- claims based on favorable changes in the law after an individual's deportation, including statutory changes, judicial rulings, vacating of convictions.;
- claims based on eligibility for statutory waivers;
- claims of particularly extreme and unforeseen hardship.

Full consideration of all such matters is beyond the scope of this essay. However, beyond judicial review as such, the Project has also focused carefully on all possible discretionary waivers that may be available—to both immigrants and non-immigrants—seeking to return after removal.[187] Our hope is to prod the government to consider promulgating regulations to structure and systematize the exercise of discretion in such cases to ensure a greater measure of predictability and fairness. Administrative cases decided more than thirty years ago had established some guidelines.[188] However, in a 2002 decision dismissing an appeal by an applicant seeking a waiver, the Administrative Appeals Office opined:

> Even though the decisions in *Tin* and *Lee* [that established guidelines] have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in their intent, and in the legislation and in their decisions, that individuals who violate

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due process violation and therefore court allowed habeas as equitable relief). *See generally*, Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135 (2002).

185. *See* Moore v. Ashcroft, 251 F.3d 919, 922 (11th Cir. 2001) (hearing petition for review filed after non-citizen had departed from the United States); *see also* Tapia-Garcia v. I.N.S., 237 F.3d 1216, 1217 (2001) ("[D]eportation no longer forecloses judicial review.").

186. The PDHR, originally known as the Ruby Slippers project, was founded in 2006 by the author as an initiative of the newly-formed Center for Human Rights and International Justice at Boston College.

187. *See, e.g.*, 8 U.S.C.A. § 1182(a)(9)(A)(iii) (2006); 22 CFR § 40.91(e) (2006); 8 CFR § 212.2 (2006) (waivers of inadmissibility based on prior removal orders); *see also* 8 U.S.C.A. § 1182(d)(3) (2006) (general waiver for non-immigrants).

188. *See* Matter of Tin, 14 I. & N. Dec. 371 (Reg. Comm. 1973); Matter of Lee, 17 I. & N. Dec. 275 (Comm. 1978) (delineating factors to be considered in requests for re-admission).

> immigration law are viewed unfavorably. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable factors gained after the violation of immigration laws following statutory changes and judicial decisions.[189]

The need for sustained, serious attention to this question has become especially compelling precisely because of the rapid expansion of the deportation system and the concomitant restrictions on discretionary relief from deportation. U.S. statutory law still offers the possibility of return for most deportees, many of whom are former legal permanent residents with families in the U.S. It hardly seems a radical request that their cases be adjudicated in a transparent and consistent manner.

It is also imperative to consider other possible judicial remedies for various types of post-deportation claims. Some courts have asserted jurisdiction to review habeas petitions where the petitioner presents a non-frivolous claim to U.S. citizenship.[190] Similarly, claimants have occasionally been successful where the petitioner alleges a failure to timely appeal due to ineffective assistance of counsel or other extenuating circumstances.[191] Beyond claims of justice and fairness, adjudication of post-deportation cases by U.S. courts could also actually enhance border control. Ironically, a complete jurisdictional bar on claims filed by deportees from outside the United States creates an incentive for deportees to re-enter the United States illegally in order to challenge their prior deportations. Courts have held that an individual subject to a "reinstatement" of a removal order,[192] who presents a colorable constitutional claim regarding the underlying removal order may seek habeas review in the district court.[193] Under *INS v. St. Cyr*,[194] the preclusion of all judicial review of "pure questions of law" would raise "substantial constitutional questions."[195]

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189. In Re: Applicant: [Identifying Information Redacted By Agency], File No. EAC00 240 51145, April 11, 2002; AAU EAC 00 240 51145, 2002 WL 32078940 (I.N.S.).

190. *See* Rivera v. Ashcroft, 394 F.3d 1129 (9th Cir. 2005). The effect of the REAL ID Act on such claims remains to be determined.

191. Gutierrez v. Gonzales, 125 F. App'x. 406 (3d Cir. 2005); Singh v. Waters, 87 F.3d 346 (9th Cir. 1996).

192. Under § 241(a)(5), the Attorney General may reinstate the prior deportation/exclusion/removal order of anyone who returns, or attempts to return, to the United States without authorization. *See* TRINA A. REALMUTO & ROBERT PAUW, AM. IMMIGRATION LAW FOUND., PRACTICE ADVISORY: REINSTATEMENT OF REMOVAL (2005).

193. Arreola-Arreola v. Ashcroft, 383 F.3d 56. 963-94 (9th Cir. 2004); Smith v. Ashcroft, 295 F.3d 425, 428-29 (4th Cir. 2002); Nolasco v. United States, 358 F. Supp. 2d 224, 237 (S.D.N.Y. 2004); Sifuentes-Barraza v. Garcia, 252 F. Supp. 2d 354, 358 (W.D. Tex. 2003).

194. I.N.S. v. St. Cyr, 533 U.S. 239 (2001).

195. *Smith*, 295 F.3d at 428 (quoting *St. Cyr*, 533 U.S. at 314); *see also*, *Arreola*, 383 F.3d at 963-64.

The REAL ID Act purports to eliminate habeas corpus review of final orders of removal, deportation, or exclusion. It confers jurisdiction on the courts of appeals to review all constitutional issues and questions of law related to final orders, but requires that such questions be raised exclusively through "a petition for review filed with the appropriate court in accordance with this section."[196] Because such petitions for review must be filed within 30 days of the entry of the final order, a challenge to a prior order underlying a reinstatement order may very well never be reviewed in any forum. Courts, however, have recognized that the validity of a reinstatement order is inextricably connected to the validity of the prior order: As the Ninth Circuit has noted, "[B]ecause the constitutionality of a reinstatement order depends on whether an alien was afforded all the process to which he or she was entitled in the prior removal proceeding, the INS cannot reinstate a prior order of removal that did not comply with due process."[197] Also, an individual charged with the criminal offense of illegal reentry under INA Section 276[198] may collaterally attack the underlying removal order by moving to dismiss the indictment.[199] The prior order is an essential element of the offense. In *United States v. Mendoza-Lopez*, the Supreme Court held that it would violate due process to allow the imposition of "a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been."[200]

In sum, the time is ripe for a meaningful consideration of how deportation laws are enforced, how they should be enforced, and how courts should oversee their enforcement pre- or post-deportation..

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196. § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

197. *Arreola*, 383 F.3d at 963 (internal citations omitted); *see also* Arevalo v. Ashcroft, 344 F.3d 1, 9 (1st Cir. 2003) ("While we cannot revisit the validity of the original deportation order . . . we do have the authority to determine the appropriateness of its resurrection.").

198. INA § 276, 8 U.S.C. § 1326 (2006, provides for criminal penalties ranging from two to twenty years confinement for those who enter, attempt to enter, or are found in the United States following an order of exclusion, deportation, or removal, absent express consent to reapply for admission by the Attorney General.

199. Challenges may also be possible at other stages of the criminal adjudicatory process. *See, e.g.*, Nolasco v. United States, 358 F. Supp. 2d 224 (S.D.N.Y. 2004) (granting a habeas petition based on a § 276 collateral attack after defendant had been convicted for illegal reentry and the government had reinstated the original deportation order).

200. United States v. Mendoza-Lopez, 481 U.S. 828, 837 (1987). Congress later amended Section 276 to provide that an individual subject to criminal prosecution under this provision may challenge the validity of the underlying order by establishing that:

1. the alien exhausted any administrative remedies that may have been available to seek relief against the order;
2. the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
3. the entry of the order was fundamentally unfair.

INA § 276(d), 8 U.S.C. § 1326(d).

CONCLUSION

Deportation was a relatively rare phenomenon in the late nineteenth century when it was exempted from substantive constitutional oversight by the Supreme Court. Still, the early concerns of Justice Stephen Field, a Democrat appointed by Abraham Lincoln, are worth recalling. Field is well-known to immigration scholars as the author of the atrocious case of *Chae Chan Ping v. United States*,[201] also known as the Chinese Exclusion Case. That case involved a basic question: could a lawful resident of the United States who had *not* violated an entry condition or any other law be excluded, following a temporary sojourn abroad, due to a retroactive change in immigration law? The answer, as all immigration law scholars know, is that the Court rejected all of the doctrinal categories asserted by Chae Chan Ping's talented lawyers, including contractual rights, vested rights, constitutional protections, and limited government powers. Instead, the Court recognized governmental sovereign, constitutionally-unrestrained, "plenary power." Soon, this exceedingly deferential approach to exclusion was internalized[202] and was applied to deportation law in *Fong Yue Ting v. United States*,[203] a case that has since been cited by Supreme Court majorities more than 70 times and by lower court majorities many hundreds of times.[204] In this realm, however, the previously unanimous Court fractured, as three Justices, including Field, dissented. Memorably, and perhaps with just a tinge of remorse, Field wrote words that are important to recall today: "As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."[205] Such a system simply cannot be exempted from the rule of law and the demands of justice.

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201. 130 U.S. 581 (1889).

202. *See* Ekiu v. United States, 142 U.S. 651, 663 (1892) (holding that executive decision of inspector of immigration to exclude immigrant from entry into United States is unreviewable).

203. Fong Yue Ting v. United States, 149 U.S. 698 (1892) ("The right of a nation to expel or deport foreigners who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

204. LEXIS Shepard's search undertaken on November 10, 2006.

205. *Fong Yue Ting*, 149 U.S. at 759 (Field, J. dissenting).