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The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law

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Introduction

The *Law and Inequality* Fall 2010 Symposium focused on the growing use of criminal prosecutions to end impunity for human rights violations. This Article takes a different look at the intersection between criminal justice and human rights law—not a view of the criminalization *of* human rights violations, but criminalization *as* a human rights violation. We review the human rights implications of U.S. immigration law as it is currently codified and enforced, focusing specifically on two aspects of the immigration law regime: the use of deportation and mandatory detention against non-citizens.[1] Although we believe that these practices in particular, and the treatment of non-citizens in general, fall short of several of the United States' international human rights obligations, this Article makes a more general claim: the selective convergence of criminal and immigration law contributes to a violation of a broader human rights norm—that citizens and non-citizens alike are entitled to equal dignity and inalienable rights, and that any discriminatory treatment of non-citizens must be proportional to achieving a legitimate state objective.[2]

This Article proceeds as follows. Part I explores the growing

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1. *See infra* Parts III–IV.

2. *See infra* Part II.

convergence between criminal and immigration law, noting the "asymmetrical" character of this trend. Part II reviews important international human rights instruments elaborating the rights of non-citizens, and sets forth what we believe to be a broad normative obligation of general equality between citizens and non-citizens. We call this obligation the "non-discrimination norm." Part III discusses the non-discrimination norm in the context of the current deportation regime, which is both categorical and harsh. Continuing this idea, Part IV analyzes another important manifestation of the growing convergence between criminal and immigration law: mandatory immigration detention. Although we review statutory authority for detention and Supreme Court jurisprudence, our principal objective is to demonstrate how mandatory detention violates the non-discrimination norm emanating from international law.

I. The Criminalization of Immigration

The nativist sentiments in U.S. culture have arisen with particular fervor in the past two decades. The rise in anti-immigrant rhetoric, trumpeted by interest groups and sympathetic media, has all but solidified the ideological construction of large groups of immigrants as "illegal" with all of the moral stigma that accompanies that term.[3] National security fears and economic instability have increased demands for more aggressive enforcement of immigration laws, not only to prevent more

3. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 500 (2007) ("Much of the recent immigration enforcement-related activity at the federal, state, and local levels reflects . . . perceived associations of immigrants with criminals."); *see also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835–39 (2007) [hereinafter Chacón, *Unsecured Borders*] (discussing the construction of the "illegal alien" in public discourse). Public perception on this issue is wrong. Most immigration into the United States occurs through legal channels. *See* U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 14, 241 (2002), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf (reporting that in 1999, 646,568 immigrants were admitted for legal permanent resident status compared to an annual estimated increase of 275,000 undocumented immigrants). Studies have consistently found that crime rates of the immigrant population are substantially lower than those of the native-born population, despite the immigrant population being younger and less educated. *See* Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFO. SOURCE (June 2006), http://www.migrationinformation.org/Feature/display.cfm?id=403. This conclusion holds true even if one does not control for age, gender, or educational attainment. *See* Kristin F. Butcher & Anne Morrison Piehl, *Cross-City Evidence on the Relationship Between Immigration and Crime*, 17 J. POL'Y ANALYSIS & MGMT. 457, 483–84 (1998); Rumbaut et al., *supra*.

immigrants from arriving, but to drive away the ones who are here.[4] Given this context, it should not be a surprise that the landscape of immigration law has changed dramatically as the traditional boundaries between the criminal and immigration spheres have eroded.[5]

Legal scholars have termed this once gradual but now accelerated blurring as the "criminalization of immigration law."[6] The convergence of criminal and immigration law has occurred on at least three fronts as Congress has (1) increased the number of immigration-related criminal offenses as well as the severity of punishment, (2) expanded the number of criminal offenses that require deportation, and (3) delegated more immigration enforcement to state and local law enforcement officers.

A. Immigration-Related Criminal Offenses

Violations of immigration law were historically civil offenses.[7] Until 1929, when Congress made illegal entry into the United States a misdemeanor and illegal re-entry a felony, the violation of immigration laws was not a crime.[8] Beginning in the mid-1980s, with the Immigration Reform and Control Act (IRCA), Congress began to increase the number of immigration-related criminal offenses.[9] For the first time, IRCA imposed criminal penalties on employers who engage in a "pattern or practice" of knowingly hiring non-citizens who are unauthorized to work.[10] Congress also created criminal sanctions for employees who use fraudulent documents to secure employment.[11] The Immigration Marriage Fraud Amendments criminalized marriages that are entered into for the purpose of gaining immigration status.[12] Subsequent congressional enactments criminalized unlawful re-entry following

4. Chacón, *Unsecured Borders*, *supra* note 3, at 1830.

5. *Id.* at 1839–43.

6. *See, e.g.*, Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 640 (2004); Legomsky, *supra* note 3, at 476; Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 617 (2003).

7. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006) [hereinafter Stumpf, *Crimmigration Crisis*].

8. *Id.*

9. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

10. 8 U.S.C. § 1324a(a)(1)–(2) (2006).

11. 18 U.S.C. § 1546(b) (2006).

12. Immigration Marriage Fraud Amendments of 1986 § 2(d), 8 U.S.C. § 1325(c) (2006).

three or more enumerated misdemeanors (generally drug crimes or crimes against persons),[13] entrepreneurship fraud in the immigration setting,[14] traffic offenses while evading immigration checkpoints,[15] failure to disclose one's role in assisting fraudulent immigration applications,[16] and falsely representing oneself to be a U.S. citizen to obtain certain immigration benefits.[17]

Congress also increased the severity of punishments, both fines and length of imprisonment, for existing immigration-related crimes. For example, the maximum prison sentence for persons who unlawfully re-enter the United States following deportation increased from two years to twenty years as Congress revisited the issue three times in less than a decade (1988, 1994, and 1996).[18] Immigration-related prosecutions quadrupled from 1996 to 2006,[19] accounting for more than thirty percent of all federal prosecutions and constituting the single largest category of federal prosecutions (more than drug- or weapon-related offenses).[20]

B. Criminal Offenses Triggering Deportation

In addition to lengthening the list of immigration-related criminal offenses, Congress expanded the number of criminal convictions that trigger deportation and other adverse immigration consequences.[21] This trend is sometimes dubbed "immigrationization of criminal law."[22] There are myriad ways that a criminal conviction can adversely affect a non-citizen's immigration status. It may result in a non-citizen being denied admission into the country.[23] If a non-citizen is already in the country, a conviction may result in deportation[24] and the

13. Violent Crime Control and Law Enforcement Act of 1994 § 130001(b), 8 U.S.C. § 1326(b)(1) (2006).

14. Immigration Act of 1990 § 121(b)(3), 8 U.S.C. § 1325(d) (2006).

15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 108, 18 U.S.C. § 758 (2006).

16. 8 U.S.C. § 1324(e) (2006).

17. 18 U.S.C. § 1015(e)–(f) (2006).

18. *See* Legomsky, *supra* note 3, at 478; Stumpf, *Crimmigration Crisis*, *supra* note 7, at 384.

19. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 139 (2009), *available at* http://www.columbialawreview.org/assets/sidebar/volume/109/135_Chacon.pdf [hereinafter Chacón, *Managing Migration*].

20. *See* Legomsky, *supra* note 3, at 479–80.

21. Miller, *supra* note 6, at 614.

22. *Id.* at 618.

23. *See* 8 U.S.C. § 1182(a) (2006) (setting forth eligibility categories for admission).

24. *See id.* § 1227(a)(2).

elimination of discretionary avenues of relief for staying deportation.[25] A conviction also triggers mandatory immigration detention pending a deportation decision, which may take months or years.[26] This Article focuses only on deportation and mandatory detention. As discussed below, while Congress created new immigration-related crimes, it steadily expanded the crimes resulting in mandatory detention and deportation, primarily through expansion of the term "aggravated felony."[27]

C. *Increased Immigration Enforcement by State and Local Police*

For purposes of this Article, the final point of intersection between criminal and immigration law occurs at the level of actual law enforcement. Over the last two decades, state and local police have been playing an ever-increasing role in immigration enforcement, even though immigration regulation is, as the Supreme Court has made clear, "unquestionably exclusively a federal power."[28] In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which, among other things, authorized the Attorney General to enter into collaborative agreements with local and state law enforcement officials.[29] Under these written agreements, also called "287(g) agreements," state and local police gain access to Immigration and Customs Enforcement (ICE) databases and are authorized to independently investigate and initiate removal proceedings.[30] As of this Article, seventy-one local and state law enforcement agencies in twenty-six states have entered into 287(g) agreements.[31]

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25. *See id.* § 1229b(a)(3) (disallowing cancellation of removal if the non-citizen has been convicted of an aggravated felony).

26. *Id.* § 1226(c)(1); *see infra* Part IV.A.

27. *See* Chacón, *Unsecured Borders*, *supra* note 3, at 1843–44; Legomsky, *supra* note 3, at 483–86; Stumpf, *Crimmigration Crisis*, *supra* note 7, at 382–84; *infra* Part III.A.

28. De Canas v. Bica, 424 U.S. 351, 354 (1976); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–89 (2004).

29. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 133 (amending Immigration and Nationality Act § 287, 8 U.S.C. § 1357 (1994)).

30. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 7 (2009), *available at* http://www.gao.gov/new.items/d09109.pdf.

31. *See Fact Sheet: Updated Facts on ICE's 287(g) Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g-reform.htm (last visited Feb. 11, 2011).

The adoption of Arizona Senate Bill (S.B.) 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," in April 2010 constituted a further action by a state government to involve itself in policing the flow of unauthorized aliens into its territory.[32] The most controversial provisions of S.B. 1070 make it mandatory for police to verify the immigration status of persons suspected to be in the country unlawfully during the course of a "lawful stop, detention or arrest"[33] and require the immigration status of every arrested individual to be verified before each individual is released.[34] The law also creates several new immigration-related state crimes, including criminal sanctions for aliens who solicit or obtain work without authorization[35] or who fail to carry federal immigration documents.[36] Even though the constitutionality of Arizona's law is being contested by the U.S. Department of Justice,[37] it is clear that states will continue to push to use their police powers to criminalize and enforce immigration laws. As of November 2010, copycat legislation had "been introduced in six state legislatures: South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan and Illinois."[38]

The policy arguments for state and local enforcement of immigration laws, as well as the constitutionality of such actions, are beyond the scope of this Article. We touch on these issues mainly to illustrate the ways that traditional criminal justice is converging with immigration enforcement in the United States.

D. "Asymmetric Incorporation"[39]

Although the boundaries between criminal and immigration law have eroded, the incorporation of the criminal justice model into immigration law (and vice-versa) has not been wholesale. Rather, criminal law has been selectively and asymmetrically projected onto the civil regulatory regime of immigration law.[40] More precisely, while immigration law has become focused on

32. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF.

33. *Id.* § 2.

34. *Id.*

35. *Id.* § 5.

36. *Id.* § 3.

37. *See* United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

38. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=20263 (last modified Nov. 10, 2010).

39. Legomsky, *supra* note 3, at 469.

40. *See id.* at 527–28.

traditionally criminal norms and theories such as incapacitation and deterrence, the adjudicatory mechanism in immigration law remains civil, thus eschewing the procedural protections of the criminal justice system and its accompanying constitutional and sub-constitutional constraints.[41]

For example, despite the harshness of the sanction of deportation, the legal proceedings for determining deportability are still civil in nature, with minimal procedural protections.[42] Similarly, prolonged detention in jail or prison (as the non-citizen's case moves between an immigration judge, the Board of Immigration Appeals (BIA), and the U.S. Court of Appeals) is deemed non-punitive and detainees seldom have the opportunity to live in the community while they await rulings in their immigration cases.[43] For over a century, the touchstone of U.S. immigration law has been that deportation is not a punishment, regardless of the impact on the deportees or their families.[44] Therefore, in terms of adjudicative procedure, whereas the criminal defendant is afforded the constitutional protections enshrined in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the non-citizen facing deportation has only the protection of the Due Process Clause,[45] and even that protection is limited in the immigration detention context.[46] The exclusionary rule[47] does not apply in "civil" deportation proceedings,[48] nor do the Federal Rules of Evidence.[49] The non-citizen also has no privilege against self-incrimination,[50] no right to counsel at the

41. *Id.* at 472. Even in the criminal sphere, procedural protections for criminal defendants charged with immigration-related crimes are beginning to erode. *See* Chacón, *Managing Migration*, *supra* note 19, at 141–45 (noting that it is not uncommon for appointed defense counsel to represent dozens of defendants at the same time during criminal prosecutions for unlawful entry).

42. Legomsky, *supra* note 3, at 472.

43. *See* Chacón, *Managing Migration*, *supra* note 19, at 141.

44. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *see also* Mahler v. Eby, 264 U.S. 32, 39 (1924).

45. *See* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903); Stumpf, *Crimmigration Crisis*, *supra* note 7, at 390–95.

46. *See infra* Part IV.B.

47. The exclusionary rule is the "general rule in a criminal proceeding . . . that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." INS v. Lopez-Mendoza, 468 U.S. 1032, 1040–41 (1984) (citing Wong Sun v. United States, 371 U.S. 471, 485–86 (1963)).

48. *Id.* at 1050.

49. Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990).

50. *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) ("[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is

government's expense,[51] no argument under the Eighth Amendment's prohibition of cruel and unusual punishment,[52] and no protection against the retroactive application of deportation laws under the Ex Post Facto Clause.[53] The rest of this Article discusses the human rights implications of the selective and asymmetric convergence of criminal and immigration law.

II. Human Rights Instruments and the Non-Discrimination Norm

Many human rights organizations, legal scholars, and even United Nations (U.N.) bodies have meticulously documented how U.S. immigration law violates international human rights treaties.[54] While such projects are extremely valuable, our

called upon to speak."); Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 623–36 (1990).

51. 8 U.S.C. § 1362 (2006). According to the Department of Justice, in 2007 nearly sixty percent of non-citizens in removal proceedings appeared without counsel. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2007 STATISTICAL YEAR BOOK G1 (2008), *available at* http://www.justice.gov/eoir/statspub/fy07syb.pdf; *see also* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541–43 (2009).

52. Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999).

53. Harisiades v. Shaughnessy, 342 U.S. 580, 593–96 (1952) (finding that because deportation is civil, the Ex Post Facto Clause does not apply to the retroactive application of the Alien Registration Act of 1940).

54. *See, e.g.*, U.N. Econ. & Soc. Council, Comm'n on Human Rights, Civil and Political Rights, Including Questions of Torture and Detention: Opinions Adopted by the Working Group on Arbitrary Detention, Opinion No. 21/2005, 73, U.N. Doc. E/CN.4/2006/7/Add.1 (May 27, 2005) (concluding that the U.S. government's treatment of immigrant Mr. Ahmed Ali did not conform with the "norms and principles set forth in the Universal Declaration of Human Rights" (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Civil and Political Rights, Including Questions of Torture and Detention: Opinions Adopted by the Working Group on Arbitrary Detention, Opinion No. 33/1999, 41, U.N. Doc. E/CN.4/2001/14/Add.1 (Dec. 1, 1999) (finding that the U.S. government's treatment of immigrant César Manuel Guzmán Cruz did not conform with the UDHR or the ICCPR); ADVOCATES FOR HUMAN RIGHTS, SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW, NINTH SESSION OF THE WORKING GROUP ON THE UPR HUMAN RIGHTS COUNCIL: MIGRANTS, REFUGEES, AND ASYLUM SEEKERS 4 (2010), *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex16_Migrants%20Refugees%20and%20Asylum%20Seekers.pdf (recommending reforms to the U.S. immigration system to ensure compliance with the ICCPR); HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 33 (2009), *available at* http://idcoalition.org/wp-content/uploads/2009/03/090429-rp-hrf-asylum-detention-report.pdf ("[T]he U.S. detention system lacks safeguards that prevent detention from being arbitrary within the meaning of the ICCPR . . . ."); MINN. ADVOCATES FOR HUMAN RIGHTS ET AL., PROBLEMS WITH U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL

objective in this Article is to highlight a broader normative ideal grounded in principles of equality, necessity, and proportionality. In 2003, David Weissbrodt, the Special Rapporteur on the rights of non-citizens for the U.N. Sub-Commission on the Promotion and Protection of Human Rights, concluded that "[i]n general, international human rights law requires the equal treatment of citizens and non-citizens."[55] Although nations may create legal distinctions between citizens and non-citizens, such distinctions are only permissible if they "serve a legitimate State objective and are proportional to the achievement of that objective."[56] We refer to this concept as the non-discrimination norm.

A. Survey of Human Rights Instruments

We start our review of important human rights instruments with the Universal Declaration of Human Rights (UDHR). Although the UDHR is not itself legally binding and does not specifically single out non-citizens for protection, it articulates an important normative vision of "equal and inalienable rights" for "all members of the human family."[57] Additionally, the UDHR influences many of the subsequent binding treaties that affect the rights of non-citizens.[58] The enumerated list of prohibited grounds of discrimination set forth in article 2 does not specifically prohibit a state from drawing distinctions based on citizenship or immigration status.[59] That does not mean, however, that non-citizens are outside the scope of the UDHR's vision for equality.

AND POLITICAL RIGHTS: VIOLATIONS OF THE RIGHTS OF ALIENS 3 (2006) (identifying numerous U.S. violations of Article 13 of the ICCPR); Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 157 (2008) (arguing that U.S. policies and practices regarding the detention of asylum seekers violate the ICCPR).

55. Special Rapporteur, *Prevention of Discrimination: The Rights of Non-Citizens*, ¶ 1, U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003).

56. *Id.*

57. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/index.shtml [hereinafter UDHR] (proclaiming itself to be "a common standard of achievement for all peoples and all nations"); *see also* Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality*, 22 GEO. IMMIGR. L.J. 177, 177–78 (2008) ("[T]he UDHR underlines the importance of the application of this equality principle for the realization of freedom, justice, and peace.").

58. *See, e.g.*, International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (stating that the treaty is drafted "in accordance with the Universal Declaration of Human Rights").

59. UDHR, *supra* note 57, art. 2.

The use of "such as" in article 2 of the UDHR indicates that the list of prohibited grounds of discrimination is merely illustrative and not exhaustive.[60] Furthermore, article 2's prohibition against distinctions on the grounds of "other status" may be broad enough to also prohibit distinctions grounded in citizenship.[61]

To give teeth to the principles embodied in the UDHR, the Commission on Human Rights drafted two treaties—the International Covenant on Civil and Political Rights (ICCPR)[62] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[63] Taken together with the UDHR, these documents constitute what is now commonly referred to as the International Bill of Human Rights.[64]

Article 2, paragraph 1 of the ICCPR requires each signatory state "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[65] Article 26 provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[66] The ICCPR does not, however, prohibit all distinctions based on citizenship. Article 12, paragraph 1[67] and article 13[68] reaffirm the right of a nation to control immigration by law.

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60. *See* Cholewinski, *supra* note 57, at 178; *see also* UDHR, *supra* note 57, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

61. *See* UDHR, *supra* note 57, art. 2.

62. ICCPR, *supra* note 58. The United States ratified the ICCPR in 1992. Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR, June 29, 1992, at 19, *available at* http://www.cartercenter.org/news/documents/doc1369.html.

63. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The United States has signed, but has not ratified, the ICESCR. *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last updated Mar. 5, 2011).

64. *International Law*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/law/ (last visited Feb. 11, 2011).

65. ICCPR, *supra* note 58, art. 2, ¶ 1.

66. *Id.* art. 26.

67. *Id.* art. 12, ¶ 1 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

68. *Id.* art. 13 ("An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law . . . .").

Article 25 explicitly distinguishes citizens from non-citizens, guaranteeing the right of "[e]very *citizen*" to take part in public affairs, vote and hold office, and have access to public service.[69] By implication, non-citizens may be denied those rights specifically designated for citizens.

The Human Rights Committee, which is a body of independent experts elected by the U.N. General Assembly and charged with monitoring implementation of and compliance with the ICCPR and with providing treaty interpretation,[70] has provided helpful guidance for reconciling the non-discrimination norm with articles 12, 13, and 25. Although decisions and comments of the Human Rights Committee are not binding, its decisions are considered highly persuasive for treaty interpretation.[71] Interpreting article 2, paragraph 1, the Committee found that "[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[72] Additionally, according to the Committee, "each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens" except when "some of the rights recognized in the Covenant are expressly applicable only to citizens" (article 25).[73] The Committee's endorsement of the non-discrimination norm as the general rule, and citizenship-based distinctions as the exception, is strongly supported in the plain language of the treaty. While most of the articles use expansive language—"*[e]very human being* has the inherent right to life" (article 6), "*[n]o one* shall be subjected to torture" (article 7), and "*[a]ll persons* deprived of their liberty shall be treated with humanity" (article 10)[74]—only articles 12, 13, and 25 circumscribe the enumerated right to specific classes of persons.[75] This suggests

69. *Id.* art. 25 (emphasis added).

70. *Human Rights Committee*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/hrc/index.htm (last visited Mar. 7, 2011).

71. *See* Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 578 (2009).

72. Human Rights Comm., General Comment 15, The Position of Aliens Under the Covenant (Twenty-Seventh Session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1, at 18 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom15.htm.

73. *Id.* ¶ 2.

74. ICCPR, *supra* note 58, arts. 6, 7, 10 (emphases added).

75. *Id.* art. 12, ¶ 1 ("[e]veryone lawfully within the territory of a State"); *id.* art.

that the drafters of the treaty knew how to limit the applicability of rights, but purposely chose to expansively protect "all members of the human family."[76]

The United States is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[77] Article 1, paragraph 1 defines "racial discrimination" to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of . . . impairing the . . . enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . . ."[78] But the ICERD makes clear in article 1, paragraph 2 that its terms do not "apply to distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens."[79] Additionally, so long as there is no discrimination against any particular nationality, ICERD does not affect a party's laws regarding "nationality, citizenship or naturalization."[80] But that does not mean signatory states may freely discriminate against non-citizens in immigration matters.

The Committee on the Elimination of Racial Discrimination, which is the U.N. treaty body charged with ICERD compliance and interpretation,[81] has repeatedly emphasized that the provisions in article 1, paragraph 1 "must not be interpreted to detract in any way from the rights and freedoms recognized . . . in other instruments, especially the [UDHR, ICESCR, and the ICCPR]."[82] Although a state may control its borders and distinguish between citizens and non-citizens, the Committee made clear that "human rights are . . . to be enjoyed by all persons," and that "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the

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13 ("[a]n alien lawfully in the territory of a State Party to the present Covenant"); *id.* art. 25 ("[e]very citizen").

76. UDHR, *supra* note 57, pmbl.

77. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]. The United States ratified the treaty in 1994. *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last updated Mar. 5, 2011).

78. ICERD, *supra* note 77, art. 1, ¶ 1.

79. *Id.* art. 1, ¶ 2.

80. *Id.* art. 1, ¶ 3.

81. *Id.* arts. 8, 9.

82. Comm. on the Elimination of Racial Discrimination, General Recommendation 11, On Non-Citizens (Forty-Second Session, 1993), ¶ 3, U.N. Doc. A/48/18 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/genrexi.htm.

extent recognized under international law."[83]

The non-discrimination norm between citizens and non-citizens also emanates from other treaties to which the United States is not a party. Article 2, paragraph 2 of the ICESCR prohibits discrimination based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[84] The Convention on the Rights of the Child (CRC), which has been ratified by every country in the world except for the United States and Somalia, similarly contains language prohibiting discrimination and expansively defines "child" to mean "*every* human being below the age of [majority]."[85] Article 7 of the CRC guarantees the right of every child to be "registered immediately after birth" and to "acquire a nationality."[86] Special protection is urged for children of non-citizens, who would otherwise be "stateless."[87] Finally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not distinguish between citizens and non-citizens in requiring states parties to eliminate discrimination against women by all appropriate means.[88]

To the extent that distinctions between citizens and non-citizens are permissible, the distinctions must be proportionate to achieving a legitimate state objective. This principle of proportionality is endorsed by the Human Rights Committee in its interpretation of the ICCPR. In General Recommendation 18, the Committee found that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[89] Similarly, interpreting

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83. Comm. on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination Against Non-Citizens (Sixty-Fourth Session, 2004), ¶ 3, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004) [hereinafter CERD, General Recommendation 30], *available at* http://www1.umn.edu/humanrts/gencomm/genrec30.html.

84. ICESCR, *supra* note 63, art. 2, ¶ 2; *see also* DAVID WEISSBRODT, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, THE RIGHTS OF NON-CITIZENS 12 (2006) [hereinafter WEISSBRODT, RIGHTS OF NON-CITIZENS], *available at* http://www.ohchr.org/Documents/Publications/noncitizensen.pdf ("States may not draw distinctions between citizens and non-citizens as to social and cultural rights.").

85. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3, (Nov. 20, 1989) (emphasis added).

86. *Id.* art. 7, ¶ 1.

87. *See* Special Rapporteur, *supra* note 55, ¶ 9.

88. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

89. Human Rights Comm., General Comment 18, Non-Discrimination (Thirty-

ICERD, the Committee on the Elimination of Racial Discrimination concluded that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[90]

B. Judicial Application of the Non-Discrimination Norm

Those who think that the non-discrimination norm is a radical idea that will never gain mainstream acceptance may be surprised to learn that U.S. courts already employ standards similar to the non-discrimination norm in at least some situations concerning the rights of non-citizens. Students of constitutional law are well aware of judicial standards of review used in equal protection challenges.[91] To the extent that the non-discrimination norm emanating from international law parallels the Equal Protection Clause of the U.S. Constitution, the requirement that classifications based on citizenship be proportional to a legitimate objective suggests that such classifications ought to be reviewed with heightened (intermediate or strict) scrutiny.[92]

Although the Supreme Court's jurisprudence in this area is far from clear, the extent to which courts invalidate distinctions between citizens and non-citizens on equal protection grounds appears to depend on the subject matter at issue and whether the actor is a state or the federal government.[93] Over a century ago, in

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Seventh Session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 13, U.N. Doc. HRI/GEN/1/Rev.1 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom18. htm.

90. CERD, General Recommendation 30, *supra* note 83, ¶ 4.

91. Generally speaking, laws that draw classifications based on race are reviewed under strict scrutiny, and are invalidated unless the government can show that the classification is necessary to achieve a compelling government interest. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 486 (Robert C. Clark et al. eds., Foundation Press 16th ed. 2007). Courts review distinctions based on gender under intermediate scrutiny, under which the government must show that the law is substantially related to an important government purpose. *Id.* All other classifications are reviewed under the highly deferential rational basis standard, and will be upheld if rationally related to any legitimate government purpose. *Id.*

92. Admittedly, the non-discrimination norm does not perfectly map onto ostensibly rigid constitutional rules. While the principle of proportionality does not appear to require an "important" or "compelling" state objective, the requirement of proportionality makes rational basis review inappropriate. *See id.*

93. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 212 (6th ed. 2008) ("[O]ur constitutional law

Yick Wo v. Hopkins,[94] the Supreme Court made clear that "the Constitution is not confined to the protection of citizens . . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction."[95] In the area of "formal" criminal punishment such as incarceration, citizens and non-citizens generally have the same rights.[96] In the area of public benefits, state laws that discriminate on the basis of citizenship are generally invalidated by courts under a heightened standard of review.[97] But federal eligibility requirements for public benefits seem to be reviewed deferentially and are upheld.[98] For matters concerning "core immigration powers" such as admission or deportation grounds, judicial review is largely non-existent,[99] with the judiciary deferring to the "plenary power" of Congress to control immigration.[100]

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relating to immigration may differ from our constitutional law relating to noncitizen immigrants.").

94. 118 U.S. 356 (1886).

95. *Id.* at 369.

96. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that immigration authorities lacked the authority to impose criminal punishments without criminal process). But in recent years, non-citizens facing criminal penalties for immigration-related offenses are afforded fewer procedural protections than criminal defendants facing non-immigration charges. *See* Chacón, *Managing Migration*, *supra* note 19, at 141–45.

97. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971) ("[A] State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify [discrimination against non-citizens]."); *see also* Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating a state law denying education to children of undocumented immigrants).

98. *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (upholding residency as an eligibility requirement for federal benefits for non-citizens).

99. By non-existent judicial review, we mean that the substantive law setting forth the exclusion or deportation reasoning is reviewed very deferentially. *See id.* at 80 (explaining that Congress may make rules for "aliens" that would be unacceptable if applied to citizens and such discrimination based on citizenship is not necessarily "invidious"). Courts may still review the law to ensure that it comports with procedural due process requirements. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1492–94 (2010) (reviewing an immigrant's Sixth Amendment claim and concluding that he was entitled to notice of the deportation consequences before entering a criminal plea).

100. *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) ("[The] plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."); Carlson v. Landon, 342 U.S. 524, 534 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."). There is a vast literature discussing and critiquing the "plenary power doctrine." *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty*, 100 HARV. L. REV. 853, 862 (1987) ("The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist,

III. Categorical Deportation

The non-discrimination norm emanates from principles of international law under which equality between citizens and non-citizens is the rule, while distinctions are the exception.[101] Even where permissible, distinctions must be proportional to achieving a legitimate state objective.[102] The current U.S. deportation regime eschews proportionality and violates international law.

A. Statutory Deportation Grounds and Discretionary Relief

Although deportation has long been a fixture of U.S. immigration policy, the number of non-citizens deported has increased significantly over the last fifteen years. During fiscal year 1994, Immigration and Naturalization Services (INS) deported 45,674 non-citizens, 32,512 of whom had criminal convictions in the United States.[103] In fiscal year 2009, ICE deported 393,289 non-citizens, 128,345 of whom had criminal convictions in the United States.[104] Non-citizens are deportable if they fall into any one of six general categories that provide grounds for deportation: (1) inadmissible at time of entry, (2) convicted of certain criminal offenses, (3) falsified documents or failed to register, (4) engaged in activities that endanger national security, (5) became a public charge, or (6) voted unlawfully.[105]

Legal scholars have described the current deportation regime as an "on-off switch."[106] As Juliet Stumpf explains, "[r]egardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory consequence," although additional consequences may be imposed (e.g., fines or incarceration).[107] For example, immigration law does not distinguish between a student who violates the terms of her visa

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nativist mood a hundred years ago.").

101. *See supra* notes 55–56 and accompanying text.

102. *See supra* note 92 and accompanying text.

103. U.S. DEP'T OF JUSTICE, *supra* note 3, at 218 tbl.63. Note that not all deported non-citizens with criminal convictions were deported *because* of their criminal conviction; many were removed for other reasons. In fiscal year 1994, for example, only 24,581 of the non-citizens with criminal convictions were actually deported on criminal grounds. *See id.* at 217 tbl.62. The Department has stopped publishing reasons for non-citizen removal.

104. U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.38 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

105. *See* 8 U.S.C. § 1227(a) (2006).

106. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1690 (2009) [hereinafter Stumpf, *Fitting Punishment*].

107. *Id.* at 1691.

by working more hours than permitted, a recreational user of marijuana, and a serial arsonist; all are deportable.[108]

Perhaps to temper the potential harshness of the broad grounds for deportation, the ostensibly "rule-based" deportation regime has always had a complex overlay of discretion, including both prosecutorial discretion (setting enforcement priorities) and adjudicatory discretion in individual cases.[109] Relying on § 212(c) of the Immigration and Nationality Act (INA) of 1952,[110] which allowed for discretionary waivers of deportation, immigration judges and the BIA waived deportation in slightly more than half of the cases before them between 1989 and 1995.[111] Reacting against this level of discretion by the courts, Congress repealed § 212(c) in 1996, replacing it with a far more restrictive "cancellation of removal."[112] This provision authorizes the Attorney General to cancel the removal of long-term legal permanent residents if they meet certain statutory time-based requirements.[113] Non-permanent residents, including undocumented migrants who entered without inspection, may be eligible for cancellation of removal if they have been continuously present in the United States for at least ten years, they are of "good moral character," and their "removal would result in exceptional and extremely unusual hardship" to their citizen (or legal permanent resident) "spouse, parent, or child."[114] Unlike some discretionary waivers, cancellation of removal purges the underlying deportation ground and restores permanent resident status (or grants it in the case of undocumented migrants).[115]

Yet to the extent that these discretionary forms of relief are meant to inject some sense of proportionality into the deportation sanction, the growing convergence between criminal and immigration law has made the exercise of discretion impossible in many cases that warrant leniency. Nowhere is that more evident than in the expansion of the term "aggravated felony."[116] Congress

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108. *Id.*

109. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006).

110. 8 U.S.C. § 1182(c) (1994).

111. *See* INS v. St. Cyr, 533 U.S. 289, 295–96 n.5 (2001); Chacón, *Unsecured Borders*, *supra* note 3, at 1845.

112. Chacón, *Unsecured Borders*, *supra* note 3, at 1845; *see* INA § 240A, 8 U.S.C. § 1229b (2006).

113. 8 U.S.C. § 1229b(a).

114. *Id.* § 1229b(b).

115. *See* Stumpf, *Fitting Punishment*, *supra* note 106, at 1695.

116. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610 (2010).

introduced the concept of "aggravated felony" in the Anti-Drug Abuse Act of 1988 (ADAA), making it grounds for deportation and mandatory immigration detention.[117] When first introduced, the term was narrowly defined, covering only serious crimes such as murder and the trafficking of drugs or weapons.[118] After numerous amendments and additions by Congress, an aggravated felony today need not be either aggravated or felonious.[119] The list of state and federal crimes now constituting aggravated felonies includes crimes of violence, theft, receipt of stolen property, money laundering, racketeering and some gambling offenses, financial fraud, forgery, tax evasion, and commercial bribery.[120] Whether many of the crimes constitute aggravated felonies turns on whether the maximum *possible* sentence is at least one year imprisonment, regardless of the actual sentence imposed or served.[121]

Unlike deportation for crimes of moral turpitude, non-citizens convicted of an aggravated felony may be deported regardless of the length of the criminal sentence or when the offense was committed.[122] More importantly perhaps, non-citizens convicted of aggravated felonies are barred from almost all "avenues of discretionary relief" including cancellation of removal, § 1182(h) waivers,[123] and even asylum, making deportation categorical.[124] Because Congress made application of the deportation laws retroactive, non-citizens sometimes face deportation for misdemeanors committed years earlier. Consider, for example, the well-publicized case of Mary Anne Gehris. Ms. Gehris was a legal permanent resident and had lived in the United States since she was an infant.[125] In 1988, acting on the advice of a public defender, she pled guilty to a misdemeanor for pulling another woman's hair and received a one-year suspended sentence.[126]

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117. *Id.* at 609–10.

118. *See* Legomsky, *supra* note 3, at 484.

119. *See id.* at 484–85.

120. 8 U.S.C. § 1101(a)(43) (2006).

121. *Id.*; *see also* Legomsky, *supra* note 3, at 485 ("From its humble origins, the aggravated felony definition now has twenty-one subparts, and the new prongs are generally applied retroactively to individuals who committed the crimes before Congress made them aggravated felonies.").

122. *See* 8 U.S.C. § 1227(a)(2) (2006).

123. Id. § 1182(h) (giving the Attorney General discretion to waive the inadmissibility standards in limited circumstances).

124. *See* Legomsky, *supra* note 3, at 483. For non-citizens who have been convicted of certain aggravated felonies, even withholding of removal is prohibited as a discretionary form of relief. *See* 8 U.S.C. § 1231(b)(3)(B) (2006).

125. *See* Anthony Lewis, *A Measure of Justice*, N.Y. TIMES, July 15, 2000, at A13.

126. *Id.*

When Congress expanded the definition of "aggravated felony" in 1996 and made the expansion retroactive, her misdemeanor hair-pulling became a "crime of violence," and because it carried a sentence of one year imprisonment, she was deportable as an aggravated felon even though she had served no jail time.[127] Under immigration law, she was ineligible for discretionary relief; only a pardon from the Georgia Board of Pardons saved Ms. Gehris from the threat of deportation.[128]

Today we have a deportation regime that can be both categorical and harsh. The system is categorical in that, in many cases, immigration judges and officials lack the authority to stay deportation and are prohibited from considering the impact of deportation on the non-citizen's spouse or minor children.[129] The system is harsh in that deportation often destroys families as parents are frequently separated from their minor children, leaving them with serious psychological trauma.[130] For example, one year after Gerardo Antonio Mosquera was deported to Colombia, his eldest son, who was just seventeen years old, committed suicide.[131] Mr. Mosquera, who was a legal permanent resident for twenty-nine years, was deported for selling ten dollars worth of marijuana to a paid police informant, even though he spent just ninety days in jail, had a U.S.-citizen spouse, and had four U.S.-citizen children.[132] And because non-citizens who have been convicted of an aggravated felony are permanently barred from returning to the United States (unless the Attorney General consents to their re-entry),[133] Mr. Mosquera was not able to attend

127. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1943 (2000).

128. *See* Lewis, *supra* note 125, at A13.

129. In 1990, Congress eliminated the authority of state and federal judges to issue binding "judicial recommendations against deportation" during sentencing. Legomsky, *supra* note 3, at 498. Creating yet another asymmetry, Congress vested federal judges with the authority to order deportation in 1996. *See id.* at 498–99.

130. Morawetz, *supra* note 127, at 1951. Morawetz states that:

> The current system of mandatory detention and mandatory deportation seriously undermines these family values. . . . The family may now be without a breadwinner; the family members left behind may face eviction due to their inability to make mortgage or rent payments. . . . When the deportation order becomes final, the system forces many of these families to separate permanently.

Id.

131. Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1.

132. *Id.* at B3.

133. *See* 8 U.S.C. § 1182(a)(9)(A) (2006).

his son's funeral.[134] According to Human Rights Watch, an estimated one million innocent spouses and minor children "have been separated from [their] loved ones [because of] deportations on criminal grounds since 1997."[135] More than seventy percent of the non-citizens deported "were expelled from the United States for non-violent offenses."[136]

B. The Non-Discrimination Norm and International Law

The current U.S. deportation regime is inconsistent with the non-discrimination norm. Under international law, nations have the right to control their borders and to subject non-citizens to deportation.[137] But the right to expel lawfully admitted non-citizens is not unqualified. International law recognizes that citizens and non-citizens alike have the right to be free from "arbitrary or unlawful interference with [their] privacy, family, [and] home."[138] Moreover, because "family is the natural and fundamental group unit of society," it is "entitled to protection by society and the State."[139] Thus, the rights of the state to protect its borders and to prevent crime must be balanced against the non-citizen's right to family life, which is guaranteed by the ICCPR and other human rights instruments.[140]

According to the Human Rights Committee, the deportation of a non-citizen is permissible, but the decision must (1) be made "under law in furtherance of a legitimate state interest," and (2) give "due consideration . . . to the deportee's family connections."[141] Regional courts interpreting similar provisions in the European Convention on Human Rights[142] and the American Declaration on the Rights and Duties of Man (American Declaration)[143] have

134. McDonnell, *supra* note 131, at B3.

135. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 4 (2009), *available at* http://www.hrw.org/node/82173.

136. *Id.* at 2.

137. *See* ICCPR, *supra* note 58, art. 13; ICERD, *supra* note 77, art. 1, ¶ 3.

138. ICCPR, *supra* note 58, art. 17, ¶ 1.

139. *Id.* art. 23, ¶ 1.

140. *See id.*; ICESCR, *supra* note 63, art. 10.

141. U.N. Human Rights Comm., *Stewart v. Canada*, Judgment of December 1996, No. 538/1993, ¶ 12.10.

142. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

143. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Final Act of the Ninth International Conference of American States (1948), arts. V & VI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.92 doc.31 rev.3, at 19 (1996).

generally required states to strike a "fair balance between the right to family life . . . and the state's legitimate interest in the prevention of disorder or crime and the guarantee of public safety . . . ."[144] For example, in *Beldjoudi v. France*,[145] the European Court of Human Rights held that the deportation of a man with a lengthy criminal record to Algeria interfered with his right to family life and was disproportionate to the state objective of maintaining a democratic society and public order.[146]

Recently in the case of Wayne Smith, the Inter-American Commission on Human Rights (IACHR) found that the United States' categorical deportation laws violated rights embodied in the American Declaration, including the right to family life and the rights of the child.[147] Smith, who was born in Trinidad and Tobago, had lived in the United States since he was ten years old and had been a legal permanent resident since 1974.[148] In 1990, Smith pled guilty to drug possession and attempted distribution.[149] After serving three years in state prison, Smith was denied the opportunity to apply for humanitarian relief despite serious financial and emotional hardship to his U.S.-citizen wife, who was undergoing cancer treatment, and his U.S.-citizen child.[150] The IACHR noted that in the area of deportation, "neither the scope of [the] action of the State nor the rights of a non-citizen are absolute."[151] Instead, states must employ a "balancing test, which weighs a State's legitimate interest to protect and promote the general welfare against a non-citizen resident's fundamental rights such as to family life."[152] Where there are children involved, the IACHR continued, the state must consider "the best interest and well-being of the children of a non-citizen . . . in a removal proceeding."[153] Because Smith was denied the "opportunity to

144. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 304 (2003) (internal quotation and citation omitted).

145. Beldjoudi v. France, App. No. 12083/86, 14 Eur. H.R. Rep. 801 (1992), *available at* http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=67762836&skin=hudoc-en&action=request.

146. *Id.*

147. Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L./V/II.139, doc. 21 ¶ 64 (2010), *available at* http://cejil.org/sites/default/files/Final%20Report_CIDH_Wayne_Smith.pdf.

148. *Id.* ¶ 13.

149. *Id.*

150. *Id.* ¶¶ 13–17.

151. *Id.* ¶ 51.

152. *Id.*

153. *Id.* ¶ 57.

present a humanitarian defense to deportation or to have [his] rights to family duly considered before deportation," the United States violated his rights under the American Declaration.[154]

Rather than requiring that deportation laws be proportional to achieving a legitimate government interest, for over a century U.S. courts have deferred to Congress's plenary power to deport non-citizens. In 1892, Congress enacted legislation that authorized the deportation of any Chinese non-citizen who was unable to obtain a "certificate of residence," which required an affidavit signed by at least one "credible white witness."[155] The Supreme Court upheld the law, finding that "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."[156] Non-citizens, according to the Court, "remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest."[157] Decades later, relying on similar reasoning, the Supreme Court upheld a law that provided for the deportation of any non-citizen who was a member of the Communist Party at any time after entering the United States.[158]

The categorical approach to deportation, which has in recent years been accelerated by the growing convergence of criminal and immigration law in the United States,[159] violates the non-discrimination norm. Although only non-citizens may be deported, it is not deportation itself that violates the non-discrimination norm, but rather the categorical approach employed under current law.[160] Compliance with the spirit of the non-discrimination norm requires an individualized balancing test that looks at the non-citizen's ties to the United States, the lack of ties to his or her country of nationality, and the seriousness of the crime for which he or she is being deported.[161] In many cases, especially those involving the retroactive application of the aggravated felony stat-

154. *Id.* ¶ 59.

155. Fong Yue Ting v. United States, 149 U.S. 698, 727 (1893).

156. *Id.* at 707. Of course, as the Court admitted, Chinese non-citizens could not apply for naturalization. *Id.* at 716.

157. *Id.* at 724.

158. Harisiades v. Shaughnessy, 342 U.S. 580, 592–95 (1951).

159. *See* Stumpf, *Fitting Punishment*, *supra* note 106, at 1720.

160. Legomsky, *supra* note 3, at 498.

161. *Cf.* Stumpf, *Fitting Punishment*, *supra* note 106, at 1732–38 (proposing a "proportionate system of sanctions for immigration violations" that involves consideration of the listed factors).

ute, deportation fails to advance a legitimate state objective (such as crime prevention), while imposing harsh personal consequences on non-citizens and their families.[162] Aggressive congressional efforts to act tough on immigration policy have eliminated all discretionary relief, thereby preventing immigration officials from trying to ensure proportionality even in the most compelling cases.[163]

IV. Mandatory Immigration Detention

As Congress criminalized more immigration-related offenses and expanded the number of criminal offenses triggering categorical deportation, the number of non-citizens in detention on any given day soared nearly six-fold between 1994 and 2008 (from 6785 to 33,400).[164] Today, ICE runs the largest detention system in the country.[165] In 2008, ICE detained 378,582 non-citizens, representing an eighty-seven percent jump from 2002.[166] ICE's budget for "custody" leapt from $860 million in fiscal year 2005 to $1.72 billion in fiscal year 2009.[167]

A. Types of Immigration Detention

The statutory scheme authorizing the detention of non-citizens is extraordinarily complex.[168] Two federal agencies—the Departments of Justice and Homeland Security—are responsible for administering at least three different statutes depending on the situation.[169] For non-citizens arriving at a port of entry who are deemed "inadmissible" on certain grounds (e.g., fraudulent documents), 8 U.S.C. § 1225(b) authorizes expedited removal and detention pending a "determination of credible fear."[170] For non-

162. *See id.* at 1733–38; McDonnell, *supra* note 131, at B1, B3.

163. Morawetz, *supra* note 127, at 1951–54. Harm to a criminal defendant's family is rarely a mitigating factor in sentencing. *See* McDonnell, *supra* note 131, at B1, B3. But recall that deportation, according to the Supreme Court, is not a criminal punishment. *See* Chacón, *Managing Migration*, *supra* note 19, at 140–41. The non-citizen's family has already been punished collaterally when the non-citizen serves prison time for committing a crime; deportation adds further harm. *See* McDonnell, *supra* note 131, at B1.

164. DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

165. DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

166. KERWIN & LIN, *supra* note 164, at 7 fig.2.

167. *Id.* at 7–8.

168. *Id.*

169. *See* Heeren, *supra* note 116, at 609.

170. 8 U.S.C. § 1225(b) (2006).

citizens legally present in the United States, § 1231(a) authorizes detention while the non-citizen awaits actual removal following a final deportation order.[171] And lastly, § 1226 authorizes detention while a non-citizen's deportation case is adjudicated.[172] Detention during deportation proceedings can be either discretionary under § 1226(a),[173] or mandatory under § 1226(c).[174]

1. Detention Pursuant to Expedited Removal

In 1996, as part of IIRIRA, Congress created an "expedited removal" process that mandates detention for all non-citizens arriving without proper travel documents and empowers immigration officers to order their immediate removal unless the non-citizen "indicates either an intention to apply for asylum . . . or a fear of persecution."[175] If the non-citizen maintains a fear of return, the non-citizen is sent to a detention facility, where an asylum officer conducts a "credible fear interview."[176] Although non-citizens are entitled to "consult" with anyone prior to the interview (at no expense to the government),[177] consultation must take place at the detention site.[178] Under this statutory scheme, even non-citizens who are found to have a credible fear of persecution in their country of origin remain detained during the asylum process unless they are granted discretionary parole.[179] Although it is difficult to know exactly how many of the over 30,000 non-citizens currently detained are asylum seekers, at least 48,000 asylum seekers have been detained since 2003.[180]

The practice of detaining asylum seekers has been sharply criticized by legal scholars and non-governmental organizations alike.[181] Among other things, mandatory detention of persons with

171. *Id.* § 1231(a)(2).

172. *Id.* § 1226(a).

173. *Id.*

174. *Id.* § 1226(c).

175. *Id.* § 1225(b)(1)(A)(i).

176. 8 C.F.R. § 208.30 (2010).

177. 8 U.S.C. § 1225(b)(1)(B)(iv) (2006).

178. *Id.*

179. *Id.* § 1225(b)(1)(B)(ii). In 2003, the grant of parole rate varied from 0.5% in New Orleans to 97.6% in Harlingen, Texas. U. S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME I FINDINGS & RECOMMENDATIONS 33 (2005). According to Human Rights First, the parole rate for asylum seekers who passed the "credible fear interview" dropped from 66.6% in 2004 to 4.5% in 2007. HUMAN RIGHTS FIRST, *supra* note 54, at 6.

180. HUMAN RIGHTS FIRST, *supra* note 54, at 16, 17.

181. *See, e.g.*, *id.* at 28 (discussing criticism of a detention facility by refugee advocacy groups and local community and faith-based groups); Brané & Lundholm, *supra* note 54, at 154–55 (describing disagreement among legal commentators on

legitimate fears of persecution risks re-traumatizing those who are already in a psychologically frail state.[182] Additionally, detention makes it harder for asylum seekers to establish their eligibility for asylum, gather evidence, and secure legal representation.[183] Finally, to the extent that mandatory detention penalizes and deters refugees from seeking relief in the United States, the practice is inconsistent with the United States' obligation under article 31, paragraph 1 of the Convention Relating to the Status of Refugees, which prohibits states from penalizing refugees for their illegal entry or presence, and article 9 of the ICCPR, which prohibits arbitrary detention.[184]

2. Post-Final Deportation Order Detention

Under § 1231, removal after a final order of deportation must generally occur within ninety days, during which time detention is mandatory.[185] If the non-citizen cannot be removed within the ninety-day period, § 1231(a)(3) authorizes the Attorney General, at his or her discretion, to release the non-citizen under supervision.[186] In the case of "inadmissible or criminal aliens," § 1231(a)(6) provides that the Attorney General "may" detain the non-citizen "beyond the removal period."[187] In the landmark case of *Zadvydas v. Davis*,[188] the Supreme Court addressed whether § 1236(a)(6) authorized the indefinite detention of a non-citizen who, although ordered deported for drug-related crimes, could not be removed.[189] In a five-four decision, the majority of the Court found that because the indefinite detention of lawfully admitted

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whether the detention of asylum seekers constitutes a violation of the Refugee Convention); Karen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 592 (2007) ("challeng[ing] the current policy and regulations behind mandatory detention for defensive asylum seekers").

182. *See* Johnson, *supra* note 181, at 604 ("The psychological impact of detention can be devastating to many asylum seekers who are experiencing anxiety, depression, and post-traumatic stress disorder.").

183. HUMAN RIGHTS FIRST, *supra* note 54, at 7. According to one study, detained mothers seeking asylum are more likely to give up their asylum struggle in order to be reunited with their children. *See* Brané & Lundholm, *supra* note 54, at 159.

184. ICCPR, *supra* note 58, art. 9, ¶ 1 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); Convention Relating to the Status of Refugees, art. 31, ¶ 1, July 28, 1951, 189 U.N.T.S. 150.

185. 8 U.S.C. § 1231(a)(2) (2006) ("During the removal period, the Attorney General shall detain the alien.").

186. *Id.* § 1231(a)(3).

187. *Id.* § 1231(a)(6).

188. 533 U.S. 678 (2001).

189. *Id.* at 682, 684.

non-citizens "would raise serious constitutional concerns," § 1231(a)(6) must be construed to "contain an implicit 'reasonable time' limitation."[190] Today, detentions of less than six months from the time of the final deportation order are presumptively constitutional and long-term detentions are limited to special circumstances by federal regulations.[191] Although *Zadvydas* generated a flurry of debate and discussion by legal scholars,[192] comparatively few non-citizens actually face indefinite detention; the detention of non-citizens for the duration of their deportation proceedings, authorized under § 1226, is far more common.[193]

3. Detention Pending Deportation Proceedings

The concept of mandatory detention during one's deportation proceeding did not exist until the passage of the ADAA in 1988.[194] In addition to creating a new "aggravated felony" ground for deportation,[195] the ADAA required that non-citizens convicted of an aggravated felony be detained without a bond hearing during their deportation proceedings.[196] Today, § 1226(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[197] Non-citizens detained under this section may be eligible for "conditional parole" or release on a bond of at least $1500.[198] Despite the discretion built into the statute, very few non-citizens are released pending the determination of their immigration

190. *Id.* at 682.

191. *Id.* at 701. A few years later, the Court extended the implicit reasonable time limitation interpretation of § 1236(a)(6) to inadmissible non-citizens. *See* Clark v. Martinez, 543 U.S. 371, 386 (2005).

192. *See, e.g.*, T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 387 (2002) (stating that long term detention usually only results from criminal conviction); Rachel Canty, *The New World of Immigration Custody Determinations After* Zadvydas v. Davis, 18 GEO. IMMIGR. L.J. 467, 479 (2004) (discussing disagreement on whether the *Zadvydas* decision applies to all aliens); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1039 (2002) [hereinafter Cole, *Due Process Limits*] (stating that immigration detention standards should be governed by civil due process principles).

193. More than half of all non-citizens in immigration detention have pending removal cases. KERWIN & LIN, *supra* note 164, at 16. But on January 25, 2009, there were nearly one thousand non-citizens who had been detained longer than six months following the receipt of their final deportation order. *Id.* at 17.

194. Heeren, *supra* note 116, at 610.

195. *See supra* notes 116–121 and accompanying text.

196. Heeren, *supra* note 116, at 610.

197. 8 U.S.C. § 1226(a) (2006).

198. *Id.*; *see also* Heeren, *supra* note 116, at 611 (describing the parole possibilities for detained immigrants under § 1226(a)).

status. In fiscal year 2010, ICE projected it would detain 400,000 people compared to approximately 23,000 who were offered alternatives to detention.[199]

In addition to discretionary detention, § 1226(c) commands the Attorney General to detain (without bond eligibility) any non-citizen who is either inadmissible or deportable because of certain criminal convictions including "aggravated felonies"[200] and crimes of moral turpitude.[201] A non-citizen wishing to challenge his or her classification as falling within the mandatory detention provisions of § 1226(c) is afforded a *Joseph* hearing, where he or she bears the burden to prove that ICE "is substantially unlikely to establish, at the merits hearing . . . the charge or charges that . . . subject the alien to mandatory detention."[202] If the non-citizen succeeds, he or she receives a bond hearing. If the non-citizen fails and is found to be "properly included in the mandatory detention category,"[203] then no individual determination of dangerousness or flight risk is permitted.[204]

The Supreme Court upheld the constitutionality of the mandatory detention scheme of § 1226(c), at least in the case of non-citizens who concede their deportability, in *Demore v. Kim*.[205] According to Chief Justice Rehnquist's majority opinion, unlike the indefinite detention faced by the non-citizens in *Zadvydas*, where deportation was "no longer practically attainable,"[206] Kim's detention had a definite end-point: the end of the deportation proceeding.[207] Despite this holding, however, lower courts have distinguished *Kim*, requiring individualized bond hearings for non-citizens detained for long periods of time.[208]

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199. *See* MIDWEST COAL. FOR HUMAN RIGHTS ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS AND THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS 7 (2010), *available at* http://www.midwesthumanrights.org/sites/midwesthumanrights.org/files/ICE%20report%20card%20FULL%20FINAL%20201 0%2010%2006.pdf [hereinafter REPORT CARD].

200. 8 U.S.C. § 1226(c)(1) (2006).

201. Although critically important in immigration proceedings, the term "crime of moral turpitude" is not defined by statute. Over the years, the BIA has defined the term to mean "an act which is per se morally reprehensible and intrinsically wrong." *In re* Ajami, 22 I. & N. Dec. 949, 950 (BIA 1999).

202. *In re* Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999).

203. *Id.*

204. *Id.* at 802.

205. 538 U.S. 510, 531 (2003).

206. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

207. *Kim*, 538 U.S. at 527–28.

208. *See* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 947–48 (9th Cir. 2008) (construing the mandatory detention statute to authorize detention only for a reasonable period, after which detention reverts to discretionary detention

B. The Non-Discrimination Norm and International Law

Mandatory immigration detention violates the general rule that citizens and non-citizens facing similar forms of detention ought to be afforded the same protections. If we can make the case that mandatory immigration detention is actually "punitive" notwithstanding its "administrative" label, then this form of incarceration violates the non-discrimination norm because only non-citizens are so punished without the procedural protections enshrined in the Fourth, Fifth, Sixth, and Eighth Amendments.[209]

Immigration law has long distinguished between administrative or preventive detention and punitive incarceration as a form of punishment. In *Wong Wing v. United States*,[210] the Supreme Court was careful to distinguish "temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion," from punitive incarceration.[211] Non-citizens, like citizens, cannot be criminally punished without the protections of the Fifth and Sixth Amendments.[212] This distinction remains intact today.[213]

Yet despite the technical difference between punitive incarceration and immigration detention, the Department of Homeland Security acknowledges that detainees in both systems "tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways."[214] Of the over 30,000 detainees currently in immigration detention, most (sixty-eight percent) are held in state prisons or local jails pursuant to Intergovernmental Service Agreements (ISA), while another seventeen percent are held in private contract detention facilities.[215] Many of the ISA facilities are county jails in isolated locations, where

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under § 1226(a)); Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003) ("[T]he INS may detain *prima facie* removable criminal aliens, without bond, for a reasonable period of time required to initiate and conclude removal proceedings promptly [but w]hen actual removal is not reasonably foreseeable, deportable aliens may not be indefinitely detained without a government showing of a 'strong special justification' . . . .").

209. *See infra* notes 227–229 and accompanying text.

210. 163 U.S. 228 (1896).

211. *Id.* at 235 ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation."); *see also* Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure.").

212. *Wong Wing*, 163 U.S. at 238.

213. SCHRIRO, *supra* note 165, at 4 ("As a matter of law, Immigration Detention is unlike Criminal Incarceration.").

214. *Id.*

215. KERWIN & LIN, *supra* note 164, at 8–9.

immigrant detainees are mixed with the general criminal population and have little access to supportive services or legal counsel.[216] Although ICE has promulgated (but not codified) National Detention Standards prescribing detainee services, detention center staff remain "ignorant about the distinction between administrative detention and punitive custody."[217] According to one report, "when interviewed by the Office of Inspector General, five Bureau of Prison (BOP) officials did not know that standards specifically applicable to ICE detainees existed, and so corrections officers were trained to treat detainees the same as inmates."[218]

Nongovernmental organizations have strongly criticized the poor conditions in which ICE detains non-citizens awaiting determination of immigration status. These deficiencies include medical neglect of those who are ill and lack of specialized treatment for vulnerable individuals, including those suffering from mental health problems (such as torture victims), women who are pregnant, and children.[219] Immigrants in detention generally wear the same prison garb as criminal inmates, eat the same food, have the same limited access to recreation and fresh air, and speak to their visitors through the same Plexiglas-encased video monitors.[220]

The similarities between immigration detention and punitive incarceration are not limited to similar holding facilities. As the criminal and immigration spheres converge, immigration detention has become an integral part of the government's overall enforcement strategy—one that employs policy assumptions traditionally found in criminal law.[221] In particular, the current practice of detaining asylum seekers who arrive at ports of entry without proper documentation (expedited removal) appears to be mostly driven by a deterrence rationale.[222] According to the Office of Detention and Removal's strategic plan, "[t]he National Stra-

216. REPORT CARD, *supra* note 199, at 9.

217. Brané & Lundholm, *supra* note 54, at 161–62.

218. *Id.* at 162.

219. *See* REPORT CARD, *supra* note 199, at 14, 16, 21.

220. *See, e.g.*, *In His Own Words: Abby's Story*, DETENTION WATCH NETWORK (July 16, 2010), http://www.detentionwatchnetwork.org/node/2722 (describing the conditions of confinement in detention).

221. *See* Brané & Lundholm, *supra* note 54, at 151 ("One of the main reasons for [Department of Homeland Security's] and ICE's reliance on a detention strategy, even in the absence of a formally articulated policy, is the rationale of deterrence that underlies the entire system.").

222. *See id.* at 150–51; Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 228 (1999) ("Deterrence has continued to dominate asylum seeker parole decision-making.").

tegy for Homeland Security promotes a balanced and integrated enforcement strategy, which ensures that the probability of apprehension and the impact of the consequences are sufficient to deter future illegal activity."[223]

Even if we assume that immigration detention is truly preventive in nature,[224] the mandatory detention of legislatively decreed classes of non-citizens, without individualized determinations of need, still violates the non-discrimination norm and international law.[225] Recall that under § 1226(c), certain "criminal aliens" are mandatorily detained without a bond hearing for the duration of their deportation cases.[226] Detention under this statute can last for months or even years, yet because detention is preventive rather than punitive, procedural protections afforded criminal defendants and arrestees facing incarceration do not apply.[227] However, because of our fundamental right to be free from government confinement, even preventive detention must satisfy the Due Process Clause.[228] In a manner repugnant to the non-discrimination norm, the Supreme Court's due process jurisprudence requires significantly fewer protections for non-citizens compared to citizens.[229]

Historically, the Supreme Court has held that "government detention violates [due process] unless the detention is ordered in a criminal proceeding . . . or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical

223. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012, at ii (2003), *available at* http://www.aclum.org/pdf/endgame.pdf.

224. Cole, *Due Process Limits*, *supra* note 192, at 1006 ("Immigration detention is by definition 'preventive' because the INS has no authority to detain for punitive purposes.").

225. *See* 8 U.S.C. § 1226(c) (2006); Brané & Lundholm, *supra* note 54, at 150–52.

226. According to ICE, of the 31,075 non-citizens in detention facilities on September 1, 2009, sixty-six percent were subject to the mandatory detention provisions of 8 U.S.C. § 1226(c). *See* SCHRIRO, *supra* note 165, at 6.

227. *See* Legomsky, *supra* note 3, at 489, 518.

228. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *see also* Cole, *Due Process Limits*, *supra* note 192, at 1006 ("[P]recisely because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt, its use is strictly circumscribed by due process constraints.").

229. *See* Cole, *Due Process Limits*, *supra* note 192, at 1014–15.

restraint."[230] While the Supreme Court has upheld preventive detention in the criminal bail, material witness,[231] and civil commitment contexts,[232] it has been careful to balance the government's interest with the individual's right to personal liberty.[233] After reviewing the constitutional landscape for preventive detention, David Cole identified three general principles common to constitutionally permissible preventive detention regimes: (1) the detention must be non-punitive, (2) the detention must have "an articulable endpoint" or be "temporally limited," and (3) generally speaking, "the justification for detention must be particularized to the individual."[234]

Consider, for example, the Bail Reform Act, which authorizes the government to detain arrestees without bail because of flight risk or danger to the community.[235] In *United States v. Salerno*,[236] the Supreme Court upheld the Act, emphasizing the government's compelling interest in preventing crime, and that the defendant's "strong interest in liberty" is protected by the government's burden to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[237] In addition to dismissing the *substantive* due process challenge, the Court also dismissed the *procedural* due process objection, observing that the detainee has the right to counsel, to proffer evidence and cross-examine witnesses, and to immediate appellate review.[238]

The justifications for preventive detention of non-citizens pending their deportation proceedings are virtually identical to those for arrestees—both are ostensibly non-punitive as the government's interests in preventing flight and protecting the community are the same for both groups.[239] Yet the non-citizen facing immigration detention receives far fewer due process protections, both substantive and procedural.[240] In *Kim*, Chief Justice Rehnquist's majority opinion dispensed with

230. *Zadvydas*, 533 U.S. at 690 (internal citations and quotations omitted).
231. Stein v. New York, 346 U.S. 156, 184 (1953).
232. *Zadvydas*, 533 U.S. at 690.
233. *Id.*
234. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 708 (2009) [hereinafter Cole, *Preventive Detention*].
235. 18 U.S.C. § 3142(e) (2006).
236. 481 U.S. 739 (1987).
237. *Id.* at 750.
238. *Id.* at 751–52.
239. Legomsky, *supra* note 3, at 490.
240. *Id.* at 518, 523–24.

individualized bond hearings, finding sufficient justification in a congressional report that noted "more than 20% of deportable criminal aliens failed to appear for their removal hearings" once released, and that cited supposedly high rates of recidivism for released "criminal aliens."[241] The majority also seemed swayed by reports that "in the majority of cases, [post-removal-period detention] lasts for less than the 90 days we considered presumptively valid in *Zadvydas*."[242] In a concurring opinion, Justice Kennedy took solace in the fact that non-citizens have procedural protections because they are entitled to a hearing in which they may challenge their inclusion in the mandatory detention category.[243] But unlike the Bail Reform Act, where the government must prove particularized dangerousness by clear and convincing evidence in an adversarial setting in which the arrestee is provided counsel,[244] under *Joseph* the non-citizen detainee has the burden to prove (without guaranteed counsel) that ICE "is substantially unlikely to establish at the merits hearing . . . the charge or charges that . . . subject the alien to mandatory detention."[245] Even if immigration detention were non-punitive, non-citizens' lack of substantive and procedural protections is repugnant to the non-discrimination norm.[246]

Although distinctions between citizens and non-citizens are permissible to the extent that they are proportional to achieving a legitimate state objective, there is no legitimate government objective that justifies this degree of discrimination.[247] The government has an interest in ensuring that the non-citizen will appear at the deportation proceeding and a duty to protect the community from additional criminal activity.[248] But those circumstances alone do not justify treating non-citizens in the

241. Demore v. Kim, 538 U.S. 510, 519 (2003).

242. *Id.* at 529.

243. *Id.* at 532 (Kennedy, J., concurring).

244. 18 U.S.C. § 3142(f)(2) (2006).

245. *In re* Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999). As one Court of Appeals judge observed, "the *Joseph* standard is not just unconstitutional, it is egregiously so. The standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable." Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

246. In what amounts to a direct repudiation of the non-discrimination norm, Chief Justice Rehnquist's majority opinion in *Kim* justified the unequal treatment of non-citizens by noting that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Kim*, 538 U.S. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

247. Cole, *Preventive Detention*, *supra* note 234, at 719.

248. *Id.*

immigration setting worse than citizens awaiting a criminal trial.[249] As Cole observes, "[t]he immigrant facing a deportation hearing and the criminal defendant awaiting trial have identical interests in not being arbitrarily deprived of their liberty," while "the government has identical interests in detaining the immigrant and the criminal defendant if they pose a risk of flight or a danger to the community."[250] Why treat them differently?

Arguments grounded in considerations of judicial economy or efficiency are equally unpersuasive. First, it is not clear that efficiency is, by itself, a legitimate government interest, nor does efficiency alone explain why criminal arrestees have comparatively more protection than non-citizens facing § 1226(c) detention.[251] In the procedural due process context, the government's interest in efficiency is only one of three factors to be considered.[252] Other factors include the individual's liberty (or property) interest and the risk of error.[253] Second, in terms of substantive due process, the Supreme Court has never found efficiency to be a justification for the deprivation of a fundamental right.[254]

Even assuming that the government has a legitimate interest in immigration detention, the current regime, like that of categorical deportation, has no sense of proportionality. The mandatory detention of an entire class of non-citizens (including, but not limited to, aggravated felons) is drastically over-inclusive. Possession of stolen bus transfers[255] or issuing bad checks[256] are examples of criminal convictions that trigger mandatory detention under § 1226(c).[257] As Justice Souter noted in dissent, "[d]etention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor."[258]

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249. *Id.*

250. *Id.*

251. *See* Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . .").

252. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

253. *Id.*

254. *See Stanley*, 405 U.S. at 656.

255. Michel v. INS, 206 F.3d 253, 256 (2d Cir. 2000).

256. Matter of Bart, 20 I. & N. Dec. 436, 437, (BIA 1992).

257. Demore v. Kim, 538 U.S. 510, 558 (Souter, J., dissenting).

258. *Id.*

Conclusion

Courts have long looked to international law in deciding immigration questions.[259] In upholding the Chinese Exclusion Act, the Supreme Court relied on international theories of state sovereignty, noting that "[j]urisdiction over its own territory to that extent is an incident of every independent nation."[260] In *Fong Yue Ting v. United States*,[261] Justice Gray relied on English and French law as well as the law of nations in upholding Congress's plenary deportation power.[262] And in the twentieth century, Justice Jackson was convinced that "[deportation] is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."[263] As we have demonstrated in this Article, far from justifying the banishment and detention of non-citizens, international law commands general equality between citizens and non-citizens, and requires distinctions to be proportional to a legitimate state objective.[264] As the boundary between criminal and immigration law has eroded in recent years, an ever-increasing number of non-citizens find themselves facing harsh—and we believe punitive—sanctions without the procedural protections afforded to criminal defendants and arrestees.[265] The Obama administration has pledged to promote a different set of priorities in civil immigration enforcement especially with regard to apprehension, detention, and deportation.[266] We remain cautiously optimistic that all branches of government will consider the obligations of international law and the non-discrimination norm as the United States continues to strive for fair and humane enforcement of immigration laws.

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259. *See generally* David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645–53 (2006) (describing the influence international law has had in U.S. courts, not as binding authority, but as a guide for statutory or constitutional interpretation).

260. Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 603 (1889); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners . . . .").

261. 149 U.S. 698 (1893).

262. *Id.* at 707–11.

263. Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952).

264. *See supra* Part II.

265. *See supra* Part IV.B.

266. *See* Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, to All ICE Employees, *available at* http://www.immilaw.com/FAQ/ICE%20prosecution%20priorities%202010.pdf (posted June 29, 2010).