

## ENFORCING RIGHTS FOR IMMIGRANTS FACING THE ULTIMATE CRIMINAL PENALTY: DEPORTATION

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### I. INTRODUCTION

In the United States, the death penalty is considered the ultimate punishment for the commission of a crime.<sup>1</sup> A criminal defendant may be eligible for death if convicted of the most heinous type of crime—usually some form of aggravated first-degree murder.<sup>2</sup> Because death is such a severe punishment, the U.S. Supreme Court has outlined a number of constitutional requirements that must be met in order for a state to impose death on any individual convicted of a crime.<sup>3</sup> Thus, there has been extensive litigation on behalf of capital defendants to ensure that the government is complying with those constitutional requirements.<sup>4</sup>

Though many might agree that the deportation of criminal immigrants is not as severe of a consequence as death, deportation serves as an additional punitive measure for immigrants who have been convicted of certain crimes.<sup>5</sup> Like the threat of death by the state is expected to deter people from committing murder (and perhaps other serious crimes), the threat of deportation is expected to deter immigrants from committing crimes in the United States.<sup>6</sup>

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<sup>1</sup> See *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

<sup>2</sup> See, e.g., *id.* at 275 (quoting *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878)).

<sup>3</sup> See *Furman*, 408 U.S. at 256 (explaining that the imposition of the death penalty cannot be discriminatory, arbitrary, or wanton).

<sup>4</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 172 (1976) (citing *Furman*, 408 U.S. at 238, 256–57) (exemplifying that death penalty statutes must not violate the principles set forth in *Furman*).

<sup>5</sup> See Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)–(F) (2012).

<sup>6</sup> See *Aggravated Felonies and Deportation*, SYRACUSE U.: TRANSACTIONAL RECS ACCESS CLEARINGHOUSE: IMMIGR. (June 9, 2006), <http://trac.syr.edu/immigration/reports/155/>.

However, there is one key difference between the U.S. citizen defendant facing the death penalty and the immigrant defendant facing deportation: U.S. citizens currently have more constitutional protections in the criminal process than immigrants do in the deportation process.<sup>7</sup>

At least in theory, the constitutional protections provided to criminal defendants allow for fair and impartial determinations of the appropriate consequence for being accused of a criminal act.<sup>8</sup> Once a noncitizen has served their<sup>9</sup> punishment for the commission of an offense that makes them deportable, they face the additional consequence of deportation.<sup>10</sup> Yet, the deportation process guarantees very few constitutional protections compared to the criminal process, even though deportation can be the direct result of the criminal conviction.<sup>11</sup>

Deportation can often be just as severe of a consequence as the death penalty. Deportation itself can result in death.<sup>12</sup> Deportation breaks up families.<sup>13</sup> It causes many to return to poverty and other unlivable conditions that they were escaping in the first place.<sup>14</sup> Yet due to the lack of constitutional protections that immigrants have in the deportation process, they are not afforded a fair and impartial determination of relief in immigration court.<sup>15</sup>

As a result, noncitizens are treated unfairly despite the fact that constitutional protections are supposed to apply to them.<sup>16</sup>

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<sup>7</sup> See generally AM. IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 1, 2 (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twosystemsofjustice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf) (discussing the difference in constitutional protections between defendants facing criminal punishment and immigrants facing the civil penalty of deportation).

<sup>8</sup> See, e.g., *id.* at 7.

<sup>9</sup> This article uses the gender-neutral pronoun: “they,” instead of the traditional “he or she.”

<sup>10</sup> See AM. IMMIGRATION COUNCIL, *supra* note 7, at 5.

<sup>11</sup> See *id.* at 5, 7 (listing seven key differences between the constitutional protections provided in criminal trials and those provided in deportation proceedings).

<sup>12</sup> See, e.g., Rory Carroll, *Mexican Man Jumps to His Death After Being Deported from U.S.*, GUARDIAN (Feb. 23, 2017), [www.theguardian.com/us-news/2017/feb/23/mexican-man-deported-suicide-trump-tijuana](http://www.theguardian.com/us-news/2017/feb/23/mexican-man-deported-suicide-trump-tijuana); Roberto Lovato, *Deported to Death: The Tragic Journey of a Salvadoran Immigrant*, AL JAZEERA AM. (July 11, 2015), <http://america.aljazeera.com/articles/2015/7/11/deported-to-death-the-tragic-journey-of-an-el-salvadoran-immigrant.html>.

<sup>13</sup> See *American Kids, Immigrant Families*, FAMILIES FOR FREEDOM, <http://familiesforfreedom.org/organizing/american-kids-immigrant-families> (last visited May 12, 2017).

<sup>14</sup> See Stephen Lendman, *U.S. Discriminatory Immigration Policies toward Haitians*, INST. FOR JUST. & DEMOCRACY HAITI, [www.ijdh.org/2009/02/topics/immigration-topics/us-discriminatory-immigration-policies-toward-haitians/](http://www.ijdh.org/2009/02/topics/immigration-topics/us-discriminatory-immigration-policies-toward-haitians/) (last visited May 12, 2017).

<sup>15</sup> See AM. IMMIGRATION COUNCIL, *supra* note 7, at 1.

<sup>16</sup> See Immigration and Nationality Act, 8 U.S.C. § 1362 (2012) (exemplifying that the constitutional right to counsel does apply in removal proceedings).

Moreover, immigrants' rights are violated at every stage of interaction with the U.S. government: from the time that the immigrant makes the decision to leave their home country, to the time that the immigrant is accused of committing a crime, to the time that the immigrant is deported.<sup>17</sup> Many immigrants leave their countries in order to live their vision of an "American Dream," a dream that the United States portrays as plausible for anyone.<sup>18</sup> Yet immigrants are not adequately protected by the freedoms that many of them immigrate to America to enjoy.<sup>19</sup> Even the most arguably dangerous U.S. citizens who commit the most egregious murders are protected by those freedoms, yet a legal immigrant who commits, for example, a burglary as a result of being poor, is not.<sup>20</sup>

This article focuses on how the criminal justice system and the immigration system may work together to provide constitutional fairness to criminal defendant immigrants, given that deportation is such a severe consequence. Deportation should be considered an ultimate punishment and should be treated with an eye toward the same policy that underlies the constitutionality of the death penalty, rather than treated as "civil" in nature. That is, if an immigrant faces the ultimate punishment of deportation for the commission of a crime, certain constitutional requirements must be met in order for that deportation to be constitutionally sound. Though there are many distinctions between the death penalty and deportation, both severe punishments must always be considered subject to a person's civil liberties under the Constitution.<sup>21</sup>

This article first discusses the cycle of how immigrants' rights are often violated from before they even decide to migrate until the time they are deported from the United States. This article then touches upon how deportation is an "ultimate punishment," and why governments should therefore act to make the criminal and

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<sup>17</sup> See AM. IMMIGRATION COUNCIL, *supra* note 7, at 1.

<sup>18</sup> See, e.g., Tom Jawetz, *DACA Helps Young People Realize the Promise of the American Dream*, CTR. FOR AM. PROGRESS (Dec. 15, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/12/15/295021/daca-helps-young-people-realize-the-promise-of-the-american-dream/>.

<sup>19</sup> See AM. IMMIGRATION COUNCIL, *supra* note 7, at 7 (noting the constitutional protections that immigrants in deportation proceedings do not receive).

<sup>20</sup> For example, if the burglary can be categorized as a "crime involving moral turpitude," then the immigrant is deportable and therefore, does not receive the list of constitutional protections that a U.S. citizen accused of murder would receive. See 8 U.S.C. § 1227(a)(2)(A)(i).

<sup>21</sup> This article does not discuss the viewpoint that the death penalty and deportation should be abolished altogether, though as a civil rights advocate, I firmly believe that they should.

immigration processes fairer for criminal immigrants. There are three ways in which this article proposes that the government do so. First, this article argues that deportation should not be a consequence for committing crimes at all, but especially not for those who are in the United States with lawful immigration status.<sup>22</sup> Second, the federal and state governments can make the criminal process fairer for immigrants by allowing noncitizens to serve on juries, given that the criminal process can eventually lead to deportation. Finally, if the United States is to continue to deport individuals for committing crimes, then, given that deportation is such a severe punishment, the government should ensure constitutional protections, particularly, the right to a government-appointed counsel if the noncitizen is unable to afford it. This article concludes with how civil impact litigation is likely the proper tool for implementing the aforementioned proposals.

## II. VIOLATION AT EVERY STAGE

### A. *Displacement*

United States policies often displace people, forcing them into poverty, out of their home countries, and into the United States.<sup>23</sup> Free trade agreements between the United States and other countries are common examples of such policies.<sup>24</sup> One commonly

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<sup>22</sup> A person's immigration status is more complex than simply "lawful," "unlawful," "legal," "illegal," or "undocumented." See *Plyler v. Doe*, 457 U.S. 202, 210–11 (1982) (demonstrating that regardless of a person's immigration status, an alien is still a "person"). For purposes of this article, "lawful immigration status" will be used broadly to mean anyone who possesses a green card, anyone granted asylum or refugee status, anyone with temporary status who is awaiting a decision on their immigration application, anyone who has been granted relief from deportation, or anyone who otherwise has authorization from the U.S. government to be in the United States. I specifically do not discuss "undocumented" individuals for several reasons, although it is her belief that those who are undocumented deserve the same protections as those who are. In fact, undocumented immigrants are protected under the Equal Protection Clause. See *id.* Although undocumented immigrants should have the same right to serve on a jury, an activity such as this could subject them to deportation proceedings unless deportation is abolished altogether. Although deportation proceedings should be abolished even for undocumented immigrants, I am unfortunately not optimistic that the United States would ever go that far. Many scholars are not even optimistic about the possibility that immigrants with *lawful* status would be afforded this protection. See, e.g., AM. IMMIGRATION COUNCIL, *supra* note 7, at 4. Nonetheless, I firmly believe that deportation, at least for those with lawful status, violates equal protection and due process, and therefore must be addressed.

<sup>23</sup> See generally DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 51–77 (2008) (discussing the impact that migration can have on immigrants).

<sup>24</sup> See *id.* at 52.

cited example of displacement is how the implementation of the North American Free Trade Agreement (“NAFTA”) affected U.S. immigration.<sup>25</sup> NAFTA allows free trade among Canada, the United States, and Mexico.<sup>26</sup> Because of this free trade, highly subsidized corn entered the Mexican market and made corn cheaper to import into Mexico than to grow.<sup>27</sup> This caused millions of Mexican farmers to lose their farms and left many with no choice but to migrate north.<sup>28</sup> Free trade agreements, such as NAFTA, and other policies that have far-reaching and perhaps indirect effects, have led to the deprivation of foreign citizens’ rights to prosper in the countries in which they initially live.<sup>29</sup> These policies have caused the displacement of many people who then chose to immigrate to the United States in hopes of finding both social and economic opportunities.<sup>30</sup>

Another example of a policy that causes immigration is deportation itself.<sup>31</sup> After former President Bill Clinton passed laws that expanded the criminal grounds for deportation,<sup>32</sup> many Central American individuals involved in gangs that started in Los Angeles, California, were deported.<sup>33</sup> These individuals were deported at such a high rate that huge communities of the American-bred gangs started to form in El Salvador and surrounding countries.<sup>34</sup> Because of the poor economic situation in these countries, particularly El Salvador, and because of the violent nature of the gangs, the gangs began to take power.<sup>35</sup> In 2016, the gang problem in El Salvador was so severe that the gangs were considered a de facto government.<sup>36</sup> Even police officers and government officials must follow the gangs’ rules, or risk being kidnapped or killed.<sup>37</sup>

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.* at 51.

<sup>27</sup> *See id.* at 25.

<sup>28</sup> *See id.* at 25–26.

<sup>29</sup> *See id.* at 25.

<sup>30</sup> *See, e.g., id.* at 25–26.

<sup>31</sup> *See, e.g.,* Mary Helen Johnson, *National Policies and the Rise of Transnational Gangs*, MIGRATION POLY INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/article/national-policies-and-rise-transnational-gangs>.

<sup>32</sup> *See* Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 868 (Apr. 24, 1996); *see also* Johnson, *supra* note 31, tbl.1 (evidencing the addition of “rape” and “sexual abuse of a minor” as aggravated felonies).

<sup>33</sup> *See* Johnson, *supra* note 31.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See* Tristan Clavel, *Report says El Salvador Gangs have Created a Parallel State*, INSIGHT CRIME (Dec. 22, 2016), <http://www.insightcrime.org/news-analysis/el-salvador-gangs-achieve-criminal-governance-parallel-economy-report>.

<sup>37</sup> *See id.*

This gang violence has caused a surge of immigrants fleeing from the violence and gang control in Central America into the United States, where the government does not consistently recognize general forms of gang violence as grounds for granting refugee status or protection.<sup>38</sup>

### B. Entrance

When a person decides that they want to immigrate to the United States, they have two general options. The “legal” route is to obtain some type of immigrant visa, usually through a family member, spouse, or employer.<sup>39</sup> Another common legal route is applying for refugee status from outside of the United States, or asylum once already in the United States.<sup>40</sup> However, legal immigration is often not possible.<sup>41</sup> If an immigrant does not have family members with legal status, family immigration is not an option unless the immigrant enters into a bona fide marriage with a U.S. citizen or lawful permanent resident (“LPR”). Even so, wait times for visas can be years away.<sup>42</sup> There is also the “illegal” route, which involves either obtaining a non-immigrant visa and over-staying the allotted visa time period,<sup>43</sup> or in the case of bordering countries, crossing the border without U.S. government authorization.<sup>44</sup>

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<sup>38</sup> See generally KATE M. MANUEL, ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW 6 (2014), <https://fas.org/sgp/crs/homesecc/R43716.pdf> (providing an explanation of the complications that arise when an alien seeks asylum in the United States due to gang-related violence).

<sup>39</sup> See Immigration and Nationality Act, 8 U.S.C. § 1152(a)(2), (4)–(5) (2012).

<sup>40</sup> See *id.* §§ 1157, 1158(a)(1). Note that asylum does not automatically lead to lawful permanent residence (i.e., a green card), but that individuals must apply to adjust their status after a certain period of time. See *Green Card for Asylees*, U.S. DEP’T HOMELAND SECURITY: U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-through-refugee-or-asylee-status/green-card-asylee> (last updated Feb. 17, 2016).

<sup>41</sup> See DORIS MEISSNER ET AL., IMMIGRATION AND AMERICA’S FUTURE: A NEW CHAPTER 22 (2006), <http://www.migrationpolicy.org/research/immigration-and-americas-future-new-chapter>.

<sup>42</sup> See *id.* In December 2016, the United States was processing family visas from individuals in Mexico who applied for visas in April 1995. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, IX VISA BULLETIN NO. 99: IMMIGRANT NUMBERS FOR DECEMBER 2016, at 2 (2016), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_December2016.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_December2016.pdf).

<sup>43</sup> See Mark Krikorian, *On Immigration, Fighting the Last War*, NAT’L REV. (Oct. 1, 2015), <http://www.nationalreview.com/article/424879/visa-overstays-todays-immigration-crisis-mark-krikorian>.

<sup>44</sup> See Vivian Yee et al., *Here’s the Reality about Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html>.

2016/2017]

## Enforcing Immigrants' Rights

1001

Immigrants, especially those fleeing from severe poverty or unsafe living conditions, will often do whatever it takes to get to the United States.<sup>45</sup> Central and South American immigrants in particular tend to take outrageous risks in order to cross the northern border of Mexico and into the United States.<sup>46</sup> Before reaching the United States-Mexico border, migrants may be traveling for weeks at a time by hopping trains.<sup>47</sup> As if hopping moving trains was not dangerous enough, gangs, drug traffickers, and anyone willing to take advantage of a traveler's vulnerability, troll the routes, aware of the journey that so many undertake.<sup>48</sup> Travelers on these routes experience rapes, violence, robberies, and countless physical harms.<sup>49</sup> And even when migrants do not make it across the border on the first try, so many of them try a second or a third time.<sup>50</sup> Some, regardless of missing limbs from falling off of a train or being left empty-handed by robbers, never stop trying.<sup>51</sup> For some, trying to get to the United States costs them their lives.<sup>52</sup>

Immigrants' rights to travel<sup>53</sup> and to be free from persecution<sup>54</sup> are restricted by U.S. law.<sup>55</sup> Their freedom to leave their country is restricted because the United States only allows in so many legal immigrants.<sup>56</sup> Given the strict qualifications, many may not qualify for refugee status,<sup>57</sup> but may still be experiencing conditions in their country that are so dire that waiting for a family or other visa is not an option.<sup>58</sup> Having such strict qualifications for refugee status

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<sup>45</sup> See WHICH WAY HOME (Mr. Mudd Production/Documentress Films 2009) (providing accounts of unaccompanied children making their way on what they call "the death train," or, "the Beast," across Central America and Mexico).

<sup>46</sup> See, e.g., *id.*

<sup>47</sup> See, e.g., *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> Although there is no specific right to travel to any country, the Universal Declaration of Human Rights ("UDHR") recognizes the right to leave one's country. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 13 (Dec. 10, 1948).

<sup>54</sup> *Id.* art. 14(1).

<sup>55</sup> See Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42), 1152(e) (2012).

<sup>56</sup> See *id.* § 1152(e).

<sup>57</sup> To qualify for refugee status, a person must be "unable or unwilling to return to, and . . . unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42). I believe that the definition is strict because it leaves no room for those who simply wish to escape extreme and uncontrollable poverty.

<sup>58</sup> See Editorial Board, *Too Slow and Helping Too Few*, WASH. POST (Apr. 16, 2016), <https://www.washingtonpost.com/opinions/a-too-slow-pace-to-admit-too-few-people/2016/04/16>

violates the human rights of those who are experiencing such dire conditions.<sup>59</sup> Further, even if refugees qualify to enter legally, many are denied status for various reasons, such as adverse credibility determinations that could very well be due to language barriers or cultural differences than anything else.<sup>60</sup> Even more alarming is that these restrictions force some Central and South Americans to forego a most fundamental human right: personal safety.<sup>61</sup> Given the restrictive immigrant and refugee laws and the likely dire conditions in countries caused at least in part by the United States, many immigrants may feel forced to violate the immigration laws by over-staying their visas, if they manage to get one, or crossing borders without permission.<sup>62</sup>

### C. Specific Border Crossing Issues

Once an immigrant successfully crosses the border, the struggle is not over. As the United States increases border enforcement and security along the southern border, the rate of illegal immigration continues to climb.<sup>63</sup> Presumably, the rationale is that increased border security will deter migrants from crossing over without permission.<sup>64</sup> Yet, rather than being deterred, migrants are so diligent about immigrating that they tend to go through more dangerous routes instead.<sup>65</sup> For example, many choose to cross treacherous rivers and unpopulated stretches of desert, risking not only deportation to their home country, but also their lives.<sup>66</sup>

Once in the United States, migrants not only have the terrain to worry about but also must watch out for the Customs and Border Protection (“CBP”) officers.<sup>67</sup> CBP controls a “100-mile zone,”<sup>68</sup>

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<sup>59</sup> See G.A. Res. 217 (III) A, *supra* note 53, art. 14; Editorial Board, *supra* note 58.

<sup>60</sup> See GÁBOR GYULAI ET AL., 1 CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES: A MULTIDISCIPLINARY TRAINING MANUAL 10, 12–13 (2013), <http://helsinki.hu/wp-content/uploads/Credibility-Assessment-in-Asylum-Procedures-CREDO-manual.pdf>.

<sup>61</sup> See G.A. Res. 217 (III) A, *supra* note 53, art. 3.

<sup>62</sup> See Krikorian, *supra* note 43; Yee et al., *supra* note 44.

<sup>63</sup> See DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 1 (2013), [http://carnegie.org/fileadmin/Media/Image\\_Galleries/immigration\\_enforcement\\_in\\_us\\_MPL\\_report.pdf](http://carnegie.org/fileadmin/Media/Image_Galleries/immigration_enforcement_in_us_MPL_report.pdf).

<sup>64</sup> See *id.* at 3, 4.

<sup>65</sup> See, e.g., Erin Siegal McIntyre, *Death in the Desert: The Dangerous Trek between Mexico and Arizona*, AL JAZEERA AM. (Mar. 11, 2014), <http://america.aljazeera.com/articles/2014/3/11/death-in-the-desertthedangeroustrekbetweenmexicoandarizona.html>.

<sup>66</sup> See *id.*

<sup>67</sup> See AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION’S (CBP’S) 100-MILE RULE 1 (2014), [https://www.aclu.org/sites/default/files/field\\_document/14\\_9\\_15\\_cbp\\_100-mile\\_rule\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/14_9_15_cbp_100-mile_rule_final.pdf).

where officers do not have to follow the same rules that U.S. law enforcement agencies would normally have to follow, such as search and seizure laws.<sup>69</sup> This also makes it easier for CBP officers to racially profile people, which puts border crossers and residents living in the zone at risk of being targeted based on their race rather than probable cause or reasonable suspicion.<sup>70</sup> Further, increasing technology along the border makes it easier for the CBP to locate and detain migrants crossing illegally.<sup>71</sup> This zone has been coined the “Constitution-Free Zone.”<sup>72</sup> Regardless of whether immigrants who are in the United States without authorization are afforded all of the same constitutional protections as citizens, they do not deserve to be racially profiled, searched, and seized by U.S. officials, especially not when the methods for doing so would be considered a violation of a U.S. citizen’s rights.<sup>73</sup> Everyone should have the right to privacy and security of their person.<sup>74</sup>

#### D. State of Fear in the United States

When immigrants reach the United States and begin to build lives, the violations do not stop. Many immigrants live in a constant state of fear that they will be picked up by immigration officials.<sup>75</sup> This fear is understandable when thinking about immigrants who are undocumented or who crossed the border without authorization. However, even those with lawful status or green cards fear immigration officials and law enforcement, thinking that something could go wrong at any time.<sup>76</sup> There is a

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<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.* at 2.

<sup>71</sup> *See Securing and Managing Our Borders*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/securing-and-managing-our-borders> (last visited Mar. 10, 2017).

<sup>72</sup> *See* AM. CIVIL LIBERTIES UNION, *supra* note 67, at 1.

<sup>73</sup> *See id.* at 2.

<sup>74</sup> G.A. Res. 217 (III) A, *supra* note 53, art. 12.

<sup>75</sup> *See* Walter Ewing, *How Deportations Devastate Families and Communities*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (Aug. 20, 2012), <http://immigrationimpact.com/2012/08/20/how-deportations-devastate-families-and-communities/>.

<sup>76</sup> One personal experience provides the perfect example of how even innocent immigrants and even United States-born *citizens* sometimes fear immigration officials, even when the immigration official is not immigration enforcement. I worked at a restaurant from 2012–2013. In 2014, while in law school, I was awaiting a background check in order to start my internship at the Executive Office of Immigration Review (“EOIR”), the immigration court. As part of the background check process, the EOIR had to call all of my past employers to verify my work history. When the EOIR called the restaurant to ask about me, one of my former co-workers, who is a United States-born citizen of Mexican descent, answered. He told me that when he heard that the person on the other line had anything to do with

culture of fear amongst immigrant communities because of the way that immigration officials treat undocumented immigrants and racially profile foreigners.<sup>77</sup>

This fear is reinforced by the fact that Immigration and Customs Enforcement (“ICE”) officials do not have to follow search and seizure laws, in violation of the Fourth Amendment, even when outside of the 100-mile zone controlled by the CBP.<sup>78</sup> For example, the exclusionary rule based on warrantless searches for criminal court proceedings does not apply in deportation proceedings.<sup>79</sup> Thus, ICE officers are not deterred from stopping without a warrant, probable cause, or reasonable suspicion, those that they believe to be “illegal” immigrants.<sup>80</sup> This may lead ICE to racially profile both immigrants and non-immigrants, which violates anti-discrimination principles, and can simultaneously violate the rights of innocent U.S. citizens.<sup>81</sup>

### *E. Immigrants as Criminal Defendants*

Like citizens, immigrants may be arrested, charged, tried, and convicted of crimes.<sup>82</sup> Also like citizens, even immigrants without lawful status have the right to an attorney in a criminal case,<sup>83</sup> and indigent immigrants are provided attorneys if they cannot afford them.<sup>84</sup> Defense attorneys should have the responsibility to inform immigrants of the immigration consequences of a criminal conviction.<sup>85</sup> However, immigration laws are complex and this rule was not even implemented until the U.S. Supreme Court decided it in 2010.<sup>86</sup> Thus, many immigrants’ rights to effective assistance of

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immigration, he became nervous to speak with them. He then spoke about the phone call with another person that worked there, who was a legal immigrant. The legal immigrant expressed fear for even being in the restaurant while the phone call was taking place, even though the call clearly had nothing to do with either of them. To me, this demonstrates fear to the point of irrationality. But the fear is real, nonetheless.

<sup>77</sup> See AM. CIVIL LIBERTIES UNION, *supra* note 67, at 2; Ewing, *supra* note 75.

<sup>78</sup> See Immigration & Naturalization Servs. v. Lopez-Mendoza, 468 U.S. 1032, 1043, 1050–51 (1984).

<sup>79</sup> See *id.* at 1042–43.

<sup>80</sup> See *id.* at 1055 (Brennan, J., dissenting).

<sup>81</sup> See MEISSNER ET AL., *supra* note 63, at 104–05, 108.

<sup>82</sup> See, e.g., Seth Freed Wessler, *Double Punishment*, COLORLINES (Oct. 20, 2009), <http://www.colorlines.com/articles/double-punishment>.

<sup>83</sup> See KATE M. MANUEL, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6–7 (2016), <https://www.fas.org/sgp/crs/homsec/R43613.pdf>.

<sup>84</sup> See, e.g., Padilla v. Kentucky, 559 U.S. 356, 364–65 (2010); MANUEL, *supra* note 83, at 6–7.

<sup>85</sup> See *Padilla*, 559 U.S. at 387–88 (Alito, J., concurring).

<sup>86</sup> See *id.* at 369 (holding that, at a minimum, defense attorneys must inform their clients

counsel have been violated for years,<sup>87</sup> and many immigrants have been removed because their criminal defense attorneys did not advise them of the consequences of their convictions.<sup>88</sup> Even so, it is often difficult for a defense attorney to predict the impact of a particular conviction on a person's immigration status.<sup>89</sup> Thus, even though all immigrants are entitled to defense counsel in criminal cases, and that counsel is supposed to advise them of the immigration consequences of a criminal conviction, defendant immigrants often raise ineffective assistance of counsel claims in post-conviction proceedings based on the inability of defense counsel to give proper immigration advice.<sup>90</sup>

Another issue is that immigrants are not entitled to serve on juries in criminal cases.<sup>91</sup> Thus, even though immigrants are arrested, charged, and tried under U.S. laws, they are not entitled to a jury of their peers.<sup>92</sup> Further, like U.S. citizen criminal defendants, if an immigrant's case does not go to trial for a criminal accusation, then they are entangled in a criminal system that forces the accused to plead guilty to crimes in order to avoid excessive prison or jail time.<sup>93</sup> Like citizens, this means that immigrants can plead guilty to criminal acts that they never committed,<sup>94</sup> or plead guilty not knowing or fully understanding the consequences of doing so.<sup>95</sup> Regardless of the reasons for pleading guilty, the immigrants

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that there is a possibility of immigration-related consequences to a criminal conviction).

<sup>87</sup> See *id.* at 383 (Alito, J., concurring).

<sup>88</sup> See John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should this be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 693 (2003).

<sup>89</sup> See *Padilla*, 559 U.S. at 376–78 (Alito, J., concurring).

<sup>90</sup> See generally DAWN SEIBERT & MOHAMMAD M. HAQUE, IMMIGRANT DEF. PROJECT, STRATEGIES TO ACHIEVE POST-CONVICTION RELIEF FOR IMMIGRANT DEFENDANTS IN NEW YORK AFTER *PEOPLE V. BARET* 8, 11 (2014), <http://immigrantdefenseproject.org/wp-content/uploads/2014/07/BARET-Advisory-FINAL-July-15-2014.pdf> (describing post-conviction relief for immigrant defendants).

<sup>91</sup> See 28 U.S.C. § 1865(b) (2012) (outlining the qualifications for federal jury service).

<sup>92</sup> See Mary Lombardi, Note, *Reassessing Jury Service Citizenship Requirements*, 59 CASE W. RES. L. REV. 725, 729 (2009). The jury of one's peers, though, has really been interpreted to be a jury of fellow citizens. See *id.* at 729, 744–46. The jury selection process is based on the fact that the jury should come from a “fair cross-section of the community.” See Patrick DePoy, *A Jury of Your Peers—The Right to a Jury Trial Free from Discrimination*, AM. C.L. UNION (June 19, 2012), <https://www.aclu.org/blog/jury-your-peers-right-jury-trial-free-discrimination?redirect=blog/lgbt-rights/jury-your-peers-right-jury-trial-free-discrimination>.

<sup>93</sup> See Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 329–30 (1997).

<sup>94</sup> See Cesar Cuauhtemoc Garcia Hernandez, *Strickland-Lite: Padilla's Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 920–21 (2013).

<sup>95</sup> See *id.* at 912.

will still be deported for having the conviction.<sup>96</sup> In fact, in immigration court, because criminal convictions are often the central reasons for deportation, the criminal case is considered finished.<sup>97</sup> Thus, if an immigrant pleads guilty to something for which they are innocent, they can still be deported for it, and claiming their innocence may actually count *against* them in the immigration trial.

*F. Immigrants as Criminal Defendants after Completing a Sentence*

When an immigrant has been convicted of a deportable offense,<sup>98</sup> they will likely have to complete their sentences just like citizens do, rather than being deported right away.<sup>99</sup> If the crime is a deportable offense, one of two things will happen: either the immigrant will be placed in removal proceedings while still serving their sentence,<sup>100</sup> or the immigrant will complete their sentence and thereafter will be transferred to an immigrant detention center run by ICE, where removal proceedings are then likely to be initiated against them.<sup>101</sup> Immigrants in detention centers may qualify for bond if they are not dangerous or do not pose a flight risk, but those who come straight from serving a criminal sentence, especially for serious felony convictions, may not qualify for bond.<sup>102</sup>

Those who do not qualify for bond and who wish to fight their cases tend to spend long periods of time in immigrant detention centers, often months or even years after they have already completed their sentences for the deportable offense.<sup>103</sup> Whether these wait times violate due process and the right to be free from double jeopardy is controversial.<sup>104</sup>

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<sup>96</sup> *Cf. id.* at 893.

<sup>97</sup> *See* AM. IMMIGRATION COUNCIL, *supra* note 7, at 2–3.

<sup>98</sup> *See* Immigration and Nationality Act, 8 U.S.C. § 1227 (2012).

<sup>99</sup> *See* BRYAN LONEGAN ET AL., LEGAL AID SOC'Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 2 (2006), [https://www.informedimmigrant.com/wp-content/uploads/2017/01/detentionremovalguide\\_2006-02.pdf](https://www.informedimmigrant.com/wp-content/uploads/2017/01/detentionremovalguide_2006-02.pdf).

<sup>100</sup> *See Immigration Detainers: A Comprehensive Look*, AM. IMMIGR. COUNCIL (Feb. 17, 2010), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-comprehensive-look>.

<sup>101</sup> *See* LONEGAN ET AL., *supra* note 99, at 2.

<sup>102</sup> *See id.* at 5–6.

<sup>103</sup> *See id.* at 7. “For immigrants who enter the criminal justice system, double punishment is a formal part of their legal landscape.” Wessler, *supra* note 82.

<sup>104</sup> *See* AM. IMMIGRATION COUNCIL, *supra* note 7, at 9.

2016/2017]

Enforcing Immigrants' Rights

1007

*G. State Prison*

Many noncitizens convicted of felonies will serve time in prison, just like U.S. citizens do.<sup>105</sup> Some state and local correctional facilities participate in some version of an Institutional Removal Program (“IRP”), where the immigration court is actually located inside of the prison and holds deportation proceedings while the noncitizen is still serving time.<sup>106</sup> This is in part for efficiency purposes.<sup>107</sup> While it may be efficient in some ways, having courts inside of prisons may also lead to the unnecessary violation of certain rights.<sup>108</sup> For example, being in prison allows for very little access to evidence that the noncitizen can present in immigration court to prove their case, even though they have the right to present evidence and examine the evidence against them.<sup>109</sup> Access to legal counsel is also difficult given that many prisons are located in remote areas, far away from large cities where many lawyers reside.<sup>110</sup> Further, having prisoners go through deportation proceedings necessarily means that the immigrant will always be accompanied by correctional officers.<sup>111</sup> Even though immigrants in removal proceedings have the right to request a closed court, it is unlikely that the correctional officers will be prohibited from entering the courtroom for safety reasons, thus subjecting many immigrants to potential abuse by officers who will then have heard their entire life stories, including the details of the crimes they committed.<sup>112</sup>

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<sup>105</sup> See DAVID D. CLARK, N.Y. STATE DEP’T OF CORRS. & CMTY. SUPERVISION, RESEARCH REPORT: THE FOREIGN-BORN UNDER CUSTODY POPULATION & THE IRP 6 tbl.5, 7 tbl.6 (2013), [http://www.dccs.ny.gov/Research/Reports/2014/ForeignBorn\\_IRP\\_Report\\_2013.pdf](http://www.dccs.ny.gov/Research/Reports/2014/ForeignBorn_IRP_Report_2013.pdf).

<sup>106</sup> See *id.* at 1, 10.

<sup>107</sup> See *id.* at 8.

<sup>108</sup> See MARC R. ROSENBLUM & WILLIAM A. KANDEL, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 35–37 (2012), <https://fas.org/sgp/crs/homsec/R42057.pdf>.

<sup>109</sup> See INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 6 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf).

<sup>110</sup> See *id.*

<sup>111</sup> See generally Fatma E. Marouf, *The Unconstitutional use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 216–17 (2015) (explaining security restraints in removal proceedings).

<sup>112</sup> See *id.* at 248–50. I have personally experienced this in my work as a removal defense attorney, where I have truly feared for my clients’ safety when I know that correctional officers have heard about the details of, for example, sexual abuse crimes committed by the noncitizen. Thankfully, I have heard of no reports of abuse by correctional officers because of this, but it is something that I always keep in mind.

### *H. Immigrant Detention Centers*

In addition to litigation about long waiting times and eligibility for bond, there has been a significant amount of litigation surrounding the conditions in immigrant detention centers.<sup>113</sup> Those operating detention centers have violated detained immigrants' rights related to "medical treatment, mental health care, religious services, transfers, and access to telephones, free legal services, and library materials."<sup>114</sup> Further, many do not have access to counsel, again, due to the detention centers being located in remote locations where attorneys do not typically reside.<sup>115</sup>

#### *I. Removal (Deportation) Proceedings*

Even though immigrant criminal defendants have the right to counsel in their criminal proceedings and are appointed counsel if they cannot afford it, they do not have the same right to counsel in immigrant removal (formerly known as "deportation") proceedings.<sup>116</sup> Even though immigrants have the right to counsel at their own expense, the government does not provide counsel because immigration removal proceedings are considered civil, rather than criminal, in nature.<sup>117</sup> Immigrants may be denied relief from removal because they are unable to properly obtain representation during their hearings.<sup>118</sup> Without an attorney, an immigrant will unlikely know what types of relief and legal arguments are available to them, and whether they qualify for any relief.<sup>119</sup> As a result, more recently, the debate about an immigrant's right to counsel has been centered on whether the U.S. government should provide representation for unaccompanied minors in immigration court.<sup>120</sup>

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<sup>113</sup> See generally *Immigrants' Rights and Detention*, AM. C.L. UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention> (last visited May 15, 2017) (describing detention center conditions, which most likely have led to litigation).

<sup>114</sup> See *Immigration Detention Conditions*, AM. C.L. UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions> (last visited May 15, 2017).

<sup>115</sup> See EAGLY & SHAFER, *supra* note 109, at 6.

<sup>116</sup> See MANUEL, *supra* note 83, at 6–7.

<sup>117</sup> See *id.* at 3.

<sup>118</sup> See EAGLY & SHAFER, *supra* note 109, at 3.

<sup>119</sup> See *id.* at 1–2.

<sup>120</sup> See *Right to Appointed Counsel for Children in Immigration Proceedings*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings> (last visited May 15, 2017) (providing the most recent

There are also situations where the U.S. government offers expedited removal, administrative removal, or voluntary departure.<sup>121</sup> These are procedures whereby removable noncitizens are sent to their home countries quickly without necessarily going through formal removal proceedings.<sup>122</sup> One can imagine that without having an attorney, being removed in a timely manner could be more appealing than spending time in ICE custody. Thus, immigrants are frequently removed without being informed fully of the relief to which they are entitled.<sup>123</sup> This becomes a dire human rights issue when the noncitizen is actually a refugee seeking asylum, but is unable to articulate their qualifications for refugee status without an attorney's assistance.<sup>124</sup> Refugees may therefore be removed to the very countries from which they escaped, which should be avoided but often occurs given these expedited procedures.<sup>125</sup>

### *J. Removal (Deportation)*

The final stage of the process is that the immigrant is removed from the United States.<sup>126</sup> There are many problems with deportation as a whole, including how much money is spent each year on deporting people,<sup>127</sup> and as discussed above, how

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updates on this litigation).

<sup>121</sup> See FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, WHAT TO DO IF YOU ARE IN EXPEDITED REMOVAL OR REINSTATEMENT OF REMOVAL 2, 11 (2011), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Expedited%20Removal%20-%20English%20%2817%29.pdf> [hereinafter FIRRPP]; *Voluntary Departure*, U.S. DEPT OF HOMELAND SECURITY: U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/tools/glossary/voluntary-departure> (last visited May 15, 2017).

<sup>122</sup> See FIRRPP, *supra* note 121, at 2, 11; *Voluntary Departure*, *supra* note 121.

<sup>123</sup> See JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 2–3 (2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf>.

<sup>124</sup> One of the protected grounds for asylum is based on persecution for being a part of a “particular social group,” which has been notoriously difficult for even experienced immigration defense attorneys to define. See NAT’L IMMIGRANT JUSTICE CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF M-E-V-G* AND *MATTER OF W-G-R* 1–2 (2016), <http://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf> (discussing the difficulties in meeting the “particular social group” standard and offering suggestions for attorneys of refugees seeking asylum).

<sup>125</sup> See *Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process*, HUM. RTS. FIRST (Nov. 13, 2015), <http://www.humanrightsfirst.org/resource/frequently-asked-questions-asylum-seekers-and-expedited-removal-process>.

<sup>126</sup> See Immigration and Nationality Act, 8 U.S.C. § 1231(a)(1)(A) (2012) (“[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . .”).

<sup>127</sup> See Sara Obeidat, *America’s Immigration Battle by the Numbers*, PBS (Oct. 21, 2015),

immigrants' rights are frequently violated in the process of being deported. Deportation itself violates the freedom to move freely across borders.<sup>128</sup> Some movements advocate for the absolute freedom to travel.<sup>129</sup> At the very least, LPRs should not be removed for committing crimes because, as this article argues below, this practice violates equal protection and is against public policy.

### *K. The Cycle*

Although deportation is technically the “final” step in the process, many immigrants return to the United States, which starts the cycle all over again.<sup>130</sup> This happens for a variety of reasons. Some examples include those who do not have lawful status but who have lived in the United States most of their lives,<sup>131</sup> those who originally escaped their home countries because of economic conditions,<sup>132</sup> or those who have lived in the United States for so long that being in their home country provides no opportunity for them.<sup>133</sup> Further, immigrants who unlawfully return to the United States after being removed and are caught by officials can also be prosecuted for illegal reentry under federal criminal laws, serve a sentence, wait in a detention center, and be removed once again.<sup>134</sup>

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<http://www.pbs.org/wgbh/frontline/article/Americas-immigration-battle-by-the-numbers/> (estimating that five billion dollars per year is spent on deportations).

<sup>128</sup> See generally Guy Aitchison, *We All Have a Fundamental Right to Cross Borders*, REFUGEES DEEPLY (Jan. 4, 2017), <https://www.newsdeeply.com/refugees/community/2017/01/04/we-all-have-a-fundamental-right-to-cross-borders> (advocating for the recognition of a freedom to move freely between nations).

<sup>129</sup> See, e.g., *Vision, Demands, Organizing Pillars*, NO ONE IS ILLEGAL—TORONTO, <http://Toronto.nooneisillegal.org/demands> (last visited Mar. 10, 2017) (supporting and advocating for the freedom of movement between nations).

<sup>130</sup> See Barbara Hollingsworth, *Criminal Prosecutions for Illegal Entry Up 7.7% in 2016*, CNSNEWS (Aug. 10, 2016), <http://www.cnsnews.com/news/article/Barbara-hollingsworth/> (stating that prosecutions for illegal reentry have increased by 668 percent in the last twenty years).

<sup>131</sup> See, e.g., Gustavo Solis, *He Entered the U.S. as a Boy. He was Deported to Mexico as a Man. Now, He is a Stranger in his Homeland*, DESERT SUN (Aug. 10, 2016), <http://www.desertsun.com/story/news/nation/california/2016/08/10/he-entered-us-boy-he-deported-mexico-man-now-he-stranger-his-homeland/88454620/>.

<sup>132</sup> See, e.g., Yana Kunichoff, *For Immigrants who Return after Deportation, Little Chance at Due Process, Say Advocates*, TRUTHOUT (June 5, 2014), <http://www.truth-out.org/news/item/24102-for-immigrants-who-return-after-deportation-little-chance-at-due-process-say-advocates>.

<sup>133</sup> See, e.g., *id.*

<sup>134</sup> See Anna Gorman & Scott Glover, *Illegal Reentry into the U.S. Increasingly Leads to Prison*, L.A. TIMES (Mar. 16, 2008), <http://articles.latimes.com/2008/mar/16/local/me-crackdown16>. Throughout my work in law school, I have personally seen each stage of this cycle—from studying abroad in Guatemala and meeting individuals who have explained to me their journeys, to working with immigrants on naturalization applications and working

2016/2017]

Enforcing Immigrants' Rights

1011

## III. THE ULTIMATE PUNISHMENT

Because immigration law and deportation proceedings are considered “civil” in nature, deportation is not, legally speaking, “punishment” for committing crimes.<sup>135</sup> Although criminal laws have a punitive aspect in addition to the deterrence rationale, even laws that are civil in nature, such as tort laws, are meant to deter people from acting in certain ways.<sup>136</sup> Similarly, while not a punishment, deportation is a threat looming over LPRs and other noncitizens and is meant to deter them from committing crimes.<sup>137</sup> However, unlike civil tort law, where paying damages for harm is clearly separate from paying punitive damages, it is difficult to separate deportation as a civil deterrent and deportation as a punishment for foreigners violating U.S. law.<sup>138</sup> As one criminal case notes:

The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality, especially in the context of this case. [Defendant] entered this country at age twelve; he has lived here for thirty-six years; he has been married to an American citizen for twenty-four years; he has raised three children all of whom are American citizens; his elderly parents are naturalized citizens; two of his four siblings are naturalized American citizens, and all four of them reside permanently in the United States; he has no ties to Colombia, the country to which he is to be deported; and he has fully served the sentence imposed upon him. If deportation under such circumstances is not punishment, it is difficult to envision what is. . . . I think the deportation of aliens for the commission of crimes is clearly punishment.<sup>139</sup>

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with criminal defendants against illegal reentry charges. I have also seen a great deal of immigrants go through removal proceedings during my clerkship with the Seattle Immigration Court, and have analyzed the law surrounding their circumstances.

<sup>135</sup> See *Immigration & Naturalization Servs. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . .”); MANUEL, *supra* note 83, at 6.

<sup>136</sup> See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 51 (2005).

<sup>137</sup> See Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 43 (2011).

<sup>138</sup> See *id.* at 28 (“[I]f deportation is enmeshed with a criminal punishment and cannot be divorced from the conviction, it follows that deportation is a . . . part of the punishment.”).

<sup>139</sup> *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring). Judge

Further, although both entering and being in the United States without authorization triggers civil penalties,<sup>140</sup> reentering without authorization after being deported is a federal crime.<sup>141</sup> Someone reenters illegally if they have previously been removed from or denied entry to the United States, and enters or attempts to enter again within the specified time frame that they are deemed “inadmissible.”<sup>142</sup> Though the immigration laws under the Immigration and Nationality Act (“INA”) are “purely civil,”<sup>143</sup> the violation of a few immigration laws trigger criminal prosecution,<sup>144</sup> and the violation of certain criminal laws frequently trigger immigration proceedings.<sup>145</sup> It becomes difficult to separate deportation as punishment from deportation as a civil penalty, especially when many immigrants are going through deportation proceedings while still serving time for their sentences.<sup>146</sup>

One judge, Judge Sarokin, agreed that deportation is a severe punishment, as noted in *Scheidemann*.<sup>147</sup> Even if someone was born in another country, being removed to that country can be difficult

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Sarokin goes on to note that if deportation really were classified as a punishment, he would hold that deportation violates the ex post facto provisions of the U.S. Constitution, which prohibit an increase in punishment for criminal actions. *See id.* I do not analyze deportation as a violation of this clause, though.

<sup>140</sup> *See* Immigration and Nationality Act, 8 U.S.C. § 1325(a) (2012).

<sup>141</sup> *See id.* § 1326(b).

<sup>142</sup> *See id.* § 1326(a). Whether a noncitizen who is removed or excluded is allowed to return to the United States depends on a number of factors, including the type of visa they held (if any) and the reason that they were removed or excluded. *See generally id.* § 1182 (listing the categories of inadmissible aliens). For instance, someone who fails to appear for their immigration proceeding is inadmissible for five years after they depart the United States. *Id.* § 1182(a)(6)(B). Someone who over-stays their student visa is inadmissible until they have been outside of the United States for a continuous five-year period. *Id.* § 1182(a)(6)(G). Anyone who has been removed for committing an aggravated felony is permanently inadmissible. *Id.* § 1182(a)(9)(A)(i)–(ii). In some circumstances, though, inadmissible noncitizens may qualify for waivers of inadmissibility. *See id.* § 1182(h), (i).

<sup>143</sup> *See* Immigration & Naturalization Servs. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

<sup>144</sup> *See, e.g.*, 8 U.S.C. § 1326(b).

<sup>145</sup> *See generally id.* § 1227(a)(2) (listing criminal offenses that lead to an alien being deemed “deportable”).

<sup>146</sup> *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)); *see also* Andrea Noble, *With Federal Cooperation, Illegals won't Set Foot on Free U.S. Soil after Mass Prison Release*, WASH. TIMES (Oct. 11, 2015), <http://www.washingtontimes.com/news/2015/oct/11/illegal-immigrant-inmates-will-go-from-prison-to-d/> (mentioning that many deportable aliens begin going through proceedings while in prison).

<sup>147</sup> *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring) (quoting *Lok v. Immigration & Naturalization Servs.*, 548 F.2d 37, 39 (2d Cir. 1977)); *see Padilla*, 559 U.S. at 365 (“We have long recognized that deportation is a particularly severe ‘penalty . . . .’” (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting))).

and life altering, particularly for people who have lived in the United States for years, especially those whose parents brought them here as young children; have built ties and communities in the United States; no longer speak the language of the country from which they immigrated; and no longer have any family or ties to the country from which they immigrated.<sup>148</sup> One can imagine the difficulty in starting a new life in a place where they no longer have many connections and no longer speak the language, and when their support system is in the United States. Not to mention that being exiled from an entire country for a period of years or even permanently can be a humiliating experience. When deported, noncitizens are leaving their lives in the United States as they knew them. Further, the deportation of immigrants breaks families apart, devastating young children and others who depend on their family members for economic and emotional support.<sup>149</sup>

Although the U.S. government is not supposed to deport noncitizens to countries if doing so would threaten their lives,<sup>150</sup> some who are deported may consider themselves refugees even when the U.S. government determines they are ineligible for refugee status.<sup>151</sup> Even if their lives are not necessarily “threatened” in the traditional meaning of the term, many noncitizens leave their home countries due to extreme poverty or unlivable conditions.<sup>152</sup> Returning these individuals to their native countries may leave them in situations where their lives are at stake.<sup>153</sup> Thus, noncitizens who are deported for criminal activity are faced with a severe, ultimate punishment not unlike being sentenced to death.<sup>154</sup>

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<sup>148</sup> See, e.g., Solis, *supra* note 131.

<sup>149</sup> See *Impact on Families of Mass Deportation*, IMMIGRANT DEF. PROJECT, <https://www.immdefense.org/issue-brief-impact-on-families-of-mass-deportation/> (last visited May 15, 2017).

<sup>150</sup> See 8 U.S.C. § 1231(b)(3).

<sup>151</sup> See, e.g., Tom Dart et al., *Immigration Activists Condemn U.S. Deportation of Asylum Seekers*, GUARDIAN (Jan. 4, 2016), <https://www.theguardian.com/us-news/2016/jan/04/immigration-activists-condemn-deportations-asylum-central-america> (discussing the deportation of immigrants denied asylum despite fleeing violence).

<sup>152</sup> See *Why Don't They Just Get in Line?*, AM. IMMIGR. COUNCIL (Aug. 12, 2016), <https://www.americanimmigrationcouncil.org/research/why-don't-they-just-get-line> (“An immigrant does not qualify as a refugee or an asylee because of poverty or difficult economic conditions in their home country.”).

<sup>153</sup> See, e.g., Philip E. Wolgin, *Ensuring Due Process Protections for Central American Refugees*, CTR. FOR AM. PROGRESS (Feb. 1, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/02/01/130294/ensuring-due-process-protections-for-central-american-refugees/> (stating that many immigrants denied asylum and subsequently deported to Central American countries are killed within days of their deportation).

<sup>154</sup> See Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and*

One rationale for imposing the death penalty in the United States is that those who commit such horrendous crimes no longer deserve to walk this earth.<sup>155</sup> While not stated as such in the seminal death penalty cases, retribution is considered a perfectly constitutional justification for those who commit capital crimes.<sup>156</sup> While capital crimes are usually some form of aggravated murder,<sup>157</sup> deportable offenses are typically less serious.<sup>158</sup> Though not stated outright, retribution is a justification for using the immigration laws to deport people who commit criminal offenses.<sup>159</sup> If someone decides to come into the United States and commits a crime, the implication of the immigration laws is that “We the People” no longer want them in this country. Therefore, though deportation is not a “punishment” under the laws, its effects can still be considered “cruel and unusual.”<sup>160</sup>

#### IV. UPHOLDING NONCITIZENS’ RIGHTS UNDER THE U.S. CONSTITUTION

By turning to the U.S. Constitution itself, there are several practical ways to advocate for fairer treatment of immigrants in the criminal justice and immigration systems. In particular, the Equal Protection Clause,<sup>161</sup> the Sixth Amendment,<sup>162</sup> and generally, policies of due process and fairness,<sup>163</sup> should allow LPRs, just like

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*Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2299 (2013).

<sup>155</sup> See, e.g., David R. Dow, *Conn. Ends Death Penalty, but Not for 11 Men on Death Row*, DAILY BEAST (Apr. 7, 2012), <http://www.thedailybeast.com/articles/2012/04/07/conn-ends-death-penalty-but-not-for-11-men-on-death-row.html> (“People support the death penalty because they . . . believe that certain people forfeit their right to live among us. They believe certain people deserve to die.”).

<sup>156</sup> See generally *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976) (stating that even though retribution is no longer a main objective of the criminal justice system, it is not a “forbidden objective” either); *Woodson v. North Carolina*, 428 U.S. 280, 285 (1976) (upholding the constitutionality of the death penalty); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment.”).

<sup>157</sup> See, e.g., 18 U.S.C. § 3592(b)–(d) (2012) (listing aggravating factors for consideration in death penalty cases involving treason, homicide, and drug offenses); WASH. REV. CODE § 10.95.030(2) (2017) (providing for the death sentence in certain cases of first-degree murder).

<sup>158</sup> See generally 8 U.S.C. § 1227 (classifying “deportable aliens”).

<sup>159</sup> See Aaron S. Haas, *Deportation and Double Jeopardy After Padilla*, 26 GEO. IMMIGR. L.J. 121, 145 (2011).

<sup>160</sup> See Caldwell, *supra* note 154, at 2299 (providing an in-depth discussion about the cruel and unusual nature of deportation, particularly juvenile offenders).

<sup>161</sup> U.S. CONST. amend. XIV, § 1.

<sup>162</sup> U.S. CONST. amend. VI.

<sup>163</sup> U.S. CONST. amends. V, XIV, § 1.

citizens, to have an opportunity to rehabilitate and reenter American society, allow noncitizens to serve on juries, and provide noncitizens with access to government-appointed counsel when being deported for criminal convictions.

*A. Immigrants should not be Deported for Committing Crimes*

Deporting LPRs for committing crimes does not make good policy sense and violates principles of fairness. LPRs, like citizens, should be allowed to finish their sentences, rehabilitate, and be reintroduced into U.S. society rather than being deported. Further, under the Equal Protection Clause of the U.S. Constitution, LPRs should not be deported for committing crimes.

1. The United States does not Exile, Banish, or Expatriate Citizens for Committing Crimes—so why Lawful Permanent Residents?

Deporting LPRs for committing crimes violates the Eighth Amendment protection against cruel and unusual punishment.<sup>164</sup> It is also fundamentally unfair and violates public policy.<sup>165</sup> The United States does not exile, banish, or expatriate citizens from the United States for committing crimes,<sup>166</sup> and therefore should not deport LPRs for committing crimes either.

The federal government has not used exile or banishment from the United States as a punishment against citizens.<sup>167</sup> While other countries, such as England, have used forms of exile as punishment, the practice has mostly been abolished in modern societies,<sup>168</sup> and U.S. courts have recognized that banishment as a punishment is barbaric and has been “decried by civilized people.”<sup>169</sup>

U.S. state governments used to use banishment from state boundaries as punishment, but that practice was held to be unconstitutional.<sup>170</sup> Reasons cited for the unconstitutionality of

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<sup>164</sup> See U.S. CONST. amend. VIII; Caldwell, *supra* note 154, at 2298–99.

<sup>165</sup> See Maddali, *supra* note 137, at 54.

<sup>166</sup> See Wm. Garth Snider, *Banishment: The History of its Use and a Proposal for its Abolition under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 465 (1998).

<sup>167</sup> See *id.* at 465–66. However, President Donald Trump has suggested wanting to take away citizenship for those who burn American flags. See David Wright, *Trump: Burn the Flag, Go to Jail*, CNN (Nov. 29, 2016), <http://www.cnn.com/2016/11/29/politics/donald-trump-flag-burning-penalty-proposal/>.

<sup>168</sup> See Snider, *supra* note 166, at 462–63.

<sup>169</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

<sup>170</sup> See Snider, *supra* note 166, at 465–66.

state exile are that exile serves no rehabilitative purpose or “public protection function,”<sup>171</sup> it interferes with the right to travel between states, and it “violate[s] the Eighth Amendment as cruel and unusual punishment.”<sup>172</sup>

Expatriation or denationalization of citizens for criminal convictions has also been held unconstitutional in violation of the Eighth Amendment’s protection against cruel and unusual punishment.<sup>173</sup> The Court in *Trop* held that although naturalized citizens may lose their citizenship if they misrepresented something during immigration proceedings, this is not a punishment but rather a way to establish rules for the process of naturalization.<sup>174</sup> However, the Court said that expatriating a citizen for a criminal conviction rather than violation of a procedural rule to gain citizenship is cruel and unusual punishment for several reasons.<sup>175</sup> The Court held that expatriation destroys a person’s status in an organized society, and subjects the expatriate to “ever-increasing fear and distress.”<sup>176</sup> The Court also reasoned: “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>177</sup>

For the same reasons that exile, banishment, and expatriation of citizens as punishment are unconstitutional, deportation of LPRs for committing crimes, though not labeled as “punishment,” should also be considered unconstitutional.<sup>178</sup> Just as expatriation destroys a citizen’s status in an organized society, deportation destroys a LPR’s status in the United States as well as the ability for the LPR to return.<sup>179</sup> While deportation differs in the sense that the deported immigrant is probably not stateless, an LPR who has made the United States his or her home may consider themselves stateless if they have already established roots in the United States and do not have ties elsewhere.<sup>180</sup> Further, even the threat of deportation leaves LPRs in constant states of fear and distress that they may be deported, even if they have not done, or never do,

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<sup>171</sup> *Id.* at 466.

<sup>172</sup> *Id.* at 467.

<sup>173</sup> *See Trop*, 356 U.S. at 101–03.

<sup>174</sup> *See id.* at 98–99.

<sup>175</sup> *See id.* at 101–02.

<sup>176</sup> *Id.* at 102.

<sup>177</sup> *Id.*

<sup>178</sup> *See Maddali*, *supra* note 137, at 29.

<sup>179</sup> *See id.* at 37.

<sup>180</sup> *See id.* at 37–38.

2016/2017]

Enforcing Immigrants' Rights

1017

anything wrong.<sup>181</sup> Thus, deporting LPRs for criminal convictions is unconstitutional as violating Eighth Amendment protections against cruel and usual punishment.

Even if it does not violate the Eighth Amendment, deportation of LPRs for committing crimes violates public policy.<sup>182</sup> LPRs are just as capable of rehabilitation as citizens are.<sup>183</sup> LPRs should therefore be given the opportunity to rehabilitate instead of being functionally banished from their communities, especially when banishment of this sort would be unconstitutional if imposed on U.S. citizens.<sup>184</sup>

## 2. Equal Protection under the Laws

Continuing to deport LPRs for committing crimes while maintaining that the exile, banishment, and involuntary expatriation of citizens is unconstitutional and violates public policy, violates a noncitizen's right to equal protection of the laws. While there have been no reported cases that attempt to challenge deportation provisions based on differential treatment of noncitizens and citizens, making those challenges may be the next attempt at allowing LPRs the rights they are entitled to under the U.S. Constitution.<sup>185</sup>

Because alienage is a classification that is inherently suspect,<sup>186</sup> criminal grounds of deportation of LPRs under the INA must meet strict scrutiny.<sup>187</sup> Thus, if deportation was ever challenged in the federal courts as unconstitutional, the federal government must have a compelling interest in deporting LPRs who commit crimes, and the deportation laws must be narrowly tailored to that interest.<sup>188</sup> Strict scrutiny is hardly ever met,<sup>189</sup> but one case in which the Court found that it was met was the Japanese internment cases,<sup>190</sup> in which the Court found that the country was in a "state of emergency" and that "severe national consequences"

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<sup>181</sup> *See id.* at 42.

<sup>182</sup> *See id.* at 29; Snider, *supra* note 166, at 492.

<sup>183</sup> *See, e.g.,* Maddali, *supra* note 137, at 42.

<sup>184</sup> *See id.* at 48.

<sup>185</sup> *See, e.g., id.* at 12.

<sup>186</sup> *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>187</sup> *See id.* at 376.

<sup>188</sup> *See id.* at 375–76.

<sup>189</sup> *See* Terry Jane Helbush, *Aliens, Deportation and the Equal Protection Clause: A Critical Reappraisal*, 6 GOLDEN GATE U. L. REV. 23, 66 (1975).

<sup>190</sup> *Id.* at 72.

could occur if the government did not act.<sup>191</sup> Government interests in deporting noncitizens who commit crimes may include general reasons related to national security, public safety, and allegiance and loyalty.<sup>192</sup> However, because the country is not in such a “state of emergency” (as the Court found in the Japanese internment cases), the criminal grounds for deportation<sup>193</sup> of LPRs would most likely not meet strict scrutiny.

Further, as will be discussed below, the government has alternatives to deportation to fulfill its interests of national security and public safety. The requirements for LPRs to legally enter the country are already rigorous.<sup>194</sup> The requirements for a green card involve extensive interviewing, and in fact those who work for the Foreign Service as adjudicators of applications for lawful status are at the front lines of national security.<sup>195</sup> Those who process U.S. visas, either at the Foreign Service level or for the U.S. Citizenship and Immigration Service within the United States, must consider not only the immigration laws that could disqualify an individual for a visa, but they must also use their discretion in determining whether someone is a threat to the country.<sup>196</sup> Obtaining a U.S. visa and going through the interviewing process is notoriously rigorous and difficult.<sup>197</sup> Thus, if the rationale for deportation is to protect national security and public safety, the thorough entry requirements, which are already in place, should be considered a viable alternative to deportation as a rationale fulfilling that interest. Rather than focusing on deportation, the government should focus on prevention.<sup>198</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g.,* Maddali, *supra* note 137, at 43.

<sup>193</sup> Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2) (2012). “Deportation laws” here refers to any law that provides for the deportation of an LPR based on a criminal conviction under 8 U.S.C. § 1227(a)(2).

<sup>194</sup> *See, e.g.,* Helbush, *supra* note 189, at 39–40.

<sup>195</sup> *See Consular Fellows Program: What We Do*, U.S. DEPT ST., <https://careers.state.gov/work/foreign-service/consular-fellows/what-we-do/> (last visited May 15, 2017).

<sup>196</sup> *Id.*

<sup>197</sup> *See The Immigrant Visa Process: Visa Applicant Interview*, U.S. DEPT ST.: BUREAU CONSULAR AFF., [https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/applicant\\_interview.html](https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/applicant_interview.html) (last visited May 15, 2017).

<sup>198</sup> However, building a wall on the United States-Mexico border is clearly not the best means of prevention. Wayne A. Cornelius, *Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States*, BORDER BATTLES (Sept. 26, 2006), <http://borderbattles.ssrc.org/Cornelius/>. One study found that increased border enforcement since the early 1990s has not deterred Mexican migration via the border. *See id.* In more recent discussions of building a wall, it seems that an increase in this type of border enforcement would not stop the flow of refugees who need to escape from wherever they are coming. *See, e.g.,* David Scott Fitzgerald & Akos Rona-Tas, *Walls Are Not the Solution*, CNN

Perhaps once admitted, if an LPR commits some type of crime, especially a very heinous one such as rape or murder, then in the eyes of the government, the LPR can become a threat to national security and public safety.<sup>199</sup> However, when a U.S. citizen commits a crime, the United States has already held that exiling, banishing, or expatriating them is not a constitutional option for dealing with the problem.<sup>200</sup> Instead, citizens are sentenced to prison time or death, but in most circumstances are permitted to rehabilitate and reenter society after serving their prison sentence.<sup>201</sup> There is no reason for the differential treatment of LPRs, who should similarly be allowed to reenter society, rehabilitate, and be given a chance.

### 3. Backlash

With the backlash that has resulted from the rise of the DREAM Act,<sup>202</sup> and the implementation of deferred action programs,<sup>203</sup> it will be increasingly difficult to protect LPRs who have committed crimes from deportation.<sup>204</sup> The arguments against implementation of the DREAM Act have been framed in a way that sheds a negative light onto immigrants who have committed crimes.<sup>205</sup> In order to gain political momentum, “DREAMers” have emphasized their accomplishments and goals.<sup>206</sup> The adage about deporting “felons, not families”<sup>207</sup> has played an important role in passing the recent deferred action programs, allowing many to support some type of immigration reform when they would otherwise be in opposition to

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(Sept. 29, 2015), <http://www.cnn.com/2015/09/29/opinions/fitzgerald-walls-not-answer-immigration/>.

<sup>199</sup> Immigration and Nationality Act, 8 U.S.C. §§ 1226, 1227 (2012).

<sup>200</sup> See *Trop v. Dulles*, 356 U.S. 86, 101–03 (1958); see also Snider, *supra* note 166, at 457–58 (discussing the punishment of banishment).

<sup>201</sup> *Compare Prisoners and Prisoner Re-Entry*, U.S. DEPT JUST., [https://www.justice.gov/archive/fbci/progmenu\\_reentry.html](https://www.justice.gov/archive/fbci/progmenu_reentry.html) (last visited July 17, 2017) (“Over 10,000 ex-prisoners are released from America’s state and federal prisons every week . . .”), with *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/time-death-row> (last visited July 17, 2017) (“8,032 people have been sentenced to death from 1977 until 2012.”).

<sup>202</sup> Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001); see *Fact Sheet: The DREAM Act: Creating Opportunities for Immigrant Students and Supporting the U.S. Economy*, AM. IMMIGR. COUNCIL (July 13, 2010), <https://www.americanimmigrationcouncil.org/research/dream-act> [hereinafter *DREAM Act Fact Sheet*].

<sup>203</sup> *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEPT HOMELAND SECURITY, <https://www.dhs.gov/topic/deferred-action-childhood-arrivals-daca> (last visited May 15, 2017).

<sup>204</sup> See *Fact Sheet: Dispelling DREAM Act Myths*, AM. IMMIGR. COUNCIL (Nov. 23, 2010), <https://www.americanimmigrationcouncil.org/research/dispelling-dream-act-myths>.

<sup>205</sup> See *id.*

<sup>206</sup> See *DREAM Act Fact Sheet*, *supra* note 202.

<sup>207</sup> See Christie Thompson, *Deporting ‘Felons, Not Families,’* MARSHALL PROJECT (Nov. 21, 2014), <https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families>.

immigrants' rights generally.<sup>208</sup> Thus, although LPRs should not be deported for committing crimes, the likelihood of it happening is very little given the current state of U.S. immigration law. While many immigrant advocates outright oppose deportation generally,<sup>209</sup> it does not appear that many advocates are doing anything to abolish deportation altogether,<sup>210</sup> likely because doing so is not practical.<sup>211</sup>

### *B. Immigrants should Serve on Juries*

#### 1. Equal Protection under the Laws

The Equal Protection Clause provides that no state shall deny to any person equal protection of the laws.<sup>212</sup> The clause protects both citizens and noncitizens,<sup>213</sup> both legal and non-legal,<sup>214</sup> from unequal government treatment.<sup>215</sup> The basic justification for affording immigrants this protection even though they are not citizens is that the clause uses the term “person” rather than “citizen,” whereas clauses in other parts of the Constitution use the term “citizen” to specify to whom that clause applies.<sup>216</sup> Under the Equal Protection Clause, a person may claim that they are treated differently based on some protected classification.<sup>217</sup> Race and gender are the typical classifications, but alienage is the classification used by those challenging their treatment based on U.S. citizenship.<sup>218</sup>

Depending on the classification, the government will be subject to a certain level of scrutiny.<sup>219</sup> Generally speaking, this means that if the government is denying someone equal protection of the laws, the government must have a good reason for doing so.<sup>220</sup> The

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<sup>208</sup> See *DREAM Act Fact Sheet*, *supra* note 202.

<sup>209</sup> See Adrian Florido, *Anticipating Trump: Deportation Fears Give Immigrant Advocates a Boost*, NPR (Jan. 3, 2017), <http://www.npr.org/sections/codeswitch/2017/01/03/507925265/anticipating-trump-deportation-fears-give-immigrant-advocates-a-boost> (discussing methods that advocates use to protect immigrants).

<sup>210</sup> See *generally id.* (discussing a wide range of tactics used by immigration advocates, but not mentioning a push to abolish deportation altogether).

<sup>211</sup> See *generally id.* (suggesting that comprehensive immigration reform is potentially impossible).

<sup>212</sup> U.S. CONST. amend. XIV, § 1.

<sup>213</sup> *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

<sup>214</sup> See *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

<sup>215</sup> See U.S. CONST. amend. XIV, § 1.

<sup>216</sup> See *Graham*, 403 U.S. at 371.

<sup>217</sup> See *id.* at 371–72.

<sup>218</sup> See *id.*

<sup>219</sup> See, e.g., *id.*

<sup>220</sup> See R. Randall Kelso, *Standards of Review under the Equal Protection Clause and*

highest level of scrutiny is generally referred to as “strict scrutiny,” which means that the government must show that its policy or law in purported violation of the Equal Protection Clause is narrowly tailored to a compelling government interest.<sup>221</sup> The lowest level of scrutiny is generally called “rational basis review.”<sup>222</sup> Under rational basis review, the government’s violation must be only rationally related to any legitimate government interest.<sup>223</sup> There is also an “intermediate level” of scrutiny, where the denial of equal protection must be substantially related to an important government interest.<sup>224</sup> The levels of scrutiny guide courts in determining whether the government’s actions in denying equal protection are justified.<sup>225</sup> Courts do not follow the levels of scrutiny exactly, but do make decisions regarding what types of classifications warrant how much judicial scrutiny.<sup>226</sup>

It is clear that the denial of equal protection based on alienage warrants some type of strict scrutiny.<sup>227</sup> The U.S. Supreme Court has held that classifications based on alienage, like those on nationality or race, are inherently suspect and qualify as “a ‘discrete and insular’ minority,” making denial of equal protection based on alienage subject to “close judicial scrutiny.”<sup>228</sup> However, even though classifications based on alienage are usually subject to strict scrutiny, courts will use rational basis review when the unequal treatment is based on the denial of some “political function,” such as a noncitizen being denied the ability to work as police officer.<sup>229</sup>

## 2. Equal Protection Provides that LPRs should Serve on Criminal Juries

Under the Equal Protection Clause, all immigrants, regardless of legal status, should be allowed to serve on juries in criminal cases. Although the right should extend to undocumented immigrants, for practical reasons set forth below, those without legal status would

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*Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227–28 (2002).

<sup>221</sup> *See id.* at 228, 234.

<sup>222</sup> *See id.* at 228, 230 nn.23, 25.

<sup>223</sup> *See id.* at 228.

<sup>224</sup> *See id.*

<sup>225</sup> *See id.* at 227.

<sup>226</sup> *See id.* at 226.

<sup>227</sup> *See* *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>228</sup> *Id.*

<sup>229</sup> *See* *Foley v. Connelie*, 435 U.S. 291, 296–97, 299–300 (1978).

not be able to serve on juries or would not want to serve on juries.<sup>230</sup> Political backlash has a history of preventing this from happening—a trend that will likely continue.<sup>231</sup> Excluding noncitizens from serving on juries denies the excluded noncitizen of equal protection under the law.<sup>232</sup> Thus far, only one court has decided a challenge to state and federal statutes under the Equal Protection Clause.<sup>233</sup>

In *Perkins*, the question before the court was whether the “State of Maryland and the United States have a compelling interest in confining” jury service to citizens.<sup>234</sup> Because the defendants in *Perkins* argued that the restriction based on alienage in the state and federal statutes met both strict and rational basis scrutiny, the court did not decide whether jury service was a “political function,” but rather analyzed the challenge based on strict scrutiny.<sup>235</sup> Unfortunately, the court held that both the federal and state governments had a compelling interest in confining jury service to citizens.<sup>236</sup> The court reasoned that jurors make ultimate factual decisions on issues in the justice system and should be U.S. citizens because as a class, citizens rather than noncitizens are more likely to make informed decisions.<sup>237</sup> Further, noncitizens do not owe allegiance to the United States, and therefore do not enjoy full civil rights, particularly rights such as voting or other functions that go to “the heart of [representative] government.”<sup>238</sup>

The *Perkins* court also reasoned that:

[P]ersons unfit for jury service can work a great deal of harm, through inability or malice, to efficiency and fairness. . . . A single juror who failed to understand the import of the evidence being presented or who lacked any concern for the

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<sup>230</sup> See, e.g., *Perkins v. Smith*, 370 F. Supp. 134, 134–35 (D. Md. 1974).

<sup>231</sup> See also Michelle Fabio, *California First State to Pass Bill Allowing Noncitizens on Juries*, LEGALZOOM, <https://www.legalzoom.com/articles/california-first-state-to-pass-bill-allowing-noncitizens-on-juries> (last visited May 15, 2017) (highlighting the political debate surrounding noncitizens serving on juries).

<sup>232</sup> See generally David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (“The Fifth and Fourteenth Amendment due process and equal protection guarantees extend to all ‘persons.’ The rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to ‘the accused.’ And both the First Amendment’s protections of political and religious freedoms and the Fourth Amendment’s protection of privacy and liberty apply to ‘the people.’”).

<sup>233</sup> See *Perkins*, 370 F. Supp. at 134–35 (D. Md. 1974).

<sup>234</sup> *Id.* at 136.

<sup>235</sup> See *id.*

<sup>236</sup> See *id.* at 138.

<sup>237</sup> See *id.*

<sup>238</sup> See *id.* at 137–38.

2016/2017]

Enforcing Immigrants' Rights

1023

fairness of the outcome could severely obstruct or distort the course of justice.<sup>239</sup>

Thus, the state and federal governments have a compelling interest in restricting “jury service to those who will be loyal to, interested in, and familiar with, the customs of this country.”<sup>240</sup> The court also reasoned that while LPRs likely feel allegiance to this country, naturalizing is a way of formalizing that allegiance and there is no way to ensure that LPRs are fit for jury service otherwise.<sup>241</sup>

This article argues that the *Perkins* court was incorrect in holding that the federal and state governments have a compelling interest in confining jury service to only citizens. First, jury service should not be viewed as a political function, but rather, a resident’s duty as a member of U.S. society.<sup>242</sup> Thus, the court should always analyze challenges to noncitizen exclusion from jury service using a strict scrutiny standard.<sup>243</sup> Second, even if jury service were a political function, excluding noncitizens from jury service does not meet a rational basis test.

The political function test proceeds in three steps.<sup>244</sup> First, the court determines whether the right denied is a governmental function, and will look to the degree of responsibility and discretion that the noncitizen would have if granted the right denied.<sup>245</sup> Second, the court looks to whether the law “bears a rational relationship to [the] interest” of the state to further its goals.<sup>246</sup> Finally, if there is no relationship between the right denied and a governmental function, then the court uses strict scrutiny.<sup>247</sup>

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<sup>239</sup> See *id.* at 138.

<sup>240</sup> *Id.*

<sup>241</sup> See *id.* at 141–42 (Winter, J., concurring).

<sup>242</sup> See, e.g., *Handbook for Trial Jurors Serving the United States District Court, Importance of Jury Service*, U.S. DISTRICT CT. SOUTHERN DISTRICT N.Y., [http://www.nysd.uscourts.gov/jury\\_handbook.php?id=2](http://www.nysd.uscourts.gov/jury_handbook.php?id=2) (last visited May 15, 2017) (“Jurors must be men and women possessed of sound judgment, absolute honesty, and a complete sense of fairness. Jury service is a high duty of citizenship.”).

<sup>243</sup> See generally Lombardi, *supra* note 92, at 729–30 (“Non-citizens are entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, under which the Supreme Court held ‘classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.’ This strict scrutiny standard requires a state to show that a classification based on alienage satisfies a ‘compelling interest.’”).

<sup>244</sup> See *Ambach v. Norwick*, 441 U.S. 68, 78–80 (1979).

<sup>245</sup> See *id.* at 78–79.

<sup>246</sup> See *id.* at 80.

<sup>247</sup> See *id.* at 74.

While the court in *Perkins* did not use the exact political function test, the court did hold that jury service is at the heart of government functioning.<sup>248</sup> The court reasoned that if noncitizens were to serve on juries, they would have a degree of discretion in making ultimate factual decisions that could be harmful if they were not familiar with or did not have an interest in the matter before them.<sup>249</sup> However, this reasoning assumes that U.S. citizens, as a class, would be more familiar with U.S. laws and that U.S. citizens have more interest in jury service than LPRs.<sup>250</sup> In reality, U.S. citizens are likely just as ignorant of U.S. law as LPRs. U.S. citizens may also have just as little interest, if not less, in serving jury duty as LPRs, as it is a commonly known theory that jury duty is a burden on citizens, which is why many citizens try their hardest to avoid it. While as a class, LPRs and citizens may have slightly different levels of familiarity and interest in jury service, the court's assumption goes too far.

Further, jurors are not actually the "ultimate" decision-makers, as the court states, because appellate courts overturn jury decisions all the time for various reasons, particularly where a criminal defendant suffers constitutional violations. Further, most criminal convictions end with guilty pleas and not with jury trials. Thus, while juries do have discretion such that they may be considered a part of the government function, they do not usually have the ultimate say in decisions affecting defendants and cannot be said to have the degree of discretion required to meet the political function test.

While laws excluding noncitizens from serving on juries might bear a rational relationship to serving the government's goals of maintaining allegiance, the court in *Perkins* also assumes that no alternative means exist for LPRs to show that they are loyal to the United States.<sup>251</sup> In fact, LPRs may be excluded from naturalizing in the first place if they show that they are against U.S. customs.<sup>252</sup> The allegiance and loyalty interest may be addressed by requiring that LPRs acknowledge their duty to be jurors, as residents who are

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<sup>248</sup> See *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md. 1974).

<sup>249</sup> See *id.* at 138.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See generally Immigration and Nationality Act, 8 U.S.C. § 1427(a) (2012) ("No person . . . shall be naturalized unless such applicant . . . has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.").

subject to criminal prosecution under U.S. law.<sup>253</sup> Moreover, at least one court has held that noncitizens serving on juries is not unconstitutional, and thus, courts will likely not overturn a criminal defendant's conviction based on the fact that one of the jurors was a noncitizen.<sup>254</sup>

Because there are alternative ways for the government to meet its interest in maintaining a fair and impartial jury trial, a state and federal government's restriction of noncitizens to serve on juries is misplaced and cannot meet a rational basis or a strict scrutiny test. The means by which the government tries to meet its goals of maintaining a fair and impartial jury is not narrowly tailored, given that the government has the option to gain LPRs' acknowledgement of a duty to serve as jurors, just as they must acknowledge their duty to abide by U.S. law.<sup>255</sup>

### 3. The Sixth Amendment and Policy Reasons

Most, if not all, states and the federal government do not allow noncitizens to serve on juries, yet those same noncitizens are subject to criminal prosecution under the laws of the United States.<sup>256</sup> While being criminally prosecuted, noncitizens still hold all of the same rights afforded a citizen criminal defendant.<sup>257</sup> As noted above, noncitizens have the right to counsel in criminal cases, all due process rights that come with being charged with a crime, and are protected by search and seizure laws under the Fourth Amendment.<sup>258</sup> The only difference between the criminal prosecution of a citizen and a noncitizen is that noncitizens face the additional risk (or certainty) of deportation for qualifying crimes.<sup>259</sup>

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<sup>253</sup> Some criminal convictions, such as aggravated felonies, may result in a noncitizen being removed from the United States or ineligible for asylum. *See, e.g.*, AM. IMMIGRATION COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 1 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated\\_felonies.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies.pdf).

<sup>254</sup> *See* *Owens v. State*, 924 A.2d 1072, 1089 (Md. 2007) (holding that due process does not mandate a citizen-juror).

<sup>255</sup> *Cf. id.* at 1090 ("In the case of the statutory right to a citizen jury, there exist three levels of screening to preserve that right. . . . In the event that the court's internally-administered means of automatically disqualifying prospective jurors has failed to eliminate a disqualified juror, we have recognized the *voir dire* process as a proper procedural occasion to verify juror qualifications.").

<sup>256</sup> *See, e.g.*, *Perkins v. Smith*, 370 F. Supp. 134, 137–38 (D. Md. 1974); *Cole, supra* note 232, at 370–71 ("When noncitizens, no matter what their status, are tried for crime, they are entitled to all of the rights that attach to the criminal process, without any distinction based on their nationality.").

<sup>257</sup> *See* *Cole, supra* note 232, at 370.

<sup>258</sup> *See id.*

<sup>259</sup> *See generally* Immigration and Nationality Act, 8 U.S.C. § 1227 (2012) (discussing

All criminal defendants also have the Sixth Amendment right to an impartial jury.<sup>260</sup> To ensure that the criminal justice system affords this right to all criminal defendants, the courts have interpreted the right to mean that defendants must be judged by a jury of their peers and that the jury must comprise a fair “cross-section of the [defendant’s] community.”<sup>261</sup> Given that laws disqualify noncitizens from serving on juries,<sup>262</sup> noncitizens’ rights to an impartial jury are therefore always violated when the government prosecutes them for a crime because other noncitizens are not allowed to be a part of the jury of peers to which all criminal defendants are entitled.<sup>263</sup>

Thus, as long as the noncitizen meets all other requirements to be a juror in any particular jurisdiction—usually being of a certain age and being able to speak English<sup>264</sup>—noncitizens should have the right to serve on juries, at least in criminal cases. Unfortunately, Sixth Amendment challenges to noncitizen exclusion from jury service have been unsuccessful.<sup>265</sup>

Moreover, because the court in *Perkins* held that LPRs are not fit for jury service because they are too unfamiliar with the customs of the United States,<sup>266</sup> then it seems fundamentally unfair that those same immigrants are still prosecuted for and convicted of crimes under U.S. law.<sup>267</sup> If immigrants as a class are considered unfamiliar with U.S. laws and therefore cannot make factual determinations under U.S. laws, then it should also be considered unfair for immigrants to be punished for violating those same laws that they are said to not understand.<sup>268</sup>

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criminal offenses that make an alien deportable).

<sup>260</sup> U.S. CONST. amend. VI.

<sup>261</sup> *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

<sup>262</sup> *See, e.g.*, WASH. REV. CODE § 2.36.070 (2017) (noting juror qualifications).

<sup>263</sup> *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (“The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).

<sup>264</sup> *See, e.g.*, WASH. REV. CODE § 2.36.070 (“A person shall be competent to serve as a juror in the state of Washington unless that person: (1) Is less than eighteen years of age; (2) Is not a citizen of the United States; (3) Is not a resident of the county in which he or she has been summoned to serve; (4) Is not able to communicate in the English language; or (5) Has been convicted of a felony and has not had his or her civil rights restored.”).

<sup>265</sup> *See Lombardi, supra* note 92, at 725–26.

<sup>266</sup> *See Perkins v. Smith*, 370 F. Supp. 134, 138 (D. Md. 1974).

<sup>267</sup> *See Amy R. Motomura, Note, The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503, 1548 (2012).

<sup>268</sup> *See Motomura, supra* note 267, at 1548.

2016/2017]

Enforcing Immigrants' Rights

1027

#### 4. Backlash and Difficulties

There would inevitably be some practical concerns with allowing noncitizens to serve as jurors in criminal cases. One is that many noncitizens, particularly new arrivals, may not speak English.<sup>269</sup> While some believe that the government should provide interpreters for such noncitizens rather requiring that a juror speak English in order to serve, others believe that providing interpretation services would be too cumbersome.<sup>270</sup>

Further, allowing noncitizens to serve on juries if they tend to have less knowledge of U.S. laws and customs may be harmful to criminal defendants, as the court noted in *Perkins*.<sup>271</sup> However, many U.S. citizens themselves do not have extensive knowledge, or even a basic knowledge, of the U.S. legal system.<sup>272</sup> Moreover, the rationale that one should only be able to serve on a jury if they have a basic understanding about the U.S. legal system is unfair when applied to the prosecution of noncitizen criminal defendants.<sup>273</sup> As noted above, if one must know about the legal system to apply the laws to a set of facts as a juror,<sup>274</sup> would not prosecuting noncitizens who the government assumes know nothing about the laws of the United States for committing U.S. crimes violate due process or at least some fundamental fairness principles? The only way someone can be deterred from committing a crime is by knowing that the action they are taking is actually criminally punishable.<sup>275</sup> If someone does not know that what they are doing is a crime, how can they be deterred from doing it in the first place?

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<sup>269</sup> See, e.g., Stephen Dinan, *Less than Half of Immigrants Speak English Well: Census Bureau*, WASH. TIMES (June 10, 2014), <http://www.washingtontimes.com/news/2014/jun/10/less-half-immigrants-speak-english-well/> (discussing the lack of comprehension of the English language among recent immigrants).

<sup>270</sup> See, e.g., Vesna Jaksic, *Future Jurors may Need Interpreters*, NAT'L L. J. (Aug. 6, 2007), <http://www.nationallawjournal.com/id=900005487436/Future-jurors-may-need-interpreters?slreturn=20170213142803> (“[A]n issue that may become increasingly more critical to courts across the nation [is] whether jurors with limited English proficiency should be allowed to have interpreters. Some lawyers [say] this question demands more attention as the nation’s population becomes increasingly diverse.”). I worked for a criminal defense association that conducted a member survey about different ideas for diversifying jury pools. Many of the comments in the survey also reflected these conflicting arguments.

<sup>271</sup> *Perkins*, 370 F. Supp. at 138.

<sup>272</sup> See Lombardi, *supra* note 92, at 741.

<sup>273</sup> See Motomura, *supra* note 267, at 1548.

<sup>274</sup> See *Perkins*, 370 F. Supp. at 138.

<sup>275</sup> See Drury Stevenson, *To Whom is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 159 (2003).

Additionally, not all noncitizens are ignorant of U.S. laws.<sup>276</sup> The best examples of those who would know just as much about U.S. law as citizens do are the DREAMers, who are immigrants who grew up in the United States, who usually speak English, and who went to U.S. schools.<sup>277</sup> This population is just as capable of being jurors as citizens are.

One practical concern is that many juror lists that states pull from in order to summon citizens for jury service come from a combination of sources such as driver's licenses or census information,<sup>278</sup> but by far the most common source is voter registration lists.<sup>279</sup> Clearly, LPRs and other noncitizens do not have the right to vote in any U.S. federal or state election.<sup>280</sup> Thus, getting LPRs on any juror source list may be difficult unless the list is created using various sources and not just voter registration and drivers' licenses.

Finally, there have been many movements that advocate for LPRs to qualify to be jurors.<sup>281</sup> However, there has also been much backlash against the idea, and no state has successfully implemented such a policy.<sup>282</sup> Often, the opposition hinges on the fact that LPRs simply do not have the same rights as citizens do to have a say in making laws of this country,<sup>283</sup> which in some ways parallels the "political function" argument under the Equal Protection Clause as described above.

## 5. Noncitizens Lacking Legal Status

Even if the unauthorized noncitizen is given the right to serve on a jury, someone who lacks legal status would probably not be easy to summon, nor would they want to make themselves known to the

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<sup>276</sup> See Lombardi, *supra* note 92, at 741.

<sup>277</sup> See *DREAM Act Fact Sheet*, *supra* note 202.

<sup>278</sup> See, e.g., WASH. REV. CODE § 2.36.054 (2017) (noting juror source lists).

<sup>279</sup> See NAT'L CTR. FOR STATE COURTS, JURY MANAGER'S TOOLBOX: CHARACTERISTICS OF AN EFFECTIVE MASTER JURY LIST 1 (2009), <http://www.jurytoolbox.org/more/Characteristics%20of%20Effective%20MJL.pdf>.

<sup>280</sup> In fact, voting in any election in violation of the law is a deportable offense. See Immigration and Nationality Act, 8 U.S.C. § 1227(a)(6) (2012). Some scholars have argued that immigrants should be allowed to vote. See generally Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (discussing the idea of aliens' right to vote).

<sup>281</sup> See, e.g., Fabio, *supra* note 231.

<sup>282</sup> See, e.g., *id.*

<sup>283</sup> See generally *id.* (stating that a concern in allowing noncitizens the right to be on juries is that it could lead to them also having the right to vote).

2016/2017]

Enforcing Immigrants' Rights

1029

U.S. government.<sup>284</sup> If a person is undocumented, they are not going to be easy to get ahold of unless, for example, the juror source lists use driver's licenses in states where people who are undocumented are able to have driver's licenses.<sup>285</sup> Further, undocumented immigrants would not wish to come under the government's radar by responding to a juror summons even if the summons was easy to deliver.<sup>286</sup> Nonetheless, some states do allow undocumented immigrants to receive driver's licenses or public services,<sup>287</sup> thus creating a list that includes them would not be difficult. The real difficulty would be getting the jurors to show up to service, i.e., there would have to be some sort of protection against deportation in order for the undocumented immigrants to feel safe to respond.<sup>288</sup>

*C. Noncitizens Being Deported for Criminal Convictions Must Have Access to Counsel*

It is time for the U.S. government to recognize that deportation is actually equivalent to a criminal punishment, and that access to counsel is just as important in immigration court as it is in criminal court. The U.S. Supreme Court has held that both U.S. citizens and noncitizens have the right to due process protections.<sup>289</sup> Given that the deportation process and the criminal process are paralleled in so many ways, as described above, it only makes sense that the U.S. government should provide appointed counsel for noncitizens who cannot afford counsel in immigration court. Especially for those convicted of crimes, government-appointed counsel would ensure that immigrants are not subject to double jeopardy for their criminal convictions, and would be one step closer to fairer

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<sup>284</sup> See Motomura, *supra* note 267, at 1547–48.

<sup>285</sup> See *id.* at 1547.

<sup>286</sup> See *id.* at 1547–48.

<sup>287</sup> See *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. ST. LEGISLATURES (Nov. 30, 2016) <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> (last visited July 30, 2017); Dylan Baddour, *Tom DeLay says Most Illegal Immigrants Draw Welfare Benefits, Send Children to Public Schools*, POLITIFACT (Sept. 28, 2016), <http://www.politifact.com/texas/statements/2016/sep/28/tom-delay/tom-delay-says-most-illegal-immigrants-draw-welfare/>.

<sup>288</sup> See Motomura, *supra* note 267, at 1547–48.

<sup>289</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Although this case specifically dealt with matters concerning immigration detention, the sentiment is there. *Id.* (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

proceedings.<sup>290</sup>

### 1. Criminal Defendants have the Right to Government-Appointed Counsel in Criminal Cases—why not Criminal Deportees?

Often, in deportation proceedings, the noncitizen is tasked with re-litigating their criminal case.<sup>291</sup> This is because so many noncitizens are barred from relief from deportation if they have been convicted of certain crimes.<sup>292</sup> For instance, a noncitizen claiming that they fear returning to their country because of the persecution that they have faced on the basis of their political opinions could apply, in deportation proceedings, for a form of protection called “withholding of removal.”<sup>293</sup> Although the U.S. government, under the withholding of removal statute, cannot remove people to the country where they fear such persecution, this prohibition is limited.<sup>294</sup> Regardless of the noncitizen’s likelihood of persecution in their home country, the noncitizen does not qualify for withholding of removal if they have been convicted of a “particularly serious crime.”<sup>295</sup> The Immigration Judge (“IJ”) will determine whether someone has been convicted of a “particularly serious crime” by considering all of the facts and circumstances of the applicant’s criminal conviction.<sup>296</sup> Thus, even though the noncitizen has already plead guilty or gone to trial on their criminal conviction, the IJ is now tasked with determining the facts of the criminal case in order to decide whether the noncitizen qualifies for protection from persecution.<sup>297</sup>

A clearer example of when re-litigation of a criminal case occurs in immigration court is when an individual is applying for discretionary relief.<sup>298</sup> Discretionary relief means that even if the noncitizen shows that he or she is legally eligible for a certain type

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<sup>290</sup> See Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR 567, 589, 601 (2013).

<sup>291</sup> See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude after Silva-Trevino*, 111 COLUM. L. REV. 313, 354 (2011).

<sup>292</sup> See Thompson, *supra* note 207.

<sup>293</sup> See 8 C.F.R. § 208.16(a) (2017).

<sup>294</sup> See Immigration and Nationality Act, 8 U.S.C. § 1231(a)(3)(B) (2012).

<sup>295</sup> See *id.*

<sup>296</sup> See, e.g., *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982).

<sup>297</sup> See Dadhania, *supra* note 291, at 354–55.

<sup>298</sup> See Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 945–46 (2006).

of relief from deportation, such as cancellation of removal,<sup>299</sup> the IJ can still decide to deport the individual based on other factors.<sup>300</sup> For instance, cancellation of removal is a common form of immigration relief that LPRs convicted of crimes are eligible for if they have been in the United States for a certain period of time and have not been convicted of an aggravated felony.<sup>301</sup> Cancellation of removal provides LPRs with a “second chance” to stay in the United States despite having been convicted of a crime.<sup>302</sup> However, an IJ can deny cancellation of removal to an individual even if they meet the requirements under the law, for reasons such as the individual not taking responsibility for their criminal actions.<sup>303</sup> The fact that an IJ can deny relief based on lack of responsibility limits the individual’s ability to truly ask for a chance to stay in the United States if the individual was wrongly convicted, or forced to plead guilty to a crime.<sup>304</sup>

Additionally, documents showing what happened in the underlying criminal case such as indictments, criminal complaints, and pre-sentence investigation reports, are typically admissible in immigration court.<sup>305</sup> These documents may contain information that is inconsistent with what actually happened in the criminal case, especially in situations where the individual plead guilty and thus there was no actual fact-finding trial.<sup>306</sup> Yet, IJs will often use these documents as evidence to find that the noncitizen was not being truthful or not owning up to their acts, which can be detrimental.<sup>307</sup> Further, the Federal Rules of Evidence do not apply in immigration court.<sup>308</sup> Thus, there are little to no means of

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<sup>299</sup> See 8 U.S.C. § 1229b.

<sup>300</sup> See *id.* § 1229b(c).

<sup>301</sup> See *id.* § 1229b(a)(3).

<sup>302</sup> See Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 LAW & INEQ. 567, 686 (1999).

<sup>303</sup> See, e.g., *Gonzalez v. Attorney Gen. of the United States*, 192 F. App’x 140, 143 (3d Cir. 2006).

<sup>304</sup> Cf. *id.* (reprimanding the defendant immigrant for his “untruthfulness”).

<sup>305</sup> See Michael S. Vastine, *Give Me Your Tired, Your Poor . . . And Your Convicted? Teaching “Justice” to Law Students by Defending Criminal Immigrants in Removal Proceedings*, 10 U. MD. L. J. RACE RELIG. GENDER & CLASS 341, 347 (2010).

<sup>306</sup> See *id.*

<sup>307</sup> See *id.*; see generally California Notes § N.3 *The Record of Conviction*, in IMMIGRANT LEGAL RES. CTR 65, 74–75 (2013), [https://www.ilrc.org/sites/default/files/resources/n.3-record\\_of\\_conviction.pdf](https://www.ilrc.org/sites/default/files/resources/n.3-record_of_conviction.pdf) (including lists of conviction documents that it is permissible and impermissible for an IJ to consult).

<sup>308</sup> See EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, THE IMMIGRATION JUDGE BENCHBOOK: INTRODUCTORY GUIDE: EVIDENCE 35–38, <https://www.justice.gov/eoir/immigration-judge-benchbook#intro> (last updated Aug. 24, 2017) (providing an overview of evidence rules in immigration court).

excluding wrongful convictions or otherwise wrongfully obtained or unreliable evidence from the hearings.<sup>309</sup>

Without the help of counsel, noncitizens in immigration proceedings may not understand how to speak about their crime, or how their crime is even relevant to their case.<sup>310</sup> Noncitizens could feel the need to excuse their criminal acts or renew their claim for innocence to an IJ, which could be irrelevant in circumstances where the noncitizen does not legally qualify to apply for relief, and detrimental in circumstances where the noncitizen actually does.<sup>311</sup>

Criminal defendants have the right to counsel because it is fair to have the opportunity to defend themselves when accused of conduct of which society does not approve.<sup>312</sup> Not only does re-litigation of a criminal case without counsel in the context of deportation proceedings deny a noncitizen their right to due process under the Constitution,<sup>313</sup> it also accepts that the U.S. criminal justice system is perfect in that everyone who pleads guilty to a crime or loses a criminal trial must have actually done the acts of which they were accused.<sup>314</sup> Innocent people are criminally convicted all the time, and individuals plead guilty to acts they did not commit because their punishment will be equivalent to the time they have already served while awaiting conclusion of their criminal case, among other reasons.<sup>315</sup> To deny counsel to individuals under such circumstances is to deny fundamental fairness, for which the U.S. Constitution is supposed to stand.<sup>316</sup>

## 2. Backlash and Difficulties

One of the biggest misconceptions about noncitizens, and thus a

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<sup>309</sup> See *id.* at 2 (“Relevance and fundamental fairness are the only bars to admissibility of evidence in deportation cases.”).

<sup>310</sup> See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

<sup>311</sup> See generally Caitlin Dickerson, *A Remote Town, a Closed-Off Courtroom, and a Father Facing Deportation*, NPR (Apr. 30, 2016), <http://www.npr.org/2016/04/30/476064078/when-immigrants-commit-crimes-they-can-be-punished-twice> (discussing how an immigrant, even after being coached by his lawyer otherwise, tried to excuse his previous conviction, potentially to his detriment).

<sup>312</sup> See U.S. CONST. amend. VI.

<sup>313</sup> See, e.g., U.S. CONST. amends. V, VI (guaranteeing a right against double jeopardy and guaranteeing assistance of counsel in criminal prosecutions).

<sup>314</sup> Cf. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited May 16, 2017) (listing the number of states where the Innocence Project has won exonerations and how many exonerates spent time on death row).

<sup>315</sup> See, e.g., *id.* (indicating the number of false confessions).

<sup>316</sup> See, e.g., U.S. CONST. amend. XIV, § 1.

significant barrier to accomplishing the right to counsel for noncitizens, is that noncitizens do not have rights under the U.S. Constitution because they are not citizens.<sup>317</sup> Even so, people on all sides of the political spectrum tend to believe that deportation actually is the punishment for criminal convictions, without understanding the true nature of deportation proceedings.<sup>318</sup> Yet providing counsel for noncitizens in deportation proceedings is not about letting criminals roam free in our country any more than providing counsel to criminal defendants is about letting criminals roam free. It is about fairness, an opportunity to be heard, and even efficiency of the courts.

If we are to treat deportation as a punishment, then at the very least, noncitizens should have the opportunity to understand what is happening to them, why it is happening, and what their options are, which is exactly how we treat criminal defendants when accused of a crime.<sup>319</sup> Having counsel in immigration proceedings does not lead to dangerous criminal immigrants roaming free to do whatever they please.<sup>320</sup> Having counsel in immigration proceedings simply means that the noncitizen who qualifies for a second chance under the immigration laws can put forward the best possible case in the most efficient manner.<sup>321</sup> The noncitizen who fears returning to their country because they have experienced government torture based on their political views will have the fairest chance at freedom from that persecution. And even the noncitizen who does not have any option or even desire to stay in the United States can figure out the most efficient way to leave while also preserving their right to return lawfully one day.<sup>322</sup>

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<sup>317</sup> See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)) (holding that noncitizens also deserve competent, effective counsel).

<sup>318</sup> See Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1348 (2011).

<sup>319</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

<sup>320</sup> See generally *Impact Litigation*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/what-we-do/impact-litigation/> (last visited May 16, 2017) (discussing the goals of the Immigrant Defense Project and the impact that it may have on immigrant communities).

<sup>321</sup> See EAGLY & SHAFER, *supra* note 109, at 2 (illustrating the impact that attorneys can have on proceedings involving immigrants).

<sup>322</sup> See generally CTR. FOR HUMAN RIGHTS & INT'L JUSTICE AT BOSTON COLL., *RETURNING TO THE UNITED STATES AFTER DEPORTATION* 6 (2011), <https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Returning%20to%20the%20US%20AfterDeportation%20-%20A%20Self-Assessment%20FINAL.pdf> (indicating that it is possible to return to live in the United States after deportation).

## V. IMPACT LITIGATION: A USEFUL TOOL

Impact litigation is one way that both citizens and noncitizens may have a say in how U.S. laws are shaped.<sup>323</sup> While voting is the most common way that citizens shape the laws of this country,<sup>324</sup> impact litigation provides a useful tool for noncitizens who are currently unable to vote in the United States.<sup>325</sup> Through civil litigation, noncitizens may bring claims against government actors who have violated their rights.<sup>326</sup> Though impact lawsuits are not always class-action claims,<sup>327</sup> the goal in bringing such claims is that the result will have a large positive impact on everyone who is similarly situated as the plaintiff who brought the suit.<sup>328</sup>

Bringing lawsuits against the government is a long, difficult, and complex process, but it is a way that noncitizens may shape the law when the law treats them unfairly.<sup>329</sup> Among other rights, legislatures have denied noncitizens of the ability to serve on juries while also denying noncitizen immigrant defendants the right to a jury of their peers.<sup>330</sup> Legislatures have denied noncitizens equal protection under the laws by deporting them for committing crimes while claiming that exile, banishment, and expatriation are barbaric and unconstitutional punishments for citizens.<sup>331</sup> Nonetheless, noncitizens are subject to prosecution under those same U.S. laws for committing crimes.<sup>332</sup> Because noncitizens may not vote, and therefore cannot vote legislators out of office, impact litigation may be the only chance they have of challenging, creating, and preserving laws that protect them from unjust treatment by the

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<sup>323</sup> See Lara Bergthold & Felix Schein, *Moving Forward Social Causes through Impact Litigation*, HUFFINGTON POST: BLOG (July 11, 2013), [http://www.huffingtonpost.com/lara-bergthold/moving-forward-social-causes-through-impact-litigation\\_b\\_3582680.html](http://www.huffingtonpost.com/lara-bergthold/moving-forward-social-causes-through-impact-litigation_b_3582680.html).

<sup>324</sup> See, e.g., U.S. CONST. art. I, § 1.

<sup>325</sup> See Daniel Kanstroom, "Alien" Litigation as Polity-Participation: The Positive Power of a "Voteless Class of Litigants," 21 WM. & MARY BILL RTS. J. 399, 413 (2012).

<sup>326</sup> See 42 U.S.C. § 1983 (2012).

<sup>327</sup> See Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 148 (1992).

<sup>328</sup> See *id.*

<sup>329</sup> See Kanstroom, *supra* note 325, at 413.

<sup>330</sup> See *Kafatia v. Adams*, No. CV 09-7119-CJC (SP), 2013 U.S. Dist. LEXIS 17663, at \*31-32 (C.D. Cal. Jan. 3, 2013) (first citing *Wright v. Van Patten*, 552 U.S. 120, 126 (2008); then quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973); and then citing *Perkins v. Smith*, 370 F. Supp. 134, 138 (D. Md. 1974)).

<sup>331</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>332</sup> See, e.g., *United States v. Zehe*, 601 F. Supp. 196, 198 (D. Mass. 1985) ("Nor is there any dispute that Congress has the power to prosecute both citizens and noncitizens for espionage committed outside of this country's territorial limits.").

2016/2017]

Enforcing Immigrants' Rights

1035

state and U.S. governments.<sup>333</sup> Protecting noncitizens from such unjust and unequal treatment is important in a country that was founded upon immigration and whose history of racial inequality has helped to shape citizens' protection of civil rights today.<sup>334</sup>

"Access to the courts—and the ability to sue in defense of our rights—has been critical to our evolution as a nation."<sup>335</sup> Impact litigation has been used to protect marriage equality, racial equity, treatment of prisoners, education quality, and immigrants' rights.<sup>336</sup> When the legislature is in opposition to immigrants' interests, and when immigrants do not have a say in how the legislature creates laws, impact litigation may not just be the most effective tool in protecting immigrants' rights, but may actually be the *only* tool.

## VI. CONCLUSION

It is high time that the U.S. government treats immigrants as equals in a society known for its civil liberties. People immigrate to the United States for a variety of reasons, but everyone, including U.S. citizens, hope to accomplish a version of the American Dream. While the United States has come a long way as far as affording due process and equal protection rights to noncitizens, it continues to treat immigrants as inferior beings who deserve less than U.S. citizens. For example, it is currently acceptable for the U.S. government to prosecute noncitizens as criminals without affording noncitizen defendants the right to have a jury of their peers or to serve on a jury. It is currently acceptable for the U.S. government to deport lawful permanent residents for committing the same crimes that U.S. citizens commit, while also maintaining that exile, banishment, and expatriation as forms of punishment for U.S. citizens are unconstitutional. At the same time, the government continues to deport immigrants as a punishment for crimes while refusing to label deportation as a "punishment," thereby denying constitutional protections, when in practice, deportation is an ultimate punishment akin to imposing the death penalty.

Because noncitizens have no say in how the laws are created (because they cannot vote), impact litigation is one of the only tools that immigrants have to ensure that their rights are protected in this country. Only one court has heard an equal protection

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<sup>333</sup> See Kanstroom, *supra* note 325, at 413.

<sup>334</sup> See generally U.S. CONST. amend. XIV, § 1 (providing due process and equal protection).

<sup>335</sup> Bergthold & Schein, *supra* note 323.

<sup>336</sup> See *id.*

challenge to a noncitizen's right to serve on a jury, but that court found against the noncitizen and for the state and federal interests of allegiance and loyalty. No court has heard an equal protection claim against the government for imposing deportation on noncitizens for committing crimes. While immigration reform continues to be stalled in the legislature with U.S. citizens fighting over what is right and what immigrants deserve, noncitizens can still have litigation as an essential tool to fight for what they are entitled to under the U.S. Constitution: equality and fairness in both the criminal justice and immigration systems.