Unjust Deserts: How the Modern Immigration System Lacks Moral Credibility

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On February 26, 2018, the mayor of Oakland decided to give a warning to residents of the North Bay of an impending action by Immigration and Customs Enforcement to find and arrest non-citizens for removal from the United States. Her office posted a statement on Twitter which among other things said, "My priority is for the well-being and safety of all residents—particularly our most vulnerable—and I know that Oakland is safer when we share information, encourage community awareness, and care for our neighbors."[1] Later on the same statement declares, "We understand ICE has used activity rumors in the past as a tactic to create fear; our intent is for our community to go about their daily lives without fear . . . ."[2] When asked to explain, an NPR article quoted her response, "Schaaf said the city's 'law-abiding immigrants and families . . . deserve to live free from the constant threat of arrest and deportation' and she considered it her duty and moral obligation . . . ."[3]

On a public level, the resistance to the current immigration regime can be seen through journalists and commentators who write about the harsh consequences of deportation and detention. New stories about sympathetic members of the community forced to be deported have become a staple of the media,[4] and not just for the national media but local ones as well.[5] Along with the

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[1] Libby Schaaf, (@LibbySchaaf), TWITTER (Feb. 24, 2018, 8:44 PM), https://twitter.com/LibbySchaaf/status/967621285890191361 [https://perma.cc/R7TZ-G6SY].

[2] *Id.* (citations omitted).

[3] Amy Held, *Oakland Mayor Stands by 'Fair Warning' of Impending ICE operation*, NPR (Mar. 1, 2018), https://www.npr.org/sections/thetwo-way/2018/03/01/589948064/oakland-mayor-stands-by-fair-warning-of-impending-ice-operation (citations omitted).

[4] *See* Christina Caron, *Michigan Father Deported after Living in U.S. for 30 Years*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/us/man-deported-jorge-garcia.html; Maria Sacchetti & David Weigel, *ICE has Detained or Deported Prominent Immigration Activists*, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.94729ebff4f3; Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her.*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html; Brent McDonald, John Woo & Jonah M. Kessel, *His Daughter Graduates. He Faces Deportation.*, N.Y TIMES: TIMES DOCUMENTARIES (Nov. 19, 2017), https://www.nytimes.com/video/us/100000005115187/ice-

media, the focus on the unjust and oftentimes harsh consequences of deportation are gaining traction with national politicians as well. Where once increased immigration enforcement was a bipartisan focus,[6] the Democratic Party has apparently shifted,[7] even enacting a short-lived government shutdown to support protection for childhood arrivals.[8] The consensus for many on the left has been that the Trump Administration in its actions on the travel ban, coupled with other immigration policies are racist, bolstered by President Trump's remarks during negotiations over DACA referring to countries from Africa and Haiti as "shitholes."[9] Democratic politicians have begun to take seriously the call for the abolition of ICE, and members of Congress have begun to explicitly endorse the defunding of ICE as an agency.

Not only has attention been paid to *who* the system is deporting, but increasingly critical attention has been applied to the manner of removal. For example, local attorneys in New York City staged a protest of ICE enforcement officers showing up in local criminal courts.[10] Local churches and congregations

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deportation-texas.html; Max Londberg, *A Federal Court Granted this Mexican National Asylum in Kansas. He was Deported Anyway*, THE KANSAS CITY STAR (Jan. 19, 2018, 12:02 PM), http://www.kansascity.com/news/local/article195579604.html.

[5] *See* Barton Deiters, *Kzoo Doctor Detained by ICE After 40 years in US*, WOOD TV (Jan. 20, 2018, 9:34 PM), http://woodtv.com/2018/01/20/kzoo-doctor-detained-by-ice-after-40-years-in-us/; Danielle Kennedy, *'We can get through this'- Granger restaurant owner faces deportation*, WSBT 22 (Mar. 8, 2017), http://wsbt.com/news/local/family-we-can-get-through-this-granger-restaurant-owner-faces-deportation; Nathaly Pesantez, *Sunnyside man deported today despite pleas from teenage daughters made yesterday*, SUNNYSIDE POST (Oct. 11, 2017), https://sunnysidepost.com/sunnyside-man-deported-today-despite-pleas-from-teenage-daughters-made-yesterday.

[6] The war on drugs ramp up of crimmigation happened under Ronald Reagan, but the AEDPA and IRAIRA regimes occurred under President Clinton, with President Obama representing the President who has deported more people than any other President from 1895–2000.

[7] Harry Enten, *Democrats Weren't Always Super Liberal on Immigration*, FIVETHIRTYEIGHT (Sept. 20, 2017, 2:34 PM), https://fivethirtyeight.com/features/democrats-werent-always-super-liberal-on-immigration/.

[8] Sheryl Gay Stolberg & Thomas Kaplan, *Government Shutdown Begins as Budget Talks Falter in Senate*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/us/politics/senate-showdown-government-shutdown-trump.html.

[9] Mark Abadi, *Poll: 48% of Americans Think Trump's 'shithole' Remarks Were Racist*, BUSINESS INSIDER (Jan. 16, 2018, 12:37 PM), http://www.businessinsider.com/trump-shithole-countries-comment-reaction-poll-2018-1.

[10] The World Staff, *NYC lawyers protest after ICE agents arrest immigrant at Brooklyn Courthouse*, PRI (Dec. 1, 2017, 5:00 PM), https://www.pri.org/stories/2017-12-01/nyc-lawyers-protest-after-ice-agents-arrest-immigrant-brooklyn-courthouse.

have offered "sanctuary" to those who fear deportation,[11] even as these actions may bring criminal liability.[12] A daughter of a sanctuary seeker explains the motivation to seek sanctuary, "They're telling you you have to turn yourself in because that's the law . . . [a]nd you're basically saying, 'No, I'm not going to do that because it's not just—because I haven't done anything wrong.'"[13]

On the local and state levels, resistance over deportation predated the 2016 presidential election, and is best exhibited by the passage of ordinances, decrees, and even state laws designed to both disentangle themselves from the deportation system and to protect their immigrant communities from deportation. "Sanctuary city" policies have been a reaction of the increasing pressure of the federal government to enlist local law enforcement in the deportation regime, and current efforts to create local policies of disentanglement has been because city officials believe that mass deportation causes harm to their communities, and that protecting against them is necessary, "to protecting fundamental rights, such as the right to live free from racial profiling, illegal searches and stops, and arrests lacking in probable cause."[14] Even in the face of threats to lose federal funding,[15] and ICE officials openly suggesting that city officials that support sanctuary policies should be subject to criminal prosecution,[16] state and local governments continue to pass laws intending to separate themselves with the deportation regime.

The federal judiciary, specifically federal district courts, who after the REAL ID Act of 2005 were statutorily "walled off" from examining deportation orders, have become increasingly involved in deciding the legitimacy of the deportation system. On January 29, 2018, Judge Katherine B. Forrest from the Southern District of New York issued an opinion that freed activist Ravi Ragbir who was detained and facing deportation. In her opinion, Judge Forrest stated:

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[11] Joel Rose, *Sanctuary Churches Brace for Clash with Trump Administration*, NPR (Feb. 16, 2017, 5:09 AM), https://www.npr.org/2017/02/16/515510996/colorado-church-offers-immigrant-sanctuary-from-deportation.

[12] *See* 8 U.S.C. § 1324 (2012).

[13] Brit McCandless, *Seeking Sanctuary in the Face of Deportation*, CBS NEWS (May 21, 2017), https://www.cbsnews.com/news/seeking-sanctuary-in-the-face-of-deportation/(citations omitted).

[14] Christopher N. Lasch et. al., *Understanding "Sanctuary Cities"*, 59 B.C.L. REV. 1703 (2018). *See also* Adam Edelman, *Sanctuary Cities: Three States, Three Very Different Approaches*, NBC NEWS (Oct. 8, 2017, 8:08AM), https://www.nbcnews.com/politics/immigration/sanctuary-cities-three-states-three-very-different-approaches-n808406.

[15] *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, DEP'T OF JUSTICE (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[16] *Acting ICE Director Wants Politicians in Sanctuary Cities Charged with Crimes*, CBS NEWS (Jan. 3, 2018, 11:51AM), https://www.cbsnews.com/news/acting-ice-director-wants-politicians-in-sanctuary-cities-charged-with-crimes/.

> It ought not to be—and it has never before been—that those who have lived without incident in this country for years are subjected to treatment we associate with regimes we revile as unjust, regimes where those who have long lived in a country may be taken without notice from streets, home, and work. And sent away. We are not that country; and woe be the day that we become that country under a fiction that laws allow it . . . . The wisdom of our Founders is evident in the document that demands and requires more; before the deprivation of liberty, there is due process; and an aversion to acts that are unnecessarily cruel.[17]

This invocation of due process and the Constitution comes even as the court acknowledges that the statutory scheme invoked by the government authorizes the detention of Mr. Ragbir. Other examples of federal judiciary actions to stop deportations of groups of people happened at a surprising rate in 2017 as four different district courts issued injunctions to stop deportations nationwide for Iraqis, Cambodians, and a more limited class to stop deportations of Indonesians and Somalis.[18]

The condemnation of the deportation system, from the media, individual community leaders, politicians, and the judiciary has important consequences. Though deportations will likely continue, the increasingly common view of the system as morally unjust has the potential to cause conflict and undermine compliance and cooperation with the system. This is one reason that ICE director Thomas Homan has condemned local politicians and even called for their arrest in supporting "sanctuary" policies, citing risks to ICE agents and requiring the increased use of resources, going so far as to promise more enforcement in areas that attempt to express disagreement on deportations through sanctuary policies or declarations.[19]

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[17] Ragbir v. Sessions, No. 18-cv-236 (KBF), 2018 U.S. Dist. LEXIS 13939, at *2 (S.D.N.Y. Jan. 29, 2018).

[18] *See* Agnes Constante, *Nonprofits Sue Over Immigration Detention of Cambodian Nationals Who Came as Refugees*, NBC NEWS (Nov. 3, 2017, 12:52 AM), https://www.nbcnews.com/news/asian-america/nonprofits-sue-over-immigration-detention-cambodian-nationals-who-came-refugees-n816861; Mukhtar M. Ibrahim, *Judge Extends Somali Deportation Ban Amid Abuse Claims*, MPR NEWS (Jan. 8, 2018), https://www.mprnews.org/story/2018/01/08/judge-halts-somali-deportations-abuse-claims-flight; Steph Solis, *Judge in N.J. Grants Emergency Reprieve to Indonesian Christians Facing Deportation*, USA TODAY (Feb. 2, 2018, 11:49PM), https://www.usatoday.com/story/news/nation-now/2018/02/02/judge-nj-grants-emergency-reprieve-indonesian-christians-facing-deportation/303379002/; Yeganeh Torbati, *U.S. Judge Orders Government to Release Iraqis or Grant Bond Hearings*, REUTERS (Jan. 2, 2018, 7:54 PM), https://www.reuters.com/article/us-usa-immigration-ruling/u-s-judge-orders-government-to-release-iraqis-or-grant-bond-hearings-idUSKBN1ES01D.

[19] Jonathan Blitzer, *In Calling for Politicians' Arrest, An ICE official embraces his new Extremist Image*, THE NEW YORKER (January 4, 2018), https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image.

While the media and politicians generally decry the cruelty of the system, academic critiques have mostly focused on the lack of procedural fairness in the deportation regime. Scholars in the last fifteen years or so have begun to describe and raise the alarm over how the immigration system has increasingly begun to resemble the criminal justice system.[20] The "modern" deportation system has increasingly adopted the tools and trappings of the criminal justice system.[21] This increasing criminalization of immigration law has alarmed many scholars, especially as they point out the asymmetry of what has been incorporated.[22] To many, this asymmetry exposed the fundamental unfairness of the system itself.[23]

The academic focus on procedural fairness is not surprising given how one immigration judge described her job as imposing the death penalty in traffic court.[24] The quote is remarkably evocative as one imagines the chaos and lax procedural protections in traffic court as having dire and severe consequences. Continuing research shows that perceptions of fairness directly affect views on legitimacy and therefore can promote or undermine compliance with the law. Yet, while most attention has centered on the "traffic court" aspect of the quote, less academic interest has been drawn to the "death penalty" nature of the deportation system.

Scholars have examined how the lack of moral credibility can undermine compliance with immigration law. For example, Professor Emily Ryo examined the historical reasons why the Chinese continued to flout the Chinese Exclusion

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[20] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign* Power, 56 AM. U. L. REV. 367, 378 (2006); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1686 (2009).

[21] *See* Katie Annand, Note, *Still Waiting for the DREAM: The Injustice of Punishing Undocumented Immigrant Students*, 59 HASTINGS L. J. 683 (2008); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2273 (2013); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad* Cases, 113 HARV. L. REV. 1890, 1892 (2000); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); 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, 4 (2011); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC IRVINE L. REV. 415, 417 (2012).

[22] *See* Legomsky, *supra* note 26.

[23] *See supra* note 21; Maisie A. Baldwin, Note, *Left to Languish: The Importance of Expanding Due Process Rights of Immigration Detainees*, 102 MINN. L. REV. (forthcoming 2018).

[24] Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29AM), http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html.

laws and entered the borders through Mexico and Canada continuously.[25] She concluded that Chinese attitudes towards the policy, such as perceptions of unfairness and racism, coupled with "opportunity structures," helped fuel the lack of respect for immigration laws by the Chinese and led to unauthorized entry from both the Canadian and Mexican border.[26] She also examined the attitudes of unauthorized migrants, concluding that their views on the system's lack of legitimacy fuel non-compliance with immigration laws designed to prevent unauthorized migration.[27]

What has not been discussed in as much detail, is how the deportation and detention regime violates moral credibility, and consequently how it lends to perceptions of unjustness. Using some of Professor Ryo's analysis, and her framework of "Neutralization" theory I conclude two primary features of a legal system will determine perceptions of moral legitimacy; (1) culpability, in other words are the blameworthy being punished and the innocent not, and (2) arbitrariness are the factors that decide punishment cognizable and not based on luck or illegitimate bases such as racism. I examine the deportation systems under these two axis to help understand why the larger community and not just the subjects of deportation may view the systems as lacking moral credibility. If the system violates a community's norms for justice, then not only would it have difficulty encouraging compliance, but it would also face resistance from the community and hamper cooperation.

I argue that the deportation system's lack of moral credibility is one reason that it has produced increased resistance on the local and state level. While focus should continue on the system's lack of procedural protections and adjudication norms, a detailed examination of whether and how the deportation system lacks moral credibility in the punishment context is overdue. I argue that components of a just punishment system would include a proper consideration of culpability and would avoid arbitrariness. However, after identifying how the deportation system lacks moral credibility, I conclude that the only viable option is for the system is to abandon two features of deportation that only recently have become major features of the system; removals based on crime and the use of detention.

Using the criminal system to make proxy judgements on those deserving or not of deportation undermines the moral framework of deportation. The criminal system has jurisdiction over all people, citizens and non-citizens alike, and imposing deportation (and detention) as a direct consequence of criminal activity necessarily imposes a new tier of punishment. However, this new tier of punishment is only applicable to non-citizens and if we take seriously the role of

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[25] Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 L. & SOC. INQUIRY 109 (2006).

[26] *Id.*

[27] Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015).

the criminal system in imposing moral norms, creates an untenable situation that forces non-citizens to conduct themselves by a completely different set of norms than do citizens, without any justification other than "citizens" are immune.

Part I of the article will outline the importance of moral credibility in promoting compliance and cooperation with the law. I will also describe two main features of a morally credible system—whether it considers questions of culpability and arbitrariness. Part II will examine two troublesome features of the deportation system: removal of "criminal" deportees to countries of origin (or citizenship) and detention of non-citizens in the deportation system. Finally, in Part III I argue that the use of detention and criminal based removals are incompatible for a just, and therefore an ultimately workable system of deportation and removal.

I. THE ROAD TO COMPLIANCE WITH THE LAWS OF REMOVAL

Those found guilty of a criminal offense can be substantially deprived of their life, liberty, or property. For example, one could be sentenced to death when found guilty of committing a particularly heinous crime.[28] The taking of these liberties are legitimized by the underlying theoretical principle that these punishments serve a legitimate function of government. Even under civil law, punishments can include the loss of one's business, ability to be employed in one's career, one's home, and one's savings (through the imposition of fines). What social science research is showing in increasingly clear ways, is that in order to meet the goals of either criminal or civil punishment efficiently, the punishment must be viewed as legitimate.[29] In order for a punitive system to be legitimate, it must both be *procedurally fair* and have *moral credibility*.[30]

One of the key components of effective punishment is its ability to impose a social norm to follow the rules and commands of the system—even if there may be some ambiguity as to the individual rule that is being imposed. For instance, when the law sets an age requirement of 21 for people to drink lawfully, the general norm of rule compliance should win out even over those who think that 19 or 20

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[28] Some states have done away with capital punishment, however more than half of the states (30 out of 50) still permit the death penalty in the United States. *States with and without the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Oct. 11, 2018), https://deathpenaltyinfo.org/states-and-without-death-penalty.

[29] *See* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH, PUB. POL'Y & L. 78 (2014); Ryo, *supra* note 27, at 630 ("[t]ax scholars . . . have advocated that the Internal Revenue Service 'adopt a tax morale approach to tax compliance that recognizes the importance of taxpayers' international motivations.'") (citations omitted). *See id.* at 638, nn.79 & 81.

[30] Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012).

year olds should be allowed to drink. As social science has shown, the fear of punishment, and its severity, is ineffective in creating those norms—while alignment with community views of morality have been found to be far more effective.[31] The social norm of compliance expresses itself in the system through the creation of a stigma.[32] The stigmatizing effect does more than just ensure compliance of those subject to the law, but it also creates cooperation between communities and law enforcement. For instance, community institutions are far more likely to help detect and even apprehend law-breakers that are properly stigmatized. However, stigma can only be created if the law does not violate the moral credibility with the community.[33]

A. *Utility of Desert, and the Procedural Justice Model*

The question of how to foster compliance with the law has been one of the central inquiries in criminology, but has not just been the province of lawyers, but also psychologists and sociologists as well. Tom R. Tyler's book *Why People Obey the Law*, used a survey designed to ascertain the attitudes of Chicago's residents on compliance with the law and its legitimacy. Much of the literature that came before focused on what he described as the "instrumental" model of law compliance—namely "people are viewed as shaping their behavior to respond to changes in the tangible, immediate incentives . . . gains and losses resulting from different kinds of behavior. In other words, "increasing the severity and certainty of punishment for committing a crime has frequently been viewed as an effective way of reducing the rate at which the crime is committed."[34] Professor Tyler, based on his survey findings and analysis concluded that the instrumental model

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[31] *See* Ryo, *supra* note 27, at 638.

[32] *See* Bowers & Robinson, *supra* note 30, at 217. *See also* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 118 (2010) (arguing that "stigma is the substantive concern that separates retribution from regulation, punishment from public safety."). The author argues that "stigma, not just time in confinement, is identified as a liberty interest." *Id.* at 137. He also posits that "the presence or absence of stigma explains the difference between deprivations which require *Apprendi/Winship* protections and those which do not." *Id.* For more information on the argument concerning the Civil/Criminal Divide, *see* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L. J. 1325 (1991); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L. J. 1 (2005); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795 (1992); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 202 (1996); Paul H. Robinson, *Forwarded: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993).

[33] *See* Bowers & Robinson, *supra* note 30, at 217.

[34] TOM TYLER, WHY PEOPLE OBEY THE LAW 3 (Princeton Univ. Press ed., 2006) (citations omitted).

was insufficient, and that *normative* models were often much more influential in shaping compliance with the law.

A normative model can be summed up as:

> [i]f people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules. They will feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law. This normative commitment can involve personal morality or legitimacy. Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior.[35]

Since his book, others have gone on to show that "instrumental" views are less effective in fostering compliance than normative ones.[36] Professor Tyler, when describing both normative models, discusses perceptions of fairness as associated with legitimacy and perception of morality.

The legal scholar, Paul Robinson, has used Professor Tyler and other researchers to make the argument that the normative instrument's morality aspect fits well with a view of "retributive" model of criminal punishment. In attempting to bridge the long-running conflict over whether criminal law should concern itself primarily with utilitarian concerns or with punishment, Professor Robinson has posited his theory of "the utility of desert."[37] Just as Professor Tyler talked of the benefits of self-regulation, Professor Robinson argued that the best way to accomplish many of the utilitarian goals of criminal punishment, would be to ensure that it also conforms to a communal sense of justice, namely punishing those who deserve punishment according to the severity of their transgressions. As he writes:

> The criminal law's power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to criminal law's moral credibility. If criminalization or conviction (or decriminalization or refusal to convict)

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[35] *Id*. at 3–4

[36] *See* Raymond Paternoster, *How Much do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010) (discussing several studies on compliance); Tom Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

[37] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997).

> is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation, and for decriminalizing and not punishing that which does not. If, instead, the criminal law's reputation is one simply of a collection of rules, which do not necessarily reflect the community's perceptions of moral blameworthiness, then there would be little reason to expect the criminal law to be relevant to the societal debate over what is and is not condemnable and little reason to defer to it as a moral authority.[38]

Professor Robinson accepted the general premise of Professor Tyler's work in recognizing the two modes of normative analysis, but he goes on to argue that one mode is more important. Robinson argues that moral credibility likely has a stronger effect of creating compliance to the law than a system with procedural protections, and pointed to Professor Tyler's own results from the Chicago study for support.[39] Professor Robinson agreed that procedural fairness, and thus legitimacy, has a strong and important role in compliance decisions, but he argued both pragmatically and theoretically that moral credibility plays the more important role.

This position finds support from the work of sociologist Malcolm Feeley. In *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, he argued that even in the absence of *procedural* justice, a criminal system can still produce substantive justice.[40] While most immigration legal scholars tend to discuss and focus on the lack of, or need to improve the procedural protections for those placed in the removal system, there hasn't been as much corresponding focus on the moral credibility (substantive justness) of the system.

Not only does normative views of the system help foster compliance under the law, but it also serves an important interest in community involvement to both detect and catch lawbreakers. On the other hand, if the set of laws are viewed by the community as not morally credible, it "may provoke resistance and subversion, and may lose its capacity to harness powerful social and normative influence."[41] A communal sense of moral justice helps foster social norms of compliance and shared responsibility against law breaking. Because people are far more likely to comport themselves to certain norms of behavior if they believe that actions are socially (un)acceptable, a morally credible system helps set social norms that can

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[38] *Id.* at 477.

[39] Bowers & Robinson, *supra* note 30, at 278 n.310.

[40] MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 283 (Russell Sage Foundation ed., 1992). He argued that despite the lack of procedural norms in the misdemeanor courts, actors were often still able to come to substantive results that complied with notions of justice.

[41] Bowers & Robinson, *supra* note 30, at 212.

propagate even close calls or ambiguous situations. Moral credibility works by creating a social stigma against non-compliance, which can only be effective if the overall system is viewed as a moral authority.[42] Not only is it important to make sure that subjects of the law comply with its dictates, but it goes further, creating norms and shared responsibility by the community to enforce the law. Without the stigma and a shared sense of responsibility, or even worse a system that violates a communal sense of justice, the likely result is the creation of resistance and active undermining of law enforcement. The operation of the legal system relies on the cooperation of "the system's witnesses, jurors, police, prosecutors, judges, offenders, and others."[43]

B. *Application of Normative Instruments to Immigration Law*

Emily Ryo's body of work has applied the lessons of Tom Tyler and others to the area of immigration law in both interesting and important ways. She has examined the subjective attitudes of unauthorized migrants from Mexico and Central America, both before and after their entry[44] and showed that authorized migrants tend to have sophisticated systems of moral judgment on the immigration system that prevents and punishes them from entering with status.[45] Moreover, she has even gotten into the historical record to attempt to ascertain the attitudes of Chinese Immigrants who crossed without authorization during the Chinese Exclusion Era.[46] Essentially, she has managed to view two different population groups who flouted the same type of immigration restrictions, despite their existence in completely different historical periods. She has taken the important task of examining what these two groups' normative views were on the laws that were preventing them from entering the United States.

These studies managed to show that both groups, the Chinese migrants and modern migrants from Mexico and Central America, had strong reasons to feel their exclusion was unjust and unfair. The survey results were clear; both groups felt that their exclusion was unjust, was motivated by racism, and was therefore worth fighting against. The Chinese had no reservations about continually crossing over, dressing in disguises, and resorting to extreme measures to enter clandestinely. The more a group felt that the laws were unfair, the higher the likelihood of making an unauthorized entry. The results were widespread non-compliance.

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[42] *Id.* at 217.

[43] *Id.*

[44] Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CALIF. L. REV. 999, 1016–18 (2017). See also Ryo, *supra* note 27.

[45] Ryo, *supra* note 44, at 1024–34.

[46] Ryo, *supra* note 27.

Professor Ryo had another study that examined something other than the system of exclusion, but rather delved into the attitudes of those being deported. This study examined the attitudes of detainees held in an Orange County Jail holding ICE detainees awaiting deportation.[47] While this study did not attempt to measure *compliance,* it did attempt to discern the potential for legal cynicism.[48] I will examine in more detail this study *infra* but it is an important start to the questioning of whether our system of deportation—not just exclusion—has moral credibility. It is important to note at the onset, that evaluating the moral credibility of the deportation system has slightly different challenges than in the criminal or even in the immigration exclusion context.

When examining compliance with the law in criminal terms, it is easy to understand why the "communal" sense of moral credibility would be members of the entire community. Everyone is subject to our criminal justice system. In fact, any immunity or exclusion would likely lead to moral outrage. When examining the rules on *exclusion*, it is easy to confine the analysis to those who are actually excluded. This is the population that these laws were targeting, and perhaps more importantly also the ones which the people were deciding whether to violate. However, an examination of the moral credibility of deportation does not appear to be easy to answer on whose attitudes are most important. The compliance of those subject to potential deportation seem to be more difficult to conceptualize. Because many of the violations that lead to deportation are already inextricably intertwined with rules of exclusion, the question of whether *deportation* is morally credible can be blurred with whether the exclusionary rules are morally just. One example would be the deportation of those who entered without authorization. What is unjust, their inability to enter the United States given a lack of visas for certain populations such as Mexicans and Central Americans? Or is the system that requires their removal? Another example could include the deportation of those who entered fraudulently, but again this is intertwined with the exclusionary process as presumably they only entered with fraud because they could not enter otherwise.

This does not mean there aren't ways to decide which communal attitudes are important. First, there is compliance with the deportation *process*, i.e. do people go to their court hearings, do they comply with orders of removal, and do they report when required. Second, the views on moral credibility and legitimacy are not confined to the group most affected. Tom Tyler and his colleagues examined police behavior towards Muslim Americans and concluded that acceptance of the role of moral credibility goes beyond controlling potential lawbreakers, but also to the community actors who are instrumental in enforcing the law.[49] This spillover

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[47] Ryo, *supra* note 43, at 1016–19.

[48] *Id.*

[49] Aziz Z. Huq, Tom Tyler & Stephen Schulhofer, *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL., PUB. POL'Y & L. 419, 427 (2011).

effect is important, for it means that the subjective notions of moral credibility should not be only confined to those who the law seeks to control.

The role of communal actors has taken on an increasingly large burden in terms of the deportation system. The logistical difficulties and resource restraints on federal actors have caused the enlistment of state and local law enforcement, and community institutions in an effort to help detect, and detain those who may be subject to deportation. The ability to harness the community's norm setting power, much less the increased availability of resources for detection and apprehension, requires cooperation, which in turn requires accepting that the system that is being assisted is in fact morally credible. In deciding *which* communal norms to examine, the decision must be the larger society's norms.[50] While a survey of views by the public on the deportation system would be instructive, in the absence of such an effort, distilling common features of what a just system should include can be a sufficient means of evaluating the moral credibility of the deportation system when examining society overall. However, I recognize that this endeavor may seem more akin to what Professor Robinson deemed to be a deontological view of moral justice, rather than the "empirical desert" view that takes actual account of community norms.[51] I accept this potential criticism, though I have endeavored to try and cast the questions about the moral norms less in terms of whether a particular practice or outcome is unjust, but rather when the outcome is devoid of *considerations* that are important to a just system.

C. *What Dimensions Must be Considered in Order to be Morally Credible?*

While many different contours affect the moral credibility of a punishment or justice system, there are two main features that a system must match community and perceptions in order to gain credibility. The first involves culpability: i.e., the punishment must fit the crime, which also includes the avoidance of punishing the blameless. Second, the system must not be arbitrary—punishment must be rational and not illegitimate.

Focus on these two features for establishing moral credibility is warranted by their relationship to what Professor Ryo describes as "Neutralization" Research. According to researchers, in order to break the law, there are several types of "rationalizations" used by people in order to justify their decision.[52] Examining the rationalization used by non-compliant people helps explain what norms are inherently required in order to be viewed as morally credible. In other words, what features or lack of features would make it easier to rationalize becoming

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[50] Ingrid Eagly, *Criminal Justice for Non-Citizens: An Analysis of Variations in Criminal Enforcement*, 88 N.Y.U. L. REV. 1126 (2013).

[51] Bowers & Robinson, *supra* note 30, at 216.

[52] Ryo, *supra* note 27, at 641.

noncompliant. In Professor Ryo's study of unauthorized migrants inside the United States she found some common attitudes. First were the attempts by the migrants to cast themselves as unworthy of blame—either through a lack of volition, or loyalty to their family and their needs.[53] For example, one subject explained, "When I came over, I made my decision because I have two sons and I am a single mother," she continues by explaining that her job was not enough to pay for her children's education.[54] Migrants explained that they caused no injury and that they did not take jobs or opportunities from U.S. Citizens.[55] Second, they pointed out that the immigration system either favored the rich, was racially biased or arbitrary.[56] Roughly, both types of objections fit into our notions of punishing only those who deserve it—culpability, and avoiding arbitrary and illegitimate outcomes.

D. *What Is Meant by Culpability and Proportionality?*

The Eighth Amendment of the Constitution requires punishment to be proportional.[57] Scholars state that there are two elements that need to be assessed to determine blameworthiness: (1) the nature and seriousness of the crime, and (2) culpability (discussed below).[58] An underlying justification for having the punishment be proportionate is overall fairness to those involved in the system.[59] Thus, someone who commits a minor offense should not be subjected to the death penalty (which is typically reserved for the most heinous of crimes). While jurists often agree that punishment should not be "grossly disproportionate" to the blameworthiness of the offender, there is not much consistency amongst jurists and scholars on how to determine if a punishment is "grossly disproportionate."[60] Nonetheless, even if a particular disproportionate punishment can pass constitutional muster the overall system still must exhibit a structural reflection of proportionality expected by the community; being constitutional does not mean it is morally justified.

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[53] *Id.* at 650–51.

[54] *Id.* at 651.

[55] *Id.* at 653.

[56] *Id.* at 657–63.

[57] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[58] Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005).

[59] Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1838 (2012).

[60] *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 572–73 (2005).

One feature in modern criminal law that reflects the value of proportionality is *mens rea*. Mens rea is the recognition that an individual's motivation and knowledge should affect their culpability and therefore the level of punishment. A classic example of mens rea's reflection on proportionality and culpability is with homicide. For example, research has suggested that individuals have typically agreed with the tendency " . . . in the modern legal codes to distinguish grades of offenses within as well as between offenses, and typically favored additional grading distinctions not made by the Code."[61] Differences in grading is appropriate for murder; an individual who intended to kill should receive a higher sentence than one who killed recklessly or negligently. Thus, the sentence one receives should be in proportion to the offender's moral blameworthiness. If one is convicted of a "higher" offense, such as First-Degree Murder, as opposed to Manslaughter, the offender should receive the higher sentence that correlates with the crime. The modern legal codes take proportionality into account by punishing "greater" offenses harsher than "lesser" offenses (i.e. Felonies vs. Misdemeanors). While individual communities and systems can choose how and what can be considered as factors of proportionality, there must be a cogent system in place.

Aside from proportionality, another important aspect of culpability is the ability to distinguish when conduct no longer becomes blameworthy and therefore should not be punished based on certain circumstances. Culpability in this context is not the graduated scale of blameworthiness, but rather the binary question of whether a person should be punished at all. Where proportionality assumes that a person is guilty of an offense, but requires that the punishment meted to be proportional to the seriousness of the crime, culpability in this context recognizes that in certain situations punishment is not warranted. Evaluating the culpability requirement to determine the system's moral credibility is essential, if the system punishes people that the community finds blameless than the law is unjust.[62]

For example, the modern criminal justice system recognizes that there are certain people who due to either age or illness are blameless actors. A person may be able to argue that their mental illness made their actions blameless—an insanity defense doesn't merely downgrade guilt, it alleviates it entirely.[63] Similarly, the Federal Juvenile Delinquency Act[64] recognizes that no criminal liability can attach for children of a certain age who commit crimes. The federal system views 12-year-olds as incapable of criminal liability.[65] Even as some state courts can occasionally allow for extraordinary cases that do attach criminal liability to young actors, the juvenile court system of most states also recognizes that children are by their nature not normally criminally liable.

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[61] Bowers & Robinson, *supra* note 30, at 245.

[62] Sara Taylor, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810 (2012).

[63] MODEL PENAL CODE § 4.01–04 (AM. LAW INST., Proposed Official Draft 1962).

[64] *See* 18 U.S.C. §§ 5031–42 (2012).

[65] *Id.*

The justice system may also recognize that certain situations would justify what would otherwise be a crime. For instance, defense of others, "stand your ground," or duress defenses recognize that normally blameworthy actions could be justified. A morally just system must be able to differentiate situations where an otherwise punishable action could be justified that not only would lessen guilt, but would actually excuse it entirely.

It is important to note that not all punishment systems must treat these situations identically to be considered morally credible, rather they must be able to express the communally shared value of what situations or circumstances that would excuse conduct. For instance, the debate over killings by police is a struggle over the question of when homicide can be excused. Are police receiving a different standard for consideration of using deadly force when feeling threatened when compared to the public, and, if so, should this treatment be justified?[66] Similarly, "stand your ground" laws reflect at least a state legislature's view on when force can be used in self-defense.[67]

E. *What Is Meant by Arbitrariness?*

Finally, in order for the criminal justice system to have moral credibility, the punishment regime must not be arbitrary.[68] If two people are committing the same crime, under the desert theory they both should be treated the same. If, for example, the punishment regime becomes one that is focused on "other factors" the system of punishment becomes arbitrary and loses its legitimacy.[69] For example, Robinson criticizes the incapacitation-based sentencing system because it takes other factors into account for its distribution of liability, such as race, gender, and age. Thus, someone who committed the same offense could be held to a greater sentence based on other extraneous factors that have no bearing on the offender's moral blameworthiness.[70]

Moreover, as Vincent Chiao posits: "A desert-sensitive, and hence nonarbitrary, distribution of punishment is one that punishes those who are

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[66] *See* Daniel Lathrop & Anna Flagg, *Killings of Blacks by Whites Are Far More Likely to Be Ruled 'Justifiable'*, N.Y. TIMES: THE UPSHOT (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/upshot/killings-of-blacks-by-whites-are-far-more-likely-to-be-ruled-justifiable.html.

[67] German Lopez, *He Killed Someone in a Parking Space Dispute. But Police Say He Just Stood His Ground*, VOX (Aug. 13, 2018), https://www.vox.com/identities/2018/7/23/17602312/stand-your-ground-florida-michael-drejka-markeis-mcglockton.

[68] Arbitrary can be defined as: "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will." *Arbitrary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/arbitrary (last visited Jan. 11, 2018).

[69] *See* Robinson, *supra* note 36, at 467–68.

[70] *Id.*

(legally) deserving, and in proportion to their desert. A desert-insensitive distribution of punishment is one that exhibits significant misfit between imposed punishment and comparative desert."[71] Much scholarship has surrounded the arbitrariness of the death penalty, and how the capital punishment system must remain fair and equal amongst offenders to be considered legitimate.[72] Thus, when the criminal justice system is not treating offenders with the same blameworthiness equally, and taking into consideration factors that may be morally suspect, such as race or class, the system becomes arbitrary and loses its moral credibility. The actions of the criminal justice system must be in furtherance of the underlying justifications for punishment.[73]

Arbitrariness is not defined in the narrow context, i.e. situations whereby outcomes are not consistent or fail to follow any rationale, but rather arbitrariness includes outcomes that are driven by what the community would view as illegitimate considerations—such as wealth and race. All class-based or race-based outcomes would be considered arbitrary because the punishment would not be related to the actual conduct being controlled.

In order for a punishment to be considered morally credible (substantively legitimate) it must reflect values of proportionality, be able to distinguish between the innocent and the guilty, and the punishment must not be arbitrary through unfair or discriminatory enforcement practices.

II. HOW THE IMMIGRATION SYSTEMS OF DEPORTATION AND DETENTION LACK MORAL CREDIBILITY

Aside from the death penalty, there are few sanctions that are more severe and feared than deportation and incarceration. The Supreme Court has stated that "[d]eportation may result in the loss 'of all that makes life worth living.'"[74] The Court also described avoiding incarceration as the "[i]nterest in securing that freedom, the freedom 'from bodily restraint,' lies 'at the core of the liberty

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[71] Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 281 (2012).

[72] *See Id.* "In general, . . . when critics complain of arbitrary enforcement, what they seem to mean is arbitrariness from the point of view of desert. Those who receive death sentences are no more culpable than those who do not; some wrongdoers receive lighter sentences than others guilty of the same crimes; the person who takes all reasonable precautions but nevertheless commits a strict liability offense is liable for causing harm although his wildly reckless, but extremely lucky, twin is not." *Id. See also* Jeffery L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998); Patrick Lenta, *Desert, Justice and Capital Punishment*, 2 CRIM. L. & PHIL. 273 (2008).

[73] *See* Bowens & Robinson, *supra* note 30, at 212.

[74] Bridges v. Wixon, 326 U.S. 135, 145 (1947) (Murphy, J., concurring) (citing Ng Fung Ho *et al.* v. White, 259 U.S. 276 (1922)).

protected by the Due Process Clause.'"[75] Yet, the modern deportation system dispenses with sanctions freely and with increasing regularity. The current rate of deportations in the last decade (2008–2018) not only exceeds the rate in any other decade, but in the entirety of the history of the United States.[76] In other words, there have been more people deported in the last ten years, than all of the years that preceded 2008.[77] The rate of immigration detention is no less alarming. With nearly 43,000 people detained on any given day and over 400,000 people detained by ICE in the last year, immigration detention has become the single largest system of incarceration in the country.[78] As alarming and remarkable as the sheer numbers may appear, it is not numbers alone that has caused the modern deportation system to lose moral credibility. Deportation as a sanction has little flexibility, and its costs on individuals vary greatly based on factors outside of the imposing system—deportation to a country marked by violence, corruption, or even illness can be markedly different than deportation to a stable, prosperous and peaceful nation. While incarceration and detention in the criminal context can be flexible, its use in the immigration setting has transformed the process itself into a type of punishment—much as the use of pre-trial detention in the misdemeanor court system in Connecticut described by Malcolm Feeley did in the late 1970s.[79]

In this section, two features of the immigration system, crime based deportation and immigration detention, are examined on their ability to account for and address communal notions of culpability and arbitrariness. Under these measurements, the immigration regime of removal fails miserably, as the current system not only is unable to conform to the moral imperatives of a just punishment, but wholly ignores them altogether.

A. *Deportation*

There are essentially three different categories of "offenses" that can result in one's deportation. These different categories of offenses are what lead to the sanction of deportation. The first is entering the United States without engaging in the proper procedures or in violation of those procedures. This doesn't just include border crossers, but can also include those who enter using false documentation or

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[75] Turner v. Rogers, 564 U.S. 431, 445 (2011) (citing Foucha v. Louisiana, 504 U.S. 71, 81 (1992)).

[76] Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661.

[77] *Id.*

[78] César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 247 (2017).

[79] *See* FEELY, *supra* note 40, at 209–13.

through the use of fraud.[80] The second categorical group would include those who violate the explicit or implicit conditions of their entry. Explicit conditions include honoring time limits, or conditions on employment,[81] while implicit conditions would include crime-based removals.[82] The third category of offenses that can result in deportation are those who do not violate any procedures of entry, but are nonetheless found to not warrant entry. This category is extremely limited as most determinations of desirability for entry are made prior to physical arrival—the lone exception are those who seek refuge at our ports of entry.[83] These categories do not conform to the Immigration and Nationality Act's ("INA's") own system that attempts to separate people into those "seeking admission" (which is how the statute treats undocumented border crossers)[84] from those who are being "deported."[85]

1. Proportionality & Culpability

The result of finding oneself, often against one's will, in a country that one either deliberately chose to leave or does not consider one's home, can either be inconvenient or a death sentence. It is this wide range of effects coupled with the binary aspect of deportation itself—what Juliet Stumpf describes as an "on-off" switch[86]—that makes the sanction of deportation fail the test of proportionality. It is this binary nature—either one is deported or one is not, that makes it extremely difficult to meet the proportionality requirement.

As described above, deportation is the result of various different types of offenses, all of which can be viewed as having different levels of moral liability. While spies and those who threaten national security can be deported,[87] so can those who overstayed their visa by a week or even a day.[88] The severity of the offense has no effect on the level of punishment since there is only a single level of

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[80] *See e.g.* 8 U.S.C. §§ 1325–26 (2012); 8 U.S.C. § 1182(a)(6)(C)(i) (2012).

[81] 18 U.S.C. § 1546 (2012).

[82] *See* 8 U.S.C. § 1182(a)(2) (2012).

[83] 8 U.S.C. § 1158 (2012).

[84] *Compare* Immigration and Nationality Act (INA) § 235 (current version at 8 U.S.C. § 1225 (2012)) *with* Immigration and Nationality Act (INA) § 212 (1952) (current version at 8 U.S.C. § 1182 (2012)).

[85] INA § 237 (current version at 8 U.S.C. § 1227 (2012)).

[86] *See* Stumpf, *supra* note 20, at 1691.

[87] Immigration and Nationality Act (INA) § 237(a)(4) (current version at 8 U.S.C. § 1227(a)(4) (2012)).

[88] Immigration and Nationality Act § 237(a)(1)(C) (current version at 8 U.S.C. § 1227(a)(1)(C) (2012)).

punishment available.[89] This scheme on its face violates the maxim that the "punishment shall fit the crime."

Even when accounting for potential relief from removal, deportation cannot adjust to different levels of harm and immoral behavior. For instance, within the first category of offenses, a person can be deported for using fake documentation or fraud.[90] However, there exists a fraud waiver which can be employed if one can show hardship to a U.S. citizen or lawful Permanent Resident family member.[91] For those who can show such a hardship, deportation can be avoided. Yet, because many forms of relief are exclusively concerned with hardship to a relative who happens to have citizenship, it doesn't actually change the sanction based on the nature of the offense.[92] In other words, two virtually identical people may commit the exact same offense, for the exact same reasons, and yet one will avoid deportation based on his or her relationship to a person who would suffer harm. This is common with forms of relief and a large reason why relief does not normally affect proportionality.[93]

Even the availability of relief does not often have a relationship to the blameworthiness of the offense involved. For instance, two lawful permanent residents may commit the same crime, an aggravated felony, but one entered the United States first as a student before getting their green card, while the other may have entered the United States with a Green Card after marrying a U.S. Citizen abroad. The first lawful Permanent Resident would be eligible for a 212(h) waiver, allowing him or her to show hardship to a citizen or permanent resident

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[89] While one common critique of immigration violators is the general notion that the blame attaches to the violation of any set of immigration laws, i.e. "lawbreakers" this critique in this context assumes that the set of laws are morally credible. However, because accepting this view would result in a tautological analysis (the laws are morally credible because breaking laws is morally unjust), the question that needs to be answered is whether the laws that are being violated have moral credibility—and in this context—whether they consider questions of culpability and proportionality. Whether the laws that require deportation have moral credibility is a function of whether they can distinguish what offenses may have different levels of condemnation as viewed by society generally. It is important to note that not everyone will share what level of blame to assign to different offenses, certain segments may view any violation equally culpable, but overall, a more likely shared societal view would recognize that some offenses that lead to deportation are less morally culpable than others.

[90] *See* 8 U.S.C. § 1182(a)(6)(C)(i) (2012).

[91] Immigration and Nationality Act § 212(i) (current version at 8 U.S.C. § 1182(i) (2012)).

[92] A comparable analogy would be the existence of immunity defenses does not change that the offense is punished in a particular way.

[93] *See* Immigration and Nationality Act (INA) § 240A(b) (current version at 8 U.S.C. § 1229(b) (2012)) (cancellation of removal), or Immigration and Nationality Act (INA) § 212(h) (current version at 8 U.S.C. § 1182(h)) (2012) (waiver).

relative, while the second would not be.[94] Moreover, because relief from removal is extremely restricted, there is little opportunity overall for any relief to inject proportionality.[95]

Proportionality is a function not just of calibrating the punishment to the blameworthiness of an offense, but also the severity of the penalty to different individuals.[96] Would deportation for one person mean a punishment of a completely different nature and severity than deportation for another? The answer is clearly yes. First, because deportation's effects depend on the citizenship of the deportee, deportation as a sanction means different things to different people. *The New Yorker* reported on how some deportations are death sentences.[97] For some, deportation may either be temporary, or somewhat inconsequential (i.e. a migrant with few ties in the United States who never intended to create lasting roots). The deportation system rarely takes into account the pain and suffering of actual deportation, and in fact when judging the necessary hardship required for certain forms of relief, makes a point of distinguishing the normal attendant harsh consequences of deportation from "exceptional and extremely unusual" hardships necessary to waive deportation.[98]

The lack of proportionality is also evident with criminal-based deportation. Because crime-based deportation is often a direct consequence of committing a criminal offense,[99] proportionality should be judged from the overall combination of sanctions—both criminal and deportation.[100] However, because U.S. citizen criminals are legally immune from deportation and banishment as a sanction for criminal activity,[101] this necessarily creates a disproportionate situation. This

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[94] *See In re* J-H-J-, 26 I&N Dec. 563 (BIA 2015) (discussing the key eligibility factor as whether a person entered with lawful permanent resident status or obtained it after entry into the United States).

[95] *See* Stumpf, *supra* note 20, at 1703.

[96] *See* Part I(2)(a) and accompanying text for a greater understanding of how proportionality is measured.

[97] *See* Sarah Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER (Jan. 15, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence.

[98] At first glance the application of asylum and protection-based relief, such as withholding of removal under INA § 241(b)(3) or the CAT Convention may alleviate those concerns, but it is important to note that the "persecution" necessary for asylum or withholding of removal is a technical term that is not necessarily related to level of suffering. For instance, the potential for death, severe poverty, and displacement do not automatically qualify as persecution. Similarly, torture is not just a general term, but a technical one that requires governmental action. This is why people fleeing countries with high crime or poverty rates may be unable to seek protection inside the United States.

[99] Padilla v. Kentucky, 559 U.S. 356, 356 (2010).

[100] Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 15–16 (2011).

[101] Trop v. Dulles, 356 U.S. 86, 101 (1958). Despite this legal immunity, the removal of U.S. citizens is not an uncommon occurrence.

imbalance has severe consequences for all criminal justice systems that regularly have non-citizen defendants, but different jurisdictions have reacted differently. For example, judges, police, and prosecutors in a jurisdiction that recognizes deportation as part of the overall punishment for a crime may be more willing to consider alternatives to charging and sentencing for non-citizens than for U.S. citizens. Professor Ingrid Eagly describes how different criminal justice systems have attempted to adjust to prosecuting non-citizens at risk of deportation.[102] Because the immigration consequence at issue—deportation—is so inflexible, the only way to adjust for proportionality is in the criminal justice system. This is one reason why Professor Gabriel Chin argues that consideration of immigration status may be proper in the criminal justice arena.[103]

Moreover, the lack of proportionality in terms of adjudication of deportation has caused Professor Jason Cade to observe that the only effective means of injecting proportionality or "equity" into the removal system comes from enforcement actors such as ICE and the attorneys working for ICE as "prosecutors."[104] As a consequence of a lack of judicial discretion and overly harsh laws, measures such as prosecutorial discretion[105] and enforcement discretion[106] become critical in order to achieve proportional results and avoid outcomes that are morally repugnant. In other words, proportionality only comes into play in deciding who is subject to the system in the first place, which is why power is disproportionally placed with the gatekeepers, as such local enforcement officers, and local ICE attorneys. Besides requiring flexibility that takes into account varying grades of blameworthiness, how to decide whether blameworthiness attaches at all is another feature of moral credibility. Innocent actors are subject to deportation. Any system of punishment, whether criminal or not, must decide what circumstances or situation can excuse an offense. Murder is a prime example where the offense, the deliberate killing of another human being, can nonetheless be excused by a showing of either self-defense or defense of others. In rare situations, a category of people may be excused from liability as well, for instance, as mentioned above, the federal system also categorically exempts a group of people from criminal liability altogether—namely children under a certain age.[107] In the culpability context, federal law consensus is that

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[102] Eagly, *supra* note 49, 1157–90 (describing three models of non-citizen criminal justice: "alien-neutral," "illegal alien punishment," and "immigration enforcement.").

[103] Gabriel Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1459 (2011).

[104] Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 1 (2014).

[105] *Id.*

[106] Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015).

[107] Depending on the crime involved, the floor may be as high as fifteen years of age but the absolute floor for the federal system is thirteen years of age. *See* 18 U.S.C. § 5032 (2012).

children are not culpable under a certain age and therefore, cannot be subject to criminal liability.[108] And yet, deportation law is applied not just to children, but infants and toddlers as well.[109]

Media, politicians and commentators often start the discussion on DREAMers by describing them as "being brought to the United States,"[110] which is in direct contrast with the description of unauthorized migration and border crossing. This passive voice is just one way that identifies a lack of culpability for DREAMers, actions. These children, who entered the United States without documentation, did so in a variety of means and vastly ranged in age, from newborns to teenagers.[111] Public opinion currently views deportation for this group as unjust. For example, a poll conducted in September of 2017 found that nearly 86% supported this group's ability to avoid deportation.[112] Despite the strong public support, DREAMers continue to be deported, both before the dissolution of DACA and after.[113] While DACA protected a specific group of children, its reach did not extend to everyone whose violation of immigration law occurred as children. People over the age of 30 when the program began in 2012 were ineligible,[114] and children brought after

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[108] *But see*, *Underage Prosecution*, EQUAL JUSTICE INITIATIVE, https://eji.org/children-prison/underage-prosecution (last visited Aug. 27, 2018).

[109] Jerry Markon, *Can a 3-year Old Represent Herself in Immigration Court? This Judge Thinks So.*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.d3802a64fe11.

[110] Maya Rhodan, '*You Created the Crisis.' The Fight with President Trump Over Dreamers Heats Up*, TIME (Jan. 2, 2018), http://time.com/5084283/defend-daca-immigration-trump-democrats/ ("In a tweet Tuesday morning, Trump accused Democrats of empty posturing on protecting undocumented immigrants brought to the U.S. as children"); Catherine E. Shoichet, Susannah Cullinane & Tal Kopan, *US Immigration: DACA and Dreamers Explained*, CNN (Oct. 26, 2017, 2:13PM), http://www.cnn.com/2017/09/04/politics/daca-dreamers-immigration-program/index.html ("These are undocumented immigrants ***who were brought*** to the United States as children, a group often described as Dreamers.") (emphasis added); Dara Lind, *9 Facts that Explain DACA, the Immigration Program Trump is Ending*, VOX (Jan. 30, 2018), https://www.vox.com/policy-and-politics/2017/8/31/16226934/daca-trump-dreamers-immigration ("unauthorized immigrants brought to the US.").

[111] The breadth and range of such stories for undocumented youth can be found at different organization's story archives such as this one maintained by UNITED WE DREAM, https://unitedwedream.org/category/stories/ (last visited Jan. 18, 2018).

[112] Scott Clement & David Nakamura, *Survey Finds Strong Support for 'Dreamers'*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/politics/survey-finds-strong-support-for-dreamers/2017/09/24/df3c885c-a16f-11e7-b14f-f41773cd5a14_story.html?utm_term=.f95f7f957aee.

[113] Alan Gomez & David Agren, *First Protected DREAMer Is Deported Under Trump*, USA TODAY (Apr. 18, 2017, 4:45 PM), https://www.usatoday.com/story/news/world/2017/04/18/first-protected-dreamer-deported-under-trump/100583274/.

[114] Jose Antonio Vargas, the Pulitzer Prize winning journalist is one of those who despite arriving as a child, was ineligible for DACA protections as he was over the age of 30 when it was announced. Elise Foley, *Jose Antonio Vargas Among Undocumented Immigrants Making Urgent*

the program was announced were also ineligible. Despite this executive decision to inject some proportionality into the deportation regime, it falls woefully short. Both the executive actions and proposed legislative fixes only look at dealing with past offenses and do not alleviate deportation for new childhood arrivals.[115]

Personal characteristics, such as age or illness, can excuse otherwise culpable conduct. The immigration parallel to duress and self-defense justifications for criminal violations is those seeking protection from violence at our ports of entry. As discussed above, deportation of asylum seekers—even those who are in compliance with both international and domestic law—is allowed by the current system. A person who fears persecution may arrive at a port of entry to the United States and apply for asylum. This usually begins the "expedited removal" process where the person is treated as an applicant for admission under INA § 235.[116] To avoid deportation, this individual must pass a credible fear interview and be granted asylum by an immigration judge. Deportation can result if the person is unable to: (1) pass the credible fear examination, or (2) meet their burden for asylum in front of an immigration judge. At this point the applicant has not violated any immigration law, crossed a border without authorization, or violated any conditions of entry, but they can still be deported. These applicants were simply found to not warrant admission into the United States, and frustratingly, because the process of seeking asylum requires physical presence, any rejection of an asylum claim[117] will result in deportation. If the applicant is unable to meet the technical or substantive requirements of asylum, current law allows for their deportation even if the applicant fled their country due to concerns for their well-being and safety. These blameless actors are punished with deportation to the country from which they fled.[118]

Plea to Obama, HUFFINGTON POST (Aug. 20, 2014, 9:06 AM), https://www.huffingtonpost.com/2014/08/20/jose-antonio-vargas-executive-action_n_5693187.html (describing why Vargas and a South Korean child's arrival were too old at the time of the pronouncement despite having arrived as children).

[115] Cade, *supra* note 104, at 683–87 (discussing the role of executive programs like DACA as providing an important outlet to reach equitable outcomes).

[116] INA § 235 (codified at 8 U.S.C. § 1226(c)(1)(A) (2012)).

[117] Asylum can be rejected on a myriad of procedural defects and technical requirements. A person can be found to have a credible fear of pain, injury, or even death, and still not qualify for asylum.

[118] Another group that should be mentioned is asylum seekers from Central America. The fact that overwhelming violence in their own countries is driving them to seek refuge in the U.S. is undisputed. Nonetheless, as Attorney General Sessions ruled, in his view asylum should not be extended to people fleeing gang violence. This group is "blameless" and yet, because the AG has ruled asylum is beyond their reach, are subject to deportation and detention.

2. Arbitrary or Illegitimate Rationale

Just punishment is one that follows an understandable and "moral" rationale. While culpability and proportionality are aspects of this rule, punishment must actually *serve* the purpose of expressing shared moral values. It should not be the result of chance, or even worse, the product of morally repugnant goals. For instance, legal realists critique judicial decisions as the result of the mood of the judge or jury ("what the judge ate that morning")[119] rather than the careful application of the law. Similarly, punishment that is dependent on luck, or factors that are not connected to blame, such as poverty[120] or logistical concerns, can be viewed as morally questionable. In fact, this is one critique of the utilitarian rationale by retributionists—if punishment is based on resources, then it is morally suspect.[121] Arbitrariness can also come from the perception that a system is not only unable to articulate the moral judgement of a community, but also produces a morally unacceptable result. The most prominent, and perhaps most devastating, criticism of the American criminal justice system is its racial disparities and the perception that it functions as a tool for racial subjugation.[122] When a criminal justice system captures and punishes a disproportionate percentage of people of color, the system loses moral credibility.[123] Sadly, deportation is vulnerable to the same critique.

Professor Vasquez argues that immigration law generally, including the law and practice of deportation, has become a tool of racial subjugation of Latinos.[124] She convincingly shows how not only the sheer numbers of Latinos subject to removal are disproportionate—over 90% of all removals in 2012 were of Latinos—but that the history of deportation and criminal laws created the criminal

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[119] WILLIAM W. FISHER III ET AL., AMERICAN LEGAL REALISM, at vi, xiv (1993). ("The Realist credo is often caricatured as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast . . . [b]ut most of their writings on the character of adjudication and on other issues were vastly more sophisticated . . . .") (citations omitted).

[120] *Alabama Town Agrees in Settlement to Stop Operating Debtors' Prison*, SOUTHERN POVERTY LAW CENTER (Mar. 14, 2017), https://www.splcenter.org/news/2017/03/14/alabama-town-agrees-settlement-stop-operating-debtors%E2%80%99-prison.

[121] Robinson & Darley, *supra* note 37 (critiquing the Supreme Court's decision to convict a person who many would view as blameless, though dangerous).

[122] Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

[123] The citations here would be too numerous to adequately capture, but perhaps a single citation would do. Samuel H. Pillsbury, *Black Lives Matter*, 13 OHIO ST. J. CRIM. L. 567 (2016).

[124] Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

alien as Latino.[125] Others have also noted how the result of "Juan Crow" laws create mass racialized deportations.[126]

Another example of an arbitrary result is seen when people can avoid deportation for reasons untethered to blame. Citizens of certain countries may be able to avoid the sanction of deportation, not because they are less blameworthy, but because their country refuses to accept them. For example, Cuba has been on a list of "recalcitrant" countries, which are countries that do not cooperate fully in accepting deportees.[127] Essentially, while a Cuban may go through the exact same process for deportation as a Mexican and have an immigration judge declare him to be "removable" and not eligible for relief from deportation, the Cuban will not be deported while the Mexican will be. These disparate results based on nationality and politics drive home the notion that the sanction of deportation—in this case, the actual physical removal from the United States—is driven by arbitrary factors, and not by legitimate and cogent rules on moral conduct.

Another feature of arbitrariness is when the people punished do not understand either the reason or system of punishment. The law that governs deportation is overly technical and has a non-intuitive application. As such, the results often do not make sense to either the people made to suffer them or to the public. One of the most difficult, confusing, and litigious areas in deportation law is removal based on criminal conduct. Even as federal statutes increased the categories of removal for crimes, the methodology of figuring out what state convictions lead to detention has proven to be difficult. The biggest example of this problem has been applying what the Court has called the "categorical approach." This approach, coined in modern Supreme Court usage in the sentencing case *Taylor v. United States*,[128] attempts to tie immigration consequences to the language of the state statute of conviction. While seemingly straightforward, the "categorical approach" has generated enough litigation and confusion that in the latest pronouncement of it, Justice Breyer complained that "What was once a simple matter will produce a time-consuming legal tangle."[129]

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[125] *Id.* at 650 ("Through the label of the "criminal alien," the law legitimates the exclusion and exploitation of Latinos, thereby, ensuring their subordination and marginal status.").

[126] *See* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016); Sheldon Novick, *Citizenship Is Not the Only Goal: Reform Should Bring an End to Mass Deportations*, 27 GEO. IMMIGR. L.J. 485, 517 (2013) (citing to Diane McWhorter, *The Strange Career of Juan Crow*, N.Y. TIMES, June 17, 2012 (Sunday Review). *See also* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163 (2010).

[127] Alan Neuhauser, *DHS Seeks Sanctions on Countries That Refuse Deportees*, US NEWS (Aug. 23, 2017, 6:20 PM), https://www.usnews.com/news/national-news/articles/2017-08-23/dhs-seeks-sanctions-on-countries-that-refuse-to-accept-deportees.

[128] Taylor v. United States, 495 U.S. 575, 600 (1990).

[129] Mathis v. United States, 136 S. Ct. 2243, 2264 (2016) (Breyer, J., dissenting).

The categorical approach itself can lead to critiques of arbitrariness because it treats the state definition of statutes, not actual conduct, as controlling. For instance, a person convicted of burglary in a state that defines burglary to include entering a vehicle as well as a building, may avoid deportation even if he entered a residence and stole a television. At the same time, a defendant who commits the exact same burglary in a state that narrowly defines burglary can not only be deported, but also can be ineligible for various forms of relief. While there are good reasons to commit to the use of the categorical approach, these reasons are difficult to translate to the public or deportees.

While many forms of relief from deportation appear to try and give some weight to the expression of moral values, such as rehabilitation[130] and harm avoidance, the extreme technical qualifications of the relief make the process opaque and nearly impossible for most to understand. For instance, the main form of relief from deportation, for an otherwise removable person, is contained in INA § 240A, and is called "Cancellation of Removal." The general contours of the relief appear easy enough, for lawful permanent residents it requires: (1) five years of lawful permanent residency, and (2) for the LPR to have resided in the United States for seven years after having been "admitted" in any lawful status. For non-lawful permanent residents, applicants must show: (1) 10 years of continuous residency, and (2) hardship to a US Citizen or lawful permanent resident relative. Even if one objects to the length of the residency requirements, the requirement is understandable and fits the idea that the longer one lives in the United States, the more they should be given a chance to stay. However, the statute does not allow for an easy or simple reading of "continuous residency," instead it employs what it describes as the "Stop-Time Rule." This rule essentially states that certain crimes, not all crimes and not even all of the "deportable" crimes, can upon commission (and not conviction), prevent a person from accruing additional time as a resident.[131] So, if a person who has lived in the United States for 26 years, commits an "inadmissibility crime" (but not one that qualifies as a petty offense)[132] by year six of their residency, the years they live in the United States afterwards do not "count" for purposes of deciding eligibility for Cancellation of Removal. This sort of technical and seemingly randomly constructed eligibility requirement heightens rather than diminishes the arbitrary nature of deportation.

Immigration relief also requires immigration judges to exercise discretion in its application. While some commentators decried the lack of discretion for relief when Congress set much stricter requirements in 1996 as part of the massive

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[130] *See* INA § 212(h) (codified at 8 U.S.C. § 1182(h)); INA § 240A(a) (codified at 8 U.S.C. § 1229b(a) (2012)); Matter of Marin, 16 I&N Dec. 581 (BIA 1978) (explaining how discretionary relief includes consideration of rehabilitation).

[131] *See* INA § 240A(d)(1) (codified at 8 U.S.C. § 1229b(a)(d)(1) (2012)).

[132] Matter of Garcia, 25 I&N Dec. 332 (BIA 2010).

immigration overhaul,[133] individual discretion can often lead to more arbitrary results. Professors Ramji-Nogales and Schrag discuss in great detail how asylum determinations are often controlled not by the law or careful consideration of the facts, but on which immigration judge is hearing the case.[134] As different judges may hold widely different views on issues, such as harm that can rise to "persecution,"[135] what groups may be considered "socially distinct,"[136] and finally considering credibility determinations across cultures. Additionally, relief such as Cancellation of Removal asks judges to consider whether a person has been rehabilitated properly, has shown remorse, and whether the hardships faced by family members may rise to the level of "extreme and unusual."[137] These exercises in discretion can result in widely disparate results and therefore increase the likelihood of imposing arbitrary punishment.

At various times policymakers have attempted to use two main justifications for deportation: non-citizens increase crime and cause economic harm. However, both of these justifications have been thoroughly repudiated by detailed evidence.[138] Moreover, the justification for the use of deportation becomes even more difficult when its usage has not led to reductions sought.[139] This leads to a cognitive mismatch in trying to justify the harsh sanctions of deportation.

The punishment of deportation fails miserably in expressing commonly held views of justice. Deportation is not applied in a proportionate manner, as its binary nature does not allow it to consider different gradations of culpability. Yet, many who the public would consider blameless when it comes to criminal liability are still subject to deportation. Finally, deportation through its complex and opaque

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[133] Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration.

[134] Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2008).

[135] *See* Pathmakanthan v. Holder, 612 F.3d 618, 622 (7th Cir. 2010) ("A determinative definition of 'persecution' has proven elusive. There is no statutory definition; nor has the BIA provided one.").

[136] Matter of M-E-V-G, 26 I&N Dec. 227 (BIA 2014).

[137] INA § 240A(b).

[138] THE SENTENCING PROJECT, IMMIGRATION AND PUBLIC SAFETY (2017), https://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf; *The Effects of Immigration on the United States' Economy*, U. PENN. (June 27, 2016), http://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy.

[139] Ryo, *supra* note 27. *See also* Tanya Golash-Boza, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOC. COMPASS 295 (2009); Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1157 (2016).

rules, its disparate racial impact, its inability to deport those from certain countries, and its inability to articulate the harms it seeks to redress, all lead to the inevitable conclusion that as it stands, deportations are unjust and morally incredible.

B. *Detention*

Aside from deportation which is the overt or expressed "punishment" imposed by the deportation system, the use of detention is also a punishment or penalty that the government extracts from non-citizens. For example, César Cuauhtémoc García Hernández writes that immigration detention is punishment by referencing the legislative intent of imposing immigration detention and its intertwining with the concurrent rise in mass incarceration on the War on Drugs.[140] Other commentators have noted that the sanction of detention, especially mandatory detention, is sufficiently harsh and even punitive that the right to counsel should attach to its usage.[141] This article does not dispute that the use of immigration detention is punitive in nature and is punishment and sanction every bit as much as deportation. The article question examines whether it is morally credible—whether it accounts for values such as culpability and proportionality and whether its usage is arbitrary or unjust. I conclude that immigration detention, like its cousin pre-trial criminal custody, fails the criteria for moral credibility.

1. Proportionality & Culpability

There are several features of immigration detention that lay bare its inability to account for culpability. First, the use of categorical denials of release from custody—including those who only seek to apply for protection in the country, without individualized determination, makes the decisions on detention wholly independent from an individual's blameworthiness. Second, the interpretation by the agency that detains, and not the government, must bear the burden to prove a *lack of* dangerousness, which leads to default incarceration of the innocent. Finally, the length of immigration detention is divorced from the severity of the immigration offense and, is instead, tied to the willingness of the detainee to exercise his or her statutory right to fight deportation and remain in the United States.[142]

The application of categorical rules to detention—without the possibility of release—has been the subject of a variety of critiques. Most of these critiques

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[140] Cuauhtémoc García Hernández, *supra* note 21.

[141] *See* Note, *'A Prison Is a Prison Is a Prison': Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV 522 (2015).

[142] This applies to both mandatory detention under INA § 236(c) and detention prior to removal generally under INA § 236(a).

have focused on the lack of due process.[143] In 1996, Congress adopted a set of rules whereby people who have been convicted of certain crimes are ineligible to request release from detention. Essentially, Congress has decided that an entire category of people is too dangerous for release.[144] Allowing detention without individualized determinations, a situation almost never found in either criminal or civil law, are not just challenges to the constitutional notions of due process, but can also be reframed as objections to the lack of proportionality. Proportionality concerns could be limited if the categories deemed dangerous by Congress were narrowly drawn, as they were in the Bail Reform Act at issue in *U.S. v. Salerno*[145] where only the most serious crimes were targeted for denial of bail. Yet, that is not the case with mandatory detention in the deportation scheme.

The statute controlling mandatory detention lists four different subsections that describe when a person is unable to apply for bond. Some of these categories are extremely broad in nature; for instance, the statute states it "is inadmissible by reason of having committed any offense covered in section 212(a)(2)."[146] Section 212(a)(2) describes crimes involving moral turpitude, which by itself covers a vast number of crimes, and the Agency has begun to expand the definition in the last few years. However, this section also refers to any controlled substance violation (including misdemeanor marijuana convictions), and anyone who has benefitted from human smuggling or is suspected of being a drug trafficker, even if they have not been convicted of a crime. The inclusion of crimes involving moral turpitude describes conduct with blameworthiness ranging from shoplifting[147] to rape.[148] What is remarkable about this list of crimes that warrant mandatory detention is how few criminal grounds of removal do not make this list. For instance, anyone who has not been admitted, but may be removable for a crime, can be detained. For those who are admitted, the exceptions are rare, but include removal based on domestic violence, child abuse, and human trafficking.[149] The exclusion of domestic violence, child abuse, and human traffickers from the list of mandatory detention makes it even clearer that blameworthiness plays no role in deciding categorical detention.

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[143] *See, e.g.*, David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010); Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 150 (2004).

[144] Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 105 (2016).

[145] United States v. Salerno, 481 U.S. 739, 747 (1987).

[146] INA § 237(c)(1)(A) (codified at 8 U.S.C. § 1226(c)(1)(A) (2012)).

[147] Matter of Diaz-Lazarga, 26 I&N Dec. 847 (BIA 2016).

[148] Matter of Keeley, 27 I&N Dec. 146 (BIA 2017).

[149] INA § 237(a)(2)(E) (2013) (codified at 8 U.S.C. § 1227(a)(2)(E) (2012)).

However, categorical or mandatory detention is not the only means by which culpability or blameworthiness is ignored. Under the general detention statute, INA § 236(a), the Board of Immigration Appeals ("BIA") has, in a line of cases beginning in 1999,[150] ruled that it is the detained who must bear the burden of proving a lack of dangerousness or flight risk. There is a myriad of problems with this burden shift,[151] but one core problem has been that this shift means that if non-dangerous, and people with little to no flight risk, are unable to meet their burden, they cannot be released. This detention by default situation punishes people who may be blameless, but simply unable to prove their lack of culpability due to resource constraints.[152]

Proportionality in the incarceration context is usually related to the length of time a person may have to spend confined. More serious conduct results in longer sentences and periods of confinement. Immigration detention, similar to pre-trial detention in the criminal court, has a much stronger relationship with one's desire to stay in the United States. If a detainee fights their removal, and attempts to apply for relief from detention, the length of confinement increases proportionally. For instance, the Transactional Access Records Clearinghouse provides statistics on the length of detention for those confined facing removals based on why they were released. The shortest time in custody belonged to those who were removed or voluntarily departed from the country. The longest period of time was for those who ended up staying in the United States—either because the immigration judge "terminated" their case (i.e. found that they should not have been removed in the first place), or that they "won" relief to stay in the U.S. [153] This sort of cost extraction for exercising one's right to try and remain in the United States recalls one of the most influential sociological examination of a criminal system in *The Process is the Punishment*.[154]

Malcolm Feeley described a Connecticut misdemeanor court system in New Haven Connecticut and made the then-remarkable observation that first, none of the criminal defendants asked for trial, and second, people were perfectly willing to plead quickly in order to get out of the criminal system faster, regardless of blame.[155] The parallel in the deportation regime is clear, if one does not "fight their removal" (i.e. "plead guilty") then they would spend far less time in immigration detention—on average 127 more days, or four additional months

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[150] *In re* Adenji, 21 I&N 1102 (BIA 1999).

[151] Holper, *supra* note 144, at 81. *See also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV 137, 156–58 (2013).

[152] Heeren, *supra* note 143, at 604.

[153] For the statistics and table see *Legal Noncitizens Receive Longest ICE Detention*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/321/ (last visited Jan. 21, 2018).

[154] FEELEY, *supra* note 40, at 180.

[155] *Id.*

incarcerated. For Feeley's observations, the innocent who may want to fight their case would end up spending more time in jail. Analogously, in the deportation regime, those with colorable, perhaps even strong claims, to stay in the United States are forced to spend more time in detention in order to go through the process. In fact, deportation can have increased costs for those who want to assert their rights.

For instance, even if an immigration judge decides that a person is not removable, or has decided that someone deserves relief from deportation, the government may appeal.[156] If the person is detained, then detention would remain in place during the appeal. An administrative appeal for a detained case can take on average more than three months.[157] Once one accounts for the fact that a reversal on appeal rarely directly leads to release, but requires another set of hearings, one can see why the process to get released, and be able to stay in the United States once detained, can on average, reach 127 days. Also, this process can often reach more than a year if there are circuit court appeals involved as well. While the pre-trial system for criminal courts can often rely on the Speedy Trial provision of the Constitution, no such parallel exists in the immigration side. Other practices, such as giving "credit" to defendants for time served before trial, helps alleviate the notion that time in detention has not relationship to blame, but only as a cost to assert one's rights.

2. Arbitrariness

Many of the same factors that reveal deportation arbitrariness are also at play with immigration detention. While immigration enforcement overall exhibits racial bias, immigration detention punishes the poor. Immigration detention, especially for crime-based removal, punish people a second time, and often much more harshly than the criminal justice system.

The practice of using bail in order to secure release from detention is an old one and has been part of the criminal justice process in the United States from common law, as evidenced by the Eighth Amendment's bail clause provision. However, over the last few years, commentators have begun to recognize that this practice punishes poor people and is ineffective in addressing flight risk or dangerousness.[158] Moreover, litigation in several different states has aimed to

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[156] This is in contrast with the criminal system, which only allows appeals from the accused for most situations.

[157] DEP'T. OF JUSTICE, I-2013-001, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2012).

[158] Tina Rosenberg, *Assisting the Poor to Make Bail Helps Everyone*, N.Y. TIMES (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/opinion/bail-assistance-poverty.html; Lucy Nicholson, *"Not in it for Justice:" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUMAN RIGHTS WATCH (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

remove the practice of cash bail. The Supreme Judicial Court of Massachusetts has ruled the setting of cash bail without consideration of ability to pay to be unconstitutional.[159] Moreover, the Department of Justice in an *amicus* brief for litigation in the 11th Circuit Court of Appeals supported the proposition that jailing people for being unable to make bail was unconstitutional.[160] Even without litigation, the Cook County judicial system, by order of the Chief Judge Timothy Evans, has ordered that bond amounts must reflect the defendant's ability to pay.[161] Furthermore, criminal justice systems that use pre-trial detention have begun to recognize that using cash as the means to ensure court appearances will punish people for simply being poor. The pace of reform has increased quickly over the past couple of years.[162]

The immigration system while importing the use of cash bail has not seen much in the way of reform with one prominent exception. For immigration detention, unlike in the criminal setting where a judge must set a bail amount within the first 48 hours,[163] custody determinations are decided by immigration officers who also run a "risk assessment" tool. Mark Noferi and Roubert Koulish describe the adoption by ICE of an automated risk assessment tool, which is a system that attempts to use evidence based practices into creating an algorithm to accurately predict the risk of flight and dangerousness.[164] These sort of tools, whose use has become widespread in the criminal justice system, face harsh criticism for continuing inherent biases and creating even more racial disparities.[165] Noferi and Koulish's analysis found that close to 91% of all people are detained by ICE and only 4% are released on their own recognizance.[166] The system, whether through the judgement of officers or use of a risk assessment tool over-detains. As

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[159] Brangan v. Commonwealth, 80 N.E.3d 949, 958–59 (2017).

[160] Brief for the DOJ as Amicus Curiae, Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2017), https://www.justice.gov/crt/case-document/file/998541/download.

[161] Reuters Staff, *Illinois Judge Orders Reform of Cook County Bail System*, REUTERS (July 17, 2017, 6:37 PM), https://www.reuters.com/article/us-illinois-bail/illinois-judge-orders-reform-of-cook-county-bail-system-idUSKBN1A22EB.

[162] For a survey of where different state systems are see *State of Pretrial Justice in America 2017*, PRETRIAL JUSTICE INSTITUTE, Nov. 2007, https://university.pretrial.org/viewdocument/state-of-pretrial-justice-in-americ (last visited Jan. 21, 2018).

[163] Cty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[164] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L. REV. 45 (2015).

[165] Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[166] Noferi & Koulish, *supra* note 164, at 71.

Denise Gillman explains, "the process [immigration detention] adopts elements from the criminal pretrial system that are ill suited to the immigration setting, even while failing to incorporate lessons learned in the criminal justice context."[167] While the criminal pre-trial system use of risk assessment has been critiqued, its damage is also limited given the criminal pre-trial default of release. In contrast, the immigration system's default requirement forces detainees to prove a lack of dangerousness, causing the default position to be detention; coupled with a cash bond system, this results in more people having to be detained than necessary.[168]

Once a detention decision has been made, the cash bond system takes place for those not in mandatory detention. The INA sets a statutory floor of $1,500 for a bond,[169] which already far exceeds criminal bail amounts in misdemeanor settings. The range on immigration bond amounts vary substantially and usually by the locality of the immigration courts, on the low end a median bond may be $5000, while on the high end a $15,000 bond is the median.[170] While there has been no published precedent or regulation to the effect, immigration judges normally do not consider a person's ability to pay, and even if they could, the $1,500 floor set by statute is binding. The BIA has had unpublished opinions that vouch for this approach, even as the Executive Office of Immigration Review ("EOIR") EOIR Benchbook lists it as a factor.[171] The practice throughout the nation still does not normally consider the ability to pay for immigration detainees and serves as a mechanism to punish the poor.[172] Just as enforcement increases in racial disparity causes it to lose moral credibility, so does the practice of cash bonds that do not consider a detainee's ability to pay.

An important perspective on whether a system of punishment is arbitrary comes from those people punished.[173] Emily Ryo interviewed immigrant detainees and discovered what their perceptions were of immigration detention. If the punished view the system as random, this serves as a powerful indication that the system cannot meet its burden for moral credibility. One of the main findings by

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[167] Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L. J. 157, 163 (2016).

[168] *Id.* at 209–10.

[169] INA § 236(a) (2013) (codified at 8 U.S.C. § 1226(c) (2012)).

[170] *Three-fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/519/ (last visited November 24, 2018).

[171] *In re* Nelson Salvador Castillo-Cajura, 2009 WL 3063742 at *1 (B.I.A. 2009) ("However, an alien's ability to pay the bond amount is not a relevant bond determination factor."); *In re* Mario Sandoval-Gomez, 2008 WL 5477710 at *1 (B.I.A. 2008).

[172] An important judicial decision in the Ninth Circuit, *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) enjoined the practice of not allowing consideration of ability to pay, this class action however is confined to the Central District of California.

[173] *See* Ryo, *supra* note 44.

Ryo was how the detainees viewed their release decisions in immigration court as arbitrary.[174]

According to immigration detainees, whether or not they could be released from detention was arbitrary. As Ryo explains, "[i]t was a common refrain among detainees in discussing their bond hearings that they were either 'lucky' or 'unlucky' in getting assigned to certain immigration judges."[175] Not only did detainees view bond decisions dependent on the judge, but also on what mood the judge was in, as one detainee put it, "It's just the luck you have honestly . . . [t]he judge you get and how they're feeling that day."[176] The detainees viewed that different judges' personal views, for instance on issues such as DUIs, can be determinative of whether the judge would treat them fairly. Detainees even believed that a judge's demeanor and decision-making could vary on the same day because of prior cases on the docket that may make the judge more irritable or less likely to listen.[177] These perspectives while important do not by themselves establish that judicial decisions on bond were in fact arbitrary, but they should be taken seriously, as detainees do have access to information and knowledge that few others do; even large studies using aggregate data may not contradict these perceptions.[178] Moreover, because bond hearings are short, and often conducted without much evidence or preparation, there is good reason to think that any inherent bias by judges would be given full reign.[179]

III.

The deportation process is neither morally credible nor fair. When a system of punishment is viewed by the community as lacking moral credibility, compliance with that system becomes much more difficult.[180] A functional punishment system relies on voluntary communal compliance to not only the overall system, but to the norms set by punishment; in order for the government to stigmatize the offenses it wishes to punish. This is a hallmark of punishment.[181] Not only would a punishment system without moral credibility have difficulty in

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[174] *Id.* at 1034.

[175] *Id.* at 1043.

[176] Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC. R. 148 (2016).

[177] Ryo, *supra* note 44, at 1044–45.

[178] Ryo, *supra* note 176, at 117 (finding that the two most relevant factors appear to be appointed counsel and past criminal history, though decisions varied widely).

[179] Ryo, *supra* note 43, at 1047–48 (providing a survey of how detainees were treated during bond court).

[180] *See* Bowers & Robinson, *supra* note 30.

[181] Ball, *supra* note 32, at 52.

encouraging compliance, but it may foster resistance. These effects are already on display and can be seen through local and state resistance to using local resources[182] for immigration enforcement in what has been coined as the proliferation of sanctuary cities. A deportation regime without moral credibility will be forced to exact societal control through brute force and will lack the ability to harness social interaction and shared mores to ensure compliance.

The first step to restoring the deportation system's moral credibility is to either abolish crime-based deportation or severely restrict its usage. This idea, while seemingly radical, has attracted several advocates. As Kari Hong explains, crime-based deportation was a relatively new legal phenomenon when Congress first passed a law taking away status from non-citizens in 1917.[183] Even after Congress created crime-based deportation, only 7% of all deportations from 1908 until 1986 were crime based.[184] It was during the 1980s, during the War on Drugs, that saw the surge of criminal-based deportation (and relatedly the rise of immigration detention).[185] In 1986, crime-based deportation was at 20%, in 1995 50%, and in 2017 it was up to 56%.[186] And in fiscal year 2017, ICE published a report in which more than 73% of arrests involved those with criminal convictions—though many of those were for traffic offenses and DUIs. It is important to note that while ICE describes these as "criminal removals" their definition involves the removal of anyone with a criminal history, even if the crime is not the basis of removal.[187] Using the deportation regime as a quasi-form of criminal control cannot be morally justified nor can it withstand scrutiny as means of deterrence or incapacitation.

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[182] Lasch, et. al., *supra* note 14, at 6. *E.g.*, Kate Mather & Cindy Chang, *LAPD Will not Help Deport Immigrants Under Trump, Chief Says*, L.A. TIMES (Nov. 7, 2016), http://www.latimes.com/local/lanow/la-me-ln-los-angeles-police-immigration-20161114-story.html ("We are not going to engage in law enforcement activities solely based on somebody's immigration status. We are not going to work in conjunction with Homeland Security on deportation efforts. That is not our job, nor will I make it our job.") (quoting Los Angeles Police Department Chief Charlie Beck); Journal North Staff, *Gonzales Reiterates Santa Fe's Pro-Immigrant Stance After Trump's Election Win*, ALBUQUERQUE J. (Nov. 15, 2016), https://www.abqjournal.com/889149/mayor-reiterates-santa-fes-pro-immigrant-stance-after-trumps-election-win.html ("[O]ur policy of human rights for all immigrants … has benefited our people, made us a safer, more cooperative community, and strengthened our economy . . . .") (quoting Santa Fe Mayor Javier Gonzales).

[183] Kari Hong, *The Absurdity of Crime Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2140 (2017).

[184] *Id.* at 2086 (citing to Legomsky, *supra* note 21, at 488).

[185] Hernández, *supra* note 21, at 1372 (explaining the rise of detention in connection with the War on Drugs).

[186] Legomsky, *supra* note 21, at 489 n.93. *See also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT.

[187] *Id.*

Even as the public consensus appears to be that the deportation regime is unjust, those supporting mass deportation continue to use the rhetoric of criminality.[188] The President's campaign remarks have now morphed into policy from the Attorney General and the acting head of ICE. The attempt by those who control the deportation regime to connect crime and immigration, which itself has a rich history,[189] also attempts to use criminal law's ability to stigmatize the deported. However, one of the difficulties has been the increasing recognition of the criminal law's own lack of moral credibility and how mass incarceration has undermined the criminal justice system's ability to make moral judgements and create norms that are shareable by the community. Kevin Johnson explains how using a deportation system that relies on a known racially-biased criminal justice system taints the deportation process altogether.[190] Nonetheless, there is no question that the deportation regime relies on stigmas once associated with the criminal justice system—especially imprisonment. "Immigration prisoners are thought to pose a public safety threat not because of any characteristics unique to them as individuals, but because they are imprisoned . . . [p]risons also stigmatize; they mark inmates as deviant and dangerous."[191] This is similarly reflected by those detained, as one of the respondents to Ryo's survey explained, "Inside detention, it makes you feel like you are the worst criminal. The most wanted of all. You tell yourself, I'm not. But that's how they make you feel."[192] This disconnect between the unjust aspect of the deportation regime and attempts to continue to use the criminal justice as a proxy for immorality, or dangerousness, requires a reexamination of the use of detention in deportation.

The moral hollowness of using deportation to punish non-citizen criminals rests on the proposition that punishing people twice for the same activity cannot be justified. Leaving aside the argument that removal of non-citizen criminals is merely to expel the dangerous and unwanted members of the community, punishing non-citizens with deportation after punishing them in the criminal system violates proportionality *per se*. As another one of Emily Ryo's interviewees explain, "Why are you giving me more time . . . ? I committed a crime, and I paid for it."[193] Even though *Padilla v. Kentucky*, made the jump and considered deportation as part of the penalty for a criminal punishment, it did not go on to realize its implications. Thus, by creating crime-based deportations, the deportation regime ends up warping the criminal justice system.

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[188] *See* Lasch, et. al., *supra* note 14. *See also* Elizabeth McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165 (2016).

[189] *See* Hernández, *supra* note 21.

[190] *See* Johnson, *supra* note 126.

[191] Hernández, *supra* note 78, at 282 (citations omitted).

[192] Ryo, *supra* note 44, at 1024–25.

[193] Ryo, *supra* note 44, at 1025 (citations omitted).

One reason that the different municipalities in Ingrid Eagly's study differed in their treatment of non-citizens has been their attempts to try to balance the implication that the criminal justice system essentially has become two-tiered.[194] While Gabriel Chin envisions the potential identification and acknowledgement of immigration status in criminal justice as compatible with notions of fairness, I do not.[195] Professor Chin points out that there are various means in which the criminal justice process can create advantages and disadvantages for non-citizens, in both punishment and process. I fear, however, that he does not properly address the fact that once deportation is considered part of the criminal penalty, it creates two different sentencing regimes. Professor Chin's premise is that criminal justice can properly balance the advantages of being a non-citizen with the disadvantage of vulnerability for deportation. So, while he ably describes how non-citizens can be advantaged at sentencing to avoid deportation, how prosecutors and the courts can try and balance deportation as a factor for sentencing, he dismisses too easily the difficulty in comparing criminal sentences with deportation, and the information imbalance between criminal actors and the deportation system.[196] For instance, while one criminal defendant could accept a longer sentence in prison (say 6 more months) if he were to avoid deportation, neither the criminal defendant nor the criminal judge could guarantee he could avoid deportation given how quickly the law changes in the realm of crimmigration. While the last few years has seen the judiciary shrink the number of crimes and circumstances for deportation, the existence of IRIRA serves as a potent reminder that Congress can increase deportation liability for crimes and do so without worry of *ex post facto* protections. Critically, criminal defendants are not particularly suited to gauging current dangers of criminal sentencing versus longer future dangers. A criminal attorney can tell their clients that they risk deportation, but often defendants will not be willing to sit in criminal custody for the potential future benefit of avoiding deportation after release.

The system becomes even more warped when immigration liability is no longer tied to criminal conviction, but simply criminal charges. The recent memorandum on priorities for deportation focus on not just those who are convicted of a crime, but also for those charged with one.[197] Under this scenario, the criminal system and its court actors have no ability to affect deportation decisions, unless the police are able to make determinations based on status at the

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[194] Eagly, *supra* note 50.

[195] Gabriel Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011).

[196] *Id.* at 1456–57.

[197] Memorandum from John Kelly to staff of the Department of Homeland Security (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

time of arrest, and there are powerful incentives to avoid having law enforcement officers to inquire about legal status as evidenced by sanctuary policies.

Even if there are some potential for the criminal justice system to account for the disparate punishment faced by citizens versus non-citizens, the vast majority of time it will not occur. The time and resource constraints that already strain the criminal system makes it difficult to assume that the necessary time and energy to properly calibrate the "costs" of deportation will be made. Thus, the main contribution of *Padilla* is not to rebalance deportation as penalty, but to ensure that non-citizen criminal defendants have access to the necessary information.

At the end, there is no running away from the simple conclusion that if deportation is "punishment" or even "quasi-punishment," it is in the form of a second punishment and one that citizenship protects against. "To allow immigration imprisonment to turn on a person's citizenship, then, is effectively to incarcerate because of one's outsider status, a characteristic that ought to be morally irrelevant."[198] While Hernández was describing immigration imprisonment, replacing the word "deportation" to replace the word "immigration imprisonment" or "incarcerate" does not change its meaning. Allowing criminal-based removal is a clear and unsupportable recognition that non-citizens deserve more punishment for the same offense, a punishment that is *constitutionally* exempt from U.S. Citizens.

Even if one were to reject the idea that deportation *punishes* criminal activity, the utilitarian perspective does not save crime-based deportation. At the heart of the utility argument is the criminals, by virtue of being criminals, are dangerous and morally undesirable. However, this proposition, even if that is the normative goal, no longer holds merit when examining the criminal justice system as a whole. As Hong explains:

> Immigration law's current reliance on convictions does not ascertain who is dangerous and who is not and errs by rendering inconsequential, minor crimes to be treated the same as serious ones. Instead of focusing just on offenders who are violent, the current scheme deems both a man who shoots a gun at a stranger to be as dangerous as a teenager who spat at a police officer during an arrest.[199]

Essentially, because crimes have become so broad as to encompass activities that few would view as dangerous or requiring incapacitation, they become poor proxies themselves for dangerousness or immorality. One example is the comparison of the criminal justice system's treatment of the exact same defendant. Often the criminal justice system will sentence defendants to probation, diversionary programs, or minimal time in jail. Yet, the immigration system will

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[198] Hernández, *supra* note 78, at 295.

[199] Hong, *supra* note 183, at 2129.

use this as a basis for deportation. For example, while possession of marijuana is often a misdemeanor offense that often results in only a fine, it can lead to deportation—even for lawful permanent residents if it occurs more than once.[200] Professor Hong argues that while criminal statutes are designed to sweep in both minor and serious conduct, because there is a reliance on criminal prosecutors exercising discretion, the deportation regime, and especially this Administration, does not believe that ICE should exercise much prosecutorial discretion at all.[201]

Finally, what cannot be ignored is the racial illegitimacy that plagues the criminal justice system. Even as scholars and jurists articulate the racist history and practices of the criminal justice system, it becomes difficult to justify decisions based on morality or dangerousness on determinations by the criminal law. As Professor Hernández writes,

> Unless race is divorced from substantive criminal law as well as from choices about how and where to deploy police, asking only whether there exists enough evidence of criminal activity to prove guilt beyond a reasonable doubt will continue to ignore the vast trove of criminal activity that is not investigated or prosecuted.[202]

Criminal-based removals result in racially-based removals.[203] If markers by the criminal system are overbroad and terrible proxies for dangerousness, then their use in even a regulatory fashion where deportation is not "punishment" cannot be justified.

Concerns involving the retention of power to expel dangerous or immoral non-citizens is overblown and ignores the institutions designed and in place to address danger. Because incapacitation and punishment has already been assigned to the criminal justice system, and because non-citizens and citizens alike are within their jurisdictional purview, there is no reason to create another layer of "protection." If a non-citizen who commits a crime is too dangerous to be released, then it is the criminal justice system (or perhaps the civil commitment system for blameless offenders) that is tasked with making the decision on incapacitation and rehabilitation. When the only difference between those who are deportable and those who are not is citizenship, then one must explain why

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[200] INA § 237(a)(2)(B) (codified at 8 U.S.C. § 1227(a)(2)(B) (2012)).

[201] Hong, *supra* note 183, at 2118.

[202] Hernández, *supra* note 78, at 273.

[203] Johnson, *supra* 126, at 998 ("Not surprisingly, focusing deportation efforts on noncitizens who encounter a criminal justice system well-known for racial bias has had racially disparate impacts on the removal of noncitizens from the United States.").

dangerous citizens are privileged over non-citizens.[204] If the current justice system does a poor job of protecting us from dangerous non-citizens, then it is the criminal justice system that must reform. Undercutting danger rationales are empirical studies show that our communities are at least as safe from non-citizens as they are from citizens.[205] This is not to say that crimes should become irrelevant in immigration law, but at the very least it should only be one of many factors, rather than the main or sole factor, in deciding deportation questions.

A. *Detention*

The abolition of immigration detention was first proposed by Professor García Hernández in his paper, *Abolishing Immigration Prisons*.[206] In his paper he traces the parallel tracks of immigration imprisonment with slavery, death penalty, and mass incarceration and essentially rests his argument for abolition on the connection between racism and immigration detention. An institution founded on and perpetuating racial subjugation cannot be supported and must be abolished.[207] Just as crime based deportation is one of modern construct, so is immigration imprisonment.[208] Professor García Hernández argues forcefully that immigration detention results in an unjustifiable destruction of Latinos.[209]

Even if one were to ignore the racial impacts and history of immigration detention, it needs to be abolished for a more pragmatic reason—its use as punishment for the process of deportation distorts the ability of the immigration deportation process from providing a just or utilitarian result.

In recent years, critics have begun to recognize the harms attendant on pre-trial detention for criminally accused. One aspect of this new recognition has been the previously discussed change in the use of cash bail, but the critique of pre-trial

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[204] Hernández, *supra* note 78, at 294. "There is nothing about passive conveyance of citizenship that renders the recipient morally superior to others. The corollary is likewise true: there is nothing morally inferior about lacking status as a United States citizen." *Id.*

[205] Chiraag Bains, *How Immigrants Make Communities Safer*, THE MARSHALL PROJECT (Feb. 28, 2017, 10:00 PM), https://www.themarshallproject.org/2017/02/28/how-immigrants-make-communities-safer.

[206] Hernàndez, *supra* note 78.

[207] *Id.* at 288–89 ("By confining migrants of color, especially Latinos, immigration imprisonment perpetuates their subordinated status. Through its power of physical isolation and symbolic stigmatization, imprisonment marks the immigration prisoner as an undesirable 'criminal alien' who can be punished like a 'criminal' and therefore excluded like an 'alien.'").

[208] *Id.* at 275.

[209] *Id.* at 291 ("To paraphrase Darryl Pinckney's assessment of African Americans, the bodies of immigration prisoners are not fully their own; they are not secure. They can, have been, and continue to be destroyed—sometimes psychologically, sometimes physically—by a racialized social order without anyone being held responsible.").

detention goes far beyond just incarcerating the poor for being poor.[210] Malcom Feeley in his seminal work, *The Process is the Punishment*,[211] describes a misdemeanor court system where the ability to claim innocence extracts a much higher cost than pleading guilty. When the criminal *process* becomes punitive, then it leads to situations where it no longer functions as a means to determine guilt from innocence, but rather as punishment by default for those who encounter law enforcement. This same phenomenon exists with immigration detention.

Just as pre-trial criminal detention is the "punishment" and imposes costs against the innocent, so it is with immigration detention. As explained *infra* the immigration system can exacerbate these effects. First, the range of time in immigration detention is often much more indeterminate and not often limited by statute.[212] In fact, detainees explained to Ryo that it is this aspect of immigration detention that makes it seem harsher.[213] While criminal pre-trial detainees may be held for lengthy periods of time, even in the face of the Speedy Trial clause, the pernicious effect of pre-trial detention is substantively on misdemeanors where the incentives to plead are much stronger. Second, while the distorting effect for criminal pre-trial detention is the pleading of guilt by the innocent, the distortion in the deportation regime is more varied and can be fatal. One of the current features of immigration detention is the imprisonment of those seeking protection in the United States from persecution as discussed *infra*. Immigration detention incentivizes people to give up their claims for protection, even when the fate they face may include death. There is a terrible irony associated with forcing those who flee persecution to spend time imprisoned before their claim can be recognized, but that is exactly what the deportation regime does.[214] This effect is deliberately planned and even was one of the historical reasons for creating immigration imprisonment in the first place.[215] People are unnecessarily forced to pay for the

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[210] Jennifer Gonnerman, *Before the Law: A Boy was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, THE NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

[211] *See* FEELEY, *supra* note 40.

[212] While one may argue that detainees held under the 9th Circuit and 2nd Circuit enjoy potential release if their hearings last more than six months, it is important to note that only a bond hearing is provided and release is rarely guaranteed despite the increased burden on the government.

[213] Ryo, *supra* note 44, at 1029. By far, the most commonly stated reason (33%) why some detainees felt that immigration detention was worse than prison/jail was the uncertainty and indefinite duration of immigration detention. *Id.*

[214] Miriam Jordan & Caitlin Dickerson, *More than 450 Migrant Parents May Have Been Deported Without Their Children*, N.Y. TIMES (July 24, 2018), https://www.nytimes.com/2018/07/24/us/migrant-parents-deported-children.html. And the sheer ridiculousness is only heightened by this Administration's child separation policy, forcing terrible choices on migrant parents.

[215] Hernández, *supra* note 78, at 281 ("'Detention of aliens seeking asylum, French Smith said, 'was necessary to discourage people like the Haitians from setting sail in the first place.'").

possibility of sanctuary from death and violence with time in imprisonment and, recently, separation from their children.

While the Supreme Court has repeatedly linked deportation to detention, its phrasing is deceptive. For while it is true that the act of forcing a person from leaving the country against their will may require a deprivation of liberty, it is not true that detention is necessary at all prior to the determination of whether a person is allowed to stay in the United States. In many cases, when a person is ordered removed and they are not already detained, ICE does not require detention upon the issuance of the final order of removal. Instead, ICE can arrange for an individual's deportation on a flight, or other mode of transportation and issue what has been deemed a "Bag and Baggage" letter, which is more formally known as a Form I-166 or notice to surrender for deportation. This letter informs the deportee that they must report to ICE on a certain date and time for removal. Usually the date is only the day before the flight, and the individual would only have to spend a single night in detention before being removed. A morally credible deportation system that could invoke compliance could easily rely on people to report for removal when required. In the criminal justice system, those released from detention during trial can often be given the opportunity, even after a conviction, to self-report for incarceration. By imposing immigration's version of pre-trial detention, the system punishes those who most wish to stay in the United States. This result is both unjust and unnecessarily cruel.

IV. CONCLUSION

On March 6, 2018, the United States Justice Department has decided to sue the State of California over what it has deemed to be sanctuary policies that, "obstruct the United States' enforcement of federal immigration law."[216] This clash between the federal government and California is the culmination of what happens when, at least according to the residents of the State of California, the deportation regime lacks moral credibility. The federal governments continual attempts to justify increased immigration enforcement by using the stigma of catching "lawbreakers," and criminals will likely meet increased resistance until they restore moral credibility to the deportation system overall.

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[216] Katie Benner & Jennifer Media, *Trump Administration Sues California Over Immigration Laws*, N.Y. TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html.