PUNISHMENT AFTER THE PUNISHMENT: HOW DEPORTATION OF JUVENILE OFFENDERS VIOLATES THE EIGHTH AMENDMENT AND INTERNATIONAL LAW

by
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"From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

—Justice Anthony Kennedy, Roper v. Simmons

This Comment examines how the United States deviates from most of the Western world by allowing deportation of noncitizen juvenile offenders to be essentially mandatory for a wide number of crimes. Deportation is "mandatory" in the sense that it is often an automatic result with very few options for judges to consider relevant mitigating factors, such as how long the noncitizen has lived in the United States, ties to U.S. citizen family members, or behavior since committing the crime. Deportation of juvenile offenders is applied harshly to both authorized and unauthorized noncitizens, many of whom have lived in the United States most of their lives.

This Comment uses the Supreme Court's approaches to juvenile justice, the Eighth Amendment, and international law to show that deportation of juvenile offenders, absent judicial discretion, is a cruel and unusual punishment, and that it is time for the United States to significantly curtail deportation of noncitizens for crimes they committed as minors. Mandatory deportation of juvenile offenders not only conflicts with the rehabilitative purposes of juvenile justice but is also unconstitutional under the Eighth Amendment's ban on

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cruel and unusual punishment as informed by international norms. International norms universally confirm mandatory deportation of juvenile offenders, without consideration of mitigating factors, is considered inhumane on the global stage.

INTRODUCTION

The United States is the last nation in the world that outlawed the death penalty for juveniles.[1] The United States was also one of the last countries to end mandatory life without parole sentences for crimes committed by youth under age 18.[2] When the Supreme Court declared these punishments unconstitutional under the Eighth Amendment in 2005 and 2010, respectively, the Court was particularly persuaded by evidence that international law and the domestic laws of close U.S. allies had come to oppose such harsh consequences on children who committed crimes.[3] The Court's holdings were entrenched in psychological discoveries that juveniles who commit crimes are less culpable, and also more capable of rehabilitation, than adult offenders.[4] In the U.S. criminal justice system, minors must now be treated differently than adults, even for the most heinous of crimes, but the U.S. immigration system has not kept up with the Supreme Court's changing perspective on juveniles. In the U.S. immigration system, noncitizen juvenile offenders[5] still face the same severe consequences as adult noncitizens who commit crimes, including mandatory deportation. The U.S. immigration system is blind to age; it often imposes on juvenile offenders the same harsh consequences as adults.

This Comment examines how the United States deviates from most of the Western world by allowing deportation of noncitizen juvenile offenders to be essentially mandatory for a wide number of crimes, often without consideration of relevant mitigating factors such as how long the noncitizen has lived in the United States, ties to U.S. citizen family members, or behavior since committing the crime. Deportation is "mandatory" in the sense that it is often an automatic result with very few options for judges to consider relevant mitigating factors. Deportation of juvenile offenders is applied similarly to both authorized and unauthorized noncitizens, many of whom have lived in the United States most of their lives.

This Comment uses the Supreme Court's approaches to juvenile justice, the Eighth Amendment, and international law to show that deportation of juvenile offenders absent judicial discretion is a cruel and unusual punishment, and that it is time for the United States to significantly curtail deportation of noncitizens for

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[1] Julian Borger, *US Becomes Last Country to End Death Penalty for Under-18s*, THE GUARDIAN (Mar. 2, 2005, 9:17 AM), https://www.theguardian.com/world/2005/mar/02/usa.julianborger; *see also* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the death penalty for juveniles is unconstitutional).

[2] Graham v. Florida, 560 U.S. 48, 80 (2010).

[3] *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 80–81.

[4] *Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 74, 79.

[5] In this Comment, the term "noncitizen juvenile offender" refers to a noncitizen who commits an offense while under age 18, including adults facing deportation if the underlying offense was committed while under age 18. The terms "youth" and "minors" are used in this Comment to refer to noncitizens under the age of 18.

crimes they committed as minors. Mandatory deportation of juvenile offenders not only conflicts with the rehabilitative purposes of juvenile justice but is also unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment as informed by international norms. International norms universally confirm mandatory deportation of juvenile offenders, without consideration of mitigating factors, is considered inhumane on the global stage.

Although the Supreme Court has long upheld the legal fiction that deportation is not a punishment, immigration law has changed so dramatically in the past century to make deportation almost inseparable from criminal punishment, a fact the Supreme Court itself has recognized in recent years. The time is ripe to apply the Supreme Court's reasoning in modern juvenile justice and deportation cases[6] to show that deportation is often being imposed on juvenile offenders as a punishment excessive to the underlying crime, including for nonviolent crimes such as shoplifting or minor drug offenses. Recent Court opinions provide a path to demonstrate that deportation of juvenile offenders is not only a severe punishment, but one that is often a human rights violation contrary to international law, which the Court's own holdings compel the United States to consider.[7]

While legal arguments against deportation of juvenile offenders are not novel, this Comment adds to the conversation by providing an in-depth analysis of international laws and practices relating to the deportation of juveniles and how those international laws deem many of the United States' deportations of juveniles to be unconstitutional punishments. Beth Caldwell's groundbreaking work on deportation of juveniles as an Eighth Amendment violation brought to light the "doctrinal inconsistency [that] has emerged between immigration law and the Supreme Court's evolving Eighth Amendment jurisprudence" as it relates specifically to juveniles.[8] Rebecca Phipps has thoroughly documented the often overly severe immigration consequences of both juvenile delinquency and juvenile convictions in adult criminal court.[9] Anita Ortiz Maddali and Daniel Kanstroom have both mapped the

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[6] *See, e.g.*, *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 80; Padilla v. Kentucky, 559 U.S. 356 (2010).

[7] *E.g.*, *Graham*, 560 U.S. at 80 ("The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual."); Enmund v. Florida, 458 U.S. 782, 788–89 (1982) ("[T]he Court looked to . . . international opinion . . . before bringing its own judgment to bear on the matter."); Trop v. Dulles, 356 U.S. 86, 102 (1958) (holding that citizenship stripping was unconstitutional because "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime").

[8] Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2263 (2013).

[9] Rebecca Phipps, *Starting Over: The Immigration Consequences of Juvenile Delinquency and Rehabilitation*, 40 N.Y.U. REV. L. & SOC. CHANGE 515 (2016).

progression over time of deportation to be used in U.S. immigration law as a punishment, but one which lacks the constitutional protections of other punishments.[10] Finally, Juliet Stumpf has written in-depth about the problem with disproportionality as immigration law has become more closely aligned with criminal law over time.[11]

This Comment builds on the valuable contributions of these legal scholars by expanding on Beth Caldwell's observation that "in light of international norms, mandatory permanent deportation is an unacceptable practice, made even more problematic when based upon juvenile convictions."[12] This Comment's most critical contribution beyond tracing the intersection of juvenile justice practices with Eighth Amendment interpretation is its in-depth analysis of international laws and practices, highlighting the troublesome contrast between the United States' international legal obligations compared to its actual practices of deporting noncitizens for crimes committed as juveniles. International norms, such as requirements to allow for a discretionary hearing and for immigration judges to consider mitigating factors such as the best interests of the child, rehabilitation, and family unity, are woven into international treaties and the domestic laws of many of our allies but are almost nonexistent in current U.S. immigration law.[13]

This Comment does not argue for an end to deportation of juvenile offenders altogether. The United States' sovereign right to control its borders is well established,[14] and deportation is a globally acceptable norm to enforce border control, so long as it comports with human rights obligations.[15] Just as established as the government's plenary power over immigration is the right to certain constitutional protections for anyone in the United States, including the Eighth Amendment, which forbids the government from imposing cruel and unusual punishments on anyone facing a criminal sentence.[16] The nation's sovereign right to control its borders must

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[10] 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 (2011); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

[11] Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

[12] Caldwell, *supra* note 8, at 2309.

[13] *See* discussion *infra* Section III.B.

[14] *E.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("It is undoubtedly within the power of the Federal Government to exclude aliens from the country." (citing Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889))).

[15] *E.g.*, Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶ 32 (2010) (noting that Article 6 of the Convention on the Status of Aliens allows nations to expel foreigners for public safety reasons, but that deportations must comply with a nation's international human rights obligations).

[16] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see, e.g.*, Landon v. Plasencia, 459 U.S.

align with constitutional protections; sovereignty does not create the right to violate the constitutional rights of anyone present in the United States, regardless of their immigration status.[17]

Part I of this Comment establishes that the current deportation construct conflicts with Supreme Court jurisprudence about juveniles. This Part presents how immigration consequences differ for juvenile offenders depending on whether they are adjudicated in juvenile court or convicted in adult criminal court. This Part then discusses what kinds of crimes or activities can lead to deportation, including minor, nonviolent crimes. The Part concludes by showing that Supreme Court precedent regarding juveniles requires a reconsideration of the complete lack of judicial discretion for many deportations based on juvenile offenses.

Part II shows how the Eighth Amendment applies in the context of juvenile offenders and argues that automatically deporting juvenile offenders for certain crimes is an excessive punishment. Relying on *Padilla v. Kentucky*, this Part shows that since the Supreme Court has recognized that deportation is now often an automatic component of a criminal sentence, the legal fiction that deportation is not a punishment is difficult to maintain. This Part then demonstrates how the analysis of the Eighth Amendment, including the Court's review of international norms in the juvenile justice cases *Roper v. Simmons* and *Graham v. Florida*, can logically be extended to show that deportation of juvenile offenders is often an unconstitutional, disproportionate punishment.

Part III demonstrates that, overwhelmingly, the global community considers far more mitigating factors before deporting juveniles than the United States, a fact which should be persuasive to U.S. courts regarding the "evolving standards of decency" that determine whether a punishment is disproportionate. This Part examines key components of international law related to deportation of juveniles, as well as how the laws of some of the United States' closest allies have applied international law in their own contexts. The Part proposes a framework that involves weighing public safety interests against mitigating factors, including the juvenile offender's right to a hearing and the internationally recognized human rights to have the best interests of the child considered, to rehabilitation, and to family unity. So long as U.S. immigration laws omit such considerations, the United States stands in opposition to global norms and our human rights obligations and therefore in opposition to our own Eighth Amendment.

21, 32 (1982) (holding that legal permanent residents are entitled to due process before exclusion); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that Sixth Amendment right to counsel requires criminal defense attorneys to advise noncitizens clients whether a plea carries the risk of deportation); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

[17] *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184 (1963) (noting that the protections of the Bill of Rights cannot be abrogated, even if someone may escape punishment, if that punishment is cruel and unusual).

I. DEPORTATION OF JUVENILES IN THE UNITED STATES

Although the stated goals of the United States' approach to juvenile justice are to rehabilitate youth and help them reintegrate into society, rehabilitation and reintegration of youth offenders are disregarded by immigration law's approach, which often makes deportation a mandatory consequence. The immigration outcomes for a noncitizen youth who has committed a crime can vary significantly depending on whether their case is adjudicated through the juvenile delinquency system or waived into adult criminal court. These two possible paths (which are determined based on state law) and what each path can mean for whether a noncitizen juvenile offender is deported are discussed below, followed by an overview of the Supreme Court's reasoning that juvenile offenders should be treated differently than adults based on developmental science showing that juveniles are less culpable than adults for their mistakes and are more capable of change.

A. Juvenile Adjudication vs. Waiver into Adult Criminal Court

When minors under 18 are sentenced for committing crimes, their cases are generally adjudicated through their state's juvenile justice system. However, all 50 states have laws that allow (and in some cases, require) juveniles to be waived into adult criminal court for certain more severe crimes.[18] For noncitizen youth, any encounter with law enforcement can have serious impacts on their immigration status and their ability to remain in the United States, but a conviction in adult criminal court can make it nearly impossible to avoid deportation.[19] Legal scholar Beth Caldwell has estimated, based on her work with deportees in Mexico, that 10,000 noncitizens are deported every year for crimes committed as juveniles, after serving their sentences in the United States.[20] Compared below are the prospects for a noncitizen youth adjudicated in juvenile court with one convicted in adult criminal court, showing that both can lead to the noncitizen having very few options to seek relief from deportation.

1. Youth Adjudicated in Juvenile Court

Despite the consistent holding of the Board of Immigration Appeals (BIA) that "findings of juvenile delinquency are not convictions for immigration purposes,"[21] a conviction is not the only path to being deported for a crime. Juvenile dispositions

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[18] Phipps, *supra* note 9, at 520.

[19] KIDS IN NEED OF DEF., REPRESENTING UNACCOMPANIED CHILDREN, CHAPTER 10: IMMIGRATION CONSEQUENCES OF DELINQUENCY AND CRIMES 1–2 (2015), https://supportkind.org/wp-content/uploads/2015/04/Chapter-10-Immigration-Consequences-of-Delinquency-and-Crimes.pdf.

[20] Caldwell, *supra* note 8, at 2263.

[21] Devison, 22 I. & N. Dec. 1362, 1365 (2001) (interim decision).

can trigger deportation in decisions of conduct-based grounds of inadmissibility and determinations in which United States Customs and Immigration Services (USCIS) or an immigration judge have discretion.[22]

Conduct-based grounds of inadmissibility and administrative and judicial discretion can come up when a noncitizen becomes eligible to apply for an immigration benefit.[23] For some conduct-based decisions, a conviction is not required and the only requirement is that the officer has a "reason to believe" the youth has engaged in the behavior.[24] Adjustment of status, the process of becoming a legal permanent resident, is "a matter of administrative grace" that allows immigration judges and USCIS in a number of adjustment determinations, including determinations based on family, employment, asylum, and trafficking, to determine if "positive factors outweigh the negative factors."[25] A noncitizen who was involved with certain behaviors as a minor can face deportation proceedings for conduct including involvement with drugs[26] or prostitution,[27] physical or mental disabilities that may pose a threat to others,[28] use of false documents[29] and fraud relating to false claims of citizenship,[30] violations of a domestic violence order of protection,[31] and human trafficking.[32]

Extremely limited waivers are available for some of the above offenses in rare cases, including where the noncitizen youth has been a victim of crime themselves[33] or for mental and physical disorders under certain prescribed conditions, such as

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[22] RACHEL PRANDINI, IMMIGR. LEGAL RES. CTR., WHAT ARE THE IMMIGRATION CONSEQUENCES OF DELINQUENCY? 5, 7 (2020), https://www.ilrc.org/sites/default/files/resources/imm_consequences_of_delinq_3.30.20.pdf.

[23] *E.g.*, Wallace v. Gonzales, 463 F.3d 135, 139 (2d Cir. 2006) (holding that IJ or BIA can consider "anti-social conduct" regardless of conviction as an adverse factor in discretionary findings for juveniles); U.S. CITIZENSHIP & IMMIGR. SVCS., POLICY MANUAL, vol. 7, pt. A, ch. 10, § B, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 (Jan. 24, 2024) (USCIS officers are to determine if positive factors outweigh the negative factors, including rehabilitation and public safety concerns, in family-based, employment-based, asylum, and trafficking-based decisions).

[24] Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182(a)(2)(C) (noncitizen is inadmissible if an officer has a "reason to believe" a noncitizen is a drug trafficker).

[25] USCIS, POLICY MANUAL, *supra* note 23, §§ B.1, B.2.

[26] 8 U.S.C. § 1182(a)(2)(C); INA § 101, 8 U.S.C. § 1101(a)(48)(A).

[27] 8 U.S.C. § 1182(a)(2)(D).

[28] *Id.* § 1182(a)(1)(A)(iii).

[29] INA § 237, 8 U.S.C. § 1227(a)(3)(C).

[30] *Id.* § 1227(a)(3)(D).

[31] *Id.* § 1227(a)(2)(E)(ii).

[32] 8 U.S.C. § 1182(a)(2)(H).

[33] *Id.* § 1182(d)(14) (U-visa waiver allows inadmissibility ground to be waived if "in the public or national interest"); *id.* § 1182(d)(13) (T-visa waiver allows inadmissibility ground to be waived if it was caused by noncitizen's victimization).

relation to a U.S. citizen.[34] The hardest area to seek relief from is involvement in drug trafficking; there is no waiver available for a finding that there is a "reason to believe" a youth was involved in trafficking drugs.[35] For many juvenile offenders seeking an immigration benefit for which they are otherwise eligible, no waiver is available even if the crime committed was seemingly minor.

Youth adjudicated in juvenile court have less risk of deportation than their counterparts who are convicted in adult criminal court, but the consequences can still be severe. The standard consequence in immigration is deportation, and juvenile offenders who are deported often return to a country they left at a very young age and where they may not know the language or culture, or have any ties.[36] The example of Edgar Chocoy stands out as a well-documented illustration that juvenile delinquencies can get a noncitizen juvenile offender deported. Edgar was adjudicated as a juvenile for gang and drug involvement.[37] Edgar pled with an immigration judge that he would be in danger if returned to Guatemala and sought relief in an asylum claim.[38] Despite steps Edgar had taken to distance himself from gangs, including removing his tattoos and finding an aunt who would take him in if he qualified for asylum, the Denver-based judge in his discretion ordered Edgar removed from the United States because of his past conduct.[39] Seventeen days after he arrived in Guatemala City, Edgar was murdered by members of the Mara Salvatrucha gang, exactly as he had predicted.[40]

2. Youth Tried in Adult Criminal Court

Juveniles waived into and convicted in adult criminal court are even more likely to face deportation, which is essentially automatic for certain criminal convictions, particularly crimes deemed "crime[s] of moral turpitude,"[41] drug crimes,[42] and aggravated felonies,[43] with limited waivers available, as discussed further below in this Section. In addition, deportation is often permanent for certain crimes, with no opportunity to return legally to the United States at a future date, including for

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[34] *Id.* § 1182(g).

[35] *Id.* § 1182(h), (a)(2)(C) (stating that waiver does not apply to § 212(a)(2)(C)'s "reason to believe" finding).

[36] U.C. IRVINE SCH. OF L. IMMIGR. RTS. CLINIC, SECOND CHANCES FOR ALL 19 (Annie Lai & Sameer Ashar eds., 2013) [hereinafter SECOND CHANCES FOR ALL], https://www.law.uci.edu/academics/real-life-learning/clinics/UCILaw_SecondChances_dec2013.pdf.

[37] *Remembering Edgar Chocoy*, GREELEY TRIB., https://www.greeleytribune.com/2011/05/11/remembering-edgar-chocoy (May 13, 2020, 6:27 AM).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] INA § 212, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

[42] *Id.* § 1182(a)(2)(A)(i)(II).

[43] INA § 237, § 1227(a)(2)(A)(iii).

crimes deemed "aggravated felonies"[44] and "crime[s] of moral turpitude."[45] Although all 50 states have mechanisms to waive juveniles into adult criminal court, in most states, waiver in the criminal context is discretionary.[46] Approximately 250,000 juveniles are waived into adult criminal courts every year.[47] In the immigration context, minors face the same consequences a convicted adult would face for the same crime, and for many youth that consequence is mandatory deportation without consideration of rehabilitation, how long they have lived in the United States, the youth's best interests, or their family ties.[48]

The mandatory deportation scheme now in place is a reasonably new development in U.S. immigration law. Until 1996, the Attorney General had broad discretion to waive deportation for certain noncitizens convicted of crimes. The Attorney General's power to exercise discretion was greatly reduced when § 212(c) of the Immigration and Nationality Act was removed by Congress and replaced with the more limited "cancellation of removal," a far higher bar that is applied very narrowly.[49] Other narrow grounds for waivers include possession of less than 30 grams

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[44] 8 U.S.C. § 1182(a)(9)(A)(ii).

[45] *Id.* § 1182(a)(2)(A)(i)(II). See also the comprehensive explanation in Bado v. United States, 186 A.3d 1243, 1251 n.14 (D.C. Cir. 2018):

> A person who is deportable as a result of conviction for any crime identified in 8 U.S.C. § 1227(a)(2) will be placed in removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1229a(a)(1) & (2) (2012). Those convicted of an aggravated felony who were removed under 8 U.S.C. § 1229a are rendered ineligible for readmission to the United States, meaning they are forever barred from entering the country unless the Attorney General consents to the application for admission. *Id.* § 1182(a)(9)(A)(ii)(II) (2012). Those convicted of a crime involving moral turpitude or a crime related to a controlled substance are similarly permanently inadmissible and deportable. *Id.* §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), & 1227(a)(2)(B)(i) (2012). Those who were removed for other grounds are eligible to apply for readmission after ten years (following a first order of removal) and twenty years (following a second order of removal). *Id.* § 1182(a)(9)(A)(ii) (2012).

[46] Phipps, *supra* note 9, at 523; Suzanne O. Kaasa, Joseph R. Tatar, II, Amy Dezember & Elizabeth Cauffman, *The Impact of Waiver to Adult Court on Youths' Perceptions of Procedural Justice*, 24 PSYCH. PUB. POL'Y & L. 418, 418–19 (2018).

[47] Caldwell, *supra* note 8, at 2262.

[48] Phipps, *supra* note 9, at 521; Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 94 (2011).

[49] Anthony Distinti, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2810, 2822 (2006) (noting that former INA § 212(c) was removed by Congress in 1996 and replaced with the more limited "cancellation of removal"). Former § 212(c) allowed immigration judges to weigh social and humanitarian considerations against any negative factors, including criminal convictions. *Compare* INA § 212(c), 8 U.S.C. § 1182(c) (1994), *with* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 302(b), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-597 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.), *and* INA § 240A, 8 U.S.C. § 1229b(b).

of marijuana, findings of extreme hardship to U.S. citizen relatives, and having been a victim of domestic violence.[50] Several other statutes provide waivers for young age and for petty offenses with sentences less than six months, but these also have very strict limitations on when they can be invoked.[51] For most juvenile noncitizens tried in adult criminal court, no waiver of their crime is available, especially if they are convicted of an aggravated felony.[52]

Despite the ominous sounding name, some "aggravated felonies" are nonviolent and relatively minor offenses, including failure to show up for court,[53] forgery,[54] or theft offenses with sentences of more than one year.[55] While aggravated felonies may result in a wide variety of criminal sentences, all carry the same immigration consequence of deportation, sometimes without a formal hearing.[56] Those deported for aggravated felonies are almost always barred for life from ever returning to the United States.[57]

An unfortunate illustration of the inconsistency between juvenile adjudication and conviction in adult court is the case of Tomas Mendez-Alcaraz, a legal permanent resident who was deported to Mexico after being waived into Oregon adult criminal court and convicted of committing first degree sexual abuse when he was sixteen.[58] Experts involved in the trial, including a psychologist and a county presentencing unit, unanimously agreed that if Tomas had not been waived into adult court they would have recommended a "probationary sentence with outpatient treatment in the community" because he was considered to be at very low risk of reoffending.[59] Outpatient treatment in the community would likely not have led to

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[50] INA § 212, 8 U.S.C. § 1182(h).

[51] 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (waiver available if noncitizen was under 18 when crime was committed and only committed one crime, if the crime was committed more than five years prior); § 1182(a)(2)(A)(ii)(II) (waiver available if only one crime committed and sentence was less than six months).

[52] INA § 240A, 8 U.S.C. § 1229b(a), (b) (providing cancellation of removal at the Attorney General's discretion for certain noncitizens, but not for legal permanent residents convicted of an aggravated felony nor non-legal permanent residents who do not have "good moral character" or who have been convicted of most crimes).

[53] INA § 101, 8 U.S.C. § 1101(a)(43)(Q).

[54] *Id.* § 1101(a)(43)(P), (R).

[55] *Id.* § 1101(a)(43)(G).

[56] INA § 238, 8 U.S.C. § 1228 (describes the process for "[e]xpedited removal of aliens convicted of committing aggravated felonies," including "expeditious removal following the end of the alien's incarceration for the underlying sentence" and does not require a hearing before the noncitizen is deported).

[57] INA § 212, 8 U.S.C. § 1182(a)(9)(A)(ii) (a noncitizen convicted of an aggravated felony is inadmissible "at any time").

[58] Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 846–47 (9th Cir. 2006) (Ferguson, C.J., dissenting).

[59] *Id.* at 847, 852 (Ferguson, C.J., dissenting) (internal quotation marks omitted).

deportation, but since Tomas was convicted in adult criminal court, he was ordered deported after he served his six year sentence.[60] The Ninth Circuit denied him relief after noting that there is "no discretionary relief from removal available to an aggravated felon who ha[s] served a prison term of five years or more."[61]

While on the surface deporting someone who has committed a sex crime seems like the immigration system doing its job to keep the United States safer, in fact the opposite is true. Deportation of a juvenile capable of rehabilitation and reintegration opposes the Supreme Court's recognition that juveniles who have committed crimes must be treated differently than adults.[62] By the time Tomas was deported for his juvenile offense, he was a law-abiding adult with a wife.[63] If he had been a U.S. citizen, he would have been deemed safe to society and released to his community to carry on with his life. Tomas had already been safely reintegrated into society by the time of his deportation; it is hard to imagine how removing him from his family and his community made anyone safer.

B. Immigration Law Conflicts with Supreme Court Conclusions About Juveniles

The Supreme Court supports the legitimacy of the juvenile justice system's goals to rehabilitate and reintegrate youth.[64] The immigration system's frequent removal of juvenile offenders, without the possibility of judicial discretion, conflicts with the Court. In 2005, the Court affirmed in *Roper v. Simmons* that children who have committed crimes should be treated differently than adults, holding the death penalty for minors to be unconstitutional.[65] The Court concluded the death penalty for juvenile offenders was unconstitutional because minors' "lack of maturity and . . . underdeveloped sense of responsibility" make them less culpable than adults.[66] The Court confirmed in 2010 in *Graham v. Florida* (in which life without parole for juveniles who committed non-homicidal crimes was held to be unconstitutional) that "a greater possibility exists that a minor's character deficiencies will be

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[60] *Id.* at 843.

[61] *Id.*

[62] *Id.* at 849 (Ferguson, C.J., dissenting).

[63] *Id.* at 847 (Ferguson, C.J., dissenting).

[64] *E.g.*, *In re* Gault, 387 U.S. 1, 15–16 (1967) (noting the purpose of the juvenile justice system is to rehabilitate rather than to punish); Graham v. Florida, 560 U.S. 48, 68, 74 (2010) (discussing scientific research that indicates "parts of the brain involved in behavior control continue to mature through late adolescence" as a reason that "juvenile offenders . . . are most in need of and receptive to rehabilitation"); Kent v. United States, 383 U.S. 541, 554 (1966) (noting the juvenile justice system's focus is on "guidance and rehabilitation for the child and protection for society").

[65] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[66] *Id.* at 569.

reformed" because of their tender age.[67] The juvenile justice system intends to return juvenile offenders safely to society once they have completed their sentences because they are still developing and capable of reintegrating,[68] an impossibility if the offender is deported.

Some specific instances of juvenile rehabilitation demonstrate that the Supreme Court is right: youth who have committed crimes are capable of change. For example, Oregon's recidivism rate for youth three years after release is only 8%,[69] and Ohio's community-supervision initiative dropped recidivism rates from 34–55% to 10–22% for low- to moderate-risk youth.[70] In Orange County, California, studies by the probation department have found that only 8% of immigrant youth qualify as "chronic recidivists,"[71] and immigration status is not associated with a higher frequency of juvenile delinquency than the general population.[72] These examples demonstrate that youth, including immigrant youth, are indeed capable of the change the Supreme Court has recognized.

Deporting an estimated 10,000 noncitizens every year for juvenile offenses,[73] many who have lived most of their lives in the United States,[74] is inconsistent with the rehabilitation goals of the juvenile justice system. An American citizen in the same situation would be considered rehabilitated, no longer a risk, and safe to return to the community. Although many noncitizen juveniles consider the United States their home and have little or no ties to their birth country, if convicted in adult criminal court or even found to have engaged in undesirable juvenile conduct, they will face the likelihood of deportation and have little legal recourse.

II. JUVENILE DEPORTATIONS AND THE EIGHTH AMENDMENT

"*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*"
—United States Constitution, Amendment VIII

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[67] *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

[68] Phipps, *supra* note 9, at 518.

[69] CRIM. JUST. COMM'N, OREGON JUVENILE JUSTICE SYSTEM RECIDIVISM ANALYSIS 5 (2019) (reporting that only 8% of youth released from a youth correctional facility or probation were incarcerated within 3 years).

[70] PEW CHARITABLE TRUSTS, RE-EXAMINING JUVENILE INCARCERATION 2 (2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/04/reexamining-juvenile-incarceration (citing CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, EVALUATION OF OHIO'S RECLAIM FUNDED PROGRAMS, COMMUNITY CORRECTIONS FACILITIES, AND DYS FACILITIES 25 tbl.10, 28 fig.4 (2005), https://www.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/Final_DYS_RECLAIM_Report_2005.pdf).

[71] SECOND CHANCES FOR ALL, *supra* note 36, at 4.

[72] *Id.* at 19.

[73] Caldwell, *supra* note 8, at 2263.

[74] *Id.* at 2300.

Deportation of juvenile offenders, absent judicial discretion for mitigating factors, is a cruel and unusual punishment following the current Supreme Court approach to the Eighth Amendment. In order to prove an Eighth Amendment violation, it must be shown that the consequence is a criminal punishment (or in certain cases a harsh civil penalty) and that the punishment is cruel and unusual.[75] Even though the Supreme Court maintains that deportation is not quite a punishment,[76] additional Eighth Amendment protections are warranted for deportation of juvenile offenders as the Supreme Court has extended to other particularly severe civil penalties, especially severe civil penalties for juveniles. This Part shows that the Supreme Court's long-standing holding that deportation is not a punishment, and therefore not subject to Eighth Amendment analysis, is outdated because Congress has intended the practice to punish. In addition, deportation has become a far more severe and automatic part of a criminal sentence than in the past, and the Supreme Court has acknowledged in recent juvenile justice cases that international treaties and foreign laws are relevant to determine whether a punishment for minors is cruel and unusual.[77] This Part concludes by applying the Court's Eighth Amendment analysis for juvenile punishments to deportation laws to show that mandatory deportation of juvenile offenders disproportionately punishes them and therefore violates the Constitution.

A. Deportation of Juvenile Offenders Is a Punishment Entitled to Eighth Amendment Review

Although the Supreme Court has long relied on the technicality that immigration law is civil code to justify its consistent holdings that deportation is not a criminal punishment and therefore not subject to Eighth Amendment review,[78] three strong lines of reasoning have emerged to indicate these holdings are ripe for overturning. First, the Court has extended additional constitutional protections to certain civil penalties when the consequences are severe, even when those penalties are not considered criminal punishments. Second, immigration law has changed so dramatically over the past century that deportation, when imposed for crimes, is essentially part of the criminal sentence. This Section shows how *Padilla v. Kentucky*[79] reflects the Court's emerging acceptance that the automatic nature of deportation following a criminal sentence has essentially made deportation into a punishment after the punishment. And third, the Court has determined some harsh civil penal-

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[75] *See* Trop v. Dulles, 356 U.S. 86, 94, 96, 99 (1958).

[76] Discussed *infra* Part II.

[77] Discussed *infra* Part II.

[78] *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[D]eportation is not a punishment for crime."); *see also infra* note 89.

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

ties to be "punishments" subject to constitutional protections when they serve primarily to deter and punish certain behavior, are especially severe, and are viewed by the international community as excessive. *Padilla* and *Trop*[80] in particular provide a pathway to argue that deportation of juvenile offenders, in all but name, has been recognized as a punishment because of its severity, affirmed by the international community. Finally, this Section combines factors for excessiveness from *Mendoza-Martinez*[81] with the Court's framing of deportation in *Padilla* to establish that mandatory deportation of juvenile offenders is often a punishment, which entitles juvenile offenders to Eighth Amendment review before they are deported.

1. Constitutional Protections Extend to Civil Penalties that Are Severe

Immigration proceedings are civil proceedings, and the Eighth Amendment typically only applies to criminal cases. However, additional constitutional protections have already been extended to juveniles by the Supreme Court, and the Eighth Amendment should similarly protect youth in civil proceedings. Specifically, the Court has read the Fourteenth and Fifth Amendment due process rights into "civil" juvenile proceedings, as well as the Sixth Amendment right to effective counsel, into immigration advice provided to all noncitizens during criminal proceedings.

Fourteenth and Fifth Amendment due process rights were extended to a civil process in *In re Gault*, where the Court held that juveniles in delinquency proceedings must be afforded the same protections as adults in the criminal system because the potential consequences can be especially harsh.[82] The Court noted that juveniles are entitled to heightened constitutional protections because they have inherent differences compared to adults who commit crimes, and cannot be "judged by the more exacting standards of maturity" because of being a "mere child" of a "tender . . . age."[83] The Court observed that juvenile adjudications had become more akin to criminal punishment than the non-adversarial process they were intended to be.[84] A juvenile could be "subjected to the loss of his liberty for years[, which] is comparable in seriousness to a felony prosecution."[85] Constitutional protections extended to juveniles by *Gault* include the right to a fair hearing, the right to counsel, and the right to appeal[86]—rights which, for the same reasons, should be extended to juvenile offenders, as discussed further in Part III below.

Another example of the Court extending additional constitutional rights to a civil penalty is found in the expanded Sixth Amendment right to effective counsel

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[80] Trop v. Dulles, 356 U.S. 86 (1958).

[81] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[82] *In re* Gault, 387 U.S. 1, 30–31 (1967).

[83] *Id.* at 45 (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948)).

[84] *Id.* at 14–16, 36.

[85] *Id.* at 36.

[86] *Id.* at 33–34, 41–42, 57–58.

for those facing deportation proceedings. In *Padilla v. Kentucky*, the severity of deportation convinced the Court to hold that, because "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction,"[87] the right to effective counsel requires attorneys to advise of possible immigration consequences of a criminal conviction, especially of deportation.[88] Taken together, *Gault* and *Padilla* indicate that additional constitutional protections should be afforded to all juvenile noncitizen offenders who face the severe possibility of being deported, regardless of whether the consequence has been intended to be a "punishment."

2. The Eighth Amendment Applies Since Deportation Is Now Part of a Criminal Punishment

The Eighth Amendment should be applied to deportations of juvenile offenders because the Supreme Court's recent jurisprudence signals the Court's implicit acceptance that deportation for crimes is essentially part of the punishment. Although for more than a century U.S. courts have created an elaborate lexical smokescreen to justify the persistent holding that deportation is not a punishment,[89] over the decades many dissenting judicial opinions have harshly criticized the nonpunitive categorization of deportation because, to the deportee, being removed from their family, friends, and lives feels like the worst possible punishment.[90] Those dissenting views of deportation have become of greater interest since 2010 when the Court in *Padilla* acknowledged that deportation law is now so harsh and "drastic" that it requires additional protections.[91]

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[87] Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

[88] *Id.* at 374.

[89] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 236 (1896) ("[D]eportation is not a punishment for crime. . . . It is but a method of enforcing the return [of a noncitizen] to his own country . . . ." (quoting Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893))); Elia v. Gonzales, 431 F.3d 268, 276 (6th Cir. 2005) ("[T]he Eighth Amendment is inapplicable to deportation proceedings because . . . deportation does not constitute punishment."); Briseno v. Immigr. & Naturalization Serv., 192 F.3d 1320, 1323 (9th Cir. 1999) (finding Eighth Amendment rights are not violated in a deportation proceeding "because deportation is not criminal punishment"); Oliver v. U.S. Dep't of Just., Immigr. & Naturalization Serv., 517 F.2d 426, 428 (2d Cir. 1975) (explaining that, despite its "severe . . . consequences," deportation is not a criminal punishment (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952))).

[90] *E.g.*, *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."); Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) ("Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.").

[91] *Padilla*, 559 U.S. at 360 (requiring Sixth Amendment right to counsel to include adequate advice about possibility of deportation following a criminal plea).

The Court's view on deportation originated with *Fong Yue Ting v. United States*, which held deportation to not be a punishment but merely "a method of enforcing the return to his own country of an alien who has not complied with the conditions [of the government]."[92] Courts have not budged from classifying deportation as not a punishment, referring to deportation by countless euphemisms over the decades,[93] while the nature of deportation itself has changed so dramatically with the passing of time that deportation is almost impossible to separate from criminal sentences.[94] *Fong Yue Ting*'s holding that deportation is not a punishment should not apply to deportation of juvenile offenders, however, because *Fong Yue Ting* was not about a criminal punishment. Fong Yue Ting faced deportation because of unlawful presence, not for committing a crime; he had failed to secure a certificate of residence required for Chinese immigrants.[95] His deportation was for lack of possessing the correct documentation, not triggered by a conviction.

Given that deportation of juvenile offenders does not resemble the type of consequence the Court considered in *Fong Yue Ting*, the holding in *Wong Wing v. United States* should apply instead.[96] In *Wong Wing*, the Court held that while the government may validly regulate expulsions due to immigration violations, the government may not add punishment onto an immigration consequence without adequate constitutional protections.[97] Further, the Court declared a statute unconstitutional that allowed one year of hard labor before deporting a noncitizen who violated an immigration law.[98] The Court held that the hard labor was a punishment subject to additional constitutional protections.[99] Today, deportation of juvenile offenders is so closely intertwined with criminal consequences that it is a punishment owed the additional constitutional protections required by *Wong Wing*.

The inseparability of criminal convictions and deportation was recognized in 2010 in *Padilla v. Kentucky*. In *Padilla* the Court recognized that changes to deportation law over the past century have resulted in "criminal and immigration law becom[ing] so closely intertwined that deportation now automatically results from

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[92] *Fong Yue Ting*, 149 U.S. at 730.

[93] *See, e.g.*, *Oliver*, 517 F.2d at 428 ("severe . . . consequences" (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952))); Trop v. Dulles, 356 U.S. 86, 98 (1958) ("harsh sanction" and "severe penal effect"); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("[T]he consequences of deportation may assuredly be grave . . . ."); *see also supra* note 89.

[94] Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301–05 (2011).

[95] *Fong Yue Ting*, 149 U.S. at 703–04.

[96] Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).

[97] *Id.*

[98] *Id.* at 237.

[99] *Id.*

certain criminal convictions."[100] In *Fong Yue Ting*, the regulation Fong Yue Ting and two other laborers broke was an anti-Chinese attempt by the federal government to curtail Chinese immigration; it was not a consequence attached to a criminal sentence.[101] In contrast, 117 years later, the Court in *Padilla* recognized that immigration law is not as it once was and deportation had become "an integral part . . . of the penalty that may be imposed on noncitizen defendants," one that is so closely connected to a criminal sentence that "removal is practically inevitable" for many crimes.[102] As immigration law has changed over the decades, it has become a punishment rather than "merely a collateral matter"[103] as envisioned by the Court of the past.

The language of the *Padilla* decision points decisively to the Court's acceptance that deportation is punishment-like, based on the case's description of deportation as a direct consequence of a criminal plea akin to a criminal punishment and on the decision's emphasis on the severity of deportation.[104] The fact that deportation is largely automatic, directly tied to a plea (even if implemented by different government agencies), and enmeshed in a criminal conviction "illustrate that deportation is . . . punishment."[105] Specifically, the Court recognized that while for most of the 20th century "there was no such creature as an automatically deportable offense,"[106] sweeping changes to immigration law in 1996 eliminated several important paths to discretion while broadening the list of crimes that lead to mandatory deportation, "dramatically rais[ing] the stakes of a noncitizen's criminal conviction."[107] The "recent changes in our immigration law [that] have made removal nearly an automatic result for a broad class of noncitizen offenders" include the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Anti-Terrorism and Effective Death Penalty Act (AEDPA).[108] These laws, both passed in 1996, combined to

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[100] Caldwell, *supra* note 8, at 2282 (citing Padilla v. Kentucky, 559 U.S. 356, 360 (2010)).

[101] Fong Yue Ting v. United States, 149 U.S. 698, 703–04 (1893).

[102] *Padilla*, 559 U.S. at 364.

[103] *Id.* at 363.

[104] Maddali, *supra* note 10, at 23 (discussing how the reasoning "in *Padilla* provides a logical pathway to conclude that deportation can be punishment").

[105] *Id.* at 26.

[106] *Padilla*, 559 U.S. at 362.

[107] *Id.* at 363–64.

[108] *Id.* at 366; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28 and 34 U.S.C.).

greatly expand the list of "aggravated felony" crimes that lead to mandatory deportation.[109] The list predictably includes violent crime such as murder and trafficking in firearms, but also includes nonviolent, more minor crimes such as theft, fraud, or failure to appear in court.[110]

The argument for deportation being a punishment entitled to constitutional protections is bolstered by the *Padilla* Court's acceptance that deportation is "the equivalent of banishment or exile."[111] Banishment has long been held, including by the Court in *Fong Yue Ting* and *Trop v. Dulles*, to be a criminal punishment that violates the Eighth Amendment and is banned by international law.[112] The Court in *Fong Yue Ting* referred to English law to determine that banishment from a country is a criminal punishment, but found deportation in Fong Yue Ting's case to be "removal . . . without any punishment" rather than banishment.[113] In an about-face, the *Padilla* Court recognized that the "impact of deportation on families" and the separation imposed is so severe that deportation is now equivalent to banishment and exile,[114]—the criminal punishment condemned in *Fong*. This admission emphasizes that the evolution of immigration law has turned deportation into a punishment on those who are removed from a country they call home, from families they may never see again, requiring the protection of the Eighth Amendment to ensure that deportation does not cross the line into an unconstitutionally cruel and unusual punishment.

3. Punishment Is Determined by Severity, Congressional Intent, and International Norms

The final reason the Eighth Amendment should be considered before juvenile offenders are deported is that the Supreme Court has classified some civil penalties as "punishments" subject to the Eighth Amendment when the penalties are particularly severe, and deportation of juvenile offenders, as noted, is particularly severe. To determine whether a civil consequence is in fact a punishment entitled to Eighth Amendment protections, the Court evaluates whether the severity of a consequence

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[109] Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 305–07 (2003).

[110] INA § 101, 8 U.S.C. § 1101(a)(43).

[111] *Padilla*, 559 U.S. at 373 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

[112] *See* Fong Yue Ting v. United States, 149 U.S. 698, 708–09, 730 (1893) (relying on English law to admit that banishment from a country is criminal punishment); Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (recognizing that banishment is statelessness, "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime," and "the Eighth Amendment forbids [that]").

[113] *Fong Yue Ting*, 149 U.S. at 709.

[114] *Padilla*, 559 U.S. at 373–74.

is "offensive to . . . the Constitution,"[115] if its intended purpose is to deter rather than to serve a legitimate government purpose,[116] and if it is "a condition deplored in the international community of democracies."[117]

In *Trop v. Dulles*, the Court held that a civil provision of the Nationality Act of 1940, which allowed for loss of citizenship for desertion from the army, was a punishment subject to Eighth Amendment review even though it was "technically not a penal law."[118] The Court noted that the label of the statute does not matter as much as whether the statute is "plainly penal," determined by the statute's purpose.[119] The Court found Congress had intended the statute to act as a punishment because, in part, the Senate Committee on Immigration had called the statute a "penalty [that] is so drastic."[120] The Court was also convinced that citizenship stripping was a punishment because the practice of making someone stateless was widely condemned by the international community.[121]

Similarly, in *Kennedy v. Mendoza-Martinez*, the Court determined that a civil statute stripping draft dodgers of their U.S. citizenship was a punishment because the practice was "one of the harshest penalties that can be imposed upon a man,"[122] Congress intended for the statute "to serve as an additional penalty,"[123] and international norms condemned the practice.[124] The Court in *Mendoza-Martinez* created a multi-prong list of relevant factors to determine whether a statute is harsh enough to be a punishment subject to Eighth Amendment protections or whether it is merely a civil penalty:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it

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[115] *Trop*, 356 U.S. at 102.

[116] *Id.* at 96.

[117] *Id.* at 102.

[118] *Id.* at 94 (quoting *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearing on H.R. 6127 and H.R. 9980 Before the H. Comm. on Immigr. and Naturalization*, 76th Cong. 492 (1940)).

[119] *Id.* at 95.

[120] *Id.* (quoting S. REP. NO. 76-2150, at 3 (1940)).

[121] *Id.* at 102.

[122] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 177 (1963) (quoting 48 CONG. REC. 2903 (1912) (statement of Mass. Rep. Roberts)).

[123] *Id.* at 169.

[124] *Id.* at 160–61 (noting that the Law of Nations would not require any other nation to accept a stateless former U.S. citizen).

> may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[125]

The first two parts of the Court's approach in *Trop* and *Mendoza-Martinez*, legislative intent and harshness as measured by the seven *Mendoza-Martinez* factors, demonstrate that deportation of noncitizens who commit crimes as juveniles is so severe that it should be classified as a punishment afforded Eighth Amendment protections. The third part of the test for whether a civil penalty is a punishment, how the penalty is viewed by the international community, is discussed in detail in Part III.

a. Legislative Intent

Evidence of legislative intent towards deportation indicates that some members of Congress have intended for or understood deportation to act as a punishment. During congressional debate for IIRIRA, the 1996 immigration bill that dramatically increased mandatory deportation for certain crimes, Senator Roth demonstrated his intent "to punish noncitizens convicted of crimes" when he said in Congress, in regards to IIRIRA, "the bill broadens the definition of aggravated felon to include more crimes *punishable by deportation*."[126] Representative Becerra argued at the time that "deportation is an acceptable punishment."[127] Senator Kennedy and seven other senators unsuccessfully attempted to change immigration laws in 2000 out of concern for the punitive approach their colleagues had taken to change deportation law to "punish . . . out of proportion to the[] crimes."[128] In addition, criminal sentencing guidelines were used by legislators in 1996 to amend the immigration law definition of aggravated felony, further indicating a punitive intent behind the 1996 changes to immigration law.[129] While the intent by Congress for deportation to be punishment is not definitive, the evidence suggests an understanding by certain legislators on both sides of the aisle that the 1996 changes made deportation act as a criminal punishment.

b. Applying the Mendoza-Martinez Factors to Deportation of Juvenile Offenders

The *Mendoza-Martinez* factors, none of which are dispositive, further solidify the assertion that deportation of juvenile offenders constitutes a harsh punishment

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[125] *Id.* at 168–69 (footnotes omitted).

[126] Maddali, *supra* note 10, at 35 (quoting 142 CONG. REC. 10054 (1996) (statement of Sen. William Roth)).

[127] Kanstroom, *supra* note 10, at 1894 n.20.

[128] Maddali, *supra* note 10, at 46 (quoting 146 CONG. REC. 19640 (2000) (statement of Sen. Edward M. Kennedy)).

[129] *Id.* at 36.

in modern immigration law, even if it was not in the past. For the first factor, deportation is certainly a restraint on a juvenile,[130] indicated by the Court's description of deportees as "displaced, homeless people condemned to bitterness and despair,"[131] and recognition that "[t]he severity of deportation [as] 'the equivalent of banishment or exile.'"[132] The Court in those two examples was referring to all deportees, not necessarily minors, but if adult offenders experience deportation severely, how much harsher is the consequence to someone who committed their crime while still technically a child, who as a result may be separated from the only family, friends, and community they have ever known?

Another *Mendoza-Martinez* factor asks if the sanction has been regarded historically as a punishment.[133] This factor is conflicting for deportation, because for over 130 years the Court's majorities have said deportation is not a punishment while simultaneously using punishment-like language to discuss deportation[134] and admitting the not-punishment "view of deportation may be highly fictional."[135] A long line of scathing dissents have disagreed with the Court's stance, further bolstering the argument that deportation is a terrible punishment.[136] The evidence of legislative intent above adds to the argument that modern lawmakers have understood and wanted deportation to serve as a punishment.[137] Finally, the *Padilla* Court's equating of deportation with the unconstitutional punishments of "banishment or exile" indicates a developing acceptance that deportation is akin to punishment.[138]

As for the scienter factor, if a sanction requires finding evidence of intent in committing the crime, then the consequence is considered punitive.[139] This factor is often satisfied for deportation since "almost every . . . crime resulting in deportation requires a finding of scienter."[140]

Another factor asks whether deportation for crimes promotes the traditional aims of punishment, such as deterrence or retribution.[141] Deportation for crimes, as currently written in U.S. immigration law, is now so closely intertwined with a

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[130] *Mendoza-Martinez*, 372 U.S. at 168 (discussing that the permanence of deportation makes it a disability or restraint).

[131] Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

[132] Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

[133] *Mendoza-Martinez*, 372 U.S. at 168.

[134] *See* cases cited *supra* notes 89 and 90.

[135] Trop v. Dulles, 356 U.S. 86, 98 (1958).

[136] *See* cases cited *supra* notes 89 and 90.

[137] *See supra* notes 126–29 and accompanying text.

[138] Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

[139] Maddali, *supra* note 10, at 40.

[140] *Id.* at 41.

[141] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

criminal punishment that it promotes the traditional aims of deterrence in criminal law.[142] An example of this connection is the written testimony of a Customs and Border Patrol official discussing deportation issues to the Homeland Security Subcommittee and highlighting the "deterrent effect provided by ICE's prioritization of recent border entrants, criminal offenders and repeat immigration law violators."[143]

The inquiry next asks whether the behavior that is sanctioned is already a crime.[144] Entering the United States without permission is often a crime,[145] although overstaying a valid visa is only a civil offense.[146] For juvenile offenders who do not have legal status and who entered without inspection, deportation can be a consequence of both their status as well as past behavior, making deportation a second punishment for a crime.

Two final *Mendoza-Martinez* factors inquire whether deportation of juvenile offenders serves an alternative government purpose and, if it does, if the consequence is excessive in relation to that purpose.[147] Proponents of deportation of criminal offenders argue that the purpose is to make communities safer.[148] However, studies indicate that not only do immigrants offend at lower levels than the general population,[149] noncitizen juvenile offenders have extremely low recidivism rates.[150] Some deportations do arguably serve some legitimate government purposes, such as

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[142] *See, e.g.*, *Padilla*, 559 U.S. at 360 ("The 'drastic measure' of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.").

[143] *Does Administrative Amnesty Harm Our Efforts to Gain and Maintain Operational Control of the Border?: Hearing Before the Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. 2 (2011) (statement of Michael J. Fisher, Chief, U.S. Customs & Border Prot.).

[144] *Mendoza-Martinez*, 372 U.S. at 168.

[145] INA § 275, 8 U.S.C. § 1325(a) (criminal consequences of improper entry into the United States can result in a fine or imprisonment of up to six months for a first offense, and up to two years for subsequent offenses).

[146] *See* INA § 212, 8 U.S.C. § 1182(a)(6)(F).

[147] *Mendoza-Martinez*, 372 U.S. at 168.

[148] *E.g.*, Brandi Grissom, *Fighting for Security*, TEX. TRIB. (Jan. 8, 2010, 5:00 AM), https://www.texastribune.org/2010/01/08/advocates-immigration-deportation-net-too-wide (discussing the Obama-era Secure Communities program which targeted even minor offenders for deportation: "ICE officials and local law enforcement argue that the program is weeding out thousands of dangerous criminals, making Texas streets safer.").

[149] *See, e.g.*, Chris Barncard, *Undocumented Immigrants Far Less Likely to Commit Crimes in U.S. than Citizens*, UNIV. OF WIS.-MADISON (Dec. 7, 2020), https://news.wisc.edu/undocumented-immigrants-far-less-likely-to-commit-crimes-in-u-s-than-citizens ("Compared to undocumented immigrants, U.S. citizens were twice as likely to be arrested for violent felonies . . . .").

[150] SECOND CHANCES FOR ALL, *supra* note 36, at 4.

controlling admissions at the border.[151] Deportation of juvenile offenders who have already served their criminal sentences does not support border control purposes but "instead seeks to continuously control a [person's] behavior."[152]

The latest agency guidance from the Biden administration, The Doyle Memo,[153] recognizes that the goal of deportation is to keep the United States safer, and that removing noncitizens who no longer pose a threat does not serve that purpose.[154] The Doyle Memo reflects the fact that, owing to the government's limited resources, the government should prioritize immigration enforcement primarily against noncitizens who pose threats to public safety, national security, or border security, not against those noncitizens deemed to not pose a risk to society.[155] If deportation of juvenile offenders is intended to make communities safer, the practice is certainly an inefficient use of limited government resources, as well as excessive in light of the nonviolent nature of some deportable crimes and the potential for juveniles to be successfully rehabilitated.[156]

Evidence of congressional intent combined with "the *Mendoza-Martinez* factors—especially viewed in light of the *Padilla* decision—weigh in favor of finding that deportation . . . constitutes punishment,"[157] and a particularly excessive one for juvenile offenders, who often have deep ties in the United States and reduced culpability because of their age. Excessiveness requires a proportionality analysis, which makes up the next step towards establishing that mandatory deportation of juvenile offenders violates the Eighth Amendment.

B. Eighth Amendment Proportionality Developed in Citizenship and Juvenile Justice Cases

The Supreme Court has developed a specific framework to analyze whether a punishment violates the Eighth Amendment, a process that historically and currently includes applying international norms. Section II.B.1 first presents the historical background of the Eighth Amendment. This Section then outlines the Court's current approach to the Eighth Amendment for juveniles from *Roper v. Simmons* and *Graham v. Florida* to show that mandatory deportation of juvenile

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[151] Maddali, *supra* note 10, at 46.

[152] *Id.*

[153] Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys (April 4, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

[154] *See id.* at 2, 4 ("OPLA attorneys are directed to focus efforts and prioritize cases involving noncitizens who pose a threat to our national security, public safety, or border security. . . . Mitigating factors may include but are not limited to: advanced or tender age . . . .").

[155] *Id.* at 2–3.

[156] *See* Roper v. Simmons, 543 U.S. 551, 570 (2005).

[157] Maddali, *supra* note 10, at 49.

offenders is a cruel and unusual punishment, as confirmed in Part III's discussion of international norms.

1. Historical Background of the Eighth Amendment

The early origins of the Eighth Amendment still inform its application and interpretation today, including its beginnings in foreign law. The concept that punishments should be proportionate to the crime originated in the English Magna Carta,[158] and the basic purpose of the Amendment to maintain "the dignity of man"[159] is derived from the English Declaration of Rights of 1688.[160] Courts did not broadly apply the Eighth Amendment for more than 100 years, until *Weems v. United States* in 1910 when the Court confirmed that punishments must be "graduated and proportioned to [the] offense."[161] The Amendment has historically been considered not to be static, but rather for its interpretation to change with time along with "evolving standards of decency that mark the progress of a maturing society."[162]

Fifty years after *Weems*, in a case with facts similar to the issue of deportation, the Supreme Court established that determining whether a punishment is disproportionate requires courts to consider how standards of what is acceptable may have changed with time, including looking to international law to inform that determination.[163] In *Trop v. Dulles*, an American citizen faced losing his citizenship because of a wartime desertion charge.[164] The Court concluded that the citizenship-stripping statute was unconstitutional because it was outside "civilized standards," bolstered by the fact that the nations of the world were in "virtual unanimity" that citizenship-stripping was never a fitting punishment, according to a U.N. survey at the time.[165]

2. Evolving Standards of Decency Are Informed by International Law

Half a century after *Trop*, the Supreme Court defined a categorical framework that courts are to use to determine how "standards of decency" have evolved, which includes relying, in part, on international law to establish what consequences for juveniles are disproportionate and, therefore, "cruel and unusual." In *Roper v. Simmons*, in which the Court held the death penalty to be unconstitutional for crimes

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[158] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[159] *Id.*

[160] *Id.* (citing Bill of Rights 1688, 1 W. & M. Session 2 c. 2, § 20.5.1 (Eng. & Wales)).

[161] Weems v. United States, 217 U.S. 367 (1910) (holding that a fifteen-year sentence for falsifying documents was cruel and unusual punishment); Pressly Millen, Note, *Interpretation of the Eighth Amendment*—Rummel*,* Solem*, and the Venerable Case of* Weems v. United States, 1984 DUKE L.J. 789, 798.

[162] *Trop*, 356 U.S. at 101.

[163] *Id.* at 101–02.

[164] *Id.* at 87.

[165] *Id.* at 100, 103.

committed by juveniles, the Court consolidated tests from *Trop* and other subsequent Eighth Amendment cases to outline a two-prong test for proportionality and to define the elusive standards of decency.[166] The test includes a third confirmatory but not controlling step involving international law.[167] Since this decision, this test has remained the standard in subsequent Eighth Amendment interpretation.[168]

The first step of the categorical test requires courts to consider "objective indicia of [national] consensus" related to the punishment in question.[169] Objective indicia may include how the majority of states have legislated on the issue and how courts have ruled on similar issues. In *Roper*, the Court noted the number of states that had outlawed the death penalty for juveniles as compelling evidence of consensus.[170]

In the second step, the Court is to form its own "independent judgment" as to whether it agrees or disagrees with the national consensus on whether the punishment is disproportionate.[171] The Court has exercised independent judgment to find a punishment to be disproportionate when its impact on an individual is extreme.[172] The Court has also been particularly cautious about punishments on juveniles being disproportionate because of the "fundamental differences between juvenile and adult minds," which make juveniles "more capable of change than . . . adults."[173]

As a component of the second step, international and foreign law plays a confirmatory role in the two-prong test. In step two, international authorities are influential in the Court's independent judgment about what constitutes disproportionate

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[166] *E.g.*, Roper v. Simmons, 543 U.S. 551, 560–64 (2005); Atkins v. Virginia, 536 U.S. 304, 307, 321 (2002) (relying on objective indicia of national consensus to hold that the death penalty for mentally handicapped offenders to be cruel and unusual punishment); Thompson v. Oklahoma, 487 U.S. 815, 830, 838 (1988) (confirming the Court's view on "civilized standards of decency" from the practices of "other nations that share our Anglo-American heritage, and by the leading members of the Western European community" to hold that the death penalty for anyone under age 16 is cruel and unusual punishment).

[167] *Roper*, 543 U.S. at 575.

[168] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 61, 74–75 (2010) (applying the *Roper* test to hold life without parole for non-homicidal juvenile offenses is unconstitutional); Panetti v. Quarterman, 551 U.S. 930, 962 (2007) (citing *Roper* for the proposition that "there is precedent to guide a court conducting Eighth Amendment analysis"); United States v. Farrar, 876 F.3d 702, 716 (5th Cir. 2017) (relying on *Roper* as the source of the Eighth Amendment two-part test).

[169] *Roper*, 543 U.S. at 567.

[170] *Id.*

[171] *Id.* at 564.

[172] Trop v. Dulles, 356 U.S. 86, 102 (1958) (finding denationalization was a disproportionate punishment because the uncertainty of that status "subjects the individual to a fate of ever-increasing fear and distress").

[173] *Graham*, 560 U.S. at 68; *accord Roper*, 543 U.S. at 569–70 (culpability of juveniles is generally reduced because of the minor's age and maturity).

punishment, although international law "does not become controlling."[174] However, the Court has recognized that in many judicial decisions since *Trop*,[175] international and foreign law has been instructive for its interpretation of cruel and unusual punishment.[176]

As evidence that a punishment is disproportionate because it is "overwhelmingly disapproved" "within the world community,"[177] the Court has consulted international treaties, the domestic laws of close allies, and reports from international organizations. The Court in *Roper* found international treaties, including the United Nations Convention on the Rights of the Child (hereinafter, "CRC" or "Convention"), which forbids life without parole for juveniles,[178] to be persuasive authorities of global consensus against the death penalty for minors. Although the United States has never ratified the CRC, the Court determined that the CRC defined modern norms of decency because the United States stands alone as the only nation to not have ratified it.[179] The laws of an ally were particularly important to the *Roper* Court, which noted that U.K. law, the source of the Eighth Amendment, had abolished the death penalty for juveniles long before the CRC came into being.[180] Similarly, in *Atkins v. Virginia*, the Court relied on an amicus brief from the European Union summarizing the laws of European nations to hold that the death penalty for mentally handicapped offenders was a cruel and unusual punishment "overwhelmingly disapproved" by most of the world.[181] Reports from international commentators and organizations like Amnesty International compelled the Court in *Graham v. Florida* to be concerned that the United States was the only nation in the world to

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[174] *Roper*, 543 U.S. at 575.

[175] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (relying on a U.N. report, noting that it was "not irrelevant . . . that out of 60 major nations . . . only 3 retained the death penalty for rape"); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982) (noting as persuasive that England, Canada, India, and continental Europe disallowed or severely restricted punishing felony murder).

[176] *Graham*, 560 U.S. at 80.

[177] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (holding the death penalty for mentally handicapped offenders to be cruel and unusual punishment because the practice was overwhelmingly disapproved within the world community).

[178] Convention on the Rights of the Child, art. 37(a), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, 55 [hereinafter CRC] (forbids "life imprisonment without possibility of release" for those under 18).

[179] *Roper*, 543 U.S. at 576; *Frequently Asked Questions on the Convention on the Rights of the Child*, UNICEF, https://www.unicef.org/child-rights-convention/frequently-asked-questions (last visited Apr. 26, 2024).

[180] *Roper*, 543 U.S. at 577 ("The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins.").

[181] *Atkins*, 536 U.S. at 316 n.21.

impose life without parole for juvenile nonhomicide offenders,[182] and one of only two nations in the world to not have ratified the CRC.[183] Based on those international sources, the Court held in *Graham* that because the "global consensus [was] against the . . . practice," the practice stood against the "basic principles of decency" and was therefore cruel and unusual.[184]

The Supreme Court has made it clear that what is "cruel and unusual" can evolve over time and has much to do with changes in international law and norms. The next Section applies the Court's two-prong test to deportation of juvenile offenders, and Part III develops the confirmatory role of international law, to ultimately show that mandatory deportation of juvenile offenders is cruel and unusual punishment.

3. Mandatory Deportation as a Punishment After the Punishment Is Excessive

Even if deportation is essentially a punishment when imposed on juvenile noncitizens as argued in Section II.A, it will only be "cruel and unusual" if it is "excessive."[185] Excessiveness is decided by determining what the modern standards of decency are, as outlined in the *Roper* test,[186] and then whether the penalty is "'excessive' in relation to the crime."[187] International standards are an important part of this analysis, following the application of the two parts of the *Roper* test: objective indicia of national consensus and the Court's independent judgment.

a. There Is National Consensus Against Both Banishment and Treating Juveniles the Same as Adults

Typically, to determine whether there is national consensus on whether a punishment is excessive, the Court considers legislation of states and their courts.[188] Since immigration law is federal, states do not deport, so looking to state legislatures is not possible for deportation.[189] Instead, it is informative to look at the national

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[182] Graham v. Florida, 560 U.S. 48, 81 (2010).

[183] At the time of *Graham* in 2010, the United States and Somalia were the only two nations in the world to have not ratified the CRC. In 2015, Somalia ratified the CRC, leaving the United States alone as the only nation to have not ratified the treaty. *See* CRC, *supra* note 178; *Status of Ratification: Interactive Dashboard*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org (choose "Convention on the Rights of the Child" from "Select a treaty" dropdown) (Feb. 21, 2023).

[184] *Graham*, 560 U.S. at 80, 82.

[185] Trop v. Dulles, 356 U.S. 86, 99 (1958).

[186] Roper v. Simmons, 543 U.S. 551, 560–64 (2005).

[187] *Id.* at 589 (O'Connor, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

[188] *Graham*, 560 U.S. at 61.

[189] *But see* S.B. 4, 88th Leg., 4th Sess. (Tex. 2024); Press Release, ACLU, Civil Rights Organizations Sue to Block Texas from Enacting Extremist Immigration Law (Dec. 19, 2023, 1:10 PM), https://www.aclu.org/press-releases/aclu-civil-rights-orgs-sue-texas-over-sb-4.

consensus of state legislation that is clearly against two relevant legal practices, banishment and treating juveniles the same as adults in the criminal system.

Banishment is widely condemned by state legislatures, and it is an appropriate comparison given the *Padilla* Court equated banishment and deportation.[190] Removing juvenile offenders from their friends, family, and community for the rest of their lives feels to them like banishment. Legal researcher Beth Caldwell noted that "most states have rejected the use of banishment," indicating a national consensus against the practice.[191] Banishment has been declared unconstitutional at the national level as well, when imposed as punishment in criminal court.[192] Even though state banishment differs from a nation's sovereign right to deport, "the impact of the practice on people's lives is the same in many cases," which should be the "focus of [determining] 'evolving standards of decency.'"[193]

All 50 states treat juveniles differently than adults in the criminal context, suggesting a national consensus against treating juveniles the same as adults in the immigration context. All 50 states adjudicate at least some juvenile offenses in juvenile courts separate from the adult system.[194] In addition, 24 states house minors separately from adults in jails or prisons or both, and 24 states have eliminated automatic transfer mechanisms for juveniles to adult criminal court.[195] One of those states was Oregon, which removed automatic waiver of juveniles into adult court in 2019 when Senate Bill 1008 was passed with broad public support and almost 70% of the legislature voted in favor.[196]

b. The Court's Independent Judgment Should Lead It to Conclude That Mandatory Deportation of Juvenile Offenders Is Excessive Punishment.

The second step to determine what the appropriate standards of decency are is for the Court to apply independent judgment to decide if the punishment is excessive.[197] The Supreme Court uses independent judgment to compare the culpability

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[190] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

[191] Caldwell, *supra* note 8, at 2294.

[192] Trop v. Dulles, 356 U.S. 86, 103 (1958).

[193] Caldwell, *supra* note 8, at 2304.

[194] *Juvenile Court*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/juvenile_court (last visited Apr. 26, 2024).

[195] BRIAN EVANS, CAMPAIGN FOR YOUTH JUST., WINNING THE CAMPAIGN: STATE TRENDS IN FIGHTING THE TREATMENT OF CHILDREN AS ADULTS IN THE CRIMINAL JUSTICE SYSTEM 7–8 (2020), https://www.campaignforyouthjustice.org/images/reportthumbnails/CFYJ%20Annual%20Report.pdf.

[196] S. 1008, 80th Leg. Assemb., 2019 Reg. Sess., 2019 Or. Laws ch. 634; *Multnomah County Celebrates SB 1008, a Milestone in Juvenile Justice Reform*, MULTNOMAH CNTY. (Aug. 16, 2019), https://www.multco.us/multnomah-county/news/multnomah-county-celebrates-sb-1008-milestone-juvenile-justice-reform.

[197] Roper v. Simmons, 543 U.S. 551, 564 (2005).

of the offender with the punishment being inflicted,[198] and in a proportionality review the Court's independent judgment can lead it to rule in conflict with national consensus.[199] As legal scholar Juliet Stumpf has noted, the criminalization of immigration law has highlighted the striking disparity between the proportionality norms that animate criminal punishment and the lack of such proportionality in immigration law.[200] The harsh consequence of deporting juvenile offenders after they have been deemed rehabilitated and released is punishment that is often exceedingly disproportionate to the underlying offense.

Finally, in exercising its independent judgment, the *Roper* test allows the Court to look to international norms for "respected and significant confirmation" of the Court's determination of the evolving standards of decency.[201] Since it is compelling to courts when the United States is the only nation to continue a practice,[202] there is no longer a question as to whether modern standards of decency still tolerate mandatory deportation of youth who have committed crimes. The Supreme Court has made it clear that what is "cruel and unusual" can evolve over time and has much to do with changes in international law and norms. Part III develops the confirmatory role of international law, as established by the *Roper* Court's two-prong test. As will be discussed in Part III, international law and norms overwhelmingly indicate that the United States stands alone in the level and method by which juvenile offenders are deported, making the practice cruel and unusual punishment unless subject to heightened constitutional protections.

III. INTERNATIONAL AND FOREIGN LAW OPPOSE MANDATORY DEPORTATION OF JUVENILE OFFENDERS

International law weighs heavily against mandatory deportation of juvenile offenders void of judicial discretion. Deportation of juvenile offenders in the United States violates modern standards of decency by flouting international norms and human rights standards, thereby making the practice cruel and unusual, violating

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[198] *E.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."); Graham v. Florida, 560 U.S. 48, 67 (2010) ("The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.").

[199] *Atkins*, 536 U.S. at 312–13.

[200] Stumpf, *supra* note 11, at 1685–87.

[201] *Roper*, 543 U.S. at 578.

[202] *Id.* at 577 ("[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty."); *Graham*, 560 U.S. at 80 ("There is support for our conclusion in the fact that, in continuing to impose [this type of sentence], the United States adheres to a sentencing practice rejected the world over.").

our own Eighth Amendment. The remainder of this Comment first lays out in Section III.A how international treaties and courts, as well as foreign domestic law, influence U.S. courts. Then Section III.B shows how international and foreign law compels the finding that deportation of juveniles, as implemented in the United States, violates global modern standards of decency and is, therefore, cruel and unusual punishment.

A. U.S. Courts Are to Consider International Treaties and Decisions of International Courts

1. Role of Treaties in U.S. Law

As noted above in Section II.B, international law and international treaties play an important role in U.S. law, including in both juvenile punishment decisions and immigration decisions.[203] The treatment by U.S. courts of a treaty depends on its status. Under Article VI of the Constitution, treaties the United States has bound itself to are the supreme law of the land, so long as they do not conflict with the Constitution.[204] Treaties are entered into force with the consent of the Senate and ratified by the president.[205] All treaties, international agreements, and customary international law are part of federal law.[206] Acts of Congress and ratified treaties are of "equal status" and whichever was made later controls.[207] For example, the International Covenant on Civil and Political Rights (ICCPR), discussed further in Section II.B.1, became the supreme law of the land under the Supremacy Clause of the Constitution when it was ratified by the United States in 1992.[208]

When the United States has not ratified a treaty, the treaty is non-binding,[209] but an unratified treaty that most of the world has signed is considered "customary international law," which U.S. courts can consider a "persuasive force as embodying

[203] *See, e.g.*, *Graham*, 560 U.S. at 81; *Roper*, 543 U.S. at 576; Trop v. Dulles, 356 U.S. 86, 102 (1958).

[204] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 301(1), § 301 cmt. b (AM. L. INST. 2018).

[205] *Id.* § 303(3); U.S. CONST. art. I, § 2.

[206] RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 115 cmt. a (AM. L. INST. 1987).

[207] *Id.*

[208] *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr (Apr. 2019); International Covenant on Civil and Political Rights, *adopted by the U.N. Gen. Assemb.* Dec. 19, 1966, T.I.A.S. 92-908, 999 U.N.T.S 171 (entered into force for the United States on Sept. 8, 1992) [hereinafter ICCPR].

[209] RESTATEMENT (THIRD), *supra* note 206, § 111(3).

the consensus of the ratifying states" and reflective of the United States' "obligations . . . to the broader international community."[210] The weight of global consensus for an unratified treaty is stronger the more the global community, particularly U.S. allies, have committed to it.[211]

Treaties, both ratified and unratified, have been relevant in juvenile and immigration court decisions. The Convention on the Rights of the Child (CRC)[212] was persuasive in *Graham* and *Roper* as a reflection of customary international law because the United States is the only nation that has not ratified the CRC.[213] Similarly, treaties are also consulted by courts in immigration decisions, on the basis that "treaties and international practices have been aimed at preventing injurious discriminations against aliens."[214]

2. Role of International Courts in U.S. Law

International courts interpret international law as it applies to member states, but U.S. courts are often reluctant to be bound to decisions of international courts.[215] Since World War II, there has been a "proliferation of international organizations and courts," including the United Nations Court of Human Rights (UNCHR), the European Court of Human Rights (ECHR), and the Inter-American Commission on Human Rights (IACHR).[216] In general, international judicial decisions are "implemented within the possibilities offered by the applicable domestic law."[217] Whether a court decision is binding on a state depends on the relationship of the state with that court as well as the agreement between a member state and that court. For example, decisions of the ECHR are binding on all of its member

[210] Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 115–16 (2006).

[211] *Id.* at 11, 113–15.

[212] CRC, *supra* note 178.

[213] Graham v. Florida, 560 U.S. 48, 81–82 (2010); Roper v. Simmons, 543 U.S. 551, 576 (2005).

[214] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 65–67 (1941) (relying on role of international law in immigration to hold that the federal government has supremacy over immigration law).

[215] *See, e.g.*, Flores-Nova v. Att'y Gen. of U.S., 652 F.3d 488, 493–94 (3d Cir. 2011) (holding a decision of the Inter-American Commission on Human Rights was not binding on U.S. courts and declining to apply the decision); Payne-Barahona v. Gonzáles, 474 F.3d 1, 3–4 (1st Cir. 2007) (noting that "when customary international law conflict[s] with the statutes, the clear intent of Congress would control").

[216] Jörg Polakiewicz, *International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts*, MAX PLANCK ENCYCLOPEDIAS OF INT'L L., https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1057 (Mar. 2011).

[217] *Id.*

states, and judgments, including monetary judgments, are enforced by the Committee of Ministers of the Council of Europe.[218] In contrast, decisions of the IACHR are binding on member states that have ratified the American Convention on Human Rights but serve only as advisory opinions for those member states that have not yet ratified the American Convention, including the United States.[219] When an international court decision is an advisory opinion, it becomes binding only if the nation decides to incorporate it into its domestic law, a practice which U.S. courts often resist.[220]

3. Role of Foreign Laws in U.S. Law

The laws of American allies are, of course, not binding on the United States, but they are instructive as far as how U.S. allies approach the subject in question, including how those allies apply international law.[221] The laws of the United States' closest allies (particularly of England) upon whose legal system the U.S. system is based (as well as other European countries) are often invoked by courts in the development of U.S. case law, including the Eighth Amendment.[222] The laws and practices of U.S. allies, especially where there is global consensus, establish customary international law that provide "basic rules" as to how governments are to treat people,[223] including reflecting the "evolving standards of decency" used in an Eighth Amendment analysis.[224]

B. The Rights of Juveniles Facing Deportation, According to International Standards

The United States must make significant changes to align its deportation practices with international norms, in order to ensure any deportations of juvenile offenders do not run afoul of the Eighth Amendment. While U.S. immigration law is

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[218] EUR. CT. OF HUM. RTS., THE ECHR IN 50 QUESTIONS 9 (2021).

[219] Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 498 (2011); Jorge E. Taiana, Remarks, *The Legacy and Current Challenges of the Inter-American Commission on Human Rights*, HUM. RTS. BRIEF, Jan. 2013, at 42, 44; *The Practical Guide to Humanitarian Law*, MEDECINS SANS FRONTIERS, https://guide-humanitarian-law.org/content/article/3/inter-american-court-of-and-commission-on-human-rights (last visited Apr. 26, 2024).

[220] *See, e.g.*, *Flores-Nova*, 652 F.3d at 493–94 (holding a decision of the Inter-American Commission on Human Rights was not binding on U.S. courts and declining to apply the decision).

[221] Cleveland, *supra* note 210, at 3 ("[C]onsideration of international and foreign law is important to the jurisprudence of the modern Supreme Court."); *id.* at 11, 113–15.

[222] *Id.* at 85 (noting that "the consideration of European practice is appropriate, given the Court's long tradition of looking to European practice as paradigmatic of 'free' societies"); *see also* cases cited *supra* notes 112, 166, 175, 177, and 180.

[223] Cleveland, *supra* note 210, at 86.

[224] *See* cases cited *supra* notes 161, 166, and 177.

extremely limited in ways judicial discretion can be applied before a juvenile offender is deported, many of its allies, including the United Kingdom, Canada, New Zealand, and Austria, apply a heightened level of discretion to juvenile offender deportation decisions.

This Comment presents a framework that would more closely align U.S. immigration law with international law and the laws of its allies. The framework adds a heightened level of discretion for noncitizen juvenile offenders that, as outlined below, international law persuasively encourages the United States to include. The framework would protect a number of rights, grounded in international human rights law: the right to a hearing before deportation (in which the other rights enumerated are to be considered), the right to consider the best interests of the child, the right for a child to be rehabilitated rather than punished, and the right to "family unity." These rights would be protected by the incorporation of a robust balancing test that would not eliminate all deportations of juvenile offenders, but which would weigh public safety concerns against factors in favor of allowing the juvenile offender to remain in the United States, for the best possible outcome for all parties.

The mitigating factors to weigh against safety concerns include the age at which the noncitizen immigrated to the United States; length of residence in the United States; potential hardship to the noncitizen's family if the noncitizen is deported; the noncitizen's links to the country to which they would be deported; the nature and severity of the offense in question, including the noncitizen's age at the time it was committed; and evidence of the noncitizen's rehabilitation.[225] Currently, these rights and factors are noticeably absent from U.S. immigration law. The United States inflicts consequences on many juvenile offenders that may be disproportionate to the underlying offense, and therefore unconstitutional according to the Eighth Amendment.

1. The Right to a Hearing Before Deportation

International human rights law requires noncitizens be afforded a full and fair hearing before they are deported. A hearing is also important as the appropriate forum to consider the additional rights enumerated in the rest of this section. Specifically, the ICCPR, which the United States has ratified and is therefore technically bound,[226] requires a noncitizen who is lawfully in a country and facing deportation to "be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before . . . the competent authority."[227] Interpreting this standard, the IACHR, the human rights body that oversees North and South America, has concluded that a deportation hearing requires an

[225] Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶ 54 (2010).

[226] ICCPR, *supra* note 208, T.I.A.S. 92-908, 999 U.N.T.S. 171.

[227] *Id.* art. 13.

interpretation "as broad as possible" of due process rights, including the right to be represented in a hearing by an attorney.[228]

Despite these robust international legal requirements, the United States often deports juvenile offenders without a full and fair hearing. Even where there is a hearing, noncitizens are often unrepresented by legal counsel since appointed legal counsel is not a right in immigration proceedings.[229] Some juvenile offenders are deported with no hearing at all, including individuals who are not lawful permanent residents (LPRs) who have been convicted of what immigration law considers an "aggravated felony."[230] Those convicted of an aggravated felony face "a strong likelihood of being subject to 'administrative removal' proceedings in which they receive no immigration court hearing and limited opportunities to . . . fight their deportation."[231] Even where a hearing is afforded, immigration judges now have very little discretion in the review process because of the removal from U.S. immigration law in 1996 of powerful waivers that provided broad legal grounds for relief.[232] The elimination of these waivers led to the end of many "[h]earings that used to occur in which a judge would consider non-citizens' ties to the United States, including their family relationships, business or property ownership, tax payments, and service in the US armed forces prior to deportation."[233] Without those waivers, immigration judges' hands are tied as they are not authorized to exercise discretion, even if they think it should be warranted.[234] There are now far fewer opportunities for a

[228] HUM. RTS. WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 13 (2009) (quoting Riebe Star v. Mexico, Case 11.610, Inter-Am. Comm'n H.R., Report No. 49/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶¶ 70–71 (1999)), https://www.hrw.org/sites/default/files/reports/us0409web_0.pdf.

[229] INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 1 (2016).

[230] INA § 101, 8 U.S.C. § 1101(a)(43) (listing all crimes categorized as "aggravated felonies" in immigration law); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 208 (2017).

[231] Koh, *supra* note 230, at 208 (citing 8 U.S.C. § 1228(b)(2)(B)).

[232] The waivers removed in 1996 include the Immigration and Nationality Act § 244 waiver based on good moral character and extreme hardship to a citizen or legal permanent resident close relative, and the § 212(c) waiver which allowed legal permanent residents to show that positive factors against deportation outweighed negative factors. HUM. RTS. WATCH, *supra* note 228, at 16–17 (discussing how 8 U.S.C. § 1254 (1994) (repealed 1996) was replaced by INA § 240A, 8 U.S.C. § 1229b, which allows waivers for legal permanent residents for a much narrower set of crimes, and excludes waivers for many crimes, including some nonviolent misdemeanors); *see also supra* notes 49–52 and associated text.

[233] HUM. RTS. WATCH, *supra* note 228, at 3.

[234] *See, e.g.*, Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 843(9th Cir. 2006) ("There is . . . no discretionary relief from removal available to an aggravated felon who ha[s] served a prison term of five years or more."); *see also* INA § 237, 8 U.S.C. § 1227(a) and INA § 212(a), 8 U.S.C.

noncitizen who committed a crime as a juvenile to seek the kind of relief intended by the ICCPR.

2. The Right to Have the Best Interests of the Child Applied

The concept of considering the best interests of the child in deportation decisions derives directly from the CRC. In the deportation context, the standard involves a number of factors which consider the child's family ties and where the child is least likely to reoffend. Specifically, Article 3.1 of the CRC requires: "In all actions concerning children, whether undertaken by . . . social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[235] Furthermore, the U.N. Committee on the Rights of the Child has declared that the CRC must be applied in full to all children in migration situations.[236] The best-interests standard is essential in the proportionality analysis of a punishment, and is used extensively by international courts and in the domestic laws of many U.S. allies.[237] By not taking the best interests of the child into consideration, the United States misses the opportunity to meter punishments to be appropriate to the offenses and to protect children, a vulnerable segment of the population, from punishments that do more harm than good.

As noted, every nation in the world except the United States has ratified the CRC; the United States has signed, but not ratified, the Convention.[238] The *Roper* and *Graham* decisions made clear that the CRC should nevertheless be a persuasive consideration in decisions relating to juveniles.[239] When the CRC provides evidence that "the overwhelming weight of international opinion" is against a particular U.S. practice, that "provide[s] respected and significant confirmation for [the Court's] own conclusions."[240]

If the United States were concerned about an aspect of the CRC, it would be able to explicitly make a statement as to what part of the treaty it opposes, which

§ 1182(a) (listing the classes of noncitizens who are inadmissible or removable and noting the waivers available).

[235] CRC, *supra* note 178, art. 3, ¶ 1.

[236] U.N. Comm. on the Rts. of the Child, Report of the 2012 Day of General Discussion, ¶ 93 (2012), https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf.

[237] *See, e.g.*, Maslov v. Austria, App. No. 1638/03546, ¶ 82 (June 23, 2008), https://hudoc.echr.coe.int/eng?i=001-87156 (recognizing that Austria is required to apply the best-interests-of-the-child standard in deportation decisions because EU and international law requires it); Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶ 56 (2010) (best interests of the child must be taken into consideration).

[238] *See supra* note 183.

[239] Roper v. Simmons, 543 U.S. 551, 576 (2005); Graham v. Florida, 560 U.S. 48, 81–82 (2010).

[240] *Graham*, 560 U.S. at 81 (quoting *Roper*, 543 U.S. at 578) (first alteration in original).

would make that part of the CRC less persuasive to U.S. courts.[241] The United States has not lodged any formal opposition to the best-interests-of-the-child standard in the CRC; instead, the United States' complicated reasons for not ratifying the CRC have mostly to do with concerns for government overreach into the independence of parents—concerns which have never been formally lodged but have kept the United States' status with the treaty in limbo.[242] Not only has the United States never formally opposed the best-interests standard, the INS (immigration agency prior to USCIS) acknowledged in 1998 the United States' obligations under the CRC in the context of the asylum process. INS guidelines from the time note "that the provisions of the CRC 'provide guidance' and that, as a signatory, the United States is obliged to 'refrain from acts which would defeat the . . . purpose of the Convention.'"[243]

Despite the INS's past acknowledgement of U.S. obligations under the CRC, today U.S. immigration law does not generally consider the best interests of the child. Neither immigration courts nor USCIS "has a mandate or the resources to investigate what is in the best interests of the child in determining immigration rights."[244] One notable exception to the absence of the best-interests standard in U.S. immigration law is for minors seeking Special Immigrant Juvenile Status (SIJS), a status reserved for children who have been abandoned by their parents or suffered abuse.[245] Eligibility for SIJS is determined, in part, by the minor's ability to show that it would not be in their "best interest to be returned to the . . . country of nationality."[246] Although examples of the best-interests-of-the-child standard in U.S. immigration law are otherwise almost nonexistent, their inclusion in these two limited examples from past INS guidance and the current SIJS statute indicate a recognition that the best-interests standard matters.

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[241] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF12208, RESERVATIONS, UNDERSTANDINGS, DECLARATIONS, AND OTHER CONDITIONS TO TREATIES 1 (2022).

[242] Bill Ong Hing & Lizzie Bird, *Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child*, 35 GEO. IMMIGR. L.J. 113, 146 (2020).

[243] *Id.* (quoting Memorandum from Jeff Weiss, Acting Dir., Off. of Int'l Affs. of the U.S. Dep't of Just. Immigr. & Naturalization Serv., to Asylum Officers, Immigration Officers & Headquarters Coordinators on Guidelines for Children's Asylum Claims (Dec. 10, 1998), https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf).

[244] STATE JUST. INST., GUIDE FOR STATE COURTS IN CASES INVOLVING UNACCOMPANIED IMMIGRANT CHILDREN 5 (2015), https://www.sji.gov/wp/wp-content/uploads/15-167_NCSC_UICGuide_FULL-web1.pdf.

[245] 8 C.F.R § 204.11 (2023).

[246] STATE JUST. INST., *supra* note 244, at 7; 8 C.F.R § 204.11(c)(2).

a. Use of the Best-Interests Standard by International Courts and U.S. Allies

The United States would align itself with international law and the domestic law of some of its closest allies if the best-interests-of-the-child standard were considered in our deportation decisions. The application by international courts and our allies of the best-interests standard demonstrates how the United States could effectively incorporate the standard to consider a child's best interests before deporting them, while maintaining public safety.

Where the best-interests-of-the-child standard applies in other countries, the standard is often applied to any individual facing deportation for a juvenile offense, even if the noncitizen is an adult at the time of the deportation proceedings, because the age of the offender when the underlying crime was committed is relevant to a proportionality determination.[247] The European Court of Human Rights (ECHR)—an EU court that is only informative to the United States but binding on our allies who are member states—has held that EU member states must consider the best interests of the child for all juvenile offenders, including those who are now adults, to ensure the consequence is proportional to the offense. The ECHR approach balances the "circumstances and the gravity of the offence, but also . . . the age, lesser culpability, circumstances and needs of the child, as well as . . . the various and particularly long-term needs of the society."[248]

In considering whether deportation is proportionate to an offense, the ECHR gives special regard for immigrants who have spent most or all of their childhood in the host country. In the 2008 case *Maslov v. Austria*, which involved the deportation of a Bulgarian adult noncitizen from Austria for a crime committed as a juvenile, the ECHR concluded that the balancing of the best interests of the child did not allow Austria to deport Maslov since he had lived in Austria from a young age, did not pose a national security risk, and was less culpable owing to his young age at the time of his offense.[249] The case of *Maslov* is informative for U.S. courts because it demonstrates how the relevant provisions in the CRC have been interpreted by a human rights court to which many of our closest European allies are bound, which further informs U.S. courts' inquiries into what constitutes cruel and unusual punishment beyond the bounds of modern standards of decency.

Further evidence that the United States deviates from its allies by ignoring the best interests of the child is found in the domestic laws of several close American allies. The law of the United Kingdom is particularly compelling to the Supreme

[247] Maslov v. Austria, App. No. 1638/03546, ¶¶ 38, 82, 100 (June 23, 2008), https://hudoc.echr.coe.int/eng?i=001-87156.

[248] *Id.* (quoting the U.N. Comm. on the Rts. of the Child, General Comment No. 10, ¶ 71, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007)).

[249] *Id.* ¶¶ 84, 87, 96.

Court in Eighth Amendment decisions due to the historical source of the Amendment.[250] Up until 2008, the U.K. had ratified the CRC but had maintained a reservation related to foreign national children and immigration matters. In November 2008, the U.K. modified its immigration laws, and now section 55 of the Borders and Immigration Act requires the Home Office (comparable to the U.S. State Department) and any agency making immigration decisions to include considerations of the best interests of the child, including before deporting a juvenile offender.[251] The U.K. does not allow automatic deportation for juvenile offenders under 18, although it does allow for discretionary deportation of minors on limited grounds where deportation is conducive to the public good.[252]

France, New Zealand, Austria, and Canada all require the best interests of the child to be considered in deportation decisions. French law refers to the best-interests-of-the-child standard throughout its immigration law, and deportation of minors is very rare in France.[253] New Zealand officials are required by statute to take international human rights obligations into consideration for all immigration decisions, including the best-interests standard from the CRC.[254] Canada uses the best-interests-of-the-child standard in all removal decisions[255] and explicitly bans deportation of juveniles for certain crimes.[256] In Austria, deportation is never allowed for people who have been in the country since the age of three or younger, no matter what their offense is, because their best interest is automatically assumed to be to remain in the only home country they can remember.[257]

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[250] *See supra* notes 158–65 and accompanying text.

[251] Borders, Citizenship and Immigration Act 2009, c. 11, § 55(1)(a) (U.K.) (requiring the government to "safeguard and promote the welfare of children who are in the United Kingdom" in all immigration matters); CORAM CHILD.'S LEGAL CTR., MIGRANT CHILDREN'S PROJECT FACT SHEET 1–2 (2017), https://www.childrenslegalcentre.com/wp-content/uploads/2016/10/Best.interests-May-2017.final_.pdf; HOME OFFICE, MANAGING FOREIGN NATIONAL OFFENDERS UNDER 18 YEARS OLD 19 (2016), https://www.gov.uk/government/publications/managing-foreign-national-offenders-under-18-years-old.

[252] UK Borders Act 2007, c. 30, §§ 33(3), (7)(b); HOME OFFICE, *supra* note 251, at 6, 19.

[253] EUR. MIGRATION NETWORK FR., STUDY 2020: DETENTION AND ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN PROCEDURES 17 (2021), https://www.immigration.interieur.gouv.fr/content/download/128773/1027104/file/1_EMN_Study_detention_and_alternatives_to_detention_in_France.pdf.

[254] JUDY MCGREGOR, SYLVIA BELL & MARGARET WILSON, FAULT LINES: HUMAN RIGHTS IN NEW ZEALAND 86, 101–02 (2015), https://www.lawfoundation.org.nz/wp-content/uploads/2015/04/2011_38_17-Public-version-of-Research-Report-embargoed-till-2.4.15.pdf.

[255] *E.g.*, Immigration and Refugee Protection Act, S.C. 2001, c. 27, §§ 25(1), 69(2) (Can.).

[256] *Id.* § 36(3)(e)(ii)–(iii).

[257] *See* Maslov v. Austria, App. No. 1638/03546, ¶¶ 31, 47 (June 23, 2008), https://hudoc.echr.coe.int/eng?i=001-87156 (noting that as interpreted by Austrian case law, FREMDENGESETZ 1997 [ALIENS ACT 1997] BUNDESGESETZBLATT [BGBL] No. 75/1997, as amended, § 38(1), ¶ 4,

The U.S. Supreme Court has made clear that the requirements of the CRC are persuasive to U.S. courts.[258] Therefore, it should be highly compelling to U.S. courts that international human rights courts and the domestic laws of close allies find the best-interests-of-the-child standard from the CRC to be an essential consideration in decisions related to deportation of juveniles. To ensure the best-interests-of-the-child standard is applied and deportation is proportionate to the offense, U.S. immigration law should allow for considerations of the factors the ECHR applied in *Maslov*, including "age, lesser culpability, circumstances and needs of the child, as well as to the . . . needs of the society."[259]

3. Right to Rehabilitation

The United States recognizes the capability for successful juvenile rehabilitation in the juvenile delinquency context but has failed to incorporate the same standard into deportation decisions.[260] International covenants give broad preference to the right to rehabilitation for youth, and widely condemn harsh, disproportionate punishments for children, including forbidding additional punishment once the individual is deemed rehabilitated. Article 37 of the CRC explicitly bans "cruel, inhuman or degrading treatment or punishment" for children,[261] language which closely mirrors our own Eighth Amendment. Article 3 of the European Convention on Human Rights ("European Convention") provides for the absolute right not to "be subjected to torture or to inhuman or degrading treatment or punishment."[262] The ECHR has found in some cases that deportation of juvenile offenders is in fact warranted, where there is evidence that the noncitizen is still dangerous and poses a threat to society.[263] However, before a juvenile offender is deported, the ECHR requires there to be compelling evidence that the crime was especially severe and

prohibits deportation of a noncitizen who had been legally present in Austria since the age of three or younger).

[258] *See* cases cited *supra* note 239.

[259] Maslov v. Austria, App. No. 1638/03546, ¶ 38 (quoting U.N. Comm. on the Rts. of the Child, General Comment No. 10, ¶ 71, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007)).

[260] *See* discussion *supra* Section I.B.

[261] CRC, *supra* note 178, art. 37(a).

[262] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, at art. 3, *opened for signature* Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention].

[263] *See, e.g.*, Bouchelkia v. France, App. No. 23078/93, ¶¶ 46–47, 51–53 (Jan. 29, 1997), https://hudoc.echr.coe.int/eng?i=001-58014 (upholding a French court's decision to deport an Algerian national who had lived in France since the age of 2, had completed his sentence for rape committed while under age 18, but was deemed "dangerous" based on additional crimes committed after being released).

that rehabilitation is lacking. The ECHR decides whether deportation is disproportionate based on the circumstances, gravity of the offense, and other factors such as the noncitizen's age at the time of the offense.[264]

The CRC grants youth who have offended the right to be given the opportunity to be rehabilitated and reintegrated into society,[265] akin to the United States' approach to juvenile rehabilitation in the delinquency context.[266] Austria, New Zealand, and Canada have explicitly incorporated the right to rehabilitation into their domestic immigration laws.

In Austria, deportation of juvenile offenders is not mandatory. A number of exceptions exist in accordance with the CRC and ECHR, including rehabilitation, as well as length of time in the country and family connections.[267]

Similarly, in New Zealand, a youth's rehabilitation is a serious consideration in determining if deportation is proportionate to the offense.[268] Influenced by the ECHR case *Maslov*, the N.Z. Supreme Court determined that "[f]urther punishment" of deporting a Tongan juvenile offender convicted of theft was not appropriate, in part because of his "long-term rehabilitation prospects."[269] The N.Z. Court noted there is "little to be gained in deportation" when he was not deemed to be at risk for reoffending.[270] Deporting a noncitizen who had offended as a minor but was not expected to reoffend was considered disproportionate to his offense and a violation of international law.[271]

Canada considers the possibility of rehabilitation as a positive factor in stays of removal for juvenile offenders.[272] Rehabilitation is an explicit expectation in the Canadian Youth Criminal Justice Act.[273] Canadian immigration law does not allow for

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[264] Maslov v. Austria, App. No. 1638/03546, ¶ 38.

[265] CRC, *supra* note 178, art. 40, ¶ 1 ("[E]very child [who has] infringed the penal law [has the right] to be treated in a manner consistent with the promotion of the child's sense of dignity and worth . . . which takes into account the child's age and the desirability of promoting the child's reintegration and . . . assuming a constructive role in society.").

[266] *See* discussion *supra* Section I.B.

[267] Maslov v. Austria, App. No. 1638/03546, ¶¶ 40, 83 (referring to FREMDENGESETZ 1997 [ALIENS ACT 1997] BUNDESGESETZBLATT [BGBL] No. 75/1997, as amended, §§ 37, 38 (Austria)).

[268] Helu v. Immigr. & Prot. Tribunal [2015] NZSC 28, [2015] 1 NZLR 298 at [120] (N.Z.)

[269] *Id.* at [173]; *id.* at [210 n.150] (Glazebrook, J., concurring).

[270] *Id.* at [99].

[271] *Id.* at [102], [164–66].

[272] Slimani v. Canada (Pub. Safety & Emergency Preparedness), 2018 CanLII 107699, para. 5 (Can. IRB).

[273] Youth Criminal Justice Act, S.C. 2002, c. 1, § 3(1)(a)(ii) (Can.) ("[T]he youth criminal justice system is intended to protect the public by . . . promoting the rehabilitation and reintegration of young persons who have committed offences . . . .").

deportation of juvenile offenders for any crimes sentenced under the Act, which can include violent crimes like murder and sexual assault.[274] In the United States, whether a juvenile who has committed crime has been rehabilitated is almost never considered in a deportation decision, and in turn the United States acts contrary to many of its allies when it expels noncitizens who no longer pose any actual threat.[275]

4. Right to Family Unity

Finally, international covenants and their interpretation by international courts compel the United States to consider the right to family unity before deporting a juvenile offender. These rights are closely related to the best-interests-of-the-child standard, in that they are generally within a noncitizen's best interest to be in the country where they have the strongest family ties.[276] For adults facing deportation for offenses committed as juveniles, the right to family life and family unity is still a basic human right, according to Articles 17 and 23 of the ICCPR, which is binding on the United States since its ratification in 1992.[277]

The U.N. Human Rights Committee (UNHRC) has held that Article 23 of the ICCPR requires member nations to consider family interests in deportation decisions. The United States is bound by the UNHRC's interpretation of the ICCPR, because the UNHRC is tasked with implementing the ICCPR, which the United States has ratified, making the covenant federal law.[278] In *Stewart v. Canada*, the UNHRC noted that, under international law, a nation's right to expel noncitizen residents for legitimate state interests must be balanced against due consideration in deportation, including family interests.[279] Ultimately the UNHRC held that Canadian and international law allowed for the deportation of Mr. Stewart, while affirming that Article 23 of the ICCPR requires member nations to consider family interests in deportation decisions. Because Canadian immigration law already allowed

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[274] Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 36(3)(e)(iii) (Can.).

[275] *See, e.g.*, Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 843 (9th Cir. 2006) ("There is . . . no discretionary relief from removal available to an aggravated felon who ha[s] served a prison term of five years or more."); *id.* at 852 (Ferguson, C.J., dissenting) ("Mendez's amenability to treatment and rehabilitation . . . was high.").

[276] CRC, *supra* note 178, art 9, ¶ 1 (stating that children should not be separated from their parents unless it is in "the best interests of the child").

[277] *See, e.g.*, ICCPR, *supra* note 208, art. 17 ("No one shall be subjected to arbitrary . . . interference with his . . . family . . . ."); *id.* art. 23 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

[278] *See* discussion *supra* Section A.1.

[279] Stewart v. Canada, CCPR/C/58/D/538/1993, Views, ¶ 9.2 (Dec. 16, 1996) (upholding decision to deport a British national from Canada for his multiple criminal convictions).

for such balancing[280] and the Canadian immigration court had given due consideration to the relevant family factors, the UNHRC upheld that particular deportation decision.[281] The holding confirms that in order to uphold its international obligations, the U.S. government is bound by the ICCPR to modify immigration law to comply with the right to family unity.

America's requirement for mandatory deportation for certain crimes violates juvenile offenders' rights to family unity under international law, according to the IACHR.[282] The IACHR, along with the Inter-American Court on Human Rights (Inter-American Court), comprise the Inter-American System of Human Rights. The Inter-American Court is the closest thing the Americas have to the ECHR.[283] Its decisions apply to members of the Organization of American States (OAS), of which the United States is a member,[284] and it has a "broad mandate to monitor human rights in all 35 independent states of the Americas."[285] However, the United States has not joined the 24 nations in the Americas who have ratified the American Convention on Human Rights.[286] Instead, the United States remains subject to a "general level of oversight," which its courts have sometimes chosen to ignore[287] and other times found compelling, including in Eighth Amendment considerations.[288] Nevertheless, given the Court's propensity to consult international law, the recommendations from the IACHR should be considered persuasive in U.S. courts in a similar fashion to the Convention on the Rights of the Child,[289] particularly in the

[280] *Id.* ¶ 12.10 ("[T]he Immigration Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart's family connections in Canada did not justify revoking the deportation order.").

[281] *Id.* ¶ 13.

[282] Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶¶ 54, 58 (2010).

[283] *What Is the I/A Court H.R.?*, INTER-AM. CT. OF HUM. RTS., https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last visited Apr. 26, 2024); Françoise Hampson, Claudia Martin & Frans Viljoen, *Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa*, 16 INT'L J. CONST. L. 161, 161–62 (2018).

[284] *Member States*, ORG. OF AM. STATES, https://www.oas.org/en/member_states/default.asp (last visited Apr. 26, 2024); *What is the IACHR?*, INTER-AM. COMM'N ON HUM. RTS., https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp (last visited Apr. 26, 2024); *What Is the I/A Court H.R.?*, *supra* note 283.

[285] Huneeus, *supra* note 219, at 497–98.

[286] *Id.* at 498.

[287] *See supra* note 220 and accompanying text.

[288] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1988) (observing that the Court's conclusion that the death penalty for juveniles under sixteen violated the Eighth Amendment was affirmed by international human rights treaties, including the American Convention on Human Rights).

[289] *See supra* discussion accompanying note 178.

role of interpreting international human rights law as it applies to OAS member states.

In *Smith v. United States*, the IACHR called for the United States to return to a balancing test to its immigration statutes, akin to the 212(c) waiver abolished in 1996.[290] The IACHR relied on relevant European Court of Human Rights[291] and U.N. Human Rights Committee[292] decisions to conclude that while nations have sovereignty to decide whom to exclude, to comply with international human rights the United States should apply a case-by-case balancing test.[293] Such a test, the IACHR concluded, would be "the only mechanism to reach a fair decision between the competing individual human rights and the needs asserted by the State."[294] The IACHR provides a long list of factors the United States should consider in deportation decisions to ensure family unity and other human rights are protected. The factors include the age at which the noncitizen immigrated to the United States; length of residence in the United States; potential hardship to the noncitizen's family if the noncitizen is deported; the noncitizen's links to the country to which they would be deported; the nature and severity of offense in question, including the noncitizen's age at the time it was committed; and evidence of the noncitizen's rehabilitation.[295]

By not accepting the strong admonition from the IACHR, the United States appears to contradict its own concession within the case. In its defense in *Smith*, counsel for the United States conceded that "any legal mechanism for removing non-citizen residents must comport with its international human rights and refugee obligations."[296] Nevertheless, so far U.S. courts have declined to apply the Commission's recommendations from *Smith* to its review of immigration decisions, citing the supremacy of federal law and the fact that the United States has not ratified the Inter-American Convention on Human Rights.[297] By declining to apply the recommendations of the IACHR or the requirements of the UNHRC to consider the right to family unity in deportation, U.S. immigration law operates in conflict with the

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[290] Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶¶ 54, 58 (2010).

[291] *Id.* ¶ 25 ("[T]he European Court of Human Rights has consistently held that the stronger an individual's family ties and the longer the duration of residency in the host country, the greater the burden on the State to demonstrate that the deportation is proportionate to the legitimate aim pursued.").

[292] *Id.* ¶ 26 ("[T]he U.N. Human Rights Committee employs a similar balancing test between the State's interests and an individual's right to family life in deportation cases.").

[293] *Id.* ¶ 58 ("[A] deportee's establishment of a family or private ties to a host country does not establish an immutable right of a non-citizen to remain in the host country.").

[294] *Id.*

[295] *Id.* ¶ 3.

[296] *Id.* ¶ 32.

[297] *See supra* note 215 and accompanying text.

Supreme Court's precedent that international human rights law is persuasive to U.S. courts.[298]

In addition to the string of international court decisions, close U.S. allies such as Canada, New Zealand, and the U.K. all incorporate family unity concerns into their domestic court decisions related to juvenile offenders, a fact which also compels family unity to be considered in U.S. immigration law. Canadian courts use the possibility of "dislocation to the family" as a factor in favor of issuing a stay of removal for juvenile offenders.[299] The New Zealand Supreme Court uses family unity factors from Articles 17 and 23 in the ICCPR in its deportation decisions.[300] In the United Kingdom, very serious grounds are required to deport anyone under the age of 18, regardless of their crime, in order to maintain family unity in accordance with Article 8 of the European Convention on Human Rights.[301]

As noted above, in 2012, the U.K. modified its immigration rules to comply with the ECHR, not only in regards to the best interests of the child but also by requiring all family life to be considered in decisions related to deportation of juvenile offenders.[302] Prior to the changes to U.K. law in 2012, the European Court of Human Rights determined that the U.K. had violated a Nigerian immigrant's right to family unity under Article 8 of the European Convention on Human Rights when the U.K. tried to deport him for a rape committed while he was a minor.[303] Only a year later, the U.K. rewrote its laws to comply with the requirements in the ECHR, codifying family unity as a required consideration in all deportation decisions.[304] The United States would align itself with the groundswell of international human rights law if it were to follow suit and incorporate family unity into deportation decisions, particularly for juvenile offenders.

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[298] *See supra* notes 180 and 182 and accompanying text.

[299] Slimani v. Canada (Pub. Safety & Emergency Preparedness), 2018 CanLII 107699, para. 5 (Can. IRB).

[300] Helu v. Immigr. & Prot. Tribunal [2015] NZSC 28, [2015] 1 NZLR 298 at [75], [117] (N.Z.) (factoring in provisions of ICCPR, *supra* note 208, in decision).

[301] HOME OFFICE, *supra* note 251, at 22, 27; European Convention, *supra* note 262, art. 8 ("(1) Everyone has the right to respect for his private and family life . . . . (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary . . . in the interests of national security, public safety or the economic well-being of the country, [or] for the prevention of disorder or crime . . . .").

[302] HOME OFFICE, *supra* note 251, at 19–20.

[303] A.A. v. United Kingdom, App. No. 8000/08, ¶¶ 7–10, 37, 68–70 (Sept. 20, 2011), https://hudoc.echr.coe.int/eng?i=001-106282.

[304] Immigration Act 2014, c. 22, § 19 (U.K.) (requiring the right to family life from Article 8 of the ECHR to be considered in all immigration decisions); HOME OFFICE, *supra* note 251, at 19.

5. Proposed Framework to Comply with International Norms

The four rights enumerated in this Section, if incorporated into U.S. immigration law, would bring the United States in line with the modern standards of decency, thereby complying with its own Eighth Amendment and its human rights obligations. The factors proposed by the IACHR in *Smith* provide a helpful pathway to exactly what considerations need to be reviewed before a juvenile offender is deported, as these factors not only weigh family unity but also incorporate a child's best interests and the right of youth to rehabilitation rather than punishment.[305]

The framework proposed is simply this: all juvenile offenders should be first afforded a full and fair hearing before an immigration judge. That judge should, by statute, be required to consider: the age at which the individual immigrated to the United States and how long they have lived here; what potential hardships there will be to the individual's family remaining in the United States, including economic, health, and social or emotional; what links the individual has to their country of origin and what harms could befall them if returned; the severity and type of offense and possibilities for relief for nonviolent, minor offenses; and strongly weighing evidence of the individual's rehabilitation. If such considerations were incorporated into U.S. immigration law, the United States would not only comply with its international human rights obligations and align with its allies but would protect its own immigrant communities from the severe disruption of having their loved ones deported, making American society stronger.

C. Concerns with Using International and Foreign Law in U.S. Decisions

Critics of over-relying on international law are concerned with it superseding the sovereignty of the Constitution, the "supreme law of the land." Justice Scalia in his dissent in *Roper* was particularly adamant that the idea "that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand. . . . [A]pproval by 'other nations and peoples' should [not] buttress our commitment to American principles . . . ."[306] In his confirmation hearings, Chief Justice Roberts criticized the Court's consideration of foreign and international law, saying it gave "unaccountable foreign judges influence over American lawmaking."[307]

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[305] Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Merits Report No. 81/10 ¶¶ 54, 58(2010).

[306] Roper v. Simmons, 543 U.S. 551, 624, 628 (2005) (Scalia, J., dissenting).

[307] Cleveland, *supra* note 210, at 4; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of J. John Roberts) ("[J]udges of course are not accountable to the people . . . . If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed.").

Concerns like Justice Scalia's and Chief Justice Roberts's are misguided. The use of international law in U.S. courts is not a recent development in U.S. jurisprudence, and the Court has generally confined international law to an important but secondary role.[308] As Justice Ginsburg noted, the use of international norms in U.S. courts dates all the way back to the establishment of the United States, when the Framers wanted to comply with the Law of Nations.[309] Additionally, the Court has tended to be conservative in its application of international law, most often delegating it to a persuasive but non-binding role. In cases where U.S. courts have allowed themselves to be bound to international law, it has been in order to comply with the nation's international legal obligations under treaties to which the U.S. government has bound itself.[310] The concern that "American ideals will be discarded cannot be justified,"[311] given that the Court has consistently ensured that international law does not displace the supremacy of the Constitution.

It is accepted in international law that sovereign nations have the right to control their borders and remove certain noncitizens.[312] Our allies deport juvenile offenders in some cases,[313] but by relying on international human rights law, most of our allies apply a heightened level of discretion to decisions about deportation of juvenile offenders. As the United States does in the juvenile delinquency context, the United States can and should effectively balance its public safety interests with the human rights of juvenile offenders, including the right to a fair hearing, the right to have a child's best interests considered, the right to rehabilitation, and the right to family unity.

CONCLUSION

There is a national and international consensus that banishing people from the only home they know, where they may have deep family ties, is not a practice to be taken lightly. The Supreme Court's recognition that juveniles deserve special consideration because of their young age, decreased culpability, and their propensity to

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[308] John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 784 (2013) ("Given the subservient role the Supreme Court has given to international law in Eighth Amendment cases, the fear that American ideals will be discarded cannot be justified.").

[309] Cleveland, *supra* note 210, at 5 (citing Ruth Bader Ginsburg, Perspective, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 330–31 (2004) (keynote address delivered to the First National Convention of the American Constitution Society on Aug. 2, 2003)).

[310] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322–23 (1988) (finding that international law obligates the Court to shield diplomats from offensive protestors).

[311] Ghaelian, *supra* note 308, at 784.

[312] *See supra* notes 263 and 279 and accompanying text.

[313] *Id.*

be rehabilitated compels discretionary considerations before noncitizen juvenile offenders are expelled from our borders. A punitive practice violates the Eighth Amendment if it exceeds accepted norms of what is decent and proportional to the offense. Widely ratified human rights conventions and the legal practices of our closest allies provide a baseline of what behavior is appropriate for a democracy like the United States. Almost universally, human rights treaties, human rights courts, and our allies oppose the practice of mandatory deportation of juvenile offenders, without judicial discretion of mitigating factors and guarantees of basic rights, including the right to a fair hearing, the right to the best interests of the child, the right to rehabilitation rather than excessive punishment, and the right to family unity.

Opponents to changes to U.S. deportation laws argue that the government's plenary power disallows such changes, and that our national security will be at great risk if those who offended as children are allowed to live among us. Constitutional protections can never be eviscerated, not even by the government's sovereign power. As Justice Goldberg wrote to critics of the majority opinion in *Mendoza-Martinez*, "The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated . . . ."[314] Justice Kennedy responded to such concerns in *Roper* when he wrote, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[315]

The Constitution exists to keep our government in check and ensure certain enumerated rights are extended to those they are owed. Rather than remove without question noncitizens who consider America their home, all of American society can be safer and immigrant communities stronger if noncitizen juvenile offenders are afforded a chance to prove they should remain after their criminal sentence is served. Any punishment after the punishment requires Eighth Amendment protections, and by extending those constitutional protections we can keep home those youth who pose no actual threat and who belong here with us.

[314] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184 (1963).

[315] Roper v. Simmons, 543 U.S. 551, 578 (2005).