ARTICLES

LACK OF UNIFORMITY IN THE DEPORTATION OF CRIMINAL ALIENS

CHRISTINA LABRIE*

John Gaul, a native of Thailand, was adopted by American citizens when he was four years old. At the age of twenty-one, he was convicted of check fraud and of stealing a car.[1] As a result of his convictions, he was deported back to Thailand.[2] Pam Gaul, his mother, could not understand why the authorities considered him a dangerous criminal worthy of deportation.[3] Under current United States deportation law, however, an individual who moved to the United States as an infant may be deported as many as fifty years later.[4] It may seem unfair to separate an individual from home, family, and community simply because he was born outside the United States and has committed a crime. However, in the current political climate, such concerns about fairness often give way to a blind desire to deport criminal aliens.[5] The Immigration and Naturalization Service (INS) has made it clear that it seeks to deport more and more aliens each year.[6] Many of those deported are "illegal" aliens, individuals who entered the United States without being lawfully admitted under United States immigration law.[7] Another growing category of deported aliens consists of those who, like John Gaul, have been convicted of crimes.[8]

* J.D., 2000, New York University School of Law.

1. Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1.

2. *Id.*

3. *Id.*

4. Only immigrants who have not become citizens are deportable. An individual can live in the United States as a legal permanent resident indefinitely without becoming a citizen. *See* Immigration and Nationality Act [hereinafter INA] § 316, 8 U.S.C. § 1427 (1994).

5. The term "alien" unfortunately carries with it negative connotations, especially in the context of undocumented, or "illegal" aliens. However, since the term is used by the INS and in common parlance, it will be used in this article. *See* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994) (noting "[t]he term 'alien' means any person not a citizen or national of the United States"). Unless otherwise noted, in this article the term "alien" shall refer to documented aliens, not undocumented or "illegal" aliens.

6. In 1997, the INS set its deportation goal at 93,000 and 114,285 were deported. Ojito, *supra* note 1, at A1. In 1998, the goal was 127,300 and 169,072 were deported. *Id.* The fact that the INS has surpassed its goals suggests that the mechanisms in place to designate "deportable" aliens are functioning beyond expectations.

7. INA § 238, 8 U.S.C. § 1227(a)(1)(B) (Supp. 1996).

8. *Compare* Report and Analysis of Immigration and Nationality Law, 76 Interpreter Releases 198 (Feb. 1, 1999) (reporting that in 1998, 56,011 criminal aliens were removed) *with* 1997 Statistical Yearbook of the Immigration and Naturalization Service 178 (1999) (reporting that in 1995, just 25,619 aliens were deported on criminal grounds).

This article examines federal deportation law with respect to criminal aliens, specifically focusing on the interaction between federal immigration law and state criminal law.[9] In doing so, it argues that two kinds of nonuniformity develop when deportation law relies on state criminal statutes. First, as a result of variations in state criminal law, similar conduct undertaken in different states leads to different deportation consequences. Second, federal deportation law often does not reflect or indeed directly undermines state policies and legislative decisions. This lack of uniformity raises numerous constitutional issues. Moreover, it is extremely troubling because of the fundamental unfairness that it creates. Deportations of aliens who have been convicted of crimes are frequently premised on the intricacies of state criminal laws—laws often passed by state legislatures without considering their interaction with federal immigration law.

Section I of this article provides background information on the history, development, and current status of United States deportation laws. Section II examines uniformity as a normative standard for immigration law in the context of the Constitution and relevant case law, and establishes uniformity as a necessary goal of deportation laws. Section III analyzes how the interaction of federal deportation law and state criminal laws leads to a lack of uniformity. This third section breaks down further into two subsections. The first illustrates how similar conduct can lead to different deportation results in different states, while the second addresses federal deportation law that contradicts the policies underlying state criminal laws. Finally, Section IV proposes some possible remedies for the current lack of uniformity in the deportation of convicted aliens.

I.
BACKGROUND

A. History of United States Deportation Law

For over 100 years following the signing of the Constitution, the United States federal government did not restrict immigration and did not

9. This article focuses on deportation law and procedure as it applies to the determination of deportability. It does not address the many problems that arise in detainment of aliens prior to deportation, or problems that arise when criminal aliens are returned to their home countries. Such problems raise complex domestic and international legal issues that are beyond the scope of this article. *See generally* Larry Rohter, *In U.S. Deportation Policy, a Pandora's Box*, N.Y. TIMES, Aug. 10, 1997, at A1 (describing problems faced by foreign nations when U.S. deports criminal aliens); Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L. & COMP. L.J. 255 (1996) (discussing deportation of aliens to countries in which their lives or freedom are threatened); Jennifer M. Corey, *Immigration and Naturalization Service v. Doherty: The Politics of Extradition, Deportation, and Asylum*, 16 MD. J. INT'L L. & TRADE 83 (1992) (analyzing deportation of aliens as means of circumventing extradition treaties and policies).

deport aliens.[10] The first effective federal exclusion law was adopted in 1882.[11] In response to extensive immigration from China, and as a result of growing xenophobia, the United States passed the "Chinese Exclusion Act" in an attempt to stem further immigration from that country.[12] In 1888, the Act was broadened to include previously admitted Chinese immigrants who had temporarily left the United States.[13] This revision allowed the United States to deny reentry to Chinese aliens who had already been granted entry during a less aggressively anti-immigrant political climate. In what is commonly known as the "Chinese Exclusion Case," the Supreme Court upheld such legislation, stating: "that the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."[14]

Despite its apparent racism, the *Chinese Exclusion Case* formed the foundation for subsequent federal deportation laws. In 1891, Congress provided for the deportation of aliens who entered the United States in violation of federal immigration law.[15] In 1907 and 1910, Congress expanded deportation to include individuals who had entered properly but

10. The 1798 Alien & Sedition Acts provided for the first time for deportation of dangerous aliens but were repealed or allowed to expire two years later. *See* Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798) (repealed 1802); Act of June 25, 1798, ch. 58, 1 Stat 570 (1798) (expired June 25, 1800); Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

11. (Chinese Exclusion) Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (providing for exclusion of Chinese laborers for initial period of ten years).

12. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); ANGELO N. ANCHETA, RACE, RIGHTS, & THE ASIAN AMERICAN EXPERIENCE (1998).

13. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888).

14. Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889). Chae Chan Ping was a Chinese laborer who had immigrated to the United States in 1875. Under the 1882 exclusion act, Chae Chan Ping and other immigrants were permitted to leave and return to the United States provided they first obtain a certificate attesting to a right of return. Chae Chan Ping obtained the required certificate and visited China in 1887. In 1888, while Chae Chan Ping was still outside the United States, Congress passed legislation that ended the certificate program and prohibited the return of those immigrants with valid certificates. In upholding Chae Chan Ping's exclusion, the Supreme Court relied on the right of the United States to preserve its independence and national security, as well as racist assumptions. For example, the Court stated:

> It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners *of a different race* in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Id. at 606 (emphasis added). Such racist assumptions foreshadowed the restrictions on people of Japanese ancestry during World War II. *Compare* Chae Chan Ping v. United States, 130 U.S. 581 (1889), *with* Korematsu v. United States, 323 U.S. 214 (1944) *and* Hirabayshi v. United States, 320 U.S. 81 (1943).

15. Act of Mar. 3, 1891, ch 551, 26 Stat. 1084 (1891).

had engaged in prostitution while in the United States.[16] Unlike previous laws that had barred the admission of foreign criminals, this legislation established for the first time the notion that criminal conduct undertaken *in the United States* could be used as grounds for deportation. Since the passage of these laws, Congress has continually expanded the universe of criminal conduct that constitutes grounds for deportation.

Congress integrated the numerous federal laws addressing immigration and naturalization into one statute in the Immigration and Nationality Act of 1952 (INA), which has been amended numerous times since its enactment. Of particular importance to the present discussion is legislation passed since the late 1980s, in which Congress has expanded the crime-related grounds for inadmissibility and deportability, narrowed the availability of discretionary relief for aliens, added to the powers of law enforcement personnel, and abbreviated certain procedures to allow for faster deportation.[17]

In 1996, in a wave of significant legislation aimed at restricting immigration, Congress passed both the Antiterrorism and Effective Death Penalty Act (AEDPA)[18] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[19] Both AEDPA and IIRIRA enlarged the definition of "aggravated felony" for purposes of deportability.[20] To the list of crimes for which a convicted alien may be deported, AEDPA added commercial bribery, counterfeiting, forgery, certain kinds of stolen vehicle

16. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898 (1907).

17. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 408 (2d ed. 1997).

18. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.) [hereinafter AEDPA].

19. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C) [hereinafter IIRIRA]. Formerly, a distinction existed between the "exclusion" process (for aliens not yet admitted to the United States) and the "deportation" process (for aliens admitted to the United States). *See* 8 U.S.C. §§ 1226, 1252 (1988). Currently, both are included under the broader term "removal" proceedings. *See* 8 U.S.C. § 1229a (Supp. 1996). However, the distinction between exclusion and deportation remains intact because different standards apply to an alien who is "inadmissible" (previously "excludable") or "deportable." *Compare* 8 U.S.C. § 1182(a) (Supp. 1996) *with* 8 U.S.C. § 1227 (Supp. 1996). IIRIRA changed the terminology of "deportation" proceedings to reflect the new term "removal." *See* 8 U.S.C. § 1229a (Supp. 1996). Deportation proceedings are now called removal proceedings and "deportable" aliens are removed through that process. *See id.* Nevertheless, this article will continue to use the term "deportation" to refer to removal proceedings for deportable aliens because it is more precise and less cumbersome.

20. *See* IIRIRA §§ 301–321; AEDPA §§ 431–443 (introducing the most significant changes to deportation law for purposes of this article). Section 501(a)(3) of the Immigration Act of 1990 and section 222 of the Immigration and Nationality Technical Corrections Act of 1994 had previously expanded the definition of "aggravated felony." *See* Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048 (1990) (amending definition of "aggravated felony" in section 101(a) of INA); Act of Oct. 25, 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4320–22 (1994).

trafficking, obstruction of justice, perjury, and bribery of a witness—provided that a sentence of at least five years may be imposed for the commission of these crimes.[21] Most importantly, however, IIRIRA reduced the sentence requirement[22] from five years to one year for crimes previously added by AEDPA as well as crimes of violence, theft, receipt of stolen property, burglary, RICO violations, alien smuggling, and document fraud.[23]

B. Current Deportation Law

Deportation is a civil, not a criminal, penalty;[24] proceedings are conducted by the INS and are not connected to state criminal proceedings.[25] Therefore, the basic constitutional right to appointed counsel, protection from double jeopardy[26] and cruel and unusual punishment,[27] and ex post facto laws,[28] do not adhere to deportation proceedings.

Recent changes in immigration law have both broadened the spectrum of crimes for which convicted aliens can become eligible for deportation, and limited the availability of relief from deportation. Two categories of crimes are particularly important to the present discussion: "aggravated felonies" and "crimes of moral turpitude."[29]

An aggravated felony is the most serious criminal classification in the INA. An alien is deportable if he or she is convicted of an aggravated felony at any time after admission to the United States.[30] The INA definition of an aggravated felony does not require the offense to be a felony or to be aggravated. Section 101(a)(43) of the INA provides a wide-ranging list of categories of aggravated felonies. The list makes reference to specific federal crimes (for example, illicit trafficking in a controlled substance) as well as broad categories of crimes such as "a crime of violence . . . for which the term of imprisonment [is] at least one

21. *See* LEGOMSKY, *supra* note 17, at 447–48.

22. The "sentence requirement" refers to the length of criminal sentence required in certain cases to trigger deportation laws for individuals convicted of crimes listed in the INA.

23. *See* LEGOMSKY, *supra* note 17, at 448. In addition, the sentencing provisions for alien smuggling and document fraud contain certain exceptions. *Id.*

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

25. Congress may have contemplated the possibility of stipulated deportation in state criminal proceedings, but the authority for such action is unclear. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 272–76 (discussing incorporation of immigration law into federal criminal proceedings).

26. LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976).

27. United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994).

28. Fong Yue Ting, 149 U.S. at 730.

29. INA § 237(a)(2)(A)(i), (iii), 8 U.S.C. § 1251(a)(2)(A)(i), (iii) (1994). Other crimes that can render an alien deportable are violations of status, controlled substance offenses, certain firearm offenses, domestic violence and child abuse, falsification of documents, terrorist activities and unlawful voting. *Id.* § 237(a).

30. *Id.* § 237(a)(2)(A)(iii).

year. . . ."[31] In addition to "crime of violence," many of the other crime definitions also include a term of imprisonment or possible sentence.[32] Furthermore, aliens convicted of aggravated felonies are ineligible for most forms of discretionary relief.[33]

Because the classification "crimes of moral turpitude" is not clearly defined in the INA, courts have struggled to create a definition. Generally, courts define a crime of moral turpitude as one that shocks the public conscience by being inherently base, vile or depraved, and contrary to the rules of morality.[34] Crimes involving fraud, murder and other intentional assaults are often considered crimes of moral turpitude.[35] An alien is deportable if he or she has committed a crime of moral turpitude for which a sentence of one year or longer may be imposed, within five years after the date of admission to the United States.[36] In addition, an alien will be deportable if he or she commits two crimes of moral turpitude, not arising out of a single scheme, at any time after admission.[37] Like aggravated felonies, crimes of moral turpitude can preclude relief from deportation.[38]

A vast array of difficulties arises in the interpretation of the above-mentioned immigration laws. The specific provisions will be addressed in greater detail below, particularly within the following examination of the lack of uniformity in the application of deportation law.

II.
UNIFORMITY

Fervent efforts to reduce immigration and increase deportation have caused lawmakers, judges, and citizens to overlook the impact of new laws on criminal aliens. The rights of criminal aliens are easily ignored because

31. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. 1996).

32. For example, the statute does not clearly state whether a "term of imprisonment" includes probation and other forms of restriction other than incarceration. *Id.* In addition, the language "an offense. . . for which a sentence of one year imprisonment or more may be imposed . . ." could be interpreted to include possible or actual sentences of such length. *Id.* Section 322 of IIRIRA amended the INA by adding section 101(a)(48)(B), which expressly defines a "term of imprisonment" or "sentence" to include suspended sentences. 8 U.S.C. § 1101(a)(48)(B) (Supp. 1996).

33. *See* INA § 240B(a), (b), 8 U.S.C. § 1229b(a), (b) (Supp. 1996) (providing that aliens convicted of aggravated felonies are ineligible for cancellation of removal); INA § 241(b)(3)(B), 8 U.S.C. § 1231 (b)(3)(B) (Supp. 1996) (providing that aliens convicted of aggravated felonies and sentenced to term of at least five years imprisonment are ineligible to avoid deportation to country in which their life or freedom would be threatened).

34. *See In re* Luaiva Tui Fualaau, 16 Immigr. Case Rep. B1-220, B1-221 (B.I.A. 1996).

35. *See* LEGOMSKY, *supra* note 17, at 442.

36. INA § 237(a)(2)(A)(i)(I), (II), 8 U.S.C. § 1227(a)(2)(A)(i)(I), (II) (Supp. 1996). In certain circumstances, this also applies to crimes committed within ten years after admission. *Id.*

37. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (Supp. 1996). The two crimes cannot arise out of a single scheme. *Id.*

38. *See* INA § 240B(b)(1)(C), 8 U.S.C. § 1229(b)(1)(C) (Supp. 1996) (providing that aliens convicted of crimes of moral turpitude are not eligible for cancellation of removal).

criminals generally do not have much support among legislators or the public. Criminals who are citizens can rely on the Constitution to provide them with procedural fairness, but criminal aliens cannot.[39] Therefore, it is important to examine whether these unpopular individuals, who have little voice in the political process,[40] are being treated fairly and equitably by the United States. This article will attempt to raise awareness of the problems associated with nonuniformity in deportation law and to aid legal practitioners and others working for immigrants' rights.

Two kinds of nonuniformity have developed in the application of deportation law. First, sometimes the same conduct undertaken in different states will lead to conflicting decisions on deportation. By defeating normative uniformity in federal immigration law, this results in unfairness to immigrants and may violate the Constitution's requirement of a uniform rule of naturalization. Second, federal deportations based on violations of state criminal laws may not reflect, and may directly undermine, the state policies embodied in those laws. Although the federal government defers to state legislatures on matters of criminal law, state legislatures do not necessarily consider immigration law consequences when passing legislation. This kind of nonuniformity is particularly troublesome because it could mean that deportation decisions are grounded in neither federal nor state policy.

A. Uniformity and the Constitution

It is difficult to argue that current deportation law is unconstitutional, for the simple reason that aliens are not afforded the same constitutional protection as citizens.[41] Nevertheless, this article briefly addresses an argument that the Constitution requires a degree of uniformity in the application of immigration law. Such an argument is helpful in the discussion of current deportation law because it illustrates the constitutional roots of the concept of uniformity in immigration law and provides insight into the reasoning of subsequent court decisions.

For over one hundred years, the United States government has regulated immigration. Nevertheless, the Constitution does not provide much guidance on the exercise of such regulatory power. The enumerated powers given to Congress do not explicitly address issues of immigration regulation. The only specific provision related to immigration is Article I, Section 8, Clause 4, which authorizes Congress "[t]o establish an uniform Rule of Naturalization." Although immigration and naturalization involve different processes, it could be argued that immigration regulation falls

39. *See supra* text accompanying notes 26–28.

40. *See* Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 171–72 (1993) (noting that aliens are not allowed to vote and are consequently unable to voice their political opinions at polls).

41. *See supra* text accompanying notes 26–28.

under the general power to establish a uniform rule of naturalization. However, it is not clear from the Constitution what is meant by "uniform" and whether such a standard applies to the application of naturalization rules.

If the power of Congress to regulate immigration is based in Article I, Section 8, Clause 4, then it is clear that immigration laws must adhere to the constitutional requirement of uniformity. If, however, the power to regulate immigration and deportation[42] flows from other sources, enumerated or implied, the uniformity requirement is not clearly mandated.[43] As explained below, whatever the merits of a constitutional argument supporting uniform immigration law, deportation law in particular requires uniform application in order to achieve the goals of deportation without sacrificing the fair treatment of individual aliens. An examination of the relevant case law shows that uniformity has been accepted by many courts as necessary in the application of federal immigration law.

B. Uniformity and Case Law

The Supreme Court has held that immigration and naturalization are entrusted exclusively to the federal government, and that states have no power to interfere.[44] In a number of cases involving the state definitions of acts such as "adultery" and other crimes relevant to a finding of good moral character, courts have acknowledged that federal control is burdened by a constitutional requirement of uniformity in naturalization laws.[45] Other courts have recognized that in order to achieve just results, immigration and naturalization laws should apply a federal standard instead of variant state standards.[46]

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42. The regulation of deportation arguably does not fall under the "immigration and naturalization" clause of the Constitution. *See generally,* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 187 (4th ed. 1998). ("One might well distinguish between regulation of the *physical entry* of aliens into the *territory* of the United States and the regulation of the entry into the *political community* of the United States through the extension of full political rights to naturalized citizens." (original emphasis)). However, Congress and the courts have dealt with immigration and deportation on the same theoretical foundation. *Id.* at 186–88. There is no normative reason to approach the two terms differently. For purposes of this discussion, use of the term "immigration" includes deportation regulation.

43. An extensive discussion of the sources of federal immigration power is beyond the scope of this article.

44. *See, e.g.,* Nyquist v. Mauclet, 432 U.S. 1, 10 (1977); Mathews v. Diaz, 426 U.S. 67, 84 (1976); Graham v. Richardson, 403 U.S. 365, 377 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

45. *See, e.g.,* Nemetz v. INS, 647 F.2d 432, 436 (4th Cir. 1981); *In re* Schroers, 336 F. Supp. 1348, 1350 (S.D.N.Y. 1971); *In re* Johnson, 292 F. Supp. 381, 383 (E.D.N.Y. 1968); *In re* Edgar, 253 F. Supp. 951, 953 (E.D. Mich. 1966); *In re* Russo, 259 F. Supp. 230, 234 (S.D.N.Y. 1966).

46. *See, e.g.,* Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976); Wadman v. INS, 329 F.2d 812, 817 (9th Cir. 1964); *In re* Labady, 326 F. Supp. 924, 928 (S.D.N.Y. 1971).

An examination of the sodomy and adultery cases illustrates that courts are uncomfortable with blindly applying state law when an obvious lack of uniformity could result. For example, in *Nemetz v. INS*, the court addressed whether it was appropriate to look to state law to determine if sodomy was a crime of moral turpitude for purposes of naturalization.[47] The court pointed out that although sodomy was a crime in Virginia, at least nine states at the time had decriminalized private, consensual sodomy between adults.[48] Therefore, in those nine states, Nemetz's admission of engagement in sodomy would not have prevented his naturalization. The court stated that such a result "hardly contributes to any principle of uniformity and is, in fact, incongruous with common sense."[49]

As the *Nemetz* court admitted, Congress traditionally defers to state standards of public morality.[50] However, by using state standards to define criminal conduct for purposes of immigration and naturalization laws, the federal government in effect allows itself to deny citizenship to (or deport) an immigrant for an act that is a crime in one state but not in another. Mr. Nemetz could move to a state that had decriminalized sodomy and live in accordance with the moral standards of that state, but he would still be prevented from becoming a United States citizen because of his statements about his activities in Virginia.[51]

The *Nemetz* court addressed this paradox by arguing that the federal government has no interest in regulating private acts for the purposes of naturalization laws.[52] The public/private distinction set out by the court would promote uniformity not by creating a federal standard, but by taking certain offenses entirely out of consideration for purposes of immigration and naturalization law. This method is innovative, but it is unlikely that such a distinction would be supported by the current Congress because it would lead to fewer deportations.[53] It is also incomplete in that it only ensures uniformity and fairness with respect to laws that regulate private acts.

In a series of cases dealing with the definition of "adultery," federal courts again exhibited reluctance to apply the relevant state definition

47. *Nemetz*, 647 F.2d at 432.

48. *Id.* at 435.

49. *Id.*

50. *Id.*

51. *Id.* at 435 n.2 (inferring from Nemetz's testimony that he had engaged in sexual acts constituting sodomy, although he had not testified to that effect).

52. *Id.* at 436.

53. Congress passed AEDPA and IIRIRA in order to expand the categories of aliens that can be deported for criminal convictions. In addition, Congress has given the INS the mandate and the money to arrest more immigrants with criminal convictions. *See* Eric Lipton, *As More Are Deported, a '96 Law Faces Scrutiny*, N.Y. TIMES, Dec. 21, 1999, at A1; Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1.

when reviewing denials of citizenship to immigrant applicants.[54] Some courts may have been reacting to the use of antiquated (and perhaps rarely enforced) laws regarding adultery. Other courts pointed to apparently meaningless distinctions in adultery definitions.[55] Yet, no matter how outdated or arbitrary the laws were, the applicants for naturalization had nevertheless been convicted of adultery under state laws. When these applicants sought reversals of the denials of citizenship, however, the federal courts chose to excuse the "crimes" and appealed to uniformity as the guiding principle for federal immigration and naturalization law. In the case of *In re Edgar*, a man was abandoned by his wife and conceived a child with another woman shortly thereafter.[56] The man immediately divorced his wife and took steps to marry the woman with whom he was having a child.[57] The court, in determining whether Mr. Edgar had the requisite "good moral character" for naturalization, noted that although he was technically guilty of adultery,

> [i]t is clear that we are not looking to see whether a petitioner is technically guilty of adultery under local law. We are considering a federal statute. . . . We conclude . . . that in reaching decision upon the meaning of the federal act, we are not remitted to a patchwork of state laws but that "the better view is to develop a uniform federal standard when interpreting a statute relating to the federal right to citizenship."[58]

Thus, the adultery cases provide examples of courts appealing to the constitutional requirement of uniformity to achieve just results in seemingly unfair circumstances.

The decisions in *Nemetz* and *Edgar* may evince a reluctance on the part of courts to accept that antiquated laws dealing with private acts reflect a normative morality. However, the courts' attempts to circumvent unjust results by appealing to the constitutional requirement of uniformity illustrate the creativity that is required to make arguments in favor of immigrants who have been convicted of crimes.

54. *See, e.g.*, Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); *In re* Schroers, 336 F. Supp. 1348 (S.D.N.Y. 1971); *In re* Johnson, 292 F. Supp. 381 (E.D.N.Y. 1968); *In re* Edgar, 253 F. Supp. 951 (E.D. Mich. 1966); *In re* Russo, 259 F. Supp. 230 (S.D.N.Y. 1966).

55. *See Edgar*, 253 F. Supp. at 952–53. The court noted, "Some states require that each of the partners be married to another, whereas in others it is sufficient if one of them is married to another. Some require continuing acts while in others a single transgression will suffice." *Id.*

56. *Id.* at 952.

57. *Id.*

58. *Id.* at 953 (quoting *In re* Briedis, 238 F. Supp. 149, 151 (N.D. Ill. 1965)).

C. Deportation and Uniformity

Although deportation began as a means of expelling aliens not properly admitted to the United States, it has become the mechanism for expelling legal aliens whom Congress finds threatening to the public welfare.[59] Although deportation is not a criminal punishment, it is clearly a harsh sanction. The Supreme Court has noted that deportation "is a drastic measure and at times the equivalent of banishment or exile."[60] Deportation can cause economic hardship and can be emotionally traumatic, especially for individuals who have lived for a long time in the United States, where they have established strong ties to friends, family, community and the nation.

The Constitution and lengthy precedent delegate responsibility for immigration and naturalization law to Congress. This presents a difficult question for Congress: which aliens threaten the public welfare? To answer that question, Congress has chosen to rely on state criminal laws, to enumerate certain crimes, and to look at factors such as the possible length of sentence imposed. However, it is important to note that states are not required to factor immigration considerations into their decisions regarding state criminal laws. Therefore, a state's criminal laws do not reflect that state's view on which noncitizens should be expelled from the United States.

State courts regularly and unknowingly make decisions that affect the application of federal immigration law. Each state controls its penal law, and all individuals within that state must abide by those laws. Aliens are no exception. If convicted of a crime, an alien faces the same criminal penalty as a citizen. But an alien's deportability may be determined by that state conviction, even though the state court did not consider deportability in convicting or sentencing. Such decisions are problematic in two ways.

First, the location where an act takes place can determine whether an individual is considered to be injurious to the public welfare. For example, an alien could commit an act in Newark, New Jersey, that is considered a crime of moral turpitude under state law and get deported. However, a similar individual could commit the very same act a few miles away in New York City and be allowed to remain in the United States.[61] If the goal of deportation is to rid the nation of "dangerous" individuals, this result is either underinclusive (if the New York alien is in fact a danger to the public) or overinclusive (if neither individual is dangerous). Either way, the current process does not provide a reliable method for determining which aliens should be deported because they are injurious to the public welfare.

59. *See* LEGOMSKY, *supra* note 17, at 377.

60. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

61. *See* Nemetz v. INS, 647 F.2d 432, 435 (4th Cir. 1981) (noting that deportation can depend on an "accident of geography").

More importantly, the process allows for the possibility of imposing an extremely harsh sanction on an undeserving individual.

Second, legislative decisions made by a state may result in immigration consequences that do not accurately reflect the policies of that state. For example, a decision to implement greater use of suspended sentences may be made to give criminals a chance at rehabilitation outside the prison system. However, an alien who receives a suspended sentence may be deported even if he or she serves no time in prison. The state legislators may not have considered the immigration consequences of their laws, which may in fact defeat their original policy goals.

III.
STATE CRIMINAL LAW AND DEPORTATION

Each state creates its own penal code, with its own terminology and procedural rules. These penal codes reflect the interests and priorities of the state as determined by the state legislature. Although similarities exist among the laws of individual states, there are wide variations on numerous issues. An act may be a crime in one state and not in another, or may carry a long sentence in one state and only probation in another. The disparities that exist among state criminal laws are generally not problematic because individuals are expected to abide by the legal standards of the state in which they are present.

The variations in state criminal law become problematic when the application of federal immigration law relies on state law. As mentioned above, such reliance can in practice work against uniformity in two ways. The following examples illustrate the injustice that flows from these two kinds of nonuniformity.

A. Aliens Engaging in Similar Conduct in Different States and Facing Different Deportation Consequences

1. Statutory Rape

The well-publicized case of Jesus Collado illustrates the problems that result from deportations based on state statutory rape convictions.[62] Mr. Collado came to the United States from the Dominican Republic in 1972 as a legal permanent resident. At age nineteen, Mr. Collado had sexual relations with his fifteen-year-old girlfriend.[63] Her mother pressed charges,

62. Mr. Collado's case also raises important retroactivity issues because the crime for which he pleaded guilty did not constitute grounds for deportation at the time of commission. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 115–16 (1998) (noting that retroactive application of deportation laws can have adverse impact on uniformity and raise important due process issues).

63. Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1.

and in 1974 Jesus Collado was convicted of statutory rape.[64] In 1997, twenty-three years after his conviction, Mr. Collado was returning from a vacation in the Dominican Republic with his wife and three children, when he was detained and placed in removal proceedings by the INS.[65] Mr. Collado was eligible for removal for having committed a crime of moral turpitude within five years of entry into the United States. After spending six months in detention, Mr. Collado was released. An immigration judge dismissed his case about one year later.[66]

Mr. Collado's case received the attention of Congress; he was the subject of speeches on the Senate floor, and special bills were introduced to stop his deportation.[67] For many people, Mr. Collado's case vividly illustrated the problems associated with blind application of deportation laws. "Sexual violence in the second degree" sounds like a crime of moral turpitude, but a closer examination of Mr. Collado's circumstances do not tell the story of an inherently base, vile or depraved individual who should be removed from the United States.

Federal courts and the Bureau of Immigration Appeals (B.I.A.) have consistently held that statutory rape involves moral turpitude.[68] Statutory rape laws, however, vary widely from state to state, and states have asserted a wide variety of interests in promulgating them.[69] Although an array of controversial issues associated with statutory rape laws presents important implications for deportation law—including consent as a defense, gender-specific laws, and knowledge of the age of the victim—this article will focus on the age of consent in statutory rape laws, because the numbers are easy to compare.

In *Marciano v. INS*,[70] the Eighth Circuit was presented with the case of an individual who had been convicted of statutory rape in violation of Minnesota law.[71] The applicable law read:

> Whoever has sexual intercourse with a female child under the age of 18 years and not his spouse may be sentenced as follows: . . . (4) if the child is 16 years of age but under the age of 18 years and the

64. *Id.*

65. *Id.*

66. *Id.*

67. Mirta Ojito, *Immigrant Fights Off His Deportation*, N.Y. TIMES, Sept. 4, 1998, at B1.

68. *See, e.g.*, Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931); Bendel v. Nagle, 17 F.2d 719, 720 (9th Cir. 1927); Pino v. Nicolls, 119 F. Supp. 122, 128 (D. Mass. 1954); *In re* Dingena, 11 I. & N. Dec. 723, 724–29 (B.I.A. 1966).

69. Lewis Bossing, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1205 n.2 (1998).

70. 450 F.2d 1022 (8th Cir. 1971).

71. *Id.* at 1023.

> offender is 21 years of age of older, by imprisonment for not more than three years.[72]

Minnesota did not allow for a defense of reasonable mistake as to age and did not require proof of criminal intent. The court held that the phrase "crime involving moral turpitude" was not unconstitutionally vague and that the statutory rape charge in question involved moral turpitude.[73]

In a scathing dissent, Judge Eisele argued for a factual determination of whether the crime involved moral turpitude.[74] He pointed out that at the time of the offense, the two individuals involved could have engaged in the act of intercourse in any one of twenty-seven states without Marciano being subject to prosecution for statutory rape.[75] Judge Eisele concluded that "Congress would have preferred a more nearly uniform treatment of aliens if it had anticipated this disparity in the law's application."[76]

State statutory rape laws are increasingly problematic in the context of current deportation laws for two reasons. First, several states have recently initiated efforts to increase the age of consent for purposes of statutory rape laws.[77] Second, the inability of the INS and the courts to consider the individual circumstances of each case makes it impossible for an alien to explain the circumstances of her alleged crime and perhaps dispute the presumption that she lacks moral conviction. Of course, the state must choose a standard for statutory rape and thus an age of consent. The selection of such a number may appear somewhat arbitrary, but arbitrariness is necessary in many areas of criminal law.[78] In the context of deportation law, however, reliance on a state-chosen number multiplies the level of arbitrariness by fifty (the possible number of different statutory rape laws). In this context, not only does the possibility of conviction depend upon the particular age chosen by a state; it also depends upon the particular state in which the alien happens to be. The resulting degree of uncertainty for aliens in the United States does not comport with conventional notions of uniformity.

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72. *Id.* at 1024 (quoting MINN. STAT. ANN. § 609.295(4) (current version at MINN. STAT. ANN. § 609.341–.349 (West Supp. 2000)).

73. *Id.*

74. *Id.* at 1026.

75. *Id.* at 1026 n.1.

76. *Id.*

77. *See* Bossing, *supra* note 69, at 1209 n.18 (noting that Georgia has raised its age of consent from 14 to 16, and Florida has amended its statutory rape law to prohibit sexual intercourse between persons aged 24 or older and minors aged 16 or 17).

78. For example, the quantity of drugs may determine the severity of drug possession charges, *see* N.Y. PENAL LAW arts. 220–221 (McKinney 1999), and the amount of money at issue often determines the severity of charges or sentences relating to bribery crimes, *see* N.Y. PENAL LAW art. 180 (McKinney 1999).

2. Driving Under the Influence

Under the INA, the definition of an aggravated felony includes any "crime of violence" for which the term of imprisonment is at least one year.[79] A "crime of violence" is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[80]

This definition is clearly open to wide interpretation and application. Its use in the context of "driving under the influence" offenses sharply illustrates the negative impact that such a vague definition may have when applied in conjunction with state statutes.

The Arizona statute regarding driving under the influence provides, in part, that "it is unlawful for any person to drive or be in actual physical control of any vehicle . . . while under the influence of intoxicating liquor."[81] The statute does not require an individual to have driven a vehicle; sitting behind the wheel while in possession of the keys would be sufficient. Although it might seem unlikely that such a situation could be considered an aggravated felony under immigration law, the B.I.A.'s decision in *In re Magallanes*[82] shows how such a nonviolent occurrence can lead to deportation.

Magallanes was convicted of driving under the influence in violation of the above-mentioned Arizona statute.[83] The B.I.A. was presented with the issue of whether the conviction was a crime of violence, and thus an aggravated felony, for purposes of deportation.[84] The B.I.A. followed the reasoning of *In re Alcantar*,[85] which had required that "the nature of the crime—as elucidated by the generic elements of the offense—[be] such

79. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (Supp. 1996).

80. 18 U.S.C. § 16 (1994).

81. ARIZ. REV. STAT. ANN. § 28-692(A)(1) (1997) (current version at ARIZ. REV. STAT. ANN. § 28-1381 (Supp. 1999)).

82. Interim Decision 3341 (B.I.A. 1998) (decided as amended Mar. 19, 1998).

83. ARIZ. REV. STAT. ANN. § 28-692(A)(1) (1997) (current version at ARIZ. REV. STAT. ANN. § 28-1381 (Supp. 1999)). Magallanes was also convicted of aggravated driving under the influence for driving under the influence while having a suspended driver's license. Interim Decision 3341, at 3. Although relevant to the sentence Magallanes received, his conviction for aggravated driving under the influence is not relevant to the present discussion.

84. Interim Decision 3341, at 2–3. The majority opinion focuses on 18 U.S.C. § 16(b) because the B.I.A. determined at the outset that the conviction did not include as an element the use, attempted use, or threatened use of physical force required by 18 U.S.C. § 16(a). *Id.* at 3–5. *See also supra* text accompanying note 80.

85. 20 I. & N. Dec. 801 (B.I.A. 1994).

that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs."[86] After discussing the magnitude of the drunk driving problem and the potential harm inherent in drunk driving, the B.I.A. concluded that driving under the influence necessarily has "an enormous potential to result in harm."[87] Therefore, the B.I.A. decided that Magallanes' conviction under the Arizona statute was a crime of violence within the meaning of section 101(a)(43)(F) of the INA.

The *Magallanes* decision shows the disparities that can develop when the B.I.A. (or a court) looks only at the statutory language and not at the factual circumstances of the case before it. Although the B.I.A.'s decision does not mention the specific facts of Magallanes' arrest, it is possible that he was arrested for being under the influence while sitting in his car. However, since the B.I.A. did not consider the universe of possible circumstances, but rather the potential to result in harm, the specific circumstances would be irrelevant. The B.I.A. relied instead on the "incontrovertible evidence that drunk driving is an inherently reckless act, which exacts a high societal toll in the forms of death, injury, and property damage."[88] The B.I.A. never considered the fact that the statute encompassed more than the act of drunk driving.

3. *Guilty Pleas*

Plea bargaining is a widely used and highly controversial mechanism in state (and federal) criminal proceedings. The criminal justice system depends on guilty pleas to reduce the burden of trials and other proceedings on the courts. Guilty pleas result in convictions and therefore can lead to the deportation of certain aliens. But plea bargaining systems vary among the states, and those variations can, in effect, determine the extent of an alien's knowledge of deportation consequences of entering a guilty plea.

Generally, in entering a guilty plea, an individual waives fundamental rights such as the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.[89] Therefore, the decision to plead guilty must be knowingly, intelligently, and voluntarily made.[90] Nevertheless, state laws differ about whether an alien criminal defendant must have knowledge about the deportation consequences of a guilty plea. A number of

86. *Id.* at 812 (quoting United States v. Marzullo, 780 F. Supp. 658, 662 (W.D. Mo. 1991)).

87. *Magallanes*, Interim Decision 3341, at 6.

88. *Id.*

89. Santobello v. New York, 404 U.S. 257, 264 (1971).

90. Hill v. Lockhart, 474 U.S. 52 (1985).

state courts have held that a trial court is not required to advise a defendant of the potential deportation consequences of a guilty plea.[91] This conclusion is generally based on the notion that a court is only required to inform a defendant of the direct consequences of a guilty plea, whereas deportation is a collateral consequence of a guilty plea.[92]

On the other hand, six states have enacted statutes that require trial courts to inform alien defendants of the possible deportation consequences of entering guilty pleas.[93] Therefore, a defendant in one of these six states is able to make a *more* knowing and intelligent decision whether or not to plead guilty than an alien defendant being tried elsewhere. Simply put, some aliens are afforded the opportunity to learn about possible initiation of federal deportation proceedings while others are not. Even if deportation law were applied uniformly to all aliens, the fact that many alien defendants lack knowledge about potential deportation at the time they enter guilty pleas, creates an imbalance in the ability of aliens to make informed decisions. This imbalance generates a lack of uniformity, not in the application of deportation law, but in its effects.

A similar problem arises with respect to whether counsel to alien criminal defendants have an obligation to inform their clients about the deportation consequences of a guilty plea. Some courts have held that defense counsel have a duty to advise clients of the potential deportation consequences of guilty pleas.[94] Other courts have held just the opposite.[95] Again, this split in the courts contributes to the nonuniform application of deportation laws to individual alien defendants. In addition, the imposition

91. *See* Downs-Morgan v. United States, 765 F.2d 1534, 1537–38 (11th Cir. 1985) (noting "[a]ll the courts considering the various versions of Rule 11 agree that it does not require the trial judge to apprise the defendant of the possible immigration consequences of his guilty plea"); *see also* United States v. Russell, 686 F.2d 35, 39 (D.C. Cir. 1982); Garcia-Trigo v. United States, 671 F.2d 147, 150 (5th Cir. 1982); Fruchtman v. Kenton, 531 F.2d 946, 948–49 (9th Cir. 1976); Michel v. United States, 507 F.2d 461, 464–65 (2d Cir. 1974); Tafoya v. State, 500 P.2d 247, 251 (Ala. 1972); Commonwealth v. Wellington, 451 A.2d 223, 224 (Pa. 1982); State v. Malik, 680 P.2d 770, 772 (Wash. 1984).

92. *See, e.g.*, United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975); United States v. Parrino, 212 F.2d 919, 921–22 (2d Cir. 1954).

93. *See* CAL. PENAL CODE § 1016.5 (West 1985); CONN. GEN. STAT. ANN. § 54-lj (1994 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1998); OR. REV. STAT. § 135.385(2)(d) (1997); TEX. CODE CRIM. P. ANN. art. 26.13(a)(4) (Vernon 1989); WASH. REV. CODE ANN. § 10.40.200 (1990 & Supp. 2000).

94. *See, e.g.*, People v. Pozo, 746 P.2d 523 (Colo. 1987); People v. Padilla, 502 N.E.2d 1182 (Ill. 1986); Commonwealth v. Wellington, 451 A.2d 223 (Pa. 1982). In *Pozo*, the court held that a finding of ineffective counsel depends on whether the attorney had "sufficient information to form a reasonable belief that the client was in fact an alien." *Pozo*, 746 P.2d at 529. There is little indication in the opinion as to what information would be sufficient.

95. *See, e.g.*, Tafoya v. State, 500 P.2d 247, 251 (Alaska 1972); State v. Ginebra, 511 So. 2d 960 (Fla. 1987); Mott v. State, 407 N.W.2d 581 (Iowa 1987).

of a duty on defense counsel presents an additional issue: it creates an incentive for defense attorneys to learn about and remain up-to-date on deportation law. If they do not, the inequities already created by varying state procedural laws could be compounded by even greater disparities in the level of assistance provided by counsel.

4. Youthful Offenders

Juvenile crime is a highly politicized and divisive issue in American politics. Great differences in opinion exist about the age at which minors should be tried as adults in state and federal criminal proceedings. As a result, states have come to a range of conclusions about the proper age and its relation to the severity of the offense.

Although the term "conviction" is defined by the INA,[96] the statute is ambiguous about the status of juvenile offenses with regard to deportation proceedings. The courts and the B.I.A., however, have consistently held that an act of juvenile delinquency does not constitute a conviction for purposes of U.S. immigration laws.[97] Therefore, differing state procedural rules regarding the definition of "juvenile offender" determine whether acts are considered convictions for purposes of deportation. Consequently, a state juvenile justice system may prevent the deportation of an otherwise deportable minor in some instances,[98] but may allow deportation to proceed in others.[99]

The youthful offender issue presents even more complicated problems when examined in conjunction with the exclusion of minors seeking admission to the United States.[100] In *In re Ramirez-Rivero*, the B.I.A. stated that "[i]n order for a foreign conviction to serve as a basis for a finding of inadmissibility, the conviction must be for conduct which is deemed criminal by United States standards."[101] The B.I.A. looked to the Federal Juvenile Delinquency Prevention Act of 1974 to determine the congressional standard

96. INA § 101(48)(A), 8 U.S.C. § 1101(48)(A) (Supp. 1996).

97. *See, e.g.*, Hu Yau-Leung v. Soscia, 500 F. Supp. 1382 (E.D.N.Y. 1980). *See also In re* Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981) (noting "[i]t is settled that an act of juvenile delinquency is not a crime in the United States and that an adjudication of delinquency is not a conviction for a crime within the meaning of our immigration laws").

98. *See In re* Andrade, 14 I. & N. Dec. 651 (B.I.A. 1974) (ordering termination of deportation proceedings against individual whose record of marijuana possession was expunged under California's youthful offender treatment program).

99. *See In re* P——, 4 I. & N. Dec. 252 (B.I.A. 1951) (holding that since Michigan law exercises juvenile jurisdiction over children under seventeen, alien was excludable because she had turned seventeen one month before offense in question).

100. An individual seeking admission to the United States as an alien can be "excluded" for a number of reasons. As in the case of deportation, an individual can be excluded based on prior criminal history. The standards are similar and thus are useful to compare in the discussion of youthful offenders. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (Supp. 1996).

101. 18 I. & N. Dec. 135, 137 (B.I.A. 1981).

for offenses constituting juvenile delinquency.[102] Applying this standard, the B.I.A. determined that since Ramirez-Rivero was thirteen years of age at the time of the offense (which occurred in Cuba), the offence "may not as a matter of law be deemed criminal by United States standards and consequently is not an excludable offence."[103]

In sum, a federal standard of juvenile delinquency is applied to offenses occurring outside the United States and state standards are applied to offenses occurring within the United States. If Congress were seriously interested in pursuing the constitutional mandate of uniformity in immigration law, the present system could easily be altered to achieve that goal. Federal standards already exist for juvenile delinquency and are applied to foreign convictions; why not apply those same standards to convictions within the United States? The answer to that question must proceed on the assumption that Congress values states' views on juvenile offenses over a desire for uniformity.

B. Federal Deportation Consequences That Undermine or Do Not Reflect State Policy

1. Deferred Adjudication

Under Texas state rules of criminal procedure, deferred adjudication is permitted after a plea of guilty or nolo contendere and a finding that the evidence substantiates guilt.[104] Under this scheme, a defendant is placed under "community supervision" for a certain period of time following the plea.[105] If the defendant does not violate the terms of her probation, the charges are dismissed upon completion of the community supervision.[106] In 1957, the Attorney General determined that such a sentence does not constitute a conviction for purposes of immigration law.[107] More recently,

102. Federal Juvenile Delinquency Act of 1974, Pub. L. 93-415, § 501, 88 Stat. 113 (1974) (current version at 18 U.S.C. § 5031 (Supp. 1996)). The current version reads:

> For the purposes of this chapter, a 'juvenile' is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and 'juvenile delinquency' is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such person of section 922(x).

18 U.S.C. § 5031 (Supp. 1996).

103. *Ramirez-Rivero*, 18 I. & N. Dec. at 139.

104. TEX. CRIM. P. CODE ANN. art. 42.12, § 5(a) (West Supp. 1999).

105. *Id.*

106. *Id.* at art. 42.12, § 5(c).

107. *See In re* L—— R——, 7 I. & N. Dec. 318 (Att'y Gen. 1957). The INS had determined that the alien was deportable for attempting to pass a forged check for $55.50. The Attorney General overruled the Board of Immigration Appeal's decision that the sentence was a "valid, subsisting criminal judgment of conviction and sentence of a duly constituted Texas criminal trial court." *Id.* at 321. The Attorney General relied on Pino v. Landon, 349 U.S. 901 (1955), in which the Supreme Court held that a suspended sentence under Massachusetts criminal procedure was not a final conviction for purposes of the INA.

in the 1988 case *In re Ozkok*, the B.I.A. held that three criteria determine whether a deferred adjudication under state procedures was a conviction under federal immigration law: a guilty or nolo contendere plea, the imposition of some form of punishment or limitation on liberty, and the closure of proceedings to determine the defendant's guilt or innocence.[108]

IIRIRA appears to have amended the definition of "conviction" by removing the third element of the *Ozkok* test:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[109]

Subsequent to the enactment of IIRIRA, the B.I.A. held that deferred adjudication under Texas rules of criminal procedure *is* a conviction for immigration purposes.[110] In reaching that conclusion, the B.I.A. looked to the legislative history behind the IIRIRA definition of "conviction" to determine the status of deferred adjudications. It found that, in drafting the new section 101(a)(48)(A) of the INA, Congress intended to broaden "the definition of 'conviction' for immigration law purposes to include all aliens who have admitted to or been found to have committed crimes."[111] Congress felt that this broader definition "will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication."[112]

This analysis shows that, in order to facilitate the removal of aliens, Congress absorbed into federal law a state sentence that did not previously trigger deportation. By doing so, the federal government also overrode any possible state policies behind deferred adjudication.

For instance, under Texas criminal law, a deferred adjudication is not considered a conviction.[113] The procedure encourages minor criminals to

108. *See In re* Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988).

109. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (Supp. 1996).

110. *See In re* Punu, 19 Immigr. Case Rep. B1-112 (B.I.A. 1998). Board Member Lory D. Rosenberg dissented from the finding of deportability, arguing that although the sentence was a "conviction" under section 241(a)(2)(A)(iii) of the INA, it was not "a final conviction for purposes of incurring deportability." *Punu,* 19 Immigr. Case Rep. at B1-120 (Rosenberg, Bd. Member, dissenting).

111. *Punu,* 19 Immigr. Case Rep. at B1-115 (citing H.R. Rep. No. 104-879 (1997)).

112. *Id.*

113. *See* Soliz v. State, 809 S.W.2d 257, 258 (Tex. App. 1991) (holding that deferred adjudication is not conviction and witness could not be impeached with deferred adjudication sentence).

plead guilty by promising dismissal of the charges upon successful completion of community supervision. There are a number of possible reasons for Texas's decision to create a sentence that is not technically a conviction. For one, Texas may save judicial resources through deferred adjudication. Additionally, deferred adjudication may provide a substantial incentive for individuals involved in criminal activity to stop such activity.[114] But regardless of what policy considerations motivated the Texas legislature, the conflicting federal immigration law now supercedes them.

Texas law requires the trial court to inform alien defendants of the possible deportation consequences of guilty pleas.[115] Therefore, alien defendants may be discouraged from taking advantage of the deferred adjudication scheme because of the fear that they will be deported. Even if the deferred adjudication proves successful in deterring crime, Texas is unable to apply that system to aliens. The alien must choose either to accept deportation or to fight the charges at trial. In this way, federal law has the practical effect of making state procedural schemes ineffective or simply irrelevant when applied to aliens.

2. *Passing Bad Checks*

In *In re Balao*,[116] the respondent had been convicted in the Court of Common Pleas, Allegheny County, Pennsylvania, on three counts of passing bad checks in violation of title 18, section 4105(a)(1) of the Pennsylvania Consolidated Statutes. In considering whether the conviction involved "moral turpitude," the B.I.A. explained that "moral turpitude is not involved if a conviction can be obtained without prior proof that the convicted person acted with intent to defraud."[117] The B.I.A. ruled that the respondent's conviction did not involve moral turpitude, because intent to defraud was not an element of the statutory definition of the crime.[118]

114. If the defendant does not successfully complete the period of community supervision (i.e., the defendant commits a crime) the state files a "motion to adjudicate." TEX. CRIM. P. CODE ANN. art. 42.12, § 5 (West Supp. 1999). The judge then decides, based on a preponderance of the evidence standard, whether the defendant violated the terms of the deferred adjudication. *Id.* If the terms have been violated, the judge may convert the deferred adjudication into a final conviction. *Id.* Therefore, the defendant has a strong incentive to fulfill the terms of the deferred adjudication. *Id.*

115. TEX. CODE CRIM. P. ANN. art. 26.13(a)(4) (Vernon 1989). *See supra* text accompanying note 93.

116. 20 I. & N. Dec. 440 (B.I.A. 1992).

117. *Id.* at 444.

118. *Id.* at 443. A few months later, the respondent was convicted of theft by failure to make required disposition of funds received in violation of title 18, section 3917(a) of the Pennsylvania Consolidated Statutes. The INS charged the respondent with deportability as an alien who has been convicted of two crimes involving moral turpitude. The B.I.A. found that the first crime did not involve moral turpitude and therefore did not address the second crime because the INS could not satisfy its burden of showing two crimes of moral turpitude had been committed. However, relief from deportation was not granted because the respondent had remained in the United States beyond the period of his authorized stay. *Id.*

Since the B.I.A. examined only the terms of the criminal statute, and not the facts of the individual case, it did not find intent.

In re Bart[119] presents a contrasting result. Here, Bart was an alien who had pleaded nolo contendere in the Magistrate Court of Dekalb County, Georgia, to the charge of issuing a bad check in violation of section 16-9-20(a) of the Georgia Code.[120] Similar to the Pennsylvania statute in *In re Balao*, the Georgia statute prohibiting the passing of bad checks did not specifically require an intent to defraud.[121] In *Bart*, however, the B.I.A. looked beyond the statute to Georgia case law in order to determine whether the element of intent was required for a conviction. Finding that Georgia courts had held that intent to defraud is an essential element of the crime, the B.I.A. concluded that the conviction involved moral turpitude.[122]

These cases illustrate two different approaches to interpreting state definitions of crimes. In *Balao,* the B.I.A. examined only the plain language of the statute, whereas in *Bart* the B.I.A. went further and considered judicial interpretations of the relevant statute. This discrepancy may have some impact on uniformity, but the ultimate outcomes have primary relevance for the present discussion. The facts as presented by the B.I.A. illuminated neither the character of the alien defendants nor the nature of their criminal actions. It is entirely possible that Balao had the intent to defraud necessary to comprise moral turpitude. The B.I.A. held only that such intent was not *required* by the relevant state statute. Whether Balao's conviction of three counts of passing bad checks indicates intent depends upon the facts of the individual case. There is no mechanism or requirement for such an inquiry under federal deportation law.

What then distinguishes *Balao* and *Bart*? Why should one defendant be deported and the other allowed to remain in the United States?[123] Answers to these questions necessarily rely on the assumption that state law can dictate the results in deportation cases. The only distinction that could be drawn between these cases (without an examination of the facts) would be based on their relationships to state criminal definitions. Since the B.I.A. in *Balao* did not decide that the Pennsylvania statute required a showing of intent, aliens convicted for passing bad checks in Pennsylvania cannot be deported based on that conviction. The Pennsylvania legislature may have created this broad definition of the crime of passing bad checks

119. 20 I. & N. Dec. 436 (B.I.A. 1992).

120. *Id.* at 437.

121. *Id.* at 438.

122. *Id.* at 438–39. The respondent had also been convicted of mail fraud in violation of 18 U.S.C. § 1341. The respondent did not contest the classification of the mail fraud crime as one involving moral turpitude. Therefore, after making its determination on the bad check conviction, the B.I.A. concluded that the respondent's deportability had been sufficiently proven. *Id.*

123. Neither in fact received relief from deportation; Balao was denied relief on other grounds. *See Bart*, 20 I. & N. Dec. at 438–39; *Balao*, 20 I. & N. Dec. at 444–46.

in order to emphasize its seriousness. If so, the fact that under *Balao* no aliens will be deported for that crime conflicts with the policy of the Pennsylvania legislature.

3. Assault

The B.I.A. and the courts have held that assault is not per se a crime of moral turpitude.[124] Judicial or agency determinations of which assault crimes involve moral turpitude depend on their constructions of the underlying state statute. *In re Luaiva Tui Fualaau*[125] presents a case in which an assault crime was deemed not to involve moral turpitude under Hawaiian state law. Luaiva Tui Fualaau pleaded guilty to "recklessly inflict[ing] bodily injury" on an individual without consent.[126] The court held that this offense was a "simple assault" and therefore did not involve moral turpitude.[127] The B.I.A. implied, however, that if the statute referred to *serious* bodily injury, moral turpitude might have been inferred.[128] Although the B.I.A. offered no further explanation for this distinction, it is a critical one for an alien defendant. Imagine a circumstance in which an assault takes place: A punches B in an argument and B is injured. A's deportability depends on whether the court or agency finds the injury "serious." Does the difference between a bruise and a broken nose indicate the individuals in which the United States has an interest in deporting?

In its discussion of different assault crimes in *Luaiva Fualaau*, the B.I.A. provided examples of assault crimes that involve moral turpitude due to a statutory "aggravating dimension."[129] Such examples include assault on a peace officer, assault with a deadly weapon, and assault on a spouse or child.[130] Apparently, the aggravating dimension adds an additional level of depravity and lack of moral conviction.

IV.
POSSIBLE REMEDIES

As stated in the introduction, the primary purpose of this article is to highlight current and potential problems in the nonuniform deportation of

124. *See, e.g.*, United States *ex rel* Valenti v. Karmuth, 1 F. Supp. 370, 373 (N.D.N.Y. 1932); Ciambelli v. Johnson, 12 F.2d 465, 466 (D. Mass. 1926); *In re* Short, 20 I. & N. Dec. 136, 139 (B.I.A. 1989).

125. 16 Immigr. Case Rep. B1-220 (B.I.A. 1996).

126. *Id.* at B1-221.

127. *Id.* at B1-222–23.

128. *Id. at* B1-222. The B.I.A. drew a comparison to *In re Perez-Contreras*, 20 I. & N. Dec. 615 (B.I.A. 1992), in making this point. *Perez-Contreras* involved a statute similar to that in *Luaiva Tui Fualaau*, which "identified misconduct which simply caused bodily injury, rather than serious bodily injury." *Id.* The B.I.A.'s statement implies that a statute requiring serious bodily injury might, in fact, lead to a presumption of moral turpitude. *Id.*

129. *See id.* at B1-222 (stating that "[i]n the area of assault, crimes involving moral turpitude ordinarily include an aggravating dimension").

130. *Id.*

criminal aliens. However, a brief examination of possible remedies may encourage further discussion and help promote efforts to solve these problems. The remedies set out below are in no way exhaustive and do not support any particular political goals beyond the desire for uniformity in the deportation of criminal aliens.

The first would be to require reliance on federal criminal definitions. This approach might help to increase uniformity, which is currently undermined by reliance on differing state statutory definitions. It could be applied already to acts for which federal criminal definitions currently exist, but many more federal definitions would have to be created in order to cover all possible crimes. The result would be a greater degree of uniformity, but it would also require comprehensive, and perhaps controversial, legislation. The task would be somewhat more manageable if immigration law relied on federal, rather than state, procedural rules. The application of state criminal definitions to federal procedural rules might still be inconsistent, but uniformity in the deportation of aliens would be increased to the extent that nonuniformity is currently caused by using varying state procedures.

Second, Congress could create an oversight or review committee within the INS that would be responsible for reviewing deportation decisions for blatant lack of uniformity or for unfairness. This process would be less predictable than a revision of the current deportation laws, but it might allow for a waiver of deportation in a case such as that of Jesus Collado.[131] Although it would be difficult to decide which state law to use as the baseline of fairness, a review mechanism would ensure that cases decided using strict federal rules also comport with notions of due process and uniformity.

Alternatively, Congress could relax the current B.I.A. rules to allow for an inquiry into the individual circumstances of each case. This change would create more work for the B.I.A. and the courts, but would clearly allow for greater fairness in the application of differing state criminal laws. More importantly, such an inquiry would allow the B.I.A. and the courts to deport individuals who actually pose a threat to public health and morals rather than those who are merely presumed to pose a threat by virtue of their criminal convictions.

None of these options would necessarily lead to fewer deportations, but they would begin to reconstruct the system to allow for more uniform decisions regarding deportation. Such a restructuring would bring current deportation laws into compliance with the Constitution and would lead to the deportation of only those individuals in whom Congress has an express interest in deporting.

131. *See supra* notes 62–66 and accompanying text.

Editors' Note: On April 1, 1998, the *N.Y.U. Review of Law and Social Change* sponsored a symposium entitled *Shaking the Foundations: Challenging the Child Welfare System.* The following two articles represent work presented at that event.