REINTERPRETING THE IMMIGRATION AND NATIONALITY ACT'S CATEGORICAL BAR TO DISCRETIONARY RELIEF FOR "AGGRAVATED FELONS" IN LIGHT OF INTERNATIONAL LAW: EXTENDING *BEHARRY V. RENO*

J. Ryan Moore*

> Finally, the Department's distinction [of thousands of deportations effected pursuant to an unlawful regulation] is reasonable and fair because aliens who have been deported had a sufficient opportunity to challenge the denial of their applications for 212(c) relief in administrative and judicial proceedings.
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> – U.S. DOJ justification for rule purporting to implement the decision of the U.S. Supreme Court in *INS v. St. Cyr*.[1]

I. INTRODUCTION

In November 1996, Don Beharry, a lawful permanent resident[2] of the United States and citizen of Trinidad, was convicted of robbery in the second degree for stealing $714.00 from a coffee shop.[3] His unrelated prior convictions included petty larceny, criminal mischief, and criminal riot.[4] He received a sentence of between two and four years in the New York state prison for the

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* J.D. candidate, University of Arizona James E. Rogers College of Law, 2004; B.A. Economics, B.A. Political Science, University of Arizona, 1997. Special thanks to Professor James F. Smith of the University of California at Davis School of Law for his invaluable mentorship over the years.

1. Sec. 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627, 52629 (proposed Aug. 13, 2002).

2. The term "permanent resident" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . . ." 8 U.S.C. § 1101(a)(20) (2003); ANN BENSON ET. AL., IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE § I(A) (Washington Defender Association 2001) (on file with author). A permanent resident is not a U.S. citizen, but is permitted to live and work legally in the United States permanently and indefinitely. He is given a "green card," which is usually pink or white, identifying him as a "Resident Alien." Permanent residents are subject to the criminal grounds of deportability. 8 U.S.C. § 1227(a) (2) (2003).

3. Beharry v. Reno, 183 F. Supp. 2d 584, 586 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003) (finding no subject matter jurisdiction over habeas petition where petitioner failed to exhaust administrative remedies).

4. *Id.* at 587.

robbery.[5] During his incarceration, the former Immigration and Naturalization Service (INS)[6] initiated deportation proceedings.[7] In 1997, an immigration judge ordered Mr. Beharry removed from the United States as an "aggravated felon" after finding him statutorily ineligible to apply for any discretionary relief.[8] The Board of Immigration Appeals (Board) affirmed.[9]

Mr. Beharry entered the United States in 1982 at age seven and resided in this country for more than twenty-four years.[10] He obtained an eleventh grade education,[11] and had a six-year-old U.S. citizen daughter.[12] His family, including his U.S. citizen sister and lawful permanent resident mother, resided in this country.[13] During his state prison term, he secured a job at a non-profit computer recycling center upon release.[14] Nevertheless, because of changes made to the immigration law in 1996, after he committed the deportable offense, Mr. Beharry was no longer eligible to present the positive merits of his life to an immigration judge and avoid deportation.[15]

A. Consequences of an "Aggravated Felony" Conviction after 1996

In 1996, as part of a continuing effort to prevent noncitizens who commit crimes in the United States from remaining in this country,[16] Congress amended the Immigration and Nationality Act (INA).[17] Through the Antiterrorism and

5. *Id.*

6. The Homeland Security Act of 2002 abolished the INS, transferring its functions from the Department of Justice (DOJ) to the Department of Homeland Security (DHS). The Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135, 2137 (2002). The Executive Office of Immigration Review, including the immigration courts and Board of Immigration Appeals, remains part of the DOJ. Although the prosecutorial component of the INS has now been relocated to the Bureau of Immigration and Customs Enforcement (ICE) within DHS, this Note will follow the current practice of the Ninth Circuit Court of Appeals and refer to the agency as INS for convenience. Hernandez v. Ashcroft, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

7. *Beharry*, 183 F. Supp. 2d at 587.

8. *Id.*

9. *Id.*

10. *Id.* at 586.

11. *Id.*

12. *Beharry*, 183 F. Supp. 2d at 586.

13. *Id.*

14. *Id.* at 587.

15. *Id.* at 588-89.

16. Juan P. Osuna, *The 1996 Immigration Act: Criminal Aliens and Terrorists*, 73 No. 47 Interpreter Releases 1713, 1714 (1996).

17. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (2002). The INA of 1952 has been repeatedly amended, but is still the basic statute dealing with immigration and nationality. CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE § 2.03(1) (rev. ed., Lexis 2003). "The amendments have been fitted into the structure of the parent statute and most of the original enactment

Effective Death Penalty Act of 1996 (AEDPA)[18] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[19] Congress dramatically expanded the criminal grounds of deportation and restricted the availability of discretionary relief to noncitizens in removal proceedings.[20] As the keystone of "the ability of the United States to deport criminal aliens,"[21] Congress broadened the definition of "aggravated felony,"[22] an immigration law term of art describing a class of noncitizens convicted of certain offenses.[23] The aggravated felony definition includes twenty-one provisions that describe hundreds of offenses, which need not be aggravated or felonious.[24] Further, Congress all but

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remains undisturbed." *Id.* For an historical overview of the evolution of U.S. immigration law, see id. § 17.02.

18. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

19. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

20. INS v. St. Cyr, 533 U.S. 289, 297 (2001).

21. Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief?- The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(a) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 4 (2000) (citing H.R. CONF. REP. NO. 104-518, at 119 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 952).

22. *See* Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act – The Impact of the 1996 Reform Legislation*, 12 GEO. IMMIGR. L.J. 65, 119 (1997). Congress first enacted the aggravated felony provision in the Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, 102 Stat. 4181 (1988). Congress expanded the aggravated felony provisions in 1990, 1991, and twice in 1994, before making considerable changes in 1996 through the AEDPA and IIRIRA. Those acts are: (1) The Immigration Act of 1990 (IA 90), Pub. L. No. 101-649, 104 Stat. 4978 (1990); (2) The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (1991 MTINA), Pub. L. No. 102-232, 105 Stat. 1733 (1991); (3) Violent Crime Control and Law Enforcement Act (1994 Violent Crime Act), Pub L. No. 103-322, 108 Stat. 2026 (1994); and (4) Immigration and Nationality Technical Corrections Act (1994 INTCA), Pub. L. No. 103-416, 103 Stat. 416, (1994). *See* James F. Smith & Amagda Pérez, *Practice Guide for Pleas for Noncitizens and INS Detention: California and Federal* (forthcoming Fall 2005) (manuscript at 84, on file with author).

23. Parastou Hassouri, *Decision in* Beharry v. Reno *Presents Innovative Avenue of Relief for Aggravated Felons*, 7 Bender's Immigr. Bull. (Matthew Bender & Co.), March 15, 2002, at 308; Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1996).

24. BENSON ET. AL., *supra* note 2, § I(B)(3). The "aggravated felony" definition generally includes, *inter alia*, offenses such as murder, rape, drug trafficking, firearm trafficking and other firearms offenses, money laundering, crimes of violence as defined in 18 U.S.C. § 16, theft, child pornography, gambling, racketeering, supervising of prostitution, disclosure of classified information, treason, fraud, tax evasion, alien smuggling, illegal reentry after deportation, immigration document fraud, failure to appear, bribery, counterfeiting, forgery, obstruction of justice, perjury, subornation of perjury, bribery of a witness, and attempt or conspiracy to commit any of the above. *Id.* Some subsections require a sentence or suspended sentence to imprisonment of at least one year, *see, e.g.,* 8 U.S.C.A § 1101(a)(43)(F) (crime of violence) and (G) (theft), and some require

eliminated the privilege of noncitizens convicted of an "aggravated felony" to apply for discretionary relief from deportation.[25] Consequently, many more noncitizens fall within the "aggravated felony" category than ever before, and most are statutorily ineligible to apply for relief from deportation.[26]

Under the immigration law, aggravated felons are, *inter alia*: (1) presumed to be deportable; (2) ineligible for asylum, cancellation of removal, and voluntary departure; and (3) subject to mandatory detention without bond.[27] Aggravated felons are not entitled to judicial review of deportation orders based on such convictions[28] and are permanently banished from the United States absent advance permission.[29] Additionally, a conviction for the federal crime of illegal reentry after deportation will carry a significantly higher federal prison term, up to twenty years, if the defendant was previously convicted of an aggravated felony.[30]

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a loss of at least $10,000. *See, e.g.,* 8 U.S.C.A § 1101(a)(43)(D) (money laundering) and (M) (fraud). Many subsections do not require a minimum sentence or specify that the underlying conviction must be for a felony offense. Many misdemeanor offenses have been found to be aggravated felonies. See note 31, *infra*. No subsection of the aggravated felony definition requires a conviction for an "aggravated" offense, and it applies to state, federal and foreign convictions. 8 U.S.C.A § 1101(a)(43). The classification applies to convictions retroactively such that a conviction will be considered an aggravated felony regardless of whether it was entered before, on, or after the September 30, 1996 amendment date. *Id*. The crimes listed in the aggravated felony definition are either defined by reference to other federal crimes or are not defined at all. 8 U.S.C.A § 1101(a)(43). The Board of Immigration Appeals and federal courts have interpreted these undefined terms broadly. *See, e.g.,* note 31, *infra*.

25. *See generally* Hunker, *supra* note 21. "Discretionary" relief in the INA, or that which *may* be granted by the Attorney General (usually acting through a U.S. Immigration Judge), provides the broadest form of relief from removal. See *supra* Part V.B. for a discussion of the scope of various forms of discretionary and mandatory relief under the INA.

26. *See* Gordon, Mailman & Yale-Loehr, *supra* note 17, § 71.05(2)(c). For a recent case exemplifying the harsh consequences of an "aggravated felony" categorization, *see* Randhawa v. Ashcroft, 298 F.3d 1148 (9th Cir. 2002) (lawful permanent resident convicted of possession of stolen mail in violation of 18 U.S.C. § 1708 and sentenced to a halfway house found deportable and ineligible for discretionary relief as an aggravated felon).

27. INA § 236(c), 8 U.S.C. § 1226(c) (2002); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 72.05(2)(c). *See also* U.S. v. Corona-Sanchez, 291 F.3d 1201, 1210 n.8 (9th Cir. 2002) (en banc) (aggravated felons ineligible to apply for most forms of discretionary relief from deportation including asylum, voluntary departure, and cancellation of removal); Demore v. Kim, 123 S. Ct. 1708 (2003) (aggravated felons subject to mandatory detention without bond).

28. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2002); Gordon, Mailman, & Yale-Loehr, *supra* note 17 § 72.05(2)(c).

29. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2002); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 72.05(2)(c).

30. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (2002); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 111.08(2)(d).

Even an underlying misdemeanor offense may qualify as an "aggravated felony," such as a misdemeanor theft offense with 365 days of imprisonment, a misdemeanor assault conviction with 365 days, or a misdemeanor statutory rape conviction.[31] An offense that is expunged or dismissed pursuant to a state rehabilitative statute may also qualify as an "aggravated felony."[32] Furthermore, "aggravated felons" are almost always statutorily precluded from the opportunity to apply for discretionary relief from removal.[33] Even in rare cases when an aggravated felon is eligible for discretionary relief,[34] immigration judges are very reluctant to grant it.[35]

B. The *Beharry* Solution

While awaiting deportation, Mr. Beharry filed a petition for writ of habeas corpus[36] in the U.S. District Court for the Eastern District of New York.[37]

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31. Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors As Felonies For Immigration Purposes*, 27 J. LEGIS. 477, 477 (2001). For example, misdemeanor offenses can be aggravated felonies as a "crime of violence" within INA § 101(a)(43)(F). United States v. Pacheco, 225 F.3d 148, 153-55 (2nd Cir. 2000) (Straub, J., dissenting), *cert. denied*, 533 U.S. 904 (2001) (misdemeanor conviction for domestic assault with one-year suspended sentence is an aggravated felony under INA § 101(a)(43)(F)); United States v. Urias-Escobar, 281 F.3d 165, 167-68 (5th Cir. 2002) (misdemeanor assault with bodily injury with one year sentence); Wireko v. Reno, 211 F.3d 833, 835-36 (4th Cir. 2000) (misdemeanor sexual battery with one year sentence); United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir. 2002) (misdemeanor child abuse); United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001) (misdemeanor sexual abuse with 60 days in jail). Misdemeanor offenses can also be aggravated felonies as theft offenses within INA § 101(a)(43)(G), *see* United States v. Christopher, 239 F.3d 1191, 1193-94 (11th Cir. 2001), *cert. denied*, 534 U.S. 877 (2001); United States v. Graham, 169 F.3d 787, 791-93 (3rd Cir. 1999); *Pacheco*, 225 F.3d at 153-55, and as a conviction for "murder, rape, or sexual abuse of a minor" within INA § 101(a)(43)(A), Matter of Small, 23 I. & N. Dec. 448 (B.I.A. 2002) (misdemeanor violation of sexual abuse of a child under age fourteen is an aggravated felony).

32. Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001) (finding that a non-drug-related theft conviction expunged pursuant to ARIZ. REV. STAT. § 13-907(A) remains an aggravated felony).

33. Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 No. 33 Interpreter Releases 1317, 1317 (Aug. 29, 1997); Nadine K. Wettstein, *The 1996 Immigration Act: New Removal Proceedings, Cancellation of Removal, and Voluntary Departure*, 73 No. 46 Interpreter Releases 1677, 1682 (Dec. 9, 1996).

34. In some circumstances, a noncitizen convicted of an aggravated felony may adjust status in removal proceedings at the discretion of the immigration judge under INA § 245(a), provided a visa number is immediately available and he is not otherwise inadmissible. Matter of Gabryelsky, 20 I. & N. Dec. 750, 752 (B.I.A. 1993); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 1.03(4)(d).

35. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 72.05(2)(c).

36. 18 U.S.C. § 2255 (2004).

Due to the 1996 amendments, he was statutorily ineligible for any relief from removal.[38] However, in a groundbreaking[39] decision, Senior U.S. District Judge Jack B. Weinstein found that categorically denying discretionary relief formerly available to all long-time lawful permanent resident aggravated felons, in a limited set of circumstances, violates international law.[40] The court concluded that an INA provision barring discretionary relief from deportation to aggravated felons must be narrowly construed to conform to international law requirements.[41] Accordingly, the court held that where Mr. Beharry committed the offense before the IIRIRA redefined the "aggravated felony" provisions, and he would have been eligible for the waiver of inadmissibility at the time the offense was committed, he is entitled to a waiver hearing notwithstanding the 1996 retroactivity provisions.[42] Although this narrow holding, discussed in detail in Part III, applies only to a very limited set of circumstances, the international law rationale potentially applies to all similarly situated "aggravated felons" denied the opportunity for discretionary relief under the Immigration and Nationality Act.

C. Expanding *Beharry*

This Note explores the weight to be accorded international law when interpreting U.S. immigration law and examines whether the INA's "aggravated felony" provisions are in compliance with international law. Specifically, what role should international law play in interpreting domestic immigration statutes? Which instruments or forms of international law inform the inquiry? Are the INA's "aggravated felony" and discretionary relief provisions, as presently interpreted, compliant with international law? If not, how can INA sections categorically precluding discretionary relief to aggravated felons be reinterpreted consistently with international law? Can this reasoning be utilized by noncitizens eligible for discretionary relief under *INS v. St. Cyr* but who presently have no procedural avenue for relief under Department of Justice regulations? The Note concludes by suggesting several minimally intrusive ways that the INA and corresponding regulations might be brought into compliance with international law.

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37. Beharry v. Reno, 183 F. Supp. 2d 584, 587 (E.D.N.Y. 2002).

38. *Id.* at 587-88.

39. Beharry v. Reno: *Immigration Law v. International Law*, 7 Bender's Immigr. Bull. (Matthew Bender & Co.), June 15, 2002, at 722.

40. *Beharry*, 183 F. Supp. 2d at 604.

41. *Id.*

42. *Id.* at 605.

II. THE ROLE OF INTERNATIONAL LAW WHEN CONSTRUING DOMESTIC STATUTES

International law, depending on whether it is accepted by the United States, may bind the United States and be directly enforceable in U.S. courts.[43] Less clear, however, is the reach of international law when interpreting domestic statutes.[44] In 1801, Chief Justice John Marshall first observed an applicable rule of statutory construction, stating that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."[45] In 1804, in *Murray v. Charming Betsy*,[46] Chief Justice John Marshall enunciated what is now known as the *Charming Betsy* doctrine of statutory construction.[47] Marshall stated that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[48] In recent years, the U.S. Supreme Court has reaffirmed the *Charming Betsy* doctrine as a "maxim of statutory construction."[49]

Other federal courts have also increasingly considered international law principles when interpreting domestic statutes.[50] The Third Restatement agrees, stating that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the

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43. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1104-06 (1990).

44. *Id.* at 1106, 1107 n.13.

45. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801).

46. 6 U.S. (2 Cranch) 64 (1804).

47. *See generally* Brief of Amici Curiae Human Rights Watch et al. 2000 at 16-29, Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (No. 99-35976) (tracing the history of the *Charming Betsy* doctrine).

48. *Charming Betsy,* 6 U.S. (2 Cranch) at 118.

49. Weinberger v. Rossi, 456 U.S. 25, 32 (1982). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-41 (1987) (construing a the federal statute consistently with international law where Congress specifically intended to conform U.S. refugee law with international law).

50. *See, e.g.,* Ma v. Ashcroft, 257 F.3d 1095, 1114 n.30 (9th Cir. 2001) (factoring the "well-established *Charming Betsy* rule" and international law when holding that federal law does not authorize the indefinite detention of removable aliens); Zadvydas v. Davis, 533 U.S. 678, 678 (2001); Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (stating that the *Charming Betsy* rule is a "long-standing rule of construction"); Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y. 1999); Matter of Vigil, 19 I. & N. Dec. 572 (B.I.A. 1988) (using international law to construe federal statutes). *See also* RICHARD B. LILLICH & HORST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE 157, 159, 16, 272 (3d ed.1995). The Ninth Circuit has affirmed the *Charming Betsy* doctrine on several occasions. *See Ma*, 257 F.3d at 1114; United States v. Thomas*,* 893 F.2d 1066, 1069 (9th Cir. 1990); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984).

United States."[51] Accordingly, although the *Charming Betsy* principle is not a rule of decision,[52] it generally informs statutory interpretation.[53] Although Congress may supercede preexisting international law, the congressional purpose to do so must be clear.[54] Courts do not infer such intent when the statute can be reconciled with international law.[55] Legislative silence is not sufficient to abrogate a treaty.[56]

The *Beharry* case represents one of the most recent affirmations of the *Charming Betsy* doctrine. Judge Weinstein declared that "[i]mmigration statutes must be woven into the seamless web of our national and international law."[57] Although the court was uncomfortable resting solely on the international law rationale,[58] it nevertheless, on international law grounds alone, invalidated and subsequently reinterpreted a federal immigration law statute.[59] International law is particularly relevant to interpreting domestic immigration statues because congressional power to exclude aliens itself derives from international law.[60] *Chae Chan Ping v. United States* (The *Chinese Exclusion Case*) "affirmed the federal power to control immigration, as part of the general federal power to

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

52. Steinhardt, *supra* note 43, at 1110.

53. *Id*. at 1112-13, 1161-62, 1197.

54. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled.").

55. *See, e.g., Ma*, 257 F.3d at 1114 n.30; Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) (holding that ambiguous Congressional action should not be construed to abrogate a treaty).

56. *Trans World Airlines, Inc.*, 466 U.S. at 252 (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982)).

57. *Beharry*, 183 F. Supp. 2d at 591.

58. *Id.* at 605 ("That would obviously be a more comfortable rationale than one depending upon international law *ex proprio vigore.* Placing reliance wholly on international law may have the disadvantage of perhaps inhibiting Congressional power more than may be desirable or necessary.").

59. *Id.*

60. *See* discussion *infra* Part IV.A.; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States…cannot be granted away or restrained on behalf of anyone."); Fong Yue Ting v. United States, 149 U.S. 698, 705-07 (1893) (summarizing Supreme Court precedent holding that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation" to conditionally admit or expel foreigners) (citation omitted); s*ee also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (concluding that "the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

conduct foreign relations, or as 'an incident of sovereignty.'"[61] Given the trajectory of the *Charming Betsy* doctrine and the influence of international law in recent federal immigration law decisions, the principle of statutory interpretation remains viable and available to resolve future inconsistencies.

III. THE *BEHARRY* DECISION

Although the Second Circuit Court of Appeals overturned the holding in *Beharry* on other grounds,[62] the District Court's original reasoning has far-reaching implications for U.S. immigration law. The decision can only be understood in the context of prior changes to the immigration law, administrative policy, and Supreme Court precedent.

A. The 1996 Acts, *Matter of Soriano* and *INS v. St. Cyr*

Before 1996, the immigration law provided for a discretionary waiver of the criminal grounds of deportation known as the "212(c) waiver" because of its codification as former INA § 212(c).[63] The waiver was available to certain long-

61. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 9.03(2).

62. *See Beharry*, 183 F. Supp. 2d at 586, *rev'd on other grounds*, 329 F.3d 51.

63. INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). Former section 212(c) provided for a waiver of grounds of exclusion (as opposed to deportation) in exclusion proceedings for "aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years . . . ." *Id.* But the Board of Immigration Appeals gradually held that the provision applied in certain deportation proceedings as well. *See* Matter of G.A., 7 I. & N. Dec. 274, 275 (B.I.A. 1956); Matter of Smith, 11 I. & N. Dec. 325, 327 (B.I.A. 1965). Following Francis v. INS, 532 F.2d 268 (2d Cir. 1976), the board in Matter of Silva, 16 I. & N. Dec. 26 (B.I.A. 1976) extended the waiver to permanent residents in deportation proceedings who never made a temporary departure, thus completely extending the waiver to qualifying permanent residents in deportation proceedings to waive grounds of deportability with an analogous ground for exclusion. Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (A.G. 1991). The waiver requires a showing of statutory eligibility and facts meriting an affirmative exercise of discretion. *Id.* To be eligible for section 212(c) relief a respondent must have been a lawful permanent resident prior to the entry of the deportation order, accumulated a seven-year period of "lawful, unrelinquished domicile" in the United States, and not fall into a class of deportable persons who were ineligible for § 212(c) relief. *Id.* Additionally, the Respondent was required to show the existence of certain equities meriting a favorable exercise of discretion. Matter of Marin, 16 I. & N. Dec. 581, 584-85 (B.I.A. 1978) ("Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country . . . , evidence of hardship to the respondent and his family if deportation occurs, . . . a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a

time permanent residents, even those with aggravated felony convictions, as long as they had not served an aggregate term of imprisonment of five years or more.[64] Then, on April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[65] The AEDPA amendment to the INA dramatically enlarged the definition of an aggravated felony, encompassing many more criminal offenses, and thus narrowed eligibility for § 212(c) relief.[66] Five months later, on September 30, 1996, Congress enacted a second major immigration law reform, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[67] The IIRIRA, *inter alia*, effective April 1, 1997, repealed former INA § 212(c) entirely.[68]

On February 21, 1997, former Attorney General Janet Reno in *Matter of Soriano*[69] reversed the Board of Immigration Appeals[70] and concluded that the AEDPA amendment expanding the "aggravated felony" definition served as a retroactive bar to § 212(c) relief for those aliens who had not been granted the waiver before the AEDPA's enactment date, even if they were already in deportation proceedings or had applied for the waiver before that date.[71] In January 2001, in response to the extensive litigation that followed in the federal circuit courts, the Department of Justice issued a rule allowing aliens who had been placed into deportation proceedings before the AEDPA was enacted on April 24, 1996 to apply for § 212(c) relief under the pre-AEDPA standards ("the Soriano rule").[72]

But the same retroactivity problem arose for noncitizens beyond the scope of the Soriano rule who were placed into deportation proceedings *after* April 24, 1996 but pled guilty at a time when they would have otherwise been eligible to apply for the § 212(c) waiver. One such noncitizen, Mr. Enrico St. Cyr, was a Haitian citizen admitted to the United States as a lawful permanent resident in 1986 who pled guilty in March of 1996, prior to the enactment dates of both

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respondent's good character . . . .").

64. 8 U.S.C. § 1182(c).

65. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

66. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 74.04(b).

67. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

68. Illegal Immigration Reform and Immigrant Responsibility Act § 304(b), Pub. L. No. 104-208, 110 Stat. 3009-597 (1997). The IIRIRA replaced section 212(c) relief with a new form of discretionary relief from removal called "Cancellation of Removal." Gordon, Mailman & Yale-Loehr, *supra* note 17, § 74.04(b). Significantly, cancellation of removal is not available to a noncitizen convicted of an aggravated felony. Immigration and Nationality Act § 240A(a), 8 U.S.C. § 1229b(a) (2004).

69. 21 I. & N. Dec. 516, 533 (B.I.A. 1996).

70. *Id.* at 517.

71. *Id.* at 540.

72. Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 8 C.F.R. § 1003.44 (Dep't of Justice 2004). For a detailed summary of the federal court litigation, see Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436, 6437-39 (Jan. 22, 2001).

1996 Acts, to offenses rendering him deportable.[73] However, the INS did not initiate removal proceedings against him until April 10, 1997, nine days after the IIRIRA's complete repeal of the § 212(c) waiver took effect.[74] Thus, despite his reliance on the availability of the § 212(c) relief at the time of his plea, he was statutorily ineligible to apply for the waiver. Then, in June 2001, the U.S. Supreme Court held in *Immigration and Naturalization Service v. Enrico St. Cyr*[75] that the AEDPA's limitations on eligibility and the IIRIRA's repeal of § 212(c) relief in 1996 for most aggravated felons do not apply retroactively.[76]

The U.S. Supreme Court ruled that an administrative policy enforcing a retroactive repeal of § 212(c) relief created an impermissible retroactive effect.[77] The Court held that noncitizens who pled guilty before IIRIRA's effective date, on April 1, 1997, and who were otherwise eligible for § 212(c) relief at the time of their pleas, would be eligible to apply for the denied relief.[78] Although the Supreme Court addressed only the IIRIRA amendment and not the AEDPA limitation on § 212(c) relief, the effect of the decision was also to restore eligibility for § 212(c) relief to noncitizens whose pleas predated the AEDPA enactment date but were placed into proceedings after that date, and who were otherwise eligible for 212(c) relief at the time of their plea.[79] Thus, under *St. Cyr,* the operative time to determine the applicability of the 1996 amendments is the date of the plea agreement.[80] "[A]pplying IIRIRA § 304(b) to aliens who pled guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212(c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement."[81]

B. The *Beharry* Case

Mr. Beharry, however, did not fall within the *St. Cyr* decision.[82] Unlike Mr. St. Cyr, Mr. Beharry pled guilty in November of 1996, after the enactment dates of both 1996 Acts but before the IIRIRA effective date,[83] and thus could not

73. INS v. St. Cyr, 533 U.S. 289, 293 (2001).
74. *Id.*
75. *Id.* at 326.
76. *Id.*
77. *Id.*
78. *St. Cyr*, 533 U.S. at 326.
79. *See, e.g.,* Attwood v. Ashcroft, 260 F.3d 1, 3 (1st Cir. 2001) (holding that under *St. Cyr*, a noncitizen who pled guilty prior to the date of AEDPA's enactment and was placed into proceedings before IIRIRA is eligible to apply for section 212(c) relief). *See also* Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627, 52628 (proposed Aug. 13, 2002).
80. *St. Cyr*, 533 U.S. at 325 n.55.
81. *Id.*
82. Beharry v. Reno, 183 F. Supp. 2d 584, 589 (E.D.N.Y. 2002).
83. *Id.* at 586.

have relied upon the availability of § 212(c) relief at the time of his plea as Mr. St. Cyr did. Six months after AEDPA had expanded the aggravated felony definition on April 24, 1996, Mr. Beharry would have known at the time of his plea that his robbery offense would be considered an aggravated felony, and thus that he would not be eligible for § 212(c) relief.[84] Accordingly, even though his underlying criminal *offense* predated enactment of the 1996 laws, Mr. Beharry could not benefit from *St. Cyr* because he pled guilty after April 24, 1996.[85]

The *Beharry* decision confronted the issue not addressed by the U.S. Supreme Court of whether the 1996 amendments bar relief to a noncitizen who pleaded guilty after enactment of the AEDPA on April 24, 1996, but committed the underlying criminal offense before the 1996 changes.[86] Judge Weinstein invoked the principle of *nulla poene sine lege*, meaning that there can be no punishment without the law, to reason that because the AEDPA changed the definition of "aggravated felony" after Mr. Beharry committed his crime, he could not now be subject to its enhanced penalties.[87] Although the Second Circuit Court of Appeals had, prior to *St. Cyr*, found that the date of conviction – rather than the date the crime was committed – determined whether the denied relief would be made available,[88] neither case considered international law requirements. The *Beharry* Court specifically invited the Second Circuit to reconsider, in light of international law-based arguments not previously considered,[89] the two prior decisions on point.[90] Thus, *Beharry* invoked international law principles to essentially eliminate "the retroactive application of the statutory bar to relief"[91] in a narrow set of circumstances beyond the reasoning of *St. Cyr*.[92]

The U.S. District Court for the Eastern District of New York found that international law, embodied in ratified treaties, non-ratified treaties, general agreements, and custom, proscribes summary deportation and undue interference with the rights of children or the family.[93] These principles in turn inform the interpretation of domestic immigration law statutes because of the rule of statutory construction that "an act of Congress ought never to be construed to violate the

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84. *See* Kankamalage v. INS, 335 F.3d 858, 864 (9th Cir. 2003) (holding that convictions obtained after April 1, 1997 are not waiveable by section 212(c) because the noncitizen "could not have developed the sort of settled expectations concerning section 212(c) relief that informed St. Cyr's plea bargain and that animated the St. Cyr decision").

85. *Beharry*, 183 F. Supp. 2d at 589.

86. *Id*. at 605.

87. *Id.*

88. Domond v. INS, 244 F.3d 81 (2nd Cir. 2001); Kuhali v. Reno, 266 F.3d 93, 112 (2nd Cir. 2001). *See also* Mohammed v. Reno, 309 F.3d 95 (2nd Cir. 2002) (affirming *Domond* after *St. Cyr* without addressing international law arguments).

89. *Beharry*, 283 F. Supp. 2d at 591.

90. *Domond*, 244 F.3d at 81; *Kuhali*, 266 F.3d at 112.

91. Hassouri, *supra* note 23.

92. *Beharry*, 283 F. Supp. 2d at 605.

93. *Id.* at 593-602; s*ee generally infra* Part IV.

law of nations, if any other possible construction remains . . . ."[94] Accordingly, the court held that where a domestic statute contradicts international law without specific congressional intent to do so, courts should "make the minimal changes necessary"[95] to "construe the statute as to resolve the contradiction."[96] The court found that because Mr. Beharry's deportation would violate international law, the least intrusive lawful interpretation would be to read broadly the statutory eligibility requirements for a waiver of deportation under INA § 212(h),[97] permitting Mr. Beharry to apply for such a waiver.[98]

Thus, under *St. Cyr*, noncitizens who pled guilty at a time when they would have been eligible for the waiver (either before the AEDPA amendments enacted on April 24, 1996 or the IIRIRA effective date on April 1, 1997), are entitled to apply for the denied relief.[99] Before it was overturned, *Beharry* added to that pre-defined class the additional group of noncitizens who pled guilty *after* those dates, but committed the underlying offense at a time when they would have been eligible for the waiver.[100] A third group, those noncitizens who have committed or pleaded guilty to an aggravated felony after the enactment of the 1996 amendments, are prospectively statutorily denied the opportunity to present

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94. Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *See generally infra* Part II. The *Beharry* court reasoned that violating international law could present a constitutional problem under the Supremacy Clause, U.S. CONST., art. VI, § 2, and therefore that the Immigration and Nationality Act "should be construed in conformity with international law to avoid a constitution issue if 'fairly possible.'" *Beharry*, 183 F. Supp. 2d at 604 (internal citations omitted).

95. *Beharry*, 183 F. Supp. 2d at 604.

96. *Id.* at 600, *citing* Steinhardt, *supra* note 43, at 1143 n.177.

97. Section 212(h) affords an immigration judge the discretion to waive specified grounds of inadmissibility if "the denial of admission would result in extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son or daughter of such alien . . . ." Immigration and Nationality Act § 212(h), 8 U.S.C. § 1182(h) (2002). The waiver may be granted only when filed concurrently with an application for admission to the United States or adjustment of status. 8 U.S.C. § 1182(h). To qualify for the waiver, the noncitizen must show seven years of continuous residence and not have been convicted of an aggravated felony. 8 U.S.C. § 1182(h)(2). Even if the waiver of inadmissibility is granted, it only serves to waive the basis for removability for certain offenses, primarily crimes involving moral turpitude. 8 U.S.C. § 1182(h). Thus, in many cases, where the aggravated felony conviction is not a crime involving moral turpitude or otherwise waiveable, the waiver is ineffective. *See, e.g.*, Taveras-Lopez v. Reno, 127 F.Supp.2d 598 (M.D.Pa. 2000) (aggravated felony conviction for a drug trafficking offense was not a waivable offense under section 212(h)). For a general discussion of the rare circumstances in which an aggravated felon is eligible for relief from removal, see Brent K. Newcomb, Note, *Immigration Law And The Criminal Alien: A Comparison Of Policies For Arbitrary Deportations Of Legal Permanent Residents Convicted Of Aggravated Felonies*, 51 OKLA. L. REV. 697, 721-24 (Winter 1998).

98. *Beharry*, 183 F. Supp. 2d at 604-05.

99. INS v. St. Cyr, 533 U.S. 289, 326 (2001).

100. *Beharry*, 283 F. Supp. 2d at 605.

evidence to an immigration judge showing why they should not be deported.[101]

It is to this third group that the implications of the narrow *Beharry* ruling offer the most hope. Judge Weinstein ruled that federal immigration statutes that deny noncitizens, especially those with longstanding family or other ties to the United States, the opportunity to apply for discretionary relief contravene binding international law principles.[102] The *Beharry* reasoning, however, is not limited to that small subset of noncitizens who, but for their aggravated felony convictions, would qualify for the narrow § 212(h) waiver.[103] Although the District Court appeared to choose § 212(h) as a remedy because of its high bar to relief and applicability to a narrow subset of noncitizens,[104] the international law rationale is equally applicable in cases where the noncitizen committed the underlying offense or pled guilty well after the enactment of the IIRIRA or does not meet the strict qualifications for the 212(h) waiver. Indeed, this is exactly what *Beharry* stands for.[105] Although *Beharry* was originally limited to the facts before the court, did not bind the INS or immigration judges, and was ultimately overturned, the rule announced is applicable to all noncitizens found removable without the opportunity to apply for discretionary relief.

IV. INSTRUCTIVE FORMS OF INTERNATIONAL LAW

A. Source of Federal Immigration Power

The U.S. Supreme Court has repeatedly held that a nation's power over immigration matters derives from international law's principle of state sovereignty.[106] The Court has also held that Congress's power to regulate

101. *See supra* Part I.A. Aggravated felons not covered by *St. Cyr* are generally statutorily denied the opportunity for discretionary relief.

102. *Beharry*, 283 F. Supp. 2d at 605.

103. INA § 212(h), 8 U.S.C. § 1182(h) (2002).

104. *See* INA § 212(h); *see supra* note 97 for a discussion of eligibility for the 212(h) waiver.

105. Hassouri, *supra* note 23.

106. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Fong Yue Ting v. United States, 149 U.S. 698, 705-07 (1893) (summarizing Supreme Court precedent holding that "it is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation," to conditionally admit or expel foreigners) (internal citations omitted); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . cannot be granted away or restrained on behalf of any one."); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 9.03(2) ("Chinese Exclusion

immigration is "plenary,"[107] and thus, that the decisions of the political branches are entitled to judicial deference.[108] "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens]."[109] The "plenary power" doctrine defines federal authority to regulate the deportation of noncitizens[110] and has endured over the last century.[111] Thus, both the federal authority to regulate immigration and the traditional deference of the courts to immigration legislation is based on notions of state sovereignty derived from international law.[112] Accordingly, because immigration law is based on international law, it is also subject to international law.[113]

B. International Law Limitations on a Sovereign's Right to Deport Noncitizens

The *Beharry* court found international law applicable to the interpretation of domestic statutes.[114] The court examined ratified treaties, non-ratified treaties or agreements, the Universal Declaration of Human Rights, and customary international law.[115] Specifically, the court concluded that customary international law and certain ratified international instruments confer upon a noncitizen the right to submit reasons against expulsion prior to deportation.[116]

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affirmed the federal power to control immigration, as part of the general federal power to conduct foreign relations, or as 'an incident of sovereignty.'"); s*ee also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (arguing that "the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

107. *Chae Chan Ping*, 130 U.S. 581 at 603-10 (although not enumerated in the Constitution, power to regulate immigration is inherent as an incident of national sovereignty and the power to regulate foreign affairs). *See also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551 (Dec. 1990); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 1.03(2)(a).

108. Stephen H. Legomsky, *Ten More Years Of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 937 (Summer 1995).

109. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). This phrase has been quoted with approval throughout immigration law jurisprudence in the United States. Motomura, *supra* note 107 at n.23.

110. *See Fong Yue Ting*, 149 U.S. at 731 (discussing the plenary power applicable in deportation context); Motomura, *supra* note 107 at 553.

111. *See, e.g.,* Fiallo v. Bell, 430 U.S. 787, 794 (1977) (plenary power doctrine affirmed).

112. Beharry v. Reno, 283. F. Supp. 2d 584, 598 (E.D.N.Y. 2003).

113. *Id*. *See also* Michael Scaperlanda*, Polishing The Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1028-29 (1993) (arguing that modern notions of state sovereignty derived from international law have eroded the theoretical underpinnings of the plenary power doctrine).

114. *Beharry*, 283. F. Supp. 2d at 600.

115. *Id.* at 593-601.

116. *Id.* at 603-04.

1. Ratified Treaties

The International Covenant on Civil and Political Rights (ICCPR)[117] was the product of a United Nations (U.N.) effort to bind the rights enumerated in the Universal Declaration of Human Rights in treaty form.[118] It has been hailed as a "modern Magna Carta."[119] The U.N. General Assembly adopted the ICCPR in 1966 and the Covenant entered into force on March 23, 1976.[120] The United States signed the ICCPR on October 5, 1977, but did not ratify the treaty until 1991, and the ICCPR "became the law of the United States"[121] on September 8, 1992.[122] As a ratified treaty, the ICCPR applies to all people within the United States.[123] However, the United States signed and ratified the ICCPR with certain understandings and declarations,[124] known as "RUDs."[125]

Prior to ratification of the ICCPR, President H.W. Bush submitted to the Senate certain RUDs intended to limit the international obligations of the United States under the treaty.[126] Most significantly, one qualification declared the treaty to be "non-self-executing."[127] Non-self-executing treaties, although ratified, require independent implementing legislation to have force of domestic law.[128]

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117. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 A (xxi), 21 U.N. GOAR, 21st Sess., Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, 6 I.L.M. 360 (1967), entered into force March 23 1976, [hereinafter ICCPR] (*entered into force for the United States* Sept. 8, 1992), available at http://www.tufts.edu/departments/fletcher/multi/texts/BH498.txt.

118. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1288 (1993).

119. Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1209 (1993).

120. *Id.*

121. *Maria,* 68 F. Supp. 2d at 231.

122. Quigley, *supra* note 118 at 1290.

123. ICCPR, art. 2.

124. *See* United States Dep't of State, Treaties in Force 397-98 (2001).

125. Margaret Thomas, Note, *"Rogue States" Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights*, 90 CAL. L. REV. 165, 168 (Jan. 2002). "RUD" is shorthand for "reservations, understandings, and declarations." *Id.*

126. Quigley, *supra* note 118 at 1290.

127. SENATE COMM. ON FOREIGN REL., 102D CONG., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 652 (1992); *see also* Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1257 (1993).

128. *Beharry,* 283. F. Supp. 2d at 593 (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)); *see also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 146 (1999).

The stated intent behind the Bush declaration was "to clarify that the Covenant will not create a private cause of action in U.S. courts."[129] The Executive continued that "existing U.S. law generally complies with the covenant; hence implementing legislation is not contemplated."[130]

Many commentators have suggested that the non-self-execution policy is "legally void *ab initio*"[131] and should be declared as such by the federal courts.[132] Others have asserted that even if courts are not permitted to apply non-self-executing treaty provisions "directly as a rule of decision"[133] or where asserted as grounds for a private cause of action,[134] courts may give such provisions effect when asserted defensively as protection from government.[135] "[T]he federal courts appear to have developed an implicit two-tiered enforcement structure,

129. Paust, *supra* note 127, at 1257-58 (citing SENATE COMM. ON FOREIGN REL., 102D CONG., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 657 (1992)).

130. SENATE COMM. ON FOREIGN REL., 102D CONG., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 657 (1992).

131. Quigley, *supra* note 118, at 1311. *Ab initio* means "from the beginning."

132. *See, e.g.,* Paust, *supra* note 127, at 1266-73, 1284 ("The non-self-execution policy is not only incompatible with the preamble to and several articles in the Covenant and with the overall object and purpose of the treaty, but also with the very notion of human rights as real and effective rights of real human beings. Additionally, it is incompatible with peremptory norms under the U.N. Charter and customary jus cogens."); Quigley, *supra* note 118, at 1311 (concluding that "U.S. courts should apply traditional jurisprudence on self-execution to find that the Covenant is the 'law of the land' in the United States."); Thomas, *supra* note 125, at 177-78 (describing criticism by the Covenant's Human Rights Committee on the non-self-execution declaration); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, reporters' note 5 (1987) ("If a treaty is not self-executing for a state party, that state is obligated to implement it promptly, and failure to do so would render it in default under its treaty obligations.").

133. Sloss, *supra* note 128, at 149.

134. *Id.* at 151-52, 220; *see also* Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (dismissing ICCPR claim as "without merit" and stating that "[e]ven if Article 25 could be read to imply such a right, Articles 1 through 27 of the ICCPR were not self-executing . . . and could not therefore give rise to privately enforceable rights under United States law."); Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002) (finding that U.S. reservation on ICCPR provision prohibiting imposition of the death penalty on juveniles is valid, and suggesting in dicta that the ICCPR is not binding on the federal courts because Congress has never enacted implementing legislation); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001) ("Ohio's imposition of the death penalty does not violate any international agreements entered into by the United States."); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001).

135. Thomas, *supra* note 125, at 203-208; *see also* Sloss, *supra* note 128, at 151-52 (arguing that non-self-execution merely forecloses private right of action but permits "judicial enforcement of the treaty in other contexts to help ensure compliance with treaty obligations").

making the rights justiciable when asserted by a citizen defensively as protection from the government, but non-self-executing (and thus nonjusticiable before federal courts) when asserted by a citizen in a private cause of action in civil litigation."[136] Accordingly, state and federal courts have invoked the ICCPR as an aid in statutory interpretation.[137] Additionally, the federal courts have been influenced in matters of interpretation by non-self executing treaties such as the ICCPR, including the Second,[138] Ninth,[139] and Eleventh[140] Circuit Courts of Appeals. Moreover, U.S. District Courts have also found the ICCPR dispositive or persuasive in questions of statutory interpretation.[141] The U.S. Supreme Court, however, has not decided whether the ICCPR is enforceable in federal courts.[142]

Importantly, Articles 13 and 17 of the ICCPR are not subject to specific "reservations" or "understandings."[143] These Articles only appear to be subject to the general "declaration" that "Articles 1 through 27 of the Covenant are not self-executing."[144] Accordingly, while not providing a private right of action or rule of decision, the ICCPR may be used to interpret domestic statutes consistently with

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136. Thomas, *supra* note 125, at 203-208.

137. Sloss, *supra* note 128, at 221 n.340 (citing seven state and federal court opinions).

138. United States v. Toscanino, 500 F.2d 267, 276-77 (2d Cir. 1974) (distinguishing prior cases on grounds that they did not involve treaty violations, and giving effect to the U.N. Charter and Organization of American States charter, even though they are non-self-executing); Filartiga v. Pena-Irala, 630 F.2d 876, 882 n.9 (2d Cir. 1980) (noting that the mere fact that treaty is non-self-executing "alone does not end our inquiry" and consulting ICCPR, *inter alia*, to find customary prohibition on torture).

139. Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (citing the ICCPR as a binding ratified treaty, but not addressing the issue of non-self-execution or validity of RUD's); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441-42 (9th Cir. 1996) (interpreting the ICCPR when validating restriction on travel to Cuba and never suggesting that non-self-execution limited the inquiry); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (holding that detention was not arbitrary within the meaning of the ICCPR and never suggesting that non-self-execution limited the inquiry).

140. United States v. Duarte-Acero, 208 F.3d 1282, 1283-87 (11th Cir. 2000) (acknowledging that the ICCPR is non-self-executing, then adopting the view of the U.N. Human Rights Committee because it is the body "charged [under the ICCPR] with monitoring its compliance . . . .").

141. *See, e.g., Beharry,* 183. F. Supp. 2d at 603-04; *Maria,* 68 F. Supp. 2d at 231-32 (holding that although the ICCPR is not self-executing, "it is an international obligation of the United States and constitutes a law of the land") (citing Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,* 100 HARV. L. REV. 853, 867 n.65 (1987)); Sloss, *supra* note 128, at 221 n.340 (citing seven state and federal court opinions); Mojica v. Reno, 970 F. Supp. 130, 152 (E.D.N.Y. 1997).

142. Thomas, *supra* note 125, at 203; *Beharry*, 183 F. Supp. 2d at 594.

143. SENATE COMM. ON FOREIGN REL., 102D CONG., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 651-52 (1992).

144. *Id.* at 652.

the *Charming Betsy*[145] rule of construction.

The *Beharry* court found that where a statute requires deportation of a noncitizen residing legally within the United States without the opportunity to present reasons against removal, it contravenes the ICCPR.[146] Article 13 of the ICCPR provides that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall … [absent national security concerns] be allowed to s*ubmit the reasons against his expulsion*…."[147] Additionally, ICCPR Article 17 provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his … home…."[148] The U.N. Human Rights Committee has also specifically found that deportation away from close family members can constitute interference with the family.[149] The court in *Beharry* also cited ICCPR Article 7, which provides in relevant part that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[150] citing authority interpreting a similar provision of the European Convention on Human Rights to prevent separation from family[151] and the assumption that "[a]rbitrary separation from one's family and longtime home can reasonably be interpreted to fall within that general category."[152]

2. Non-Ratified Treaties or Agreements

The United States signed the U.N. Convention on the Rights of the Child (UNCRC) on February 16, 1995,[153] but because the U.S. Senate has not ratified

145. *See supra* Part II. "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

146. *Beharry*, 183 F. Supp. 2d at 604.

147. ICCPR, *supra* note 117, art. 13. (Emphasis added.)

148. *Id.* art. 17.

149. *Beharry*, 183 F. Supp. 2d at 595. "The Human Rights Committee's General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR." *Maria,* 68 F. Supp. 2d at 232 (citing Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT 33, 44 n.63 (1997)).

150. ICCPR, *supra* note 117, art. 7.

151. "Expulsion from a country that separates a person from others with whom he has close links, even if not members of his immediate family, may be considered a violation of Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which is almost identical to Article 7 of the ICCPR." *Maria*, 68 F. Supp. 2d at 232 (citing P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 235-37 (1990)).

152. *Beharry*, 183 F. Supp. 2d at 595.

153. *United Nations: Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 1, U.N. Doc. A/Res/44/25 (1989), *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter *UNCRC*], *available at* http://www.unicef.org/crc/crc.htm.

the UNCRC, it does not have the force of domestic law.[154] Nevertheless, several U.S. courts have examined non-ratified treaties to inform statutory construction.[155]

The Preamble to the UNCRC provides in relevant part that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance . . . . The child . . . should grow up in a family environment."[156] Additionally, Article 3 provides that "in all actions concerning children, whether undertaken by . . . courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[157] Furthermore, Article 7 provides children with, "as far as possible, the right to know and be cared for by his or her parents."[158]

Notwithstanding the UNCRC's non-ratified status, the *Beharry* court found these provisions of the UNCRC to inform domestic statutory interpretation where not specifically disclaimed by statute and where Mr. Beharry has a U.S. citizen daughter.[159] The court found that the UNCRC requires that the best interests of the child be considered wherever possible and that "denial of a hearing and thus of any consideration of the child's interests in all cases of theft where the sentence exceeds a year is not in compliance with that international mandate."[160] Similarly, these provisions apply, under the rule in *Beharry*, to inform interpretation of other sections of the Immigration and Nationality Act that categorically deny noncitizens convicted of an "aggravated felony" the right to an individualized determination as to why they should not be deported.

3. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR)[161] is not a binding international obligation,[162] but "has become the accepted general articulation of recognized rights."[163] "It is increasingly accepted that states parties to the [U.N.] Charter are legally obligated to respect some of the rights recognized in the

154. *Beharry*, 183 F. Supp. 2d at 596.

155. *Id.*; Steinhardt, *supra* note 43, at 1181 (listing four federal cases citing unratified treaties as support for customary international law principles). "Customary international law has been defined as law 'made over time by widespread practice of governments acting from a sense of legal obligation.'" *Id*. at 1181 n.2 (quoting L. HENKIN, HOW NATIONS BEHAVE 33 (2d ed. 1979)).

156. *UNCRC*, *supra* note 153, at pmbl.

157. *Id.* art. 3.

158. *Id.* art. 7.

159. *Beharry*, 183 F. Supp. 2d at 596, 604.

160. *Id.* at 604.

161. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *UDHR*].

162. Thomas, *supra* note 125, at 174.

163. Restatement (Third) of Foreign Relations Law § 701 cmt. d (1986).

Universal Declaration."[164] The UDHR may be used in statutory construction,[165] and U.S. courts have used the UDHR to resolve questions regarding international human rights law.[166] Article 9 of the UDHR prohibits "arbitrary . . . exile"[167] and Article 10 provides that "everyone is entitled to a fair . . . hearing . . . in the determination of his rights and obligations."[168] Accordingly, a domestic statute that denies a noncitizen the right to present the merits of his case to an impartial judge prior to deportation does not conform to the UDHR.[169] The *Beharry* rule extends this reasoning to any analogous provision contained in the Immigration and Nationality Act not expressly excepted from the UDHR, and requires that provision's reinterpretation.

4. Customary International Law

Custom is the second integral source of international law.[170] Customary international law consists of state practice, as evidence of custom, and *opinio juris*, which is the "general acceptance of a norm as a legal obligation by the world community."[171] Sources of customary international law include "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . ."[172] Non-self-executing treaties may be used "indirectly as aids for clarifying or interpreting rights contained in . . . customary international law."[173] Indeed, several U.S. federal courts have used the ICCPR to clarify customary human rights.[174] Additionally, the UNCRC[175] and UDHR,[176] "because of their broad acceptance, collect[] and articulate[] customary international law."[177] The *Beharry* court specifically held that because it is a "uniformly-accepted legal principle[]"that the best interests of the child must be considered where possible, "denial of a hearing and thus of any consideration of

164. *Id.*

165. Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

166. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980).

167. *UDHR*, *supra* note 161, art. 9.

168. *Id.* art. 10.

169. *Beharry*, 183 F. Supp. 2d at 604.

170. Daniel H. Joyner, Note, *A Normative Model for the Integration of Customary International Law into United States Law*, 11 DUKE J. COMP. & INT'L L. 133, 133-35 (2001).

171. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000).

172. The Paquete Habana, 175 U.S. 677, 700 (1900).

173. Paust, *supra* note 127, at 1276.

174. *Id.* at 1274-76 (citing seven federal court opinions using the ICCPR to clarify customary international law before the United States had even ratified the Covenant); Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001).

175. *See supra* Part IV.B.2.

176. *See supra* Part IV.B.3.

177. Beharry v. Reno, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002).

the child's interests in all cases of theft where the sentence exceeds a year is not in compliance with that international mandate."[178]

International law, in the form of ratified treaties, non-ratified treaties, general agreements, and customary international law, proscribes summary deportation and undue interference with the rights of children or the family. These principles, established by the ICCPR, UNCRC, and UDHR, in turn bear on the interpretation of domestic immigration law statutes. This international legal instruction is particularly persuasive where the authority to deport noncitizens itself derives from international law.[179] Accordingly, the INA, as presently interpreted, must be carefully scrutinized to identify any divergence from international law norms.

V. THE INA IS NOT CONGRUENT WITH INTERNATIONAL LAW

There is a contradiction between international law limitations and the Immigration and Nationality Act's categorical preclusion of discretionary relief to aggravated felons.[180] *Beharry* reveals that under certain circumstances, the INA does not conform to pre-existing international law requirements.[181] The federal immigration statutes denying Mr. Beharry relief implicate the rights of families, children, and individual foreign residents within sovereign nations guaranteed by the ICCPR, UNCRC and UDHR.[182] Although the direct holding in *Beharry* is limited and applies in an extremely narrow set of factual circumstances,[183] the underlying principle is far-reaching. A narrow reading would find that *Beharry* stands for the proposition that *any* long-time lawful permanent resident with extensive family, cultural, economic, and other ties to the United States should not be summarily deported without an opportunity for discretionary relief.[184] A broad reading would find that any time the United States deports a noncitizen without providing the opportunity to submit reasons against his expulsion, it violates international law.[185] In either case, the *Beharry* principle necessarily extends to similarly situated noncitizens facing deportation on "aggravated felony" grounds who have been denied a merits hearing under the INA.

Many sections of the INA expressly bar the opportunity for discretionary relief to a noncitizen convicted of an aggravated felony.[186] Other sections provide

178. *Id.*

179. *See* discussion *infra* Part IV.A.

180. *See Beharry*, 183 F. Supp. 2d at 603-05.

181. *Id.*

182. *Id.*; *see supra* Part IV.

183. *Beharry*, 183 F. Supp. 2d at 605 ("This interpretation will affect only a small subset of the aliens who would otherwise be ineligible for section 212(h) relief.").

184. *See id.*

185. *See generally*, Hassouri, *supra* note 23.

186. *See* discussion *infra* Part V.B.

for summary deportation of individuals who have already been deported on the basis of prior proceedings that may not have afforded the opportunity for discretionary relief.[187] Another section criminalizes illegally reentering the United States as a federal offense and authorizes increased punishment for noncitizens convicted of illegal reentry subsequent to deportation for an aggravated felony.[188] Even if these statutory bars, procedures, and sentence enhancements themselves do not violate international law, they may affirm a previous act or order executed in violation of international law and thus may provide a venue or opportunity to remedy the prior violation. Additionally, procedural regulations implementing the INA bar re-application for discretionary relief to noncitizens deported pursuant to a DOJ policy that the U.S. Supreme Court found in *St. Cyr* to be unlawful.[189]

A. Procedures for Removal Under the INA

Under U.S. immigration law, noncitizens may be ordered removed from the United States in several distinct procedures. Most noncitizens who are removable are placed in INA § 240 "removal proceedings,"[190] where they are entitled to a hearing before an immigration judge.[191] A § 240 removal proceeding is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States," except as otherwise specified in the INA.[192] Removal proceedings afford a noncitizen the greatest procedural safeguards available to noncitizens under U.S. law.[193] Additionally, removal proceedings provide a forum for a noncitizen to present the positive merits of his life to an immigration judge when seeking a favorable grant of discretionary relief.[194] Any form of relief from deportation available to a noncitizen under the INA may be requested in a removal proceeding, provided the noncitizen is eligible.[195] Noncitizens who are lawful permanent residents can only be ordered removed in § 240 removal

187. *See supra* Part V.A.

188. *See supra* Part V.C.

189. *See supra* Part V.D.

190. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7.5 (4th ed. 2002). Removal proceedings are the forum for the removal of both aliens who (1) have not been admitted to the United States and are inadmissible under section 212(a), and (2) have already been admitted but are deportable under section 237(a). *Id.*

191. *Id.*

192. INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3) (2002).

193. INA § 240(b)(4). Since 1903, the United States Supreme court has affirmed that deportation hearings must comply with due process. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100-02 (1901) (holding that the due process clause of the Fifth Amendment protects "persons" against arbitrary deprivation of life, liberty or property).

194. 8 C.F.R. § 1240.11 (2003).

195. 8 C.F.R. § 1240.1(a) (2004).

proceedings.[196]

In addition to removal proceedings under INA § 240, noncitizens may also be ordered removed in three distinct, more expeditious procedures known as expedited removal,[197] administrative removal,[198] and reinstatement of removal.[199] Each procedure may result in the deportation of aggravated felons or long-time residents without a merits hearing.[200]

Expedited removal at a port of entry pursuant to INA § 235 applies to "arriving aliens" and certain other noncitizens already present in the United States who have *not* been technically admitted or paroled into the country.[201] Noncitizens in expedited removal are ordered removed by an immigration officer.[202] A noncitizen is only entitled to a further hearing if he claims to be a permanent resident, refugee, or an asylee.[203] Under the grounds for expedited removal relevant here, a noncitizen who is unlawfully present in the United States without having been admitted or paroled, who has previously been determined to be inadmissible under § 212(a)(6)(C)[204] or § 212(a)(7),[205] and who cannot show that he has been continuously physically present in the United States for two years immediately prior to that date, may be ordered removed by an immigration

196. INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3). Although aggravated felons may be removed in proceedings under INA § 238, such proceedings "shall be conducted in conformity with section 240 . . . ." INA § 238(a)(1), 8 U.S.C. § 1228(a)(1) (2002).

197. INA § 235, 8 U.S.C. § 1225 (2002).

198. INA § 238(b), 8 U.S.C. § 1228(b); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.08; Austin T. Fragomen, Jr., Steven C. Bell & Thomas E. Moseley, IMMIGR. LEGIS. HANDBOOK § 7:24 (2003).

199. INA § 241(a)(5)(b), 8 U.S.C. § 1231(a)(5)(b) (2003).

200. A fifth means of removal, "judicial removal," is rarely if ever invoked, and therefore will not be discussed here. INA § 238(d)(1), 8 U.S.C. § 1228(d)(1); *see* Gordon, Mailman & Yale-Loehr, *supra* note 17, § 111.08(1)(d).

201. INA § 235(b)(1)(A)(i), (iii), 8 U.S.C. § 1225(b)(1)(A)(i), (iii); FRAGOMEN & BELL, *supra* note 190, § 7.5(f). "Arriving aliens" may be ordered removed in an expedited removal proceeding if an INS officer determines that the alien is inadmissible under INA § 212(a)(6)(C) (fraud or misrepresentation in procuring a visa, other documentation, or admission) or § 212(a)(7) (lack of valid documentation). Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.06(1)-(2). Because this ground only implicates noncitizens who have technically not been "admitted" to the United States, on international law rationale would not apply to guarantee "arriving aliens" an opportunity to present reasons against expulsion. Thus, only the latter grounds will be considered here.

202. FRAGOMEN & BELL, *supra* note 190, § 7.5(f).

203. *Id*. However, the INS regulations provide that all expedited removal orders must be reviewed and approved by a supervisory officer before the order is considered "final." 8 C.F.R. § 1235.3(b)(7).

204. INA § 212(a)(6)(C) sets forth several grounds of inadmissibility for noncitizens who by fraud or misrepresentation seek to procure admission into the United States. INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2003).

205. INA § 212(a)(7) sets forth a ground of inadmissibility for noncitizens who are not in possession of valid travel documents. INA § 212(a)(7).

officer.[206] Although this ground was not initially enforced, the INS initiated a pilot project in Texas to place certain aliens in expedited removal who: (1) have been convicted of illegal entry into the United States under INA § 275 if the court record establishes the time, place, and manner of entry; (2) have not been admitted or paroled into the United States and have been physically present for less than two years prior to the date of the determination of inadmissibility; and (3) are serving criminal sentences in the specified detention facilities.[207] Thus, in limited circumstances, a noncitizen who has been illegally present for less than two years may be placed in expedited removal and summarily deported based on a prior fraudulent or undocumented entry.

Accordingly, where the noncitizen developed significant family or other close ties to the United States during this two-year period, such summary deportation may contravene international law. However, because noncitizens are only eligible for expedited removal if they have not been lawfully admitted into the United States, are not legal residents, and have few ties to the country, the international law authorities cited in *Beharry* are not likely to apply.[208] Nevertheless, because it is conceivable that a long-time lawful permanent resident could fall within the language of the INS's present interpretation of the expedited removal statute,[209] the present interpretation must not be expanded.[210] At a minimum, the deliberately narrow scope of the pilot project implementing the previously unenforced section[211] adheres to fundamental international law norms. Such consideration of international law is also appropriate when interpreting other sections of the Act.

Third, under § 238(b) administrative removal proceedings, a noncitizen is not entitled to a hearing before an immigration judge.[212] Instead, the proceedings may be conducted before an INS officer who "serves the role of both government attorney and adjudicator."[213] Section 238(b)(1) administrative removal proceedings may be brought against noncitizens who are not lawful permanent residents, including conditional permanent residents,[214] and who are not eligible

206. INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii).

207. FRAGOMEN & BELL, *supra* note 190, § 7.5(f).

208. *See generally supra* Part IV.

209. For example, a long-time lawful permanent resident who is deported and subsequently returns to the United States illegally could theoretically be placed in expedited removal proceedings, provided he was inadmissible under one of the specified sections.

210. INA § 235 subparagraphs (b)(1)(A)(i) and (iii) permit the Attorney General, at his discretion, to expand the applicability of the expedited removal procedure with certain limitations. INA § 235(b)(1)(A)(i), (iii), 8 U.S.C. § 1225(b)(1)(A)(i), (iii).

211. *See* discussion *infra* Part V.A.

212. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.08 n.1. However, the noncitizen is entitled to other basic procedural guarantees. *See id.*

213. FRAGOMEN & BELL, *supra* note 190, § 7.5(g).

214. Conditional permanent resident status is given, for example, to noncitizens applying for lawful permanent resident status on the basis of a marriage to a U.S. citizen

for relief from deportation.[215] The INS may elect to proceed under either § 240 removal proceedings or § 238(b) administrative proceedings for nonpermanent resident aliens convicted of an aggravated felony.[216] Importantly, because § 238(b) administrative proceedings may only be brought where the noncitizen is not statutorily "eligible for any [discretionary] relief from removal,"[217] proceedings under § 238(b) necessarily deny noncitizens, particularly those who have been admitted and have significant ties to the United States,[218] the opportunity to state reasons weighing against deportation. Thus, the procedure is defective where it permits deportation in violation of international law norms.

Fourth, under INA § 241(a)(5), the INS may "reinstate" a prior order of removal where a noncitizen illegally reenters the United States after being removed.[219] Thus, the INS need not initiate new removal proceedings when a noncitizen who has already been deported is found in the United States.[220] Furthermore, the immigration judge and the Board of Immigration Appeals lack jurisdiction to review the INS's removal decision.[221] The effect of this provision is "virtually automatic removal without the reopening of proceedings or judicial review."[222] Importantly, the noncitizen is not eligible to apply for any relief from removal.[223] Therefore, where reinstatement merely affirms a prior order of removal and forecloses any opportunity to reopen or review the prior order, which may have been entered in defiance of international law, the procedure is defective.

Removal proceedings provide a noncitizen a forum to present reasons against expulsion to an impartial immigration judge, provided the noncitizen is eligible for the requested relief.[224] However, expedited removal, administrative

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less than two years old, fiancées of U.S. citizens, and spouses, sons or daughters of permanent residents pursuant to the second family-based immigration preference category of INA § 203(a)(2). INA § 216, 8 U.S.C. § 1186a (2003).

215. Morris, *supra* note 33, at 1325.

216. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.03(1) n.2.1. *See also* Morris, *supra* note 33, at 1326.

217. INA § 238(b)(5), 8 U.S.C. 8 U.S.C. § 1228(b)(5). However, "in a few instances, even people convicted of aggravated felonies may be entitled to adjustment of status or withholding of deportation." Gordon, Mailman & Yale-Loehr, *supra* note 17 § 64.08 n.9.

218. Such as fiancées of U.S. citizens. *See* INA § 216, 8 U.S.C. 8 U.S.C. § 1186a.

219. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, 1 IMMIGRATION LAW & DEFENSE § 10:15 (3d ed. 2002).

220. IMMIGRATION LAW SERVICE § 15:260 (West 2003).

221. *Id.*

222. IMMIGRATION LAW & CRIMES § 7:53 (2003). "The prior order of removal … is not subject to being reopened or reviewed." INA § 241(a)(5), 8 U.S.C. 1231(a)(5) (2002). However, a reinstated removal order is reviewable by the Court of Appeals. Castro-Cortez v. INS, 239 F.3d 1037, 1043-44 (9th Cir. 2001); Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 105 (4th Cir. 2001).

223. INA § 241(a)(5), 8 U.S.C. 8 U.S.C. § 1231(a)(5); 2 IMMIGRATION LAW SERVICE § 15:260 (2003).

224. *See* discussion *infra* Part V.B.

removal, and reinstatement of removal generally do not provide for such an opportunity.[225] Therefore, these procedures may result in entering or affirming an order of removal in violation of international law, specifically Article 13 of the ICCPR. These removal procedures may themselves need to be reinterpreted to conform to international law requirements, or alternatively, may represent and provide a procedural avenue to remedy a prior international law violation.

B. Forms of Relief from Deportation Under the INA

Under the immigration law, relief from deportation is generally available in two forms: discretionary and mandatory relief.[226] Discretionary relief requires an affirmative exercise of discretion by the Attorney General, in most cases, acting through an immigration judge, in addition to statutory eligibility.[227] Mandatory relief, or relief which does not involve an exercise of discretion, must be provided upon a finding of statutory eligibility.[228] Noncitizens convicted of an "aggravated felony" are generally statutorily ineligible for discretionary relief and, in some cases, also disqualified from receiving mandatory relief.[229]

1. Mandatory Relief

Mandatory relief from deportation includes relief pursuant to the U.N. Convention Against Torture (CAT)[230] and claims of "withholding of removal."[231] Each form of relief requires some showing that the noncitizen fears persecution if returned to his country of origin.[232] INS regulations implementing the CAT do not bar aggravated felons,[233] but in many cases concerning criminal aliens, relief under the CAT does not result in lawful status, but rather a mere "deferral of removal."[234] Deferral of removal does not confer a right of release from INS

225. *See* discussion *infra* Part V.B.

226. *See* Smith & Pérez, *supra* note 22 (manuscript at 79).

227. *See id.*

228. *See, e.g.,* 8 U.S.C. § 1231(b)(3); *see also* Smith & Pérez, *supra* note 22 (manuscript at 101).

229. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 72.05(2)(c).

230. *United Nations Convention Against Torture and Other Crimes, Inhumane or Degrading Treatment of Punishment*, 39 U.N. G.A.O.R. Supp. No. 51, at 197, U.N. Doc. A/Res/39/708 (1984). CAT was enacted into U.S. law on October 21, 1998 and regulations implementing the Convention relating to criminal noncitizens can be found at 8 CFR § 1208.17 (2003).

231. INA § 241(b)(3), 8 U.S.C. 8 U.S.C. § 1231(b)(3); *see* Smith & Pérez, *supra* note 22 (manuscript at § 7.15); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 1.03(5)(e).

232. *See* discussion, *infra*.

233. 8 C.F.R. § 1208.16(c)(2). However, the noncitizen must show that it is more likely than not that he or she would be tortured in the country of removal. *Id.*

234. *See* Gordon, Mailman & Yale-Loehr, *supra* note 17, §§ 33.06(3)(b), 33.10(4). "An applicant who meets the standard for relief under the Convention is granted

custody, and the status may be terminated at any time.[235] Accordingly, CAT claims are a disfavored remedy sought only as a last resort.

Additionally, although an aggravated felony conviction with an aggregate sentence of less than five years does not render a noncitizen statutorily ineligible for "withholding of removal,"[236] that relief is denied to a noncitizen convicted of a "particularly serious crime."[237] For example, the Board of Immigration Appeals has held that burglary with intent to commit theft is not a particularly serious crime,[238] but that several counts of armed robbery with the use of a firearm is.[239] However, the term "particularly serious crime" does not necessarily encompass the aggravated felony definition,[240] and the Board has held that a *per se* rule equating the two terms of art would conflict with congressional intent to eliminate the presumption that all aggravated felonies are also particularly serious crimes.[241] Relief under "withholding of removal," like relief under the CAT, requires a showing of persecution and does not result in lawful permanent resident status, but rather merely a "withholding" of removal.[242] Thus, withholding of removal is not available to noncitizens who have committed a class of criminal offenses that often overlap with the aggravated felony definition. Those forms of mandatory relief not barred by an aggravated felony conviction set a high standard for

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withholding of removal. If, however, the applicant is statutorily ineligible for withholding she will instead be granted a less durable form of relief called 'deferral of removal.'" *Id.* § 33.10(4). Here, the noncitizen's final order of removal remains in force, but the actual deportation is not effectuated. *Id.* § 33.10(4)(b).

235. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 33.10(4)(b).

236. An aggravated felony conviction with an aggregate sentence of five years is a "particularly serious crime" and therefore bars eligibility for withholding of removal. INA § 241(b)(3), 8 U.S.C. 8 U.S.C. § 1231(b)(3); Matter of S-S-, 22 I. & N. Dec. 458 (B.I.A. 1999); Matter of L-S-, 22 I. & N. Dec. 645 (B.I.A. 1999).

237. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

238. Matter of Carbelle, 19 I. & N. Dec. 357, 360 (B.I.A. 1986); Matter of Frentescu, 18 I. & N. Dec. 244, 246 (Bd. Immigrant Appeals June 23, 1982).

239. Matter of Q-T-M-T, 21 I. & N. Dec. 639, 655 (B.I.A. 1996). *See also Matter of L-S-*, 22 I. & N. at 645 (bringing an undocumented person into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) is not a "particularly serious crime"); Mahini v. INS, 779 F.2d 1419, 1421 (9th Cir. 1986) (trafficking in heroin is a particularly serious crime); Beltran-Zavala v. INS, 912 F.2d 1027, 1031-32 (9th Cir. 1990) (trafficking in marijuana in violation of Cal. Health & Safety Code § 11360(a) remanded for further consideration). *See, generally,* Smith & Pérez, *supra* note 22 (manuscript at 101).

240. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 33.06(4)(c); *see* Smith & Pérez, *supra* note 22 (manuscript 101 n.735).

241. *Matter of L-S-*, 22 I. & N. Dec. at 645. Instead, the B.I.A. and the Ninth Circuit determine whether a conviction is for a "particularly serious crime" by considering the importance of the factual context of the crime "on a case-by-case basis," including the seriousness of a crime, nature of the conviction, circumstances and underlying facts of the conviction, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Id.*

242. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 33.06(6).

eligibility, and result in what may be only a temporary stay of execution.[243] Notwithstanding the right of a noncitizen to submit reasons against his expulsion, statutorily precluding mandatory relief for noncitizens with a valid fear of persecution may already implicate other established principles of international law.[244]

2. Discretionary Relief

The most commonly applicable forms of relief from deportation are discretionary. Most discretionary relief requires a showing of "good moral character," an immigration law term of art.[245] Good moral character is defined at INA § 101(f) as the absence of certain criminal convictions and conduct.[246] However, a conviction of an aggravated felony, at any time, precludes establishment of good moral character.[247] Accordingly, aggravated felons are statutorily ineligible for discretionary relief available in the following forms: (1) cancellation of removal for a nonresident;[248] (2) former suspension of deportation;[249] (3) cancellation of removal for victims of domestic violence;[250] (4) the Nicaraguan Adjustment and Central American Relief Act (NACARA);[251] (5) registry (amnesty);[252] (6) voluntary departure at a removal hearing;[253] and (7) naturalization following commission of an aggravated felony committed before November 1989.[254]

Other forms of discretionary relief do not require a finding of good moral character but are statutorily unavailable if the noncitizen has ever been convicted

243. *See* discussion, *supra*, Part V.B.1.

244. For example, the United States is bound to an obligation incurred under the Article 33 of the U.N. Convention Relating to the Status of Refugees, called nonrefoulement, which forbids the expulsion or return of a refugee to a country where he would be persecuted. Gordon, Mailman, & Yale-Loehr, *supra* note 17 § 1.03(5)(e).

245. *See* Smith & Pérez, *supra* note 22 (manuscript at 80).

246. INA § 101(f), 8 U.S.C. § 1101(f).

247. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).

248. INA § 240A(b), 8 U.S.C. § 1229b(b) (2003).

249. INA § 244(a), 8 U.S.C. § 1254 (repealed 1996).

250. INA § 240A(b)(2), 8 U.S.C. 8 U.S.C. § 1229a(b)(2).

251. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(b), 111 Stat. 2160 (1997) [hereinafter NACARA], as amended by the Nicaraguan Adjustment and Central American Relief Act-Technical Amendments, Pub. L. No. 105-139, 111 Stat. 2644 (1997) [hereinafter NACARATA]; s*ee also* Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.04(1) n.8.

252. INA § 249, 8 U.S.C. § 1259 (2002).

253. INA § 240B(a)(2), 8 U.S.C. § 1229c(a)(2) (2002). For cases initiated before April 1, 1997, the aggravated felony bar applies only to convictions on or after November 18, 1988. Matter of Reyes, 20 I. & N. Dec. 789, 790 (B.I.A. 1994).

254. *See* Smith & Pérez, *supra* note 22 (manuscript at 102).

of an aggravated felony.[255] These include cancellation of removal for a permanent resident,[256] waiver through immigration for a resident,[257] waiver of inadmissibility under INA § 212(h),[258] prehearing voluntary departure,[259] and political asylum.[260]

Significantly, noncitizens convicted of an aggravated felony are statutorily barred from applying for the broadest form of relief, "cancellation of removal."[261] Generally, the 1996 Acts[262] consolidated and restricted the discretionary relief previously available to permanent residents, creating a new form known as "cancellation of removal."[263] Cancellation for permanent residents is a process that confers permanent resident status on noncitizens in removal proceedings if the noncitizen has not been convicted of an aggravated felony and can demonstrate lengthy physical presence in and substantial ties to the United States.[264] Although a showing of hardship to the noncitizen or his immediate relatives is not required,[265] cancellation for a resident requires an affirmative grant of discretion by the immigration judge.[266] Cancellation is available to permanent residents,[267] nonresidents,[268] battered spouses or children,[269] and certain

255. *See id*. (manuscript at 80).

256. INA § 240A(a), 8 U.S.C. § 1229b(a) (2002).

257. A permanent resident may have grounds of inadmissibility or removability waived under INA § 212(h), and subsequently be granted permanent resident status, where: (1) he has not been convicted of an aggravated felony since the date of admission; (2) has lawfully resided continuously in the United States for at least seven years before removal proceedings were initiated; and (3) such relief is applied for in conjunction with an application to immigrate (for example, the noncitizen's spouse, parent or adult child files a relative petition on the noncitizen's behalf), at a consular post abroad or exclusion hearing or at a deportation hearing in conjunction with an application for adjustment of status (I-485). *See* Smith & Pérez, *supra* note 22 (manuscript at 93).

258. INA § 212(h), 8 U.S.C. § 1182(h) (2002). *See* discussion *infra* note 97.

259. INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2002).

260. INA § 208, 8 U.S.C. § 1158 (2002).

261. INA § 240A(a)-(b), 8 U.S.C. 8 U.S.C. § 1229a(a)-(b).

262. *See* earlier discussion of the AEDPA and IIRIRA in Part I.A., *supra*.

263. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 64.04(1). The Board of Immigration Appeals has held that the criteria originally set forth in Matter of Marin, 16 I. & N. Dec. at 584-85 in former section 212(c) cases are "equally relevant to the exercise of discretion under section 240A(a) of the Act." Matter of C-V-T-, 22 I. & N. Dec. 7 (B.I.A. 1998).

264. *Id.*

265. *Compare* INA § 212(h), 8 U.S.C. § 1182(h) (2002), *with* INA § 240A(b), 8 U.S.C. 8 U.S.C. § 1229a(b).

266. INA § 240A(a) provides that "the Attorney General *may* cancel removal in the case of an alien . . . ." (emphasis added). When adjudicating the application, the Attorney General acts through an Immigration Judge. *See* Gordon, Mailman, & Yale-Loehr, *supra* note 17, § 64.04(2)(b). INA § 240A(b)(1), 8 U.S.C. 8 U.S.C. § 1229a(b)(1).

267. INA § 240A(a), 8 U.S.C. § 1229a(a). The noncitizen must have been a lawful permanent resident (LPR) for at least five years, must have resided in the United States continuously for seven years after having been admitted in any status, and must have not

beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA).[270] However, noncitizens who are convicted of an aggravated felony,[271] or who do not meet the rigid physical presence[272] or continuous residence[273] requirements, or cannot meet the burden of proof necessary for a favorable exercise of discretion,[274] are not eligible to receive cancellation of removal. Accordingly, a noncitizen may be precluded from demonstrating reasons against his expulsion because he does not meet statutory eligibility requirements, or he may be denied such relief because of an extremely high burden of proof. In many cases, cancellation is the only form of relief available to a noncitizen, often leaving aggravated felons with no remedy under the INA.

Additionally, certain forms of discretionary relief are precluded by inadmissibility,[275] which does not turn on the conviction of an aggravated felony.[276] Adjustment of status to lawful permanent resident[277] and adjustment of

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been convicted of an aggravated felony at any time. *Id.*

268. INA § 240A(b)(1), 8 U.S.C. § 1229a(b)(1). The bar to cancellation for a nonresident, however, is much higher. The noncitizen must have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of the application, must have been a person of "good moral character" during such period, must not have been convicted of certain criminal offenses, including an aggravated felony, and must establish that removal would result in "exceptional and extremely unusual hardship" to the noncitizen's spouse, parent, or child, who is a U.S. citizen or lawful permanent resident. *Id.*

269. INA § 240A(b)(2), 8 U.S.C. § 1229a(b)(2).

270. NACARA, Pub. L. No. 105-100, § 203(b), 111 Stat. 2160 (1997), as amended by NACARATA, Pub. L. No. 105-139, 111 Stat. 2644 (1997).

271. INA § 240A(a)(3), 8 U.S.C. § 1229a(a)(3) (canceling removal for permanent residents); INA § 240A(b)(1)(C), 8 U.S.C. § 1229a(b)(1)(C) (canceling removal for nonresidents); INA § 240A(b)(2)(A)(iv), 8 U.S.C. § 1229a(b)(2)(A)(iv) (canceling removal for battered spouses or children).

272. Cancellation for a nonresident under INA § 240A(b)(1)(A) requires ten years of "continuous physical presence" preceding the date that the INS served the Notice to Appear or the date the criminal offense was committed that renders the noncitizen inadmissible or removable. INA § 240A(d), 8 U.S.C. § 1229a(d).

273. Cancellation for a permanent resident under INA § 240A(a)(2) requires seven years of "continuous residence" preceding the date that the INS served the Notice to Appear or the date the criminal offense was committed that renders the noncitizen inadmissible or removable. INA § 240A(d), 8 U.S.C. § 1229a(d).

274. Cancellation for a nonresident under INA § 240A(b)(1)(D), for example, requires that the noncitizen demonstrate that removal would result in "exceptional and extremely unusual hardship" to the noncitizen's permanent resident or U.S. citizen spouse, parent, or child. INA § 240A(b)(1)(D), 8 U.S.C. § 1229a(b)(1)(D).

275. *See* Smith & Pérez, *supra* note 22 (manuscript at 81). Noncitizens must be "admissible" to enter the U.S. and receive other immigration benefits, such as becoming a permanent resident. Admissibility is defined by what it is not. INA § 212 sets forth the extensive grounds of inadmissibility. 8 U.S.C. § 1182 (1996).

276. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (1996).

status from political asylee or refugee to permanent resident are two forms of discretionary relief precluded by inadmissibility.[278] Adjustment of status to permanent resident is a procedure set forth in INA § 245 that permits a noncitizen to adjust his status to lawful permanent residence without departing the United States.[279] Adjustment is available as relief from deportation to aggravated felons in removal proceedings only in the rare case where the offense constituting the aggravated felony does not also render the noncitizen inadmissible under INA § 212.[280] Accordingly, even where relief is not precluded to aggravated felons, it is rarely applicable.

Finally, certain forms of relief do not bar aggravated felons or require a finding of require good moral character.[281] These include: (1) a waiver under former INA § 212(c), repealed effective April 1, 1997;[282] (2) waiver through immigration for a nonresident (INA § 212(h));[283] (3) *nunc pro tunc* permission to reenter;[284] (4) deferral of removal pursuant to the CAT;[285] (5) estoppel;[286] (6) deferred action;[287] and (7) private bills.[288] Each form of relief is granted only in

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277. INA § 245, 8 U.S.C. § 1255 (2002).

278. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (2002); INA § 209(a)(1) (refugees), (b) (asylees), 8 U.S.C. § 1159(a)(1), (b) (2002).

279. INA § 245. Adjustment is commonly used in removal proceedings as a form of discretionary relief where the respondent is not inadmissible to the United States under INA § 212 or has such grounds of inadmissibility waived, makes an application for adjustment, and has a visa number immediately available (for example the respondent has a United States citizen spouse, parent or adult child who files a visa petition on his behalf). *See also* Matter of Gabryelsky, 20 I. & N. Dec. 750, 752 (B.I.A. 1993); Gordon, Mailman & Yale-Loehr, *supra* note 17, § 1.03(4)(d).

280. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 1.03(4)(d). For example, certain firearms convictions qualify as aggravated felonies within INA § 101(a)(43)(E) but are not cross-referenced as grounds of inadmissibility in section 212.

281. *See* Smith & Pérez, *supra* note 22 (manuscript at 81).

282. *See id.* (manuscript at 84). Relief under former INA § 212(c) remains available to noncitizens who were otherwise eligible for 212(c) relief at the time of their plea agreement. *See St. Cyr* discussion in Part III, *supra*. For a discussion of the section 212(c) waiver generally, *see* discussion *infra* note 63.

283. Under INA § 212(h), a nonresident who is inadmissible on certain grounds and who is otherwise eligible to adjust status under INA § 245, may be granted a waiver and concurrently, permanent resident status. Importantly, unlike immigration through the section 212(h) waiver for permanent resident, the waiver as applied to nonresident does not bar aggravated felons. *See* Smith & Pérez, *supra* note 22 (manuscript at 94).

284. *See* Smith & Pérez, *supra* note 22 (manuscript at 94).

285. *See* discussion in Part V.B.1, *supra.*

286. The INS may only be estopped from relying on the circumstances induced by its own "affirmative misconduct" to effect deportation. *See, e.g.,* Santiago v. INS, 526 F.2d 488, 491-92 (9th Cir. 1975).

287. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 72.03(2)(h). Deferred action is the result of an exercise of prosecutorial discretion. *Id*. For a general discussion of why prosecutorial discretion fails to reduce the harshness of the 1996 laws, *see* Johnson, *supra*

rare circumstances.[289]

Therefore, almost all forms of discretionary relief applicable in the case of most noncitizens are precluded if the noncitizen has been convicted of an aggravated felony. As such, the INA is not consistent with international law principles requiring that a noncitizen be permitted to submit reasons against his expulsion.

C. Criminal Sentence Enhancements Under the INA based on Prior Aggravated Felony Convictions

The INA criminalizes the offense of illegal reentry after deportation.[290] A noncitizen charged with an offense of INA § 276 is prosecuted in U.S. District Court and sentenced under the U.S. Sentencing Guidelines (U.S.S.G.).[291] Significantly, the federal offense of reentry subsequent to deportation for commission of an aggravated felony carries a maximum sentence of twenty years in prison.[292] However, where the prior removal order was entered on aggravated felony grounds, out of harmony with international law,[293] reaffirming that defective order or further using it as a basis for a maximum twenty-year prison sentence, compounds the violation. Thus, illegal reentry proceedings based on prior aggravated felony convictions afford the noncitizen an opportunity to remedy the prior violation in a court with jurisdiction to interpret international law.

However, a noncitizen may only challenge the validity of a prior deportation order, as a defense to an illegal reentry charge, in limited circumstances.[294] The AEDPA of 1996 added, *inter alia*, the requirement that a

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note 31, at 488-89.

288. A noncitizen may request that a member of Congress introduce a private bill on the noncitizen's behalf. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 74.09(2).

289. *See generally* Smith & Pérez, *supra* note 22 (manuscript at 79).

290. INA § 276, 8 U.S.C. § 1326 (1996).

291. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2003), 18 U.S.C. app. § 2L1.2.

292. INA § 276 (b)(2), 8 U.S.C. § 1326(b)(2) (1996); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2.

293. *See* discussion in Part V, *supra*.

294. INA § 276(d), 8 U.S.C. § 1326(d) (1996). INA § 276(d) provides that the noncitizen may not challenge the prior order unless "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). *See also* United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (noncitizen can challenge illegal reentry prosecution on grounds that underlying deportation order was invalid where judicial review of the order had been effectively precluded); United States v. Herrera-Blanco, 232 F.3d 715 (9th Cir. 2000) (IIRIRA does not foreclose judicial review of the validity of a deportation order, in violation of due process, since the defendant in an illegal reentry prosecution may challenge it by motion to

noncitizen must have exhausted his administrative remedies[295] before he can challenge the validity of the prior deportation order.[296] But where the AEDPA's jurisdictional impediments to collateral review bar a defendant from challenging a prior deportation order, which may have been entered in violation of international law, the statutory barrier itself may contravene international law. Accordingly, federal prosecution for illegal reentry following deportation based on an aggravated felony may violate international law and provide a procedural forum for a remedy.

D. Denial of *St. Cyr* Relief under Current and Proposed Department of Justice Regulations

Under the U.S. Supreme Court's ruling in *St. Cyr*, a noncitizen unlawfully denied the opportunity to apply for § 212(c) relief is now eligible for such relief provided he was otherwise eligible for the § 212(c) waiver at the time of his plea.[297] In practice, however, procedural barriers prevent noncitizens deported prior to the *St. Cyr* decision in June of 2001 from reopening their cases. Generally, departing the United States bars a noncitizen from reopening proceedings before the Board of Immigration Appeals[298] or federal courts.[299]

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dismiss).

295. To exhaust available administrative remedies, a respondent generally must appeal the immigration judge's order of removal to the administrative appellate body, the Board of Immigration Appeals. Gordon, Mailman & Yale-Loehr, *supra* note 17, § 104.02(2)(a). When an order of removal or deportation is appealed, it becomes final only upon adjudication by the Board. INA § 101(c)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (2002); 8 C.F.R. §§ 1003.1(d)(6), 1003.39, 1240.14 (2004). For some of the reasons that noncitizens fail to exhaust administrative remedies, aside from cost, *see supra* Part V.D.

296. INA § 276(d)(1), 8 U.S.C. § 1326(d) (2002).

297. INS v. St. Cyr, 533 U.S. 289, 326 (2001); *see* discussion *infra* Part III.

298. 8 C.F.R. § 1003.2(d) provides in relevant part that "[a] motion to reopen . . . shall not be made by or on behalf of a person who is the subject of . . . deportation . . . proceedings subsequent to his departure from the United States." 8 C.F.R. § 1003.2(d) (2004). The regulation is taken from the INA provision precluding judicial review in the federal courts of an order once an alien has "departed" the United States. Estrada-Rosales v. INS, 645 F.2d 819, 820 (9th Cir. 1981).

299. 8 U.S.C. § 1105a(c) provided in relevant part that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after issuance of the order." Section 1105a was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, 110 Stat. 3009 (1996). However, where deportation proceedings began before April 1, 1997 and a final order of deportation was entered after October 30, 1996, the IIRIRA transitional rules apply. Kalaw v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997). The final order need not have been issued prior to April 1, 1997. Torres-Aguilar v. INS, 246 F.3d 1267, 1269 (9th Cir. 2001). Thus, judicial review in the federal courts for many *St. Cyr*-eligible noncitizens is governed by IIRIRA section

Because deportation is considered a legal "departure,"[300] *St. Cyr*-eligible noncitizens wrongly deported from the United States have no procedural avenue by which to benefit from the relief afforded them by the Supreme Court.

Arguably, however, the jurisdictional bar to reopening proceedings set forth in regulations governing motions to reopen before the Board and immigration courts is limited by international law. Because certain non-self-executing treaties inform interpretation of domestic statutes, domestic immigration statutes that categorically deny the opportunity for discretionary relief should be construed to allow for a hearing so as not to violate international law.[301] This argument as applied to the jurisdictional bar is particularly persuasive given that the portion of the regulation preventing noncitizens who have been deported from reopening proceedings was not mandated by a Congressional act, but rather was created and authorized by regulation only.[302]

309(c)(4), "which must be read in conjunction with former INA § 106 [8 U.S.C. § 1105a]." Gordon, Mailman & Yale-Loehr, *supra* note 17, § 104.13(4)(b); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1222-23 (9th Cir. 2002) ("[U]nder § 309(c) of IIRIRA, [the Ninth Circuit] has jurisdiction to review a B.I.A. decision under pre-IIRIRA § 106(a) of the INA, 8 U.S.C. § 1105a(a), unless a specified exception applies"). Accordingly, many *St. Cyr*-eligible noncitizens are precluded from seeking judicial review in the Court of Appeals by IIRIRA § 309(c)(4)(G) because they were "deportable by reason of having committed a criminal offense covered in . . . § 241(a)(2)(A)(iii)[aggravated felony] . . . ." IIRIRA § 309(c)(4)(G), Pub. L. No. 104-208, 110 Stat. 3009 (1996). They may, however, petition a U.S. District Court for a writ of habeas corpus under 28 U.S.C. § 2241 as that statute survived the 1996 legislation. *St. Cyr*, 533 U.S. at 314.

300. *See generally* Mendez v. INS, 563 F.2d 956 (9th Cir. 1977).

301. Beharry v. Reno, 183 F. Supp. 2d 584, 604-05 (E.D.N.Y. 2002).

302. Although Congress specified that a noncitizen may only file one motion to reopen and must file it within 90 days of the date of the final administrative order of removal, INA § 240(c)(6)(A), (C)(1), 8 U.S.C. § 1229a(c)(6)(A), (C)(1) (West 2002), it did not legislate the bar to reopening proceedings for noncitizens who have been deported. *See* Socop-Gonzalez v. INS, 272 F.3d 1176, 1190-92 (9th Cir. 2001) (en banc). Rather, the Department of Justice devised and promulgated this restriction in the Code of Federal Regulations. *See id.* at 1192. In practice, the bar due to deportation may be the only impediment to reopening proceedings because the Ninth Circuit has held that both the statute of limitations and numerical limitation imposed by Congress on filing a motion to reopen are subject to equitable tolling. *See, e.g.,* Fajardo v. INS, 300 F.3d 1018, 1021-22 (9th Cir. 2002) (tolling 90-day statute of limitation for almost four years until respondent became aware of the extent of her two prior consultants' misrepresentations); *Rodriguez-Lariz*, 282 F.3d at 1224-25 (numerical limitation waived where legal representative failed to timely file, despite his assurances, and subsequently restated foreclosed arguments in motion to reopen, thus wasting only opportunity to reopen); Socop-Gonzalez v. INS, 272 F.3d at 1193-94 (tolling 90-day statute of limitation where *pro se* appellant relied on erroneous INS advice to his detriment); Varela v. INS, 204 F.3d 1237, 1240 (9th Cir. 2000) (waiving numerical limit because of fraud by a third party filing a worthless motion to reopen); Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999) (tolling a 180-day statute of limitation because lack of timeliness was caused by fraud of notary posing as an attorney).

In August of 2002, the U.S. Department of Justice (DOJ) proposed a rule[303] purporting to implement the decision of the U.S. Supreme Court in *INS v. St. Cyr*.[304] The regulation, however, forecloses relief to noncitizens who have already been deported or have illegally returned to the United States,[305] reasoning that they "had a sufficient opportunity to challenge the denial of their applications for § 212(c) relief in administrative and judicial proceedings."[306] Several commentators have questioned the good faith of this statement:

> This is the very same DOJ that argued all along that no such opportunities existed, and that not even the Supreme Court of the United States had the power to second-guess it on whether new restrictions on relief applied retroactively. Instead, the DOJ aggressively opposed stays of removal and habeas corpus actions, moved detainees about frequently and to parts of the country where they could not obtain meaningful legal help and where the courts summarily dismissed habeas petitions, and often made litigation as costly as possible.[307]

Further, "[m]any persons who could have benefited from *St. Cyr* did not contest the denial of § 212(c) relief and were subsequently deported because they did not want to languish in INS detention facilities for years while the cases worked their

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303. Sec. 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627, 52627-52633 (proposed Aug. 13, 2002).

304. *St. Cyr*, 533 U.S. at 326; *see* discussion *infra* Part III. The proposed rule "would permit certain lawful permanent residents (LPRs) who have pleaded guilty or nolo contendere to crimes before April 1, 1997, to seek relief, pursuant to former section 212(c) of the Immigration and Nationality Act (INA or Act), from being deported or removed from the United States on account of those pleas." Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627, 52627 (proposed Aug. 13, 2002).

305. Section 212(c) provides:

> This proposed rule would not apply to aliens who have departed, and are currently outside the United States; aliens who were subject to a final order of deportation or removal and who have illegally returned to this country; and aliens who are present in the United States without having been admitted or paroled. Aliens who have been deported or have departed under an order of deportation or removal will not be eligible for relief under the regulation.

Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. at 52629.

306. *Id*.

307. Memorandum from Rob Randhava, Leadership Conference on Civil Rights, Nancy Morawetz, New York University School of Law, Immigrant Rights Clinic, & Shoba Sivaprasad, National Immigration Forum, on Concerns with the DOJ's Proposed Rule to Implement the *St. Cyr* Ruling, to Interested Persons (Sept. 3, 2002) (on file with author).

way up the system."[308] Nevertheless, if codified as proposed, the rule would appear to contravene international law norms that guarantee a noncitizen the right to submit reasons against his expulsion prior to deportation. Accordingly, both the current regulation governing motions to reopen and the proposed DOJ regulation implementing *St. Cyr* deny noncitizens the opportunity to apply for discretionary relief in violation of international law.

VI. CONSTRUING THE INA TO RESOLVE THE CONFLICT WITH INTERNATIONAL LAW

International law, embodied in ratified treaties,[309] non-ratified treaties,[310] general agreements,[311] and custom, proscribes summary deportation and undue interference with the rights of children or the family.[312] These principles in turn bear on the interpretation of domestic immigration law statutes.[313] Accordingly, where a domestic statute contradicts international law without specific Congressional intent to do so, courts should "make the minimal changes necessary"[314] to "construe the statute so as to resolve the contradiction."[315] As discussed in Part V, the INA, through many of its procedural and substantive provisions, as well as implementing regulations, is inconsistent with these international law directives.[316] Therefore, to resolve the contradiction, the federal courts and relevant administrative agencies should reinterpret INA provisions denying discretionary relief and provide relief for noncitizens ordered removed in

308. Austin T. Fragomen, Jr. & Steven C. Bell, *EOIR Issues Proposed Rule On § 212(C) Relief for Criminal Aliens*, IMMIGR. BUS. NEWS & COMMENT, Oct. 15, 2002, at 4 *available at* 2002 WL 31296093.

309. ICCPR, *supra* note 117, arts. 13 ("alien lawfully in the territory . . . shall . . . be allowed to submit the reasons against his expulsion") and 17 ("[n]o one shall be subjected to arbitrary or unlawful interference with his . . . home . . . .").

310. *UNCRC*, *supra* note 153, at pmbl. ("the family . . . should be afforded the necessary protection and assistance . . . . The child . . . should grow up in a family environment"), art. 3 ("in all actions concerning children, whether undertaken by . . . courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"), art. 7 ("as far as possible, the right to know and be cared for by his or her parents").

311. *UDHR*, *supra* note 161, arts. 9-10 (prohibiting "arbitrary…exile" and arguing "everyone is entitled to a fair . . . hearing . . . in the determination of his rights and obligations").

312. *See supra* Part IV.

313. Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."). *See supra* Part II.

314. Beharry v. Reno, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002).

315. *Id.* at 600 (citing Steinhardt, *supra* note 43, at 1143 n.177).

316. *See supra* Part V.

one of the INA's procedural avenues that preclude a hearing. The courts should also provide relief to illegal reentry prosecutions based on violative prior deportation orders, and permit noncitizens entitled to relief under *St. Cyr* to apply notwithstanding jurisdictional bars and proposed DOJ regulations. The DOJ should modify these regulations barring relief under *St. Cyr* to conform to international law.

The *Beharry* remedy is to read international law requirements into the INA's discretionary and mandatory relief provisions.[317] This approach permits an "aggravated felony" finding, and thus the collateral consequences that Congress has determined shall follow.[318] These consequences may or may not violate international law, but are not at issue here. The relevant violation is the categorical denial of an opportunity to convince a judge that a noncitizen should not be deported.[319] Accordingly, an appropriately narrow remedy would reinterpret an applicable relief statute to provide the respondent with a merits hearing. This approach has the advantage of not disrupting Congress's general scheme of punishment of noncitizens for various criminal offenses, and specifically addresses the international law violation. The *Beharry* court found this to be the least intrusive remedy available and read the right to a merits hearing into one form of relief under the INA.[320]

Any challenges similar to those brought in *Beharry* must be pursued in the federal courts, because immigration judges and Board of Immigration Appeals are only authorized to interpret the Immigration and Nationality Act.[321] Constitutional and other challenges to administrative practice, interpretation and

317. *Beharry*, 183 F. Supp. 2d at 604-05.

318. For example, a noncitizen convicted of an aggravated felony but granted discretionary relief would remain subject to the collateral consequences of an aggravated felony conviction, including ineligibility for good moral character required for naturalization and increased penalties for illegal reentry after deportation. INA § 101(f), 8 U.S.C. § 1101(f) (2002); INA § 316(d), 8 U.S.C. § 1427(d) (2002); INA § 276, 8 U.S.C. § 1326 (2002). *See also* Bruce Robert Marley, Note, *Exiling The New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 885 (1998).

319. ICCPR, *supra* note 117, art. 13.

320. *Beharry*, 183 F. Supp. 2d at 604. Although aggravated felons are specifically ineligible for INA § 212(h) relief, Judge Weinstein interpreted the statute, in light of international law, to require a hearing for Mr. Beharry to present the merits of his case to an Immigration Judge. *Id*. at 605.

321. *See* Gordon, Mailman & Yale-Loehr, *supra* note 17, § 3.05(3). However, in concluding that the District Court lacked subject matter jurisdiction over Mr. Beharry's habeas petition under the exhaustion doctrine, the Second Circuit found that immigration judges and the Board have authority to consider a claim for relief from deportation that, like Mr. Beharry's, does not arise solely under international law but rather arises under INA § 212(h). Beharry v. Ashcroft, 329 F.3d 51, 51 (2d Cir. 2003). Accordingly, removal proceedings may provide a venue for relief. In either case, respondents must be sure to raise the argument during proceedings to preserve it for review.

the INA itself must be made in the federal courts.[322] Federal court challenges must be made through petition for writ of habeas corpus in a U.S. District Court or by petition for review in a U.S. Court of Appeals.[323]

International law proscriptions against summary expulsion and interference with the family should also be applied in other administrative procedural contexts as well. Because noncitizens may be deported or punished in a variety of procedures,[324] the federal courts should consider international law when reviewing those situations as well. Noncitizens in expedited removal proceedings, who developed significant ties to the United States within the two-year period, should be permitted a merits hearing before an immigration judge. Additionally, noncitizens in administrative removal proceedings should likewise be placed in § 240 removal proceedings for a full hearing. Further, the federal courts should only permit reinstatement of a prior order of removal where the prior order was issued subsequent to a merits hearing. Those orders entered after pretermitting an application for discretionary relief should be vacated and the case remanded for a § 240 removal proceeding with the opportunity to apply for discretionary relief. Because the jurisdictional reach of the administrative courts is limited to interpreting the INA and the relevant agencies are unlikely to voluntarily comply because of their institutional mandates, such remedies must be pursued in the federal courts on petition for review or habeas corpus.

International law protections of the family and children, as well as against summary expulsion,[325] also apply to the INA's authorization of criminal prosecution for the federal offense of illegal reentry after deportation. Federal courts should permit collateral attacks upon prior orders of removal entered without a merits hearing, notwithstanding the statutory bar. Furthermore, federal courts should vacate such prior defective deportation orders and remand to the administrative courts as necessary. Permitting a long-time lawful permanent resident to be imprisoned for up to twenty years simply for returning to this

322. *Beharry*, 329 F.3d at 61.

323. *St. Cyr* affirmed a District Court's finding of jurisdiction over habeas corpus petitions filed by noncitizens notwithstanding the 1996 acts. INS v. St. Cyr, 533 U.S. 289, 314 (2001). Additionally, although the IIRIRA removed jurisdiction for review of most administrative orders of removal, INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2002), review generally available in the District Courts, provided the noncitizen is "in custody" and has exhausted his administrative remedies within 28 U.S.C. § 2241. *See St. Cyr*, 533 U.S. at 314. The Circuit Courts of Appeals also retain jurisdiction in limited circumstances. INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2002). Additionally, notwithstanding INA § 242(a)(2)(C), where the petitioner challenges the B.I.A.'s ruling that he has been convicted of an aggravated felony, the Court has "jurisdiction to determine if it does have jurisdiction," Aragon-Ayon v. INS, 206 F.3d 847, 849 (9th Cir. 2000), and thus to determine the threshold question of whether the petitioner's conviction constitutes an aggravated felony. Matsuk v. INS, 247 F.3d 999, 1001 (9th Cir. 2001); Montiel-Barraza v. INS, 275 F.3d 1178, 1180 (9th Cir. 2002).

324. *See supra* Part V.A.

325. *See* discussion *infra* Part IV.

country to be with his family, on the basis of a deportation proceeding where he was unable to present the positive merits of his life to an immigration judge, is an unconscionable flouting of international law.

Finally, the international law prohibitions against summary expulsion and interference with the family also protect *St. Cyr*-eligible noncitizens who continue to be denied relief on the basis that the have already been deported or have reentered the country illegally. The Department of Justice's proposed regulation implementing the *St. Cyr* decision should be redrafted to permit those already deported or those who have reentered after deportation to reopen proceedings. Additionally, in light of international law, the Board of Immigration Appeals and federal courts should allow similarly situated noncitizens to reopen the prior defective proceedings, notwithstanding the statutory and regulatory jurisdictional bars. At present, a noncitizen's sole procedural avenue to challenge such a prior order lies in a petition for writ of habeas corpus in the federal courts.[326] Noncitizens who so petition expose themselves to reinstatement of removal and criminal prosecution for illegal reentry.[327] While the federal courts are unlikely to reinterpret INA provisions or invalidate agency regulations on the basis of international law alone, the rationale is persuasive and provides a strong secondary or *amicus* argument. Therefore, as demonstrated by the *Beharry* decision, many creative possibilities exist for the Department of Justice, Board of Immigration Appeals, and federal courts to bring the INA into compliance with international law.

VI. CONCLUSION

The *Charming Betsy* principle of statutory construction, frequently affirmed in U.S. jurisprudence, provides that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[328] Although not a rule of decision, the maxim generally informs statutory interpretation.[329] Therefore, certain international instruments defining international law inform the interpretation of domestic statutes.

Article 13 of the International Covenant on Civil and Political Rights, notwithstanding non-self-execution, establishes a right of a foreign resident to

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326. *See supra* Part V.D.

327. For example, if a noncitizen has reentered the United States after deportation and files a habeas petition in federal court, he alerts the federal authorities to his presence and location in the United States. He could be immediately detained and charged with the crime of illegal reentry or placed in civil reinstatement proceedings to reinstate his prior order of removal. Thus, the habeas remedy, while available, is a difficult option to choose, particularly where the noncitizen has returned to the United States to challenge his prior order to provide for a desperate family still residing in the United States.

328. Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

329. *See* discussion *infra* Part II.

submit reasons against his expulsion.[330] Such right becomes more acute where a noncitizen has extensive family and other ties to the country of residence.[331] The right to discretionary relief from deportation further derives from non-ratified treaties or agreements, the Universal Declaration of Human Rights, and customary international law in general.[332] Collectively, these instruments guarantee a foreign-born resident an international right to submit reasons against his expulsion.

In contrast, the Immigration and Nationality Act, a domestic statute, categorically precludes eligibility for most forms of relief from deportation if a noncitizen has been convicted of an "aggravated felony."[333] Several of the INA's procedures for removal foreclose individual merits hearings or reaffirm prior orders entered without such a hearings.[334] Further, the INA imposes criminal penalties on the basis of prior orders of removal, regardless of whether the prior proceedings afforded an opportunity for relief.[335] In some circumstances, these criminal penalties affirm and compound the severity of the denial of such relief.[336] Moreover, current and proposed regulations continue to bar relief from deportation to noncitizens eligible under *St. Cyr*.[337] Accordingly, where international law requires that a foreign resident be permitted to submit reasons against his expulsion, the INA and corresponding regulations are not compliant with international law.[338] Therefore, because the INA makes categorical determinations of deportability out of harmony with international law, the federal courts should reinterpret the INA consistently with international law obligations.

The significance of the *Beharry* decision pervades many areas of the law. The influential U.S. District Court in Brooklyn, New York reaffirmed the *Charming Betsy* principle, reestablishing the general reach and viability of international law.[339] The decision presented a scholarly and well-reasoned discussion of why certain international instruments, whether "non-self-executing" or not, generally inform interpretation of domestic statutes.[340] Furthermore, it applied these principles to the immigration context, resulting in a dramatic reinterpretation of a clear congressional act.[341] In effect, Judge Weinstein called

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330. *See supra* Part IV.B.1.

331. *See* Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999); ICCPR *supra* note 117, art. 17 ("[n]o one shall be subjected to arbitrary or unlawful interference with his . . . home . . . .").

332. *See supra* Part IV.B.

333. *See supra* Part V.B.

334. *See supra* Part V.A.

335. *See supra* Part V.C.

336. *Id.*

337. *See supra* Part V.D.

338. *See supra* Part V.

339. *See generally* Hassouri, *supra* note 23.

340. *See generally* Beharry v. Reno, 183 F. Supp. 2d 584, 593-605 (E.D.N.Y. 2002).

341. *Id.* at 604-05.

into question the very legitimacy of Congress's design of the "aggravated felony" scheme within the immigration law.[342] To be sure, because the INA's substantive and procedural provisions depart substantially from international law norms, the federal courts will have ample occasion to bring the law into compliance. The innovative *Beharry* decision is a valuable resource for these efforts and a cause for hope for thousands of noncitizens facing permanent banishment with no opportunity for relief and those already deported under policies invalidated by the U.S. Supreme Court.

342. *See id.*