



AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES



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LC Education
CR Fund
Leadership Conference on
Civil Rights Education Fund

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FOREWORD

The horrific September 11, 2001 terror attacks on New York City and Washington, DC fundamentally changed the way our nation of immigrants views itself. Shameful episodes of anti-immigrant violence immediately after the attacks grabbed most of the headlines. But the more significant shift in attitudes has played out more quietly in federal government offices where immigration policy is made.

The United States government, acting on a new urgency to control immigration and American borders, has tightened an array of regulations that affect how people from other countries may enter or live in the United States. Those actions have been applauded by many Americans as tough measures for tough times. But critics in the United States and abroad have said Washington has gone too far, that it has abandoned the ideals upon which the country was founded, effectively blindfolding the Statue of Liberty. Chinese businessmen and college students from Jamaica wonder how hand-cuffing and strip-searching them makes America safer from Al Qaeda.

Non-U.S. citizens, even those in the United States legally, are being removed from the country in record numbers, in many cases for the slightest infractions and often with little or no chance to appeal.

In its efforts to control immigration, the U.S. government has sharpened the teeth of an already tough 1996 law that made it much easier for the government to deport non-U.S. citizens. That law, and the modifications to it since September 11, are the subject of this meticulously researched report by the American Bar Association and the Leadership Conference on Civil Rights Education Fund. The cases presented here should be read carefully by anyone with a serious interest in immigration and civil rights in the United States. They are compelling and worrisome.

Government bureaucracies tasked with controlling immigration are severely overburdened in the best of times – and only more so at a time of great national pain, when so much is being asked of them. But the cases detailed here seem, sadly, not to be freakish exceptions but rather the logical results of increased enforcement. They are also cautionary tales of how well-meaning laws can have unintended consequences. It is painful to read some of them and realize that the cruelty and indifference inflicted upon these men, women, and children was carried out by officials with the American flag sewn into their uniform.

Keeping the United States safe and guarding against those who would do it harm is a sacred trust of our government. But an equally noble responsibility is civil society's duty to monitor the government's performance, and to demand that it keep its commitment to fairness and justice for all. *American Justice Through Immigrants' Eyes* is an admirable and compelling fulfillment of that duty.

Kevin Sullivan and Mary Jordan
Mexico City, March 2004

Kevin Sullivan and Mary Jordan are Foreign Correspondents for the Washington Post, and winners of the 2003 Pulitzer Prize for International Reporting.

American Justice Through Immigrants' Eyes

Chapter 1

Introduction: Nation of Immigrants at a Crossroads



When a nation goes down, or a society perishes, one condition may always be found; they forgot where they came from. They lost sight of what had brought them along.

- Carl Sandburg (1878 - 1967)

Throughout its history, the United States has taken pride in being a beacon of freedom and opportunity – a nation that not only has strengthened its social and political fabric but also has enriched its entire economy through its generous and equitable treatment of immigrants.¹ As befits a nation settled and built by immigrants, America's much-vaunted dedication to "liberty and justice for all" has long been extended to residents born elsewhere, including refugees who arrive on its shores to petition for asylum and immigrants who come to America to join their families and to do work that contributes to the U.S. economy. Our diversity has long been considered a national asset and an important element of the uniquely American identity.

Today, more than one in every five U.S. residents is either foreign-born or born to immigrant parents. Of the nation's more than 33 million foreign-born residents, most are legally entitled to live and work here and more than one in three is a naturalized U.S. citizen.² Large numbers of "immigrant" families also include U.S.-born, U.S. citizen spouses and children, and over 37,000 immigrants are serving in the United States armed forces.

At the dawn of the twenty-first century, however, the nation's promise as a truly inclusive society is at risk. In 1996, in response to calls for cracking down on illegal immigration and curbing terrorism, Congress enacted the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)³ and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴ These laws place obstacles in the path of desperate, and often confused, asylum seekers, and contain provisions that strip immigrants of many of the rights to fair hearings, judicial review, and relief from unreasonable detention that U.S. citizens take for granted. They have gone so far astray of their original purpose and led to such disastrous consequences for thousands of U.S. families and their immigrant loved ones that even some sponsors of the laws admit that they have gone too far.⁵

The horrific events of September 11, 2001 were a catalyst for further changes to immigration policy and the nation's perception of immigrants. Passage of the USA PATRIOT Act⁶ and then the Homeland Security Act⁷ have resulted in the expansion of immigration enforcement powers, the dissolution of the Immigration and Naturalization Service (INS), and the transfer of its authority to three bureaus within the Department of Homeland Security (DHS). Other far-reaching post-September 11 initiatives, combined with aggressive enforcement, amplify the injustices present in the 1996 laws and run counter to our strengths, national interests and most cherished values.

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As the Supreme Court reaffirmed in 2001, due process applies “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁸ The equality of this protection to all who set foot on our soil has been one of the great achievements of our democracy. The sweeping 1996 laws together with law and policy changes since 9/11 diverge from this legacy at a moment in history when more than a fifth of all U.S. residents are in families with immigrant members. A two-tiered system of justice that singles out one segment of society for less favorable treatment runs sharply against the grain of American principles and poses a threat to the integrity of the justice system as a whole.



A hallmark of the American system of justice is that important decisions are made following a fair process. This concept of due process of law is so central to our national identity that the United States invokes it to distinguish itself from authoritarian governments and sees it as essential in developing the rule of law in emerging democracies around the world. Consistent with this philosophy, guarantees of fairness and due process have long been central features of U.S. immigration policy as well as key to the respect and protection of civil rights. These guarantees historically have included a constitutional minimum standard of due process when deportation is at stake: the right to be notified of charges; timely, impartial, and individualized consideration of one’s case; the right to examine and rebut evidence; the privilege of legal representation and confidential conversations with counsel; the right to appeal an adverse decision and federal court review of the implementation of the law by the Executive Branch.⁹

However, the United States has also experienced periodic waves of anti-immigrant sentiment in which immigrants have been blamed for various societal ills, testing our basic principles of justice in the process. The nation’s earliest immigration laws listed various categories of “undesirables” to be kept out or kicked out, including not only convicts and prostitutes but also paupers and Chinese laborers.¹⁰ After World War I, hostilities towards immigrants surged, setting the stage for the round-up and deportation of thousands of innocent people and the enactment of discriminatory immigration laws that stood until 1965.

The early 1990s saw yet another resurgence of anti-immigrant feelings, culminating with the passage in 1994 of California’s Proposition 187, a ballot initiative that aimed to deny basic government services, including public education, to undocumented immigrants. The initiative, which directed educators and other service providers to report suspect families to immigration authorities, stirred widespread apprehension within the state’s immigrant communities and deterred many individuals from seeking benefits to which they were legally entitled. Later it was found to be largely unconstitutional.

Even in the midst of anti-immigrant sentiment, however, an individual facing deportation enjoyed some of the procedural safeguards afforded a criminal defendant even though immigration hearings are civil, administrative proceedings. Detention was reserved primarily for people who were deemed dangerous or likely to flee. Ordinarily a person was released on personal recognizance or a cash bond while proceedings were pending. He or she could also ask an immigration judge to lower the bond if the INS had set it too high.

Moreover, immigration judges were responsible for making deportation decisions and often had the ability to confer various forms of discretionary relief on deserving individuals who were facing deportation. In addition to granting asylum to those fearing persecution, for example, immigration judges could forgive certain deportable acts committed by longtime permanent residents who had turned their lives around and demonstrated why they should be given a second chance. In some cases, they also could excuse conduct that otherwise would prevent a person from securing lawful permanent residence.

Before the 1996 laws took effect, even a person arriving for the first time at a U.S. airport or border could request a hearing with an immigration judge before being denied entry (“excluded”) and forcibly expelled. A person fleeing human rights abuses had the right to apply for asylum, and to consult with and be represented by counsel at no cost to the government during this process. These decisions were subject to both administrative and judicial review – the traditional checks and balances that are a key feature of our system of justice.

The 1996 immigration laws changed all this and established sweeping new grounds for detention and “removal”¹¹ while greatly reducing procedural protections and eliminating opportunities for discretionary relief and judicial review. Immigration court hearings are no longer required for deportation in many cases. Youthful indiscretions for which no jail time was ordered are now deportable offenses. Hardship waivers that used to prevent the deportation of individuals with U.S. citizen family members are no longer available. Some asylum seekers must present their cases immediately upon arriving in the country or lose the protection from persecution that international law guarantees them. Retroactive provisions in the laws allow immigrants to be arrested, detained and deported today for minor crimes committed long before the laws were changed to turn their offenses into grounds for deportation. Immigration detention has increased to the point that professional men and women, refugees, children, and even nursing mothers find themselves locked up, often in the same jails as criminals, for technical immigration violations of which they may not even have been aware. To enforce these laws, the INS expanded into the nation’s largest law enforcement agency, deploying more armed agents than any other.

The 1996 immigration laws also have led to the deportation of legitimate tourists and business travelers, people fleeing genocide and torture, abandoned children, abused women, the developmentally disabled, and seriously ill individuals. Many of those deported were actually entitled under the immigration statutes and U.S. Constitution to remain in the United States but the 1996 laws so severely curtailed administrative and judicial review, and access to attorneys, that grievous errors were committed. Countless numbers of U.S. citizens have been adversely affected.

The regulations that implement the laws have continued to change and expand since 1996. The Department of Justice, prior to relinquishing power over immigration enforcement to DHS, promulgated regulations expanding its removal authority over immigrants who arrive by sea, extending the length of pre-charge immigration detention, enforcing harsh consequences for failing to notify immigration authorities of a change in home address, and weakening a Supreme Court order to release immigration detainees within a reasonable time frame. The Department also announced its view that state and local police have “inherent authority” to enforce federal immigration laws, causing alarm in immigrant communities from coast to coast. Federal immigration authorities have entered into cooperative agreements in which state and local police are deputized to enforce the immigration laws, detracting from the essential law enforcement responsibility to maintain public order and safety and eroding community trust.

The Department of Justice retains authority over the immigration courts and Board of Immigration Appeals despite the dismantling of the INS. In 2002, Attorney General John Ashcroft undertook a severe streamlining of the Board by enacting so-called procedural reforms that: 1) nearly eliminate three-judge appeal panels; 2) encourage routine affirmances without opinion; 3) forbid *de novo* review on appeal of factual findings; and 4) eliminated half of the Board of Immigration Appeals (BIA) member positions, leaving just 11 nationwide. The court of last resort is now, in the view of many, little more than a rubber stamp for many thousands of immigrants who appeal to the Board for meaningful review.

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Together, sweeping changes in law and policy wrought both in 1996 and since 9/11 reveal a perplexing hostility to immigrants and their families. This report examines these laws and practices, their grave consequences for individuals, and their implications for society as a whole:

- ***Low-level immigration officers make what can be life-and-death decisions with no minimal standards of due process and no oversight by an immigration judge.*** Life-altering decisions that were previously made only by immigration judges are now made by enforcement officers in the Department of Homeland Security who frequently do not have the qualifications or factual information on which to render individual decisions.
- ***Expanded grounds for deportation have created a dual system of justice in the United States, with far tougher penalties for those born outside its borders than for those born within.*** Long-term, legal immigrants convicted of minor first offenses are penalized as harshly as more serious offenders, and face much graver consequences than the native-born. By adopting a “zero tolerance” approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that “the punishment should fit the crime.”
- ***Elimination of discretionary relief means factors that weigh against an individual's deportation are now ignored.*** In the vast majority of cases, immigration judges can no longer consider equities such as long U.S. residence, hardships to U.S. citizen spouses and children, employment history, military service, community ties, or evidence of rehabilitation. Without such discretion, immigration judges must deport immigrants who deserve a second chance.
- ***Laws are retroactive, meaning that lawful permanent residents are detained and deported for activities that occurred years ago, even if their acts were not deportable offenses when they occurred.*** Many longtime immigrants have been permanently banished for youthful run-ins with the law. Such *ex post facto*, or after-the-fact, laws are unconstitutional under U.S. criminal law, but tolerated under immigration law.
- ***Immigration laws are exceptionally complex, yet more often than not, people facing detention and deportation do not have the help of a lawyer.*** Immigration court is an adversarial setting, presided over by an immigration judge and prosecuted by an experienced government trial lawyer with the Department of Homeland Security. Despite the high stakes, asylum seekers, children, and lawful permanent residents facing deportation do not have the same Sixth Amendment right to government-appointed counsel as individuals facing criminal charges.
- ***Mandatory detention costs U.S. taxpayers nearly a billion dollars every year and disrupts the lives of American families.*** Immigrants and refugees are routinely incarcerated even if they do not present a flight risk or danger, are not charged with any crime, have lived in the United States

for many years, have U.S. families to support and have very strong incentives to resolve their immigration cases. These individuals often are locked up with criminals in state and local jails at great distances from their homes and families, where it is difficult to find a lawyer who could help.

- ***The 1996 laws severely curtailed administrative and federal court review, further increasing the possibility of erroneous and disastrous outcomes.*** The 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which the nation's legal system was founded. Without judicial oversight, laws are applied inconsistently and sometimes incorrectly, with serious consequences for immigrants and their families. Reforms to the administrative appeals system in 2002, coupled with the high number of individuals in proceedings without lawyers, further reduce the chances that mistakes will be detected and corrected.
- ***Overzealous immigration enforcement compounds the dangerous inadequacy of the nation's confusing and conflicting immigration laws and administrative practices, at great risk to citizens' and legal immigrants' civil rights.*** State and local entities are being drawn into enforcing complex federal laws without proper authority or training. Experience shows that the involvement of state and local police in immigration enforcement strains police-community relations and undermines public safety.
- ***Protecting national security need not be at immigrants' expense and can be achieved without depriving any segment of the population of their basic civil rights and liberties.*** Policy changes both before and after passage of the USA PATRIOT Act have resulted in extended pre-charge immigration detention, closed hearings, special registration programs, and severe consequences for technical violations of law that previously were routinely waived or forgiven. The measures have focused on members of Arab and Muslim communities and created a climate in which suspicion, discrimination and hate-crimes flourish.

The goal of national unity is more important in the post-9/11 world than ever before; it also is more threatened. Whereas the "Fix '96" movement to restore due process to the immigration laws was once vocal and gaining significant momentum, it has lagged in the aftermath of September 11. Registration programs and detention of immigrants have replaced calls for reform. In the meantime, in the name of promoting national security, the divide between the foreign- and the native-born populations grows ever wider.

This report examines today's immigration laws, the rationales behind them, their consequences for individuals and U.S. families, and their implications for society as a whole. The report begins with a look at how newcomers are greeted upon arrival at a U.S. border and then studies more in depth the treatment of lawful permanent residents with deep roots in this country. It closes with an examination of the dramatic growth and changes in immigration law enforcement and its profound effect on entire segments of the population, and on immigrant and border communities.

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The individuals who are featured in the case studies in each chapter are real people affected by a web of laws of which most Americans are largely unaware. Some of them have been deported but continue to hope for legal reforms that will allow them to reunite with their loved ones in the United States. The report concludes with recommendations for repairing the immigration laws and recommitting to the principles crafted by our Founders.

Chapter 2

Judicial Authority Shifted to Immigration Officers



*I got stopped by the immigration man,
He says he doesn't know if he can,
Let me in,
Let me in, immigration man,
Can I cross the line and pray,
I can stay another day.*

- Graham Nash & David Crosby
"Immigration Man," Crosby & Nash, 1972

In recent years, low-level immigration officers have acquired unprecedented and unparalleled authority to determine who is admitted to the United States and who is deported.¹² They have the power to separate immigrants from their closest relatives for many years, disrupt their work or businesses, or return them to the hands of a persecutor. They now make hundreds of these decisions every day without involving an independent immigration judge or observing any minimal standards of due process.

The 1996 laws allow immigration officers to make decisions without a formal hearing or appeal in at least three situations: (1) "expedited removal" when aliens arrive at a port of entry or have been unlawfully present in the United States for up to two years;¹³ (2) "expedited administrative removal" of individuals with criminal convictions;¹⁴ and (3) "reinstatement of removal" orders for previously deported aliens who return to the United States without permission.¹⁵ These summary removal provisions share common features: notwithstanding the significant interests at stake and the complexity of the applicable laws, they expressly exclude the involvement of an impartial adjudicator and empower immigration officers to make final removal decisions, and they are conducted at accelerated speed outside of the public's view.

The overarching question is whether decisions of this magnitude should be delegated to immigration personnel with minimal supervision and no independent review. Immigration enforcement officers labor under huge caseloads, typically lack the factual information on which to render individualized decisions, and frequently do not have the experience, qualifications, and guidance needed to exercise discretion in their prosecutorial roles.

Libardo Y- H- was a prosperous landholder in Colombia. He went into hiding in 2000 after receiving threats from both guerillas and paramilitary troops, paying extortion money to protect his family, and being the target of a shooting at his home. But the threats continued, he was accused of being a guerilla collaborator, and some close family members and friends were killed. In a distant part of the country where he had taken refuge, armed paramilitary men apprehended him. He begged for his life, and by some miracle was spared, but the men ordered him to leave. Unable to return home and in grave danger where he was, he made preparations to flee to the United States.

Arriving at the Miami International Airport on November 30, 2000, Libardo was detained for not having the proper travel documents. He told several immigration officials that he feared returning to Colombia. But instead of seeing an asylum officer, he was deported back the next day.

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Back in Colombia the threats on Libardo's life continued. Unidentified "men on motorcycles" went looking for him at his home and farm. His wife received anonymous calls, one saying "We know your husband returned. ... Obviously he does not want to live." A few weeks later, Libardo fled Colombia again, leaving behind his wife, four children, mother, and the only life he had ever known.

This time, Libardo traveled mostly over land, looking for safety along the way. In Nicaragua, he sought help from the Colombian embassy but they could do nothing and warned that he would be jailed if caught by the authorities. In Mexico, border officials sent him back to Guatemala. He then took a boat back to Mexico and crossed the Rio Grande on May 24, 2001. He was picked up by two days later by the U.S. Border Patrol.

He told the Border Patrol that he needed asylum and that he had asked for asylum in Miami but was deported. He was sent to the Port Isabel detention center outside of Brownsville, Texas. Libardo's deportation order was reinstated and again he was not allowed to apply for asylum. But this time a *pro bono* lawyer came to his defense. She helped him contest the order in the U.S. Court of Appeals and obtain his file from the INS. The file contained a memorandum written by a Miami immigration inspector and dated November 30, 2000. It confirmed that Libardo had "stated a concern of being returned to his country."

A few weeks later, Libardo was released from detention and the INS revoked the November 2000 expedited removal order. At last, Libardo was allowed to apply for asylum. He was granted asylum and has begun rebuilding his life. He looks forward to the day when his wife and children join him.¹⁶

Many experts contend that immigration enforcement officers or inspectors should not be entrusted with these weighty decisions.¹⁷ Particularly in the asylum context, the consequences of error are far too great to process cases quickly and without a mechanism to correct the inevitable mistakes that take place whenever human beings make decisions. Nevertheless, hundreds of thousands of summary deportations have been carried out since 1996 without a formal hearing before an immigration judge or even any legal supervision or guidance. Increasingly, this is the rule rather than the exception.

Expedited Removal at Ports of Entry

Today, international travelers and asylum-seekers arriving at U.S. airports, land borders, and sea ports encounter immigration inspectors who literally can put them on the next plane home. Roughly 4,900 officers conduct inspections at nearly 300 airports and other ports of entry.¹⁸ After the initial inspection, a person who has no documents or what appear to be fraudulent documents will be directed for more extensive questioning to "secondary inspection," where 99 percent of all expedited removals take place.¹⁹ Secondary inspections are conducted exclusively by lower-level inspections officers in secured areas of the ports of entry that are off limits to non-governmental observers and legal representatives.²⁰ Their decisions are final and not subject to immigration judge review.²¹

Individuals who are allowed to withdraw their requests for admission do not face the same harsh long term consequences as those against whom an expedited removal order is issued,²² but there are huge disparities among those whom secondary inspections officers allow to withdraw their applications for admission. Along the southern border of the United States, for example, only 27 percent of all those seeking admission are allowed to withdraw their

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applications, while in airports, 39 percent are allowed to withdraw, and 95 percent are allowed to withdraw along the northern border.²³ Mexicans, most of whom enter the United States at the southern border, receive the vast majority of expedited removal orders.²⁴

Applicants are “not entitled to representation during the secondary inspection process at the port of entry,”²⁵ and qualified interpreters are rarely utilized. Individuals who do not assert a fear of returning to their countries receive a “removal” order and usually are returned without further process. The removal order bars them from returning to the United States for five years unless they first obtain a waiver from the U.S. Attorney General.

The federal courts have no authority to review expedited removal orders (or the government’s expedited removal policies and practices), and there has been only negligible administrative and congressional oversight.²⁶ Moreover, 84 percent of all expedited removals are carried out within two days, making independent follow up virtually impossible. The INS issued over 34,000 expedited removal orders in fiscal year 2002.²⁷ In fiscal year 2003, expedited removals increased by 23 percent.²⁸

The law specifies that only people who attempt to enter without proper documents or through fraud or misrepresentation can be summarily expelled. People who may be ineligible for other reasons may still request a hearing before an immigration judge and have the case reviewed by the BIA. Even so, business people, students, and ordinary tourists are ensnared in this summary process every day.²⁹ The expedited removal process poses the gravest risks, however, to refugees fleeing human rights abuses.

Refugees who are fleeing torture, imprisonment, or other forms of persecution often are forced to travel without valid documents because there is not enough time to obtain them or it would be too dangerous to apply for and carry them. They arrive in the United States fatigued and traumatized after long and sometimes harrowing journeys, fearful of the consequences that may befall loved ones left behind. Having little or no ability to speak English or to understand U.S. law, they face almost insurmountable obstacles in seeking asylum without the assistance of a skilled interpreter and legal counsel.

Individuals who manage to convey a desire to apply for asylum or fear of leaving the United States must be read a brief explanation of U.S. asylum law and asked three specific questions about why they left home and their concerns about returning.³⁰ A person who appears to be seeking asylum is then sent to an immigration detention center or local jail to await a “credible fear” interview by an asylum officer and is given a list of assistance programs. Within a few days, the asylum-seeker must persuade an asylum officer that he or she has a “credible fear of persecution.”³¹ If the officer does not find “credible fear,” an immigration judge can review the decision. Although passing the credible fear test is essential to halting deportation and applying for asylum, the government does not recognize a right to counsel in these matters and often keeps the applicant detained without bond even after he or she has passed the test.

Despite the high approval rate for those who are referred to the credible fear process – 93 percent of those interviewed are found to have credible fear – a major concern has been whether the inspections officers are properly exercising their expedited removal authority.³² Some asylum-seekers have been returned to dangerous countries before anyone even knew that they had reached the United States. Imminent deportations of other asylum-seekers have been intercepted before they suffered a similar fate. Their cases illustrate troubling irregularities, including the improper use of the expedited removal process against persons who already had entered the United States, the failure to provide credible fear interviews to some persons who expressed fears of returning to the countries they had fled, and the failure to identify *bona fide* refugees even when they had received credible fear interviews.

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Unfortunately, the courts have rejected litigation aimed at obtaining more information about the inspections process and gaining access to persons subject to expedited removal.³³

“**Ardita**” was a victim of the ethnic and religious conflict that raged through Albania in the 1990s. Five masked, armed men gang raped Ardita in her home. Her husband had fled into the mountains before the rape, and she believed the men were looking for him in order to force him to join their fight. She fled to the United States four days later because she was afraid the men would come back and attack her again.

Ardita was traumatized by and deeply ashamed of the rapes when she arrived in Boston without valid travel documents in May 1997. The INS placed her in expedited removal proceedings and sent her to a detention facility in Elizabeth, New Jersey for a credible fear interview. The INS did not give her critical information regarding the interview. In addition, they provided a male Albanian interpreter. It was impossible for Ardita to mention the rape in front of a man, particularly an Albanian, due to the trauma she had experienced and the strong stigma attached to rape victims in her culture. The INS officer found that she lacked a credible fear.

Ardita was referred to an immigration judge for a review of the credible fear denial. This time she described the rape but the judge doubted her credibility because of her failure to reveal it earlier. Ardita was not allowed to apply for political asylum and was deported back to Albania. A reporter for the New York Times traveled to Albania to corroborate her testimony and desperate circumstances. The INS then relented and allowed her to return to the United States to apply for asylum. She was able to do so only because private agencies covered her travel costs. She was granted asylum.³⁴

Asylum-seekers too often are deported without ever receiving credible fear interviews. Occasionally, such individuals manage to return to the United States. A number of such cases have been documented, including these:

“**Dem**,” an ethnic Albanian from Kosovo, fled to the United States in 1999 to escape the brutal Serbian persecution of Albanian Kosovars. Upon arrival at a California airport, he attempted to apply for political asylum. The persecution of Albanian Kosovars had been receiving a great deal of media attention at this time. Nevertheless, the INS made only one attempt to communicate with Dem before subjecting him to expedited removal: they contacted a Serbian interpreter to translate via telephone. When the interpreter realized that Dem only spoke Albanian, he hung up on him. The INS then handcuffed Dem and deported him to Mexico City, where his flight had originated. Dem managed to return to the United States. This time, however, he managed to obtain a credible fear interview conducted through an Albanian interpreter. Dem was found to have a credible fear of persecution. Nevertheless, he was forced to spend several months in detention.³⁵

“**Jacob**” fled to the United States from Ghana after his family members were killed and he was tortured subsequent to his lawfully opposing policemen with whom he had a conflict. Arriving in the U.S. by air in February 2000, Jacob was taken by an immigration officer into a cubicle where he was searched and screamed at that he was going to be deported. He then was taken to a waiting room. Jacob explained that he only

spoke broken English and requested an interpreter in his native language. He also told the officer that he was afraid to return to Ghana where he had been imprisoned several times, for days or weeks at a time, for refusing to obey the police's unlawful orders, and where several family members had been brutally slaughtered.

The officer refused to provide an interpreter, but informed Jacob that someone would listen to his story the next day. Instead, Jacob spent the night in the airport only to be brought to a plane the next day. He struggled and said he could not go to Ghana, and eventually the officers brought him back to the detention center, again promising that someone would come to listen to his story. The next day, however, they deported him to another country in Africa.

After hiding for several months in that African country, he returned to Ghana to be with his family. He stayed in hiding, except for one occasion when he went to a meeting with a relative. As they were leaving the meeting, policemen started chasing the two. Jacob escaped. The next day, his relative was found murdered and mutilated in the same fashion as his mother. In the ensuing weeks, the police actively searched for Jacob. With the help of a friend, Jacob returned to the United States. Again, he was detained. This time he was permitted to apply for political asylum, but he was detained throughout the process. An immigration judge denied Jacob's case, and the Board of Immigration Appeals affirmed the judge's decision, but his attorneys were able to have the case remanded back to an immigration judge, where proceedings remain pending.³⁶

“Ricardo,” “Jesús” and “Enrique” fled their native Ecuador in July 1997 with the help of a human rights organization after being attacked and receiving death threats for assisting the government in its efforts to uncover police corruption. They intended to go to England and apply for asylum. Only Jesús, however, made it that far. When their plane stopped in Miami, INS officials detained Ricardo and Enrique for questioning. Ricardo and Enrique explained that they were only in Miami in transit and that they intended to proceed to England to apply for political asylum. The INS officers accused them of lying, kept them in the airport overnight under surveillance, then finally allowed them to board a flight to London the following morning.

Upon arrival at the London airport, Ricardo and Enrique requested asylum. The British officials, however, did not allow them to enter. They informed Ricardo and Enrique that, based on the stamps the Miami INS had placed in their passports, they had technically entered the United States. The officials explained that under British law, they were therefore prohibited from applying for asylum in the United Kingdom and must be returned to the United States. The officials provided Ricardo and Enrique with documentation showing that they had sought to apply for asylum in the United Kingdom and escorted them onto a flight to New York.

Ricardo and Enrique did not fare any better in New York. They reiterated their request for asylum to several Spanish speaking INS officers and showed them the documents they had received in London. Nevertheless, the INS detained them, held them overnight in handcuffs, denied them food, showers, and telephone calls, and then escorted them onto a plane back to Ecuador. Again, the plane stopped in Miami, and again, Ricardo and Enrique tried desperately not to be returned to Ecuador. With the aid of sympathetic Cuban-American travelers, they contacted the human rights organization that had helped them, who contacted the United Nations High Commissioner for Refugees, who in turn contacted the INS. The telephone calls came too late, however, and Ricardo and Enrique found themselves in Ecuador.

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Ricardo and Enrique immediately went into hiding. Interviewed by National Public Radio from his hiding place, Ricardo described his experience with the U.S. expedited removal process: "I didn't have a chance to explain myself. I told them I couldn't leave the United States because I received death threats in my country. And one of the officers just smiled and said, 'That's a lie.'"

Ricardo and Enrique managed to escape Ecuador again, this time to a European country where they were allowed to apply for asylum.³⁷

"**Sam**" is a 28 year old Egyptian national who belongs to the Coptic Christian minority. He was easily identifiable as a Christian from his name and his frequent visits to the Christian church, where he volunteered as a bread baker. In September 1999, shortly after he had returned from a trip to the United States, a Muslim group began to threaten that he must either pay their "tax" or convert to Islam. Not willing to pay the extortion money or convert to Islam, Sam feared for his life and fled to the United States.

Upon arrival in the United States, Sam was placed in secondary inspection, where he admitted to having worked illegally in the United States. INS officers shackled him to a bench for eight hours. During his interview at secondary inspection, he told an inspections officer that he feared returning to Egypt because as a Christian he faced retaliation by a group of Muslims. The officer reportedly said, "I am a Muslim. What is your problem with Muslims?" The officer also told Sam that the INS would contact the Egyptian government about his case. Sam was extremely intimidated by the officer's attitude and remarks; he therefore was careful to give answers that did not disparage the Egyptian government or Islam and stated that he did not wish to seek asylum. As a result, the officer did not refer him for a credible fear interview.

While in detention waiting for his imminent removal, Sam called his sister in Egypt. She informed him that the Muslim group had been looking for him since he left and urged him not to return. Sam then contacted another INS officer at the detention facility and informed him that he wished to seek asylum. The officer referred Sam for a credible fear interview, during which an asylum officer found him to have a credible fear. In February 2000, after five months in detention, an immigration judge granted Sam asylum.³⁸

The General Accounting Office (GAO), the investigative arm of Congress, conducted a limited study of the expedited removal process in 1997 and reported "inconsistent compliance" with INS procedures. Although it found that inspectors generally followed the prescribed procedures, inspectors at four of the five locations reviewed frequently failed to document asking all three questions that are required for determining whether a credible fear interview is necessary. The GAO did not investigate anecdotal reports about the denial of telephone, food, and bathroom privileges and other mistreatment.³⁹ It also declined to evaluate the accuracy of the inspectors' decisions. The GAO did note, however, that 47 percent of the individuals who were referred to immigration judges for attempting to enter without proper documents or through fraud or misrepresentation were *not* found inadmissible on the basis of those charges after formal removal proceedings.⁴⁰

In a subsequent study, the GAO reviewed 365 case files of 47,791 aliens who were ordered removed at three airports and one land port during fiscal year 1999. GAO reported that, although INS had improved its adherence to procedures, inspectors "generally" but not always complied with expedited removal procedures. GAO identified six cases at JFK airport and one

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in Los Angeles where individuals had expressed fears but were not referred to an asylum officer. Additionally, because asylum officers did not document the reason for withdrawal of persecution claims, the GAO determined that INS “has little assurance that some aliens who recanted their claims would not be improperly returned home where they might be subjected to persecution or torture.”⁴¹

Independent researchers with academic and other non-governmental institutions have been denied permission to observe the inspections process firsthand and have tried to monitor the expedited removal process through other means. One multi year study suggests that women may find it more difficult to navigate the process than men.⁴² Another study showed that immigrants from the Middle East and the former Soviet Bloc were two to three times more likely to receive adverse credible fear determinations than were immigrants from Asia,⁴³ and were therefore disproportionately subjected to expedited removal.

A 1991 study by Janet Gilboy, a researcher at the American Bar Foundation, raised concerns about whether the inspections process is fraught with discrimination on the basis of national origin. Gilboy, who examined the work of immigration inspectors at ports of entry before expedited removals, reported that they often make judgments based on a traveler’s nationality:

*Little or no individualized inspection occurs; presentation of the country passport suffices to judge what type of individual is requesting admission. This handling implicitly reflects inspectors’ notions about the individual’s limited credibility, that is, lack of trustworthiness of statements or documents.*⁴⁴

Gilboy’s observations, set against the secrecy that surrounds the expedited removal process and the virtually unlimited authority invested in secondary inspectors, raises concerns that inspectors’ biases may cloud their judgment and affect their decision making.

Although refugees suffer the greatest trauma under the expedited removal process, international travelers carrying visas issued by the U.S. State Department also report indignities, inconveniences, and hardships when they arrive. Over the years, the news media have reported on numerous incidents.

Guo Liming, a businesswoman from China, was ordered to strip to her underwear and detained for two nights after INS officials mistakenly identified her passport as fraudulent. She was traveling with her fiancé and business partner. They arrived in Portland, Oregon, on August 19, 2000, on their way to New York when an INS inspector became suspicious of her passport because of the condition of the laminate. She had used the same passport to travel to Los Angeles the previous January without incident. The director of the INS’ district office in Portland said that Guo “fit the profile” of an illegal immigrant because she was traveling with someone else. Guo was handcuffed, chained, and driven two hours away to a detention facility. After spending two nights in jail, she was released when a forensics laboratory verified that her passport was authentic. Her fiancé was not told where she was or why she was being detained. Guo was not allowed to call a lawyer or her consulate while detained.⁴⁵

Meng Li, a real estate development executive from Beijing, was traveling to New York in the spring of 1997, using a valid business visa, to buy plumbing fixtures. She had used the same visa for business trips to the United States twice before without experiencing any problems. When her plane landed in Anchorage on this trip, she was

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strip searched, handcuffed, and jailed for a month before a lawyer who learned of her case managed to get her released to fly home. She vowed never to do business in the United States again.⁴⁶

In 1999 a **10 year old Venezuelan girl** was held in custody upon arriving at the Dallas-Fort Worth Airport. She had a valid visa but was interrogated and strip searched for drugs. No drugs were found. She was so traumatized by the incident that she returned to Venezuela.⁴⁷

INS inspectors also have improperly issued expedited removal orders for individuals who should not have been subjected to expedited removal procedures because they were not arriving at a port of entry.

Rita Joy Martins Beckly and her husband William Beckly are from Sudan. Their families were killed in the ongoing war being waged by the Islamic fundamentalist government in the north against the Christians and animists of the south. William and Rita knew that they would be killed for being Christian southerners if they remained in Sudan. They decided to seek refuge in the United States, long recognized in their home country as a symbol of freedom, hope, and peace to their oppressed and war ravaged people.

William and Rita fled to the United States through Mexico in August 1997. They had left Sudan together. In Mexico, however, they separated because of the risks involved with crossing the border. They would come very close to being separated permanently.

Rita crossed the border through Texas first. She was waiting anxiously at a bus station in Brownsville for her husband to join her when a border patrol agent arrested her. The officer took Rita back to the border station, where she was summarily ordered removed. She told the INS officers that she was afraid of returning to Sudan, but they ignored her pleas. The INS sent her to the Port Isabel detention center while they made arrangements to execute the expedited removal order. Rita could not believe that the country that had provided refuge to thousands of persecuted and tortured people was separating her from her husband and sending her back to an uncertain fate.

William was apprehended upon entering the United States. He, too, was brought to the Port Isabel detention center for a credible fear interview. Fortunately, he came to the attention of ProBAR, a legal program. He told them that he had been separated from his wife Rita and did not know where she was. ProBAR located Rita and helped to have her expedited removal order revoked, but she encountered even more procedural irregularities. She was subjected to a grueling three hour interrogation instead of a standard 45 minutes to one hour interview, before she was finally found to have a credible fear of persecution.

Rita and William were in INS detention for three and a half months before they were released and reunited. In the end, however, the Becklys' American dream came true. An immigration judge granted them asylum in the United States.⁴⁸

The Beckley case illustrates three procedural irregularities. First, although expedited removal is limited to arriving individuals who have not yet passed through inspections or entered the United States in some other way, the process was improperly applied when Ms. Beckley was

taken back to the border inspection station. Second, she does not recall being asked the three required questions and was not referred for a credible fear interview even though she is certain that she told the INS official that she feared returning to Sudan. Third, even after it was established that she was not subject to expedited removal, the INS put her through a lengthy and exhaustive credible fear interview before placing her into regular removal proceedings to apply for asylum.

"A.A." was a 34 year old husband and father when he narrowly escaped expulsion from the United States and indefinite separation from his wife and daughter. The INS used what A.A. describes as a trick to force him to depart and then reenter the United States in order to place him in expedited removal. In 1997, while awaiting adjudication of an application for permanent residency through his then employer, he applied for and received permission to go to India to visit his dying grandmother. He returned to the United States without incident. In June 1998, A.A. admitted using a credit card fraudulently and served ten months in prison. Upon his release, INS took him into custody.

One day, the officers told him to get his belongings because he was going home to his wife and daughter. Instead, the Border Patrol agents shackled him and took him to the Bridge of Americas at the El Paso/Mexico border. They shackled him to a bench for the day. Finally, they told him to sign papers in effect stating that by going to the bridge he had left the United States, then reentered the United States illegally, and that the INS had apprehended him at the border. The INS then classified him as an arriving alien in order to deprive him of rights to which he would otherwise be entitled.

A.A. asserts that the actions of the INS were an oft repeated routine carried out against countless individuals "who were not fortunate like me to have a lawyer assert their rights for them." His attorneys filed an emergency application for *habeas corpus* and a temporary restraining order. The U.S. District Court for the Western District of Texas prohibited the INS from deporting A.A. and ordered him placed in regular removal proceedings. His wife, who had become a U.S. citizen, petitioned for him so that he could apply again for permanent residence. His application was successful, and A.A. became a lawful permanent resident eligible to apply for citizenship in 2003.⁴⁹

The expedited removal process is replete with the potential that legal residents and *bona fide* refugees will be wrongly turned away. It was perhaps inevitable that vulnerable U.S. citizens would be deported.

Sharon McKnight was a little nervous traveling by herself but was excited to tell her family back in New York about her trip to Jamaica. Sharon was 35 when she made the trip but had the mental capacity of a young child due to a developmental disability. When it was her turn in line at immigration, she handed the officer behind the desk her passport. Sharon, who is a U.S. citizen by birth, did not understand what was going on when the inspector called over another officer and they told her to wait. They came back and told her that there was a problem with her passport. Then they took her away to a cold, air conditioned room, shackled her to a chair, and held her there overnight. Sharon was not given anything to eat and was not even allowed to use the restroom, ultimately causing her to soil herself. The INS prohibited her waiting relatives from seeing Sharon and dismissed as fake the birth certificate that they presented. The next day, June 11, 2000, Sharon was deported to Jamaica.

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In Jamaica, there was no one to meet Sharon at the airport and her luggage was stolen. Sharon was stranded in Jamaica for a week until, after considerable media scrutiny and intervention from former Congressman Michael Forbes (D-NY), the INS acknowledged that it had made a mistake and allowed her to return. Sharon continues to have nightmares, and has filed a lawsuit against U.S. officials. "They treated me like an animal. They handcuffed me. They shackled my feet and put me in a room," she recalls.⁵⁰

Deolinda Smith Willmore was born in the United States in 1931. She suffers from blindness, diabetes and schizophrenia. Deolinda's mother was born in the Dominican Republic, and Deolinda would often call herself Dominican. The INS took her word for it and deported her to the Dominican Republic, where she languished in a nursing home for four months before the INS admitted their mistake and allowed her to return.

Deolinda mistakenly had been placed in a South Carolina facility that houses immigrants with mental illnesses. INS deported her from there under the name she frequently assumed, Linda Rosario. Deolinda insisted that she was born in New York, but the INS said they could find no proof of her citizenship. Once in the Dominican Republic nursing home, Deolinda tried to recall the Spanish she had learned from her mother as a child in order to ask for her medicine and for vegetables rather than the rice and chicken she was fed seven days a week. Deolinda would tell her fellow patients, "I am American, I am not Dominican."

Deolinda's attorney hired a private investigator to determine Deolinda's citizenship. Despite INS' protests that they could find no proof of her New York birth, the investigator was able to find her New York birth certificate in less than a week. INS refused to pay for Deolinda's return trip, citing lack of funds. Deolinda's attorney paid for it himself, as well as for her medicine. Deolinda required hospitalization upon her return. The 72 year old wheelchair bound woman has filed a lawsuit against the INS.⁵¹

Gregorio Diaz was arrested at O'Hare International Airport in Chicago on February 18, 1998. He presented documents proving his U.S. citizenship, but INS placed him in expedited removal proceedings. They did not verify his claim to citizenship or allow him to see an immigration judge. Instead, they immediately deported him to Mexico. He was not allowed to return until March 7, 1998. Gregorio lost his job and tried to sue the INS for lost wages and emotional distress, but the court found it did not have jurisdiction.⁵²

Richard Riley arrived at JFK International Airport on January 13, 1998. He was returning to Syracuse University, where he was a freshman, after spending Christmas break with his sick mother in Jamaica. At the airport, the INS questioned the validity of the stamp in his passport, his proof that he was a legal permanent resident. Richard was then, and still is, a legal permanent resident of the United States.

The INS officials verbally abused Richard, telling him that the only way Jamaicans get green cards is by mopping floors or making jerk chicken. Richard tried to explain that he had received his green card through the special immigrant juvenile program, which is reserved for orphaned or abandoned children. He was questioned for hours, shackled to a bench and held at the airport overnight, and subjected to further verbal abuse and two

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humiliating strip searches. When he asked to speak to a lawyer, the INS officials told him that would not be necessary, because they were his judge and jury. The next morning Richard was taken to an INS detention facility, where he was again strip searched, but was finally able to contact his lawyer. He was released on January 15 after being held for more than 40 hours.⁵³ Richard later filed a lawsuit alleging that the INS ignored their own policies and violated Richard's constitutional rights to due process and to be free from unlawful searches.

Questions remain as to how the expedited removal process may be expanded or modified. Although the Clinton Administration opposed its enactment, it vigorously defended the expedited removal process in court and later even proposed expanding the program. The law permits the Attorney General to use expedited removal to deport any alien who is illegally present in the United States for less than two years.⁵⁴ Former Attorney General Janet Reno declined to use this authority initially and delegated the decision to the INS Commissioner.⁵⁵ In 1999, INS Commissioner Doris Meissner proposed the expansion of expedited removal to deport aliens who were in the United States for less than two years and serving sentences for illegal entry.⁵⁶ Commissioner Meissner's proposal was highly controversial and was never implemented; however, border patrol and other immigration enforcement personnel reportedly sought expedited removal authority too. On November 13, 2002, Attorney General John Ashcroft announced that, for the first time, expedited removal would be applied, to individuals who were already present in the United States.⁵⁷ Immigration officials now may use expedited removal against persons who arrive by sea on or after November 13, 2002, who are not admitted or paroled, and who are not continuously physically present in the United States for two years prior to the removal determination. Cubans are exempt from this rule "because it is longstanding U.S. policy to treat Cubans differently from other aliens."⁵⁸

Facilitating the entry and exit of individuals and goods at the nation's ports of entry had always been one of the INS' most important functions, and one that has come under intense scrutiny since September 11, 2001. More than 525 million people are admitted annually, with only a small fraction of individuals denied admission. With the consolidation of border enforcement and inspections in the DHS, an increase in expedited removals is likely. This could have a severe impact on tourism and business as well as amplify concerns about the DHS' respect for civil liberties.

"Expedited Administrative Removal"

Detention and deportation officers – who generally have no formal legal training – handle some of the most complex removal decisions today. Seeking to conclude deportation proceedings while non-citizens are still serving their criminal sentences, Congress set up an accelerated "administrative" process in 1994 for deporting "non-resident aliens" with serious felony convictions. That administrative process was expanded and further streamlined in 1996.⁵⁹

The 1996 law turned the deportation process on its head. The government normally is required to prove that someone is an alien and is deportable. In this process, the burden is shifted to the accused, who is required to convince the government that he or she is a permanent resident (or U.S. citizen) to whom these procedures do not apply, or has not been convicted of an aggravated felony.⁶⁰ If he or she fails, there is no administrative or judicial review.

Regulations stacked the deck against immigrants even higher. Besides dispensing with formal in person hearings, there is only a paper adjudication; individuals have only 10 days to respond in writing (and in English) to the removal charges even though they presumably are serving

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lengthy terms of incarceration that would allow time for a more thorough process. A subject need not even be provided with a copy of the evidence on which the charges are based, and the failure to respond on time automatically results in a final deportation order whether or not the allegations are true.⁶¹ Moreover, a requirement that the proceedings be conducted in, or translated into, a language that the alien understands was repealed. A deportation order under this part of the statute also carries greater penalties than deportation on other grounds: it bars eligibility for asylum and other relief, *permanently* bars return to the United States, and carries a substantially enhanced sentence if convicted for unauthorized reentry after deportation.⁶²

This unusual, expedited procedure even applies to some lawful permanent residents – those who have conditions attached to their status (primarily the spouses and children by marriage of U.S. citizens and permanent residents) – and to refugees and asylees who are waiting to adjust to permanent residence. All categories of “non-immigrants” may be subject to this process also, no matter what type of visas they may hold or how long they have lived, worked, and paid taxes in the United States.

Although there is no evidence that these procedures accelerate the deportations of individuals who are serving lengthy prison terms, they may increase the risk of error. To perform these duties, an immigration officer would need a sophisticated knowledge of federal criminal statutes and their state equivalents, and specific information about the person being removed and his or her criminal record and sentence. These are details that an officer is not likely to know. The aggravated felony statute is so complex that officers who are not trained in law are not likely to make accurate assessments regarding whether a conviction under one criminal statute is in fact an aggravated felony under the immigration law. As a result, officers may initiate summary proceedings against people who are not aggravated felons. Besides being deprived of a hearing before an immigration judge, these individuals lose the chance to apply for relief that deportation officers cannot grant but that judges can. They also may be U.S. citizens who are “foreign looking” or foreign-born, but not deportable.

A young man who had been living in the United States since 1984 faced local prosecution for possession of two buds of marijuana in 2000. His wife and child were U.S. citizens. The INS apprehended him when he attempted to bail out of the county jail. It placed him in administrative removal proceedings even though he did not have an aggravated felony conviction. He argued to the INS that he should be given a hearing before an immigration judge, where he could pursue lawful permanent residence through his wife, as well as other forms of relief. Instead, he was deported to Mexico.⁶³

Reinstatement of Deportation Orders

Immigration officers also may order the “reinstatement” of a prior deportation order and immediately expel a person if they determine that he or she previously was removed from the United States and returned without permission.⁶⁴ Even if the departure and return occurred years before enactment of this 1996 provision, and the individual has grounds to remain in the United States, the person has no right to see an immigration judge and cannot apply for any discretionary relief, including asylum, or seek administrative or judicial review.

Previously, only an immigration judge could reinstate a prior deportation order. Moreover, a hearing was convened to establish the person’s identity and unlawful reentry to the United States after an earlier deportation. Relief was not automatically precluded.

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The immigration officer's task sounds far simpler than it is. He or she must make multiple determinations that previously were made only by immigration judges. These include establishing the individual's identity and details about the date and circumstances of the prior deportation and whether the person reentered the United States lawfully or unlawfully.⁶⁵ This also involves a search of immigration records, which are notoriously deficient.⁶⁶ Individuals who are subject to reinstatement may be eligible for relief under the Convention Against Torture,⁶⁷ but this relief is limited. At best, an individual may be allowed to stay in the United States until the danger has subsided or sent to a third country.⁶⁸

One of the more vexing aspects of this provision is that the government has applied it retroactively. The law has no independent effective date or any expressly retroactive language.⁶⁹ The statute limits reinstatement to anyone who was previously "removed" from the United States. One view is that it should apply only to people who departed under a removal order issued under the 1996 law, which by definition could only have occurred on or after April 1, 1997.⁷⁰ The government's view is that reinstatement *must* be invoked against individuals who were excluded or deported *at any time* in the past. Many individuals who reentered the United States years ago after a prior deportation order have been arrested and deported without hearings and without regard to the impact on their families in the United States.

On March 2, 1999, Maria Araujo was hurrying to get ready to go to early mass. For the past two weeks, she had been praying day and night for her husband, **José Luis Araujo**. He had suffered a double stroke; she thought she had lost him. It was one of the worst experiences of her life. Now he was home recuperating, and she was thankful to have him with her.

José was sleeping on the floor of the front room that morning. It was too painful for him to sleep in a bed. He awoke to loud banging on the front door. He thought Maria had left for church and forgotten her keys. He could not walk, so he crawled to the door. Outside were three men and one woman, who proceeded to kick open the door and barge into the house. José was afraid for his life. One of the men asked if he was José Luis Araujo, and Jose said yes.

All of a sudden, two of the men started pushing José and pulling his hair, put their knees in his back, and handcuffed him. Maria, who had run into the room when she heard all the noise, screamed at them and begged them to stop, that he had just had a stroke two weeks ago. One of the men swore at her. Another man pushed her into the bedroom and she fell on the floor, crying hysterically. As the people dragged José from the house, Maria begged them to let him take his medications because he was still so fragile from his strokes. The man refused. The woman took the medications surreptitiously.

The people who dragged Jose away were INS officers. They were reinstating a 15 year old deportation order. Two years earlier, José had applied for a green card through Maria, a U.S. citizen. They were interviewed in 1997, but had not heard anything from INS since that time.

The INS officers had taken him out of the house with no money, no luggage, and no identification. He was wearing sweat pants, a tee-shirt, and a pair of sandals. The next time Maria heard from her husband was two days later. He had been flown to Phoenix, Arizona and then put on a bus to Nogales, Mexico. He arrived in Mexico on March 3, 1999. He called Maria collect on March 4. In his weakened state from the strokes and the rough treatment he received, he could not remember his home telephone number. He had to read it from the medicine bottle. Maria asked José if he had eaten. He said no.

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Maria flew down to Mexico that same night and met José in Tijuana. She brought his cane, identification, wallet, and some clothing. José eventually was allowed to return to the United States. Today, however, he is struggling severely with his health. He is 100 percent deaf in his right ear and often cannot maintain his balance. He is not able to work as he had prior to his stroke and subsequent deportation.⁷¹

Vanessa Funes does not understand what happened to her family. One day she had a loving father and the next he was gone. He did not even say goodbye. At first she slept in her mother's bed at night because she was afraid of the emptiness in their house. When her father called on the telephone he sounded very sad. Vanessa and her older brother Kevin cried and begged him to come home. Her mother was upset a lot. She stopped letting Vanessa and Kevin go to birthday parties because she could not afford gifts. Vanessa had to go to a new doctor and wait for a long time in the waiting room when she got sick because they did not have health insurance any more.

Vanessa's father is **Francisco Mario Funes**, a Salvadoran national who was ordered excluded from the United States in 1986 and returned shortly thereafter. He later married Ruth, a United States citizen who filed papers for him to become a permanent resident. They went to INS for an interview on March 22, 1999. At the interview, Mario was arrested and handcuffed without explanation. The INS officers said he would be deported immediately. A few hours later, they released him and said that he would be notified of a hearing before an immigration judge.

The next day, however, INS officers arrested Mario at work. They did not allow him to contact his attorney. Mario protested that they were violating his rights. The officers informed him that he did not have any rights and served him with the reinstated order of exclusion. They brought him to the airport and told him that they were deporting him to El Salvador that same night. They allowed him to make one phone call.

Mario called Ruth and told her what was going on. He asked her to bring him some clothes and money. When Ruth arrived, she was allowed to spend a few moments with Mario in the Customs office before she was escorted out.

Mario was deported that night. He spent 25 months in El Salvador before winning a court case in which the INS was ordered to bring him back to the United States. During those months, however, his marriage fell apart and his family was forced to live in near poverty conditions.⁷²

Nestor Salinas-Sandoval makes it a point to spend as much time with his wife Marie and her little girl Givonne as possible. He is never sure when his time with them might be cut short. His fear is not so much that his HIV will progress into full blown AIDS, but rather that the government will deport him to his native Mexico.

Nestor first came to the United States in 1987 to escape desperate poverty. In December 1990, INS apprehended him and deported him to Mexico. He returned a few months later. He was diagnosed with HIV in January 1991 and since that time has been on a rigorous medical regime that has kept his disease from progressing. He pays for his HIV treatment with the health insurance he receives from his employer. In 1996 he married Marie, a U.S. citizen, and has been helping to raise Givonne, her daughter from a previous marriage.

Judicial Authority Shifted to Immigration Officers

In early 1997, Nestor and Marie filed the paperwork for him to become a permanent resident. In March 1997, the INS requested that they file an application for a waiver of the 1990 deportation, and they complied, demonstrating that the family would suffer extreme hardship if Nestor were deported to Mexico. Nestor also filed for a waiver due to his HIV status, for which the family also had to show extreme hardship.

Nestor and Marie waited for months to hear from INS, but no information was forthcoming. Finally, in June 1998, Nestor went to the INS office to inquire about his case. Instead of answering his question, the INS detained him and informed him that they were reinstating his 1990 deportation order. Nestor's lawyer was able to have him released, but he had to appear at the INS in person every week. At one point the INS sent for Nestor again for immediate deportation and his lawyer had to petition the federal court to prevent his deportation. The INS then denied his application for a green card, stating that he was ineligible because of the prior deportation order.

Nestor felt as if he had received a death sentence. Deportation meant not only heartbreaking separation from his family, but the loss of his job and health insurance, and with it the ability to stay alive.

Thanks to review by the district court, however, the INS was prohibited from carrying out the deportation and ordered to reconsider Nestor's green card application. The appeals court affirmed the district court on January 23, 2001.

On July 21, 2003, the U.S. government granted Nestor's application for permanent residency.⁷³

The Araujo, Funes, and Salinas cases were heard by the Ninth Circuit Court of Appeals which found that the INS had erred in retroactively applying the reinstatement provisions. Ruling that the new provisions should apply only to individuals who reentered the United States after the 1996 law went into effect, the court vacated all their reinstatement orders and ordered the INS to return Araujo and Funes to the United States. In addition, the court noted that the current reinstatement procedures raise "very serious due process concerns" and pointed out that the new process is not something mandated by Congress but instead a change put into place by the INS.⁷⁴

For those who live outside the jurisdiction of the Ninth Circuit,⁷⁵ the government has not changed its position or improved its reinstatement process. No other jurisdiction has adopted the Ninth Circuit's approach.

Judith Quinones Paz was a high school senior when she met **Antonio Paz**, her best friend's brother-in-law. A little over a year later, they were married. Although many of her friends got pregnant in high school and dropped out, Judith pursued a brighter future for herself and went on to study at Iowa State University. Antonio wanted to work hard to support her so that she could realize her dream of being a professional and helping other Latinos. The INS, however, had other plans for this family.

Antonio arrived from Mexico illegally in 1999 after one failed attempt in which he was turned away at the border. In Mexico, he had played and coached basketball and was a few credits shy of graduating from high school. Here he worked hard at various jobs and quickly learned English. As the spouse of a U.S. citizen, Antonio was eligible to apply for permanent residence. He and Judith filled out the forms and paid the fees.

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June 3, 2002, was to be the final step in the process: the interview. After keeping them waiting for hours in the INS waiting room, an INS officer called them in to the office. Then, instead of approving their application, the officer took Antonio into custody. Apparently, Antonio had been ordered deported during his first attempt to enter the United States in 1999, even though he never actually crossed the border. The INS claimed the authority to reinstate the prior order without even allowing Antonio to appear before a judge.

Antonio was deported several weeks later. Judith went with him, leaving behind her family, her education, and her dreams.⁷⁶

Arnulfo “Army” Ibarra, a U.S. citizen, and his wife, **Enriqueta Ibarra**, were working hard to raise their family and pay their mortgage until the immigration laws tore them apart in November 2002. Enriqueta now lives in Mexico with the four young children, three of whom were born in the United States. She was deported after the INS invited her to the office to renew a work permit.

Enriqueta and Army married in their native Mexico in 1990. Enriqueta was caught and deported while trying to enter the United States illegally to rejoin her husband and children in 1996. She reentered the country a short time later and Army hired a “notario” to file papers to legalize her. Notarios are non-lawyers who promote themselves as lawyers, primarily to immigrants who come from countries where the term “notario” refers to an attorney. Army informed the notario of his wife’s deportation, but the notario said that it would have no effect upon their case. The Ibarras received a notice from the INS that Enriqueta needed to renew her work permit. When they arrived, Enriqueta was arrested and taken to the local jail to await deportation. Army could not bring himself to tell his children what had happened to their mother. He had to quit his roofing job to take care of the children.

After spending two weeks detained, Enriqueta was deported. Immigration authorities did not tell Army where she had been taken; Army did not learn of her whereabouts until she called from Mexico. The children (Elizabeth, age 12; Marisa, age 11; Marcela, age seven; and Miguel, age six) have had to leave school and move to Mexico to be with their mother. Army has stayed behind to save some money to return to Mexico, sell the house, and finally close the door on his family’s American dream.⁷⁷

Chapter 3

Expanded Deportation Grounds: Punishment that Does Not Fit the Crime



Mr. Speaker, it is wrong to retroactively deport a hard working immigrant for stealing \$14.99 worth of baby clothes and to equate shoplifting with murder, rape and armed robbery. This Congress, with the best of intentions, went too far.

- Representative Bill McCollum
Congressional Record, Sept. 19, 2000, p. H7770

By adopting a “zero tolerance” approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that “the punishment should fit the crime.” Virtually anyone can be deported for any error made at almost any time in life. Some small offenses are penalized as severely as monstrous crimes so that even long time legal immigrants with extensive ties to the United States have almost no prospect of remaining here. This one-size-fits-all approach to deportation has created a dual system of justice in the United States, with far tougher penalties for those born outside its borders than for those born within.

Although the practice of deportation for criminal conduct dates to the nineteenth century, the criminal grounds for deportation have been broadened significantly. Immigrants today can be deported for “crimes involving moral turpitude,” “aggravated felonies,” drug-related crimes, firearms violations, and offenses related to domestic violence. While these categories may sound very serious, they cover a multitude of conduct that does not have serious ramifications under criminal law. In addition, the nation’s immigration laws have their own unique and counterintuitive definitions for such terms as “conviction,” “term of imprisonment,” and “sentence.” This interplay of expanded deportation categories and novel terminology has had dramatic unforeseen consequences.

New Definition of Aggravated Felony

Congress made up the term “aggravated felony” in 1988 to describe a distinct group of deportable offenses. This term was first applied to only truly serious crimes such as murder, drug trafficking, and trafficking in firearms or destructive devices.⁷⁸ These crimes already were a basis for deportation, but changing the terminology signified making the war against crime a priority of immigration policy.

In the early 1990s, the statutory definition of aggravated felony was amended several times to embrace additional crimes. The 1996 expansion added even more types of offenses, many of which are neither “aggravated” nor “felonies.” A “conviction” for any of these, however, now results in *automatic* “removal,” as deportation is presently called, and permanent expulsion.

A “crime of violence” for which a sentence of one year or more is imposed, for example, is now classified as an aggravated felony.⁷⁹ Before 1996, the same crime was not an aggravated felony unless a sentence of five years or more was imposed. Hair pulling, a high school brawl,

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rock throwing and similar incidents are now among the many types of conduct held to be "crimes of violence" resulting in automatic deportation.

While her accent is unmistakably Southern, **Mary Anne Gehris** of Covington, Georgia was a German citizen until recently. She was adopted by an American family when she was less than two years old. Now in her mid 30s, and taking classes with the hope of becoming a private investigator, Mary Anne also is married and busy raising two children, one of whom is severely disabled.

In late 1999, after living legally in the United States for 33 years, Mary Anne decided that it was time to become an American officially and apply for citizenship so that she could vote, hold a government job, get scholarships, and simply "have the same rights as other citizens." Dutifully filling out her paperwork, she answered "yes" when she was asked if she had ever been convicted of any crime. Eleven years earlier, she had pulled another woman's hair in a spat over the father of her child. After she was arrested, a public defender advised Mary Anne to plead guilty to simple assault, a misdemeanor. The judge gave her one year of probation, and she put the incident behind her.

When Mary Anne received her next letter from the INS, she had every reason to believe that it would be good news, that her citizenship was granted. Instead, the letter turned out to be a notice to appear for a deportation hearing, as the law now considered her to be an "aggravated felon."

"It was as if somebody pulled the carpet out from under me," she later recalled. "My father was in the U.S. military and I was adopted when he lived in Germany. I was only 16 months when we moved here. I'm as American as pecan pie."

The news media were as shocked as she was, and word of her plight appeared in papers and broadcasts across the country. Among those in disbelief were staffers for the Georgia Board of Pardons, who immediately invited her attorney to file an application for a pardon. It was unanimously granted, one of 94 pardons the state of Georgia gave that year as a last resort to non-citizens who were facing mandatory deportation for old, petty crimes. The pardon saved her from deportation, and she ultimately became a U.S. citizen, but she still is working to change the laws for others.⁸⁰

"**Guillermo**" lived and worked in the United States since coming here from Colombia in 1978. He became a legal permanent resident of the United States in 1990. His wife, two children, brother, and grandchild are all U.S. citizens. He has two driving-under-the-influence convictions that are six years apart. Although his attorney assured him that these convictions would have no adverse immigration consequences, he was detained and prosecuted for deportation. His wife worked two jobs to support the family and began to experience health problems. Their daughter, a pre-med student, considered dropping out of college to help out. Guillermo lost his case and was deported. A federal court later ruled that DUI is not an aggravated felony, but the ruling came too late to help him.⁸¹

Theft and burglary also are classified as aggravated felonies if the sentence imposed is one year or more.⁸² Before 1996, such offenses were treated as aggravated felonies only if a sentence of five years or more had been imposed. Today, shoplifting, joy riding, passing bad checks and other relatively minor offenses fall under the expanded definition.

Olufolake Olaleye, an Atlanta working mother of two U.S. citizen children, came legally to the United States in 1984 and became a legal permanent resident in 1990. She worked as a cashier at a gas station, earning \$6.50 an hour, and never asked for or received any public benefits. She was accused in 1993 of shoplifting when she tried to exchange baby outfits worth \$14.99 without a sales receipt. Believing that she would be able to explain the misunderstanding to a judge, she went to court without a lawyer and ended up with a misdemeanor conviction. She was fined \$360 and given a 12 month suspended sentence and probation, which was terminated when she paid the fine in full. It was her first and her last offense.

She was not subject to deportation at the time because her conviction was then considered a petty offense under the immigration law. The INS, in fact, had approved her citizenship application in 1996. Instead of swearing her in as a citizen, however, the INS put her into removal proceedings once the law changed. Olufolake was ordered deported as an aggravated felon, without any possibility for discretionary relief. Fortunately, she received a pardon of her criminal conviction, which saved her from deportation.⁸³

Maria Wigent has lived in Rochester, New York since she was five years old. She was born in Albi, Italy, but does not speak Italian and does not know a soul in her native land. In fact, she has rarely left Rochester, not even for her honeymoon. Her longest trip out of town was a visit as a teenager to Niagara Falls, some 90 miles away.

A married mother of two teenage boys, Maria struggled with kleptomania and was arrested for several thefts. Her last arrest for taking \$25 worth of merchandise resulted in a 19 month jail sentence. It was at that point that the INS became involved. Maria had thought that her marriage to Larry Wigent, a U.S. citizen, automatically made her a citizen. She was wrong. Moreover, under the 1996 laws, she was subject to mandatory deportation because her shoplifting amounted to an “aggravated felony.” Maria was immediately taken into custody and jailed by INS for months while awaiting inevitable deportation.

Maria would have been forced to leave her husband and children and the country she called home for more than three decades if a county judge had not intervened. The judge ruled that she had received “ineffective assistance of counsel,” because she never would have accepted the plea agreement recommended by her attorney had she understood the immigration consequences. The judge resentenced her to less than a year, which meant that she was no longer an aggravated felon under the immigration laws. The judge also ordered her to complete a drug therapy program. She now plans to put to use what she has learned from her mistakes, and is planning for a new career – as a drug counselor.⁸⁴

When **Daniel Campbell** was 18, he and his friend thought it would be amusing to celebrate their graduation by breaking into an Alcoholics Anonymous office in Pontiac, Michigan and drinking a bottle of wine. The judge was not amused and sentenced Daniel to 20 months in prison for attempted breaking and entering. Because of that 1968 prank, the government zealously pursued Daniel’s deportation to France for many years.

Daniel came to the INS’ attention in 1994, when he was arrested for having his car’s license plates on his truck. INS brought proceedings against him. At the time, Daniel applied for a waiver but the current immigration laws came into effect before he had a

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hearing. Suddenly, the immigration judge appeared to have no authority. The attempted breaking and entering now constituted an aggravated felony because he received a sentence of more than one year. At the time of his hearing, the immigration judge could not take into account the fact that Daniel had lived in the United States for over 40 years, did not speak French, had a U.S. citizen daughter and grandson, and helped care for his elderly U.S. citizen mother, grandson, and his brother, a disabled Vietnam veteran. Daniel was ineligible for any relief.

Daniel described his hopelessness to a reporter. "I'm a man without a country," he told Tim Doran of the Detroit Free Press in 1998. "I feel like somebody going to the firing squad. Truthfully, that's what it feels like: I'm going to be executed."

Meanwhile, Daniel applied for naturalization while his deportation case was pending. A sympathetic immigration judge adjourned his case for a year but because he was facing deportation proceedings, INS denied his application. By the time Daniel returned to immigration court, the Supreme Court had decided the *St. Cyr* case and the trial attorney withdrew his objections to cancellation of removal. The immigration judge granted relief on the spot. Daniel then applied for naturalization again. Now 55, Daniel feels like a new man and can finally enjoy life with his daughter and grandson without fear of banishment. His naturalization interview was scheduled for March 2004.⁸⁵

For many years, a conviction for fraud, deceit, or tax evasion was a deportable offense only if the loss to the victim or government exceeded \$200,000. Then, in 1996, the loss figure was lowered to \$10,000.⁸⁶

Salomon "Sal" Loayza came to the United States from Ecuador as a young boy and lived here for more than 25 years. He served honorably in the U.S. Navy for more than eight years, married, and has a U.S. citizen teenage son. When Sal and his wife divorced, their son Jeremy went to live with Sal, who became his primary caretaker and fostered an exceptionally close relationship with Jeremy.

In 1994, Sal was convicted of mail fraud involving an amount of \$39,000. He steadfastly denied any guilt and fought the charges rather than accept a lesser plea. A former Secret Service employee who testified at the trial also believed that Sal was innocent and supported his efforts. Nonetheless, Sal served almost 40 months in prison.

Sal spoke with his son Jeremy three times a day during his entire incarceration, before school, after school, and at bedtime. Jeremy had a difficult time adjusting to life without his dad, but the daily phone calls helped. The years went by, and finally Sal was approved for release. Jeremy could hardly wait to see his dad.

Due to the 1996 immigration laws, the October 17, 1998, reunion that Jeremy was expecting with his father never happened. INS transferred Sal to a detention center in Oakdale, Louisiana to await deportation proceedings for the fraud offense, which would not have made him deportable at the time he was convicted. Jeremy, his hopes dashed and convinced that he would never see his dad again, attempted suicide. The Oakdale officers hung up on Jeremy's mother when she called to have Sal speak to his son.

Sal appeared before an immigration judge to fight his deportation, but the judge did not have the authority to take into account Sal's U.S. military service or the horrible toll that deportation would take on Sal's U.S. citizen son. Ineligible for a waiver, Sal was deported back to Ecuador in 2000.⁸⁷ He remains there to this day, trying to make a living by teaching English.⁸⁸

Unique Definition of “Conviction”

The definition of “conviction” was changed for immigration purposes in 1996 and now includes numerous dispositions that are not considered convictions under criminal law, including deferred adjudications and offenses that have been expunged or vacated under state and federal rehabilitative statutes.⁸⁹ Under these types of dispositions, an individual may have to demonstrate law abiding behavior during a set period of time and be required to meet other conditions. Once the probationary period has passed and the conditions have been satisfied, the charges are dropped and there is no record of conviction.

Before 1996, the immigration laws followed the criminal laws in determining when a disposition constituted a conviction,⁹⁰ but today they do not. Immigration consequences may attach even if the criminal charge is later expunged or vacated under a state rehabilitative statute.⁹¹ In some cases, even a pardoned offense counts as a “conviction,” thus triggering deportation proceedings.⁹² This undermines the purpose of alternative sentencing arrangements – namely, to allow persons to learn from their mistakes without suffering permanent consequences.⁹³ One court found that the government’s interpretations in this area are too broad; it held that convictions that have been expunged under the Federal First Offender Act or a state equivalent should not be treated as convictions for immigration purposes.⁹⁴ Outside of this narrow exception, however, individuals regularly are deported for encounters with the criminal justice system that those courts do not recognize as convictions.⁹⁵

Sheila Salas is an Air Force staff sergeant stationed at Eglin Air Force Base at Fort Walton Beach, Florida, where she works as an aerial photographer, flying in F-16s to videotape training missions. In addition to serving her country, Sheila is raising two young daughters with her husband, **Robert Salas**. They were living a normal life until 1999, when Robert applied for U.S. citizenship. Now, because of a 1987 incident, the Salas family faces the threat of permanent separation.

Robert came to the United States from Peru in 1985 at the age of 17, and became a legal permanent resident the following year. In 1987, at the age of 19, he was arrested for possession of less than one ounce of cocaine. He pleaded guilty, was granted deferred adjudication, and received five years of probation. After about two and a half years, the judge reviewed his case, dismissed the charges, and released him from the rest of his sentence. Robert now works as an installation manager for an office furniture company, where he supervises a crew of eight employees. He has had no further run-ins with the law.

After the birth of their second daughter, Robert decided it was time to apply to become a U.S. citizen. In March 1999, he went to the INS with Sheila for his naturalization interview and disclosed his 12 year old offense. The INS responded by placing him into deportation proceedings. Sheila and Robert were baffled as to how a deferred adjudication resulting in dismissed charges could possibly constitute a conviction. Under the 1996 law, moreover, Robert was not even eligible to apply for a waiver or present evidence of his equities.

Sheila’s and Robert’s family has been devastated. “It is absolutely amazing to me that the government that I love and that my daughter is diligently serving, even risking her life in flying Air Force training missions, is tearing her family apart, ruining their finances and trying to deprive my granddaughters of their father’s presence in their lives,” said Tony Valentino, Robert’s father-in-law. Today, Robert and Sheila are still fighting to keep their family together, selling their home and moving to on base housing in order to pay for the more than \$22,000 in legal expenses they have already incurred.⁹⁶

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Rick Siridavong came to the United States in 1981 at the age of five as a refugee from Laos. In 1995, shortly after his high school graduation, he went out with friends who stole a car radio. He pleaded guilty to the offense, received a two year suspended sentence, paid restitution and performed 50 hours of community service. He was released from his probation six months early for good behavior and his criminal record was expunged.

Rick enrolled in college, and he worked two jobs. In 1999, he applied to become a U.S. citizen, “to show my appreciation” for the country that his brother, Nou, had served in the Gulf War. Shortly afterward, two INS agents showed up without warning at his parents’ Virginia home, and took him away. His mom “saw them handcuff me and broke down in tears. She didn’t understand what was going on. Neither did I.”

Rick was taken to an overcrowded county jail many hours away, where he was locked up with men who had committed such violent crimes as murder and rape. He stayed there, without bail, for five months.

The criminal justice system had forgiven Rick and erased his record so that he would not be haunted by a single mistake. Immigration law, however, is not so forgiving and considers him to have a theft conviction and two year sentence. He was ordered deported as an aggravated felon in June 1999. Because Laos does not accept deportees from the United States, he faced indefinite detention – the equivalent of a life sentence. Subsequent developments in the law led the INS to release him, but his future remains uncertain.⁹⁷

New Definition of “Term of Imprisonment”

A “term of imprisonment” now includes situations where no time is spent in jail. Before 1996, when determining whether a sentence would lead to a crime being classified as an aggravated felony or a crime involving moral turpitude, only the time sentenced to actually be served in jail counted.⁹⁸ Under the 1996 law, virtually any type of sentence and any reference to a term of imprisonment counts, including suspended sentences as well as actual periods of incarceration or confinement.⁹⁹ This definitional change is important because, in some instances, the length of term of imprisonment is determinative of whether a particular offense will be treated as an aggravated felony.

Depending on the applicable state law, even a certain length of “probation” may be treated as if the immigrant had been ordered to serve time in prison.¹⁰⁰ In the criminal justice system, a one year suspended sentence is typically given to first time offenders who are expected to learn from their mistakes, make amends, and lead productive lives. Under immigration law, the same offenders get one way tickets out of the United States with little hope of ever returning. These differences between the criminal and immigration law systems are creating striking disparities among defendants for the same types of crime.

Carlos Garcia of Sterling, Virginia, came to the United States in 1978 to study and to escape dangerous conditions in El Salvador. In 1982, he and his entire family obtained permanent residence in the United States through his mother. Today his parents and many other family members are U.S. citizens.

Years ago, burdened to the breaking point with credit card and tax debt, he took \$200 from the cash register of the department store where he worked. The next day he voluntarily admitted what he had done and soon thereafter made complete restitution.

His immediate supervisor told him that no further action would be taken, but the store's management decided to press charges. He received a two year suspended sentence and two years of probation, which he satisfactorily completed. He never had any other problems with the law.

Since then, Carlos has built a successful life. He is a homeowner and has worked for many years for a local catering company. As part of his job, he worked at functions at Congress, the State Department and the White House, including the inauguration of President Ronald Reagan. He also has worked for major airlines as a ramp supervisor.

In late 1998, Carlos and his wife took a cruise that stopped in Cozumel, Mexico for four hours. At the end of the cruise, the INS stopped him, confiscated his green card, and commenced deportation proceedings based on the 1993 offense. An immigration judge found that under the 1996 laws, she could not grant Carlos any relief despite the compelling circumstances of his case and close ties to the United States. Fortunately, he received a pardon from the governor of Virginia while his case was pending and thus was narrowly able to escape deportation.¹⁰¹

Expansion of the Term "Crime Involving Moral Turpitude"

"Crimes involving moral turpitude" have had immigration consequences since 1891.¹⁰² For many years, a lawful permanent resident could be deported for such a conviction if it occurred within five years of entry and he or she had served or been sentenced to a year or more of *actual* imprisonment. Since 1996, however, the standard is whether a sentence of a year or more *could* have been imposed,¹⁰³ even if not a single day of actual imprisonment was imposed. An immigrant also can be deported if convicted for two or more "crimes involving moral turpitude" at any time after entry.

Crimes involving moral turpitude have never been defined in any statute but they have been understood to involve conduct that is inherently base, vile, or depraved and contrary to accepted moral standards.¹⁰⁴ Crimes that can trigger deportation under this category now include the unauthorized use of cable television services and turnstile jumping¹⁰⁵ as well as many petty offenses for which only a fine or probation is imposed.

This broadened definition, combined with other changes made in 1996, means that a person who was "convicted" of such an offense at any time – even decades ago – may be deported without any possibility of relief. Because a conviction under immigration law now includes deferred adjudications and expunged convictions, individuals with "clean" criminal records are still subject to deportation years later. This provision is likely to create significant problems for immigrants in the future. Minor crimes that adolescents frequently commit may not come to the attention of immigration authorities for decades. If and when they do, automatic deportation awaits the offenders if they committed the offense within five years of becoming a legal permanent resident or if they ever committed two such offenses.

"Maryam," of Gaithersburg, Maryland, immigrated to the United States in 1995 with her entire family. She is pursuing a master's degree in finance and working to help support her family.

In 1999 she used a colleague's credit card – she thought with his consent – to make purchases. The police were called, and Maryam was charged with four counts of credit card fraud. She accepted a plea and was sentenced to 11 months on each count, to be served concurrently in a pre-release center. She was advised that accepting the plea and

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sentence would have no deportation consequences. After serving six months of her sentence, the state wanted to release her on parole, describing her as the most qualified person for parole. Instead of finding freedom, however, she was taken into custody by the INS.

Maryam's family was able to get her released on bond, but she lived in constant fear of deportation. In July 2003, on the day she expected a deportation order, the unexpected happened – an immigration judge tossed out the charges because the government failed to prove its case.¹⁰⁶

Deportation for Voting

In overhauling the nation's immigration laws in 1996, Congress added several new deportation grounds relating to unlawful voting and false claims to U.S. citizenship.¹⁰⁷ Although a false claim of citizenship has been a federal crime for years, the 1996 law made the act of voting or registering to vote grounds for deportation; a conviction is not required.¹⁰⁸ Persons who vote illegally also are ineligible for U.S. citizenship. The law applies retroactively as well as prospectively, and it has ensnared some individuals who honestly believed that they were U.S. citizens. There now exists a narrow exception, passed in 2000, for those who reasonably believed they were citizens when they voted.¹⁰⁹

Julia Parker was born in Eritrea and was adopted by a U.S. serviceman and his wife when she was three months old. Parker grew up in New Jersey where she now owns a home, and has a job on Wall Street. Julia's father died before he completed the naturalization process for her. Julia got her driver's license when she turned 17. A year later she was sent a voter registration form, which she filled out, believing that she was a U.S. citizen through her parents' naturalization. She voted in the next election. Several years later, Julia discovered that she was not a citizen. When she applied for naturalization, she admitted that she had voted. She was put into deportation proceedings. Julia had no hope for relief from deportation until the law was amended.¹¹⁰

Frank Audia always thought that he was an American citizen. He and his family came to the United States from El Salvador when he was 12 years old and he became a permanent resident four years later. In 1992 and 1993, while a student at a Bible college, Frank registered to vote and voted in elections. He only discovered that he was not a U.S. citizen several years later, when he applied for a passport for a church mission abroad. Frank immediately began the naturalization process. During his naturalization interview, the INS officer asked him if he had voted and he responded that he had. Under the 1996 law, this disclosure triggered deportation proceedings and Frank was ordered to appear before an immigration judge.

For several months, Frank feared that he would be deported, separated for life from his friends and family in the United States. Fortunately, Frank's case became widely publicized, and was featured on a nationally televised cable documentary as well as in numerous local and national news articles. In the face of public outcry, the INS dropped the case and naturalized Frank.¹¹¹

Convictions for Domestic Violence

The 1996 laws made all crimes of domestic violence deportable.¹¹² In attempting to deport abusers, the 1996 laws also put victims of domestic violence at risk of being deported to their native countries, where the abuser has returned or may follow, and where there often are no laws to protect against domestic violence.

Maria Sanchez, a Virginia resident, came to this country from Guatemala. She became a permanent resident in 1987 and lives with two teenage daughters, both U.S. citizens. Over several years she complained to the police that her husband was assaulting her. In June 1998, during one of their disputes, her husband sat on Maria and hit her. Defending herself, she bit him. He called the police, who arrested her. Maria was charged with domestic assault. In a brief hearing, a Virginia judge urged her to plead guilty without a lawyer. She knew that her husband had been before a judge without consequence so she expected nothing to happen to her. Unlike her, he always had a lawyer and speaks English well. She agreed to plead guilty and was sentenced to six months' probation and 30 days in jail to be suspended when she finished probation, which she did. Then, early one morning, two INS agents came to Maria's home and arrested her.¹¹³ Maria was fortunate enough to receive a great deal of press coverage. A high profile criminal attorney heard about her case and decided to help her free of charge. Her domestic violence guilty plea was vacated and she pleaded to disturbing the peace. She was no longer deportable, and the immigration judge terminated her case.¹¹⁴

Chapter 4

No Second Chances: Elimination of Discretionary Relief



If the banishment of an alien from a country into which he has been invited ... where he may have formed the most tender of connections, where he may have vested his entire property and acquired property ... and where he may have nearly completed his probationary title to citizenship ... if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the norms can be applied.

- James Madison
Report to the General Assembly of Virginia, Jan. 7, 1800,
reprinted in The Virginia Commission on Constitutional
Government, The Kentucky-Virginia Resolutions and Mr.
Madison's Report of 1799, at 36 (1960).

Many deserving immigrants cannot be considered for relief today even if the United States has been their home for decades. In addition to enlarging the grounds for deportation, in most situations the IIRIRA strips immigration judges of the power to grant discretionary relief from deportation. An individual with an “aggravated felony” conviction is barred from all forms of discretionary relief, including asylum, and will be deported unless he or she proves a strong likelihood of persecution or torture.¹¹⁵ Anyone convicted of a “crime involving moral turpitude” within five years of their arrival in the United States similarly is deportable without relief, even if the incident occurred half a century ago. A legal permanent resident who leaves the United States, even for a few hours, has less access to discretionary relief than if he or she had never left.

Consequently, many legal permanent residents face automatic deportation regardless of their individual circumstances. Factors that once were considered important in the deportation process – such as length of U.S. residence, hardships to spouses and children, employment history, military service, community ties, evidence of rehabilitation, and other equities – now are irrelevant in the vast majority of cases involving permanent residents with convictions.

Elimination of Discretionary Relief for Legal Permanent Residents

For many decades, legal permanent residents who faced expulsion from the United States could, under the nation's prevailing immigration law, request permission to keep their status and stay in the country. Such applicants had to establish that they had a lawful, unrelinquished U.S. domicile of at least seven years, that they had served less than five years in jail for one or more aggravated felony convictions, and that the equities in their favor outweighed their past mistakes. Only a small fraction of individuals in deportation proceedings were eligible to apply for such relief, and not everyone who applied was granted it.¹¹⁶

This “212(c) relief,” as it was known, was eliminated in 1996 and replaced by “cancellation of removal.”¹¹⁷ However, anyone who has been convicted of an aggravated felony is ineligible. Since most crimes now are classified as aggravated felonies, cancellation of removal is not an option in most cases.

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It had never occurred to Pam Gaul that her son **John Gaul III** was not a U.S. citizen. She and her husband John had adopted him from Thailand in 1979 at the age of four. The adoption was completed in the United States and John was issued a new birth certificate by the State of New Jersey. John grew up in Tampa, Florida, playing basketball, baseball and soccer, attending a private school and going to a Baptist church. It was not until he was 17 and they applied for his passport in preparation for a family trip overseas that they were informed that he was not and had never been a U.S. citizen.

Pam hastened to file her son's naturalization application before he turned 18. The INS returned the application, however, saying she had paid the wrong fee even though she paid the exact amount that the INS had required. John's next application was processed after he turned 18, and he was no longer eligible for automatic citizenship.

At age 19, John fell in with the wrong crowd. He was convicted of stealing a car and writing bad checks, and was sentenced to 20 months imprisonment. Upon completing his sentence, he was immediately whisked away by the INS to face deportation proceedings. "John, you're adopted, don't worry about it," Pam told him at the time, not realizing that this was, legally, irrelevant. John spent the next four months in an INS detention facility in Bradenton, Florida. Pam managed to bail him out and he worked hard to pull his life together. He held two jobs and one of his employers offered him a partnership, but the INS took him back into detention.

At John's removal hearing, the immigration judge ruled that although the INS had taken too long to process John's application for citizenship, he was powerless to do anything about it. After exhausting her savings trying to fight John's deportation, Pam saw the toll that incarceration was taking on her son. "He went through a spell where he was languishing," she said. "The light had gone out of his eyes." At age 25, John gave up his fight and was deported to Thailand, a country he had not seen in over 20 years, where he had no known family and where he did not speak the language.¹¹⁸

Haydee Klappert of Hollywood, Florida has a husband and four young children. Everyone in the Klappert family was born in the United States, except for Haydee, who came to the United States as a child in 1982. She is active in her church, working as both a religious education teacher and a volunteer. Now she is in danger of deportation to Nicaragua, the country that her family fled during political upheaval, and separated from her family indefinitely.

Haydee worked as a teller for one bank from 1991 to 1999, when she quit her job as head teller to move to another bank. Weeks later, the bank where Haydee was working alleged that she stole \$13,340. The bank sued her in civil court and lost, then it pressed criminal charges. On advice of her lawyer, Haydee pleaded guilty and received a 30 day sentence, but she was not told that the plea would have immigration consequences. She completed her sentence on April 25, 1999. The INS immediately took her into custody and locked her in Krome Detention Center. The bank that pressed charges wrote a letter on her behalf in support of her efforts to prevent deportation. Nevertheless, an immigration judge ordered her deported and the BIA rejected her appeal. During the 18 months that she spent in detention, her family suffered greatly and her children began doing poorly in school.

Haydee eventually was released when Krome came under investigation for wrongdoings, but the INS re-detained Haydee in the summer of 2001. The INS again released her when her attorneys intervened. Haydee's youngest child suffers from severe kidney malfunction and requires constant medical care. Haydee still faces

deportation and is not eligible for any relief under the current laws. She and her family have pinned their hopes on a pending request for deferred action and the favorable exercise of prosecutorial discretion.¹¹⁹

Egil Sinka, 71, overcame a difficult childhood during which he survived the brutal 1940 Russian invasion of his native country, Latvia, followed by life in a German concentration camp. He came to the United States legally in 1951, became a permanent resident, and joined the U.S. army that same year. The United States was already fighting in Korea when Egil joined, and he served in the 82nd Airborne Division as a paratrooper and demolitions expert. In 1961 he participated in a CIA-led operation against Fidel Castro in Cuba. When the Vietnam War started, he reenlisted in the U.S. Navy Reserve for four years, but was never sent overseas. Egil's reenlistment papers classified him as a citizen, and he did not realize he was not one until the 1970s when he was denied a passport. His military records, which could shed some light on his immigration status, were destroyed in a fire. He applied for citizenship, but believes he missed his swearing-in ceremony due to his frequent work travel.

Egil retired in 1994 and began living with his girlfriend and her young son, to whom he became an adopted father. Egil managed to survive on his \$600 per month Social Security benefits, but his son is a dwarf and requires expensive medical attention. Egil therefore agreed to drive a motor home containing marijuana from Mexico to a parking lot in Tucson in November 2000. He was caught at the border, pleaded guilty to the drug charge, and spent just over a year in a jail pending sentencing. He finally was sentenced to time served, then transferred to INS custody, where he has remained ever since. He has been charged as an arriving alien and is therefore not eligible for bond or for relief from deportation to Latvia. His drug conviction also makes him ineligible for political asylum. The immigration judge ordered Egil deported and the Board of Immigration Appeals affirmed the decision.

Egil has maintained that his application for naturalization combined with his military service and strong allegiance to the United States render him a United States national who cannot be deported. His attorney is fighting his case in the Ninth Circuit Court of Appeals, who will decide the question of his nationality. In the interim, Egil remains detained.¹²⁰

Samuel Schultz, a 21 year old Utah man, considers himself "all-American." His parents, Pat and Tom Williams, also consider him American. The problem, however, is that Sam never was naturalized. He left an Indian orphanage on July 20, 1985, at the age of three when Pat adopted him and brought him to the United States. Now, 18 years later, he faces the almost certain possibility of being deported to India, where he does not speak the language or have any friends or known relatives among its one billion people.

Sam pleaded guilty in 2001 to receipt of a stolen car. In March 2001, he began serving a 15 year prison sentence. A year and a half later, the Utah parole board approved a September 24, 2002, release date. Rather than being released, however, Sam was transferred to INS custody. He remained there for several weeks, until an immigration judge ordered him released on \$20,000 bond. Sam's case is pending.¹²¹

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Claudette Etienne was born in Haiti but fled to the United States in 1980 to escape the repression of the Duvalier regime. She became a legal permanent resident but, unfortunately, made some mistakes – and paid with her life.

Claudette was deported to Haiti in September 2000. Upon her arrival, the Haitian government jailed her along with the other deportees from the United States. Conditions in Haitian jails are atrocious. Prisoners sleep on cement floors and are dependent on their families or outsiders to bring them food and other necessities. Claudette's family was in the United States and she had no one in Haiti to help her. The unsanitary tap water that she was forced to drink made her sick with diarrhea. Deprived of medical treatment, Claudette died.¹²²

Ironically, Claudette was deported and imprisoned in Haiti for crimes for which she received no jail time in the United States. In 1997 Claudette was sentenced to a year of probation and counseling, which she successfully completed, for a domestic dispute with her boyfriend. In June 1999, she attempted to sell a small amount of cocaine to an undercover police officer. The judge sentenced her to a year of probation so that she could care for her two young sons at home.

On February 10, 2000, when reporting to her probation officer, she found an INS officer waiting to arrest her. Claudette spent the next seven months in INS detention centers while she fought a losing battle to remain with her family.

From 1990 to 1996, drug trafficking was an aggravated felony for which there was no relief only if the individual served a sentence of five years or more.¹²³ Under the 1996 laws, nearly all drug offenses, even some simple possession offenses, are treated as aggravated felonies regardless of the sentence imposed.¹²⁴ Many long term residents already have been deported or are facing virtually certain deportation for a single drug conviction.

Catherine Caza has lived in the United States since she was brought here in 1960 at the age of three. In 1981 she was taking medication prescribed by her doctor. Her boyfriend repeatedly asked her to sell some to him, and finally she complied. Her boyfriend turned out to be an undercover police officer and proceeded to arrest her. The following year she was sentenced to five years' probation. She served no jail time and since then has led a law abiding, productive life. She became a social worker, went to graduate school, and has been raising her daughter.

In 1997 the INS put Catherine in deportation proceedings because of her 1982 conviction. Although she would have been eligible for a waiver in 1982, she is not eligible under the 1996 laws. An immigration judge ordered her deported, but the BIA dismissed the deportation order because of INS errors. Catherine later was pardoned by former Governor of Florida Lawton Chiles, but her fate remains uncertain. Because she was convicted on a drug charge, the pardon has no legal effect in immigration court, and removal proceedings could be re-instituted at any time. She has applied for naturalization, but the government has not yet made a decision. At one point, the INS tried to convince Catherine to withdraw her naturalization application, telling her that they would grant her relief from deportation if she did so. Catherine refused, and awaits the final outcome of her case.¹²⁵

Nancy Saunders and James Herbert always had thought that their son **Joao Herbert** was a U.S. citizen. They had adopted him at the age of eight from an orphanage in San Paulo, Brazil. He grew up in Wadsworth, Ohio, playing soccer and basketball alongside his Medina County classmates. When Joao was seventeen, his parents learned that he was not a citizen, and that his naturalization process needed to be completed before he turned eighteen. INS accepted his application and the fee, but the application was not processed on time.

Shortly after his 18th birthday, Joao was arrested for selling 7.5 ounces of marijuana to a police informant. He pleaded guilty and was sentenced to probation and participation in a drug treatment program. Because he was not a citizen, INS was alerted and placed him in removal proceedings. Although it was his first and only offense and he did not receive any jail time, the INS charged him with having an aggravated felony conviction for which no relief is available. Therefore, the fact that his father is a quadriplegic, that Joao had lived his entire life in the United States, and that he neither knew any one in Brazil nor spoke Portuguese, were irrelevant in immigration court. After 20 months in INS detention, Joao was deported back to Brazil. His father, who cannot make the trip to Brazil due to his physical condition, fears that he will never see his son again.¹²⁶

Stop-Time Rule

Even lawful permanent residents who have not committed aggravated felonies may find that they cannot apply for discretionary relief from a deportation order. Prior to the 1996 laws, permanent residents in deportation proceedings could apply for discretionary relief called a "212(c) waiver." Among other requirements, they had to have seven consecutive years of residence in the United States. Time was counted at least until the person was placed in proceedings and in some cases until the deportation order was final. The 1996 laws, however, repealed this waiver and replaced it with "cancellation of removal."

Cancellation of removal is available to permanent residents who have been continuously present in the United States for seven years after a lawful admission and have been lawful permanent residents for at least five of those years.¹²⁷ Individuals with fewer years of residence prior to committing their offense, however, do not meet this eligibility requirement.¹²⁸ Unlike the 212(c) waiver, the period of continuous presence in the United States stops when the deportable offense was committed. This is called the "stop-time rule." Because this provision is retroactive, anyone who committed a deportable offense within seven years of being admitted to the United States (in any status) cannot be considered for relief no matter how long he or she has lived here.

Luis Espinosa-Hernandez came to the United States to work in 1969. In 1983 he married a U.S. citizen, and a few years later he became a legal permanent resident. Luis and his wife had four children together. Luis' wife later left him and the children, and he became their sole caretaker.

To earn some extra money, he agreed to drive a car from Florida to Texas. He had no idea that drugs had been hidden in the car, until the car was stopped and searched in Alabama. He was convicted of a drug offense, for which he served one year.

The immigration judge observed that Luis had many equities and said that he would have granted relief allowing Luis to remain in the United States with his children if the newly imposed "stop-time rule" had not disqualified him. No time after the 1992 incident could be counted toward the seven years of continuous presence needed for

relief. Against his attorney's advice, Luis withdrew his appeal and asked to be deported. He could not tolerate incarceration or support his children while detained. He was deported to Mexico just days before Christmas 1998, leaving his four U.S. citizen children – at the time 19, 18, and 10 year old twins – to fend for themselves.¹²⁹

Maria Barry, who has lived in the United States since 1977, went to visit her mother in Britain in the spring of 2000. On her return, the INS stopped her for an old drug charge. Barry speaks Italian and French and was a dean's list student in psychology and social work at Long Island University. In 1982 she pleaded no contest to a charge of possessing a small amount of cocaine and a Quaalude. She served one and a half years' probation and performed 100 hours of community service. In the 20 years since, she was the nanny to actor Eddie Murphy's children and went on to run her own small business. She is ineligible for relief today because of the stop-time rule. "I cannot believe it," she told a reporter for the New York Daily News. "I came here for the American dream. I'm living the American nightmare instead."¹³⁰

Diminished Rights for Legal Permanent Residents Returning from Trips Abroad

IRIRA established stricter rules for "admission" to the United States, including new penalties on permanent residents who travel abroad. Returning legal permanent residents may be treated as if they were applying for admission to the United States for the first time if upon arrival an immigration inspector becomes aware of an old offense. The individual may be deemed ineligible for admission and detained while his or her case is sorted out. Residents who traveled frequently before the law changed have faced removal charges upon returning from business trips, family holidays, visits to sick relatives, and funerals.

José Velasquez was returning from a trip to his native country of Panama, where he had visited his elderly mother. It was December 1998, and, although he was not looking forward to the cold weather, he was eager to reunite with his family. He would soon find out that an 18 year old drug conviction would separate him from his family for many months, and possibly for good.

José first came to the United States as a child with his father, a member of the Panamanian diplomatic corps. He became a permanent resident in 1960. In 1980, Jose attended a party where someone asked him if anyone was selling drugs. José pointed someone out and speculated that the individual may have been selling drugs. José was then arrested and later convicted of conspiracy to sell drugs. He was sentenced to probation and paid a \$5,000 fine.

In the years since then, José "married his high school sweetheart, raised three children and put in 80 hour weeks at a small neighborhood deli to build a life for himself and his family."¹³¹ He never expected to be arrested upon landing at the Newark International Airport or to spend the next four months jailed without bond because of that nearly forgotten incident. The INS would not release him, insisting that his offense was serious and detention was mandatory. He challenged his detention in federal court. The judge, finding that Jose had lived an exemplary life both before and after the 1980 incident, ordered him released. Even the INS conceded that they could not imagine a less sympathetic case for detention.¹³²

Ybernia Gomez left the United States for 10 days in 2000 so that she could visit her mother, who was seriously ill with emphysema in her native Dominican Republic. Upon her return, she was arrested and detained for three months because of a 1985 disorderly conduct violation.

Ybernia, a certified nursing assistant with adult U.S. citizen children and grandchildren, had lived in the United States for 25 years when she visited her mother. Fifteen years earlier, she had been arrested for possessing prescription pain medication that a friend had given to her to help with a toothache. She was fined \$500 and given a 30 day suspended sentence. Ybernia later applied for legal permanent residence based on her marriage to a U.S. citizen and was approved.

Ybernia's return from her 10 day stay in the Dominican Republic made her an "arriving alien" and, according to the INS, she could not be admitted to the United States because of her "drug offense." An immigration judge agreed that she had violated a law relating to a controlled substance and ordered her deported from the United States, having no discretion to take into account the strong equities in her favor. Fortunately, a panel of the Board of Immigration Appeals reviewed the case, found that the statute under which Ybernia was convicted was a disorderly conduct statute rather than a controlled substance statute, and terminated proceedings.¹³³

New Restrictions on Asylum

The United States has long prided itself on being a haven for those seeking refuge from oppressive regimes. Under the expedited removal provisions of the 1996 immigration laws, many asylum-seekers face the prospect of being deported without any opportunity to have their cases heard. However, even individuals who are legally admitted to the United States face new hurdles to receiving asylum if they seek it later.

Before the laws were changed in 1996, any person in the United States or at a port of entry had the right to apply for asylum. The 1996 laws established a one year filing deadline on filing for asylum.¹³⁴ Now, refugees who cannot prove that they entered within one year of filing for political asylum face immediate rejection of their claims unless they meet one of the narrow exceptions.¹³⁵

Although a one year filing deadline may sound reasonable in the abstract, the plight of many refugees belies this presumption. Refugees typically arrive in the United States with few resources and little or no support system. Many refugees do not even know that they can apply for asylum; others are reluctant to talk about their experiences with anyone, particularly with government officials, whom they have learned to fear. In addition to the challenge of simply surviving from day to day, adapting to an unfamiliar culture and acquiring basic language skills, many harbor desires to return home to their loved ones. It often takes some time for refugees to come to grips with the harsh reality that conditions at home have not improved and returning would be dangerous. They must then find legal representation, overcome the trauma inherent in describing their experiences, and gather documentation to support their claims. By this time, a year may have passed. Consequently, many refugees in need of protection miss the one year filing deadline.

Many others apply timely but lack proof of their entry date, thereby failing to prove eligibility. Some refugees must flee their countries without proper identification or under assumed names in order to escape persecution. Many refugees who have had to escape to the United States in such a manner find themselves unable to apply successfully for asylum because of the one year deadline.

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“**Abdi**” is a young man from Somalia. In 1995, while his country was embroiled in an ongoing civil war, he was kidnapped by militiamen from a powerful tribe. Abdi spent the next two years as a slave on a banana plantation. He was forced to work from daybreak until sunset and sleep on the ground with only trees for shelter. The militia gave him very little food and beat him frequently. Finally, Abdi managed to escape when fighting broke out in the vicinity. He fled to nearby Kenya, where he found protection in a refugee camp and reunited with his wife and four children (two of whom were the orphaned children of his brother and sister-in-law, killed in the tribal warfare).

The camp where Abdi and his family lived was surrounded by a high fence. Rape, violence and death from disease were everyday occurrences, and Abdi constantly feared for his family. There was no end in sight to the war in Somalia, and their futures seemed bleak.

In 1999, Abdi arranged to leave Kenya to go to the United States. Abdi paid several thousand dollars that he had saved and collected from family members to a Kenyan, who would only give his name as “Jake.” Jake accompanied Abdi to Nairobi’s international airport but did not allow Abdi to handle any documents. He told Abdi that under no circumstances was he to speak to anyone. When they arrived in New York, Jake presented the passports and spoke to the immigration officer. They passed through without incident. Jake said good luck and left. Abdi never saw him again.

Eager to bring his family to join him in the United States, Abdi applied for asylum right away. Eventually his case came before an immigration judge. The judge asked him why he did not have any proof of when he entered the country. Abdi explained that Jake left him alone without any documents. The judge decided that since Abdi did not have proof of entry, he must have entered more than one year prior to applying for asylum. He denied Abdi’s application for political asylum. Abdi’s family continues to struggle to survive in the Kenyan refugee camp while Abdi’s case is on appeal.¹³⁶

In addition, an asylum-seeker may be denied protection for minor criminal offenses. U.S. law bars anyone with a so called “aggravated felony” conviction from receiving asylum.¹³⁷ Under international law, a determination of refugee status must balance an asylum-seeker’s offenses against the danger to him or her if returned.¹³⁸

Abbas Shariff Abdullahi, a Somali refugee, narrowly escaped deportation from the United States by obtaining a full and unconditional pardon in July 2000 from North Dakota Governor Edward T. Schafer. At the age of 18 he had a consensual sexual relationship with a young woman who told him that she was 17 years old, although in fact she was just 13. The girl begged the trial court not to jail Abbas, but he ended up serving six months in jail for statutory rape, followed by more than a year in INS detention. The immigration judge and the BIA found him to be deportable as an aggravated felon, and ineligible for asylum. Had it not been for the pardon, he would have been deported to Somalia.¹³⁹

Sadrija Radoncic is a Muslim from Serbia-Montenegro. He and his wife fled their country in 1991 to escape religious persecution. They applied for political asylum in November 1993. In March 1996, the INS placed them in proceedings. In August 1996, Sadrija was arrested by the Border Patrol for assisting other Muslims from Serbia-Montenegro to enter the United States. He was released on bond and subsequently convicted of alien smuggling and conspiracy to smuggle aliens. A federal judge in the

U.S. District Court for the District of Vermont sentenced him to 18 months imprisonment, finding that Sadrija's "major purpose was in service of his community in Yugoslavia and Astoria, NY." The judge also stated, "[T]he court finds that this defendant is not a dangerous person. Therefore the Court strenuously recommends that this defendant not be deported upon completion of his sentence"

Nevertheless, the INS initiated proceedings and took Sadrija into custody upon completion of his sentence. An immigration judge found Sadrija to be ineligible for asylum due to his conviction and ordered him removed. Sadrija appealed to the Board of Immigration Appeals. The INS intended to detain Sadrija for the duration of his appeal and an immigration judge denied him a bail hearing on the basis that the 1996 laws deprived him of jurisdiction. Ultimately, the District Court for the Eastern District of Pennsylvania granted Sadrija's petition for *habeas corpus* and he was released.

Despite the recommendation of a district court judge and overwhelming countervailing equities, the government continued to pursue deportation for Sadrija and his wife, who now have two U.S. citizen children.¹⁴⁰

At best, an individual with an aggravated felony conviction may qualify for "restriction on removal," which was formerly called "withholding of deportation."

This relief is the embodiment in U.S. law of its international obligations not to return (or "refoule") a refugee to a place where his or her life or freedom would be threatened. The U.S. government is prohibited from returning any such individual except those who have persecuted others, are threats to national security, or who pose a danger on account of having committed serious non-political crimes. Under this law, an individual is disqualified from protection if he or she has been sentenced to at least five years for one or more aggravated felonies.¹⁴¹ Individuals with serious criminal convictions, however, may be eligible for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴² Neither of these forms of relief leads to any secure immigration status, and the protections may be revoked if conditions in the home country improve. The U.S. government also can deport the individual to any third country where he or she would not be persecuted, including a country where he or she has no ties, if another country is willing to accept him or her. The government also may continue to detain such an individual indefinitely.

Suspension of Deportation in Hardship Cases

For 60 years, U.S. immigration law provided an important remedy in rare cases where an individual's deportation would result in "extreme hardship" to a U.S. citizen or lawful permanent resident spouse, child or parent or the person herself. An applicant had to prove continuous residence in the United States for at least seven years and good moral character throughout this period.¹⁴³ This relief, known as "suspension of deportation," could be granted only by an immigration judge after a full trial-like evidentiary hearing. Only people who merited the favorable exercise of discretion received relief. People granted relief, therefore, typically were the mainstay of their family with significant ties to the United States and whose deportation would result in grave consequences for their families. It was one of the few forms of relief available to undocumented individuals.

The 1996 laws repealed suspension but created a form of "cancellation of removal" relief for people who are not permanent residents. To qualify, someone must prove at least 10 years of continuous residence and good moral character, and exceptional and extremely unusual

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hardship to a spouse or child who is a U.S. citizen or permanent resident or to a U.S. citizen parent. Exceptional hardship to the person who would be deported does not count. The law also contained a "stop-time" rule ending the accrual of continuous residence on the date the charging document was served. These changes in effect wiped out 60 years of immigration policy and eliminated a potential remedy for people who had fled civil war and political strife, including many who were waiting to have their suspension applications heard.¹⁴⁴

Teresa Bartoszevska-Zajac is a Polish woman who came to the United States in 1989. She is married and has two U.S. citizen children. Teresa accrued seven years of presence in the United States in May 1996. She filed an application with the immigration court to allow her to seek suspension of deportation. While her motion was pending, however, IIRIRA came into effect. The new law mandated 10 years continuous residence and had stopped the clock for continuous residence when INS served the charging document commencing proceedings in 1994.

Teresa took her case all the way to the U.S. Court of Appeals for the Sixth Circuit. The appeals court called Teresa's case "unfortunate," but affirmed, albeit reluctantly, the Board of Immigration Appeals opinion that the 1996 law had rendered Teresa ineligible for suspension of deportation. Teresa's community was so moved by her case that the mayor intervened and had the city sponsor her for employment-based permanent residency. Her case is pending.¹⁴⁵

"Prosecutorial Discretion" – A Sorry Excuse for Legislative Inaction

Some defenders of the 1996 laws argue that the problem is not with the laws themselves, but with the way they have been implemented. Specifically, some maintain that the hardships resulting from the 1996 laws could be eliminated if "prosecutorial discretion" were exercised more frequently and the government declined to pursue cases in which deportation is clearly not justified.¹⁴⁶

Prosecutorial discretion is an important feature of the criminal justice system. In that arena, prosecuting attorneys review the evidence and make decisions regarding whether to bring charges, how much bail to seek, and whether to prosecute, dismiss charges, or offer a plea. While they could prosecute every criminal case to the fullest extent of the law, it is not always in the public interest to do so. One might expect prosecutorial discretion to play a similar role in the immigration setting, but this has not been the case.

Unlike the criminal justice system, the arresting immigration officer generally decides what the charges will be and prepares the formal charging document that commences removal proceedings. The same officer also sets or denies bond. Unlike their counterparts in the criminal process, the immigration district counsel rarely review charges before they are lodged or decide whether prosecution would serve the interests of justice. Front-line officers who have initial contact with the immigrant, therefore, control the process. These lower-level officers have huge case loads and generally lack the experience, qualifications, guidance, and factual information that would be necessary to exercise prosecutorial discretion properly.

While the careful exercise of prosecutorial discretion may lead to more equitable and fair results in some cases, it alone is not a solution to the problems created by the 1996 laws. One reason is that the similarities that can be drawn between criminal prosecutors and their immigration counterparts are limited. While a single criminal prosecutor often is responsible for overseeing an entire case from beginning to end and has a responsibility to terminate a

prosecution whenever it becomes clear that justice would not be served by pursuing it, within the immigration setting trial attorneys do not become involved until a much later stage and then only to assess whether the removal charges can be proven. Immigration trial attorneys do not look behind the paper file or evaluate whether or not an individual should be deported; as far as they are concerned, that decision has been made.

A variety of factors reinforces this perception. First, the trial lawyers possess little information that would be necessary for making individualized decisions, and they lack the time and resources necessary to investigate. Second, all levels of the agency are imbued with an enforcement culture. The lawyers receive little guidance in how to exercise discretion and the climate does not suggest that a favorable exercise of discretion would be viewed positively by supervisors, senior officials, or congressional oversight committees. Third, historically, the authority to mitigate the potentially harsh consequences of deportation had been delegated by the Attorney General to the immigration judges; the agency, therefore, did not see this as trial counsel's role.

Even where the exercise of prosecutorial discretion is feasible and is encouraged, the immigration laws themselves often prevent an equitable outcome. Once removal charges are filed and proceedings commenced, district counsel usually cannot terminate them; they can only ask the immigration judge to do so. They also have no authority to negotiate "plea bargains" or other alternatives to deportation, other than "voluntary departure" if the individual is not an aggravated felon and agrees to leave the United States.¹⁴⁷ The immigration judges, moreover, can only determine whether or not the individual is removable as charged and may grant relief only if available under the statute. An immigration judge is not authorized to craft equitable relief that is not specified by law and delegated by the Attorney General.¹⁴⁸ If the individual is removable as charged, the immigration judge must order removal even if the judge believes the disposition is disproportionate to the offense and is a miscarriage of justice.

As the unintended consequences of the laws became increasingly visible and members of the public called for legislative reforms, key supporters of the 1996 laws accused the INS of failing to exercise prosecutorial discretion. In 1999, 28 members of the House of Representatives, including Judiciary Committee Chairman Henry Hyde, sent a letter to Attorney General Janet Reno calling attention to the unintended consequences of the 1996 immigration laws and strongly urging her to issue guidelines on prosecutorial discretion so that INS prosecutors would be encouraged not to pursue removal in inappropriate cases.¹⁴⁹

Former INS Commissioner Doris Meissner attempted to utilize prosecutorial discretion more effectively. On November 17, 2000, Commissioner Meissner issued a Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel mandating that the INS exercise prosecutorial discretion. In her memorandum, Commissioner Meissner stated that "[immigration] service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process"¹⁵⁰

These efforts, however, were destined to fail. In most situations, officers and trial counsel have large caseloads and do not have the time or information at hand to decide whether a specific immigrant should simply be given a break. Inevitably, compelling hardship cases slip through the cracks because these officers are not aware of all of the relevant facts and equities or are reluctant to exercise discretion favorably. In fact, a "get tough" attitude within a district office can even result in a blatant hostility toward the exercise of discretion: a memo issued by the INS' district office in Atlanta, for example, encouraged criminal prosecutors in the region to charge immigrants with what are defined as "aggravated felonies" under the 1996 immigration laws and to avoid plea bargaining as a means of ensuring their "swift removal."¹⁵¹

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In addition, even the best system of prosecutorial discretion would leave immigrants and families in perpetual legal limbo. A individual who is deportable but not deported always is in jeopardy. As recognized in the Commissioner's November 2000 memorandum, because "immigration violations are continuing offenses ... an alien [remains] legally removable regardless of a decision not to pursue removal on a previous occasion."¹⁵² Furthermore, an immigrant who has benefited from a favorable exercise of prosecutorial discretion might for the time being not be in danger of deportation, but such discretion cannot be exercised to readmit a long term legal permanent resident who leaves the United States even briefly. Immigration officers are statutorily prohibited from admitting any alien who is not "clearly and beyond a doubt entitled to be admitted,"¹⁵³ and since most criminal offenses are not only grounds for deportation but also amount to separate grounds of inadmissibility, this can lead to a bizarre situation in which someone whom the government chooses not to deport can never actually leave the United States if he or she ever wishes to return.

This report is full of compelling stories that not only illustrate the reluctance to exercise prosecutorial discretion in an immigrant's favor but which also demonstrate why prosecutorial discretion alone cannot mitigate a seriously flawed law. Occasionally, however, strong media attention can persuade immigration authorities to decline prosecution once they have placed someone in proceedings.

The INS decided not to deport 88 year old **Natalia Caudillo** to Mexico after media accounts brought her plight to the attention of her U.S. Representative and state legislators. INS officials began deportation proceedings against Caudillo, a U.S. resident for 79 years, because she voted illegally in Dawson County, Texas, in 1996. Caudillo said that someone had told her she could vote if she'd been in the country at least 50 years. Her vote came to INS' attention when she applied for citizenship in 1998. Caudillo has lived in the same house in Lamesa, in West Texas, for fifty years and has raised seven children. She has more than 50 grandchildren and great-grandchildren.

According to an account in the Dallas Morning News, the INS "decided it would not be prudent to pursue it." The acting district director in Dallas said that he asked an immigration judge to terminate the proceedings against Caudillo "for humanitarian reasons." Immigration Judge Edwin Hughes of Dallas granted the motion.¹⁵⁴

Even the Department of Justice under Attorney General Janet Reno recognized that prosecutorial discretion alone is an insufficient remedy for hardships resulting from the 1996 immigration laws, and its officials stated that legislative reform was necessary. Responding to the letter from House Judiciary Committee members, the Justice Department's Office of Legislative Affairs urged Congress to "reject the notion that prosecutorial discretion, even wisely exercised, can provide an adequate substitute for sound administrative adjudication ... we also need your support for remedial legislation."¹⁵⁵

Encouraging federal officers to exercise broader prosecutorial discretion cannot compensate for a defective law. A system of justice that relies on the initiative of individual civil servants to achieve a fair and just result is a system that cries out for reform.

Chapter 5

Retroactivity

One aspect of the 1996 act has, however, led to a number of deportations that strike many, including myself, as unfair. The act broadened the definition of crimes which are considered aggravated felonies for which no relief from deportation is available. The hardship has come about because this change was made retroactively. The new definition of aggravated felony applies to crimes whenever committed. Thus, aliens who committed crimes years before enactment of the 1996 act, crimes not considered aggravated felonies when committed, have become deportable as aggravated felons.

- Representative Henry Hyde
Congressional Record, Sept. 19, 2000, p. H7766



One of the most glaring injustices of the 1996 immigration laws is that they are being applied retroactively. This means that the greatly expanded grounds for deportation, restricted availability of relief from deportation, harsher detention rules, and reduced access to review by the federal courts apply to cases that began before the laws were changed. These changes also are being used to deport people for activities that occurred years before the statutes were enacted, even if their acts were not deportable offenses at the time they occurred.

As a general rule, laws are changed prospectively. As far back as the days of the Romans and the Code of Napoleon, civilized societies have followed the principle of “no punishment without law,” meaning that people should be aware of the legal consequences of their actions at the time they take them.¹⁵⁶ The idea of applying new laws to past acts goes against this principle and against longstanding notions of what is fair. *Ex post facto* laws are unconstitutional in the criminal law context and are strongly disfavored in others, but there is no prohibition against enacting immigration laws retroactively. Because many provisions of the 1996 laws are being applied retroactively, the fairness of those provisions is being challenged and the courts have been asked to review whether Congress intended these laws to operate retroactively.

Retroactive Application of the New Grounds of Deportation

When it created new deportation grounds before 1996, Congress usually specified that only convictions after their date of enactment would count.¹⁵⁷ Because Congress did not similarly restrict many of the 1996 provisions, activities that had no previous immigration consequences and have been forgiven and forgotten by the criminal courts provide a basis for deportation today.

Gabriel Delgadillo was born in Coahuila, Mexico, but came to the United States at the age of 15. Gabriel once was a migrant farmworker who volunteered to protect Cesar Chavez during a grape boycott. In 1967, he was drafted to serve in the Vietnam War and earned three medals for his service. When he applied for veterans’ disability benefits several years ago, a crime that he was involved in a decade earlier came to the attention of the INS. In 1988, Gabriel had let some friends borrow his car to commit a burglary. He pleaded guilty, served 14 months, obtained his GED, and entered a religious program for recovering addicts.

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In 1999, the 52 year old was arrested by the INS at his home in California on the basis of his aggravated felony conviction. Under the 1996 laws, he was left with no chance of remaining in the country he had served in battle. In addition, he faced mandatory detention and had to fight his deportation from a Florence, Arizona detention center.

Later that year, while Gabriel was still detained and fighting deportation, his sister died of a liver disorder. Gabriel also was suffering from serious liver disease. Several weeks later, detention proved too much for Gabriel and he decided to forgo any appeals and accept deportation to Mexico – leaving behind his wife and seven children, all U.S. citizens. “I feel for my kids,” he said. “I know the little ones are going to miss me. I know that.” In June 2001, the Supreme Court ruled that non-citizens who pleaded guilty to a crime prior to the enactment of the 1996 laws, and thus would have been eligible for a waiver of deportation, could not have the 1996 laws applied to them retroactively. But it was already too late for Gabriel. He was deported to Mexico in April 1999 and remains there to this day.¹⁵⁸

Many legal permanent residents who leave the United States even briefly are being detained and denied readmission because of old crimes. In some cases, the offenses for which they are stopped are so minor they would not be a basis for deportation if they had not left the United States. This change has come as a huge shock to many long term residents who had traveled in and out of the United States over the years without incident.

Jésus Collado has been a permanent resident of the United States since 1975. He and his wife operate a restaurant in New York City and have three children. In 1997, he went abroad for a two week trip. Upon his return, INS agents arrested him and detained him without bond. It would be almost one year before he was released.

The reason was that as a teenager he admitted having sexual relations with his underage girlfriend and pleaded guilty to contributing to the delinquency of a minor. Twenty-three years later, the INS branded Jesús an aggravated felon and sent him to a secure detention facility in rural Pennsylvania. An immigration judge there said he was ineligible to apply for any relief and ordered him deported. Fortunately, a documentary made by an Academy Award winning filmmaker brought his plight to public attention and he was eventually freed. Zealous legal representation resulted in reversal of his deportation order by the Board of Immigration Appeals because of an INS error, and the INS declined to renew proceedings.¹⁵⁹

Retroactive Elimination of Discretionary Relief

As discussed in Chapter Five, Congress also stripped away various long standing forms of discretionary relief from deportation. For many decades, immigration judges had the power to waive deportation for long term legal permanent residents who could demonstrate that their positive qualities outweighed their negative conduct. This usually involved a showing of family ties, rehabilitation, and the likelihood that deportation would pose a hardship for remaining family members. In 1996, however, Congress made it considerably more difficult for permanent residents to apply for relief and totally disqualified entire categories of previously eligible individuals. Since then, many deserving immigrants have been denied consideration for a second chance even though the United States has been their home for decades and their entire families are here.

These changes have been applied retroactively to individuals who already had applied for relief as well as to individuals who would have been eligible to apply if the government had instituted proceedings before the law changed. For them, the rules were changed midstream. Among them are individuals who were granted relief by immigration judges only to have the INS appeal, during which time the law changed to their detriment. Others had committed minor crimes long ago that did not render them deportable, but then found themselves facing permanent banishment from the United States upon the enactment of the 1996 laws.

Rene Alvarez has been a lawful permanent resident of the United States for more than 20 years. Born in Santiago, Chile, like thousands of his fellow citizens, he was forced into exile following a military coup in 1975, and he never returned. With the help of the United Nations and Amnesty International, he fled Chile, and in 1977 the United States granted him asylum.

Rene began a new life in the United States. He settled in Seattle, worked hard, and supported his daughter Yvonne, born in 1979. In 1986, however, he and several thousand of his coworkers at the Lockheed shipyards were laid off following a labor dispute. Rene looked for work unsuccessfully for the next two years, and eventually was forced to live with friends. It was then that he made what he would soon realize was a costly mistake. He got involved with drugs, which led to his arrest. Rene pleaded guilty in 1988 to a drug distribution charge and spent the next 33 months in a federal prison in Texas. He completed his jail time and was discharged from probation.

Just before he was released from prison, the INS initiated deportation proceedings. Rene's crime made him deportable, but he was able to apply for a waiver before the immigration judge. Rene had not been in trouble with the law at any other time in his life, as the sentence "gave me a lot of time to think." He also had a U.S. citizen daughter to support. After hearing the evidence of Rene's rehabilitation and strong ties to the United States, an immigration judge granted his 212(c) waiver request in September 1992.

The INS appealed the immigration judge's ruling. In March 1997 – after the appeal had languished for four and a half years – the Board of Immigration Appeals issued a one page boilerplate decision overturning the immigration judge's decision and denying relief because the law had changed. The BIA, applying the new law retroactively, ordered Rene – who now owned a construction company that employed five people – deported.¹⁶⁰

Danny Kozuba, of Mesquite, Texas, came to the United States when he was five years old. He served in the U.S. Army and has been a U.S. taxpayer for 30 years. He is married to Laurie Kozuba, a native-born U.S. citizen. In 1993, an immigration judge granted relief from deportation after Danny demonstrated that he had turned his life around since being convicted on drug related charges in 1988. The INS appealed the immigration judge's decision. While the appeal was pending, the law was amended, retroactively rendering Danny ineligible for relief and threatening to tear apart Laurie's and Danny's lives.

It took eight anxiety ridden years of living in legal limbo and numerous court rulings for Danny to obtain a new hearing and for the INS to change its position on his eligibility. He was given a new hearing in December 2001, and an immigration judge again granted

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him a waiver. In the midst of their ordeal, Laurie founded Citizens and Immigrants for Equal Justice, a grass roots organization of more than 1,000 families that lobbies for and offers support to American families threatened by the 1996 immigration laws.

Even though Danny's legal difficulties appear to be at an end, Laurie is still leading CIEJ in the fight for other families that have not been so lucky. "There are still plenty of people out there who need help," she said. "I didn't start this organization just to get Danny out of trouble. I started this organization because there was a real need to change the laws in this country to make them more fair."¹⁶¹

This aspect of the 1996 law was not explicitly written to be retroactive. The INS interpreted the provision to apply retroactively and pressed immigration judges and the Board of Immigration Appeals to support its interpretation. Initially, the BIA ruled that individuals who had applied for relief before the change in the law could continue to pursue their applications.¹⁶² At the urging of the INS, however, the Attorney General overruled the BIA and even decided that relief applications pending at the time the law changed should be disqualified.¹⁶³ Almost all federal appellate courts found the Attorney General's decision to be wrong. Courts reached this decision "on the principle that 'individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"¹⁶⁴

In an effort to curb further litigation and achieve greater uniformity, the Justice Department changed its position, and in the summer of 2000 it proposed a new regulatory interpretation.¹⁶⁵ Under the new regulations, 212(c) relief would again be available to individuals against whom the INS had commenced proceedings by April 24, 1996, whether or not they already had applied for it. Relief was not made available, however, to individuals against whom the INS had not initiated proceedings as of that date or who were deported under the previous interpretation. Many experts called the proposed rules arbitrary and predicted that they would not put an end to litigation.

The continuing litigation over the retroactive elimination of relief ultimately reached the Supreme Court in 2001, in the companion cases of *INS v. St. Cyr* and *Calcano-Martinez v. INS*.¹⁶⁶ The two cases involved several legal permanent residents who were eligible to apply for 212(c) relief at the time they pleaded guilty to deportable offenses, but who were not actually placed into proceedings until after the 212(c) provision had been repealed in 1996. The Justice Department argued that they were no longer eligible for the waiver and that the repeal of the waiver applied to any "new" deportation case – even those based on very old convictions. This was in spite of the fact that Enrico St. Cyr and the others in the case deliberately had negotiated pleas that preserved their eligibility to apply for the 212(c) waiver in the event that the INS later tried to deport them.

Agreeing that the Justice Department had gone too far in its interpretation of the 1996 law, the Supreme Court ruled that Mr. St. Cyr and the other legal residents still were eligible to apply for waivers, regardless of whether waivers would be granted. While Congress clearly intended other provisions in the 1996 laws to apply retroactively, such as the expanded definition of the term "aggravated felony," there was no such unmistakable intent in the repeal of the 212(c) waiver.¹⁶⁷ Absent this clear showing of intent, the Court would allow the provision to apply retroactively only if it would have been fair to do so. But because Mr. St. Cyr had sought to preserve his eligibility for the waiver by agreeing to the plea bargain that subsequently triggered deportation, it would have been contrary to "considerations of fair notice, reasonable reliance, and settled expectations"¹⁶⁸ to impose new rules after the criminal case had long been closed.

“Mark,” a U.S. citizen, is a 40 year old former police officer. He has been on dialysis for almost ten years and is on a kidney transplant list. His wife, “**Elizabeth**,” delivers car parts to provide the sole income for Mark and her two U.S. citizen children, ages 12 and eight. When the INS tried to deport her to her native Scotland for a minor drug conviction, Mark would have had to go with her and lose his place on the kidney transplant list.

Elizabeth is a native and citizen of Scotland who came to the United States as a teenager. She became a permanent resident in 1991. In 1994, Elizabeth responded to a police officer who was looking for drug dealers. She informed him that she believed a bag on the floor contained marijuana. He asked her to hand it over and she did. In 1995, she received a phone call from the police informing her that there was a warrant out for her arrest and asking her to report to the magistrate's office. Elizabeth complied and was given a court date. She was never placed under arrest and never advised that she had the right to an attorney. She presented herself to the court without legal counsel. The prosecutor took her into the hallway and intimidated her into pleading guilty to selling less than a half ounce of marijuana. She took the plea, paid a \$100 fine and received a 30 day suspended sentence. She thought that was the end of it and continued with her life. She traveled to Scotland about once a year to visit her sick mother.

In March 2002, she was stopped at the airport after a visit to Scotland, detained for a day, and put into removal proceedings. She was charged as an arriving alien removable because of conviction of a crime relating to a controlled substance and drug trafficking.

Her husband's dialysis, which he requires three times a week for three hours, had to be scheduled around her court hearings. They had to pay for hotel rooms and traveling expenses because they live four hours away from the court. The immigration judge in Elizabeth's case ultimately granted her a 212(c) waiver pursuant to the *St. Cyr* decision, but the prosecution of her case took an enormous financial and emotional toll on her and her family.¹⁶⁹

Xuan Wilson came to the United States at the age of four with her mother and stepfather, an American serviceman. Thirty-one years later, the wife and mother of three children faced deportation to Vietnam because she wrote a bad check for \$19.83 at a Safeway supermarket in 1988 when she was in the throes of a drug addiction. She conquered her addiction, and both her counselor and employer attested to her complete rehabilitation.

After the law changed, Xuan's conviction was reclassified as an aggravated felony. In 1997, Xuan was placed in deportation proceedings and an immigration judge ordered her deported. Xuan could not apply for any deportation relief, including asylum, even though Amerasians in Vietnam are victims of extreme discrimination and persecution. Xuan does not even speak Vietnamese. Her parents, husband, and children, all U.S. citizens, had to reconcile themselves to the fact that she might have to leave them and return to Vietnam after more than 30 years in the United States.¹⁷⁰ On April 24, 2003, after seven years of litigation, Xuan was granted 212(c) relief at an emotional hearing and permitted to remain in the United States.¹⁷¹

The Supreme Court's ruling in *St. Cyr*, however, is only a partial solution to the problem facing legal residents who were retroactively denied a chance to apply for the 212(c) waiver. Because the Court explicitly based its decision on the presumption that a legal resident pleaded guilty

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to an offense in order to preserve his or her eligibility for the waiver, it is unknown what effect the ruling will have on a person who contested a criminal charge and was convicted. Another problem is that because the Court also held that legal residents had to be eligible for the waiver at the time of their pleas, legal residents who had not met the seven year residency requirement by the date of the plea agreements will still not be able to seek waivers – even if they subsequently remained in the United States for many years or even decades afterward before facing removal under the new 1996 laws. This creates a unique problem for individuals whose offense did not carry deportation risks before 1996.

Another issue that the *St. Cyr* ruling has left unresolved is whether legal residents who were already deported, such as Rene Alvarez, after having been improperly denied the 212(c) waiver, will be allowed to return to the United States. While it would be especially cruel to ignore the suffering of illegally deported legal residents, the regulations proposed to implement *St. Cyr* make no such correction and continue to deny an opportunity to seek a 212(c) waiver to those who were deported before the decision.¹⁷²

Gerardo Antonio Mosquera Sr. was a child when he immigrated to the United States from Columbia in 1969. Along with his mother and five siblings, he came here to be with his father, a car dealer who had already immigrated to the United States. He married Maria Sanchez, a native-born U.S. citizen, and together they struggled to make ends meet on Gerardo's \$300 a week salary as a forklift operator. Together they had four children, the first of whom they named after Gerardo. Today, they have only three.

In 1989, Gerardo was arrested and charged after selling \$10 worth of marijuana to a paid police informant. He pleaded guilty to the offense and was given a 90 day jail sentence, three years of probation, and a fine of \$150. He eventually served some time for not reporting to his probation officer. Upon his release Gerardo was turned over to the INS to face deportation.

It was not until October 1996 that an immigration judge ordered him deported – and, because of the retroactive application of the law, Gerardo could no longer be considered for a 212(c) waiver. After his appeal was rejected the following year, Gerardo was deported to Colombia, a country he had not seen in almost three decades. By then, Gerardo's Spanish was rusty, and he had no idea how he would survive or what he would do with his life in a country where he is "a stranger."

Gerardo is not the only one who would spend the rest of his life paying for a 10 year old mistake; the family he left behind would suffer as well. His oldest son, 17 year old Gerardo Jr., who had to work after school to help the family make ends meet, became severely depressed over his father's deportation, skipping classes and frequently locking himself in his room. Three months after his father was deported, Gerardo Jr. shot himself. He died two days later – leaving behind an infant son of his own.

Gerardo Sr., nearly 4,000 miles from his family, begged U.S. officials to allow him to return temporarily. "I have to bury my son," he said. "I need to be next to my boy, somehow. I need to be with my family. This is the worst point in my life, and all I'm asking is, please let me be there."¹⁷³

His request was turned down, and even after *St. Cyr* made clear that he should have been able to apply for a waiver, no relief appears likely.

RETROACTIVITY AND THE *EX POST FACTO* CLAUSE

Retroactive applications of new laws go against the very grain of our legal system. We are taught that there are rules to follow and specific penalties for breaking the rules. Rewriting the rules and attaching new liabilities to old conduct undermines respect for the law. In the criminal law context, *ex post facto* laws are unconstitutional.¹⁷⁴ The devastating inequities of the 1996 laws demonstrate why they also should be avoided in the immigration context.

Why hasn't the retroactive application of deportation laws been ruled unconstitutional under the *Ex Post Facto* Clause? The 1996 laws, after all, impose severe new penalties on old instances of criminal misconduct, penalties that could not have been expected or predicted when the conduct took place. It is the unfairness of such new "surprise" penalties that the *Ex Post Facto* Clause was meant to prevent.

The answer lies in a significant distinction that has long existed in the deportation context. Late in the nineteenth century, the Supreme Court ruled – over vigorous dissent – that "deportation is not punishment" and that the basic constitutional rights and protections afforded to individuals accused of a crime thus do not apply to those who face deportation. This distinction between "deportation" and "punishment" was first set out in *Fong Yue Ting v. United States*, a case that upheld an 1892 law that required the deportation of any Chinese laborer who could not prove, with the help of a "credible white witness," that he was legally present in the United States.¹⁷⁵

Despite the racially suspect nature of this ruling, the Supreme Court has never seriously reconsidered this distinction between deportation and punishment. In 1954, in fact, the Supreme Court – in a ruling that upheld a law requiring the deportation of any person who had been a member of the Communist Party at any time before or after the law was passed – said that it was bound only by precedent to rule that the *Ex Post Facto* Clause was irrelevant:

Much could be said for the view, were we writing on a clean slate, that ... the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation. But the slate is not clean. ... And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors ...¹⁷⁶

This adherence to "unbroken rules of the Court" and the doctrine of *stare decisis* came only one week after the Court reversed another old, harmful precedent in *Brown v. Board of Education of Topeka, Kansas*, the decision that brought an end to racial segregation in public schools.

Retroactively Applied Detention Rules

After the 1996 laws went into effect, the Justice Department rounded up numerous individuals who did not face the prospect of deportation before 1996. They were incarcerated without bond or custody hearings, often at great distances from their homes and communities, while the INS pressed deportation charges against them under laws that did not exist at the time of

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the events that later triggered deportation charges. Again, numerous courts ruled that the Justice Department had taken its interpretation of the 1996 laws – specifically, a new “mandatory” detention provision – far beyond anything Congress had intended, by applying it retroactively to individuals who in many instances had never been incarcerated and did not represent any sort of danger to society. It was not until late 1999 that the Justice Department relented and agreed to apply the mandatory detention laws prospectively only to individuals who were released from criminal incarceration after the new detention law went into effect.¹⁷⁷

Retroactive Restrictions on Judicial Review

The 1996 laws restricted federal judicial review of certain types of immigration decisions, including the review of individual deportation orders based on criminal offenses, denials of discretionary relief, and detention without bond. Many pending appeals were dismissed. In addition, severe limitations were put on class action lawsuits and injunctions that had been effective in challenging widespread INS practices and abuses. As a result, decades old lawsuits were thrown out of court. This has made legal challenges to the retroactive application of the laws exceptionally difficult.

Congress also invalidated pending cases that affected tens of thousands of legalization candidates who had been denied the opportunity to legalize in the late 1980s.¹⁷⁸ These individuals had been fighting for more than a decade for the chance to apply for legal status. When Congress retroactively amended the Immigration Reform and Control Act of 1986 as part of its 1996 overhaul, these individuals were left fighting for their day in court.¹⁷⁹

Chapter 6

Restricted Access to Counsel



The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.

- Justice George Sutherland
Powell v. Alabama, 287 U.S. 45, 68-69 (1932)

Defending against deportation or pursuing relief before an immigration judge is a complex and often intimidating endeavor. The immigration laws are more complicated than ever, and the accelerated procedures present additional barriers to mounting a successful defense or achieving asylum or other remedies. Access to legal representation is vital for immigrants and refugees who cannot navigate the immigration labyrinth on their own. Individuals who are detained during the process face further impediments, including seeking, securing, and communicating with counsel.

Despite the high stakes, asylum-seekers and lawful permanent residents facing deportation do not have a right to government appointed counsel as do individuals facing criminal charges under the Sixth Amendment.¹⁸⁰ They generally have only a “privilege” of representation by counsel “at no expense to the Government.” 8 U.S.C. 1242(b)(4)(A).¹⁸¹ In some immigration processes, however, a legal representative is not allowed to be present or even consulted.

The laws enacted in 1996 further restrict access to counsel in a variety of ways:

- A person subject to expedited removal is not allowed to consult with or be represented by counsel, or to have counsel present during the process.
- The credible fear interview affords asylum-seekers only limited opportunities to access legal counsel and marginalizes the involvement of counsel.
- The role of counsel is diminished in administrative removal proceedings.
- The expanded use of detention makes it much more difficult, as a practical matter, to access and communicate with counsel.
- “Alien” restrictions on legal services programs further limit assistance for low-income individuals.

While valuable for all who are facing removal, legal assistance is indispensable for detained individuals (particularly for refugees seeking asylum) who have no access to sources of evidence or witnesses, do not understand our legal processes, and may have educational, cultural or psychological disabilities that make it difficult to articulate their experiences or to discuss their situations with government officials.¹⁸² The removal process is even more confusing and challenging for someone who does not read, write, or speak the English language. A lawyer, or qualified legal representative, makes an assessment of legal options and eligibility for relief, prepares the formal applications, identifies witnesses and gathers supporting documentary evidence, and helps the

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applicant focus on what is relevant to meet his or her burden of proof. The involvement of counsel is not only vital to the individual, it also facilitates the smooth functioning of the system and increases the probability that cases will be resolved in a just manner.

Indigent individuals who cannot find lawyers or private non-profit programs to represent them for free or at reduced cost must represent themselves in adversarial immigration court proceedings that are prosecuted by experienced government trial lawyers. A represented detainee is four times more likely to be granted asylum as one without a lawyer.¹⁸³ It is estimated that 90 percent of immigration detainees go without representation in removal proceedings.¹⁸⁴

“Francois” fled to the United States from his native Democratic Republic of Congo in 1996. He had been imprisoned by presidential security forces for belonging to a political party that opposed Congolese dictator Mobutu Sese Seko. He moved in with his cousin, who helped him file an application for political asylum. Francois went to his interview with his cousin as a translator. The asylum officer asked Francois what had happened to him in Congo. Francois replied that he had been “molested” by security forces and imprisoned. He provided few details in either his written application or his oral testimony, and presented no corroborating evidence. The asylum office declined to grant asylum and instead put Francois into deportation proceedings.

Francois came to the attention of the American University Washington College of Law International Human Rights Clinic in 1997, a few months before he was to appear before an immigration judge. A team of student attorneys took on his case. After interviewing Francois exhaustively, they learned that he had suffered brutal torture on several occasions at the hands of Congolese presidential security forces on account of his political opposition. Francois also provided the students with a Congolese newspaper article mentioning him by name as an opposition member. The students prepared thorough written testimony, secured medical and psychological proof of the torture, and collected hundreds of pages of documents attesting to the brutality of Congolese security forces against political opponents. They submitted these along with the newspaper article mentioning Francois by name and a detailed legal brief to the immigration court. Upon reviewing their submission, the INS decided not to oppose the case, and an immigration judge granted Francois political asylum in December 1997.¹⁸⁵

Expedited Removal Procedures Limit Access to Counsel

Individuals facing the expedited removal, administrative removal, and reinstatement processes discussed in Chapter Two have little or no opportunity for legal representation. Aside from dispensing with formal evidentiary hearings, the accelerated timeframes in most cases do not allow individuals time to consult with or involve a lawyer. Moreover, lawyers are excluded from the expedited removal process and legal assistance is not even permitted until the individual establishes that he or she is seeking asylum. At that point, the asylum-seeker is scheduled for a credible fear interview and informed that he or she may consult with an attorney or other representative. An individual who is unfamiliar with this process and afraid to confide in the inspections officer will be deported without ever consulting a lawyer or seeing an asylum officer.¹⁸⁶ Those who are referred to asylum officers may manage to obtain a lawyer for the credible fear interview, although the entire process transpires very quickly. The attorney, however, is relegated to being an observer who is not permitted to speak or advocate on behalf of his or her client unless the officer offers the attorney that opportunity.¹⁸⁷

There also is no opportunity for meaningful representation in the expedited administrative removal process even if the individual is represented when the 10 day period for responding to deportation charges begins. The reinstatement process denies both a forum in which to present a case and any role for a lawyer, even if an individual has one, and there is no review.

Arumugam Thevakumar, an ethnic Tamil from Sri Lanka, arrived in New York's JFK airport on a flight from Istanbul in January 1999. Arumugam had fled Sri Lanka after being persecuted by the Sri Lankan army on account of his ethnicity. Upon arrival in the United States, he was placed in expedited removal proceedings. Arumugam tried to explain through an interpreter that he was a refugee and needed asylum. The translator laughed and said he did not know how to translate that into English. Confused and afraid of being sent back to Sri Lanka, Arumugam refused to sign the papers that the INS presented. At one point the officer threatened to withhold food if he did not sign. When he still refused, an INS officer pried his fingers open and forcibly took his fingerprints.

The INS placed Arumugam in a detention facility, where he finally was able to telephone a U.S. citizen cousin. His cousin contacted a lawyer, who in turn contacted the INS to make sure the INS understood that Arumugam wished to apply for asylum. Despite these communications, the INS took Arumugam from the detention facility in handcuffs and brought him back to the airport. Arumugam asked to speak to his attorney but the INS ignored his request. Desperately afraid of being returned to Sri Lanka, Arumugam tried to run away, but he was caught after running a few steps.

Instead of giving Arumugam the credible fear interview to which he was entitled, INS deported him to Turkey, where his flight to New York had originated. Turkish officials jailed Arumugam for four days, beating and interrogating him. They eventually released him and gave him the address of the United Nations High Commissioner for Refugees office in Ankara, halfway across the country. After a brutal trip, during which he suffered from cold and hunger, he arrived at the United Nations office and begged for refugee status. His fate is unknown.¹⁸⁸

Legal Needs of Children

Children who arrive in the United States unaccompanied by their parents or other legal guardians present a special concern. Some of these children are escaping political persecution, while others often are fleeing war, famine, abusive families, or other dangerous conditions in their home countries that may give rise to asylum and other claims to relief. When they arrive, these children generally have no legal status or support system and face a stressful and confusing ordeal.

Children, like adults, have the "privilege" of representation by counsel "at no expense to the government." They do not receive appointed counsel. Even when children are involved, immigration court is an adversarial setting, presided over by an immigration judge and prosecuted by an experienced government trial lawyer. These cases decide a child's future.

Children who have no family members in the United States are exceptionally vulnerable. Detention, often in isolated areas, further diminishes a child's ability to find legal assistance. More than 5,000 children were detained in 2002 in more than 90 different locations.¹⁸⁹ Thirty-five percent of these children were held in secure facilities built for juvenile offenders because of a lack of foster care and family-type shelters.

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Under the current system, young children often represent themselves in immigration proceedings and must make life altering decisions without any professional assistance or adult guidance. With little understanding of the law and legal process, nervously they wait for their turn to appear before an immigration judge. Even though an immigration judge may not accept an admission of deportability from a child who is under 18 and not accompanied by a guardian, relative or adult friend,¹⁹⁰ the rule does not preclude a judge from accepting a child's admission to factual allegations that, in turn, can be used as a basis for finding the child deportable.¹⁹¹ It is estimated that as many as 80 percent of these children appear in court without a lawyer, guardian *ad litem*, or adult assistance.¹⁹² Without legal assistance, many of these children are deported – often to potentially dangerous situations with virtually no follow up to find out what happens to them.

As the case of Elian Gonzalez highlighted, children in immigration proceedings need various forms of social and legal support. Outside the immigration setting, counsel is appointed where children are being prosecuted and important rights are at stake. The Supreme Court recognized over 35 years ago that a “child requires the guiding hand of counsel at every step in the proceedings against him.”¹⁹³

*The juvenile needs assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.*¹⁹⁴

International guidelines, moreover, require that an advisor or guardian should be appointed whenever a child is being detained or deprived of his or her liberty.¹⁹⁵ Non-profit organizations and the private bar are doing what they can to assist children who seek to remain in the United States. But the growing numbers of these children, combined with the law's failure to provide counsel for them, is creating an increasingly dire situation.

José Luis and José Enrique Oliva, 15 year old twins born in Honduras, were abandoned by their mother as three week old babies. Their care was left to relatives who beat them violently with kitchen utensils, clubs, sticks, stones, and metal bats. The two children fled the abuse by running away together to the United States. Starting their journey from central Honduras, they arrived in the United States seven weeks later, completing the last leg of their journey by swimming across the Rio Grande. They were quickly seized by INS authorities, held in a juvenile detention center, and headed down a one way deportation track back to the abusive relatives from whom they had fled.

ProBAR, an ABA project in South Texas that represents detained asylum-seekers, arranged for one of its lawyers to represent the children. Arguing that the young boys could face death at the hands of gangs or death squads that target street children in Honduras, the ProBAR lawyer convinced an immigration judge that the twins should be granted asylum. The INS appealed the decision.¹⁹⁶ Eventually the case was closed. The boys live in Michigan, where they go to school and play soccer. Their asylum cases remain pending at the BIA.¹⁹⁷

Santos Ramon Zepeda Campos fled the streets of Nicaragua at age 15. He found himself there after his mother, who used to beat him and scar him with burning sticks, sold him into service as a farmhand. When the owner of the farm died, Ramon feared increased abuse from her two sons and had nowhere to go other than the streets. He slept on a church doorstep, in a tree, anywhere that could provide shelter from gangs and the police. Eventually Ramon ran out of places to hide. He embarked on an 18

month, 2,400 mile trek northward, suffering hunger, fear, exhaustion, and attacks until finally crossing the border into the U.S. There, his physical and emotional survival were rewarded with two months in an Arizona adult detention center before the Florence Immigrant and Refugee Rights Project, a non-profit legal assistance organization, intervened. They were able to convince the INS that he was in fact a child and needed to be housed in a setting appropriate for juveniles.

Ramon was one of those fortunate enough to secure *pro bono* counsel. With the assistance of his attorneys, he successfully proved his need for asylum. The judge's grant of asylum should have secured Ramon's release. The INS, however, decided to appeal Ramon's case, and his dream of freedom again was deferred. Ramon's attorney secured a temporary restraining order that allowed Ramon to be declared a ward of the state of Washington, released from INS detention, and placed in foster care. Finally, in October 2002, the BIA affirmed the grant of asylum. Today, Ramon continues to live with a foster family.¹⁹⁸

In jail they called her "**the girl who cries.**" Found on a ship of Chinese refugees, she cried almost every day for the eight months that she was held at Portland's juvenile jail. The Chinese girl, who was then 15, did not understand English, was unprotected by parents, was forced to eat unfamiliar foods, and was in the county jail as her first home in the United States. Her "crime," seeking asylum in the United States from persecution as a third child, a violation of China's strict family planning policy. As the third child, she was viewed as a "non-person" who could not attend school, work for the government, or own land. In October 1999, an immigration judge granted her political asylum in the United States. Despite her newly granted legal status, the young girl remained in a juvenile jail for another six weeks because the INS could not decide where to place her. Only after her extended detention came to the attention of the public and her lawyer filed suit in federal court was she finally released to a foster family.¹⁹⁹

Marcos, a teenage Nicaraguan boy suffering from physical and mental illness, was transferred from Texas to Pennsylvania to Ohio to California and deported back – all before he could secure advice from competent counsel. Marcos fled his abusive father and street violence in Nicaragua. Upon his arrest by the INS in early 2000, he was held in several facilities in Texas where he reportedly was diagnosed with serious medical problems and attempted suicide on two occasions. He was transferred to Pennsylvania and subjected to medical treatment including injections he did not understand. He was punished with placement in solitary confinement due to his reported aggression towards himself and staff. He was subsequently transferred to a psychological hospital in Ohio and then on to a remote, rural secure facility in California. By the time *pro bono* counsel was secured for Marcos, it was too late, he had been deported back to Nicaragua, to an uncertain fate.²⁰⁰

Similarly, a child who has been "abused, abandoned or neglected" may be eligible for immigration relief known as "special immigrant juvenile status," but this relief also is complicated as it requires, among other things, obtaining an order from a juvenile court judge.²⁰¹ Other forms of deportation relief include applications for legal status under the Violence Against Women Act, the Nicaraguan Adjustment and Central American Relief Act, "cancellation of removal," and voluntary departure. All are difficult to obtain without legal counsel.

American Justice Through Immigrants' Eyes

Jim Wang is a teenager living in Richmond, Virginia. He likes soccer and plays the flute. Jim was born in Fujian province in China. When he was quite young, his mother died. His father could not continue to care for him. He took Jim to the airport and put him on a plane alone to live with relatives in New York. He was only eleven.

When Jim arrived in Honolulu, the INS took him to a detention center. Shortly thereafter, he was moved to another center in Los Angeles and later to one in Arizona. After then, he lived with his aunt in New York until a family emergency required her to return to China. He then lived briefly with an uncle.

When he was 12, the INS took him to Commonwealth Catholic Charities in Richmond. Catholic Charities has a program for unaccompanied immigrant children and arranged foster care for him with a family who had adopted another child from China.

In the meantime, the INS was trying to deport Jim but he did not have a lawyer. His social worker called an immigration lawyer with Catholic Charities in Washington, D.C. She helped him obtain a green card under a special law for children who do not have families in the United States or abroad to whom they can return. During the process, Jim says, "I was always afraid that I would be uprooted again and sent back to China. Sometimes I think about the children I met in Arizona and wonder where they are now."²⁰²

Restrictions on Legal Services Organizations

Programs funded by the Legal Services Corporation (LSC) are the primary source of legal assistance for indigent and low-income individuals across the nation, but this critical resource is not available to many people with immigration problems, including asylum-seekers and unaccompanied children. The reason is that LSC funds only may be used to represent citizens, lawful permanent residents, refugees, and a few other specified groups of non-citizens.²⁰³

Legal services organizations that receive funds from the LSC also often receive funds from other sources. In the Omnibus Appropriations Act of 1996,²⁰⁴ however, Congress extended the "alien restrictions" to all funds received by an LSC grantee from non-governmental sources.²⁰⁵ Many legal services programs previously had used foundation grants and other non-LSC money to represent clients in need without regard to their citizenship or immigration status. Thus, the limited resources that had been utilized to assist non-citizens with legal problems were no longer available. *Pro bono* lawyers, along with religious-based and other non-profit organizations, have worked hard to fill the void, but this is an uphill battle that grows steeper everyday, as funding for enforcement, detention, and deportation continues to rise.

Chapter 7

Excessive Use of Detention



Eventually I made it to America where I thought I'd be taken in, where I thought I would be safe. But instead of finding safety, I'd found a jail cell – or actually a series of cells. I was now in my fourth prison. I had been beaten, tear-gassed, kept in isolation until I nearly lost my mind, trussed up in chains like a dangerous animal, strip searched repeatedly, and forced to live with criminals, even murderers. ... My teachers in Africa said that America was a great country. It was the land of freedom, where people were supposed to find justice. But I was delivered into a dark corner of America where there was no justice. There was only cruelty, danger, and indifference.²⁰⁶

- Fauziya Kassindja, 19 year old from West Africa
Do They Hear You When You Cry, 1997

The numbers are telling: approximately 202,000 individuals spent some time in INS custody in 2002 alone.²⁰⁷ In 1994, the Immigration and Naturalization Service had approximately 5,500 persons in detention on any given day;²⁰⁸ by 2002, that daily average had increased to 20,282.²⁰⁹ From 1994 to 2002, the INS' detention and removal budget soared from \$239 million to \$1.1 billion.²¹⁰ Now that the INS has been merged into the Department of Homeland Security, the detention capacity is expected to grow.

The dramatic rise in immigration detentions is attributable directly to 1996 statutory changes that require the government to detain, without bond, arriving aliens who appear to be inadmissible, individuals who are facing deportation on specified grounds, and persons with final deportation orders. This trend is unlikely to change in light of the new emphasis on immigration enforcement after 9/11 combined with the transfer of immigration functions to the Department of Homeland Security and a landmark decision by the Supreme Court in *DeMore v. Kim*²¹¹ validating immigration detention.

As larger numbers of people are detained, the government has had to build new detention facilities and to contract with private prisons and with state and county jails for more beds in existing facilities. More than 55 percent of immigration detainees are incarcerated in local, county, or state jails, where they are housed with – and subject to the same conditions as – inmates serving criminal sentences. They are not, however, criminal inmates; they are “administrative detainees” who are being held for civil immigration purposes.

Detention arises in four contexts. First, many arriving individuals who are seeking admission to the United States are detained without bond. Second, people may be detained while deportation hearings are pending; those who are charged on criminal and national security grounds are held without bond until their removal proceedings are concluded. Third, people with final deportation orders that the INS cannot carry out may be detained indefinitely. And fourth, children under the age of 18 may be detained when there is no suitable adult relative or legal guardian or foster care placement.

Detention of Returning Immigrants and Asylum-Seekers at U.S. Borders

Legal permanent residents returning from brief travels abroad once were treated for immigration purposes as though they had never left the United States. Under the 1996 laws, however, returning individuals can be detained without bond until an immigration judge

decides whether they are eligible for admission.²¹² Some legal permanent residents have been subjected to prolonged detention on the ground that they are “inadmissible” on account of offenses they committed before leaving.

Emma Mendez de Hay of Puyallup, Washington had just returned from a vacation in Italy with her fiancé in September 1999. She was looking forward to seeing her four children and giving them the presents she had brought back. When she arrived in New York, however, the immigration officer told her to proceed to secondary inspection. There, INS officers confronted her with an eight year old minor drug conviction and arrested her. She spent the next six months in a detention center operated by the Bureau of Prisons in Louisiana, far from her home, children and lawyer in Washington state.

In 1990, Emma was arrested for relaying a message to a caller on behalf of her cousin, who was a guest in her home at the time. Her cousin received a call and, explaining that he did not speak English well, asked Emma to inform the caller that he could not help him today, but that he would help him tomorrow. Emma relayed the message to the caller, who, she would later discover, was an undercover federal drug agent. Emma was arrested and charged with “use of a communication to facilitate the distribution of cocaine.” On the advice of her lawyer, Emma pleaded guilty and was sentenced to probation.

Although Emma had lived in the United States for more than 25 years, she was treated as an “arriving alien” and was subject to detention. While she was detained, her 20 year old daughter Vanessa had to drop out of college to get a job and support the family. Eventually, media coverage and public pressure led to Emma’s release but, in spite of her many equities, an immigration judge ordered her deported. Fortunately, in light of the Supreme Court’s ruling in *St. Cyr*, Emma was granted a waiver of deportation in 2002 after spending years in legal limbo. But even with this relief she would likely face a similar ordeal if she tried to take another trip abroad.²¹³

Ralph Richardson once had a wife and three children. They lived in a home near Atlanta, Georgia and he supported them by running two small businesses. He lost it all – family, home, and business – when he took a weekend trip to his native country of Haiti.

Ralph immigrated to the United States as a permanent resident when he was two years old. At age 31, Ralph took his first trip outside the United States since entering 29 years earlier. On October 26, 1997, Ralph returned to the United States. He would spend the next three years and eight months in INS detention.

During immigration inspection, Ralph was asked about and admitted a conviction for a concealed weapon at age 18 and another several years later for drug possession. Ralph was placed in removal proceedings and taken to the Krome Detention Center in Miami. The INS claimed that, despite Ralph’s strong ties to the community, he was a flight risk.

Ralph fought the INS tooth and nail in the courts. He successfully battled for a writ of *habeas corpus*, but the INS obtained a stay. He then successfully appealed to the Supreme Court an Eleventh Circuit decision denying him bond. The Court granted *certiorari* and vacated the Eleventh Circuit decision, only to have the Eleventh Circuit issue the same decision again on different grounds. Finally, he fought in state court and

eventually won vacation of his convictions. The INS, however, continued to detain him and embarked on a campaign to influence the Florida State Attorney to prosecute him again.

By this time, Ralph had lost everything that meant anything to him. His wife had divorced him. He had lost his businesses. His house had burned down. In June 2001, broken spirited and depressed, he gave up all his appeals and accepted removal. On June 28, 2001, the Supreme Court struck down indefinite INS detention. Ralph, however, was already in Haiti, where he remains to this day.²¹⁴

Asylum-seekers fleeing persecution also can expect detention once they reach the United States. Even after they pass the credible fear interview, they may be confined in detention facilities while they undergo the asylum process, causing continued suffering. The Department of Homeland Security announced in March 2003 that asylum applicants from certain countries would not be considered for release even after they establish a credible fear.²¹⁵

In some districts, the practice has been to continue detention of asylum-seekers absent “urgent humanitarian reasons or a significant public benefit” that warrant their release.²¹⁶ The Washington representative of the U.N. High Commissioner for Refugees repeatedly has called on the United States to stop detaining people seeking asylum and to consider alternatives to detention while their cases are processed.²¹⁷

Abraham Zuma was detained by the INS for nearly three years while he waited for his asylum application to be processed. He had fled to the United States after being imprisoned and tortured in Kenya for six years for participating in a demonstration in favor of a multi-party government. Abraham initially represented himself in his asylum application, and it was denied. He also helped an illiterate friend with whom he had fled and who had suffered similar persecution; his friend was granted asylum and released. Abraham found a lawyer to help with his appeal through the American Friends Service Committee, but it took a full year before his attorney could even obtain the hearing transcript. Finally, the appeal was processed and the Board of Immigration Appeals sent the case back to the immigration judge for a new hearing. The judge again denied asylum and again Abraham appealed. This time the BIA granted asylum.

Abraham remained in detention throughout the duration of his case. He attempted suicide several times because of his overwhelming sense of hopelessness and uncertainty. “Criminals know what their sentence is, but refugees stay inside,” he told a reporter for the *Village Voice*. “You have no idea when you might get out and you fear that they might send you back to the place you had to run away from.”²¹⁸

When he was released in March 2000, Abraham found it difficult to adjust after suffering severe trauma in Kenya followed by three years of INS detention. He had nowhere to go and no one to whom to turn. Today, Abraham is waiting to become a permanent resident. The effects of torture followed by lengthy INS detention, however, have not left him, and he still does not feel that he has overcome his ordeal.²¹⁹

Diebo Kuna was detained by the INS at the Elizabeth Detention Center in Elizabeth, New Jersey for nearly two and a half years. She was released in August 2000. With the aid of persistent lawyers, she will be allowed to remain in the United States under the Convention Against Torture. A native of Congo, Kuna arrived in the United States

seeking protection from the violence inflicted by her husband, a soldier with ties to the former dictator who was responsible for numerous atrocities and human rights abuses.²²⁰

Tesfu Araya was studying in India when suddenly he became stateless. Tesfu was born and raised in Ethiopia. All his life, Tesfu had carried an Ethiopian passport. In 1998, while Tesfu was studying for a master's degree in New Delhi, the province of Eritrea seceded from Ethiopia, prompting bitter fighting between the two countries. The Ethiopian embassy cancelled Tesfu's passport and told him that he was no longer Ethiopian. Tesfu's family is of Eritrean descent, and thus had their Ethiopian citizenship revoked.

Like many people of Eritrean descent, Tesfu's family suffered greatly at the hands of the Ethiopian government. The Ethiopian government confiscated their family home. Tesfu's brother was arrested, detained, tortured and finally deported to Eritrea.

Tesfu understandably was reluctant to return to Ethiopia, even if he would have been permitted into the country. Eritrea refused to issue him a passport. Tesfu finally went to his uncle in Kenya.

Tesfu tried to apply for asylum in Kenya but was faced with corrupt government officials who required bribes to process asylum applications. Tesfu decided to join his two U.S. citizen siblings in the United States. He entered the country in May 2001 with false documents but immediately informed immigration officials that he wished to apply for asylum. The officials detained him. Six months later, an immigration judge granted Tesfu asylum. The INS appealed, however, and Tesfu remained incarcerated. After another eight months of imprisonment, the Board of Immigration Appeals overturned the immigration judge's decision and ordered Tesfu removed to Ethiopia. A federal court declined to intervene. But Ethiopia refused to take Tesfu back and, unable to deport him, the U.S. government finally set him free in September 2003.²²¹

Mandatory Detention of Legal Residents

Freedom from physical detention is a basic human right that is embedded in the Constitution.²²² In our society, incarceration usually is reserved to punish individuals who have committed serious crimes, and even then pretrial detention is limited.²²³ As far as immigration detainees are concerned, however, an exception has been made to this most fundamental human right.

The INS historically detained relatively few people in deportation proceedings. If a person was not released on his or her own recognizance, the INS ordinarily set a bond to ensure his or her appearance at the immigration hearing, and the individual could ask an immigration judge to lower the bond. The judge's decision was subject to review by the Board of Immigration Appeals. In approving a mandatory detention provision as part of the 1996 laws, Congress changed this procedural scheme; custody hearings and bond were eliminated for anyone charged with being deportable for a wide range of offenses.²²⁴

There was extensive litigation over the validity of a similar mandatory detention provision in the 1988 Anti-Drug Abuse Act.²²⁵ Most courts that were confronted with the issue found detention without bond or without an individualized custody hearing to be unconstitutional.²²⁶

Even the few courts that held these provisions to be valid indicated that, in some cases, detention could be inappropriate and subject to *habeas* review.²²⁷ Congress repealed the mandatory detention provision of the law in 1990 to restore bond and custody hearings.²²⁸

In 1996 Congress disregarded the prior legal authority and approved a mandatory detention requirement once again.²²⁹ The current statute requires the detention of even legal permanent residents and prohibits their release for the duration of administrative proceedings if they are charged with removal for any one of over 20 different types of offenses. Because the INS did not have the capacity to hold all immigrants facing detention under the new law, the Attorney General decided to phase in the changes over a two year transition period. Full implementation of the permanent rules took effect on October 9, 1998.²³⁰

Under these rules, the INS initially detained every non-citizen being deported for crime-related reasons who came into INS custody. This took place even if the underlying criminal behavior had occurred many years earlier.

After numerous federal courts disagreed with its interpretation of the law, the INS slightly modified its mandatory detention policy.²³¹ Under the revised policy, issued in July 1999, individuals who completed their criminal sentences on or before October 8, 1998 would qualify for custody hearings and release on bond while their deportation cases are pending;²³² anyone who did not complete their sentence (including sentences of probation) until after October 8, 1998, however, would remain subject to mandatory detention without the possibility of release.

Long time legal permanent residents who have never been incarcerated or whose brief sentences were completed after October 8, 1998 are among the individuals detained under the newer provision. Under the pre-1996 immigration law, many would not even have faced deportation and, if they had, would have been eligible for relief. Still others cannot endure long periods of incarceration in difficult conditions and give up the few rights they may enjoy.

“Rudy,” a Texas native, is struggling to raise four children on his own. The children are growing up without their mother, “**Rosa**.” Rudy and his children are angry, distressed, saddened and traumatized by the loss of Rosa, as would be any family who has been permanently separated from the central figure in their lives.

Rosa came to the United States from Mexico as a young child with her parents. They acquired lawful permanent residence in the late 1980s. In 1993, Rosa was arrested for drug possession. She maintained her innocence through five long years of legal proceedings. In 1998, when she and Rudy could no longer afford to continue the legal battle, they took their lawyer’s advice and Rosa pleaded guilty to possession of a controlled substance with intent to deliver. Before pleading, Rosa and Rudy asked the lawyer if there would be any adverse immigration consequences. He assured them there would not. Rosa was sentenced to ten years of probation.

In May 1999, at her regularly scheduled probation meeting, INS officers took her into custody without a warrant. For the next five months, she was held without bond at a detention facility in Laredo, Texas. Shortly after her arrival, she was ordered to clean the dormitory. She had just had carpal release surgery and had a three inch incision on her wrist. When she protested, the guard told her that she would be placed in solitary confinement if she did not comply. Rosa cleaned the dormitory and suffered extreme pain and permanent disfigurement when her stitches were ripped loose. She endured even worse mistreatment at the hands of the guards but refuses to discuss it. The abuse she suffered there was so horrible that Rosa gave up her fight and accepted deportation.

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Rosa lives in Mexico now, doing menial work whenever she can find it. Rudy works two jobs to support her and the children. Once or twice a year, Rudy spends thousands of dollars to bring his family to Mexico to visit her. Rosa's parents, brothers and sisters, all of whom reside legally in the United States, are devastated. Rudy fears that his children will grow up holding a grudge against the country that took their mother away from them. He himself no longer trusts his government and is bitter that the government tore his family apart.²³³

Although individuals who are denied custody hearings and bond have no direct route of appeal to the federal courts, the constitutionality of mandatory detention was challenged in the courts through *habeas* review. By mid 2002, four circuit courts had found the provision unconstitutional as applied to the legal permanent residents who challenged it. The Supreme Court, however, by a narrow five to four majority, upheld the statute mandating the detention of lawful permanent residents during removal hearings without bond or any opportunity to show they are not a danger or flight risk pending civil immigration hearings.²³⁴

Hyung Joon Kim came to the United States when he was six years old and became a lawful permanent resident in 1986, when he was eight. He was convicted of burglary as a teenager in July 1996. A year later, he was convicted of "petty theft with priors," a crime the INS says constitutes an aggravated felony.

Immediately after completing his sentence, the INS took Hyung into custody and initiated removal proceedings. No bond was set and no custody hearing was provided. After six months of detention, Hyung sought *habeas corpus* relief. The district court held that mandatory detention was unconstitutional, noting that Congress could have accomplished its goals by providing individual bail hearings. The INS appealed to the Ninth Circuit Court of Appeals and lost again.²³⁵ The INS then sought Supreme Court review. The sole relief Hyung sought was a hearing to show that he is not a danger or a flight risk. The Supreme Court, however, found that Hyung and individuals like him may be detained without such a hearing.

Indefinite Detention

Some people are facing indefinite incarceration long after their deportation has been ordered. Known as "lifers" and "unremovables," these men and women remain in custody only because the U.S. government cannot deport them from the United States and chooses not to release them.

Current law gives the INS 90 days to deport individuals with a final deportation order and requires those with criminal convictions to be detained during that period.²³⁶ The question arises as to what happens after the 90 day period when, for a variety of reasons, certain individuals cannot be deported. Many such people are subjected to indefinite detention. These "lifers" usually are from countries with which the United States does not have diplomatic relations (such as Cuba), or where there is political upheaval or no functioning government (such as Somalia), or from one of the few countries that refuse to cooperate with the United States by issuing travel documents.²³⁷ In January 2004, the government disclosed that over 1,100 "lifers" were in this situation, including 920 Cubans who arrived during the 1980 Mariel boatlift.²³⁸

Son Thai Huynh was born in Vietnam in 1968 to a Vietnamese mother and U.S. citizen father. He has never met his father, who was a member of the U.S. Armed Forces. At the age of 15 he came to the United States as a refugee with his mother and four siblings. At the time, he had no formal education and was illiterate. He later became involved with a group that “influenced me to participate in illegal activities.” Son was arrested numerous times for non-violent offenses and, in October 1995, pleaded guilty to residential burglary. Because of his record, he was treated as a habitual offender and sentenced to 33 months in jail. The INS took him into custody when he was released early in August 1997, and three months later he was ordered deported as an aggravated felon. The INS immediately asked the Vietnamese Embassy for the travel documents needed to deport him, but to date none have been received and none are expected anytime soon.²³⁹

José Fernandes was born in Angola in 1961 when it was a colony of Portugal. He came to the United States in 1971 as a legal permanent resident and has lived in the United States continuously since then. In July 1995 he pleaded “no contest” to drug charges. Based on several convictions, he was sentenced to 10 years in prison, with all but two years suspended.

In October 1995 the INS placed José in deportation proceedings. He was advised that a 212(c) waiver was an option, and a 212(c) hearing was scheduled for August 1996. But following the change in the law, the immigration judge ordered José deported on the ground that he no longer had any relief available. He attempted to file an appeal with the BIA but mistakenly filed it with the INS. José completed his criminal sentence on September 20, 1996, and was immediately taken into INS custody. The INS attempted to deport him to Angola, Portugal and Cape Verde, but their governments all refused to accept him. In April 1999, the INS conceded that his deportation could not be accomplished in the near future. He was released after a U.S. District Court found that his continued indefinite detention violated his substantive due process rights under the Fifth Amendment.²⁴⁰

Donald Seretse-Khama was born in Liberia in 1972. He came to the United States with his family when he was eight years old. Ten years later he became a permanent resident. In 1993, he was convicted of a drug offense and sentenced to eight years in prison. The INS initiated removal proceedings on the basis that Donald had committed an aggravated felony. Donald won an early release from prison, but rather than be released he was transferred to INS custody. One month later, on September 3, 1993, an immigration judge ordered him deported to Liberia. Liberia, however, refused to issue the necessary travel documents that would allow the INS to deport him because Donald has no family left in Liberia. An INS deportation officer recommended that Donald be released, stating that he would not pose a threat to the community. The officer’s supervisor did not concur and Donald remained in detention.

Over the next two years, several more custody reviews would take place. Despite the detention officer’s repeated recommendations for release, and the supervisor’s eventual concurrence, Donald remained in detention. On June 28, 2001, the Supreme Court issued its decision in *Zadvydas v. Davis*,²⁴¹ holding that the INS cannot detain people beyond a six month period while awaiting deportation if there was no significant likelihood of deportation in the reasonably foreseeable future.

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In October 2001, the INS again refused to release Donald, who had now been in INS detention for over three years, stating that his deportation would occur in the reasonably foreseeable future. There was, however, no basis for this assertion. In June 2002, Donald had another custody review. This time he was denied release because he had not made an attempt to find an alternate country to be deported to. He took his case to the United States District Court for the District of Columbia, which ordered his release, four years after he had been transferred to INS custody.²⁴²

Before the enactment of the 1996 laws, the INS had six months to deport an individual after the entry of a final order of deportation.²⁴³ During the six month removal period, the detained person could receive a custody hearing before an immigration judge and administrative review by the BIA and, if not released, further review of the determination by a federal court.²⁴⁴ This changed when, in 1996, Congress shortened the length of the removal period to 90 days but added that deportees with old criminal convictions could be detained "beyond the removal period."²⁴⁵

The government took the position that this authority extended indefinitely. In the case of *Zadvydas v. Davis*,²⁴⁶ however, the Supreme Court disagreed. The Court ruled that the statute implicitly authorized detention beyond the removal period for only a "reasonable" amount of time, and that six months is a reasonable time when someone cannot be deported within the 90 day removal period. Accordingly, once a non-citizen had been detained for six months after receiving a final removal order, the government would have to prove that removal was likely to occur in the "reasonably foreseeable future" before any further detention would be allowed.²⁴⁷

In response to the Supreme Court's decision, the INS issued guidelines and interim rules for periodic custody reviews of individuals who have been ordered removed.²⁴⁸ These guidelines and regulations have shortcomings and will not eliminate indefinite detention.

A major flaw in the INS' interpretation of the *Zadvydas* ruling is that, while hundreds of detainees from Cuba, Laos, and Vietnam (which have no repatriation agreements with the United States) have been released, the government has detained the citizens of other countries far beyond the six month period established by the Supreme Court, maintaining that it would – eventually – be able to remove them. In doing so, the INS ignored the Court's observation that "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."²⁴⁹

The INS also insisted that the ruling does not benefit "parolees" – individuals who have not technically been admitted to the United States but who have been allowed by the government to reside here anyway, often for many years. A disproportionately large number of parolees have come from Cuba, Laos, and Vietnam – the three countries that are the most likely to refuse to take their citizens back if they are ordered deported from the United States. Consequently, parolees from these countries are the most likely to be subject to indefinite detention, in spite of the Supreme Court's decision in the *Zadvydas* case.

Although the INS has been dismantled, these interpretations and practices continue to be followed by the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE).

Detention of Children

For many years, immigration authorities routinely have incarcerated unaccompanied minors. Some children are escaping political persecution, while others are fleeing war, famine, abusive families, or other dangerous conditions in their home countries. They generally face a stressful and confusing ordeal for which they are unprepared.

Most unaccompanied immigrant children speak little or no English and are rarely aware of their rights under U.S. law. Immigration authorities frequently detain them in secure facilities and sometimes mix them with juvenile offenders while their cases proceed through the immigration court system. Approximately 5,000 unaccompanied children were detained in 2002 at over 90 locations, 35 percent were held in secure facilities that human rights monitors have criticized for being punitive and jail-like. This policy is inconsistent with nationally recognized juvenile justice standards, including the Institute of Judicial Administration - ABA Juvenile Justice Standards. The United Nations Convention on the Rights of the Child also prohibits the detention of children except as a measure of last resort.

The detention of immigrant children also was the subject of *Flores v. Reno*, a major class action lawsuit that established new nationwide policies and requires children to be released once it is established that detention is not required to ensure the child's safety or court appearance.²⁵⁰ Although the *Flores* settlement restricts the use of juvenile correctional facilities, immigration authorities continue to use such facilities and the children in them are often subject to punitive treatment. Beginning on March 1, 2003, the care and welfare of these children was transferred to the Office of Refugee Resettlement in the Department of Health and Human Services (ORR). ORR is committed to placing children in shelter care and more appropriate family-like settings and to phasing out use of facilities with or for juvenile offenders that the INS commonly used.

Edwin Muñoz, 15, testified before a Senate subcommittee in February 2002 about his detention by the INS. Edwin's parents abandoned him at age 7 to a cousin who beat him. He escaped Honduras at age 13, "hitchhiking alone to the United States, only to be thrown into a San Diego juvenile facility filled with violent offenders, where he was taunted by other inmates, brought to court in shackles, and for weeks had no lawyer or court appointed guardian to assist in his case."²⁵¹

"The officers did not know why I or other children picked up by the [Immigration and Naturalization Service] were being held there," Edwin testified in Spanish. "They treated us the same as the others, as criminals. Many of the other boys were violent, frequently looking for a fight." Even after an immigration judge awarded him asylum, Edwin was detained for several more weeks. "I am happy that there are now people like you who care to help children like me," the teen told the senators.²⁵²

Davinder "Jimmy" Singh is in many ways a normal teenager. He attends high school, likes pizza and Indian food, and cheers for the Philadelphia Eagles during football games. For the first 15 years of his life, however, he lived in terror and pain. Ever since he could remember, his mother had beaten him daily, deprived him of food, and restricted him from activity outside the home while his alcoholic father watched passively. Finally, when he was 14, his father took him aside and told him that he had arranged for him to start a new life in the United States. Jimmy did not know that much suffering was still in store for him.

Jimmy's father had arranged for a smuggler to pose as Jimmy's grandfather and bring him to the United States. They were caught at JFK Airport in New York, however, and Jimmy was detained by the INS. He spent one of his first nights in the United States handcuffed to a bed in a hotel. He escaped and lived on the streets briefly before being arrested and returned to INS custody. Even though Jimmy had relatives in Los Angeles, the INS placed him in a number of detention facilities – two months in a New York hotel, three months in Chicago, and 14 months in Berks County, Pennsylvania. Jimmy was fortunate enough to come to the attention of *pro bono* attorneys, who represented him. An immigration judge granted Jimmy asylum, but the INS appealed. To make matters worse, half of the audio tapes of the lengthy asylum hearing were lost in transit between the immigration court and the Board of Immigration Appeals, and the complete hearing thus could not be transcribed. As a result, the BIA ruled that it could not properly review the matter and advised the immigration court to complete the record (even if this required holding another hearing if necessary). INS and its successor DHS have insisted that a new hearing must be held, which would require Jimmy to recount yet again the horror that he experienced at the hands of his mother. The hearing is scheduled for fall 2004.²⁵³

The Impact of Detention

The primary goal of pre-hearing detention is to ensure that individuals appear for all their immigration hearings and comply with the final order of the immigration judge. But the loss of liberty has punitive effects and works to undercut legal and human rights on many levels.

The government's detention practices make it exceedingly difficult for detained persons to secure and communicate with counsel and pursue relief. Immigration authorities frequently transfer detainees to distant locations, often without notifying their lawyers and without regard for their need to prepare for a hearing or to be close to their families and support systems. Many of the more than 900 facilities used for immigration detention are in rural locations, far from private and *pro bono* lawyers and non-profit legal programs, making access to lawyers, families, and legal materials even more difficult.²⁵⁴ Without representation, detained persons often cannot access the extensive documentation and other information necessary to meet their burden of proof and apply for most forms of relief, including asylum.

Over the past decade, many organizations – including the Lawyers Committee for Human Rights, Human Rights Watch, the Florida Immigrant Advocacy Center, and the Women's Commission on Refugee Women and Children – have issued reports about problems in the immigration detention system.²⁵⁵ These reports have documented incidents of mistreatment by detention officers, inappropriate placements of unaccompanied minors, the absence of legal resources, and a multitude of problems relating to access to representatives, including the isolated location of facilities, limited consultation hours, and restricted use of telephones. Lawsuits brought against the INS have demonstrated that unrepresented detainees often are misinformed about the legal process and sometimes pressured into abandoning their claims.²⁵⁶ Other complaints relate to accredited representatives, volunteers, and out of state lawyers not being allowed to enter INS facilities to provide legal assistance to indefinite detainees.

Female detainees in the Hillsborough County Jail in New Hampshire went on a hunger strike in the summer of 1999 to protest being locked up for 20 hours a day, having visits limited to 30 minutes, and being denied medical treatment as well as to dramatize their complaints of verbal and sexual abuse by guards at the facility. The INS removed more than 200 detainees while the situation was investigated.²⁵⁷ In March 2001, female inmates were removed from a prison in New Hampshire following allegations of sexual abuse.²⁵⁸

One of the costs associated with long term and indefinite detention has been increased levels of despair among detainees. The combination of physical isolation, substandard conditions at facilities, limited access to lawyers, and the lack of legal information demoralizes many detainees – some, even to the point that they give up their cases and agree to be deported rather than continue to be imprisoned. As noted above, detainees in some facilities take other actions such as hunger strikes. Officials of the detention center in Elizabeth, New Jersey acknowledge that, on average, there is a suicide attempt or threat there every 40 days.²⁵⁹

Thanh Cao Nguyen, a 28 year old Vietnamese national, languished in detention for more than three and a half years because the United States and Vietnam have no agreement allowing the return of persons who have been ordered deported. The INS detained Nguyen in at least five different facilities in California, Florida, and Minnesota. Violating its own procedures, the INS failed to review his custody status during this entire time.

Nguyen was held at the Federal Correctional Complex in Coleman, Florida some 3,000 miles from his family in California. Because there were no other immigration detainees at the facility, for one year he was held in 23 hour lockdown in a small cell with limited access to a telephone, legal materials, and recreational facilities. When he finally secured representation, his counsel with the Florida Immigrant Advocacy Center had, according to legal papers, “significant difficulty gaining access to see him” after driving nearly four and a half hours. In July 2000, his lawyers filed a petition for *habeas corpus*, arguing that his continued detention violated the U.S. Constitution, the Immigration and Nationality Act, and international law. At that point, he was freed.²⁶⁰

Until recently, the INS had no uniform standards or guidelines to govern such issues as visitation, access to telephones, and access to legal rights presentations. The American Bar Association began working with the INS and the Justice Department in 1996 to establish rules regarding access to legal assistance, telephones, “know-your-rights” presentations, and legal materials for those in detention. In March 1998, such standards were implemented for the 18 detention centers then operated by the INS. Unfortunately, nearly 60 percent of all INS detainees were left without such protections, inasmuch as they are held in more than 900 local and county jails nationwide.

In November 2000, the INS issued 36 Detention Standards (Standards) that are intended to provide uniform treatment and access to counsel to immigrants and asylum-seekers in both immigration detention centers and local jails. The Standards went into effect in January 2001 at INS-operated facilities and contract detention centers and at the nine largest jails where INS held more than 40 percent of the immigration detainees who were not in INS-operated facilities. All other facilities holding INS detainees for more than 72 hours were to be brought into compliance by January 2003. Since implementation of the 36 Standards, a 37th Standard regarding Staff-Detainee Communication and a 38th Standard regarding Detainee Transfers are pending at time of printing. While additional safeguards should be provided in several other areas, the Standards are a very significant step toward improving due process for all who are detained, and it is vitally important that the Department of Homeland Security continue to adhere to them.

Access to telephones – vital for preparing a case and keeping in touch with family – has been a persistent problem, notwithstanding improvements under the Standards. Many facilities have too few phones, often in inaccessible areas, where detainees need permission or escorts to go, or in public areas with no privacy. In many facilities, telephones only can be used to make collect calls, which most law offices and automated message systems do not accept. Other

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facilities have programmed their telephones to cut off automatically after a 10 or 15 minute conversation and have rules that restrict detainees to one call per day. Rarely are there procedures for routing incoming calls or messages to detainees. These problems impede the ability of detainees in need to secure *pro bono* representation, make communicating with counsel extremely difficult, and often deter counsel from assisting in such cases.

The new detention standards are not regulations, making enforcement difficult. In addition, so long as large numbers of immigration detainees are incarcerated in remote areas, many detainees will not have legal representation. One approach that could address some of the legal needs of detainees and also help the deportation process operate more efficiently and fairly is allowing for group “know-your-rights” legal orientations. These presentations are designed to educate detainees about the process, what if any relief they may be eligible for, and how to find counsel.

In 1998, the Executive Office for Immigration Review (EOIR) funded 90 day pilot projects at three detention centers to make rights presentations to detainees before their first master calendar appearance.²⁶¹ The Department of Justice concluded that the rights presentations resulted in faster completions and increased availability of representation to detainees with potentially meritorious claims to relief, and recommended that the government expand them to all INS detention facilities. Congress provided \$1 million in the Commerce, Justice, State and the Judiciary Appropriations Act for fiscal year 2002 for non-governmental agencies to provide live legal orientation presentations to persons in INS detention prior to their first hearing before an immigration judge “[to] provide immigration detainees with essential information about immigration court procedures and the availability of legal remedies to assist detainees in distinguishing between meritorious cases and frivolous cases.” Such legal orientation programs were being conducted at six locations by October 2003.

The Need for Alternatives to Detention

Detention without an individual custody determination is strictly prohibited as violative of the Constitution in virtually every setting outside of immigration. In the criminal justice context, pre-trial supervised release programs have been standard practice for the past four decades and have been successfully implemented in more than 300 counties and in all 94 districts in the federal court system. Implementation of such programs in the immigration context has the potential to save millions of tax dollars, free up scarce detention resources available for individuals who are dangerous or likely to flee, and spare immigrants and refugees the unnecessary loss of liberty and anguish of incarceration.

Advocates for immigrants urged the INS to explore alternative means of ensuring that individuals appear at court proceedings, such as the supervised release programs employed in the federal and state criminal justice systems. High cash bonds – if bonds are available at all – currently preclude most persons from ever being released from detention, which in turn reduces their chance of securing legal representation and creates stress and financial hardship for their families. A supervised release program would benefit these individuals and the process, while freeing scarce detention space for those individuals who truly require it.

The INS undertook two pilot programs in the 1990s to test the feasibility of pre-hearing supervised release. In collaboration with the Lawyers Committee for Human Rights, the INS agreed in April 1990 to parole up to 200 asylum-seekers who were detained pending their exclusion hearings in Los Angeles, Miami, New York City, and San Francisco. As a result of its success, the INS implemented the Asylum Pre-Screening Officer Parole Program for asylum-seekers in April 1992 and expanded the parole program to all INS detention facilities.²⁶²

A non-profit organization called the Vera Institute of Justice subsequently conducted another supervised release program in New York City from 1997 to 2000, with favorable results.²⁶³ Although the appearance rates of the lawful permanent residents who had served criminal sentences was already quite high (89 percent) without any supervisory assistance, when these individuals were given the benefit of even limited appearance assistance support, their appearance rate exceeded 94 percent.²⁶⁴ Ultimately, about 90 percent of all of the supervised immigrants participating in the program appeared at all court hearings. As the bipartisan leadership of the Senate Judiciary Committee recognized, the results from the Vera Institute's program "exceeded expectations, resulting in ... an impressive appearance rate at court hearings."²⁶⁵

In light of the pilot program's proven successes, Congress allocated \$3 million in fiscal year 2002 for the implementation of "alternatives to detention" programs.²⁶⁶ As a letter from the members of the Senate Judiciary Committee responsible for authorizing these appropriations makes clear, Congress "specially directed" the Department of Justice to devote these funds to using "community-based organizations to screen asylum-seekers and other INS detainees for community ties, provide them with necessary services and help to assure their appearance at court hearings."²⁶⁷ Similar appropriations followed in fiscal year 2003 and 2004.

The national implementation of a pre-hearing release program for individuals who are awaiting immigration proceedings is long overdue. Bond programs with established track records operate in every major city and state; they should be consulted in developing fair release standards and procedures.

Chapter 8

Bars to Judicial Review



Constitutional due process wisely confers upon any alien, whatever the charge, the right to challenge in the courts the Government's finding of deportability.

- President Dwight D. Eisenhower
Special Message to the Congress on Immigration
Matters, February 8, 1956

Many Americans consider the nation's judicial system to be the institution that most distinguishes the United States and holds democratic society together. The third branch of government acts as a check on legislative and executive power to ensure that the U.S. Constitution is upheld and that no one branch of government becomes too powerful. This separation of powers is essential to preserving liberty.²⁶⁸

With the growth of administrative agencies, the importance of the courts has increased, and perhaps nowhere more than in the area of immigration. Courts long have recognized the need for the review of immigration decisions and have held that deportation implicates fundamental liberty interests. "That deportation is a penalty – at times a most serious one – cannot be doubted," the Supreme Court said in 1945. "Meticulous care must be exercised lest the procedure by which [an individual] is deprived of that liberty not meet the essential standards of fairness."²⁶⁹

In overhauling the nation's immigration laws in 1996, however, Congress sought to tighten the access of immigrants to the federal courts while at the same time narrowing the ability of the courts to protect immigrant rights. The new laws aimed to:

- restrict the review of deportation orders by federal courts;²⁷⁰
- eliminate the review of discretionary denials of relief;²⁷¹
- eliminate the review of custody decisions;²⁷²
- bar *habeas* review of orders denying admission, except in rare cases;²⁷³
- limit the power of federal courts to review the implementation of the laws and issue injunctions;²⁷⁴ and
- revoke federal court jurisdiction over matters already pending in the courts.²⁷⁵

These measures are disturbingly reminiscent of similar efforts, never enacted, to "strip" federal courts of the jurisdiction to hear school desegregation, school prayer, and abortion cases.²⁷⁶

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The 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which this nation's legal system was founded. They establish a dangerous precedent for unreviewable government actions and, in doing so, threaten the rights of all Americans.

Limits on Review of INS Practices

The 1996 laws sought to strip courts of the power to enter injunctive relief "[r]egardless of the nature of the action brought or claim or identity of the party or parties bringing the action."²⁷⁷

Injunctive relief and class action lawsuits are invaluable methods of correcting system wide wrongs and protecting the rights of whole classes of individuals. Although courts nearly always are reluctant to resort to injunctive relief – and usually do so only to preserve justice or to prohibit an act that is deemed contrary to justice²⁷⁸ – over the years they have done so frequently to force the INS to comply with the law.

- The courts have stepped in to protect nationwide classes of vulnerable immigrants, such as unaccompanied children.²⁷⁹ In one case, the INS held children in isolated detention centers, prohibited contact with family members or legal advisers, and required them to sign forms waiving their right to a hearing before an immigration judge. Confronted with "inherently coercive" practices, a federal judge issued an injunction requiring the INS to at least allow children an opportunity to consult with legal counsel or family members.²⁸⁰ "When children's rights are presented to them in a stressful situation in which they are separated from their close-knit families and faced with a new culture, they cannot make a 'knowing and voluntary choice,'" the court held. "Rather, the natural tendency is to defer to the authority before them, especially for those children accustomed to autocratic governments."²⁸¹
- The courts intervened to protect unaccompanied immigrant children who were in the custody of the INS to ensure that their needs were met, that detention was kept to a minimum, and that they were not held in juvenile correctional facilities except in very specific instances.²⁸²
- A federal court stepped in to bar the INS from using misrepresentation, intimidation, and coercive detention policies to dissuade Salvadoran refugees from raising asylum claims.²⁸³
- A lawsuit was brought to compel the INS to replace procedures that resulted in systematic discrimination against Guatemalan and Salvadoran asylum applicants. Statistics showed that an unusually low percentage of Guatemalan and Salvadoran refugees were being granted asylum. Under a court enforced settlement, asylum-seekers were allowed to apply for asylum under the improved procedures.²⁸⁴
- Courts have intervened to stop immigration authorities from engaging in discriminatory questioning and searches in Illinois. The INS repeatedly was stopping individuals of Mexican appearance – including U.S. citizens and legal permanent residents – in their automobiles and on the street to question them about their immigration status. One motorist was threatened with jail when he did not immediately produce proof of his legal permanent residence. The court found that these practices violated the First, Fourth, and Fifth Amendments of the Constitution.²⁸⁵

- Class action lawsuits challenged the INS' policy of turning away thousands of Haitian asylum-seekers, ignoring its statutory and constitutional responsibility to make individual asylum determinations.²⁸⁶ "The manner in which the INS treated the more than 4,000 Haitian plaintiffs violated the Constitution, the immigration statutes, international agreements, INS regulations, and INS operating procedures," the trial court judge ruled. "It must stop."²⁸⁷
- The U.S. Supreme Court found in 1991 that INS procedures failed to satisfy minimum standards of due process. The Court was reviewing the INS' implementation of the Special Agricultural Worker program under the Immigration Reform and Control Act of 1986 (IRCA).²⁸⁸ The INS did not dispute that it routinely and persistently violated the Constitution and statutes in its processing of applications for the program, but it argued that IRCA did not allow such a legal challenge.²⁸⁹ The Supreme Court disagreed and upheld the lower court's finding that the INS had violated the statute and needed to vacate entire categories of denials.²⁹⁰
- The courts intervened several times to force the INS to correct its mistakes in implementing the historic 1986 legalization program. After the INS prevented hundreds of thousands of individuals from applying for legalization by misinterpreting the eligibility rules and following improper procedures, the courts stepped in and forced the INS to accept late applications.²⁹¹ After more than a decade of litigation, Congress sought to bring an end to the lawsuits by removing the jurisdiction of the federal courts to hear them, yet again denying these individuals their opportunity to pursue legal status. The courts found that they did have jurisdiction, however, and in February 2002 again intervened to allow the original class members plus an additional group of class members to pursue legal status.²⁹²

Although it is certainly troubling that lawsuits have been needed to ensure that immigrants are not abused by the government, deprived of their constitutional or human rights, or prevented from applying for programs created for their benefit, it is even more disturbing that courts now may be barred from stopping such practices. The situation is all the more dire because individuals now cannot necessarily obtain redress through review of their individual cases.

Direct Review of Deportation Orders

For more than a century, noncitizens have had access to the courts to challenge the legality of deportation orders.²⁹³ Initially, review was obtained exclusively through writs of *habeas corpus* brought in federal district court. This form of review had some limitations.²⁹⁴ Over time, the need for a more orderly and expeditious system became clear.²⁹⁵

In 1961, Congress provided that final deportation orders could be appealed directly to the appropriate federal court of appeals. This practice proved to be more efficient by allowing for a single level of direct review. In reviewing the immigration judge's record and BIA decision, a federal appellate court could correct errors in findings of fact as well as in the interpretation and application of the law, and prevent arbitrary decisions. While all deportation orders could be reviewed, relatively few were appealed. Less than 1,700 appeals came before the circuit courts of appeals in fiscal year 1996.²⁹⁶ In that same year, the immigration judges decided over 150,000 cases.²⁹⁷ Under this system, however, important legal questions came to the attention of the federal courts and could be resolved, affecting large numbers of immigrants. The courts, for example, established that:

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- Asylum-seekers were not required to establish by a “clear probability” that they would be persecuted in their home country in order to qualify for asylum protection.²⁹⁸
- Legal permanent residents who made innocent, brief, and casual trips outside the United States should not be regarded as having made an “entry” into the United States and, thus, would not have their resident alien status disrupted.²⁹⁹ This is significant because the government could no longer prohibit lawful permanent residents from returning to their homes and families if there had been no basis for deportation prior to their departure.
- A single chamber of Congress could not veto the grant of suspension of deportation in an individual immigration case.³⁰⁰

In IIRIRA, Congress nearly abolished the judicial review of deportation orders. The statute says that “no court shall have jurisdiction to review any final order of removal” that is based on criminal grounds.³⁰¹ This provision was another manifestation of the law’s “zero tolerance” approach toward legal residents who had run afoul of the law. Advocates of the provision alleged that appeals in these cases were dilatory. But Congress also had addressed that issue by eliminating automatic stays of deportation, thus allowing individuals to be deported while their appeals are being considered.

Some members of Congress argued that appeals were unnecessary because individuals in these cases already had been before a criminal court. The criminal courts, of course, do not examine whether an individual is an alien, has committed a deportable offense, or qualifies for immigration relief; these issues are left to immigration judges and may require further administrative and judicial review. The criminal courts also do not interpret the meaning of federal immigration statutes. Moreover, many of the cases that are no longer being reviewed are ones where no one in the criminal justice system anticipated that subsequent changes in the law might have profound immigration consequences.

Mauro Roldan-Santoyo and **Hector Tito Lujuan-Armendariz** are two long time legal permanent residents. Each was involved in an offense that was resolved under state first offender laws. Under the state criminal justice system, they are not considered to have been convicted; therefore, they argued, they cannot be deported under the immigration law for having “convictions.” The BIA ruled against them,³⁰² so they took the matter to federal court.

The Department of Justice argued that the federal court had no authority even to consider their cases, but the U.S. Court of Appeals for the Ninth Circuit disagreed and found that these offenses should not carry immigration consequences. The court of appeals pointed out that cases handled under rehabilitative statutes were designed to allow first time offenders who had committed a minor offense to avoid such drastic legal consequences such as deportation. The court vacated the deportation orders.³⁰³

Roldan-Santoyo and Lujan-Armendariz were fortunate that the court of appeals reviewed their cases. The court took a novel approach, reasoning that judicial review would be barred if the offenses were convictions but would be available if they were not actually convictions. The court then found that they had not been convicted, allowing the court to go on to review the deportation orders. Others have not been so fortunate and face deportation on the basis of legal interpretations that have never tested by independent judicial review.

In the absence of a direct path to judicial review, many individuals once again are resorting to *habeas corpus* review. While courts have recognized that some level of appellate review still remains, there has been extensive litigation to determine what that level is. There still is no agreement as to precisely what can be reviewed and to what extent. Moreover, because of the battles over whether courts even have the power to hear such cases, disputes over many of IIRIRA's statutory provisions are only now reaching the courts. In spite of the obstacles, a record 8,794 appeals were filed in the circuit courts of appeals in the 12 months ending June 20, 2003.³⁰⁴ But, just when the need for judicial interpretation and oversight is greater than ever, there is no clarity about how to achieve it.

Prince Dwight Max-George came to the United States from Sierra Leone when he was four years old. He is now over 30 and stranded in Ghana while the government litigates his case and refuses to process applications for waivers filed by his U.S. citizen mother.

In 1991 he was convicted of a 1988 theft offense. He was sentenced to four years in jail. In September 1998, the INS initiated deportation proceedings against Prince and he was ordered deported on October 6, 1998. He filed a petition for a writ of *habeas corpus* in November 1998. He was deported while his *habeas* petition was pending, and the petition was rejected on jurisdictional grounds arising out the 1996 laws.³⁰⁵

Under the Supreme Court's decision in *St. Cyr*, Prince was most likely eligible for relief and deported in error. His mother, a certified nurse in Texas, filed a new immigrant visa petition for her son along with the waivers for which the court erroneously found him ineligible. The INS, however, refused to adjudicate those waivers, preferring to pursue litigation in Prince's case. Prince remains stranded in Ghana, unable to go to Sierra Leone due to civil war and barred from returning to the United States.³⁰⁶

In other courts, some judges found creative ways to protect the rights of long term legal residents.

Jerry Arias-Agramonte has been a legal permanent resident of the United States for more than 30 years. He left the Dominican Republic in 1967 and settled in New York, where he married. He and his wife raised six U.S. citizen children, one who went on to serve in the U.S. military and another who is suffering from heart disease. Jerry has worked as a Spanish language interpreter, often for free, in the state court system in an effort to help low-income Spanish speakers make their way through the system.

In October 1977 Jerry was arrested during an undercover buy-and-bust drug raid in a restaurant where he was working. He had a marked \$50 bill in his possession that he says was given to him by a customer who asked for change. He pleaded guilty to the criminal sale of a controlled substance and was given two years of probation. He has never had any other problem with the law.

Late in 1998 Jerry and his family traveled to the Dominican Republic for his father's funeral. On his return, Jerry was detained at John F. Kennedy International Airport in New York and charged with being inadmissible because of his 1977 conviction. He was held in the INS detention facility in York, Pennsylvania. Although Jerry applied for and was granted 212(c) relief by an immigration judge, the INS appealed the decision on the basis that 212(c) had been repealed and continued to detain him. He asked to be released, but the INS refused his request, stating that due to his 21 year old conviction he presented "a continuing danger to the safety of the public and the community."

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The BIA reversed the immigration judge's decision, finding that 212(c) was no longer available to "aggravated felons" such as Jerry. He filed a petition for a writ of *habeas corpus*, asking the district court to review whether he should be released and whether the BIA was correct to deny him relief. The court found that *habeas* review existed and that the review extended to examining the denial of relief. The judge went on to find that 212(c) relief was available and reinstated the immigration judge's decision.³⁰⁷

Jerry Arias-Agramonte was exceptionally fortunate. Until the Supreme Court decided *St. Cyr* in June 2001, few courts were willing to review deportation orders of long term lawful permanent residents.

Review of Discretionary Decisions

Before the 1996 laws went into effect, federal courts of appeal also reviewed denials of discretionary relief.³⁰⁸ In assessing whether a denial of relief was arbitrary or capricious, a court could examine the findings of fact relating to eligibility for relief, the inferences drawn from the facts, and the application of the law to those facts. Federal appellate courts repeatedly faulted the BIA for its decisions.³⁰⁹ In overturning a BIA decision to deny relief, Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit wrote that immigration proceedings:

*are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality. The lodgment of this troubled Service in the Department of Justice of a nation that was built by immigrants and continues to be enriched by a flow of immigrants is an irony that should not escape notice.*³¹⁰

In 1996 Congress sought to cut off the review of all discretionary relief decisions except asylum, stating that "no court shall have jurisdiction to review" several categories of waiver decisions or "any other decision or action of the Attorney General the authority for which is ... in the discretion of the Attorney General."³¹¹

Alfredo Aries Duldulao, Jr., a native of the Philippines, became a legal permanent resident in 1975. He married a U.S. citizen in 1980 and they have four U.S.-born children. His wife suffered an aneurysm in 1987 and has since been disabled and confined to a wheelchair. Alfredo, a roofer, was the sole source of financial support for his wife and children. His parents and siblings also live in the United States.

In February 1990 Alfredo was convicted of unlawful possession of a firearm and assault. In deportation proceedings, he applied for relief on the basis of the hardship his deportation would cause to his wife. The immigration judge and the BIA denied his application. In 1995 he appealed to the Ninth Circuit Court of Appeals, but before issuing its decision, the law had changed. The court then held that it no longer had jurisdiction to review his case. His lawyers asked the court to reconsider, but to no avail. He died in the Philippines at age 40. He was returned to the United States and laid to rest near his family in Hawaii.³¹²

The judicial review of asylum decisions is essential to ensuring that this form of relief continues to be available and meaningful. The 1996 laws raised the standard for review by requiring applicants to establish that a denial of asylum is “manifestly contrary to the law and an abuse of discretion.”³¹³ It also precluded review of individuals whose asylum applications were not filed within one year of entry, even if the applicants asserted that they qualified for an exception because of changed circumstances affecting their eligibility or extraordinary circumstances preventing them from timely filing.

IIRIRA also included a “catch all” provision that further limits review by stating that courts cannot look to other statutes for jurisdiction to hear immigration cases. “Except as provided in this section and notwithstanding any other provision of law,” the law says, “no court shall have jurisdiction to hear any causes or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien in this chapter.”³¹⁴

The Supreme Court interpreted this section early in 1999. It was reviewing a case involving eight individuals, two of them legal permanent residents, who argued that the government had targeted them for deportation because of their alleged affiliation with an organization that supports Palestinian causes and that this type of selective prosecution was unlawful under the First Amendment.³¹⁵ The question before the Supreme Court was whether the 1996 “catch all” provision precluded the federal courts from hearing the selective-prosecution claim. The Court found that Congress had repealed judicial review for three types of immigration decisions or actions: (1) to commence proceedings, (2) to adjudicate proceedings, or (3) to execute removal orders.³¹⁶ The plaintiffs, therefore, could not continue their legal challenge after more than 12 years of litigation.

Habeas Review

From the 1800s up through 1961, *habeas corpus* had been the principal means of reviewing the legality of detention and deportation decisions.³¹⁷ With direct federal review now limited, individuals again are turning to the “Great Writ” for relief. Unfortunately, there has been much confusion in the wake of the 1996 laws as to what is left of *habeas* review and what can be reviewed.

Habeas corpus has been used since the Middle Ages to protect an individual’s right to freedom from unlawful imprisonment. From the early days of the United States, the federal courts have used writs of *habeas corpus* to free individuals from unlawful incarceration, including immigration custody. *Habeas* review has been described as “the most efficient protector of liberty that any system has ever devised.”³¹⁸

The writ of *habeas corpus* has both constitutional and statutory bases. The Constitution states: “The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³¹⁹ Under the federal *habeas* statute, established in 1789, a court can examine whether the custody of a person violates the Constitution, laws, or treaties of the United States.³²⁰ This review previously has been interpreted as extending to immigration cases.³²¹ This statutory form of *habeas* was used extensively prior to 1961 to review the legality of deportation and detention decisions.³²²

In addition, until 1996, immigration law itself contained two specific *habeas* provisions. One allowed for *habeas* review of detention decisions after a final order of deportation was entered; the other permitted *habeas* review of exclusion orders.³²³ These *habeas* provisions were repealed in 1996, raising questions as to what extent *habeas* review of immigration decisions remains under the general federal statute and the Constitution.³²⁴

After 1996, the INS contended that only *habeas* review over constitutional issues remained. Most courts, however, found that they continued to have review power over statutory questions as well. The Supreme Court agreed with them in the companion cases of *Calcano-Martinez v. INS* and *INS v. St. Cyr*, and clarified, at least as to permanent residents, that the courts retain *habeas corpus* review of deportation orders.³²⁵

Statutory *habeas* review allows the courts to address violations of not just the Constitution but also of statutes and treaties. Using this form of review, courts have used both statutory and constitutional grounds to question and overrule immigration decisions, including those involving detention.

Barronie Grant came to the United States from Jamaica more than 20 years ago. Now in his 40s, he has been a legal permanent resident since 1982. His two children are U.S. citizens, as are his father and stepmother. In November 1992, Barronie was convicted of possession of marijuana with intent to distribute. He was fined and successfully completed 18 months' probation.

In May 1999, the INS took Barronie into custody for the 1992 offense. Eight days later an immigration judge found that he was neither a flight risk nor a danger to society and ordered his release on \$1,500 bond. The INS refused to release him, arguing that the mandatory detention provisions of the 1996 laws applied retroactively, and appealed to the BIA, a process that was likely to delay his release many more months. Barronie, therefore, filed a petition for *habeas corpus* in federal court. The judge found that he had the authority to review the case and ordered Barronie to be released, holding that the INS had misinterpreted the law.³²⁶

Balasaraswathy Sivathanupilla escaped from Sri Lanka after she was raped by a soldier with a militant separatist group that she refused to support. She was also arrested, interrogated and beaten by the Sri Lankan government forces. In November 1997, she fled, intending to join family members in Canada. She was arrested by the INS upon arrival in the Portland, Oregon airport and was not allowed to continue on to Canada. Instead, she was held in the Yamhill County Jail for over two and a half years.

Balasaraswathy was denied asylum and appealed to the BIA. She also pursued relief under the Convention Against Torture. In June 1999 she requested release from detention and submitted evidence that her continued detention was causing her mental health to worsen as she suffered from depression and post-traumatic stress disorder. Ten local Sri Lankan families came forward offering to be responsible for her if she were released. The INS again denied her request. In May 2000, a U.S. district judge found that he did have *habeas* jurisdiction under the general federal statute, and that the INS had abused its discretion in continuing to detain her. He ordered the INS to release her.³²⁷

Review of Expedited Removal Decisions

In writing the 1996 laws, Congress expected legal challenges to the expedited removal process and set out exacting rules on when and where lawsuits could be brought. In addition to the restrictions to entering injunctive relief and certifying a class action,³²⁸ challenges to expedited removal procedures had to be filed within 60 days of the regulation or written policy being implemented and only in the U.S. District Court for the District of Columbia.³²⁹

Expedited removal began on April 1, 1997. In the following weeks, several lawsuits were filed arguing that expedited removal violated individuals' due process and equal protection rights as well as international law.³³⁰ The U.S. Court of Appeals for the District of Columbia ultimately dismissed all of the suits for a variety of reasons that illustrate how difficult it has been to mount a successful legal challenge to the expedited removal program.

One group of plaintiffs, consisting of organizations that sought to assert the rights of unidentified immigrants subject to the process as well as the rights of their members, had its claims dismissed for lack of standing. Another group had its claims dismissed because the incidents in question took place more than 60 days after the regulations had been implemented. Two individual plaintiffs had been subjected to expedited removal within the 60 day window, but the court ruled that they could not argue issues about the overall process that were not directly related to their own claims; ultimately their claims were dismissed. The court also held that it could review only written policies and thus could not review the INS' failure to comply with the statute or the noncompliance of individual officers with the regulations.³³¹ In light of these decisions, it is difficult to see how the expedited removal process ever will be successfully challenged.

Congress also placed very strict requirements on when federal courts can review individual expedited removal orders.³³² Review of individual orders is limited to cases involving individuals who should not be put into the expedited removal process in the first place – e.g., those who are in fact U.S. citizens or legal permanent residents. If such a person is mistakenly ordered removed, review would be available through *habeas corpus* proceedings. Even then, the court is limited to addressing only three questions: (1) is the person an alien? (2) was the person ordered removed under expedited removal? and (3) can the person prove by a preponderance of evidence that he or she has the status as a legal permanent resident, refugee, or asylee?³³³ If the answer to all three questions is yes, the person is to be placed into regular removal proceedings rather than expedited removal, yet the federal court judge still cannot rule on the ultimate question of whether the person is admissible.

Limits on Administrative Review

With the new limits on review by federal courts, administrative reviews of individual deportation decisions by the BIA have become more important – and, unfortunately, more cursory – than ever before. To respond to its burgeoning caseload, the BIA has been “streamlining” its review process.³³⁴ The BIA's caseload has grown ten fold since 1984, and it receives approximately 28,000 new appeals each year.³³⁵

The BIA's new procedures are another manifestation of putting top priority on deporting people over preserving due process and protecting against errors. Under new procedures that went into effect on September 26, 2002, a single BIA member – rather than a three member panel – reviews most cases. The single member is able to dismiss appeals summarily without issuing a written decision explaining why and to modify or remand immigration judge decisions with very brief orders. With the limits on federal court review, the types of mistakes that are inevitable with such cursory review will not be corrected.³³⁶

Even if BIA procedures allowed for more complete review, it would not be enough. Due process requires judicial review by the federal courts, and the BIA is not an independent body. Like the immigration judges, it is subordinate to the Attorney General, who may overturn decisions of the BIA on his own initiative or at the request of the Department of Homeland Security.³³⁷ In the case of *In re Soriano*,³³⁸ for example, the Attorney General overturned what

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the federal courts later decided was a correct interpretation of a provision that restricted 212(c) relief from deportation. Review by a tribunal outside the agency is a fundamental safeguard for maintaining fairness and impartiality.

What Review Remains Today

With respect to the review of individual immigration cases, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 set back the clock more than a hundred years. The courts now are struggling to define what forms of review remain. While many crucial issues in the 1996 laws would benefit from judicial analysis, immigration lawyers and the government still are fighting over what level of review even exists and what issues in particular can be reviewed by the courts. Unfortunately, the confusion means that even though an individual's life and liberty may be at stake, there are no assurances that the courts may intervene.

It is essential that U.S. immigration laws and policy uphold the highest standards of impartiality, fairness, and constitutionality. Many immigrants come from countries where judges are not independent and where there is little separation between the courts and law enforcement. A judicial review policy that reflects such practices rather than our own constitutional ideals creates insecurity among immigrants and their family members and undermines their confidence in government's ability to dispense equal justice. Nothing less than achieving our national goal of integrating immigrants into the mainstream of American life and forging a more unified nation hangs in the balance.

Chapter 9

Civil Rights Implications of Immigration Enforcement



Equal laws protecting equal rights

...

the best guarantee of loyalty & love of country.

- James Madison (1820)

It is in justice that the ordering of society is centered.

- Aristotle (384 BC - 322 BC)

Before its functions were transferred to the Department of Homeland Security, the INS had become the largest federal law enforcement entity.³³⁹ Its budget grew from \$1.6 billion in 1994 to \$5.6 billion in 2002,³⁴⁰ with most of the increase going into enforcement functions. The INS employed more armed agents than any other federal agency, including the FBI,³⁴¹ and operated an extensive detention system.³⁴² The INS had 33 district offices,³⁴³ 23 Border Patrol sectors³⁴⁴ and approximately 35,000 employees.³⁴⁵ Its presence no longer was limited to the borders and a few urban areas, but was felt in many communities across the country, affecting citizens as well as immigrants. Immigration enforcement was characterized by three factors:

- a massive buildup of personnel and technical equipment at the borders;
- an interior enforcement strategy that involves teams of federal immigration agents working with local police departments, and new workplace enforcement strategies; and
- an increased reliance on state and local government agencies, private employers, and providers of state and local government benefits to check immigration status.

For years, a mission to curb illegal immigration dominated immigration policy. In actuality, undocumented immigrants represent a small minority of the total U.S. population – only about 3.2 percent³⁴⁶ and roughly five percent of the U.S. workforce.³⁴⁷ Legal immigrants outnumber undocumented immigrants by nearly three to one.³⁴⁸ The INS offices that processed visa applications and served immigrants, asylum applicants, and foreign visitors were, however, perpetually starved for resources and overwhelmed with ever increasing backlogs of applications while the Border Patrol invested millions in technology and had more job openings than it was able to fill. The disparities were even more pronounced after 9/11. The INS' fiscal year 2002 appropriation for enforcement was 2.8 times larger than the appropriation for immigration services.³⁴⁹

On March 1, 2003, the Department of Homeland Security absorbed the INS and inherited its service, adjudicatory, and enforcement responsibilities. These functions are now divided among three bureaus. Customs and Border Protection (CBP) oversees 6,000 miles of border with Canada and Mexico, and regulates the admission of persons and goods into the United States.³⁵⁰ Immigration and Customs Enforcement (ICE) conducts investigations, prosecutions, detention and deportation of non-citizens. It is made up of more than 15,000 federal

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employees, many of whom were previous INS employees.³⁵¹ The CBP and ICE are situated within the Department's Border and Transportation Security "directorate." U.S. Citizenship and Immigration Services (USCIS) processes applications for a wide array of immigration benefits, including for lawful permanent residence, work authorization, asylum, and naturalization.³⁵² It is located in a separate directorate. The Board of Immigration Appeals and immigration judges remain in the Department of Justice under the authority of the Attorney General.³⁵³ The new Department is comprised of 22 federal agencies and 170,000 workers. How DHS' anti-terrorism and national security mission will influence immigration enforcement and provision of services in the long term remains to be seen.

Southwest Border Buildup

The September 11th tragedy has raised concerns that terrorists can enter and reside in our country without detection and kill thousands of innocent people. Whereas border protection previously focused on curbing illegal immigration, new border security measures are directed at detecting people who might pose a threat. Technologies are being upgraded, new restrictions are being imposed on visas holders, border security is being intensified, and intelligence agencies are sharing information with immigration authorities.

From 1993 to 2002, the Border Patrol – the enforcement arm of the INS – more than doubled in size from 4,036 agents to more than 9,700.³⁵⁴ Between 1994 and 1998 alone, the Border Patrol also received record increases in equipment and technology, including 47 new infrared scopes, 766 new underground sensors, 29 miles of fencing (six miles of which are permanently lit), 100 new portable lighting platforms, more than 1,065 new vehicles, more than 1,250 new computers, four helicopters³⁵⁵ and retractable, mobile observation towers.³⁵⁶ The 1996 laws fueled this growth by providing for the addition of 1,000 Border Patrol agents each year through 2001, the building of three-tiered fences along the southern border, and the acquisition of additional technology, including more helicopters and night vision goggles.³⁵⁷

Building on the rapid expansion in the 1990s, Congress has continued to put greater resources into immigration enforcement since 9/11. For example, INS plans called for hiring over 8,000 new employees in 2002.³⁵⁸ The fiscal year 2003 budget included funds for 1,790 additional border enforcement agents, as well as \$163.8 million for border patrol facilities and infrastructure.³⁵⁹ With the transfer of immigration enforcement responsibilities to the Department of Homeland Security, additional appropriations have been sought for the screening of visitors crossing the border, secondary inspection of immigrants and visitors at ports of entry, and increased security between ports of entry on the northern border.

Prior to 9/11, enforcement along the U.S.-Mexico border featured special "operations" designed to curb illegal immigration. Originating in El Paso in 1993 with "Operation Hold the Line," the Border Patrol shifted its approach to prevent illegal crossings (rather than apprehension after entry) by positioning three tiers of agents in close proximity to the border where they are visible.

Using this same technique in "Operation Gatekeeper" on the San Diego sector of the border, apprehensions decreased by 81 percent, from 524,231 in 1995 to 100,681 in 2002.³⁶⁰ Apprehensions for the same period increased by 70 percent in the neighboring border sectors of El Centro, Yuma, and Tucson, from 285,740 in 1995 to 484,575 in 2002, suggesting a shift in border crossing routes.³⁶¹

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In South Texas, both the presence of Border Patrol agents and the number of persons stopped by “roving patrols” increased with “Operation Rio Grande,” which was modeled after Operation Gatekeeper. For people who live in border areas, immigration enforcement is a fact of daily life to which the rest of us are not exposed. With Hispanics constituting the majority population in these areas, these enforcement efforts inevitably affect U.S. citizens and legal residents as well as unauthorized migrants.³⁶²

Gilberto Hinojosa, a judge in Brownsville, Texas, has experienced the militarization of the border and heightened scrutiny firsthand, having been followed in his car by Border Patrol agents and questioned at the airport about his citizenship status. Judge Hinojosa has said that the Border Patrol has blanketed Cameron County, Texas affecting the daily lives of members of the community. He has voiced great concern that the situation instills a sense of fear in children who are with their parents when they are pulled over to prove their citizenship. “It feels like occupied territory,” Judge Hinojosa said. “It does not feel like we’re in the United States of America.”³⁶³

Tim Barton, son of El Cenizo Mayor Flora Barton, was running to catch up with the truck of a garbage crew he was volunteering with when a Border Patrol agent mistook him for an undocumented immigrant, pulled his Border Patrol vehicle in front of Barton and slammed the vehicle door open into Barton. Barton responded by yelling and throwing rocks at the car, for which he has been charged for assaulting a federal officer and damaging government property. El Cenizo residents have noted an escalation of Border Patrol enforcement activity since Spanish was established as the city government’s official language and a resolution was passed to discourage city government employees from collaborating with the INS.³⁶⁴ El Cenizo resident Maria Luisa Casares doesn’t dare buy a pint of milk without carrying proof of legal residence. “It’s gotten so bad nobody wants to leave their house anymore. The agents laugh at you and make you feel low. Even when you prove that you’re legal, they don’t have any respect.”³⁶⁵

Antonio Garza was walking in his El Paso neighborhood in March 2002, when an INS Border Patrol agent approached and stopped him. The same agent had stopped Mr. Garza several months earlier and had confirmed at that time that Mr. Garza is a United States citizen. Despite his knowledge of Mr. Garza’s U.S. citizenship, the Border Patrol agent demanded Mr. Garza’s identification, took away his cellular phone, proceeded to frisk him and aggressively forced him into the Border Patrol vehicle. Mr. Garza maintains that he fully cooperated at all times, and asserted his legal status. According to a lawsuit filed on his behalf by the Lawyers’ Committee for Civil Rights under Law of Texas, the agent dismissed Mr. Garza’s efforts to establish his U.S. citizenship and requests for an attorney and threatened him with questioning by the FBI. The agent detained Mr. Garza in the Border Patrol vehicle for approximately an hour until he was finally released. In the lawsuit, Mr. Garza seeks monetary relief for the emotional distress, mental anguish, humiliation, loss of dignity, and physical pain he suffered as a result of the Border Patrol agent’s conduct.³⁶⁶

The effectiveness of these initiatives in curbing illegal immigration has been questioned. A study of census data for the U.S. and Mexico, as well as focus groups and surveys conducted in Mexican border towns, found that the flow of unauthorized immigrants temporally

corresponds more with the economic cycles in the United States than with increased border enforcement.³⁶⁷ A study conducted by the Center for Immigration Research at the University of Houston similarly concluded " – with statistical precision – that controlling illegal migrant flow along the 2,000 mile Mexican border is a bit like squeezing a water balloon: the flow is redistributed rather than cut off. And in this case, the redistribution is to areas that are more remote and more treacherous to cross."³⁶⁸

Policies that have resulted in migrants taking hazardous routes has been challenged as a violation of international law.³⁶⁹ But the human toll continues to rise as people seek out more dangerous routes. Nearly 2,200 migrants died between October 1, 1995, and October 1, 2002. The U.S. General Accounting Office reported that 367 people died trying to cross the border in 2000,³⁷⁰ which is the highest number of deaths in 15 years.³⁷¹ The Mexican government reported that 384 people lost their lives during 2001.³⁷²

Eighteen migrants were found dead at a truck stop outside Victoria, Texas in May 2003. Authorities said it was the most lethal incident in at least 16 years. The dead had suffocated in the trailer of an 18-wheeler that was crammed with at least 62 people. The youngest victim was only about five years old. Among the approximately 44 survivors were individuals requiring hospitalization for dehydration and heat exhaustion and a girl who was celebrating her 13th birthday.³⁷³

In a small farm town northeast of Omaha, a railcar containing the **skeletal remains of 11 migrants** was discovered by a grain elevator worker in October 2002. Their ages, gender, where they boarded and destinations could not be determined, but the dead almost certainly were undocumented Mexicans who were locked in the car several months earlier. Upon learning the news, a secretary at the local Denison Baptist Church commented, "I can't imagine people being so desperate to come to the United States and be willing to do that."³⁷⁴

"Y.G.", a young mother from Oaxaca, Mexico, died of exposure in the Arizona desert in May 2000. She had saved her remaining water for her 18 month old daughter, who was with her. Her daughter was promptly returned to Mexico. The father was in the United States but afraid to come forward out of fear that he, too, would be deported.³⁷⁵

"Raul" came to the United States from Mexico at the age of twelve. He was the son of legal permanent resident parents, the husband of a U.S. citizen, and the father (and sole source of support) of three U.S. citizen children. In 1992, he tried to obtain legal status through his wife but could not afford to complete the process. A few years later he and his wife went to the local INS office to inquire about his case. He was arrested and deported to Mexico. He returned two weeks later by crossing the border illegally. In June 1998, he was arrested and deported again. He tried several times to return to the United States to be with his family and was turned back. In July 1998, he told his family that he had heard about a point in the desert where he could cross undetected. In mid-August, having no word from him, his family contacted the Border Patrol, which eventually found his decomposing body by a bicycle and an empty water jug. His wife and children needed public assistance. His oldest child still writes him letters.³⁷⁶

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Julio Gallegos, a Mexican citizen, married his wife, Jackie, and they had their first son together. Although Jackie intended to petition for her husband to receive legal permanent residence, they had not completed the process when Julio returned to Mexico to be with his seriously ill father. While he was away, Jackie discovered that she was pregnant and informed her husband. He was very anxious to return to her and agreed to take his niece and nephew with him. The “coyote” (smuggler) stole their money and deserted them. They found another coyote to lead Julio, his niece, and his nephew, along with several others, across the desert in June 1998. They were again abandoned, and they all died in the heat.³⁷⁷

These are just a few of the hundreds of stories of people dying in their efforts to come to the United States. In response to the large numbers of deaths, the Border Patrol has created a Border Safety Initiative, which includes training agents to rescue drowning victims and air patrols to spot people dying in the desert. The Border Patrol also airs warnings of the potential dangers “on both sides of the border, and signs depicting blazing suns, rattlesnakes and other hazards went up along the fence line. New patrols, dedicated exclusively to rescuing migrants in distress, were also formed, resulting in 1,041 rescues in 1999 and 2,054” in 2000.³⁷⁸

Interior Enforcement

Interior enforcement efforts have seen a parallel growth. In March 1999, the INS released an outline of a new Interior Enforcement Strategy that involved a shift away from traditional raids, a focus on five priorities, and an overarching goal of deporting five million persons in five years. The five priorities were to: (1) identify and remove legal immigrants who are deportable for criminal offenses; (2) deter, dismantle, and diminish smuggling and trafficking of aliens; (3) minimize immigration-benefit fraud and document abuse; (4) respond to community reports and complaints about illegal immigration and build partnerships to solve local problems; and (5) block and remove employers’ access to undocumented workers.³⁷⁹

Consistent with this plan, between 1998 and 2002 the INS allocated as many resources to the removal of “criminal aliens” as to the other four priorities combined: roughly 950 work years (exclusive of administrative time) in 2002 alone.³⁸⁰ Worksite enforcement, in comparison, consumed 150 work years.³⁸¹ The INS also emphasized increased collaboration with other government agencies, particularly state and local police departments. The investigation into 9/11 has raised the interest of some police departments in participating in immigration enforcement and brought new federal agencies to this effort as well. It also has re-ignited a debate about, and opposition to, the delegation of federal immigration authority to state and local police.

A GAO report released in April 2003 concluded that the INS faced numerous challenges to implementing its interior enforcement strategy that DHS will need to address. Among the factors GAO identified are the lack of reliable data and information technology, clear and consistent guidelines and procedures for staff, and effective cooperation and coordination within the INS and other agencies.³⁸² Asa Hutchinson, Under Secretary for Border and Transportation Security at DHS, testified to a revised set of priorities on April 11, 2003, emphasizing deterrence, disruption and disabling terrorist plans and support networks; identifying, apprehending, and removing aliens who threaten the safety and security of the nation; and protecting businesses of national security interest from the vulnerability created by the employment of unauthorized alien workers.³⁸³ This approach is largely a repudiation of the approach adopted in 1986, when employer sanctions and worksite enforcement were considered to be a vital component of immigration enforcement.

POLICE REACT TO PROPOSED ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

California Police Chiefs' Association

President Rick TerBorch

"It is the strong opinion of the California Police Chiefs' Association that in order for local and state law enforcement organizations to be effective partners with their communities, it is imperative that they not be placed in the role of detaining and arresting individuals based solely on a change in their immigration status."

- Excerpt from letter to Senator Feinstein, 9/19/2003

Boston (MA) Police Department

Commissioner Paul Evans

"The Boston Police Department, as well as state and local police departments across the nation have worked diligently to gain the trust of immigrant residents and convince them that it is safe to contact and work with police. By turning all police officers into immigration agents, the CLEAR Act will discourage immigrants from coming forward to report crimes and suspicious activity, making our streets less safe as a result."

- Excerpt from letter to Senator Kennedy, 9/30/2003

Houston (TX) Police Department

Spokesperson Silvia Trevino

"The INS handles immigration. We handle crime."

- *Local Police May Get Role in Immigrant Law*,
BALTIMORE SUN, 7/9/2003

Denver (CO) Police Department

Chief Gerry Whitman

"Communication is big in inner-city neighborhoods and the underpinning of that is trust. If a victim thinks they're going to be a suspect in an immigration violation, they're not going to call us, and that's just going to separate us even further."

- *Immigration Bill Has Police Uneasy*,
DENVER POST, 4/22/02

South Tucson (AZ) Police Department

Chief Sixto Molina

"We don't have the time and the personnel to be immigration agents. Murderers, rapists, robbers, thieves and drug dealers present a much bigger threat than any illegal immigrant."

- *Immigration Role Not for Local Police*,
Editorial from TUCSON CITIZEN, 10/15/2003

Ventura County (CA) Sheriff's Department

Spokesperson Eric Nishimoto

"The number one risk is the potential for civil rights violations. Right now we're involved in preventing any kind of racial profiling and this type of function could open us to that kind of risk. . . We fear our officers are not equipped to make that kind of determination of who is legal."

- *Proposal for Police to Act as INS Agents Denounced*,
VENTURA COUNTY STAR, 4/6/02)

Based on compilations from <http://www.immigrationforum.org/currentissues/articles/CLEARHSEAQuotes.pdf>

Increased Police Involvement in Immigration Enforcement Efforts

Controlling immigration is the responsibility of the federal government. State and local police are usually precluded by law from engaging in immigration enforcement activities and lack the necessary immigration law training to do so.³⁸⁴ When local police and the INS worked together, each was supposed to stay within the confines of its given role. The local police handled public safety or investigated criminal activity while the INS enforced immigration laws and apprehended individuals who were unauthorized to be in the United States or had violated their visas. This separation between the INS and state and local police was vital, as public safety depends on community trust and people feeling safe to go to the local police to report crimes and share information, while immigration enforcement requires knowledge of a unique and complex body of law. This division of labor also was dictated by law.

The Department of Justice issued a legal opinion in February 1996 addressing the relationship between immigration authorities and police. It concluded that “[s]tate and local police lack recognized legal authority to stop and detain an alien solely on suspicion of *civil* deportability.”³⁸⁵

*Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens for violating the **criminal** provisions of the Immigration and Naturalization Act.*

*State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of **civil** deportability, as opposed to a criminal violation of the immigration laws or other laws.*

*State and local police may detain aliens reasonably suspected of a **criminal** violation of the immigration laws for periods of as long as 45 to 60 minutes when detentions of that length are necessary to allow for the arrival of Border Patrol agents who are needed for the informed federal disposition of the suspected violations.*

Soon after this opinion was issued, the 1996 laws were amended giving the Attorney General the authority to enter into memorandums of understanding (MOUs) with state and local police departments that would allow them to enforce federal immigration laws once they had received proper training.³⁸⁶ Law enforcement officers who perform these functions, moreover, were to be placed under the direction and supervision of the Attorney General. These requirements were believed necessary to minimize risks that untrained and inexperienced officers would violate the civil rights of minority citizens and residents and to reduce the strain on police – community relations that otherwise might develop. The Attorney General began discussions with a number of localities, but most that have considered the idea so far have concluded that the negatives outweigh the positives. Only two states, Florida and Alabama, have entered into an MOU.

In **Salt Lake City, Utah**, law enforcement officers complained that when they had an undocumented individual in custody, the INS would not respond. Some of these officers wanted the power to arrest and detain undocumented immigrants. In July 1998, it appeared certain that a pilot memorandum of understanding was going to be established. In the end, though, community concerns outweighed the calls for increased efficiency in law enforcement. Worried about possible increases in civil rights abuses, members of the City Council voted to reject the MOU. The INS then explored setting up a pilot MOU in Marshalltown, Iowa, but law enforcement officials there also rejected the idea of performing INS duties.³⁸⁷

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In March 2002, **Florida** state and federal authorities announced a plan to train 35 police officers who would focus on terrorism suspects and be attached to seven domestic security task forces being established. State officials initially proposed enlisting the entire state police force for federal immigration law enforcement.³⁸⁸ State officials later clarified that “officers covered by the MOU would not be involved in immigration enforcement activities that did not involve terrorism or domestic security issues.”³⁸⁹

As an alternative to deputizing state and local officers, some states received INS “Quick Response Teams” (QRTs) as part of the new interior enforcement strategy. Forty-five QRTs, for a total of 200 immigration enforcement personnel, were deployed to 11 states to “work closely with state and local law enforcement officials to determine the status of apprehended individuals and remove those determined to be removable.”³⁹⁰ Utah received four QRTs, for a total of 20 additional immigration enforcement personnel. Iowa received five QRTs, with two of the teams based in Des Moines. Arkansas, Colorado, Georgia, Kentucky, Missouri, Nebraska, North Carolina, and Tennessee also received QRTs.³⁹¹

The purpose of the QRTs was to establish INS offices to apprehend and remove aliens identified by state and local law enforcement in the course of their normal duties. Under the internal interim guidelines for the QRTs, INS officers were only to respond to calls from the local police when: (1) an individual has been arrested and charged with a violation of state or local law, or (2) after a lawful stop, the local police have a reasonable suspicion that a criminal violation of the immigration laws is taking place.³⁹² Not all communities welcomed the QRTs as a positive development, however. In Carbondale, Colorado, for example, the directors of several government agencies expressed concern that the arrival of QRTs would undermine their efforts to reach out to the Latino community.³⁹³

As would be expected, the presence of QRTs seems to lead to increased cooperation between immigration enforcement and local police. Through the third quarter of fiscal year 2001, INS-QRT officers responded to 7,608 requests for assistance from state or local law enforcement officers, which resulted in 10,998 arrests, of which 847 individuals were charged with criminal immigration violations.³⁹⁴ In fiscal year 2001, QRTs briefed police officers from 408 agencies on immigration matters.³⁹⁵

The presence of QRTs in a community, however, may influence how local law enforcement sets priorities and could be misinterpreted as encouraging police to investigate the immigration status of individuals with whom they come into contact. The very mission of QRTs is confusing and blurs the lines between immigration officers and local police. The confusion is exacerbated by the fact that the teams are located primarily in states that recently have experienced sizable influxes of immigrants, have not historically had a large immigration enforcement presence, and are at a particularly vulnerable stage in terms of race relations. If encouraged to engage in immigration enforcement, state and local police officers, who are untrained in immigration law and less accustomed to dealing with immigrant communities, may rely on such invidious factors as an individual's name, accent, speech pattern, or physical appearance in determining who may be undocumented.

One of the most important issues in immigrant communities today is the role of police in immigration enforcement.³⁹⁶ Even without delegating any new authority to state and local police, the heightened presence of immigration personnel is increasing informal collaborations with state and local police and creating some overlap in their activities. The deployment of five QRTs in rural Colorado, for example, led to a 500 percent increase in immigration enforcement from fiscal year 1999 to 2000.³⁹⁷ Moreover, the presence of immigration officers may

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embolden local police to venture improperly into immigration enforcement activities. Police in some communities have used their authority to investigate crime as a pretext for engaging in immigration enforcement, eroding the community trust and cooperation that is so vital to effective police work.

Members of the Pasadena Police Department subjected **Lin Chen Hui Chu** and **Buddhist clergy**, who were visiting her Pasadena, California home, to a warrantless raid and interrogation in June 2002. On the basis of a tip, police surrounded the house and approximately 15 officers searched and photographed Mrs. Lin's home over the course of eight hours. Mrs. Lin and her guests were ordered to sit on the couch or the floor and were ordered not to talk, make phone calls or receive calls. When they needed to use the bathroom, an officer accompanied them and forced them to leave the door open. They were denied food and water while the police ate in front of them. One guest was removed from the bathroom where she was showering when police arrived, and not allowed to dry her hair. Officers turned the house inside out, in the process desecrating Buddhist shrines in the master bedroom and living room. Finding nothing illegal, the police then called the INS. The police agreed to leave only after an immigration officer looked at everyone's passports, green cards and visas, and verified their status: by then it was 5:30 a.m.³⁹⁸

As an extreme example of what can happen when the INS and local police work together, the **Los Angeles Police Department's** Rampart Division, at the center of a police corruption scandal, planted incriminating information in immigration files and collaborated with the INS to deport Latino immigrants and to bring criminal immigration charges against 23 people who were charged with no other crime.³⁹⁹ Since 1979, the LAPD has had a written policy, Special Order No. 40,⁴⁰⁰ that prohibits its officers from initiating actions that are intended to discover an individual's immigration status. Some officers in the Rampart Division, under the pretext of gang-related investigations, targeted Latino residents who were not associated with any gang activity and pressured the INS to deport more than 160 of them. The revelations heightened tensions between the police and the community they are supposed to serve.⁴⁰¹ In November 2000, the Department of Justice and the City of Los Angeles entered into a consent decree requiring numerous reforms and granting Justice Department oversight of the L.A.P.D. for a period of five years.⁴⁰²

The residents of Chandler, Arizona, profoundly felt the impact of profiling during the last week of July 1997. Local police and Border Patrol agents had an "informal" work relationship that led to a five day sweep as part of "Operation Restoration," an economic redevelopment plan for the downtown area.⁴⁰³ During the sweep hundreds of people were stopped and arrested, nearly all of them Latino. As a result, 432 undocumented immigrants, all of them Latino, were deported. Numerous U.S. citizens and legal residents also were stopped and interrogated.

Catalina Veloz, who was born and raised in Arizona, was stopped and questioned twice during the five day period. Following the sweep, her five year old son would cry whenever he saw a police officer and ask her to hide so that the INS would not take her away. During the operation, police without search warrants went to homes at night – including those of U.S. citizens and legal residents – demanding entry and terrifying sleeping residents. Officers reportedly told one immigrant and his family, "We can do whatever we want – we are the Chandler Police Department."⁴⁰⁴ The family was questioned for 90 minutes even after presenting proof of their legal status.

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Arizona's Attorney General found that the operation violated the constitutional rights of many residents and greatly eroded trust between the police and the community.⁴⁰⁵ In 1999, twenty of the people victimized in Chandler won a \$400,000 settlement against the government, and the Border Patrol concluded in an audit that the operation should not have been done.⁴⁰⁶ The city also implemented a new policy that prohibits police officers from stopping people for the purposes of determining their immigration status and from contacting the INS except in limited circumstances.

In 2003, the **State of Alabama** entered into an MOU with DHS allowing 21 state troopers to receive immigration training and to make immigration arrests.⁴⁰⁷ The director of the Alabama Department of Public Safety assured that the troopers would engage in immigration enforcement actions only as needed in the course of their regular duties. But even before receiving this authority one county sheriff indicated that almost 25 percent of the 500 arrests made by his department in 1999 involved persons without proper immigration documents.⁴⁰⁸

Police in some states and communities call on immigration officers to provide interpretation. In **Dalton, Georgia**, it has been reported that when the local police pull over drivers for alleged traffic violations who do not speak English, they call in immigration agents to provide translation services. Once the agents are on the scene, the drivers are asked questions not related to the alleged driving infraction but regarding their immigration status.⁴⁰⁹ A Border Patrol officer told a group of visitors from the American Bar Association that the **San Diego police** routinely call the San Diego Sector Border Patrol to act as interpreters when they stop someone. If the suspect seems uneasy when introduced to the Border Patrol officer, it gives rise to a suspicion to inquire about the person's immigration status.⁴¹⁰

In July 2001, **Miguel Lopez** was driving his family to their home in Rogers, Arkansas – when he was pulled over by police officers who detained Lopez and his wife, asked about his immigration status, searched his vehicle without his consent and failed to explain why they had pulled him over. The officers left without issuing a citation. Lopez filed suit against the **Rogers Police Department**, claiming that police officers regularly stopped Hispanic motorists and inquired into their immigration status. Under a court approved settlement agreement, the City of Rogers agreed to publish an order prohibiting “racial/bias profiling” and to establish mechanisms for monitoring the city's compliance. It also agreed to provide police officers with annual training on cultural diversity.⁴¹¹ The Rogers area is experiencing a rapid increase in its Hispanic population, and the state has one of the highest Hispanic population growth rates in the country.⁴¹²

Ohio State Highway Patrol officers, after pulling over two Latino motorists for a faulty headlight, not only asked them questions about their immigration status but also confiscated their green cards. A federal judge ruled in 2000 that state troopers who stop motorists for suspected motor vehicle violations cannot ask them about their immigration status. Officials of the Ohio State Highway Patrol admitted that they had detained hundreds of motorists and held them until Border Patrol agents arrived. They further admitted that they had confiscated many green cards – some of which turned out

to be legitimate – and that all of them belonged to Latino motorists. The judge ruled that this type of discriminatory behavior violated the equal protection rights of the motorists.⁴¹³

Eight Orange County Police Departments acknowledged taking more than 4,000 people suspected of being in the country illegally to a Border Patrol checkpoint for deportation. Although they were not charged, the La Habra police chief said the individuals had violated city ordinances against selling items such as “flowers and fruit on a median or sidewalk without a business license.” In Orange County, merchants had complained to police of loitering, soliciting jobs, and “talking Spanish.” In some cases the Border Patrol agents met sheriff’s deputies at “gas stations, fast food restaurants and parking lots to pick up undocumented people.”⁴¹⁴

In April 1999, a teenage boy who was picked up for jaywalking was turned over to the Border Patrol. He was in the United States legally but not carrying documentation. The Border Patrol pressured him to sign a voluntary departure and expelled him.

Police apprehensions accounted for 40 percent of Border Patrol cases in fiscal year 2001; they represented 33 percent for the previous year.⁴¹⁵

Because of incidents like these, many communities were alarmed by Attorney General John Ashcroft’s announcement on June 6, 2002 that suspected immigration law violators would be entered into the National Crime Information Center (NCIC) database that is routinely checked by state and local police.⁴¹⁶ Among those to be included in the NCIC system are foreign visitors who fail to register or overstay their visas under a special “registration” system, and approximately 314,000 suspected alien “absconders.”⁴¹⁷ Law enforcement accessing the NCIC system were asked to apprehend these immigration law violators and transfer them to INS custody. The Attorney General characterized this unprecedented involvement of local and state police in immigration law enforcement as an anti-terrorism initiative that, according to the Justice Department’s Office of Legal Counsel (OLC), “is within the inherent authority of the states.”⁴¹⁸

These announcements generated substantial controversy and speculation over whether the Department of Justice had revised the 1996 OLC opinion concluding that police do not have authority to stop and detain solely for civil violations of the immigration law. A detailed legal analysis prepared for the Migration Policy Institute concludes that the 1996 Justice Department policy prohibiting the enforcement of civil immigration law violations by state and local law enforcement was correct.⁴¹⁹ Citing the DOJ Office of Legal Counsel, White House counsel Alberto R. Gonzales responded that “state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center (NCIC).”⁴²⁰ His letter went on to say that “[o]nly high risk aliens who fit a terrorist profile will be placed in NCIC.”⁴²¹ The DOJ OLC opinion, however, was not released and several organizations filed a lawsuit to obtain the opinion under the Freedom of Information Act.⁴²²

In addition, the INS established a Law Enforcement Support Center (LESC) to make available databases intended to track immigrants’ current legal status to state law enforcement officers of all but four states (Idaho, New Jersey, Rhode Island and Indiana) 24 hours a day.⁴²³ In fiscal year 2002 alone, the LESO databases received 426,895 law enforcement inquiries, 309,489 of which came from state and local law enforcement, and 24,646 inquiries regarding foreign

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nationals seeking firearms.⁴²⁴ LESC also logged 2,112 detainees – in less than 0.5 percent of inquiries – authorizing the detention of undocumented immigrants.⁴²⁵ LESC is assembling a training force to provide workshops to local criminal law enforcement officers in immigration law.⁴²⁶

These collaborations are growing. Immigration agents also participate in Violent Gang Task Force (VGTF) units in “major cities throughout the United States.”⁴²⁷ The INS assigned 127 Special Agents to the Organized Crime Drug Enforcement Task Force (OCDETF) in nearly 60 cities.⁴²⁸ The INS also was a key player in anti-terrorism task forces coordinated by the FBI before being absorbed into the Department of Homeland Security.⁴²⁹

Some communities and government agencies are concerned about the impact of this increased cooperation between the INS and the local police and have taken steps to minimize its potentially adverse impact on police – community relations. The concern is that members of immigrant communities are not likely to report crimes or assist officers investigating crimes if local police are known to have a cooperative relationship with the INS. When immigrants do not trust – or worse, fear – law enforcement authorities, the consequences can be tragic.

A 15 year old Mexican national was kidnapped, abused, raped, and impregnated, but she was afraid to say anything to police because she was undocumented. Although her tormentor was placed in prison, her fears were not unfounded, she was deported to Mexico.⁴³⁰

In New Jersey, **Elena Gonzalez** was found murdered in the basement of her apartment. Friends of the woman say that the suspected murderer, her former boyfriend, threatened to report her to the INS if she did not do as she was told.⁴³¹ Domestic violence crimes against immigrants often go unreported because victims fear that a police report could trigger removal proceedings.⁴³²

Fifty-eight deaf and mute Mexicans were discovered living a life of servitude in New York City in July 1997. They had been smuggled into the United States, where they were forced to live in crowded apartments and were beaten, raped, traded, and forced into submission with stun guns. Most feared going to police because they were undocumented, and their smugglers threatened to turn them over to the INS. The workers were found only after two of them managed to write a statement about what was happening to them and get the statement to a police officer. The neighbors of the Mexicans witnessed some of the abuse but also were afraid to call the police out of fear that the INS would become involved.⁴³³

In March 1999, a three day enforcement action on the **Olympic Peninsula in Washington** involved the collaboration of 11 local and federal agencies, including the local sheriff, the U.S. Forest Service, the INS, the Border Patrol, and two private companies. The goal of the sweep was to crack down on “brush-pickers” who were harvesting forest products without permits. The sweep caused a great deal of fear in the community. A school employee reported that families were not sending their children – even those with legal status – to school. Classes that normally had 24 or more Hispanic children had only two. Community members reported seeing police stop only minorities

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and reported a range of abusive behavior, including the slamming of one man against a car, families not being allowed to see those being held, and persons having numbers written on them as if they were animals.⁴³⁴

To counter similar fears, some police departments have had policies specifically prohibiting their officers from inquiring into immigration status or engaging in other immigration enforcement activities,⁴³⁵ and additional departments now are following that path.⁴³⁶ When a deadly sniper terrorized the Washington, D.C. metropolitan area in October 2002, Montgomery County Police Chief Charles A. Moose sought to assure the immigrant witnesses that their status “is not the concern of the sniper task force” and that they could come forward without fear of problems with the INS.⁴³⁷ Federal authorities also pledged that immigrant witnesses would not be turned over to the INS and even suggested that special visas might be granted to immigrants who “materially aided” the investigation.⁴³⁸

ENFORCEMENT

Although Fourth Amendment protections apply to everyone in the United States, immigration enforcement authorities have the power to intrude into people’s lives in myriad ways:

Border Stops. Everyone is subject to questioning at the U.S. border. This extends to stopping vehicles and questioning their occupants as well as to stops and searches at the “functional equivalent of the border.”⁴³⁹

Extended boundary. Within 25 miles of the U.S. border, immigration officers may enter and search private land (but not dwellings) without a warrant to “prevent the illegal entry of aliens into the United States.”⁴⁴⁰

Vehicle checkpoints and roving patrols. At “permanent checkpoints” near the border, immigration officers may stop vehicles and question their occupants without any individualized level of suspicion. Officers in “roving patrols” must not stop vehicles and question their occupants without specific articulable facts that a vehicle contains illegally present individuals.

Inside the United States. To justify “casual questioning” (where there is no show of force, and the subject is free and feels free to walk away), an immigration officer must be able to articulate facts to justify a suspicion that the person is an immigrant rather than a U.S. citizen. To justify “detentive stop and questioning,” an immigration officer must have a reasonable suspicion – which requires some level of objective justification, not just a hunch – that a person is engaged in an offense against the United States or is present illegally.⁴⁴¹ A person stopped for casual questioning can create reasonable suspicion through their behavior, thus justifying detention. If the questioning occurs in a workplace that the agency has entered with either a warrant or consent, an immigration officer does not need any individualized suspicion (as long as the person feels free to leave).

Arrests. Immigration officers may arrest someone if they have probable cause to believe that the person is engaged in an offense against the United States or is present illegally.⁴⁴² Information provided during detention questioning may provide probable cause for arrest.

Community and Workplace Enforcement Efforts

Area control operations and workplace raids have been a prominent feature of immigration enforcement although their effectiveness in curbing illegal immigration has never been established. These measures do, however, undermine the ability of immigrants and minority citizens to feel safe in their homes, jobs, and communities.

On January 20, 2000, INS agents raided Randolph Air Force Base in **San Antonio, Texas**, blocking exits and asking the high tech workers for their immigration documents. Many were questioned for hours, and 40 workers were arrested and led away in handcuffs. Those arrested included green card holders and pregnant women. Eyewitnesses to the raid allege that the INS targeted individuals of apparent Indian ethnicity in deciding which workers to detain.⁴⁴³ All charges were later dropped against the detainees swept up in this raid. The enforcement agents organized the raid without the permission of their own legal department.⁴⁴⁴

In May 1999, INS agents, supported by the Seattle Police Department, raided a construction site in the **Seattle, Washington** area. After sealing off the area, they interrogated workers regarding their immigration status. A Latino laborer who was blocks away also was arrested under the mistaken assumption that he was from the construction site. A Latino union organizer who is a U.S. citizen was detained during the raid for being undocumented. Another U.S. citizen worker of Mexican heritage was repeatedly questioned about his immigration status.⁴⁴⁵

The interior enforcement plan also includes new strategies for workplace enforcement. Even before 9/11, the INS was placing less emphasis on work site raids and more into establishing relationships with employers in certain industries to systematically detect and deter unauthorized employment. The operations undertaken focused primarily on industries with large numbers of low-wage, low-skill jobs that largely are filled by immigrant workers. The DHS also has continued to engage in the type of workplace raids that it had found to be largely ineffective.⁴⁴⁶

Operation Vanguard, launched in 1998, reflects a newer approach to detecting undocumented workers. Focusing on meatpackers in Iowa and Nebraska, the INS subpoenaed employment records from targeted employers and compared them with government databases, including those of the Social Security Administration. The INS then compiled lists of workers whose documents raised questions, notified employers, and attempted to set up interviews with the suspected employees. Many workers simply changed jobs rather than interact with INS officials. The INS interviewed an estimated 1,000 employees who had been identified as having discrepancies in their records; only 34 were unable to verify their status.⁴⁴⁷ In the summer of 1999, the Social Security Administration stopped cooperating with the INS out of concern that allowing such “fishing expeditions” into its database risked wholesale invasions of privacy.⁴⁴⁸

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In the state of **Washington**, the INS targeted workers in the apple packing industry. Using a method similar to that used in Operation Vanguard, the INS conducted an industry-wide audit to create a list of employees whose documents did not seem to be in order. The INS gave the list to employers, who then fired individuals whose names appeared on the list. Most of the workers are believed to have found work in other packing plants. Union officials believe that the enforcement measures have put these workers in more dangerous working conditions with less ability to speak out. The INS also conducted “follow up raids” since the initial firings.⁴⁴⁹

In **Miami**, approximately 100 armed federal agents raided the world’s largest manufacturer of bulletproof vests in October 1999. More than 60 workers were handcuffed and taken away to the Krome immigration detention center. All but eight workers produced proof of legal status and just three were deported.⁴⁵⁰

Eight employees of a Holiday Inn in Minneapolis, Minnesota, were fired and reported to the INS in October 1999 after leading a drive to unionize hotel workers. The hotel manager claimed he fired them because they did not have work authorization. After the INS arrested and detained the workers, the union filed a complaint with the National Labor Relations Board (NLRB). The NLRB found the hotel guilty of firing the workers in retaliation for their union activities, a labor law violation. In a separate action, the Equal Employment Opportunity Commission (EEOC) found the hotel guilty of civil rights violations. The workers also won a two year postponement of deportation and work authorization.⁴⁵¹

In **Stockton, California**, 45 armed INS agents surrounded a group of farm workers who were in a restaurant parking lot waiting to be paid on July 15, 2000. The agents forced approximately 35 workers to lay face down on the pavement at gunpoint before arresting them. The agents then raided the restaurant and took away at least one worker. The raid was described as part of an effort to crack down on farm-labor contractors, but the two contractors who were arrested were released. The workers were held in a local county jail until midnight and then put on a bus to Bakersfield, California, where they were strip searched, removed of their possessions, and held in cold, overcrowded rooms.⁴⁵²

After 9/11, the INS continued work site enforcement but changed its strategy. It targeted investigations at industries and businesses where there might be “a threat of harm to the public interest.”⁴⁵³

“Operation Tarmac” was a national effort to remove potential security threats from jobs in airports. The operation targeted undocumented employees of airports, and hundreds of immigrant workers across the country lost their jobs. Over 900 individuals were arrested at 100 airports, chiefly for presenting false information regarding their immigration status to obtain work. None have been linked to terrorism.⁴⁵⁴

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One worker, **Juana Jiminez**, a legal permanent resident since 1987, had spent 21 years working the night shift at the food services job at LAX when she was awoken from her bed by four marshals who handcuffed her on the spot. Juana had been working to support her three U.S. citizen children, and her husband, also a citizen, whose diagnosis with cancer prevented him from finding work. The government accused Juana of providing an illegally obtained Social Security number on her job application in 1978. As a consequence, she faces criminal charges and possible deportation.⁴⁵⁵

While work site raids continue, “‘they have not worked,’ conceded Doris Meissner, who served as INS commissioner for seven years.”⁴⁵⁶ INS’ pursuit of sanctions against employers who hire undocumented immigrants dropped as much as 97 percent from 1999 to 2001.

Race and Ethnicity-Based Profiling

At the core of concerns over the enforcement of immigration laws is the fear that current practices invite the targeting of racial minorities. For decades, race has been a permissible factor in the INS’ decision to stop a person. The U.S. Supreme Court has ruled race or ethnic appearance can be one of the factors – but not the only factor – on which an immigration officer forms “reasonable suspicion” to justify questioning or detaining a person.⁴⁵⁷ In particular, the Supreme Court found that “Mexican appearance” was a relevant factor.

Plaintiffs in lawsuits have argued that the INS often violated the wide latitude afforded it by the Supreme Court and that the Border Patrol relies almost exclusively on race in making immigration stops. Once officers begin talking to an individual, it is easy for them to come up with the necessary “articulate facts” to strengthen their “reasonable suspicion.”⁴⁵⁸ Race and ethnicity-based immigration enforcement extends far beyond the border and into every part of the United States, although many Americans are not fully aware of the impact it may have on their neighbors who look or sound “foreign.”

Many civil rights organizations view race and ethnic profiling by law enforcement agencies to be a serious concern.⁴⁵⁹ In June 1999, as part of a new “Fairness in Law Enforcement” project, President Clinton directed federal law enforcement agencies – including the INS and Border Patrol – to begin collecting data on the race, ethnicity, and gender of all persons they stop and search.⁴⁶⁰ Legislation also was introduced that would require the Justice Department to collect similar data from law enforcement agencies nationwide.⁴⁶¹

In the immigration context, profiling appears to play a large role in deciding who is questioned at airports, which motorists are pulled over by the Border Patrol, and which neighborhoods and workplaces should be investigated or raided. Although the Latino, Asian, and Arab populations have grown to the point that Hispanic, Asian or Arab appearance is of little or no use in determining whether a person is in the United States legally, immigration enforcement efforts, both at the border and in the interior, continue to rely heavily on profiling. In 2000, 85 percent of persons deported were Mexican⁴⁶² even though Mexicans make up just 69 percent of the nation’s undocumented population.⁴⁶³ Even in New York City, with immigrants from six continents, nearly all arrests made during 187 INS worksite raids over a 30 month period involved Latinos. Mexicans and nationals of Central and South America accounted for 96 percent of the 2,907 people arrested between January 1997 and June 1999, while only two arrests were for Chinese nationals.⁴⁶⁴

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Two courts have taken another look at these enforcement practices and held that race and ethnicity are not appropriate factors where particularized or individual suspicion is required.⁴⁶⁵ The Hispanic population has grown to the point where “Hispanic appearance is, in general, of little probative value” in determining whether a person is in the United States legally, the U.S. Court of Appeals for the Ninth Circuit has found.⁴⁶⁶ “Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone,” the court said in its ruling.⁴⁶⁷ “Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection.”⁴⁶⁸

Prior to 9/11, racial profiling was condemned by President Bill Clinton, President George Bush, and Attorney General John Ashcroft.⁴⁶⁹ A growing national consensus seemed to indicate that it was improper for law enforcement to have any authority to engage in racial profiling.⁴⁷⁰ September 11 produced a dramatic shift in public attitude with respect to racial profiling, with many believing it may be a necessary strategy in waging the war on terrorism. In June 2003, the Bush Administration ordered a ban on racial profiling by federal law enforcement agencies in routine investigations, although the guidelines accommodate clear exemptions for investigations involving national security and terrorism.⁴⁷¹

Impact on Criminal Justice System

Many violations of immigration law now also are federal crimes that are subject to prosecution, imprisonment, and fines. The Border Patrol increasingly refers aliens to U.S. attorneys for criminal prosecution of such immigration violations as illegal entry and illegal reentry, and similar crimes for which only non-citizens can be prosecuted and convicted. The results have been striking:

- Criminal convictions for immigration-related crimes doubled from 1996 to 2001, “ranking the INS first among all federal law enforcement agencies in terms of its share of convictions.”⁴⁷²
- The length of median prison sentences for immigration crimes increased from two months in 1992 to 15 months in 2001,⁴⁷³ and the total number of years of imprisonment handed down to immigration law violators increased from 6,413 in 1993 to 16,804 in 2002.⁴⁷⁴
- In 2001, 50 percent of INS criminal prosecutions were for reentry of a deported alien, and 20 percent were for improper entry by an alien.⁴⁷⁵

Stepped up prosecutions for immigration violations – 16,541 in 2001 compared with 7,680 in 1996 – are overwhelming federal court systems in border counties. While the size of the Border Patrol has doubled, the size of the judiciary has not increased at the same rate.⁴⁷⁶

Expansion of Immigration Enforcement Into Other Segments of Society

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)⁴⁷⁷ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁴⁷⁸ imposed new requirements on some government agencies that provide public benefits. Most social service agencies now are required to verify the citizenship or immigration status of applicants for federal public benefits (except when the benefit is one for which all immigrants continue to be eligible, such as emergency medical treatment). In addition, three benefit-providing agencies –

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those providing housing assistance, supplemental security income and aid to needy families (HUD, SSI, and TANF) – must report to immigration authorities the individuals “known to be unlawfully present.”⁴⁷⁹ In the past, this type of requirement has been interpreted narrowly to cover only persons who are subject to final orders of deportation, inasmuch as only the Attorney General can determine that an individual is present unlawfully in the United States.

The 1996 laws also contain a “no confidentiality” provision. This provision essentially holds that no federal, state, or local government entity may restrict communications between its employees and the federal authorities about the immigration status of individuals.⁴⁸⁰ The purpose of the provision is to preempt state and local laws that prevented such communications; these local laws were intended to encourage people to seek help from government agencies when they might otherwise avoid them. New York City had such an ordinance and challenged the “no confidentiality” provision on the ground that it interfered with states’ rights. New York City lost in federal court, however, and the U.S. Supreme Court declined to hear the case, letting stand a lower court’s decision upholding the constitutionality of the provision.⁴⁸¹

Attorney General guidance and proposed regulations for the new benefits-verification rules stress that privacy protections and anti-discrimination laws continue to apply. In addition, the Health and Human Services Department has instructed Medicaid and TANF directors that privacy protections continue to exist despite the “no confidentiality” provisions.⁴⁸² Despite these assurances, fear remains, deterring people from accessing even the most basic services, including services for U.S. citizen children.

In a study of how immigrants are faring after welfare reform, the Urban Institute found evidence of a chilling effect. After the 1996 changes, the percentage of non-citizen households applying for Medi-Cal and CalWorks in California fell by 71 percent although there was no change in eligibility for legal immigrants for those programs. During the period studied, there was virtually no change in citizen households.⁴⁸³ However, the chilling effect extended to non-citizen households applying for benefits for U.S. citizen children, those applications fell by nearly 50 percent.⁴⁸⁴

A George Washington University study shows that Latino immigrants applying for public benefits are subjected to more questioning about their immigration status than are members of other immigrant groups.⁴⁸⁵ This, of course, leads to Latino immigrants being more apprehensive about accessing needed public services. Mexican immigrants in California, for example, said they were told that Medi-Cal offices planned to report undocumented persons to the INS, thus discouraging many eligible individuals from applying, either for themselves or their U.S. citizen children.⁴⁸⁶ This fear of accessing services extends to emergency medical treatment, even though everyone is eligible for emergency medical care regardless of immigration status.⁴⁸⁷ Requiring health care and social service providers to verify the immigration status of applicants imposes financial and administrative burdens on them and diminishes their ability to provide needed assistance.

Nativity House, a drop-in center for the homeless in **Tacoma, Washington**, was raided several times by the INS in January and February of 1998. The Director stated, “I’m pretty apprehensive about the INS presence down here because we are a place of welcome. Anytime the INS appears on the scene, a lot of people feel very threatened, and we don’t want that here. There is already serious racial tension between African American and Latino communities. Certainly, any INS presence would add to that.”⁴⁸⁸

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Seventeen year old “Omar” left his family in Morocco in August 2001 because he is gay and feared repercussions. Not knowing about asylum, he applied for an extension of his visa in February 2001. He received a letter from the INS acknowledging receipt, but never heard from them again and eventually relocated to Virginia, where he had a friend.

Wanting to complete his education, Omar registered to attend high school on September 12, 2001. Two days later, the school guidance counselor called him to her office and instructed him to bring in his passport and visa. When he brought his documents to school on Monday, September 17, the guidance counselor took him to the school security office and contacted the principal. The police were called. The police handcuffed Omar and took him to the local police station “because of what is happening in this country.” Omar tried to assure them that he was not a terrorist but they locked him in a cell and called the INS.

The INS took him to their district office, interrogated him, and put him in removal proceedings for working without authorization. He was sent to the Piedmont jail to wait for his hearing. A *pro bono* lawyer helped him apply for asylum and bond out of jail in February 2002. He has since won his asylum case, passed his GED exams, and is studying for a business degree.⁴⁸⁹

Abdolreza Masoodi, a naturalized U.S. citizen born in Iran, has lived in El Paso, Texas for over 25 years. On January 15, 1999, he went to the Social Security office in El Paso to apply for social security cards for his elderly parents who recently had emigrated to the United States. At the office, a Social Security employee called the INS to come to the office to review the documents. After being told that his parents’ applications were approved, Mr. Masoodi left the office. Although they had no warrant, two INS agents arrested and handcuffed him, and transported him to the INS office for questioning.

Mr. Masoodi tried to explain that he was a U.S. citizen and that his parents were legally in the United States. Once at the INS office, an agent was able to confirm this information. However, Mr. Masoodi felt publicly disgraced as a result of his ordeal, and he lost weight and suffered extreme anxiety and stress. He brought suit challenging his false arrest by the INS. The case went to trial on April 4, 2002. On April 24, the court ordered the United States to pay \$75,000 to Mr. Masoodi for the pain, suffering, and humiliation he suffered.⁴⁹⁰

Fourteen Hispanic men were arrested by the INS in the Wayne County, Kentucky, Courthouse when they went to pay their traffic fines in November 2000. Two weeks earlier, police in Monticello, Kentucky had erected a roadblock that targeted Hispanic workers en route to Cagle-Keystone Food, a poultry processing plant, for the overnight shift. Eighteen drivers were cited for lacking proper licenses and all but two of them were arrested. Their passengers, including a woman and baby, were left on the side of the road as police towed away the cars. According to one news account:

The Hispanics sat [in court] all morning among the residents of Wayne County, wondering what was being said around them as they awaited their turn before District Judge Robert Wilson. Then, just before lunch, the judge announced that the INS wanted

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to talk to them. An interpreter conveyed the message and the men exchanged startled glances. Two bearded agents wearing blue jeans, with pistols poking from their jackets, appeared.⁴⁹¹

Anissa Khoder, a citizen of the United States for 10 years, appeared in traffic court in Tarrytown, New York in May 2003 to contest a parking ticket. Local Justice William Crosbie is reported to have asked Ms. Khoder if she was a terrorist. Ms. Khoder, who was born in Lebanon, fainted. She subsequently filed a complaint with the state Commission on Judicial Conduct and the judge stepped down in a letter to the mayor on June 16, 2003.⁴⁹²

The justice system plays a prominent role in American society and is considered by many to be the institution that most distinguishes our nation. Judicial independence and impartiality, moreover, are paramount to preserving public confidence in the justice system. These incidents illustrate how immigration enforcement may undermine public trust, particularly in the eyes of immigrants from countries that lack independent judicial systems.

As has been the case with many other aspects of the 1996 laws, the enforcement mechanisms that arose from the laws have had unintended consequences. Immigration enforcement has pervaded communities to the point where community trust in the police is eroding, people of various ethnicities feel victimized, and both government personnel and private citizens feel authorized to inquire into a person's immigration status. This trend towards aggressive enforcement and federal collaboration with state and local authorities has compounded the effects of the 1996 laws and will have increasing importance in the post-9/11 world.

Chapter 10

The 1996 Laws in the Post-9/11 World

He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself.

- Thomas Paine
“Dissertation on First Principles of Government” (orig. pub. 1795), *The Writings of Thomas Paine*, ed. Moncure D. Conway, vol. 3, p. 277 (1895)



For the last seven years, the 1996 laws have torn apart families, ruined lives, and even led to people's deaths. Sometimes, intervention by courts and the press has saved a few individuals from permanent banishment from their loved ones, but the majority of immigrants caught in the laws' web find no reprieve.

Today, the situation is even worse. In the weeks following the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, the Administration began to implement immigration enforcement measures that critics characterized as draconian. Using its authority under the 1996 laws, the Justice Department made sweeping changes in the way it conducted immigration enforcement and in the procedural rights accorded to individuals apprehended in such actions. The cumulative effect of these changes, combined with the Justice Department's vast terrorist investigation, has been the arrest and extended detention of individuals without charges or charged with minor immigration violations, such as visa overstay and working without authorization, that prior to 9/11 rarely resulted in pre-hearing detentions. Notwithstanding the immensity of the atrocities that occurred on September 11, 2001, the government's response to those acts of terrorism must be related to actual security needs and must continue to respect fundamental due process protections.

Beginning almost immediately after 9/11, the Justice Department implemented new rules directed at immigrants. On September 20, 2001, the length of time for which an individual arrested by immigration authorities can be held without being charged was increased from 24 to 48 hours or "an additional reasonable period of time" in the event of an "emergency or other extraordinary circumstance."⁴⁹³ The next day, the Attorney General ordered that certain immigration court cases be closed to the public.⁴⁹⁴ On October 31, 2002, the Justice Department issued a regulation providing an automatic stay of an immigration judge's decision to lower bond or release a detainee if the INS initially sets bond at \$10,000 or more.⁴⁹⁵ That same day, the Justice Department also issued a regulation permitting eavesdropping on conversations between detainees and their attorneys whenever there is "reasonable suspicion ... to believe that a particular inmate may use communications with attorneys ... to further or facilitate acts of terrorism."⁴⁹⁶

In addition to the new immigration procedures, the FBI announced that it was seeking "voluntary" interviews of Arab and Muslim men during which immigration status questions may be asked.⁴⁹⁷ A list of 7,602 individuals was drawn up based on the demographic and visa information of the perpetrators of the 9/11 attacks. Although fewer than 20 interview subjects were taken into custody for immigration violations,⁴⁹⁸ the interviews coincided with a vast law

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enforcement sweep immediately after the terrorist attacks that yielded over 1,000 immigration arrests.⁴⁹⁹ More than half of the law enforcement officers contacted later by the U.S. General Accounting Office “expressed concerns about the quality of the questions and the value of the responses obtained.”⁵⁰⁰ While some law enforcement representatives said that the project was helpful in building community ties, “others stated that it had a negative effect on relations between the Arab community and law enforcement.”⁵⁰¹

Ali Maqtari, a Yemeni French teacher married to a U.S. citizen, was detained on September 15, 2001, while dropping off his wife, Tiffany, at basic training. Ali testified at a Senate Judiciary Committee hearing that officers descended upon him and his wife (who was wearing an Islamic head scarf) “wild and full of anger.” Charged with a minor visa violation that normally would have been resolved with some paperwork, the INS detained Ali for almost two months, during which time he was allowed only one phone call per week not to exceed 15 minutes. He was interrogated and threatened with evidence that he was a terrorist. He was threatened with beatings and taunted by a guard. He passed a lie detector test three days after being detained but was held for the next seven weeks with hardened criminals. Fearing for her husband’s and her own safety, his wife resigned from the Army.⁵⁰²

The FBI took into custody more than **40 immigrants from Mauritania** during a September 21 sweep through three Boone County, Kentucky apartment complexes. The FBI was following up on a “tip” that some of the 9/11 hijackers had been living in Northern Kentucky. All of the Mauritians were cleared of any connection to terrorism and all but four were released the next day.⁵⁰³

The Israeli government believes that as many as **100 young Israeli adults** were detained nationwide in the post-9/11 sweeps. At least one Israeli national spent almost a month in immigration service custody before lawyers were able to gain her release. Most of the time she sat in a county jail, having been denied bond, finding it difficult to gain access to an attorney, and being encouraged to sign papers that waived her right to a hearing. “At first we were told that we would be back in Israel in about 10 to 14 days and that all we needed to do was not to ask for a bond hearing and sign some papers to go,” she said. “I had no idea what my rights were.” The FBI and the INS declined to comment about her case.⁵⁰⁴

Post-September 11 detainees who were released after six months in New York area facilities report having suffered sleep deprivation, body cavity searches after each meeting with their attorneys, and physical abuse by guards that left them bloodied. The prolonged incarceration and conditions of their confinement are the subject of a class action lawsuit filed by detainees held in both state and federal facilities. Detainees claim that they were deliberately kept in custody long after they received voluntary departure or final removal orders while authorities sought to investigate – without probable cause – whether they had ties to terrorism. Class members also allege that they were interrogated without being advised of their right to counsel, verbally and physically abused, and prohibited from practicing their religion.⁵⁰⁵ None of them were found to have links to terrorist activity.⁵⁰⁶

The government acknowledged arresting over 1,200 people in connection with the 9/11 probe before ceasing to release detention data in early 2002. After many inquiries, the Department of Justice reported that about 750 of those arrested had been detained on immigration charges but it continued to withhold the names of those in detention, where they were held, and what, if any, charges were brought against them.⁵⁰⁷ Families could not locate relatives and lawyers could not find clients. Moreover, the INS repeatedly changed the detention and bond rules to prolong detention. Reports gathered from lawyers and the media revealed that release bonds often were not set, custody hearings were not scheduled, and the INS refused to accept bonds for individuals who should have been eligible for release. None of the individuals were charged with terrorism-related crimes.

On June 2, 2003, the Department of Justice Office of Inspector General (OIG) issued a detailed examination of 738 immigration detainees arrested as a direct result of the FBI's investigation between September 11, 2001, and August 6, 2002.⁵⁰⁸ The report focused on the treatment of the detainees, including the conditions of confinement and why many of them experienced prolonged incarceration. Although nearly all of the detainees violated immigration laws, the OIG observed that "[i]n other times, many of these aliens might not have been arrested or detained for these violations. However, the 9/11 attacks changed the way the Department, particularly the FBI and INS, responded when encountering aliens who were in violation of their immigration status."⁵⁰⁹

The report confirmed that DOJ instituted both a blanket "no bond" policy (which the INS questioned) and a "hold until cleared" policy requiring the INS to hold detainees until the FBI cleared them. Instead of taking only a few days, however, the FBI clearance process dragged on for months, averaging 80 days but taking as long as 244 days.⁵¹⁰ Legal visits and information were restricted, access to telephones was arbitrarily denied, and certain conditions of confinement were "unduly harsh."⁵¹¹ A subsequent OIG report documented an array of physical and verbal abuse at the Metropolitan Detention Center in Brooklyn, New York, including slamming detainees against walls; bending or twisting detainees' arms, hands, wrists and fingers; lifting restrained detainees off the ground by their arms; and stepping on detainees' leg restraint chains."⁵¹² The reports did not look at the situations of persons held as material witnesses or charged with crimes.

The fates of hundreds of individuals caught up in the post-9/11 investigations still remain unknown, but at least one story is known to have ended in tragedy.

Fatima Siddiqui and her husband **Ahfaz Khan** were elated when a law was renewed allowing her, a U.S. citizen, to petition for her husband to receive a green card. Married five years, they owned a gas station and convenience store and had two young U.S.-born daughters. They lived a comfortable life in Rock Hill, South Carolina and finally had the chance to legalize Ahfaz's status.

Fatima and Ahfaz submitted the necessary paperwork and fees totaling almost \$1,500 to INS and waited for their interview. They expected that day to be one of the happiest of their lives. Instead, it was to be one of the worst. On January 8, 2002, Ahfaz was summoned to an interview with federal officers, not for his green card, but rather for a post-9/11 interview of male Muslims and Arabs. When INS learned that his visa had expired, he was detained even though INS usually does not detain or prosecute people who are married to a U.S. citizen and have applied for a green card.

Ahfaz had applied for political asylum when he first entered the United States in 1992 but he had never received notice of a hearing. After he was arrested, INS told his lawyer that he had an outstanding deportation order and that they were going to remove him

immediately. The attorney notified the INS that she was going to file a motion to reopen his case. Instead of waiting for the motion to be heard, however, INS deported him on February 1, 2002, to Pakistan, the country from which he had claimed asylum almost 10 years before. Five months later, Fatima's petition for him was approved.

Fatima did not lose hope. She moved to Florida and took a night job so that she could take care of her children during the day. She helped their lawyer prepare a waiver that would allow Ahfaz to return rather than be banished for 10 years. Such waivers often take a year to process. Meanwhile, Ahfaz was living in hiding in Karachi, Pakistan, fearful of retaliation for filing complaints against illegal police searches in the past, which had led him to flee Pakistan years before. Finally, the waiver was approved in 2003. The U.S. Embassy in Pakistan, however, closed due to terrorist threats, and Ahfaz never received his final interview. He wrote a desperate letter to his attorney, stating that he had a bad feeling and feared for his life. On March 26, 2003, he was shot and killed in a targeted attack against him.⁵¹³

In July 2002 the DOJ resurrected an obscure provision of the INA dating back to 1952 that requires all immigrants and visitors in the United States for 30 days or longer to notify the INS when their addresses change.⁵¹⁴ Failure to do so is punishable by fine, imprisonment, and deportation.⁵¹⁵ Up until 2002, INS did not enforce this law, and no one is known to have been deported for failure to update an address.

In the summer of 2002, however, the Department of Justice proposed including a standardized notice on immigration forms to inform applicants of the need to report address changes within 10 days.⁵¹⁶ About the same time, the INS initiated removal proceedings against an immigrant who had failed to register a timely change of address, prompting a wave of fear within immigrant communities that the government would actively seek to deport those who inadvertently had failed to report an address change within 10 days.

Thar Abdeljaber and his wife Khitam Abu Sabi, are lawful permanent residents living in a suburb of Richmond, Virginia with their children. Two children are U.S. citizens, two are permanent residents, and one, a daughter born in the West Bank, is on her way to the U.S. To make ends meet, Thar, a Palestinian, buys electronic equipment through the mail and sells it to small retailers. That was what Thar was doing one day in March 2002 when he was stopped by the police for driving four miles an hour above the speed limit. The police noticed that he had maps with circles around certain locations and proceeded to arrest him on suspicion of terrorist activity. The FBI did not press charges after learning that the map was marked not for potential terrorism locales but for flea markets. The INS, however, had become involved in the investigation and discovered that he had failed to notify the INS of a 1999 move from Florida to Richmond.

The INS decided to press criminal charges and detain Thar. He pleaded guilty and served 25 days in jail. Rather than allowing him to return home to his wife and children after serving his sentence, however, INS continued to detain Thar and moved forward with removal proceedings. Only after he retained a prominent immigration attorney who successfully represented him in a bond hearing was Thar able to end four months of detention. Finally, in August 2002, an immigration judge in Atlanta ruled that the INS could not deport him for failing to change his address, because he did not know about the requirement.⁵¹⁷

Adding to concerns about the enforcement of the address change requirement is the immigration service's reputation for poor record keeping. The INS was notorious for failing to maintain and update information in its poorly managed and un-integrated databases.⁵¹⁸ On the same day that the INS released its address change regulations, 200,000 forgotten change of address forms were found in one of its warehouses.⁵¹⁹ In early 2003, a Los Angeles federal grand jury "indicted two employees of an agency contractor who dealt with a backlog of passports, birth certificates, visa applications and a host of other often irreplaceable documents by shredding some 90,000 of them."⁵²⁰

On September 11, 2002, the Justice Department commenced a new immigration enforcement program called the National Security Exit-Entry Registration System (NSEERS).⁵²¹ NSEERS requires visitors from 25 designated countries, and other travelers who meet undisclosed criteria, to be fingerprinted and photographed as they enter the country, and to report to the immigration service after 30 days and at one year intervals. These individuals also must register their departure with the government as they leave the United States. In addition, nationals of 24 Arab and Middle Eastern countries and North Korea were required to present themselves in person at immigration offices for "special registration."⁵²² After waiting in line for hours, individuals were interviewed by immigration officers and asked numerous questions about their family, finances, and other personal matters. There were many inconsistencies in how the program was implemented. In some offices, individuals were permitted to have their lawyers present; in other offices, lawyers were excluded. Those who were out of status were issued notices to appear in immigration court. Many were detained until their families could post bond. More than 82,000 individuals voluntarily presented themselves to the INS. Over 13,000 of these people were put into deportation proceedings, often because of innocent mistakes in complying with the immigration law, of whom 2,761 were detained.

Among those facing expulsion is "**Z.S.**", former engineer for a U.S. technology company with degrees from two U.S. universities, who was elected student body president at Johns Hopkins University's School of Advanced International Studies. An 11 year resident of the United States, he left his job with the technology company before applying for a student visa in 2002. Under the immigration law, he should have filed his immigration papers before leaving his job. He fears that he'll be forced to leave the United States before he earns his degree.⁵²³

Even though no information has been made available to the public, the Department of Justice asserts that NSEERS and the initiatives discussed above have produced substantial leads in the terrorism investigation. Members of Arab and Muslim communities and civil rights organizations dispute the value of these measures in promoting national security and contend that these tactics are generating mistrust of and discontent with law enforcement in immigrant communities. Some counter-terrorism experts agree and have warned that such tactics do not produce intelligence information and in fact undermine terrorism investigations by eroding community trust.⁵²⁴ American-Arab and Muslim leaders also say that the government's actions are creating a climate in which discrimination and hate crimes flourish.⁵²⁵

The Department of Homeland Security now is following up on DOJ initiatives. New rigorous reporting requirements have been established for both foreign students and the schools they attend.⁵²⁶ Additionally, in the foreseeable future, all visitors to the United States will be photographed, fingerprinted, and subjected to new security and clearance procedures.⁵²⁷

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Just how far the government will use national security as a justification for changing long standing immigration practices remains to be seen. In April 2003, the Attorney General used his authority to review individual BIA cases to issue a binding, precedent decision that releasing a Haitian asylum-seeker and other undocumented migrants was unwarranted due to national security considerations.⁵²⁸ The rationale is simply that release of even a single migrant may encourage further migration from Haiti by sea, putting "strains on national and homeland security resources."⁵²⁹

The 1996 laws have even more potential to cause significant damage to American families now that law enforcement and immigration have become so intertwined. As more and more people are swept up in anti-terrorism operations, many of those who are innocent of any criminal wrongdoing find themselves in immigration proceedings instead. U.S. citizen spouses and children whose family members have been placed in proceedings because they are members of targeted ethnicities face long term separation from their loved ones.

The courts can do only so much in the face of laws such as IIRIRA and AEDPA. Intense media pressure can save only a handful of families from separation and destitution. The only real solution to the consequences of the 1996 laws is to amend them through legislation.

Americans believe above all in freedom, fairness and family. Our immigration laws should reflect these ideals. The 1996 laws make a mockery of them.

FINDINGS AND RECOMMENDATIONS

The way in which immigrants are treated serves as the yardstick by which we measure our nation's commitment to civil rights.

The United States is a nation of immigrants, and immigration continues to shape and strengthen our country. Today, more than one in five of every U.S. residents is either foreign-born or born to immigrant parents, and more immigrants arrive daily to reunite with close family members, fill jobs, and find protection from persecution in their homelands. Notwithstanding immigrants' contributions to America's cultural and economic prosperity, their distinguished service in the Armed Forces, and participation in community life and activities, constitutional protections and established statutory rights have been eroded, adversely affecting U.S. citizen family members as well as the immigrants themselves.

The United States can and should be able to balance the challenges of controlling borders, protecting national security, and preventing illegal immigration with the equally legitimate interest in protecting civil rights, respecting due process, and promoting family unity. The current laws fall far short of these aims while creating devastating consequences that tear apart families and communities. The far reaching 1996 laws and post-9/11 initiatives gravely undermine the goal of becoming a more inclusive society. Our diversity has long been considered a national asset and an important element of the uniquely American identity. A two-tiered system of justice that singles out one segment of society for less favorable treatment runs sharply against the grain of American principles and poses a threat to the integrity of the justice system as a whole.

We offer the following recommendations towards reaching a proper balance:

Authority to conduct deportation proceedings should be restored to immigration judges.

Low-level immigration officers have the power to summarily deport refugees fleeing persecution, international travelers, and even non-citizens returning from short trips abroad who have lived substantial portions of their lives in this country. In recognition that deportation may result "in loss of both property and life, or of all that makes life worth living," due process safeguards are essential.⁵³⁰

- ◆ Removal orders should be made only by impartial immigration judges following a hearing that conforms to accepted norms of due process, including the rights to be notified of the charges, to examine and rebut the evidence, to be present and defend oneself in person or through legal assistance, and to a decision based on evidence in the record that is subject to administrative and judicial review.

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- ◆ Qualified interpreters should be made available throughout the removal process and particularly to persons subject to expedited removal processes to determine whether they are fleeing persecution and may have a credible fear for their lives or well-being if returned to their countries.

Penalties should not exceed the offense.

Americans believe that the punishment should fit the crime, but the immigration law penalizes small infractions as severely as serious crimes. Shoplifting, joy riding and other offenses now are called "aggravated felonies" for which deportation is mandatory if a one year sentence is imposed, even if it is entirely suspended. As a result, a person who has never spent a night in jail is treated no differently than someone who has served decades in prison. Moreover, an offense that is expunged or vacated under a state rehabilitative statute may be considered a deportable conviction for immigration purposes even if it is not a "conviction" under the state law.

- ◆ The immigration law uses the words "conviction," "term of imprisonment," "aggravated," and "felony" in ways that are inconsistent with their accepted criminal justice definitions. Giving unique meanings to terms that are commonplace in criminal law is confusing and often leads to unforeseen collateral immigration consequences.
- ◆ Immigration consequences should not be disproportionate to the underlying offense and minor infractions should not be penalized as severely as grave offenses.
- ◆ Defendants should be apprised of potential collateral immigration consequences prior to entering a plea. The court should advise that, if the defendant is not a United States citizen, a consequence of entering the plea may be a change in immigration status, and that the defendant should consult with defense counsel for additional information. ABA Standard for Criminal Justice, Pleas of Guilty, Standards 14-1.4(c) (3d ed. 1999). Criminal defense counsel also have an obligation to advise the defendant "as to the possible collateral consequences that might ensue from entry of the contemplated pleas." ABA Standard for Criminal Justice 14-3.2(f), Pleas of Guilty, Standard 4-3.2(f) (3d ed. 1999)

Immigration judges should be invested with the discretion to make appropriate decisions.

Many deserving immigrants cannot be considered for relief today even if the United States has been their home for decades. Deportation is automatic regardless of the nature of their offense, the extent of their ties to the United States, evidence of rehabilitation, and the severity of the hardship that deportation may cause to their U.S. citizen and legal resident family members.

- ◆ Discretion to make appropriate decisions should be returned to immigration judges. Immigration judges should be able to evaluate all of the relevant factors and to give deserving individuals a "second chance" when doing so would serve the interests of justice.

- ◆ Long term residents who have established families in the United States or other significant U.S. ties, or who would suffer exceptional hardship if deported, should be considered for relief from deportation on a case by case basis.

Laws should operate prospectively, not retroactively.

The 1996 laws are being applied retroactively. The new deportation grounds are being used to deport people for acts they took long before 1996 and which did not make them deportable at that time, and to deprive them of remedies for which they previously were eligible.

- ◆ Retroactive (e.g., *ex post facto*) laws are unconstitutional in criminal law and they should be avoided in the immigration context.
- ◆ Remedies should be made available to people whom the 1996 laws render deportable based on offenses that were not grounds for deportation when they were committed.
- ◆ Individuals who were eligible for discretionary relief from deportation prior to the enactment of the 1996 laws should be permitted to pursue that relief.
- ◆ Individuals who have been erroneously deported under the retroactive provisions of the law should be permitted to apply for the relief from which they were improperly barred.
- ◆ Judicial review should be available in cases where it had been available prior to the 1996 laws.
- ◆ Individuals should not be detained for offenses committed before 1996 if they would not have been detained under the prior law.

Meaningful access to counsel must be respected throughout removal processes.

Defending against deportation is a complex and often intimidating endeavor. The immigration laws are more complicated than ever and the accelerated procedures present additional barriers to mounting a successful defense or achieving asylum or other remedies. Access to legal representation is vital for immigrants and refugees who cannot navigate the immigration labyrinth on their own. Detention further impedes their ability to secure and communicate with counsel.

- ◆ Individuals in regular and expedited removal proceedings should have the opportunity to consult with and be represented by counsel.
- ◆ Children in regular and expedited removal proceedings should be provided with counsel throughout their proceedings. Children in detention should have appointed counsel at the government's expense as well as *guardians ad litem* to look out for their interests.

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- ◆ Immigrants and asylum-seekers should not be detained in facilities in remote areas where legal assistance generally is not available for immigration matters, nor should they be transferred involuntarily to facilities that impede an existing attorney-client relationship.
- ◆ Legal services organizations that receive government funds should not be restricted from using non-government funds to represent immigrants regardless of their legal status.
- ◆ In the absence of court appointed counsel and government funded legal services, the private bar has the responsibility to provide *pro bono* legal assistance to indigent men, women and children in immigration proceedings.

Detention should not be the norm.

On any given day, approximately 20,000 immigration detainees are in federal custody. Although they are “administrative detainees,” many are ineligible for a custody hearing or release on bond. More than 55 percent are incarcerated in local, county, or state jails, where they are housed with inmates serving criminal sentences. Detention deprives individuals of liberty and impedes their ability to secure and communicate with counsel and family members.

- ◆ Detention should be used only in extraordinary circumstances, such as to protect national security or address serious threats to public safety, following an individualized custody determination before immigration judges, with meaningful administrative and judicial review.
- ◆ Prehearing supervised release programs could save millions of tax dollars, free up scarce detention resources for individuals who are dangerous or likely to flee, and spare immigrants, refugees, and their families the loss of liberty and the anguish of incarcerations. In the criminal justice system, pretrial supervised release programs have been standard practice for the past four decades. Similar programs should be established in the immigration context.
- ◆ Children should be released as soon as possible to family members or foster families. If detention of a minor is required, the minor should be detained in the least restrictive environment and in a culturally appropriate and family like setting.
- ◆ *Bona fide* asylum-seekers who do not present a danger to society or a flight risk should not be detained during the pendency of their cases.
- ◆ Immigration and law enforcement authorities should disclose the names, detention facilities, and charges against immigration detainees and ensure their immediate access to attorneys and family members.
- ◆ Immigration and law enforcement authorities should promptly charge immigration detainees or promptly release them if charges are not brought.

- ◆ If detention is required, the government should avoid transferring detainees, especially when such transfers separate detainees from their attorneys or family members.
- ◆ Immigration authorities should release individuals whose removal orders are not effectuated within a constitutionally permissible time period. *Zadvydas v. Davis*, 533 U.S. 678 (2001). Once removal orders are final, immigration authorities should return detained individuals to their countries as soon as practicable. Detained individuals with final removal orders should not have the burden of proving that their country, or any other country, will not accept them or that their removal is unlikely to occur in the "reasonably foreseeable future."
- ◆ Immigration authorities should promptly promulgate into regulation the four immigration detention standards relating to access to counsel, telephones, group legal orientations, and legal information (Department of Justice, November 2000), and should permit independent organizations to visit the detention facilities and meet privately with detainees to monitor compliance.

Judicial review remains vital in protecting immigrants' rights and civil liberties.

Judicial review of deportation and custody decisions and many immigration agency actions was restricted severely in 1996, effectively immunizing federal immigration authorities from judicial scrutiny that applies to virtually all other government agencies. Access to the courts is an essential feature of our system of government, and the implementation and execution of the immigration law often has been "corrected" by such judicial oversight. Judicial review also has been important historically in protecting immigrants' rights and civil liberties.

- ◆ The government should respect the system of checks and balances upon which the U.S. government was founded and restore direct judicial review of immigration agencies' decisions regarding deportation orders, discretionary decisions, detention, and expedited removal and every other instance where judicial authority was stripped.
- ◆ Procedural reforms adopted by the Board of Immigration Appeals in 2002 have backfired and should be discarded. Rather than eliminating the backlog, the reforms appear to have shifted the burden to the federal courts. More than 50 percent of decisions today are made by a single Board member without a written decision, and only one in 10 appeals are granted, compared to one in four before. In response, the rate at which BIA decisions are appealed to the federal courts has tripled.

Immigration enforcement has implications for the civil rights of both U.S. citizens and immigrants.

Before its dissolution, the INS was the largest federal law enforcement entity, employing more armed agents than any other federal agency. A formidable presence at the border is augmented by an interior enforcement strategy that teams immigration agents with local police, utilizes new workplace strategies, and imposes duties on state and local government,

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private employers, and social service agencies to obtain immigration information. This emphasis on immigration enforcement is strongly felt in many communities across the country, creating a climate of fear and causing discrimination against citizens and legal residents who may appear or sound "foreign." Together with the 1996 laws, these changes are affecting citizens as well as immigrants and creating divisions among communities that are struggling to unify.

- ◆ Immigration is a federal responsibility. The federal government ought not ask or require other institutions, including local and state police, to assume enforcement responsibility for immigration law and jeopardize community trust and safety.
- ◆ In order to prevent civil rights violations, state and local police should not interrogate a person with respect to violations of the federal immigration laws, or directly or indirectly enforce federal immigration laws. When state and local police have a person in custody on state or local charges, and while the custody is proper under state or local law, the police should inform federal immigration authorities when, consistent with applicable law, they suspect the person is an undocumented or illegal alien.
- ◆ The government should not place employers, private charities, and benefits agencies in the role of immigration officers by requiring them to verify the citizenship or immigration status of individuals who seek their assistance. Doing so imposes financial and administrative burdens on them, diminishes their ability to provide charitable assistance, and opens the way for eligibility determinations to be based on invidious factors such as an individual's name, accent, speech pattern, or physical appearance.
- ◆ Lawful permanent residents who are eligible for U.S. citizenship should be encouraged to consider naturalization in order to become fully participating members of American society.
- ◆ Access to legal avenues of immigration is essential. Backlogs in the legal immigration system must be reduced. Non-citizens who both reside in and demonstrate significant ties to the United States, such as employment, tax payment, family, length of residence, should have a meaningful opportunity for themselves and their immediate relatives to acquire lawful permanent residence.

National security can be achieved without depriving immigrants or any segment of the population their basic rights and civil liberties.

Beginning almost immediately after 9/11, the Justice Department implemented new rules directed at immigrants. Immigration laws also were stretched – if not violated – to detain without bond and for prolonged periods of time hundreds of individuals who had nothing to do with terrorism. Immigrants were deprived of many of our most cherished protections: the right to a full, fair, and open hearing; the right to be notified of charges in a timely manner; the right to access to legal representation; and confidential communications with counsel.

- ◆ Protecting national security need not be at immigrants' expense. Our nation can face the many challenges in preventing future acts of violence without depriving any segment of the population of its basic civil liberties.

Findings and Recommendations

- ◆ In light of the relocation of immigration functions to the Department of Homeland Security, it is vitally important to recognize that immigration policies and practices affect a large number of Americans and their families, especially members of minority groups, as well as their coworkers, employers, employees, and neighbors. Examination of the potential impacts of DHS' policies and activities on these individuals, their work and communities would minimize the risks of alienating entire segments of the population and disrupting businesses and private lives.
- ◆ Our government must respect the rule of law by making good faith efforts to comply with unfavorable court decisions, developing remedies for people adversely affected by erroneous interpretation and application of the law, and obeying the statutes, regulations and applicable court decisions.
- ◆ Clarification by the DHS and the Attorney General of the scope of authority each possesses over immigration would eliminate the confusion over their respective roles and responsibilities.
- ◆ Law enforcement agencies and immigration authorities should restore respect for the right to a full, fair, and open hearing; the right to have charges filed in a timely manner; the right to legal representation; and the right to confidential conversations with counsel, regardless of an individual's immigration status.
- ◆ Rather than practice secrecy and divisive tactics, law enforcement and immigration authorities ought to constructively engage the Arab, Muslim and Arab-American communities.
- ◆ Removal hearings (including for individuals arrested during the post-9/11 investigations) should be held publicly except when required to protect the individual's safety or welfare or when a judge finds closure necessary to protect national security.
- ◆ The favorable exercise of prosecutorial discretion, not deportation, may provide appropriate remedies for the individuals with technical visa violations who willingly cooperated with immigration authorities by registering for NSEERS (National Security Exit-Entry Registration System).

Selected Key Changes Made in 1996 to Immigration Laws Governing Detention, Removal and Discretionary Relief

SELECTED POST-1996 CHANGES TO IMMIGRATION LAWS

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
General & Definitional Changes			
"Conviction"	A conviction exists, for immigration purposes, where an alien has had a formal judgment of guilt or, if adjudication of guilt has been withheld, where all of the following elements are present: (1) a judge or jury has found the alien guilty or he has entered a plea or admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty; and (3) a formal finding of guilt may be entered without further proceedings if the person fails to comply with the requirements of the court's order. <i>Matter of Ozkok</i> , 19 I. & N. Dec. 546 (BIA 1988).	Eliminated the third requirement under <i>Ozkok</i> , for cases where formal adjudication has been withheld, that the disposition be one in which a formal finding of guilt can be automatically entered upon failure to comply with the court's order. INA § 101(a)(48)(A).	Broadened the definition of the term "conviction" by including other dispositions such as vacated or expunged convictions and deferred adjudications. The new definition applies retroactively. <i>Matter of Punu</i> , Int. Dec. #3364 (BIA 1998).
"Term of Imprisonment"	No statutory definition, for purposes of immigration law. Generally, only time actually ordered to be served would count, for purposes of determining a crime involving moral turpitude or aggravated felony.	Any reference, under immigration law, to a "term of imprisonment" or "sentence" in a criminal offense includes the total period of incarceration or confinement ordered, even if part or all of the sentence has been suspended. INA § 101(a)(48)(B).	Broadened the definition of "term of imprisonment" by explicitly including sentences that have been suspended; as a result, a person can face deportation as an "aggravated felon" without having spent a single day in jail. A period of <i>probation</i> , however, generally does not fall within the new definition. <i>See, e.g. U.S. v. Banda-Zamora</i> , 178 F.3d 728, 730 (5th Cir. 1999).
Treatment of Returning LPR with Prior Criminal Conviction	An LPR is not treated as making a new entry upon return from trip abroad, if the trip was "innocent, casual and brief" and not meant to be "meaningfully interruptive" of LPR status. <i>Rosenberg v. Fleuti</i> , 374 U.S. 449 (1963).	An LPR returning from a trip abroad, regardless of length, is treated as seeking admission if he has ever committed any criminal offense that would make him inadmissible, unless he had been granted discretionary relief. INA § 101(a)(13)(C).	LPRs can now be detained and denied reentry for offenses that would not make them deportable had they remained in the United States. The new definition also bars returning LPRs for whom immigration authorities exercised prosecutorial discretion and did not previously seek to remove.

American Justice Through Immigrants' Eyes

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
Grounds for Removal			
"Aggravated Felony""		See separate chart on page 123 for complete definition and list of changes	
Crime Involving Moral Turpitude	A conviction of a crime involving moral turpitude (CIMT) within five years of entry is a deportable offense if it results in a sentence of one year or longer. INA § 241 (a)(2)(A)(i) (1995).	A conviction of a CIMT within five years of entry is deportable if a sentence of one year or longer <i>may be imposed</i> . INA § 237(a)(2)(A) (i).	Expands the CIMT ground of deportability by making the actual sentence irrelevant, as long as the offense <i>could</i> result in a year of imprisonment. The actual definition of a "crime involving moral turpitude."
Unlawful Voting	Not previously a separate ground of deportability.	Any alien who has voted in violation of any federal, state or local constitutional provision, statute, ordinance or regulation is deportable. INA § 237(a)(6).	Applies without regard to intent or mistaken belief in eligibility. Also applies retroactively to cover voting prior to enactment. The enactment of the Child Citizenship Act of 2000 (P.L. 106-395) now provides an exemption for some aliens adopted by U.S. citizen parents.

Selected Post-1996 Changes to Immigration Laws

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
Removal Proceedings			
Expedited Removal of Arriving Aliens	No expedited removal proceedings existed for arriving inadmissible aliens, prior to 1996. Most excludable aliens, including those who were excludable due to misrepresentation or lack of documentation, were allowed to withdraw their request for admission or were ordered deported only following a hearing before an immigration judge. Only some aliens suspected of terrorism or other national security grounds could be excluded without a hearing before an immigration judge. INA § 235-236 (1995).	An immigration officer can order, without a hearing before an immigration judge, the immediate removal of an arriving alien who is determined to be inadmissible due to misrepresentation or lack of documentation. If the officer determines that the alien has a fear of returning, the alien is detained and an interview with an asylum officer is conducted to find whether he has a “credible fear” of persecution. If the officer finds no such fear, an immigration judge provides a <i>de novo</i> hearing within seven days and the alien is then removed. If removed at either stage, the alien is inadmissible for five years. INA § 235(b)(1).	A challenge to the expedited removal process, brought by American Immigration Lawyers Association and other immigrant advocacy groups, was rejected by the U.S. Court of Appeals for the Dist. of Columbia on the grounds that they lacked standing to bring suit. <i>AILA v. Reno</i> , 199 F.3d 1352 (D.C. Cir. 2000).
“Administrative” Removal of Criminal Aliens	The 1994 crime bill (P.L. 103-322) established procedures to allow the deportation of non-LPR aggravated felons, provided they are not eligible for discretionary relief, without a hearing before an immigration judge. Burden of proof falls on the alien. Proceedings need not be conducted in person; only requires that removal not be ordered by same person who issued charges and that alien be given at least 30 days to seek judicial review before deportation takes place. INA § 242A(b) (1995).	Expanded so that provisions apply to conditional permanent residents as well as non-LPRs, and also now applies regardless of whether alien would be eligible for discretionary relief if facing removal under other removal proceedings. Discretionary relief for otherwise eligible aliens is barred, as is judicial review. The burden of proof is on alien to show that he or she is not subject to this type of proceeding. Removal can now take place 14 days after it has been ordered. Proceedings need not be conducted in, or translated into, a language that the alien understands. INA § 238(b). No administrative review is available.	Judicial review is now barred as a result of INA § 242(a)(2)(C), but <i>habeas corpus</i> may still be available. See <i>Hypolite v. Blackman</i> , 57 F.Supp.2d 128 (M.D.Pa. 1999). Administrative removal has been upheld as constitutional by one federal court; <i>i.e.</i> , the commingling of prosecutorial and adjudicatory functions within the INS does not violate due process. <i>U.S. v. Benitez-Villafuerte</i> , 186 F.3d 651 (5th Cir. 1999).
Reinstatement of Removal	A previous order of deportation will be reinstated against an alien who is subsequently found unlawfully in the United States. Deportation takes place following a hearing before an immigration judge to determine the alien’s identity as well as the unlawful nature of the reentry. Relief from deportation is not automatically precluded. INA § 242(f) (1995).	A previous order of “removal” is automatically reinstated against an alien who reenters the United States unlawfully. Such an alien does not get a hearing before an immigration judge, and all forms of discretionary relief are barred. No administrative review of the reinstatement decision is available. INA § 241(a)(5).	While the newer procedures expressly apply to aliens who were <i>removed</i> from the United States, the INS took the position that they also applied to individuals who had been <i>deported</i> and reentered under the older statute. As a result, individuals who reentered many years ago can be removed again without a hearing and regardless of U.S. family ties, which are likely to be stronger in the case of an alien who reentered long ago. The Ninth Circuit rejected this retroactive application. <i>Castro-Cortez v. INS</i> , 239 F.3d 1037 (9th Cir. 2001).

American Justice Through Immigrants' Eyes

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
Relief from Deportation for Legal Permanent Residents	An LPR may be granted a "212(c)" waiver of exclusion or deportation, based on certain criminal conduct, if he has resided in the U.S. for seven years and has served less than five years imprisonment for the commission of an aggravated felony or felonies. INA § 212(c) (1995).	Discretionary Relief An LPR may be granted "cancellation of removal" if he has resided in the U.S. continuously for seven years, has been an LPR for 5 years, and has not been convicted of any aggravated felony. The period of continuous residence needed for eligibility is generally deemed to end upon the commission of a deportable offense. INA § 240A(a).	The U.S. Supreme Court ruled that the repeal of former § 212(c) could not be applied retroactively to LPRs who pled guilty to deportable offenses prior to April 1, 1997, the date on which the provision ceased to exist. <i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).
Relief from Deportation for Other Aliens	An alien may be granted "suspension of deportation" and adjustment of status if he has resided continuously in the U.S. for seven years (or ten years, if facing deportation on criminal grounds), proves good moral character, and shows that deportation would cause extreme hardship to himself or a citizen or LPR spouse, parent or child. INA § 244(a) (1995).	An alien may be granted "cancellation of removal and adjustment" to LPR status if he has been continuously present in the U.S. for ten years, proves good moral character, has not been convicted of any deportable criminal offense, and shows that removal would result in <i>exceptional and extremely unusual</i> hardship to a citizen or LPR spouse, parent or child. INA § 240A(b).	Cancellation of removal under INA § 240A(b) is not available to any alien with a prior criminal offense, and requires a far stronger showing of hardship. Also, the hardship to oneself that would result from removal is not a factor to be used in granting relief.
212(h) Waiver of Inadmissibility for Prior Criminal Conduct	An alien may seek a waiver of certain grounds of inadmissibility, including crimes involving moral turpitude, upon a showing that denial of admission would result in extreme hardship to a citizen or LPR spouse, parent, son or daughter. INA § 212(h) (1995).	No such waiver is available to an LPR who has been convicted of an aggravated felony since being admitted in that status. Also explicitly bars any judicial review of a decision by the Attorney General to grant or deny a waiver. INA § 212(h).	The 1996 amendment has been challenged on Equal Protection issues because it restricts availability of the waiver solely to LPRs, but a number of courts have upheld it. See, e.g. <i>Lara-Ruiz v. INS</i> , 241 F.3d 934, 947 (7 th Cir. 2001), <i>Moore v. Ashcroft</i> , 251 F.3d 919 (11 th Cir. 2001).
Voluntary Departure	An alien facing deportation may be allowed to voluntarily leave the country instead of being deported, if he is not facing deportation for a criminal offense, can show good moral character for the five years prior to the request, and has the means to leave the country. Voluntary departure is available in spite of a criminal conviction if the alien is eligible for suspension of deportation under INA § 244(a)(2) as it existed, but not in the case of any aggravated felony. INA § 244(e) (1995).	Before removal proceedings have concluded, an alien may voluntarily leave, if not an aggravated felon. The alien may be required to post bond, and will be granted 120 days to depart. If removal proceedings have concluded, an IJ may grant voluntary departure if the alien was present in the U.S. for at least one year, can show five years of good moral character, is not an aggravated felon, and can show means and intent to leave the country. Bond is required, the alien has 60 days to depart, and judicial review is barred. In either case, civil penalties apply for failure to depart. INA § 240B.	Voluntary departure is significant because it allows alien to choose own destination, and it removes some bars on subsequent admission. The changes to the voluntary departure provisions only apply to removal proceedings brought after April 1, 1997. An amendment in 2000 allows the Attorney General to waive application of the 120 day deadline to depart in a limited number of cases where an alien requires extended medical treatment. <i>International Patient Act of 2000</i> , P.L. 106-406.

Selected Post-1996 Changes to Immigration Laws

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
Detention			
Detention of Legal Residents with Criminal Convictions During Removal Proceedings	Any alien facing deportation on the basis of an aggravated felony is subject to detention during deportation proceedings, but a lawfully admitted alien may be released if he demonstrates to the satisfaction of the Attorney General that he is not a threat to the community and is likely to appear for any scheduled hearings. INA § 242(a)(2) (1995).	Any alien charged as removable on the basis of an aggravated felony, sentenced to at least one year for a CIMT, in addition to other grounds, or is <i>inadmissible on any criminal ground</i> , is subject to <i>mandatory</i> detention, beginning when the alien is released from criminal custody. Release is possible only if necessary under the federal witness protection program. Lawful status is irrelevant. INA § 236(c).	INS initially tried to apply mandatory detention retroactively, but a number of courts held that the statute only applied to individuals released from criminal custody after October 9, 1998 when the new law became effective. <i>See, e.g., Velasquez v. Reno</i> , 37 F.Supp. 2d 663 (D.N.J. 1999). The U.S. Supreme Court recently upheld the constitutionality of § 236(c). <i>Demore v. Kim</i> , 123 S.Ct. 1708 (2003).
Detention Following Final Order of Removal	Upon a final order of deportation, the Attorney General may detain or release an alien during the six month period during which deportation is expected to occur. After six months, the alien must be released under supervision until deportation finally occurs. Judicial review of release decisions, via <i>habeas corpus</i> proceedings, is expressly provided for by the statute. INA § 242(c)-(d) (1995).	Upon a final order of removal, the Attorney General must detain a criminal alien for 90 days, during which removal is expected to occur. The Attorney General may continue to detain a criminal alien if removal has not taken place within the 90-day period, or may release the alien under supervision. INA § 241(a).	The U.S. Supreme Court held that § 241(a) does not authorize indefinite detention, in cases where execution of the removal order cannot take place. Aliens who cannot be removed (<i>e.g.</i> , because the native country does not accept deportees) are entitled to release six months after the final order of removal, upon a showing that removal is not foreseeable in the immediate future. <i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).
Judicial Review			
Judicial Review of Orders of Removal, Generally	An alien may seek judicial review of a final order of deportation, following exhaustion of all administrative remedies, by filing a petition for review in either the circuit where the proceedings were conducted or the circuit in which the alien resides. The petition must be filed within 90 days of the issuance of the final order. An alien is generally entitled to an automatic stay of deportation pending review. INA § 106 (1995).	An alien may seek judicial review of a final order of removal, following exhaustion of all administrative remedies, but must file the petition for review only in the circuit in which the proceedings were conducted. The petition must be filed within 30 days of the final order. The filing of a petition does not automatically stay the removal order, but the court may order a stay. The alien must file a brief in the case 40 days after the administrative record becomes available. No court may review a decision to commence proceedings, adjudicate cases or execute removal orders. INA § 242.	The INS argued that § 242(g)'s bar on review of decisions to "commence proceedings, adjudicate cases or execute removal orders" amounted to a "catch-all" clause that precluded all judicial review not otherwise allowed. The U.S. Supreme Court rejected this interpretation, holding that the provision only shielded the three discrete actions described in the statute. <i>Reno v. American-Arab Anti-Discrimination Committee</i> , 525 U.S. 471 (1999).

American Justice Through Immigrants' Eyes

Provision	Before 1996 Changes	Current Law	Analysis & Subsequent Changes
Judicial Review			
Judicial Review of Orders of Removal Based on Criminal Convictions	An alien ordered deported on criminal grounds may generally seek judicial review on same terms as other aliens, but a person deportable on the basis of an aggravated felony must file a petition for review within 30 days of the final order. INA § 106(a)(1) (1995).	Judicial review is not available to an alien who has been ordered removed on the basis of most types of prior criminal conduct. INA § 242(a)(2)(C).	The bar on review of orders of removal involving criminal aliens does not prohibit review, through <i>habeas corpus</i> proceedings, of pure questions of law. <i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).
Judicial Review of Discretionary Relief Decisions	Statute silent with regard to judicial review of discretionary relief decisions. See INA § 106 (1995).	No judicial review allowed of a decision of the Attorney General to deny discretionary relief such as cancellation of removal, voluntary departure or adjustment of status. Judicial review is available for denial of asylum, but the Attorney General's decision in such a case will be upheld unless it is manifestly contrary to law and an abuse of discretion. INA § 242(a)(2)(B), (b)(4)(D).	The bar on judicial review of discretionary decisions does not preclude <i>habeas corpus</i> review of pure questions of law. See <i>St. Cyr, supra</i> ; <i>Montero-Martinez v. Ashcroft</i> , 277 F.3d 1137 (9th Cir. 2002).
Judicial Review of Detention Decisions	Judicial review via <i>habeas corpus</i> proceedings expressly permitted in cases where alien remains detained following the final entry of a deportation order. INA § 242(c) (1995). (The statute is silent with regard to other forms of detention.)	Discretionary decisions regarding detention are not subject to review; no court may review a decision regarding the detention or release of any alien or the grant, revocation or denial of bond or parole. INA § 236(e).	The bar on judicial review only prohibits review of matters left to the discretion of the Attorney General, and does not bar constitutional claims or pure questions of law. <i>Demore v. Kim</i> , 123 S.Ct. 1708 (2003).

Selected Post-1996 Changes to Immigration Laws

Changes Made to Immigration Law Definition of “Aggravated Felony”

Aggravated Felony; INA 101(a)(43)(<u> </u>)	Definition Prior to 1996 (INA as of May 1, 1995)	Definition as Amended by AEDPA (INA as amended on April 24, 1996)	Definition as Amended by IIRIRA ¹ (INA as amended on Sept. 30, 1996)
A. Murder, rape, or sexual abuse of a minor	Murder, rape, or sexual abuse of a minor.	(not changed)	(not changed)
B. Illicit trafficking in a controlled substance	As described in Sec. 102 of the Controlled Substances Act, including a drug trafficking crime as described in 18 U.S.C. 924(c). This includes any controlled substances offense other than a first-time, simple possession offense. <i>(Any simple possession offense (other than 30 grams or less of marijuana), and being a drug abuser or addict, form separate grounds for removal but are not treated as aggravated felonies.)</i>	(not changed)	(not changed)
C. Illicit trafficking in firearms or destructive devices, or in explosive materials	As described in 18 U.S.C. 841(c), 921.	(not changed)	(not changed)
D. Money laundering	As described in 18 U.S.C. 1956 (relating to laundering of monetary instruments) or 1957 (relating to engaging in monetary transactions in property derived from specific unlawful activity), if the amount of funds exceeded \$100,000.	(not changed)	Expanded to include any offense involving more than \$10,000.
E. Firearms and explosive materials offenses	As described in 18 U.S.C. 842(h) or 844(d)-(i) (relating to explosive materials offenses); 18 U.S.C. 922(g)(1)-(5), (j), (n), (o), (p), (r), or 924(b), (h) (relating to firearms offenses); § 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses).	(not changed)	(not changed)
F. Crime of violence	As defined in 18 U.S.C. 16 (but not including a purely political offense), for which the term of imprisonment (actual sentence) <i>regardless of any suspension of imprisonment</i> ² is at least 5 years.	(not changed)	Expanded to include any offense for which the sentence imposed is at least one year.

¹ As a result of IIRIRA, the term “aggravated felony” now applies to any offense that meets the current definition, regardless of whether the offense was labeled as an aggravated felony at the time of the underlying criminal conviction.

² Crimes of violence and theft offenses were treated under pre-1996 law as aggravated felonies if the sentence imposed was at least five years, *even if* some or all of this sentence was suspended. Under § 322(a) of IIRIRA, a “term of imprisonment” or sentence for *any* offense is now treated as including any period in which the sentence is suspended.

American Justice Through Immigrants' Eyes

Aggravated Felony; INA 101(a)(43)(C)	Definition Prior to 1996 (INA as of May 1, 1995)	Definition as Amended by AEDPA (INA as amended on April 24, 1996)	Definition as Amended by IIRIRA ¹ (INA as amended on Sept. 30, 1996)
G. Theft offenses	A theft offense (including receipt of stolen property) or burglary offense, for which the term of imprisonment (actual sentence) <i>regardless of any suspension of imprisonment</i> is at least 5 years.	(not changed)	<i>Expanded</i> to include any offense for which the sentence imposed is at least one year.
H. Demand for, or receipt of ransom	As described in 18 U.S.C. 875, 876, 877, or 1202.	(not changed)	(not changed)
I. Child pornography	As described in 18 U.S.C. 2251, 2251A, or 2252.	(not changed)	(not changed)
J. Racketeer influenced corrupt organizations offenses (and gambling offenses)	As described in 18 U.S.C. 1962, for which a sentence of <i>five years</i> imprisonment or more <i>may</i> be imposed (<i>possible sentence, not necessarily that actually imposed</i>).	<i>Added</i> offenses under 18 U.S.C. 1084 (transmission of wagering information) where a second or subsequent offense, and 1955 (relating to gambling offenses).	<i>Expanded</i> to include any offense for which a sentence of <i>one year</i> or more <i>may</i> be imposed (<i>possible sentence</i>).
K. Prostitution business offenses; peonage, slavery, and involuntary servitude offenses	Offenses related to the owning, controlling, managing, or supervising of a prostitution business; or offenses described in 18 U.S.C. 1581-1585, 1588 (relating to peonage, slavery, and involuntary servitude).	<i>Added</i> offenses described in 18 U.S.C. 2421-2423 (relating to transportation for the purpose of prostitution), if committed for commercial advantage.	(not changed)
L. Treason, sabotage, and gathering or transmitting national defense information; disclosure of identity of undercover agents	As described in 18 U.S.C. 793 (gathering or transmitting national defense information), 798 (disclosure of classified information), 2153 (sabotage), 2381-2382 (treason); and 50 U.S.C. 421 (relating to protecting the identity of undercover intelligence agents).	(not changed)	<i>Expanded</i> to cover offenses relating to disclosing the identity of all undercover agents under 50 U.S.C. 421, not merely intelligence agents.
M. Fraud, tax evasion	Offenses that involve fraud or deceit in which the loss to the victim exceeds \$200,000; tax evasion offenses under § 7201 of the Internal Revenue Code of 1986 in which the revenue loss to the government exceeds \$200,000.	(not changed)	<i>Expanded</i> to include fraud or tax evasion offenses in which the loss to the victim or government exceeds \$10,000.

Selected Post-1996 Changes to Immigration Laws

Aggravated Felony; INA 101(a)(43)(C)	Definition Prior to 1996 (INA as of May 1, 1995)	Definition as Amended by AEDPA (INA as amended on April 24, 1996)	Definition as Amended by IIRIRA ¹ (INA as amended on Sept. 30, 1996)
N. Alien smuggling	Offenses described in § 274(a)(1)(A) of the Immigration and Nationality Act (relating to alien smuggling through a place other than an authorized port of entry) for the purpose of commercial advantage.	<i>Expanded</i> to include offenses under § 274(a)(2) (bringing alien to the U.S., even through authorized ports of entry, knowingly or in reckless disregard of lack of authority for alien to enter); also <i>expanded</i> to cover offenses not committed for commercial advantage. <i>Narrowed</i> by requirement that offender receive term of imprisonment of at least five years (actual), <i>regardless of suspension of sentence</i> .	<i>Expanded</i> to include any previously covered alien smuggling offense <i>regardless of sentence imposed</i> , but <i>limited</i> by new exception for first offense in which smuggling involved spouse, child, or parent (and no other individuals).
O. Unlawful reentry of alien previously removed due to commission of aggravated felony	<i>(not treated as an aggravated felony)</i>	<i>(not treated as an aggravated felony)</i>	<i>Added</i> by IIRIRA; includes any offense described under § 275(a) or 276 of the INA (reentry-related offenses) committed by an alien who was previously deported as an aggravated felon.
P. Document fraud	An offense under 18 U.S.C. 1546(a) (relating to document fraud) which constitutes trafficking in the documents described in that section, and for which the term of imprisonment imposed is at least <i>five years, regardless of any suspension of sentence</i> . ⁴ (This was INA § 101(a)(43)(O) at the time.)	<i>Expanded</i> to also include the offenses of falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. 1543; also <i>expanded</i> to include any offense for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least <i>18 months</i> . (This was formerly INA § 101(a)(43)(O).)	<i>Expanded</i> to include any offense for which the term of imprisonment imposed is at least <i>12 months</i> (this now included suspended sentences by default); but <i>limited</i> by new exception for first offense in which document fraud was to aid or assist spouse, child, or parent (and no other individuals). (Redesignated as INA § 101(a)(43)(P).)
Q. Failure of criminal defendant to appear for service of sentence	An offense relating to a failure to appear by a defendant for service of a sentence if the underlying offense was punishable by a term of imprisonment of <i>15 years</i> or more. (This was INA § 101(a)(43)(P) at the time.)	<i>(not changed)</i>	<i>Expanded</i> to include offenses relating to a failure to appear where the underlying offense was punishable by a term of imprisonment of <i>five years</i> or more. (Redesignated as INA § 101(a)(43)(Q).)
R. Fraudulent alteration of vehicle identification numbers	<i>(not treated as an aggravated felony)</i>	Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered VIN, where a sentence of at least <i>5 years may</i> be imposed (<i>possible sentence</i>).	<i>Expanded</i> to include any such offense in which the term of imprisonment is at least <i>one year (actual sentence)</i> .

³ Alien smuggling offenses were treated under AEDPA as aggravated felonies if the sentence imposed was at least five years, *even if* some or all of this sentence was suspended. Under § 322(a) of IIRIRA, a “term of imprisonment” or sentence for *any* offense is now treated as including any period in which the sentence is suspended.

⁴ Document fraud offenses were treated under pre-1996 law as aggravated felonies if the sentence imposed was at least five years, *even if* some or all of this sentence was suspended. Under § 322(a) of IIRIRA, a “term of imprisonment” or sentence for *any* offense is now treated as including any period in which the sentence is suspended.

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Aggravated Felony; INA 101(a)(43)(<u> </u>)	Definition Prior to 1996 (INA as of May 1, 1995)	Definition as Amended by AEDPA (INA as amended on April 24, 1996)	Definition as Amended by IIRIRA ¹ (INA as amended on Sept. 30, 1996)
S. Obstruction of justice, perjury, subornation of perjury	<i>(not treated as an aggravated felony)</i>	Offenses relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which a sentence of at least 5 years may be imposed (<i>possible sentence</i>).	<i>Expanded to include any such offense in which the term of imprisonment is at least one year (actual sentence).</i>
T. Failure to appear in court for criminal proceedings	<i>(not treated as an aggravated felony)</i>	Offenses relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony that is punishable by at least 2 years imprisonment.	<i>(not changed)</i>
U. Attempt or conspiracy	An attempt or a conspiracy to commit any of the above aggravated felonies.	<i>(not changed per se, but obviously applied more broadly due to expanded definition of "aggravated felony")</i>	<i>(not changed per se, but obviously applied more broadly due to expanded definition of "aggravated felony")</i>

GLOSSARY OF IMMIGRATION TERMS

Admission or Admitted: The lawful entry of an alien into the United States after inspection and authorization by an immigration officer.

Aggravated Felony: A term of art that encompasses more than 50 broad categories of misdemeanor and felony offenses, including a number of minor state misdemeanor offenses, such as misdemeanor battery or retail theft for which a non-citizen is sentenced to one year in the county jail with the execution of the sentence suspended.

Alien: A foreign national or a person who is not a citizen or national of the United States.

Consulate: A U.S. government office in a foreign country that issues U.S. visas and passports; a similar office of a foreign country government, located in the United States, that issues visas for travel to that country.

Conviction: For immigration purposes, a non-citizen will have a conviction where a formal judgment of guilt has been entered by a court, or, if adjudication of guilt has been withheld, where there has been a finding of guilty by a judge or jury and a plea of guilt, *nolo contendere*, or admission to sufficient facts to warrant a finding of guilt has been entered, and the judge has ordered some form of punishment, penalty, or restraint on liberty to be imposed.

Crime Involving Moral Turpitude (CIMT): Generally an offense involving fraud, theft, an evil intent, intent to commit serious bodily harm, lewdness, malice, and an act which is intrinsically and morally wrong.

Deportation (Removal): The expulsion of a non-citizen from the United States based on a violation of immigration laws.

Department of Homeland Security (DHS): The federal department that took over immigration enforcement and service functions from the INS on March 1, 2003.

Foreign-born: A person born outside the United States to non-citizen parents.

“Green Card” (in formal terms, a **“permanent resident card”**): The card provided to a lawful permanent resident by the U.S. Citizenship and Immigration Services (USCIS) as evidence of permanent resident status.

Immigrant or Lawful Permanent Resident: A foreign national who has obtained the right to permanently reside in the United States. Individuals usually qualify for permanent residence on the basis of ties to close family members or a U.S. business.

INS: U.S. Immigration and Naturalization Service, an agency of the U.S. Department of Justice that until March 1, 2003, was responsible for administering and enforcing immigration and nationality laws.

Naturalization: A process by which individuals may obtain U.S. citizenship. With some limited exceptions, generally only permanent residents and non-citizen nationals are eligible for naturalization.

American Justice Through Immigrants' Eyes

Non-citizen: See "alien."

Non-immigrant: A foreign national who is admitted to the United States for a temporary period and a specific purpose (such as tourism or study).

Refugee or Asylee: A person who is outside his or her country of nationality or last residence who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. A person obtaining refugee or asylee status in the United States is entitled to remain in the United States, and may apply for permanent residence.

Removal: See "deportation."

Sentence: For immigration law purposes, a term of imprisonment is the period of incarceration or confinement ordered, regardless of any suspension of the imposition or execution of that sentence.

Undocumented Person (also sometimes called "unauthorized" or "illegal" alien): A person who lacks U.S. government permission to enter or remain in the United States.

U.S. Citizen: A person who owes permanent allegiance to the United States, and who enjoys full civic rights (for example, the right to vote in elections and to run for elective office).

U.S. Non-citizen National: A person who owes permanent allegiance to the United States, but who does not enjoy full civic rights.

Visa: A document issued by a government that establishes the bearer's eligibility to seek entry into that government's territory. U.S. consulates abroad issue visas to foreign nationals, permitting them to travel to the United States and request admission at the border. U.S. citizens need visas to travel to foreign countries for certain purposes.

ENDNOTES

Chapter One

¹ This report uses the term “immigrant” to denote all noncitizen residents of the United States, including those with permanent and temporary legal status as well as those present without legal status or authorization. This is a departure from the narrower statutory definition of “immigrant.” See Immigration and Nationality Act (INA) § 101(15), 8 U.S.C. § 1101(a)(15).

² Press Release, U.S. Census Bureau Public Information Office, Miami-Dade Leads Nation in Percentage of Foreign-Born (September 3, 2003) *available at* <http://www.census.gov/Press-Release/www/2003/cb03cn66.html>; U.S. Census Bureau. The Foreign-Born Population in the United States: March 2002 (issued February 2003).

³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacting a new Title V within the INA) [hereinafter “AEDPA”].

⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997) [hereinafter “IIRIRA”].

⁵ See Statements of Representatives Henry Hyde, Chair House Judiciary Committee, Lamar Smith, and Bill McCollum, Congressional Record, Sept. 19, 2000, pp. H7766 - 7770.

⁶ See USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 2135 (2001) (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, also known as the Anti-terrorism Act).

⁷ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

⁸ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁹ Immigration and Nationality Act (INA) § 106, 8 U.S.C. § 1105a (1995), *amended by* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650 (1961) (codifying into law the principle of judicial review of deportation decisions, including the denial of relief from deportation, which was firmly established by 1936. Prior to 1996 and through most of the twentieth century, deportation orders could be issued only after a formal hearing. A professional corps of administrative immigration judges was established in 1983 to replace immigration officers who had previously conducted deportation hearings. To ensure their impartiality and independence from the INS, these immigration judges were lodged in a newly created Executive Office for Immigration Review (EOIR), along with the Board of Immigration Appeals, within the U.S. Department of Justice).

¹⁰ Immigration Act of 1891, ch. 551, 26 Stat. 1084 (1891); Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917).

¹¹ IIRIRA uses the term “removal” to refer to the expulsion of an alien from the United States. This expulsion may be based on grounds of inadmissibility or deportability.

Chapter Two

¹² Michele Pistone & Phillip Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 Geo. Immigr. L.J., 1, 32 (2001).

¹³ INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (1999).

¹⁴ 8 U.S.C. § 1228(a)(3)(A) (2003).

¹⁵ 8 U.S.C. § 1231(a)(5) (2003).

¹⁶ Information provided by ProBAR and the Lawyer’s Committee for Human Rights.

¹⁷ See Pistone & Schrag, *supra* note 12; Lawyer’s Committee for Human Rights, *Is this America? The Denial of Due Process to Asylum Seekers in the U.S.* (October 2000) [hereinafter *LCHR Due Process Report*].

¹⁸ Immigration and Naturalization Service, U.S. Department of Justice, *About INS Field Offices: Ports of Entry*, at <http://www.immigration.gov/graphics/fieldoffices/aboutus.htm> (last modified July 14, 2003).

¹⁹ Center for Human Rights and International Justice, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, at 55 (2000).

²⁰ See Pistone & Schrag, *supra* note 12.

²¹ See Center for Human Rights and International Justice, *supra* note 19.

²² Withdrawing allows them to choose their destination and does not bar them from returning legally in the future.

²³ See Center for Human Rights and International Justice, *supra* note 19.

²⁴ See *Id.* at 53. (explaining that Mexicans constituted 91% of all persons subject to expedited removal in FY 1997 through 1999.)

²⁵ Immigration and Naturalization Service, U.S. Department of Justice, *INS Expedited Removal FAQ: Can an alien have an attorney present during the expedited removal process?* (2002), at <http://www.ins.usdoj.gov/graphics/lawenfor/bmgmt/inspect/exped.htm>.

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²⁶ INA § 242(e)(3), 8 U.S.C. § 1252(e)(3) (1999); see also *American Immigration Lawyers Association (AILA) v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000), *consolidated with Liberians for United Peace v. Reno*, No. 98-5464, Dist Ct. C.A. No. 97-1237 (EGS) and *Wood v. Reno*, No. 98-5466, Dist. Ct. C.A. No. 97-1229 (EGS).

²⁷ Bureau of Citizenship and Immigration Services, *Immigrant Removal Statistics* (2002).

²⁸ Bureau of Citizenship and Immigration Services, *Immigrant Removal Statistics* (2003), at <http://uscis.gov/graphics/shared/aboutus/statistics/msrsep03/REMOVAL.HTM>.

²⁹ INA § 235(b), 8 U.S.C. § 1225(b) (1999), *amended by* IIRIRA § 302.

³⁰ See generally INS Form I-867A inquiring (a) Why did you leave your home country or country of last residence? (b) Do you have any fear or concern about being returned to your home country or being removed from the United States? (c) Would you be harmed if you were returned to your home country or country of last residence?

³¹ See INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (1999) (defining a credible fear of persecution to mean "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.")

³² See Center for Human Rights and International Justice, *supra* note 19, at 62.

³³ *AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) (arguing that expedition violated the due process and equal protection rights of aliens seeking to enter the United States, that the regulations were not consistent with the statute and that summary removal violated international treaties protecting children and refugees. Plaintiffs rested their claims on allegations of: summary removal procedures that banned communication with family, friends, or attorneys; failure to notify aliens of the reasons for removal and the procedures for challenging removal; failure to provide adequate language interpretation; and limited review of removal decisions. Plaintiffs also asserted that the First Amendment entitled immigration representatives to have access to persons subject to summary removal procedures. The district court dismissed each of these complaints and upheld the appellate court dismissals).

³⁴ *LCHR Due Process Report*, *supra* note 17, at 54-55.

³⁵ *Id.* at 53-54.

³⁶ Information provided by the ACLU Immigrants' Rights Project.

³⁷ *LCHR Due Process Report*, *supra* note 17, at 56-58.

³⁸ See Center for Human Rights and International Justice, *supra* note 19, at 78-81.

³⁹ U.S. General Accounting Office, Pub. No. GAO/GGD-98-81, *Illegal Aliens: Changing In the Process of Denying Aliens Entry to the United States* (1998) [hereinafter 1998 GAO Report] (substantiating that between April 1, 1997 and October 31, 1997, the GAO reported that 29,170 aliens were placed in expedited removal, of whom 1,394 were referred to asylum officers for credible fear interviews, of these 79 percent had a credible fear).

⁴⁰ 1998 GAO Report, at 79.

⁴¹ United States General Accounting Office, Pub. No. GAO/GGD-00-176, *Illegal Aliens – Opportunities Exist to Improve the Expedited Removal Process* 8, (2000) (stating that the GAO could not determine why aliens recanted their claims in 94 of 133 cases)

⁴² See Center for Human Rights and International Justice, *supra* note 19, at 54-55. (explaining that although denied permission to observe the INS inspections process, ERS compiled information about hundreds of asylum seekers from legal services agencies and from the Executive Office for Immigration Review, and compared that information to the information reported by the GAO using standard statistical methodology).

⁴³ Center for Human Rights and International Justice, *Evaluation of the General Accounting Office's Second Report On Expedited Removal*, at 48 (2000).

⁴⁴ Janet Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 Law & Soc'y Rev. 571, 587-88 (1991).

⁴⁵ Richard Read, *INS Jails Business Traveler*, *The Oregonian*, Aug. 23, 2000, at A1; see also *LCHR Due Process Report*, *supra* note 17, at 80.

⁴⁶ Anthony Lewis, *It Can Happen Here*, *N.Y. Times*, Sept. 8, 1997, at A19; see also *LCHR Due Process Report*, *supra* note 17, at 80 (according to Meng's attorney, Lisa H. Donnelly, Meng filed a *habeas corpus* petition for review of the INS's actions. The district court decided that it did not have jurisdiction and that under the 1996 laws, Meng had no constitutional due process right to challenge her immigration status. The Court of Appeals for the 9th Circuit affirmed, but Meng petitioned for a rehearing).

⁴⁷ National Network for Immigrant and Refugee Rights, *Examples of INS Raids and Interior Enforcement Incidents – 1999 and 2000*, at 5 (2000) (testimony reported to NNIRR Aug. 31, 1999).

⁴⁸ *LCHR Due Process Report*, *supra* note 17, at 59-60. Information also provided by Steven Lang.

⁴⁹ Plaintiff's Original Application for Writ of Habeas Corpus, *Abuwala v. Reno*, No. EP00CA0085 (W.D. Tex. Filed Mar. 24, 2000). (detailing the testimony of Abuwala in a Sept. 15, 2000 conversation with Lynn Coyle, then with the Lawyer's Committee for Civil Rights Under Law of Texas, where he gives full credit for the effective intervention of the federal district court to his legal team of attorney, Bernard Rosenbloom, and

paralegal, Elaine Rosenbloom. Without them, Abuwala is certain that he would be in India today with little hope of ever returning to the U.S.)

⁵⁰ John Moreno Gonzales, *Amityville Woman Seeks \$8M for Mistreatment at JFK*, *Newsday*, July 12, 2000, at A3; see also John Morales Gonzales, *McKnight Comes Home/ INS Officials Apologize for Blunder*, *Newsday*, June 19, 2000, at A7.

⁵¹ Miguel Perez, *Back in the U.S., Ill Woman Tries to Put INS Error Behind Her*, *The Record*, July 10, 2002.

⁵² *Diaz v. Reno*, 40 F. Supp. 2d 984 (N.D. Ill. 1999).

⁵³ Mae M. Chang, *Student Held by INS Plans \$2M Lawsuit*, *Newsday*, July 12, 2000, at A20; see also LCHR Due Process Report, *supra* note 17, at 79.

⁵⁴ See INA § 235(b)(1)(A)(iii)(II), 8 U.S.C. § 1225(B)(1)(A)(iii)(II)(1999) (explaining that the statute allows the removal of an alien “who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period to the date of the determination of inadmissibility”).

⁵⁵ 62 Fed. Reg. 10,312, 10,355 (Mar. 6, 1997) (codified at 8 C.F.R. § 235.3(B)(ii)).

⁵⁶ 64 Fed. Reg. 51,338, 51,338-39 (Sept. 22, 1999) (pursuant to INA § 235(b)(1)(A)(iii)(1999) (permitting the Attorney General, in her sole and unreviewable discretion, to designate certain other aliens to whom the expedited removal provisions may be applied even though they are not arriving in the United States).

⁵⁷ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

⁵⁸ *Id.*

⁵⁹ INA § 238(b), 8 U.S.C. § 1228(b) (1999), amended by § 442(a) of AEDPA and § 304(c)(2) of IIRIRA.

⁶⁰ See *id.*

⁶¹ 60 Fed. Reg. 43,954, 43,954-62 (Aug. 24, 1995).

⁶² See INA § 238(b)(5), 8 U.S.C. § 1228(b)(5), and 212(a)(9)(A)(i) & (C), 8 U.S.C. § 1182(a)(9)(A)(i) & (C) (1999).

⁶³ *Reaching the Unreachable: INS' Three 'Black-Hole' Proceedings*, Detention Watch Network News, (Asylum and Immigration Concerns Program, Lutheran Immigration and Refugee Service, Baltimore, M.D.), February/March 2000, at 8.

⁶⁴ INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (1999).

⁶⁵ 8 C.F.R. § 241.8(a) (1999).

⁶⁶ See 1998 GAO Report, *supra* note 39.

⁶⁷ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277 § 2242, 112 Stat. 2681, 2681-821; see also United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 1985).

⁶⁸ 8 C.F.R. § 241.8(d) (1999); see also David B. Caruso, *Torture Fears Don't Halt Deportation*, Associated Press, April 17, 2003 (stating “Last year, immigration judges rejected a record 16,744 claims by foreigners who said they would be tortured if forced to return to their home countries, according to the Executive Office of Immigration Review, part of the Justice U.S. Department. The Judges allowed 558 people to stay under new immigration rules adopted by the United States under the convention in 1999. In 2001, immigration judges granted 544 requests and denied 11,929”).

⁶⁹ INA § 236, 8 U.S.C. § 1226 (1999), as amended by IIRIRA § 303(b)(3).

⁷⁰ See IIRIRA, *supra* note 4, § 309(c).

⁷¹ *Castro-Cortez v. Reno*, 239 F.3d 1037 (9th Cir. 2001); Information provided by Jose Luis Araujo and Trina Realmutto, Van Der Hout & Brigagliano.

⁷² Information provided by Trina Realmutto, Van Der Hout & Brigagliano; see also *Castro-Cortez v. Reno* 239 F.3d 1037 (9th Cir. 2001).

⁷³ Information provided by Matt Adams, Northwest Immigrants Rights Project; see also *Castro-Cortez v. Reno* 239 F.3d 1037 (9th Cir. 2001).

⁷⁴ *Castro-Cortez v. Reno* 239 F.3d 1037 (9th Cir. 2001).

⁷⁵ The Ninth Circuit governs the federal courts of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. This court is based in San Francisco, California.

⁷⁶ Rekha Basu, *Politically Inspired Laws create a Serious Impact*, *Des Moines Register*, June 11, 2002.

⁷⁷ Derek Jensen, *INS Trickery Split Us Up, Family Says*, *Desert News*, Dec. 4, 2002; Information also provided by Norma Bench.

Chapter Three

⁷⁸ See Anti-Drug Abuse Act of 1988 § 7342, Pub. L. No. 100-690, 102 Stat. 4181, amending INA § 101(a), 8 U.S.C. § 1101(a) by adding “(43) The term aggravated felony means murder, any drug trafficking crime or any illicit trafficking in any firearms . . . or any attempt or conspiracy to commit any such act within the United States.”

⁷⁹ INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (1999).

⁸⁰ Anthony Lewis, *Measure of Justice*, N.Y. Times, July 15, 2000, at 27; Restoration of Fairness in Immigration Act of 2000, HR 4966, 106th Cong. (2000), and statement of Mary Anne Gehris at <http://www.aila.org/contentViewer.aspx?bc=9,594,1008,1029> (last visited July 23, 2003).

⁸¹ Information provided by Citizens and Immigrants for Equal Justice.

⁸² INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (1999).

⁸³ Interview by Rob Randhava, Policy Analyst, Leadership Conference on Civil Rights, with Socheat Chea, Olufolake Olaleye's attorney.

⁸⁴ Information provided by Jeffrey Jason, attorney for Ms. Wigent. See also Jeffrey Blackwell, *New Start Eases Old Problems*, Rochester Democrat and Chronicle, June 23, 2003 at 1B.

⁸⁵ Information provided by William Dance, attorney for Daniel Campbell; see also Tim Doran, *Man Faces Deportation for Teenage Prank in '68*, Detroit (MI) Free Press, July 21, 1998; *INS v. St. Cyr*, 533 U.S. 289 (2001) under which Daniel ultimately qualified for discretionary relief.

⁸⁶ INA § 101(a)(43)(M).

⁸⁷ Information provided by Manuel Vargas, Immigration Defense Project, New York State Defenders Association.

⁸⁸ Information provided by Tony Valentino, father-in-law of Robert Salas.

⁸⁹ INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (1999), as amended by IIRIRA § 322.

⁹⁰ *Matter of Ozkok*, 19 I. & N 546 (BIA 1988).

⁹¹ See *Matter of Roldan*, Int. Dec. 337 (BIA 1999) (en banc). But see *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000)(reversed Roldan); *Matter of Devison*, Int. Dec. 3435 (BIA 2000) (a youthful offender dispositions under New York Criminal Procedure Law is not a conviction under the INA). See generally *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000) (a conviction that has been vacated under the New York Criminal Procedure Law does not constitute a conviction).

⁹² See Dan Kesselbrenner & Lory D. Rosenberg, National Lawyer's Guild, IMMIGRATION LAW AND CRIMES § 4.7(a) (2000) [hereinafter IMMIGRATION LAW AND CRIMES] (asserting that INA § 237(a)(2)(A)(v) lists certain types of offenses and states they will not be deportable offenses if the person is pardoned, however, controlled substances offenses under INA § 237(a)(2)(B) are not included. Therefore even if pardoned for a controlled substance offense, there will still be immigration consequences).

⁹³ *Martinez Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990) stating that courts have acknowledged this issue raises policy problems and held that the INS cannot tread deferred adjudications as a conviction.

⁹⁴ *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

⁹⁵ But see *Vazquez-Velezmore v. INS*, 281 F.3d 693 (8th Cir. 2002). But see also *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002) (illustrating the courts decline to extend its own reasoning).

⁹⁶ Information provided by Tony Valentino, father-in-law of Robert Salas.

⁹⁷ See *INS v. St. Cyr*, No. 00-767, brief *amici curiae* of the Florida Immigrant Advocacy Center et. al. at 14; See also Phillip P. Pan, *INS Shifting Policy on Immigration Detention*, Wash. Post, Aug. 9, 1999, at A1 (suggesting that Mr. Siridavong is eligible for a 212(c) waiver of deportation because he entered his guilty pleas before that provision was repealed, but many others are not so lucky).

⁹⁸ IMMIGRATION LAW AND CRIMES, *supra* note 92, § 6.3 (explaining that a suspended execution of a sentence is a sentence "actually imposed" for purposes of the exception to inadmissibility under 8 U.S.C. § 1182 (a)(2)(A)(ii) (II), INA § 212(a)(2)(A)(ii)(II).)

⁹⁹ INA § 101(a), 8 U.S.C. § 1101 (a) (1999), as amended by IIRIRA § 322, adding (48)(B).

¹⁰⁰ Georgia and Texas have statutes that have a hidden jail sentence imposed when probation is ordered. See IMMIGRATION LAW AND CRIMES, *supra* note 92.

¹⁰¹ Information provided by Dean Wanderer, Carlos Garcia's attorney.

¹⁰² Charles Gordon et. al., IMMIGRATION LAW AND PROCEDURE §2.02{2}[hereinafter IMMIGRATION LAW AND PROCEDURE] (Matthew Bender & Co., Inc. et al. eds., 2000).

¹⁰³ INA § 241(a)(2)(A)(i)(II), U.S.C. § 1251(a)(2)(A)(i)(II) (1999), as amended by AEDPA § 435, renumbered as INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227 a)(2)(A)(i)(II) by IIRIRA § 305(a)(2).

¹⁰⁴ IMMIGRATION LAW AND PROCEDURE, *supra* note 102, §71,05[1][d][II]; See also *Matter of L-V-C*, Int. Dec. 3382 (BIA 1999). See also *Tourney v. Reimer*, 8 F. Supp. 91 (S.D.N.Y. 1934) (detailing crimes involving moral turpitude including adultery); see also *Fitzgerald v. Landon*, 238 F.2d 864 (1st Cir. 1956)(detailing lewdness); see additionally *U.S. v. Qadeer*, 953 F. Supp. 1570 (S.D. Ga. 1997) (stealing cellular air time); see generally *Matter of Khalik*, 17 I. & N Dec. 518 (BIA 1958) (detailing intentionally passing bad checks); see generally *Orlando v. Robinson*, 262 F.2d 850 (7th Cir. 1959)(detailing larceny of a sealed Christmas package worth \$5, shoplifting, assault with a deadly weapon, and sodomy).

¹⁰⁵ Cal. Penal Code § 484, 245, 498(d), 591 (West 2001); see IIRIRA 309(c)(4)(G) foreclosing judicial review if a legal permanent resident commits any crime where the sentence that could be imposed is one year in prison. Under California law, this category includes shoplifting or other theft of goods of \$400, misdemeanor aggravated assault, theft by illegal hookup of gas or electricity of over \$400, and unauthorized use of or damage to telephone or cable TV systems.

¹⁰⁶ Information provided by Denyse Sabagh, Duane Morris & Heckscher.

- ¹⁰⁷ INA § 237(a)(3)(D) & (6), 8 U.S.C. § 1227(a)(3)(D) & (6), INA § 212(a)(6)(C)(ii) & (10)(D), 8 U.S.C. § 1182 (a)(6)(C)(ii) & (10)(D)(1999).
- ¹⁰⁸ See INA § 237(a)(6), 8 U.S.C. 1227(a)(6) *as amended* by the Child Citizenship Act of 2000, Pub. L. No. 106-395 § 201 (c) (explaining that a waiver to this ground of deportation was created in October 2000).
- ¹⁰⁹ 8 U.S.C. § 1227(a)(3)(D).
- ¹¹⁰ See *CBS Evening News with Dan Rather: Interview with Richard Schlesinger* (CBS Television Broadcast, Apr. 17, 2000) (reporting information provided by Mr. Schlesinger, attorney for Ms. Parker).
- ¹¹¹ Mike Dorning, *Petty Acts Now Haunt Immigrants: Deportations Soar Under 1996 Law*, Chi. Trib. (Washington Bureau), Feb. 20, 2000.
- ¹¹² INA 237(2)(E), 8 U.S.C. 1227(2)(E) (1996).
- ¹¹³ Philip P. Pan, *Victimized Woman Faces Deportation*, Wash. Post, Feb. 20, 2000, at A1; information also provided by Michelle Morales, attorney for Maria Sanchez.
- ¹¹⁴ Information provided by Michelle Morales, attorney for Maria Sanchez.

Chapter Four

- ¹¹⁵ The bar to cancellation of removal relief for aggravated felons, INA § 240A(c)(6), 8 U.S.C. § 1229a(c)(6) (1999), was created by IIRIRA § 302(a)(3). At the same time, IIRIRA § 304(b) repealed 212(c) relief, previously found at INA § 212(c), 8 U.S.C. § 1182(c) (1995).
- ¹¹⁶ See Executive Office For Immigration Review, U.S. Department of Justice, *Decisions by Immigration Judges on Applications for Relief From Deportation* (1997) (stating in fiscal year 1996, 6,517 people applied for 212(c) relief but only 2,563 applications were granted). According to Executive Office for Immigration Review, U.S. Department of Justice, *Caseload Figures and Estimates* (on file with author), the 6,517 people who applied for 212(c) relief were among the total 246,426 removal cases completed before Immigration Judges in fiscal year 1996.
- ¹¹⁷ INA § 212(c), 8 U.S.C. § 1182(c) (1995), repealed by IIRIRA § 304(b); INA § 240A(c)(6), 8 U.S.C. § 1229a(c)(6) (1999), created by IIRIRA § 302(a)(3).
- ¹¹⁸ Information provided by Pam Gaul, John Gaul's mother. Amy Herdy, *Mishandled forms, two felonies and a strict immigration law send a 25-year-old back to Thailand*, St. Petersburg Times, February 23, 1999, at <http://www.ciej.org/ciej05.html>.
- ¹¹⁹ Information provided by Haydee Klappert and Rebecca Sharpless, Florida Immigrant Advocacy Center.
- ¹²⁰ Information provided by Gloria Goldman, Gloria A. Goldman, P.C., attorney for Egil Sinka.
- ¹²¹ Information provided by Hakeem Ishola, attorney for Samuel Schultz. See also Angie Welling, *Utahn Calm, but Date with INS Looms: W.V. man may face deportation after '03 hearing*, Desert News, Oct. 21, 2002 at A01.
- ¹²² Mara Delt, *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, HAITI PROGRES, Vol. 18, No. 28, (Sept. 27-October 3, 2000).
- ¹²³ INA § 212(c), Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 5052 *as amended* by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1751.
- ¹²⁴ See IMMIGRATION LAW AND CRIMES, *supra* note 92, § 2.3(e) (2000); see also Matter of L-G, Int. Dec. 3254 (BIA 1995) (explaining that a drug offense may not be an aggravated felony if it is a single offense involving possession of 30 grams or less of marijuana, or if it is a single possession charge for which the offender is not subject to one year in jail under federal law. However, if it is a conviction for a cocaine-based drug, even simple possession will be an aggravated felony under immigration law because it is treated as a felony.).
- ¹²⁵ Information provided by Laurie Kozuba, Director, Citizens & Immigrants for Equal Justice.
- ¹²⁶ See Susan Levine, *On the Verge of Exile: For children Adopted From Abroad, Lawbreaking Brings Deportation*, Wash. Post, Mar. 5, 2000, at A1; see also Terry Oblander, *Parents Say Son May Agree To Deportation*, The Plain Dealer, Aug. 29, 2000, at 1B; see generally Stephen Buckley and Susan Levine, *A Young Man's Homecoming to a Brazil He Does not Know*, Wash. Post, Nov. 29, 2000, at A01.
- ¹²⁷ INA § 212(c), 8 U.S.C. § 1182(c), *as amended* by AEDPA § 440(d), repealed by IIRIRA § 304(b).
- ¹²⁸ See 8 U.S.C. § 1227(a)(2)(A)(i)(I) (stating immigrants who commit a single crime of moral turpitude less than five years after being admitted as lawful permanent residents are subject to removal).
- ¹²⁹ Bill Maxwell, *Commentary: Are Immigration Laws that Hurt Children Fair?*, Naples Daily News, Dec. 6, 1998.
- ¹³⁰ Nancie Katz, *18-year old crime could lead to deportation*, Daily News, Aug. 6, 2000, at 1.
- ¹³¹ Robert Rudolph, *Tough Deportation Law Derails Hard-earned Life for Immigrant*, The Star Ledger, Apr. 1, 1999.
- ¹³² *Velasquez v. Reno*, F. Supp. 2d 633, 664-65 (D.N.J. 1999).
- ¹³³ Information provided by Tom Mosley, attorney for Ybernia Gomez.
- ¹³⁴ See INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (1999); see also INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C) (1999) (adding that people who have previously applied and been denied cannot apply again).

¹³⁵ INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (1999) (stating there are exceptions for cases where there have been material changes in circumstances that effect the person's eligibility or where extraordinary circumstances prevented the person from applying within the one year time period)

¹³⁶ For reasons of confidentiality, "Abdi" has asked that his real name not be used. Information provided by his attorney, Marisa Cianciarulo.

¹³⁷ 8 U.S.C. § 1158(b)(2)(A)(ii); INA § 208(b)(2)(A)(ii). 8 U.S.C. § 1158(b)(2)(B)(i); INA § 208(b)(2)(B)(i).

¹³⁸ *Note on the Exclusion Clauses*, U.N. High Commission for Refugees Standing Comm., 8th mtg. 18, U.N. Doc. EC/47/SC/CRP.29 (1997) at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=EXCOM&id=3ae68cf68>; U.N., *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 156-161, U.N. Doc. HCR/IP/4 (rev. 1992).

¹³⁹ *State v. Abdullahi*, 2000 ND 39, 607 N.W.2d 561 (2000). Information provided by David Chapman, Abbas Abdullahi's attorney.

¹⁴⁰ *Radnonic v. Zemski*, 121 F. Supp. 2d 814 (E.D.P.A. 2000).

¹⁴¹ INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (1999). See *Matter Q-T-M-T*, Int. Dec. 3300 (BIA 1996) (interpreting INA § 241(b)(3)(B)).

¹⁴² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

¹⁴³ IMMIGRATION LAW AND PROCEDURE, *supra* note 102, §74.07{2}(a) (detailing that the requirements for suspension included proving physical presence in the United States for over seven years, was a person of good moral character, and could show the either himself or his legal permanent relative would suffer hardship if he was deported.)

¹⁴⁴ See *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002).

¹⁴⁵ See *Bartowszewska-Zajac v. INS*, 237 F.3d 710 (6th Cir. 2001). (detailing that the mayor of Teresa's town intervened in her case and the city petitioned for Teresa through the labor certification process. Her attorney successfully sought a stay of deportation. While her appeal was pending, the labor certification petition was approved. Her lawyer filed a motion to reopen her case so that she could apply for adjustment of status to lawful permanent resident through the approved labor certification petition. Her case was still pending when this Report went into production.)

¹⁴⁶ See 106 Cong. Rec. H7766 (daily ed. Sept. 19, 2000) (statement of Rep. Hyde).

¹⁴⁷ INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1); INA § 240B(b)(1)(C), 8 U.S.C. § 1229c(b)(1)(C).

¹⁴⁸ INA § 101(b)(4), 8 C.F.R. § 3.10.

¹⁴⁹ H.R. Rep. No. 107-785 (2002).

¹⁵⁰ Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, *Exercising Prosecutorial Discretion*. [hereinafter Meissner Memorandum] (Nov. 17, 2000).

¹⁵¹ Memorandum from INS Atlanta District Office, *Immigration and Naturalization Service Update: Removal of Criminal Aliens*.

¹⁵² Meissner Memorandum, *supra* note 150.

¹⁵³ INA § 235(b)(2), 8 U.S.C. § 1225(b)(2).

¹⁵⁴ Frank Trejo, *88-year old Won't be Deported: Illegal Voting Case Dropped by INS*, The Dallas Morning News, Apr. 14, 1999, at 23A.

¹⁵⁵ Letter from Assistant Attorney General Robert Raben, U.S. Department of Justice, to Congressman Barney Frank (Jan. 19, 2000) (identical letters of reply sent to 27 other Members of Congress).

Chapter Five

¹⁵⁶ Justinian Code, Book1, Title 14, § 7.

¹⁵⁷ See Anti-Drug Abuse Act of 1988, § 7344(b), 102 Stat. 4181 (1988) (; see also *Matter of A-A-*, 20 Int. Dec. 492 (BIA 1992) noting that the BIA held that the criminal grounds of deportation that were added in that Act only applied to convictions for crimes committed on or after the Act passed.

¹⁵⁸ Pamela Hartman, *An 88' Burglary Forces His Deportation. Some Legislators Want to Change the Law*, The Tucson Citizen, Apr. 24, 1999.

¹⁵⁹ See *Matter of Collado*, Int. Dec. 3333 (BIA 1998) (vacating an immigration judge's decision to terminate deportation proceedings and remanding it to further proceedings).

¹⁶⁰ Information provided by Ann Benson, Northwest Immigrant Rights Project. Mr. Alvarez now may be able to his application for 212(c) relief under the *Soriano* rule 8 CFR § 3.44 (see discussion of 212(c) relief *infra*).

¹⁶¹ Information provided by Laurie Kozuba, Director, Citizens & Immigrants for Equal Justice.

¹⁶² *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996).

¹⁶³ *Matter of Soriano*, 21 I. & N. Dec. 516 (AG 1997).

¹⁶⁴ *Tasisos v. Reno*, 204 F.3d 544 (4th Cir. 2000).

¹⁶⁵ See 65 Fed. Reg. 44, 476 et seq. (July 18, 2000); see also 66 Fed. Reg. 6436 et seq. (Jan. 22, 2001).

¹⁶⁶ *INS v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001).

¹⁶⁷ *INS v. St. Cyr*, 533 U.S. at 317-319.

¹⁶⁸ *Id.* at 321-323.

¹⁶⁹ Information provided by Michelle Morales, George Washington Law School Immigration Clinic.

¹⁷⁰ Information provided by Steven Lang, and Imran Mirza, Quan, Burdette & Perez, P.C. See also Celia Dugger, *After Crime She Made a New Life But Now Faces Deportation*, N.Y. Times, Aug. 11, 1997, at A8.

¹⁷¹ Information provided by Imran Mirza, Quan, Burdette & Perez, P.C.

¹⁷² Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627 (proposed Aug. 13, 2002).

¹⁷³ Patrick J. McDonnell, *"Deportation Shatters Family"*, L.A. Times, Mar. 14, 1998.

¹⁷⁴ An *ex post facto* law is one which purports to retroactively make criminal certain conduct which was not criminal when done, increases the punishment for crimes already committed, or changes the rules of procedure in force at the time an alleged crime was committed in a way substantially disadvantageous to the accused. *Definition of Ex Post Facto law*, Encyclopedia of Britannica, Britannica Online at <http://www.brittanica.com>.

¹⁷⁵ Daniel Kanstroom, *United States Immigration Policy at the Millenium, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889 (2000).

¹⁷⁶ *Galvan v. Press*, 347 U.S. 522 (1954).

¹⁷⁷ *INS Adopts New Legal Interpretation on Mandatory Detention*, Immigration and Naturalization Service News Release, July 12, 1999.

¹⁷⁸ INA § 245A(f)(4), 8 U.S.C. § 1255a(f)(4) (1999) as amended by IIRIRA § 377.

¹⁷⁹ See *Catholic Social Services v. Meese*, 685 F. Supp. 1149 (E.D. Cal. 1988) (order granting summary judgment), *aff'd*, 956 F.2d 914 (9th Cir. 1992), *vacated and remanded*, *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), *vacated and dismissed*, *Catholic Social Services v. Reno*, 134 F.3d 921 (9th Cir. 1998) (CSS I); and *Catholic Social Services v. INS*, 197 F.3d 1041 (9th Cir. 2000) (CSS II) (ruling that the CSS case must stay in court and that the INS was properly ordered to issue work permits and stays of deportation to Group 1 and 2 class members. In Dec. 2000, Congress provided relief to many of these individuals).

Chapter Six

¹⁸⁰ INA § 292, 9 U.S.C. § 1362 (1999) (stating immigration proceedings the applicant's right to counsel must be "at no expense to the Government"); see *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings are purely civil and various protections that apply in the context of criminal hearings do not apply in deportation proceedings); see also *United States v. Campos-Ascencio*, 822 F.2d 506 (5th Cir. 1987); see *Ramirez v. INS*, 550 F.2d 560 (9th Cir. 1977).

¹⁸¹ INA § 292, 8 U.S.C. § 1362 (1999).

¹⁸² United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng/Rev 189-914 (1979).

¹⁸³ See, e.g., Susan Martin and Andrew Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 Geo. Immigr. L.J. 589, 595 n.34 (2000) (citing EOIR, *Immigration Court Asylum Decisions: FY 1999*); Richard Tulskey, *Asylum Seekers Face Lack of Legal Help*, San Jose Mercury News, Dec. 30, 2000, at A12.

¹⁸⁴ See Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998) (citing statistics from the Executive Office of Immigration review).

¹⁸⁵ Information provided by Marisa Cianciarulo.

¹⁸⁶ See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (1999) (stating "The officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum...or a fear of persecution").

¹⁸⁷ See 8 C.F.R. § 208.30(b) (1999) (stating, "The interviewing officer has the discretion to allow the attorney to make a statement at the end of the interview").

¹⁸⁸ LCHR Due Process Report, *supra* note 17 at 54-55.

¹⁸⁹ Women's Commission on Human Rights, *INS Treatment of Children Jeopardizes Asylum Claims*, May 2002.

¹⁹⁰ 8 C.F.R. § 1240.10(c).

¹⁹¹ 8 C.F.R. § 1240.10(d).

¹⁹² *Unaccompanied Alien Child Protection Act: Hearing on S. 121 Before the Senate Judiciary Subcomm. on Immigration*, 107th Cong. (Feb. 28, 2002) (statement of Andrew Morton, Attorney with Latham & Watkins LLP) available at http://judiciary.senate.gov/testimony.cfm?id=172&wit_id=239.

¹⁹³ *In re Gault*, 387 U.S. 1 (1967).

¹⁹⁴ *Id.*

¹⁹⁵ United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, at 4 (1997).

¹⁹⁶ James Pinkerton, *Border Patrol Detains More than 9000 Kids Over Past Two Years*, Houston Chronicle, Jan. 31, 2000; *Judge Grants Orphaned Honduran Twins Asylum*, Associated Press, Feb. 7, 2000.

¹⁹⁷ Information provided by Meredith Linsky, ProBAR.

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¹⁹⁸ Information provided by Christopher Nugent, then with the Florence Immigrant and Refugee Rights Project. See also Mark Cowling, *Nicaraguan Youth Hoping for Asylum Finds Advocates at the Florence Project*, Florence Reminder and Blade Trib. (Florence, Ariz.), July 27, 2000; O. Richardo Pimentel, *Street Kid from Nicaragua Finds a Refuge*, Ariz. Republic, July 22, 2000.

¹⁹⁹ Julie Sullivan, *A Teen Age Refugee from China Talks To the Media for the First time About Her Immigration Ordeal*, The Oregonian, Dec. 14, 1999; Tom Brune, *Children in the U.S. Alone, Illegally Are Often Held in Juvenile Jails*, Newsday, Feb. 8, 2000, at A04.

²⁰⁰ Information on file with ABA Commission on Immigration Policy, Practice and Pro Bono.

²⁰¹ See INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (1999) (stating for children in INS custody, the Attorney General must consent to juvenile court jurisdiction over dependency proceedings.)

²⁰² Information provided by Jim Wang.

²⁰³ Limited exceptions for victims of domestic violence.

²⁰⁴ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 3009 (1996).

²⁰⁵ 45 CFR Part 1626, Vol. 61, No. 169 (August 29, 45 C.F.R. § 1626 (1996)).

Chapter Seven

²⁰⁶ Fauziya Kassindja & Layli Miller Bashir, *Do They Hear You When You Cry* (Delta 1999).

²⁰⁷ U.S. Department of Homeland Security, *Enforcement, Fiscal Year 2002, 2002 Yearbook of Immigration Statistics*, [hereinafter *Enforcement Fiscal Year 2002*] at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002.pdf> (last visited February 29, 2004).

²⁰⁸ Marisa Taylor, *INS Struggles with Criminals, Crowding*, San Diego Union-Tribune, Feb. 21, 2000, at A1.

²⁰⁹ *Enforcement Fiscal Year 2002*, *supra* note 207.

²¹⁰ U.S. Department of Homeland Security, *Funding by Initiative Area*, at http://www.whitehouse.gov/homeland/homeland_security_charts.html.

²¹¹ *DeMore v. Kim*, 123 S. Ct. 1708 (2003).

²¹² INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (1999).

²¹³ See Susan Gilmore, *Mother Won't be Deported After All*, Seattle Times, Aug. 7, 2002.

²¹⁴ See *Richardson v. Reno*, 180 F.3d 1311, 1315 (11th Cir. 2000). See also Alfonso Chardy, *20,000 Are Waiting Deportation But Some May be Held Indefinitely*, Miami Herald, Sept. 12, 2000.

²¹⁵ U.S. Department of Homeland Security, *Operation Liberty Shield*, at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml.

²¹⁶ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1999) as amended by IIRIRA § 602(a).

²¹⁷ John Goshko, *INS rejects U.N. Suggestion on Jailing Refugees*, Wash. Post, Feb. 23, 1999, at A12. Letter from UNHCR Regional Representative Guenet Guebre-Christos to Rebecca Sharpless, Attorney, Florida Immigrant Advocacy Center (Apr. 15, 2002), reproduced in 79 Interpreter Releases 630 (Apr. 29, 2002).

²¹⁸ Alisa Solomon, *Free at Last*, Village Voice, Mar. 28, 2000, at 59.

²¹⁹ Information provided by Amy Gottlieb, American Friends Service Committee.

²²⁰ See Denise Visconti, *Summary Of A Recent Decision Granting CAT Relief To A Victim Of Domestic Violence*, Immigration Daily at http://www.ilw.com/lawyers/colum_article/articles/2000,0809-Visconti.shtm (last visited July 16, 2003).

²²¹ Information provided by Steven D. Converse, Attorney, Anderson, Converse & Fennick, P.C.

²²² *Foucha v. Louisiana*, 504 U.S. 711 (1992).

²²³ *Morrisey v. Brewer*, 408 U.S. 471, 478 (1972).

²²⁴ See IIRIRA § 303 (1996).

²²⁵ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181 (requiring individuals convicted of aggravated felonies to be detained without the possibility of review).

²²⁶ See *Kellman v. INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); See *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990); *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd on other grounds*, 954 F.2d 1253 (6th Cir. 1992); *Paxton v. United States*, 745 F. Supp. 1261, *dismissed as moot*, 925 F.2d 1465 (6th Cir. 1992); See also *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990); *Yang v. United States*, No. 90-Civ. 300 (D. Minn. 1990); *Joe v. Thornburgh*, 1990 U.S. Dist. LEXIS 14530 (D. Mass. 1990). See generally *United States v. Salerno*, 481 U.S. 739 (1987). (established a balancing test to determine whether a provision in the law was unconstitutional: (1) Congress intended the restriction to constitute punishment; (2) no non-punitive, alternative purpose can be assigned to it; or (3) it is excessive in relation to the legitimate goal it seeks to further).

²²⁷ *Davis v. Weiss*, 749 F. Supp. 47 (D. Conn. 1990); *Morrobelt v. Thornburgh*, 744 F. Supp. 725 (E.D. Va. 1990).

²²⁸ See INA § 242(a), 8 U.S.C. § 1252(a) (1995), as created by the Immigration Act of 1990, and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991; see also Ira Kurzban, IMMIGRATION LAW SOURCE BOOK 193 (6th ed. 1998) (allowing persons who lawfully entered the U.S. including lawful permanent residents eligibility for bond even if they were characterized as aggravated felons).

²²⁹ Kurzban, *supra* note 228; see INA § 236(c)(1), 8 U.S.C. § 1226(c)(1) (1999) (dealing with the mandatory detention of criminal aliens); see INA § 236(c)(2), 8 U.S.C. § 1226(c)(2) (1999) (stating that the release of persons subject to mandatory detention is only available in the limited situations, such as where the detainee is part of a witness protection program); see also INA § 236(e), 8 U.S.C. § 236(e) (1999) (stating that the Attorney General's actions under this section are not subject to judicial review).

²³⁰ See IIRIRA § 303(b)(3) (1996) (stating that the Transitional Period Custody Rules in effect through October 8, 1998, allowed for release of detained aliens if: they lawfully entered the U.S. or if they unlawfully entered but they cannot be removed to the country of removal because it will not accept the alien; the alien does not pose a danger to other persons or property and they are likely to appear for scheduled hearings; and they have not been charged with an aggravated felony or terrorism).

²³¹ Memorandum from Michael A. Pearson, INS Exec. Assoc. Comm'r, Office of Field Operations, to Regional Directors, *Field Guidelines for Applying Revised Interpretation of Mandatory Custody Provision*, HQQPS (DD) 50/20 (Jul. 12, 1999).

²³² *Id.*

²³³ Information provided by "Rudy," "Rosa's" husband.

²³⁴ *DeMore v. Kim*, 123 S.Ct. 1708 (2003).

²³⁵ *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002).

²³⁶ INA § 241(a)(1)(A) & (2), 8 U.S.C. § 1231(a)(1)(A) & (2) (1999).

²³⁷ See IMMIGRATION LAW AND PROCEDURE, *supra* note 102, §108.05[3][a] (explaining there are generally six types of noncitizens who become lifers: (1) those who are being sent back to countries with which the U.S. has no diplomatic relations (*i.e.* Cuba, North Korea, Libya); (2) those who are "stateless" (from places like the former Soviet Union); (3) those from nations that refuse to take back their nationals; (4) persons from countries experiencing political upheaval or no central government (those designated for TPS); (5) those from nations who selectively deny travel documents to their nationals; (6) in some cases those who are eligible for Torture Convention protections, but due to past criminal activity can only get their deportation orders deferred, which does not always lead to release).

²³⁸ *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) *cert. granted* (U.S. January 16, 2003) (No. 03-7434); Charles Lane, *High Court to Consider Detention Case*, Washington Post, January 17, 2004 at A02.

²³⁹ *Huynh v. Reno*, 56 F. Supp.2d 1160 (W.D. Wash. 1999). Further information provided by Jay Stansell, Federal Public Defender's Office. See also Mike Carter and Steve Miletich, *Indefinite Detention By INS Is Illegal--Seattle Ruling has Wide Impact*, Seattle Times, July 10, 1999 at A1.

²⁴⁰ *Fernandez v. INS*, 79 F. Supp.2d 44 (D.R.I. 1999).

²⁴¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

²⁴² *Seretse-Khama v. Ashcroft*, 215 F. Supp.2d 37 (D.D.C. 2002).

²⁴³ INA § 242(c), 8 U.S.C. § 1252(c) (1995).

²⁴⁴ *Id.*; see also IMMIGRATION LAW AND PROCEDURE, *supra* note 102, §108.05[1] (showing that the INS was not acting on the deportation with reasonable dispatch).

²⁴⁵ INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (1999).

²⁴⁶ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

²⁴⁷ *Id.* at 701-703.

²⁴⁸ Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (interim rule November 14, 2001)(to be codified at 8 C.F.R. pt. 3, 241).

²⁴⁹ *Zadvydas v. Davis*, 533 U.S. at 701-03.

²⁵⁰ *Reno v. Flores*, 507 U.S. 292 (1993).

²⁵¹ *Unaccompanied Alien Child Protection Act of 2003: Hearing on S. 121, Before the Senate Comm. on the Judiciary Subcomm. on Immigration*, 107th Cong. (Feb. 28, 2002)(statement of Edwin Munoz) available at http://judiciary.senate.gov/testimony.cfm?id=172&wit_id=237.

²⁵² *Id.*

²⁵³ Susan McRae, *Tracing a Long Story of Abuse: Missing INS Tapes Mean Boy May Have to Recite Ordeal*, Los Angeles Daily Journal, Jan. 14, 2003.

²⁵⁴ Melanie Nezer, *Refugees in America's Jails*, Refugee Reports, Jan. 1999. Some of the major INS facilities include Oakdale, La.; Eloy, Ariz.; Florence, Ariz.; El Centro, Cal.; York, Pa.; and Port Isabel, Tex.

²⁵⁵ Women's Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, Oct. 2000; Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, 1999; Human Rights Watch, *Detained and Deprived: Children in the Custody of the Immigration and Naturalization Service*, Vol.10, No.4 (G), Dec. 1998; Women's Commission for Refugee Women and Children, *Liberty Denied: Women Seeking Asylum Imprisoned in the United States*, Apr. 1997; Florida Immigrant Advocacy Center, Inc., *Florida County Jails: INS's Secret Detention World*, Nov. 1997.

²⁵⁶ *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990).

²⁵⁷ Katherine Webster, *N.H. Investigates Sex in County Jail*, Associated Press, Jan. 28, 2000; J.M. Hirsch, *Immigrants in N.H. Jail Protest*, Associated Press, Aug. 17, 1999.

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²⁵⁸ Stephanie Hanes, *Federal Detainees are Removed for Safety*, Mar. 25, 2001.

²⁵⁹ Alisa Solomon, *Free at Last*, Village Voice, Mar. 28, 2000, at 59.

²⁶⁰ Information provided by Joan Friedland, Florida Immigrant Advocacy Center.

²⁶¹ Anna Hinken, U.S. Department of Justice, *Evaluation of the Rights Presentation*, at <http://www.usdoj.gov/eoir/statspub/rtspresrpt.pdf> (last visited Nov. 10, 2003).

²⁶² Eleanor Acer, Lawyer's Committee for Human Rights, Address Before the United States Senate Committee on the Judiciary Immigration Subcommittee (Sept. 16, 1998) available at http://www.lchr.org/archives/arc_refs/feature/detention/current.htm.

²⁶³ See Vera Justice Institute, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, (Aug. 1, 2000) (examining the appearance rates of the class of immigrants at issue in the case. The study was conducted between 1997 and 2000 and involved 534 participants, 127 of whom were presumptively subject to removal and detention based on their criminal convictions. Of this 127, all but six were lawful permanent residents.).

²⁶⁴ See *id.* at 33-36 (suggesting that the lawful permanent residents involved in the study consistently demonstrated a higher appearance rate, with or without assistance, than any other immigrant group studied, including political asylum seekers and undocumented immigrant workers).

²⁶⁵ Letter from Senators Leahy, Kennedy, Hatch and Brownback, to the Honorable John Ashcroft, Attorney General [hereinafter Senators letter] (Aug. 16, 2002).

²⁶⁶ U.S. Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Bill, S. Rep. No. 107-42, at 40 (2002). Congress made similar appropriations in FY2003 and FY2004.

²⁶⁷ Senators letter, *supra* note 265.

Chapter Eight

²⁶⁸ *Mistretta v. United States*, 488 U.S. 361 (1989); James Madison, *The Particular Structure of the New Government and the Distribution of Power Among its different Parts*, The Federalist Papers No.47 (Feb. 1, 1788).

²⁶⁹ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

²⁷⁰ INA § 242(a)(2)(C), 8 USC § 1252(a)(2)(C) (1999), amended by IIRIRA § 306(a)(2); INA § 242(b), 8 USC § 1252(b) (1999), amended by IIRIRA § 306(a)(2).

²⁷¹ INA § 242(a)(2)(B), 8 USC § 1252(a)(2)(B) (1999), amended by IIRIRA § 306(a)(2).

²⁷² INA § 236(e), 8 USC § 1226(e), AEDPA § 401(e), repealing INA § 106(10); IIRIRA § 306(b), repealing INA § 106.

²⁷³ INA § 242, 8 USC 1252 (1999), amended by IIRIRA § 306.

²⁷⁴ INA § 242(f)(1), 8 USC § 1252(f)(1) (1999), amended by IIRIRA § 306(a)(2); INA § 242(f)(2), 8 USC § 1252(f)(2) (1999), amended by IIRIRA § 306(a)(2).

²⁷⁵ INA § 242(a)(2), 8 USC § 1252(a)(2) (1999), amended by IIRIRA § 306(a)(2).

²⁷⁶ See, e.g., S. 1005, 97th Cong., 1st Sess. (1981) (Sponsored by Sen. Jesse Helms (R-NC), would *inter alia* prohibit any federal court from requiring school boards to change the racial composition of the student body or faculty for such purposes); S. 26, 98th Cong., 1st Sess. (1983) (Sponsored by Sen. Jesse Helms (R-NC), would *inter alia* eliminate lower federal court jurisdiction to issue any order in any case involving a state or local law that limits or regulates abortion or provides funding or other assistance for abortions); H.R. 87, 99th Cong., 1st Sess. (Sponsored by Rep. Phil Crane (R-IL), would eliminate Supreme Court and federal district court jurisdiction to review or hear any case arising out of State law relating to voluntary prayer in public buildings and schools); S. 327, 100th Cong., 1st Sess. (1987) (Sponsored by Sen. Orrin Hatch (R-UT), would eliminate lower federal court jurisdiction to issue any order requiring the assignment or transportation of students to public schools on the basis of race, color, or national origin).

²⁷⁷ See INA § 242(f)(1), 8 U.S.C. § 1252(f)(1) (1999), amended by IIRIRA § 306(a)(2) (explaining only the Supreme Court can enter injunctive relief); see also INA § 242(f)(2), 8 U.S.C. § 1252(f)(2) (1999), amended by IIRIRA § 306(a)(2) (explaining that stays require "clear and convincing evidence" that the execution of a final order of deportation is "prohibited as a matter of law").

²⁷⁸ 6 *The Guide to American Law* 175 (West 1985).

²⁷⁹ *Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985).

²⁸⁰ *Id.* at 662, 665.

²⁸¹ *Id.* at 661.

²⁸² *Reno v. Flores*, 507 U.S. 292 (1993).

²⁸³ *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990).

²⁸⁴ *American Baptist Church v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

²⁸⁵ *Illinois Migrant Church v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976).

²⁸⁶ *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd sub nom.*; *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

²⁸⁷ *Id.* at 452.

- ²⁸⁸ See Immigration Reform and Control Act § 302(a)(1), Pub. L. No. 99-603, 100 Stat. 3359, *amending* INA § 210(e), 8 U.S.C. § 1160(e), *amending* INA § 210(e), 8 U.S.C. § 1120(e) (precluding federal court review of individual decisions under the Special Agricultural Worker program).
- ²⁸⁹ *McNary v. Haitian Refugee Center*, 498 U.S. 479, 487-89 (1991). See Immigration Reform Control Act § 302(a)(1), Pub. L. No. 99-603, 100 Stat. 3359, *amending* INA § 210(e), 8 U.S.C. § 1160(e) (precluding federal court review of individual decisions under the Special Agricultural Worker program).
- ²⁹⁰ *McNary v. Haitian Refugee Center*, 498 U.S. 479, 487-89 (1991).
- ²⁹¹ *Catholic Social Services v. Meese*, 685 F. Supp. 1149 (E.D. Cal. 1988) (granting order of summary judgment), *aff'd*, 956 F.2d 914 (9th Cir. 1992), *vacated and remanded*, *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), *vacated and dismissed*, *Catholic Social Services v. Reno*, 134 F.3d 921 (9th Cir. 1998)(CSS I); and *Catholic Social Services v. INS*, Civ. S-98-629 LKK (E.D. Cal. Filed Apr. 7, 1998), *order granting rehearing en banc*, *Catholic Social Services v. INS*, 197 F.3d 1041 (9th Cir. 1999) (CSS II), *Catholic Social Services v. INS*, No. 98-16269(9th Cir. Nov. 21, 2000) (ruling that the CSS case must stay in court and that the INS was properly ordered to issue work permits and stays of deportation to Group 1 and 2 class members).
- ²⁹² *CSS, Inc., v. Ashcroft*, 206 F.R.D. 654 (E.D. Cal. 2002).
- ²⁹³ *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).
- ²⁹⁴ See 28 U.S.C. § 2241 (limiting review to people in custody or with some restraint on their liberty); see *Jones v. Cunningham*, 371 U.S. 236 (1963) (finding that custody did not necessarily involve actual physical restraint and holding that parole constituted constructive custody for purposes of seeking *habeas corpus* relief); see *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (expanding the right to habeas relief to include when a prisoner was release on his own recognizance); see generally IMMIGRATION LAW AND PROCEDURE, *supra* note 102, §104.02[2] & [5].
- ²⁹⁵ See *Marcello v. District Director*, 634 F.2d 964 (5th Cir. 1981) (reviewing deportation orders under the Declaratory Judgment Act and The Administrative Procedure Act).
- ²⁹⁶ U.S. Department of Homeland Security, 2002 Yearbook of Immigration Statistics Table 54: Writs of Habeas Corpus, Judicial Review of Orders of Deportation, and Declaratory Judgments in Exclusion and Deportation Cases Fiscal Years 1996-2002, available at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002.pdf>.
- ²⁹⁷ Executive Office for Immigration Review, U.S. Department of Justice, Statistical Yearbook 2000, available at <http://www.usdoj.gov/eoir/statspub/SYB2000Final.pdf>.
- ²⁹⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
- ²⁹⁹ *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).
- ³⁰⁰ *INS v. Chadha*, 426 U.S. 919 (1983).
- ³⁰¹ INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (1999), *amended by* IIRIRA § 306(a)(2).
- ³⁰² *Matter of Roldan*, Int. Dec. 3377 (BIA 1999).
- ³⁰³ *Lugan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).
- ³⁰⁴ Administrative Office of the U.S. Courts Office of Public Affairs, *Immigration Appeals Surge in Courts*, The Third Branch; Newsletter of the Federal Courts, Vol 35, No. 9 (Sept. 2003) available at <http://www.uscourts.gov/ttb/sep03ttb/immigration/index.html>. This surge has been linked to a change of procedures at the Board of Immigration Appeals in 2002. See
- ³⁰⁵ *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000).
- ³⁰⁶ Information provided by Josh Turin, Turin, Turin and Olinger.
- ³⁰⁷ *Arias-Agramonte v. Commissioner of INS*, No. 00 Civ. 2412 (RWS) (S.D.N.Y. 2000).
- ³⁰⁸ INA § 106, 8 U.S.C. § 1105a (1995); See *Foti v. INS*, 375 U.S. 217 (1963) (holding that federal courts should also review decisions of waiver applications for abuse of discretion).
- ³⁰⁹ See e.g. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 451-452 (1987) (Blackmon, J., concurring) (noting the federal courts' tendency to overturn BIA decisions and the "seemingly purposeful blindness" of the INS toward the statutory standard of well-founded fear); *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995)(Posner, C.J.) (criticizing both the judicial officers of the INS and the BIA for opinions that "often flunk minimum standards of adjudicative rationality. ") See also P. Schuck and T. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts 1979-1990*, 45 Stan. L. Rev. 115, 167 (1992) (finding that between 1979 and 1990, aliens prevailed in courts in approximately 23-36% of 'statutory review cases' where final orders of deportation or exclusion were at issue).
- ³¹⁰ See *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (emphasis in original) (noting also that the Service is "absurdly understaffed").
- ³¹¹ INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (1999), *amended by* IIRIRA § 306(a)(2).
- ³¹² *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996).
- ³¹³ See INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (1999), *amended by* IIRIRA § 306(a)(2) (finding that if a denial was based on failure to file within the one-year limit or a finding that the person was barred due to a criminal conviction, there is no review in federal court); INA § 208(a)(3) & (b)(2)(D), 8 U.S.C. § 1158(a)(3) & (b)(2)(D) (1999), *amended by* IIRIRA § 604(a).
- ³¹⁴ INA § 242(g), 8 U.S.C. § 1252(g) (1999), *added by* IIRIRA § 306(a)(2).
- ³¹⁵ *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

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³¹⁶ *Id.* at 473 (1999). (interpreting INA § 242(g) where the court found that these plaintiffs could not have their selective prosecution claim reviewed until they had a final order of deportation).

³¹⁷ See *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795); *United States v. Villato*, 2 U.S. (2 Dall.) 370 (1797) (Peters, Circuit Justice); See also *Heikkila v. Barber*, 345 U.S. 229 (1953).

³¹⁸ 5 *Guide to American Law* 416 (West 1984).

³¹⁹ U.S. Const. Art. I, § 9, cl. 2. (Historically, the conditions required by the Suspension Clause have only been met in situations as dire as the Civil War.)

³²⁰ 28 U.S.C. § 2241.

³²¹ See 28 U.S.C. § 2241 (providing relief to those “in custody under or by color of the authority of the United States” or who are “in custody in violation of the Constitution or laws or treaties of the United States”).

³²² See generally Lucy E. Saylor, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (University of North Carolina Press 1995).

³²³ INA § 106, 8 U.S.C. § 1105a (1995), added by Act of Sept. 26, 1961, § 5, 75 Stat. 651 (1961) (detailing that INA § 106(a)(10) allowed for judicial review through habeas for people in INS custody pursuant to a final order of deportation, while INA § 106(b) established habeas corpus as the form of review for exclusion orders).

³²⁴ AEDPA § 401(e), repealing INA § 106(10); IIRIRA § 306(b), repealing INA § 106.

³²⁵ E.g., *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001).

³²⁶ *Grant v. Zemski*, 54 F. Supp. 2d 437 (E.D. Pa. 1999).

³²⁷ *Sivathanupilla v. Beebe*, No. CV 99-1362-PA, (U.S. Dist. Ct. Oregon 2000).

³²⁸ INA § 242(e)(1), 8 U.S.C. § 1252(e)(1) (1999), added by IIRIRA § 306(a)(2).

³²⁹ INA § 242(e)(3), 8 U.S.C. § 1252(e)(3) (1999), added by IIRIRA § 306(a)(2).

³³⁰ *American Immigration Lawyers Association (AILA) v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000), aff'd, *AILA v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), consolidated with *Liberians for United Peace and Democracy v. Reno*, No. 98-5464, Dist. Ct. C.A. No. 97-1237 (EGS) and *Wood et al v. Reno*, No. 98-5466, Dist. Ct. C.A. No. 97-1229 (EGS).

³³¹ *Id.*

³³² INA § 242(e), 8 U.S.C. § 1252(e) (1999), added by IIRIRA § 306(a)(2).

³³³ INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (1999), added by IIRIRA § 306(a)(2).

³³⁴ 67 Fed. Reg. 54878-905, Aug. 26, 2002.

³³⁵ 67 Fed. Reg. 54878-905, Aug. 26, 2002, at 54878.

³³⁶ Deborah Sanders, *New Refugee Rules Favor Efficiency over Fairness*, L.A. Times, Sept. 25, 2002, at B13.

³³⁷ 8 CFR § 1003.1(h).

³³⁸ *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996/AG 1997).

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³³⁹ U.S. General Accounting Office, *Strategic Objective: An Effective System of Justice*, GAO Strategic Supplement 2002-2007, (June 12, 2002), at <http://www.gao.gov/sp/strobj15.pdf>.

³⁴⁰ Immigration and Naturalization Service, U.S. Department of Justice, *Ten Year Display of Budget Authority and Positions* [hereinafter *Ten-Year Display of Budget*], at <http://www.usdoj.gov/jmd/2003summary/pdf/INS-BAR.pdf> (last visited July 22, 2003).

³⁴¹ *Federal Law Enforcement Officers*, Bureau of Justice Statistics Bulletin (June 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf>.

³⁴² See discussion, *supra* Chapter Seven.

³⁴³ Immigration and Naturalization Service, U.S. Department of Justice, *Number of INS District Offices*, available at <http://ins.usdoj.gov/graphics/fieldoffices/aboutus.htm#districOffice> (June 6, 2002).

³⁴⁴ Immigration and Naturalization Service, U.S. Department of Justice, *Border Patrol Sectors*, previously available at <http://ins.usdoj.gov/graphics/fieldoffices/sectors/index/htm> (June 6, 2002).

³⁴⁵ Ten-Year Display of Budget, *supra* note 340.

³⁴⁶ As of February 26, 2004, the total population of the United States was 292,673,441 U.S. Census Bureau, Population Clock, at <http://www.census.gov/main/www/popclock.html>. The best estimate, based on the March 2002 Current Population Survey and other data sources, is that there are 9.3 million undocumented immigrants in the country. Jeffrey S. Passel, Randolph Capps, Michael E. Fix, *Undocumented Immigrants: Facts and Figures*, The Urban Institute (Jan. 12, 2004) available at <http://www.urban.org/url.cfm?ID=1000587>; see also Frank D. Bean, Jennifer Van Hook & Karen Woodrow-Lafield, *Estimates of Numbers of Unauthorized Migrants Residing in the United States: the Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001*, Pew Hispanic Center, at http://www.pewhispanic.org/site/docs/pdf/study_-_frank_bean.pdf (November 2001).

³⁴⁷ Jeffrey S. Passel, Randolph Capps, Michael E. Fix, *supra* note 346; see also Lindsay Lowell and Richard Fry, *Estimating the Distribution of Undocumented Workers in the Urban Labor Force: Technical Memorandum to How Many Undocumented: the Numbers Behind the U.S.-Mexico Migration Talks*, Pew Hispanic Center Study, at <http://www.pewhispanic.org/site/docs/pdf/distributionofundocumentedworkers.pdf> (March 21, 2002).

³⁴⁸ *Id.*

³⁴⁹ Immigration and Naturalization Service, U.S. Department of Justice, *Total Funding Summary by Program*, at <http://www.usdoj.gov/ind/2003summary/pdf/ins-sum-prog.pdf> (last visited July 23, 2003) (showing enforcement appropriations for FY2002 at 4,028,734 and immigration services appropriations for the same period at 1,433,911).

³⁵⁰ U.S. Customs and Border Protection, at <http://www.cbp.gov/xp/cgov/home.xml>.

³⁵¹ U.S. Immigration and Customs Enforcement, at <http://www.ice.gov/graphics/about/organization/index.htm>.

³⁵² U.S. Citizenship and Immigration Services, at <http://uscis.gov/graphics/index.htm>.

³⁵³ The Homeland Security Act of 2002 Pub. L. No. 107-296, 116 Stat. 2135, 2178 (2002), created the Department of Homeland Security. Pursuant to the HSA, the Attorney General transferred to DHS the powers that had previously been delegated to the INS Commissioner (administering and enforcing the immigration laws), but the Attorney General retained certain “powers, functions and duties.” 68 Fed. Reg. 9,824-46 (Feb. 28, 2003) (reorganization of regulations); 68 Fed. Reg. 10,922-24 (Mar. 6, 2003) (authority of DHS secretary); 68 Fed. Reg. 10,349-61 (Mar. 5, 2003) (technical amendments). The HSA further provided that the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA § 103(a)(1), 8 USC 1103(a)(1), as amended by the HSA. See also, David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvement*. Migration Policy Institute, (2003) (stating that under the HSA it is arguable that the Attorney General retains the complete concurrent INA authority with respect to immigration).

³⁵⁴ Immigration and Naturalization Service, U.S. Department of Justice, *Over 1,700 New Agents Hired: Border Patrol Fiscal Year 2000 Recruiting and Hiring Report* (2000), available at <http://www.immigration.gov/graphics/publicaffairs/factsheets/recruit.pdf>. See <http://trac.syr.edu/tracins/findings/national/borderguards.html>. (last visited July 23, 2003).

³⁵⁵ *Operation Gatekeeper: New Resources, Enhanced Results*, U.S. Department of Justice, Immigration and Naturalization Service Fact Sheet, July 14, 1998.

³⁵⁶ Immigration and Naturalization Service, U.S. Department of Justice, *Immigration in Arizona from 1993-1999*, Oct. 8, 1999, at <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/Arizona.pdf>; *Hearing on the Need for Additional Border Patrol at the Northern and Southern Borders Before the Senate Comm. On the Judiciary Subcomm. On Immigration*, 106th Cong. (Apr. 27, 1999) (statement of Gus de la Vina, Chief, U.S. Border Patrol, Immigration and Naturalization Service).

³⁵⁷ IIRIRA §§ 101, 102, 103 (1996) (citing relevant portions of these sections that do not amend the INA).

³⁵⁸ U.S. Department of Justice, *INS Seeks to hire 8,000 New Employees, Wide Variety of Career Opportunities* (2002), at <http://www.immigration.gov/graphics/publicaffairs/factsheets/hire.htm>.

³⁵⁹ *Hearing on the President's FY 2003 Budget Request Before the House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, State and the Judiciary* (June 12, 2002) (statement of James W. Ziglar, Commissioner, Immigration and Naturalization Service).

³⁶⁰ U.S. Department of Homeland Security, *2002 Yearbook of Immigration Statistics, Table 59: Deportable Aliens Located by Program, Border Patrol Sector, and Investigations District: Fiscal Years 1996-2002* [hereinafter 2002 Statistical Yearbook] at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002.pdf>; See also *Immigration Subcommittees Hold Marathon Session in Race Toward Legislation*, 72 No. 10 Interpreter Releases 343 (Mar. 1995) (stating that since its initiation in 1994, Operation Gatekeeper involved three tiers of border patrol agents in close proximity to the border).

³⁶¹ 2002 Statistical Yearbook, *supra* note 360.

³⁶² See U.S. Commission on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination* (Jan. 1993); See also Mexican-American Legal Defense and Education Fund, *The Rights of the Immigrant Poor: A Legal Analysis*, at Ch. IX: Local Police Enforcement (Mar. 1983).

³⁶³ Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. Times, Jan. 26, 2000, at A17. Information provided by Judge Hinojosa, State of Texas County Court.

³⁶⁴ Karen Brooks, *Border Town Clash Sparks Rights Debate*, The Fort-Worth Star Telegram, Apr. 7, 2002, at 1.

³⁶⁵ Megan K. Stack, *El Cenizo Held Hostage by Patrol Agents, Residents Say: City Panel Documenting Allegations of Rights Abuses*, Dallas Morning News, Oct. 8, 2000, at 64A.

³⁶⁶ Javier N. Maldonado, *Civil Rights Group Files Lawsuit Challenging Unlawful Detention of U.S. Citizen*, News Release, Texas Lawyers' Committee for Civil Rights Under Law of Texas, Feb. 24, 2003.

³⁶⁷ Belinda Reyes, Hans Johnson, & Richard Van Swearingen, Public Policy Institute of California, *Holding the Line? The Effect of the Recent Border Build-Up on Unauthorized Immigration* [hereinafter *Holding the Line*] at 40 (2002), at <http://www.ppig.org/publications/PPIC162/ppic162fulltext.pdf>.

³⁶⁸ See Karl Eschbach, Jacqueline Hagan & Nestor Rodriguez, Center for Immigration Research, *Causes and Trends in Migrant Deaths along the U.S. - Mexico Border, 19985-1998*, at <http://www.uh.edu/cir/death.htm> (2002). One of the report authors, Karl Eschbach, commented, “[t]he battle for the border is largely symbolic. No matter how much control you have, it doesn’t appear to stop the flow of immigrants. It only controls how much it costs them, where they do it and how they will die.” Tom Zeller, *Migrants take their chances on a harsh path of hope*, N.Y. Times, Mar. 18, 2001, at 4.

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³⁶⁹ See ACLU Foundation of San Diego and Imperial Counties, *Legal Docket*, 10, (January 2002) (reporting that the ACLU and CRLAF filed a petition with the Organization of American States Inter-American Commission on Human Rights in February 1999, charging that through Operation Gatekeeper, the United States is deliberately forcing illegal border-crossers to treacherous desert and mountain areas which constitutes a violation of international human rights law).

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³⁷⁵ Pamela Hartman, *Unlike Elian Case, Mom's Sacrifice for Baby Largely Ignored*, Tucson Citizen, June 2, 2000.

³⁷⁶ Catholic Legal Immigration Network, Inc., *Chaos on the U.S-Mexico Border*, Nov. 2001, at 56-57.

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³⁸⁰ *Hearing on the Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement Before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims* [Hereinafter Hearing on Department of Homeland Security Transition] (April 10, 2003) (statement of the U.S. Gen. Accounting Office, GAO-03-660T, at 5).

³⁸¹ *Id.*

³⁸² *Id.* at 1.

³⁸³ Hearing on the Department of Homeland Security Transition (statement of Asa Hutchinson, Under Secretary for Border and Transportation Security, U.S. Department of Homeland Security), available at <http://www.house.gov/judiciary/hutchinson041003.htm>.

³⁸⁴ See INA § 287(d), 8 U.S.C. § 1357(d) (1999) (stating that local police do have the power to detain undocumented immigrants who have committed drug offenses).

³⁸⁵ Office of Legal Counsel, U.S. Department of Justice, Memorandum Opinion for the United States Attorney General, *Assistance by State and Local Police in Apprehending Illegal Aliens*, Southern District of California (emphasis added), at <http://www.usdoj.gov/olc/immstopo1a.htm> (Feb. 5, 1996); See also Letter from John L. Hill, Attorney General of Texas, to Joe Resweber, County Attorney (July 28, 1977) (on file with author) (explaining that state officers can make arrests for federal offenses).

³⁸⁶ See INA § 287, 8 U.S.C. § 1357 (1999), amended by IIRIRA § 133 (providing for an increased role by state entities to enforce immigration laws, where the Attorney General of the U.S. is permitted to enter into written agreements to delegate federal immigration law enforcement powers to state and local law enforcement entities). See also INA § 287, 8 U.S.C. § 1357 (1999), amended by IIRIRA § 134 (mandating that every state receives a minimum of ten INS enforcement agents).

³⁸⁷ Michele Waslin, National Council of La Raza, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos* (2003) [hereinafter *NCLR Enforcement Report*].

³⁸⁸ Mary Beth Sheridan, *Plan to Have Police in Florida Help INS Stirs Rights Debate*, Wash. Post, Mar. 6, 2002, at A17.

³⁸⁹ Darryl Fears, *Hispanic Group Assails INS Enforcement Plan; La Raza Says Fla. Pact Stirs Immigrant Fears*, Wash. Post, July 23, 2002, at A03.

³⁹⁰ See Backgrounder, *supra* note 379. Frustrated by reports of INS' failure to respond to state and local police's request for INS to take into custody suspected undocumented aliens, members of the House of Representatives proposed creating QRTs as part of a new interior enforcement strategy.

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³⁹² *Briefing on INS Quick Response Teams* (April 2000) (statement of Michael Pearson, Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service); Immigration and Naturalization Service, U.S. Department of Justice, *INS Enhances Interior Enforcement Strategy; Plans Deployment of New FY 1999 Resources: 45 Quick Response Teams Assigned to 11 States*, available at <http://uscis.gov/graphics/publicaffairs/newsrels/QRT.htm> (March 30, 1999); *Hearing on INS Relationship with State and Local Law Enforcement before the House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations; Criminal Justice, Drug Policy and Human Resources; and National Security, Veterans' Affairs and International Relations* [hereinafter Hearing on INS Relationship with Law Enforcement], 107th Cong. 3 (Nov. 13, 2001) (statement of Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service).

³⁹³ Dennis Webb, *Federal Agencies Watching Local Operation*, The Glenwood Post, Apr. 17, 2000.

³⁹⁴ Hearing on INS Relationship with Law Enforcement, *supra* note 392 (statement of Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service).

³⁹⁵ *Id.*

³⁹⁶ *NCLR Enforcement Report*, *supra* note 387.

³⁹⁷ Charlie Brennan, *INS Arrests Jump 75%: Tougher Enforcement, Increase In Illegals Cited*, Rocky Mountain News, February 18, 2002, at 5A.

³⁹⁸ Information provided by Bernard P. Wolfsdorf, Wolfsdorf Associates.

³⁹⁹ Anne-Marie O'Connor, *INS Memo Calls Gang Allegations False*, L.A. Times, Mar. 31, 2000, at A1.

⁴⁰⁰ LAPD Manual 2000, Vol. 1, Section 390, Vol. 4, Section 264.50 (codifying the Nov., 27, 1997 Special Order 40 in the LAPD manual). The policy behind Special Order No. 40 states in part: "The Department is sensitive to the principle that effective law enforcement depends on a high degree of cooperation between the Department and the public it serves. The Department also recognizes that the Constitution of the United States guarantees equal protection to all persons within its jurisdiction. In view of those principles, it is the policy of the Los Angeles Police Department that undocumented alien status in itself is not a matter for police action." The policy statement goes on to indicate that:

the Department will provide special assistance to persons . . . who, by the nature of the crimes being committed upon them, require individualized services. Since undocumented aliens, because of their status are often more vulnerable to victimization, crime prevention assistance will be offered to assist them in safeguarding their property and to lessen their potential to be crime victims.

⁴⁰¹ Thomas Saenz, *Linkage to the INS May Prove the Most Dangerous Rampart Revelation: Police must work to rebuild trust with immigrant communities*, L.A. Times, Mar. 1, 2000, at B7 (Op-Ed). As stated by the author, Mr. Saenz: "Particularly in an era of community policing, local law enforcement depends mightily upon the cooperation of everyone in the community. When a crime victim fails to report the crime for any reason, the perpetrator remains free to prey on a new victim. Similarly, police rely on witnesses of crime to volunteer information; when a significant segment of the community declines to volunteer such information, police work becomes next of impossible. We all lose when large numbers of residents are afraid to come to police because they are viewed as local INS agents."

⁴⁰² L.A.P.D. Consent decree, http://www.lapdonline.org/pdf_files/boi/final_consent_decree.pdf. (last visited July 24, 2003).

⁴⁰³ The Office of the Arizona Attorney General, Civil Rights Division, *Survey of the Chandler Police Department-INS/Border Patrol Joint Operation*, (1997). See also Carmen T. Joge & Sonia M. Perez, National Council of La Raza, *The Mainstream of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90's*, at 23 (1999); Ruben Navarrette Jr., *Constitutional Sights: Chandler's INS Sweep Another Black Mark in Valley's Treatment of Latinos*, Ariz. Republic, August 31, 1997; Ruben Navarrette Jr., *Fallout Continues for Chandler INS Sweep*, Ariz. Republic, December 7, 1999; Hector Tobar, *An Ugly Stain on a City's Bright and Shining Plan*, L.A. Times, December 28, 1998.

⁴⁰⁴ Carmen T. Joge & Sonia M. Perez, National Council of La Raza, *The Mainstream of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90's*, (1999) at 23.

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⁴⁰⁶ Melissa Jones, *Officials Overstepped Authority in Chandler Roundup Policies Violated, INS Report Says*, ARIZ. REPUBLIC, August 6, 1999 at 2B; Janie Magruder, *Council Approves Roundup Settlement \$400,000 to Come From Reserve Fund*, ARIZ. REPUBLIC, February 12, 1999 at 1E.

⁴⁰⁷ *State Troopers Complete Immigration Enforcement Training*, Alabama Department of Public Safety News Release, October 3, 2003, at <http://www.dps.state.al.us/public/administrative/pio/newsrelease>.

⁴⁰⁸ Rose Livingston, *Lawmen Struggling to Police Illegal Aliens Meet with Immigration Official*, The Birmingham News, Apr. 12, 2000.

⁴⁰⁹ *Morning Edition: Cooperation between the Dalton Police Department and the INS Causing Controversy over the Rights of Immigrants in Georgia* (National Public Radio, May 1, 2000).

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⁴¹⁹ Migration Policy Institute, *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, June 11, 2003, available at <http://www.migrationpolicy.org/files/authority.pdf>. The memorandum presents several reasons for this position. The Immigration and Nationality Act historically has been understood to authorize federal authorities, and not the states, to enforce the immigration law, except where it specifically authorizes enforcement by other officers. The 1996 amendments expressly authorize state and local officers to make civil arrests when operating pursuant to an agreement with DOJ which calls for the training and federal supervision of state officers. If the state and local enforcement officers have inherent authority to make civil arrests, the statute would confer "fewer powers than they would have without the agreement, making [the statute] pointless."

⁴²⁰ Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002) (on file with author).

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⁴²⁴ Hearing on Department of Homeland Security Transition *supra* note 383 (statement of Asa Hutchinson, Under Secretary for Border and Transportation Security, U.S. Department of Homeland Security).

⁴²⁵ *Id.*

⁴²⁶ Hearing on INS Relationship with Law Enforcement, *supra*, note 392 (statement of Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service).

⁴²⁷ *Hearing Before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary House of Representatives*, 107th Cong. (June 19, 2002) (statement of Joseph R. Greene, Assistant Commissioner for Investigations, Immigration and Naturalization Service), at <http://www.house.gov/judiciary/80319.PDF>.

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⁴³⁴ Washington Alliance for Immigrant and Refugee Justice, *Update to Civil Rights Under Siege: The Impact of Immigration Raids in Washington State* (1999).

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⁴⁴¹ 8 C.F.R. § 287.8(b)(2) (outlining general procedures for interrogation and detention).

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⁴⁵⁸ *Id.* at 886-887 (holding the “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but it standing alone does not justify stopping all Mexican-Americans to ask if they are aliens.” INS officers have testified that, along with Hispanic appearance, a “hungry look” and the fact that a person was “dirty, unkempt, or wears work clothing” suggests that a person is illegal)(emphasis added). See also, Kevin Johnson, *The Case for African American and Latino/a Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 Fla. L. Rev. 341 (2003) (detailing adverse impact of race-based law enforcement on racial groups).

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⁴⁷⁷ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2260 (1996) [hereinafter PRWORA].

⁴⁷⁸ IIRIRA.

⁴⁷⁹ PRWORA (codifying as amended in scattered sections of 8 U.S.C. and 42 U.S.C.) (H.R. 3734). PRWORA added reporting requirements for agencies administering TANF, SSI and HUD benefits. Food stamp offices already had similar requirements.

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⁴⁹⁵ 66 Fed. Reg. 211, at 54909, Oct. 31, 2001.

⁴⁹⁶ 66 Fed. Reg. 211, at 55062, Oct. 31, 2001.

⁴⁹⁷ Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional directors, Oct. 23, 2001.

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⁵⁰⁵ See *Turkmen et al. v. Ashcroft et al.*, No. CV-02-2307 (E.D.N.Y. 2002) (Class Action Complaint and Demand for Jury Trial).

⁵⁰⁶ Steve Fainaru, *Detainees Offer Glimpse of Life in N.Y. Facility*, Wash. Post, Apr. 17, 2002, at A1.

⁵⁰⁷ In December 2001, The Center for National Security Studies (CNSS) filed a FOIA action to obtain information about arrest and detention of terrorism suspects post-September 11, 2001. While CNSS' motion for summary judgment was granted in part, ordering the Department of Justice to release the names of those arrested and detained as well as the names of their attorneys, the DOJ was granted a motion for stay pending their appeal. On appeal, the court ruled that the government did not have to disclose any of the information sought by CNSS. *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied* 124 S.Ct. 1041 (2004). In a similar action by the ACLU of New Jersey, the district court ruled that the names of detainees held in New Jersey jails must be released. However, in response, the DOJ issued Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (April 22, 2002) (amending 8 C.F.R. pts. 236, 241), forbidding federal authorities from releasing information about immigration detainees held in state and local facilities and appealed the lower court decision. The ACLU subsequently lost at the state appellate level and was denied *cert* to the New Jersey Supreme Court. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. 2002), *cert. denied* 803 A.2d 1162 (N.J. Sup. Ct. 2002).

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⁵¹⁰ *Id.* at 196.

⁵¹¹ *Id.* at 197.

⁵¹² U.S. Department of Justice, Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York*, (2003) available at <http://www.usdoj.gov/oig/special/0312/final.pdf>.

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⁵¹⁴ 8 U.S.C. § 1305(a).

⁵¹⁵ 8 U.S.C. § 1306(b).

⁵¹⁶ 67 Fed. Reg. 48818 (July 26, 2002).

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⁵²⁰ Joan Friedland, *Official Crime Information Should be Accurate*, Miami Herald, Apr. 28, 2003 (op-ed).

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⁵²⁸ *In re D-J-*, 23 I. & N. Dec. 572 (A.G. 2003), Interim Decision # 3488.

⁵²⁹ *Id.* at 577.

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