

BANISHED FOR MINOR CRIMES: THE AGGRAVATED FELONY PROVISION OF THE IMMIGRATION AND NATIONALITY ACT AS A HUMAN RIGHTS VIOLATION

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Abstract: The aggravated felony provision of the U.S. Immigration and Nationality Act was originally intended to provide for the deportation of non-citizens convicted of very serious crimes. Over the last 15 years, however, the provision has been consistently expanded to include a plethora of minor crimes that are neither aggravated nor felonious. Moreover, Congress has categorically prohibited aggravated felons from applying for discretionary, equitable relief. This Note contends that the sweeping and indiscriminately applied aggravated felony provision violates an individual's universally recognized right to respect for family and private life. The Note concludes that to comply with international law and treaty obligations, Congress should follow the standards employed by the European Court of Human Rights in deportation cases. Under this approach, a court may overturn a deportation order when the relevant interests of the non-citizen outweigh those of the United States.

*The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution or even death.*¹

INTRODUCTION

Xuan Wilson came to the United States with her mother and her stepfather, a U.S. serviceman, when she was four years old.² She is now thirty-two and has lived in this country for twenty-eight years.³ In 1989 she was convicted of writing a forged check for \$19.83.⁴ Because of

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¹ Bridges v. Wixon, 326 U.S. 135, 164 (1945).

² See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 591 (1998).

³ *Id.*

⁴ *Id.*

this minor infraction, Ms. Wilson will be deported to a country she has not seen for almost three decades and will be permanently barred from returning to the United States⁵ This situation is only one example of the many severe consequences of current U.S. immigration law.⁶

Under current law, a lawful permanent resident (LPR)⁷ of the United States can be banished from the country for an offense as minor as writing a bad check, shop-lifting, or misdemeanor battery.⁸ An individual like Xuan Wilson will be permanently banned from re-entering the United States based solely on this type of offense.⁹ It makes no difference whether this person has just arrived in the country or has lived here most of her life.¹⁰ There will be no consideration of whether deportation will force her to leave her entire family and return to a country that she scarcely remembers.¹¹ In fact, she may not even have the opportunity to contest the deportation or to ask a court to remedy the situation.¹² Finally, she could be punished for a minor offense even if it was committed years before these deportation laws were passed.¹³

This Note will address the severe and unjust results of laws mandating deportation (now technically called "removal")¹⁴ of immigrants

⁵ *Id.*; Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii) (2000) [hereinafter INA].

⁶ See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Coonan, *supra* note 2; Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 861-62 (1998).

⁷ INA § 1101(a)(20).

⁸ See Morawetz, *supra* note 6, at 1939; Iris Bennett, Note, *The Unconstitutionality of Non-uniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1699 (1999); Coonan, *supra* note 2, at 591.

⁹ See INA § 1182(a)(9)(A)(ii).

¹⁰ *Id.* § 1227(a)(2)(A)(iii); Marley, *supra* note 6, at 861-62.

¹¹ See Coonan, *supra* note 2, at 591.

¹² See INA § 1182(c). This section, which allowed the Attorney General to issue discretionary waivers of deportation, was repealed in 1996. See *id.*; see also *id.* § 1252(a)(2)(C) (eliminating judicial review of removal orders for aggravated felons).

¹³ See *id.* § 1101(a)(43).

¹⁴ Marley, *supra* note 6, at 872. The Illegal Immigration Reform and Responsibility Act of 1996 changed this terminology. See Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1229a (1996) [hereinafter IIRIRA]. Before 1996, there were two different proceedings for aliens deemed inadmissible (forbidden entry) and aliens who were deportable (deported after entry)—exclusion proceedings and deportation proceedings, respectively. *Id.* IIRIRA consolidated exclusion and deportation proceedings by creating "removal proceedings." *Id.* However, some of the old language remains in that the

who have been convicted of crimes, regardless of the seriousness of the offense.¹⁵ In particular, the Note will consider the inequity of immigration laws that treat lawful permanent residents who commit petty offenses in precisely the same manner as undocumented non-citizens who commit grievous crimes upon entering the country.¹⁶ Furthermore, this Note will question whether Congress's failure to weigh the seriousness of the crime against the effects of deportation violates a fundamental human right, as recognized by the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and customary international law.¹⁷

Part I outlines the history of the deportation of criminal non-citizens, focusing on the "aggravated felony" category.¹⁸ Part II of the Note contends that deportation of certain individuals convicted of aggravated felonies violates a fundamental human right recognized by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), namely the right to respect for private and family life under Article 8.¹⁹ Part II will also consider the approach employed by the European Court of Human Rights in cases where criminal non-citizens raise Article 8 to contest deportation.²⁰ Part III contends that the aggravated felony provision is inconsistent with principles of international law and international agree-

statute still distinguishes deportable aliens from inadmissible aliens and therefore, this Note employs the term "deport" and its derivatives. See INA §§ 1182, 1227a.

¹⁵ See INA § 1101(a) (43) (including crimes ranging from murder and drug trafficking to misdemeanor theft and passport defacement); Marley, *supra* note 6, at 874.

¹⁶ See Marley, *supra* note 6, at 862.

¹⁷ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 222, 230 [hereinafter Convention]; International Covenant on Civil and Political Rights [hereinafter ICCPR], entered into force Mar. 23, 1976, art. 13, art. 17, 999 U.N.T.S. 171, G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), available at <http://www1.umn.edu/humanrts/instrree/b3ccpr.htm>.

¹⁸ See INA §§ 1101(a) (43), 1227(a) (2) (A) (iii); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841-46 (1993) (discussing early American immigration restrictions).

¹⁹ See Convention, *supra* note 17, at 230.

²⁰ See *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 1179, 1184-89 (2001) (Eur. Ct. H.R.); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, 641-46 (1999) (Eur. Ct. H.R.); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 750-53 (1997) (Eur. Ct. H.R.); *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686, 704-08 (1997) (Eur. Ct. H.R.); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 807 (1990) (noting that the European Court of Human Rights and the European Commission on Human Rights have created the most developed body of human rights law).

ments and then, employing the reasoning of a recent case and tenets of international law, suggests an alternative approach.²¹ Finally, the Note concludes that to comply with international law, Congress must amend the Immigration and Nationality Act to include a balancing test that weighs the relevant interests of the non-citizen and the government.²²

I. DEPORTATION OF CRIMINAL NON-CITIZENS AND THE AGGRAVATED FELONY PROVISION OF THE IMMIGRATION AND NATIONALITY ACT

Deportation of criminal non-aliens has evolved from state laws created to ward off an influx of exiled foreign criminals in the late eighteenth century to a federal system that banishes individuals for a number of minor crimes. Since the creation of the aggravated felony provision in the Immigration and Nationality Act (INA), Congress has consistently expanded its reach to cover less serious crimes while simultaneously circumscribing discretionary relief.²³ The hardship imposed on non-citizens convicted of aggravated felonies, particularly lawful permanent residents, has inspired many critics to oppose these laws as unjust and unnecessarily harsh.²⁴

A. *Deportation Regulations Based on Criminal Activity*

During America's first century as a nation, Congress did little to regulate immigration.²⁵ The few federal immigration laws in existence primarily concerned naturalization and the protection of passengers on international voyages.²⁶ Despite the common misperception of early Americans as welcoming to all immigrants, restrictions on immigration were in fact imposed by the states.²⁷ Not surprisingly, England's long history of transporting convicts to the colonies inspired passionate protest by the colonists.²⁸ This compelled the colonies to attempt to regulate criminal immigration as early as 1718, although

²¹ See *infra* notes 265–310 and accompanying text.

²² See *infra* notes 311–324.

²³ See *infra* notes 44–198.

²⁴ See generally Morawetz, *supra* note 6; Coonan, *supra* note 2; Marley, *supra* note 6.

²⁵ EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1963, at 11–46 (1981). The Alien and Sedition Act Laws of 1798 did allow the President to expel any alien that he deemed dangerous. See *id.* at 14. This law was unpopular, however, and expired after 2 years. See *id.* at 14–16.

²⁶ See *id.* at 11–46.

²⁷ Neuman, *supra* note 18, at 1833–34.

²⁸ See *id.* at 1841.

they were not successful until 1787.²⁹ At that time, states began refusing entry to criminals who were exiled from another country, and some states forbade entrance to any individual who had ever been convicted of a crime.³⁰

The federal government, however, did not attempt to control the immigration of criminals until nearly a century later. Congress's first effort in 1875 was similar to the states' earliest immigration laws, excluding convicts who had been forced to emigrate from their native country to avoid a prison sentence.³¹ Congress also passed a law in 1882 banning "idiots," "lunatics," convicts, and "persons likely to become public charges" in response to states' complaints that indigent and unwanted immigrants were consuming tax revenues.³² In 1891 Congress expanded the class of excludable criminal aliens to include those who had committed crimes involving "moral turpitude."³³

Even though Congress had expanded its authority to exclude criminals, a 1908 bill proposed to deport non-citizens convicted of felonies after entering the United States initially failed.³⁴ Opponents argued that such a bill would be applied unfairly, because the definition of a felony varied too widely from state to state and included minor crimes in some states.³⁵ It was not until 1917, nine years later, that proponents gained sufficient support to implement the country's first deportation policy.³⁶ By 1938 the grounds for deportation included the commission of felonies and crimes involving moral turpitude if committed within five years of entry into the United States.³⁷

Throughout the early twentieth century, these criminal grounds for deportation remained largely unchanged.³⁸ In 1952 Congress

²⁹ *Id.* at 1841–42. Before the Revolutionary war, colonial attempts at legislation were vetoed by the British government. *Id.* at 1841.

³⁰ *See id.* at 1842.

³¹ *See id.*, *supra* note 18, at 1844.

³² HUTCHINSON, *supra* note 25, at 79–80.

³³ *Id.* at 102. Committing a crime of moral turpitude remains a ground for exclusion, as well as for deportation, to this day. *See* INA, 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A)(i) (2000). The phrase "moral turpitude" has never been statutorily defined, but has been interpreted to refer to conduct that is "base, vile or depraved and contrary to the rules of morality." Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357, 362 (1999). Crimes such as fraud, murder, and other intentional assaults are usually found to involve moral turpitude. *Id.*

³⁴ *See* HUTCHINSON, *supra* note 25, at 144.

³⁵ *See id.*

³⁶ *See* Neuman, *supra* note 18, at 1844.

³⁷ HUTCHINSON, *supra* note 25, at 148, 165, 231–32, 242.

³⁸ *See id.* at 451.

passed the Immigration and Nationality Act, which retained the same grounds for deportation, established deportation procedures, and outlined discretionary relief.³⁹ Since Congress passed the INA, crime-related grounds for deportation have expanded steadily.⁴⁰ Currently, the criminal grounds for deportation include crimes of moral turpitude committed within five years of entry; aggravated felonies; high speed flight from an immigration checkpoint; controlled substance convictions, drug abuse, or addiction; firearms offenses; crimes relating to espionage, sabotage, treason or sedition for which a five-year sentence may be imposed; and crimes of domestic violence, stalking, violation of a protection order, and child abuse.⁴¹

Of these categories, the aggravated felony provision encompasses the widest range of crimes.⁴² The types of crimes that constitute an "aggravated felony" have expanded rapidly since the passage of the Anti-Drug Abuse Act in 1988, resulting in severe consequences for non-citizens, particularly lawful permanent residents.⁴³

B. *The Transformation of the Aggravated Felony Provision of the Immigration and Nationality Act*

One legal scholar, employing Dante's legendary categorization, asserts that aggravated felons populate the eighth ring of immigration hell.⁴⁴ The consequences for the commission of the offense are frighteningly harsh—deportation, mandatory detention, expedited removal, and an absence of discretionary relief, to name a few. These crimes, however, need neither be "felonies" nor "aggravated" in the commonly understood sense of the words.⁴⁵ In fact, many misdemeanors, including shoplifting and simple battery, are considered "aggravated felonies."⁴⁶ This section summarizes the growth of this monstrosly sweeping provision.

³⁹ See *id.* See generally, INA, 8 U.S.C. §§ 1227, 1229 (2000).

⁴⁰ See INA § 1227(a) (2).

⁴¹ See *id.*

⁴² See *id.* §§ 1101(a) (43), 1227(a) (2) (A) (iii).

⁴³ See Marley, *supra* note 6, at 859–60; Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIGR. L.J. 507, 515 (1997).

⁴⁴ See McWhirter, *supra* note 43, at 515. The only immigrants in a worse situation than aggravated felons are those that occupy the ninth ring of immigration hell. See *id.* at 519. The inhabitants of the ninth ring are immigrants that attempt to re-enter the country after deportation; they may face up to 20 years in jail before being deported again. See *id.* at 519.

⁴⁵ Morawetz, *supra* note 6, at 1939.

⁴⁶ *Id.*

1. The Early Evolution of the Aggravated Felony Provision

The Anti-Drug Abuse Act of 1988 (ADAA) introduced the “aggravated felony” concept.⁴⁷ The ADAA made commission of an aggravated felony a deportable offense.⁴⁸ By enacting the ADAA, Congress sought to prevent the manufacturing, distribution, and use of illegal drugs.⁴⁹ Congress apparently believed that the provision was an integral part of controlling drug crimes.⁵⁰ Debates in the House of Representatives suggest a concern over the growing number of drugs and weapons crimes committed by immigrants, as well as a belief that felonious immigrants were evading deportation.⁵¹

Under the ADAA, aggravated felonies were limited to serious crimes, such as murder and drug and weapons trafficking.⁵² An aggravated felony committed any time after entry subjected non-citizens to deportation.⁵³ Furthermore, the ADAA barred aggravated felons from seeking re-admission into the United States for ten years.⁵⁴

The Act also instituted special deportation procedures for aggravated felons.⁵⁵ It requires the Immigration and Naturalization Service (INS) to complete deportation proceedings before the non-citizen finishes serving his criminal sentence for the aggravated felony conviction.⁵⁶ If proceedings are not completed before that time, the Attorney General is instructed to hold the individual in custody until deported.⁵⁷

An expansion of the aggravated felony provision was buried in the Immigration Act of 1990.⁵⁸ One small section of the Act

⁴⁷ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Anti-Drug Abuse Act, Pub. L. No. 100-690, 1988 U.S.C.C.A.N. (102 Stat.) 4181.

⁵¹ See generally 133 CONG. REC. H8961-01 (1987).

⁵² See Anti-Drug Abuse Act § 7342. The ADAA defined an aggravated felony as “murder, any drug trafficking crime, or any illicit trafficking in firearms or destructive devices (committed in the United States), or any attempt or conspiracy to commit such an act.” See *id.*

⁵³ INA, 8 U.S.C. § 1227(a)(2)(A)(i) (2000); Anti-Drug Abuse Act § 7344(a)(2).

⁵⁴ Anti-Drug Abuse Act § 7349.

⁵⁵ See *id.* §§ 7343(2), 7347.

⁵⁶ *Id.* § 7347.

⁵⁷ *Id.* § 7343. The Act also created a presumption of deportability, which prevented the individual from requesting voluntary departure in lieu of deportation. *Id.* §§ 7343(b), 7347. Additionally, the time period for appeal of an order of deportation was also changed from six months to sixty days. *Id.* §§ 7343(b), 7347(b), 7347(c).

⁵⁸ See Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990).

significantly altered the aggravated felony provision by expanding its coverage to include more crimes.⁵⁹ The legislative history of the Immigration Act states that the provision's purpose was to broaden the list of "serious crimes."⁶⁰ These "serious crimes," however, included lesser drug crimes and crimes of violence⁶¹ for which the term of imprisonment was five years; these offenses are far less serious than the crimes denoted in the ADAA.⁶² The changes were also intended to tighten perceived loopholes in the ADAA that allowed individuals to "escap[e] justice or deportation," implement expedited deportation proceedings, and limit stays of deportation.⁶³ President George Bush shed further light on the reasons for the changes in his signing statement, writing:

[The aggravated felony expansion] meets several objectives of my Administration's war on drugs and violent crime . . . [by providing] for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country. These offenders, comprising nearly a quarter of our federal prison population, jeopardize the safety and well-being of every American resident.⁶⁴

When Congress passed the Immigration Act in 1990, the number of undocumented non-citizens in prison was six times greater than ten years before, and most of these prisoners had been convicted of drug crimes.⁶⁵ More than 80% of the undocumented individuals who

⁵⁹ See *id.*

⁶⁰ H.R. CONF. REP. NO. 101-955, at 132 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6797.

⁶¹ A crime of violence is an "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or one that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing an offense." 18 U.S.C. § 16 (2000).

⁶² See Immigration Act of 1990 § 501; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988). The new definition also expanded its reach over drug offenses by including any illicit trafficking in a controlled substance. See Immigration Act of 1990 § 501. The Tenth Circuit found that possession of a controlled substance alone, even if not for the purpose of distribution or sale, could constitute a "drug trafficking" crime and therefore, be considered an aggravated felony. See *Marley*, *supra* note 6, at 864 (explaining that the Tenth Circuit considers mere possession of narcotics a trafficking crime, because "trafficking" does not require an element of trade or exchange).

⁶³ See 136 CONG. REC. S17106-01 (1990).

⁶⁴ Statement on Signing the Immigration Act of 1990, PUB. PAPERS 1717-18 (Nov. 29, 1990).

⁶⁵ See Ronald J. Ostrow, *Bush Proposal to Short-cut Deportations Sounds Alarm*, SEATTLE TIMES, May 16, 1990, at A5.

were imprisoned had been convicted of narcotics violations, compared with approximately 50% of all federal prisoners.⁶⁶ Given these statistics, supporters of the law cited concerns about increasing levels of crime committed by non-citizens.⁶⁷ Furthermore, drug control officials argued that the large number of incarcerated criminal aliens had a "tremendously adverse" effect on the nation's criminal justice system, which was compounded by an "ineffectual deportation system."⁶⁸

A few critics, however, pointed to the Act's potentially harsh effects on lawful permanent residents (a group often ignored when lawmakers focus on undocumented non-citizens).⁶⁹ LPRs are highly likely to have family members, productive jobs, and established lives in the United States.⁷⁰ In such cases, deportation is effectively banishment from one's home nation.⁷¹

In addition to broadening the definition of aggravated felony, the Immigration Act raised the bar for re-entry into the United States after a conviction to twenty years⁷² and made certain aggravated felons ineligible for discretionary relief.⁷³ Before 1990, LPRs convicted of crimes, including aggravated felons, were eligible to apply for an INA section 212(c) waiver of deportation.⁷⁴ This discretionary provision allowed the Attorney General to consider mitigating factors, such as the individual's permanent residence status, his length of residence in the United States, and the effect of his deportation on family mem-

⁶⁶ *Id.*

⁶⁷ See David Freed, *Justice in Distress: The Devaluation of Crime in Los Angeles*, L.A. TIMES, Dec. 16, 1990, at 1; *Give Criminal Aliens the Boot*, ATLANTA JOURNAL-CONSTITUTION, May 29, 1990, at A12.

⁶⁸ Ostrow, *supra* note 65, at A5. A General Accounting Office report on immigration control found that before the expedited procedures were instituted, exclusion cases taken to the Immigration Board of Appeals took three years to resolve. *Id.*

⁶⁹ See Andrew Blake, *Strict Deportation Law Imperils an American Dream*, BOSTON GLOBE, Jan. 28, 1990, at 18 (recounting the story of Al Correa, an LPR who was ordered deported); Chris Hedges, *Enforcement of Immigration Law Stirring Backlash, Call for Change: Defenders Cite Drop in Drug-Related Crime*, DALLAS MORNING NEWS, Sept. 2, 2000, at 39A (explaining that supporters of immigration restrictions believe that, without tough laws, the INS is "powerless against illegal aliens who "[know] how to exploit weak federal laws to avoid deportation").

⁷⁰ See Blake, *supra* note 69, at 18; Hedges, *supra* note 69, at 39A.

⁷¹ See Blake, *supra* note 69, at 18; Hedges, *supra* note 69, at 39A.

⁷² See Immigration Act of 1990, Pub. L. No. 101-649, § 514(a), 104 Stat. 4978, 5048 (1990).

⁷³ *Id.* § 511(a).

⁷⁴ See INA, 8 U.S.C. § 1182(c) (1988).

bers.⁷⁵ Under the Immigration Act, however, aggravated felons imprisoned for five years or more were made ineligible for a § 212(c) waiver of deportation.⁷⁶ This eliminated the Attorney General's ability to consider mitigating factors in the case of many aggravated felons.⁷⁷ In 1991 Congress limited the class even further by withholding waivers from those who committed more than one aggravated felony, regardless of the sentence imposed.⁷⁸ The harsh consequences of this provision for LPRs with established lives and families in the United States are not difficult to imagine.

For example, Al Correa left Columbia with his family at the age of two and never returned.⁷⁹ He attended grade school and high school in Brooklyn, went to college in Manhattan, and registered with the draft board at age eighteen.⁸⁰ Mr. Correa does not speak Spanish.⁸¹ He is "totally American" although "technically Columbian" simply because he failed to apply for American citizenship.⁸² Nevertheless, pursuant to the aggravated felony provision, Mr. Correa faced deportation to Columbia after pleading guilty to a federal charge of cocaine possession with intent to distribute.⁸³

Before this offense, Mr. Correa was employed and had no police record.⁸⁴ The prosecutor actually requested a minimum sentence, admitting that Mr. Correa was the "smallest of small fry offenders" and simply "in the wrong place at the wrong time."⁸⁵ Even the detective who arrested Mr. Correa did not believe that he should be deported for this offense.⁸⁶ Unfortunately, the government has "virtually no option even in cases like Mr. Correa's."⁸⁷ As a result of this inflexible law, Mr. Correa faced separation from his family, deporta-

⁷⁵ See Marley, *supra* note 6, at 875-76 (describing § 212(c) discretionary waiver of deportation).

⁷⁶ Immigration Act of 1990 § 511.

⁷⁷ See Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Pub. L. No. 102-232, § 306(a) (10), 105 Stat. 1751; Immigration Act of 1990 § 511.

⁷⁸ Miscellaneous and Technical Immigration and Nationality Amendments of 1991, § 306(a) (10).

⁷⁹ Blake, *supra* note 69, at 18.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Blake, *supra* note 69, at 18.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

tion to a country that he did not remember and where he could not speak the language, and induction into the Columbian army.⁸⁸

2. The Harsh Effects of Anti-Immigrant Sentiment on the Aggravated Felony Provision: The Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act.

Following the enactment of the Immigration Act of 1990, one commentator remarked that "the future is bleak for the aggravated felon and will probably only worsen."⁸⁹ This prediction proved true.⁹⁰ The Antiterrorism and Effective Death Penalty Act (AEDPA) was the first of two major laws Congress passed in 1996 addressing "immigrant" crime,⁹¹ although its primary focus was on preventing and punishing terrorism.⁹² Following the tragic Oklahoma City bombing, where 168 people were killed, most of the American public believed that Middle Eastern terrorists were responsible for the attack.⁹³ The public perception that foreign terrorists were to blame had the potential to intensify anti-immigrant, xenophobic, and isolationist tendencies that were already visible in society.⁹⁴

Accordingly, some commentators proposed comprehensive immigration reform to prevent the admission of alien terrorists.⁹⁵ One journalist suggested that Congress tighten political asylum laws, more

⁸⁸ *Id.*

⁸⁹ Coonan, *supra* note 2, at 597.

⁹⁰ See Immigration and Nationality Technicality Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994). Consistent with past changes, Congress further expanded the definition of "aggravated felony" in 1994. See *id.* The new definition covered federal and state crimes, such as use of fire or explosives, gun related crimes, thefts and burglaries, receipt of stolen property, RICO violations with a five year sentence imposed, kidnapping for ransom, child pornography, prostitution, espionage, treason, alien smuggling, and immigration document fraud. See *id.*; see also *infra* notes 91-198.

⁹¹ Press reports often refer to crimes committed by foreigners but fail to make distinctions between immigrants, non-immigrants, and illegal aliens. See INA, 8 U.S.C. § 1101(a)(15) (2000) (classifying immigrants); *infra* notes 102-112.

⁹² Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, pmbll., 110 Stat 1214, 1214 (1996).

⁹³ Richard Estrada, *We Must Confront all Sources of Terrorism*, DALLAS MORNING NEWS, April 28, 1995, at 29A; Harry Levins, *Bomb's Death Toll Surprising: Oklahoma City Disaster Worse Than Quake, Official Tells Meeting Here*, ST. LOUIS POST-DISPATCH, Aug. 4, 1995, at 01C; see Editorial: *No Rush to Judgment*, PORTLAND OREGONIAN, Apr. 27, 1995, at D08.

⁹⁴ Gerald F. Seib & John Harwood, *Oklahoma City Bombing: Oklahoma City Terror May Intensify Hard-Line Views on Crime and Immigration*, WALL ST. J., Apr. 21, 1995, at A12.

⁹⁵ See Howie Carr, *Bomb Begg the Question: Do We Need Immigrants?*, BOSTON HERALD, Apr. 21, 1995, at 006; Estrada, *supra* note 93, at 29A.

effectively deport illegal aliens, and “swiftly exclude” undocumented newcomers by “put[ting] them on the first return flight.”⁹⁶ Other suggestions were more extreme; one particularly antagonistic radio talk show host proposed closing the borders to immigrants for “ten or twenty years—or maybe even a century.”⁹⁷ He railed, “Just claim you’re a ‘political refugee’ and you can come in, flop, pick up your food stamps and start plotting to blow up the World Trade Center. Doesn’t matter if your carrying the HIV virus, doesn’t matter if you hate the country.”⁹⁸

More rational commentators pled with Congress to wait for the horror of the bombing to pass before enacting any new laws, arguing that a “grieving, outraged nation” was in the “wrong frame of mind to consider legislation.”⁹⁹ Shortly, investigators discovered that Middle Eastern terrorists were not to blame and, in fact, “home-grown” American citizens were responsible for the attack.¹⁰⁰ Even so, some analysts pointed out that the immediate suspicion of Middle Eastern terrorists was not “wholly irrational” given that Islamic defendants were on trial at the time for the 1993 World Trade Center bombing and that car bombs were used twice against Americans in Beirut.¹⁰¹

Reflecting these concerns, Congress rushed to pass a law that deterred and punished terrorist acts by the first anniversary of the Oklahoma City bombing.¹⁰² The result, AEDPA, was designed to simplify the prosecution of people charged with committing or planning terrorists attacks, limit the number of appeals for death row prisoners, deport more non-citizen criminals, and eliminate discretionary waivers of deportation.¹⁰³ Under this law, many long-term LPRs who were spouses and parents of American citizens were suddenly subject to deportation for minor crimes and ineligible for discretionary relief.¹⁰⁴

⁹⁶ Estrada, *supra* note 93, at 29A.

⁹⁷ See Carr, *supra* note 95, at 006.

⁹⁸ *Id.*

⁹⁹ Richard Cohen, *Your Liberties or Your Guns?*, WASH. POST, Apr. 25, 1995, at A17; *No Rush to Judgment*, *supra* note 93, at D08.

¹⁰⁰ See William F. Woo, *A Nation No Longer Quite So Indivisible*, ST. LOUIS POST DISPATCH, May 7, 1995, at 1B.

¹⁰¹ *Id.*

¹⁰² See Charles V. Zehren, *Anti-Terror Bill Crafted Passage Hoped by April 19*, DENVER POST, Apr. 16, 1996, at A5.

¹⁰³ Editorial, *A Terror of Law Series*, ST. PETERSBURG TIMES, July 18, 1996, at 14A.

¹⁰⁴ *Id.*; Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440, 110 Stat 1214, 1214 (1996).

Perhaps partly for this reason, the bill was unenthusiastically accepted by some as the “better-than-nothing anti-terrorism bill”¹⁰⁵ and roundly criticized by others as a “reactionary” law passed “in a fit of election year folly.”¹⁰⁶ President Bill Clinton signed the bill into law, even though he admitted that the legislation made “major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism” and that it eliminated the most basic forms of relief for LPRs.¹⁰⁷

Specifically, AEDPA expands the aggravated felony “grab-bag of convictions”¹⁰⁸ to include less serious crimes, such as bribery, counterfeiting or mutilating a passport, obstruction of justice, gambling offenses, and transportation for the purposes of prostitution.¹⁰⁹ AEDPA also limits discretionary relief for individuals convicted of an aggravated felony.¹¹⁰ Whereas the Immigration Act of 1990 had allowed aggravated felons who spent less than five years in prison to apply for a waiver of deportation, AEDPA explicitly bars any aggravated felon from applying for § 212(c) discretionary relief.¹¹¹ Thus, before AEDPA, an immigration judge would consider whether deportation imposed an inequitable hardship by weighing factors such as family ties, length of residence, rehabilitation, service in the armed forces, history of employment, community service, and hardship to family members.¹¹² This Act, however, forces a court to ignore these important considerations in the case of all aggravated felons.

Six months after the passage of AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which further exacerbates the consequences of an aggravated felony conviction by applying the provision retroactively.¹¹³ The passage of IIRIRA reflected anti-immigrant sentiment in America that ran

¹⁰⁵ See Zehren, *supra* note 102, at A5.

¹⁰⁶ See *A Terror of Law Series*, *supra* note 103, at 14A.

¹⁰⁷ See *id.*

¹⁰⁸ Coonan, *supra* note 2, at 600.

¹⁰⁹ Anti-Terrorism and Effective Death Penalty Act § 440(e). The sentence required for immigration document fraud to be an aggravated felony was reduced from five years to eighteen months, including time suspended. *Id.* § 440(e)(4). The Act also made failure to appear for service of a sentence an aggravated felony if the underlying offense was subject to a sentence of five years or more. See *id.* § 440(e)(8)(T).

¹¹⁰ See *id.* § 440(d). This section eliminates the five-year term of imprisonment requirement for waiver ineligibility, thus eliminating relief for all aggravated felons. See *id.*

¹¹¹ *Id.*

¹¹² See *Matter of Marin*, 16 I. & N. Dec. 581, 584–85. (1978).

¹¹³ See IIRIRA, Pub. L. No. 104–208, § 321(b), 110 Stat. 3009–546, 3009–628 (1996) (codified in 8 U.S.C. § 1101(a)(43) (2000)).

deeper than the fear of terrorism.¹¹⁴ The American public also held non-citizens responsible for the social problems plaguing society, such as high unemployment, drug abuse, crime rates, and the rising cost of social services.¹¹⁵ For example, a Congressional commission reported that the job skills and education of immigrants were declining, that they were taking jobs from Americans, and that they were committing more crimes; newspaper polls established that many Americans shared this view.¹¹⁶ Another study, however, found that the proportion of immigrants with less than eight years of education had in fact fallen, while the proportion with sixteen years or more had risen.¹¹⁷ Furthermore, it showed that many cities with high immigrant populations had lower unemployment rates and lower crime rates than those with smaller immigrant populations.¹¹⁸

The public perception that modern immigrants come to America with their "hands out for welfare checks" further aggravated the anti-immigrant sentiment.¹¹⁹ In fact, however, in 1995 less than 10% of welfare recipients came from immigrant families.¹²⁰ Americans also believed that early immigrants contributed to the country's melting pot image, but groundlessly found modern immigrants to be different and less deserving.¹²¹ Modern immigrants are of a different ethnic makeup than early immigrants, and perhaps many Americans were and continue to be unsettled by a changing ethnic landscape with which they cannot identify.¹²² In addition, modern immigrants do not necessarily wish to assimilate into American society as newcomers strove to do in the past.¹²³ Rather, many immigrants choose to retain their distinct culture and language.¹²⁴

¹¹⁴ See Woo, *supra* note 100, at 1B.

¹¹⁵ Marley, *supra* note 6, at 857.

¹¹⁶ See Stephan Chapman, *Old Arguments on Immigration*, ST. LOUIS POST-DISPATCH, June 12, 1995, at 07B; Thadeus Herrick & James Pinkerton, *Texans Favor Immigration in Principle/Increased Costs Are Serious Concern*, HOUSTON CHRON., Oct. 20, 1996, at 1 (noting that one in four Texans believe Hispanics are "very or extremely likely" to contribute to lower performing schools and higher crime); Maria Puente, *Immigration Is a Negative for Cities, Study Says*, USA TODAY, Nov. 14, 1995, at 03.

¹¹⁷ Chapman, *supra* note 116, at 7B.

¹¹⁸ *Id.*

¹¹⁹ See Woo, *supra* note 100, at 1B.

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² See *id.* Early immigrants were white Europeans and the majority of modern immigrants are not. See *id.*

¹²³ *Id.*

¹²⁴ See Woo, *supra* note 100, at 1B.

IIRIRA, Congress's response to this increasing anti-immigrant sentiment, made substantial changes to the aggravated felony provision.¹²⁵ Not surprisingly, there was little resistance to the proposed law.¹²⁶ After all, as one legal scholar noted, "disenfranchisement of an unpopular, scapegoat community that does not enjoy suffrage carries no political risk."¹²⁷ In its quest to reform immigration law and appease the public, however, Congress failed to make any distinctions between lawful permanent residents convicted of petty crimes and non-citizens suspected of terrorism or drug trafficking.¹²⁸ Consequently, some critics argued that the already harsh aggravated felony provisions became cruel and indiscriminate.¹²⁹

Although some serious crimes were added to the aggravated felony definition, IIRIRA's primary effect is to reduce the sentence required for defining less serious crimes as aggravated felonies.¹³⁰ The monetary requirements for a conviction of fraud, deceit, or tax evasion are also greatly reduced.¹³¹ Most drastically, IIRIRA forbids a convicted aggravated felon from ever returning to the United States.¹³² Thus, one immigration expert noted that "incredibly, [an LPR] convicted of shoplifting or of having smuggled a sister into the United States may now be separated for life from his or her United States citizen family."¹³³

IIRIRA also makes it easier to obtain an aggravated felony conviction by redefining the terms "conviction" and "term of imprisonment" in the INA.¹³⁴ Before the Act, "conviction" was not statutorily defined; rather, most courts applied a definition created by the Board of Immigration Appeals (BIA) in *Matter of Ozkok*.¹³⁵ The *Ozkok* definition

¹²⁵ See Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

¹²⁶ See Marley, *supra* note 6, at 858.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See Bennett, *supra* note 8, at 1702-03; Marley, *supra* note 6, at 866.

¹³⁰ See Immigration Reform and Immigrant Responsibility Act § 321(a). Rape and sexual abuse of a minor were added to the definition, and the sentence for theft, receipt of stolen property, and document fraud was decreased from a five-year minimum to a one-year requirement. See *id.*

¹³¹ See *id.* For example, the required amount for money laundering and tax evasion crimes was slashed to \$10,000 (from \$100,000 and \$200,000 respectively.) See *id.*

¹³² See *id.* § 301(b).

¹³³ See Coonan, *supra* note 2, at 605.

¹³⁴ See IIRIRA § 322(a).

¹³⁵ See 19 I. & N. Dec. 546, 546 (B.I.A. 1988). The BIA applied a three-prong test to determine what constituted a "conviction." *Id.* at 546. It required that (1) a judge or jury find the defendant guilty or that the defendant admit guilt or sufficient facts to support a

often benefited immigrants because a judge could defer adjudication, meaning she could delay her decision and issue some form of probation instead.¹³⁶ As long as the individual complied with the probationary requirements, no conviction was entered on the record, and the non-citizen was not deportable.¹³⁷

Congress sought to expand the scope of "conviction" to assure deportation in cases where a judgment of guilt had been suspended, such as in the case of deferred adjudications.¹³⁸ IIRIRA, therefore, creates a new definition of "conviction."¹³⁹ INA section 101(a)(48) states that a conviction occurs for immigration purposes even when the judge defers adjudication, so long as there are sufficient facts to establish guilt and "the judge has ordered some form of punishment, penalty, or restraint on the non-citizen's liberty to be imposed."¹⁴⁰

This broader meaning of "conviction" exacerbates the effects of the ever-expanding aggravated felony definition, resulting in severe consequences.¹⁴¹ Non-citizens, including lawful permanent residents, need not be convicted (in the usual sense) in order to be deported as a "convicted" aggravated felon.¹⁴² In addition, adjudications not treated as convictions by state laws nevertheless fall within IIRIRA's definition of conviction, producing inconsistencies between state and federal law.¹⁴³

Furthermore, IIRIRA provides that any reference in the INA to "term of imprisonment" includes any period of time that the sentence

finding of guilt; (2) the judge order some form of punishment, penalty or other restraint on defendant's liberty; (3) a defendant who received probation under a method of deferred adjudication have no further hearings as to guilt or innocence in the event that he or she violated the terms of probation. *Id.*

¹³⁶ See Marley, *supra* note 6, at 867.

¹³⁷ See *id.*

¹³⁸ See *id.* at 868.

¹³⁹ See *id.* at 867.

¹⁴⁰ See INA § 1101(a)(48)(A). Specifically, the definition incorporates the first two prongs of the *Ozkok* test, but removes the third prong. See *Ozkok*, 19 I. & N. Dec. at 546. Therefore, this definition requires (1) a formal judgment of guilt entered by the court or (2) if adjudication of guilt has been withheld, the first two prongs of the *Ozkok* test must be applied. See *id.* Thus, in the event of deferred adjudication, a conviction will occur when (1) a judge or jury has found the individual guilty or the non-citizen has entered a plea of *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt and (2) the judge has ordered some form of punishment, penalty, or restraint on the non-citizen's liberty to be imposed. See *id.*

¹⁴¹ See Marley, *supra* note 6, at 867.

¹⁴² *Id.*

¹⁴³ See INA § 1101(a)(48)(A); Morawetz, *supra* note 6, at 1942.

is suspended.¹⁴⁴ Before this amendment, the INA required a judge to impose a jail term in order for certain crimes to be classified as aggravated felonies.¹⁴⁵ Thus, IIRIRA eliminates a judge's discretion to suspend the sentence in an effort to avoid the deportation consequences of an aggravated felony conviction.¹⁴⁶ Some critics contend that changing the meaning of "term of imprisonment" produces inconsistent results and demonstrates a lack of respect for federal and state court discretion.¹⁴⁷ Prior to IIRIRA, courts could suspend a sentence in cases where deportation was not justified.¹⁴⁸ According to the new terminology, a plea bargain for a one-year suspended sentence for theft results in deportation as an aggravated felon.¹⁴⁹ An eleven-month jail term for the same offense, however, is likely to have no immigration consequences.¹⁵⁰

In accordance with the historical severity of the consequences of an aggravated felony conviction, IIRIRA also institutes harsh procedural changes.¹⁵¹ Most notably, the law applies retroactively.¹⁵² A conviction is considered an "aggravated felony" regardless of whether the conviction was entered before, on, or after the date of IIRIRA's enactment.¹⁵³ Critics fiercely opposed this provision, arguing that it was the "mother of all ex post facto laws forbidden by the Constitution."¹⁵⁴ The ex post facto clause in Article I of the United States Constitution, however, only applies to criminal proceedings, and courts have determined that deportation is "a purely civil action" rather than a criminal proceeding.¹⁵⁵ The Supreme Court has consistently upheld Congress's authority to retroactively apply immigration consequences to prior criminal conduct.¹⁵⁶

¹⁴⁴ See IIRIRA, Pub. L. No. 104-208, § 322(a), 110 Stat. 3009-546 (1996).

¹⁴⁵ See Marley, *supra* note 6, at 868.

¹⁴⁶ See *id.* at 869.

¹⁴⁷ See *id.*; Morawetz, *supra* note 6, at 869-70.

¹⁴⁸ Morawetz, *supra* note 6, at 869-70.

¹⁴⁹ See INA § 1101(a)(43)(G); Marley, *supra* note 6, at 869.

¹⁵⁰ See INA § 1101(a)(43)(G); Marley, *supra* note 6, at 869.

¹⁵¹ See IIRIRA, Pub. L. No. 104-208, §§ 304, 305, 321(b), 110 Stat. 3009-546 (1996).

¹⁵² IIRIRA § 321(b).

¹⁵³ *Id.*

¹⁵⁴ Hakeem Ishola, *Of Convictions and Removal: The Impact of New Immigration Law on Criminal Aliens*, UTAH B.J., Aug. 10, 1997, at 18, 22.

¹⁵⁵ U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto law shall be passed"). See *e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893).

¹⁵⁶ See *e.g.*, *Galvan v. Press*, 347 U.S. 522, 529, 531 (1953).

The harsh provisions of the 1996 laws, particularly the retroactive effect of IIRIRA, attracted widespread media attention.¹⁵⁷ Reports uncovered that the INS, pursuant to these laws, began deporting LPRs because minor crimes they had committed years before had since become aggravated felonies.¹⁵⁸ For example, in 1987, twenty-one year old Alejandro Bontia was convicted of sexual contact with a minor for having sex with his sixteen year-old girlfriend, because her mother was angry about the relationship and reported Mr. Bontia to the police.¹⁵⁹ Almost fifteen years later, he faced separation from his wife and child solely because of this "youthful dalliance."¹⁶⁰ Nigerian native Olufolake Olaleye became a permanent resident in 1990, and both of her children were born in the United States.¹⁶¹ She was ordered deported based on a six-year old conviction for shoplifting baby clothes worth \$14.99.¹⁶²

Another procedural change IIRIRA instituted is "expedited removal" of convicted aggravated felons.¹⁶³ This provision provoked due process concerns, because non-citizens can be deported without ever seeing an immigration judge.¹⁶⁴ Furthermore, once a judge issues a removal order, IIRIRA mandates that the individual be detained until he is deported.¹⁶⁵ The consequences of this provision are severe. Mandatory detention could require incarceration thousands of miles away from family members while awaiting the results of lengthy and uncertain appeals.¹⁶⁶ Moreover, if the non-citizen's native country refuses to allow his return, the statute's plain language contemplates perpetual detainment in the United States.¹⁶⁷ This provision, like the expedited removal provision, raised due process questions, which the United States Supreme Court finally addressed in *Zadvydas v. Davis*.¹⁶⁸

¹⁵⁷ See Hedges, *supra* note 69, at 39A; Eric Rich, *Deportations Soar Under Rigid Law*, HARTFORD COURANT, Oct. 8, 2000, at A1.

¹⁵⁸ See Hedges, *supra* note 69, at 39A; Rich, *supra* note 157, at A1.

¹⁵⁹ Hedges, *supra* note 69, at 39A.

¹⁶⁰ *Id.*

¹⁶¹ Rich, *supra* note 157, at A1.

¹⁶² *Id.*

¹⁶³ IIRIRA, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1228). Expedited removal allows the Attorney General to complete removal proceedings and any administrative appeals before the non-citizen is released from prison for the underlying aggravated felony conviction, provided that the individual is not a permanent resident or has completed less than two years of permanent residency. See *id.*

¹⁶⁴ See Marley, *supra* note 6, at 873.

¹⁶⁵ See IIRIRA § 305.

¹⁶⁶ See Morawetz, *supra* note 6, at 1947.

¹⁶⁷ See IIRIRA § 305.

¹⁶⁸ See generally 533 U.S. 678 (2001).

In that case the Court determined that reasonable time limits for detention must be read into the statute.¹⁶⁹

Emma Mendez De Hay's story illustrates the harsh effects of IIRIRA's retroactive application and detention provisions. Ms. Mendez De Hay is a thirty-nine year old mother of four who had lived in the United States for twenty years but was detained thousands of miles away from her family and faced deportation for a "stupid mistake."¹⁷⁰ In 1990, Ms. Mendez De Hay's Spanish-speaking cousin received a phone call at Ms. Mendez De Hay's home.¹⁷¹ When Ms. Mendez De Hay answered, her cousin asked her to "tell [the caller] I can't help him today. I'll help him tomorrow."¹⁷² Because her cousin did not speak English well, Ms. Mendez De Hay relayed this message to the caller.¹⁷³

The caller was an undercover narcotics officer, and Ms. Mendez De Hay was subsequently found guilty of using a communication device to facilitate the distribution of cocaine.¹⁷⁴ Despite her innocence, she pled guilty in exchange for a promise that she would not be recommended for incarceration and would not be deported.¹⁷⁵ Since 1992, she had been a restaurant manager and had planned to prepare for work as a translator.¹⁷⁶ In 1996, however, Ms. Mendez De Hay was stopped by the INS while returning from a trip to Italy with her fiancé and was detained immediately on the basis of that guilty plea.¹⁷⁷ To make matters worse, she was sent to a Louisiana facility, far away from her family's home in Washington state.¹⁷⁸ She was particularly concerned about being separated from her two youngest children and her mother, who had been hospitalized for complications from heart disease and diabetes.¹⁷⁹ After five months of detention, Ms. Mendez De Hay considered giving up and returning to Mexico. She did not want to leave her family, however, and chose to pursue her appeal

¹⁶⁹ See *id.* at 701. The Court read a limiting principle into the statute requiring a periodic review of an individual's likelihood of removal. See *id.* If removal is not reasonably foreseeable, the government must release the non-citizen. See *id.*

¹⁷⁰ Peggy Anderson, *Immigrant Faces Deportation Under Tough INS Laws*, OREGONIAN, Feb. 14, 2000, at E7.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Anderson, *supra* note 170, at E7.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

rather than submit to deportation.¹⁸⁰ After a grueling two-year fight to stay in the United States, her deportation order was finally lifted when a United States Supreme Court decision invalidated certain deportation orders.¹⁸¹

In IIRIRA, Congress did not stop at broadening statutory definitions, instituting procedural changes, and applying the law retroactively. Where AEDPA had severely circumscribed routes to relief from deportation, IIRIRA essentially eliminates them.¹⁸² The Act completely repeals the § 212(c) waiver of deportation¹⁸³ and, in its place, institutes cancellation of removal.¹⁸⁴ The new provision gives the Attorney General discretion to cancel removal for some non-citizens, relief for which aggravated felons are categorically ineligible.¹⁸⁵ Finally, the Act severely limits judicial review of removal orders for aggravated felons.¹⁸⁶ In summary, an individual convicted of an aggravated felony is left with essentially no relief—an immigration judge has no authority to consider mitigating factors, and the deportation order is not subject to judicial review.¹⁸⁷

Antonio Cesar Chamorro's situation embodies the distressing effects of repealing the waiver provisions.¹⁸⁸ In 1993, Mr. Chamorro completed a three and a half-year sentence for money laundering.¹⁸⁹ Mr. Chamorro had been a legal permanent resident since 1972, had

¹⁸⁰ See Anderson, *supra* note 170, at E7.

¹⁸¹ Susan Gilmore, *Mother Won't Be Deported After All: '92 Conviction Had Left Her in Limbo*, SEATTLE TIMES, Aug. 7, 2002, at A1. Her order was lifted after the United States Supreme Court decided that certain individuals could not be deported retroactively. See *INS v. St. Cyr*, 533 U.S. 289, 320–26 (2001).

¹⁸² See IIRIRA, Pub. L. No. 104–208, § 304(b), 110 Stat. 3009–546, 3009–597 (eliminating § 212(c) waivers of deportation).

¹⁸³ *Id.* In 2001 the Supreme Court held that § 212(c) relief remains available for non-citizens whose convictions were obtained through plea agreements and would have been eligible for the relief at the time of their plea. See *St. Cyr*, 533 U.S. at 320–26. Thus, the decision offers hope to only a narrow group of individuals and does nothing to reinstate the balance of equities required under the old § 212(c) provision. See *id.*

¹⁸⁴ IIRIRA § 304(a).

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* § 306(a) (2) (codified at 8 U.S.C. § 1252(a) (2) (C)). Congress removed all courts' jurisdiction to review final orders of removal against non-citizens ordered deported as aggravated felons. See *id.*

¹⁸⁷ See *id.*; IIRIRA § 304(a). Many critics argued that this bar to judicial review was unconstitutional; the Supreme Court finally addressed the issue in *INS v. St. Cyr*. See 533 U.S. at 289. The Court held that Congress did not repeal the writ of habeas corpus for review of deportation orders, thereby leaving a habeas challenge available to non-citizens. See *id.*

¹⁸⁸ Jo Ann Zuniga, *Deportation Rules Break up Families, INS Critics Charge*, HOUSTON CHRON., May 31, 1998, at 29.

¹⁸⁹ *Id.*

married a citizen, and had two sons, both born in the United States.¹⁹⁰ After considering these factors, an immigration judge approved a § 212(c) waiver of deportation, and Mr. Chamorro was allowed to return to his family.¹⁹¹ In 1997, however, Mr. Chamorro was suddenly deported to his native Chile after an immigration judge struck down the waiver pursuant to the 1996 laws.¹⁹² Mr. Chamorro's family was forced to declare bankruptcy and decide whether to remain separated from their husband and father or move to Chile.¹⁹³ Mr. Chamorro's wife criticized the 1996 law for making her choose between her husband and her country and for "destroying numerous families."¹⁹⁴

In summary, the aggravated felony provision of the INA has undergone a transformation since its inception in 1988. Congress has consistently broadened the provision, primarily by defining less serious crimes as aggravated felonies.¹⁹⁵ Changing the statutory definition

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Zuniga, *supra* note 188, at 29.

¹⁹⁴ *Id.*

¹⁹⁵ See INA, 8 U.S.C § 1101(a) (43) (2000); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988). To compare, consider the difference between the ADAA's definition and the INA's current definition. The 1988 ADAA definition of an aggravated felony read: "The term 'aggravated felony' means murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices. . . or any attempt or conspiracy to commit such an act, committed within the United States." Anti-Drug Abuse Act of 1988 § 7342. In contrast to this short provision limited to serious crimes, the definition of "aggravated felony" currently includes:

- (A) murder, rape or sexual abuse of a minor; (B) illicit trafficking in a controlled substance . . . including a drug trafficking crime . . . ; (C) illicit trafficking in firearms or destructive devices . . . or in explosive materials . . . ; (D) . . . laundering of monetary instruments or . . . engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded \$10,000. (E) (i) . . . explosive materials offenses; (ii) . . . firearms offenses; or (iii) [a different section of the United States Code also] relating to firearms offenses; (F) a crime of violence . . . for which the term of imprisonment is at least one year; (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year; (H) an offense . . . relating to the demand for or receipt of ransom; (I) . . . child pornography; (J) an offense . . . relating to racketeer influenced corrupt organizations or . . . gambling offenses for which a sentence of one year imprisonment or more may be imposed; (K) (i) . . . owning, controlling, managing or supervising of a prostitution business; (ii) . . . transportation for the purposes of prostitution if committed for commercial advantage; or (iii) . . . peonage, slavery, and involuntary servitude; (L) (i) . . . gathering or transmitting national defense information . . . disclosure of classified information . . . sabotage [or] treason; (ii) . . . protecting the identity of undercover intelligence agents; or (iii) [another provision] relating to

of "conviction" and "term of imprisonment," as well as decreasing the minimum term of imprisonment required, further broadens the scope of the provision.¹⁹⁶ Moreover, aggravated felons are ineligible for the discretionary relief that previously had allowed judges to consider mitigating factors.¹⁹⁷ Finally, the consequences of a removal order have become progressively harsher and now include mandatory detention, limited judicial review, and a permanent bar from returning to the United States.¹⁹⁸ In fact, the consequences of an aggravated felony provision are so harsh that, if one applies international human rights standards, it becomes clear that the provision violates a universally recognized fundamental human right.

protecting the identity of undercover intelligence agents. (M) an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) . . . tax evasion in which the revenue loss to the government exceeds \$10,000. (N) . . . alien smuggling [unless first offense and the purpose was to only aid certain family members]; (O) [relating to previously deported aggravated felons] (P) . . . falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument or [violating a United States Code section] relating to document fraud . . . for which the term of imprisonment is at least 12 months . . . (Q) . . . failure to appear by a defendant for service of sentence if the underlying offense in punishable by imprisonment for a term of five years or more; (R) . . . commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year; (S) . . . obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year; (T) . . . failure to appear before a court pursuant to a court order to answer to or to dispose of a charge of a felony for which a sentence of two years imprisonment or more may be imposed; and (U) an attempt or conspiracy to commit an offense described in this paragraph. The term applies to an offense described in this paragraph whether in violation of a Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the last 15 years. Notwithstanding any other provision of the law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after [the date of the enactment of this paragraph].

INA § 1101(a)(43).

¹⁹⁶ See *id.*; § 1101(a)(43), (48)(A) (defining "conviction"), and (B) (defining "term of imprisonment").

¹⁹⁷ See *id.* § 212(c) (citing that this section has been repealed), 1229b (barring aggravated felons from applying for cancellation of removal).

¹⁹⁸ See *id.* §§ 1231, 1252(a)(2)(C), 1182(a)(9)(A)(i).

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHT TO RESPECT FOR PRIVATE OR FAMILY LIFE AS A DEFENSE TO DEPORTATION

Article 8 of the European Convention on Human Rights (the Convention) establishes an individual's fundamental right to respect for private and family life.¹⁹⁹ Non-nationals²⁰⁰ convicted of crimes in the signatory countries have invoked this right to prevent deportation.²⁰¹ The European Court of Human Rights, taking into account both the individual's interest in "respect of his private or family life" and the government's need to control crime, has found that deportation violates this fundamental right in certain circumstances.²⁰²

Non-citizens convicted of aggravated felonies in the United States do not have the benefit of a balancing test like that applied by the European Court. Because Article 8 requires consideration of the competing individual and government interests, the INA's approach is inconsistent with the protection of the fundamental right to respect for private and family life.²⁰³

A. Article 8 of the Convention: The Right to Respect for Private and Family Life

The European Convention on Human Rights was implemented in 1950 to encourage collective enforcement of the fundamental human rights recognized by the Universal Declaration of Human Rights in 1948.²⁰⁴ In the past half-century, the enforcement tribunals of the Convention—the European Commission of Human Rights and the European Court of Human Rights (ECHR)—have produced the world's most extensive body of international human rights jurispru-

¹⁹⁹ Convention, *supra* note 17, at 230.

²⁰⁰ The European Court refers to citizens of a particular nation as "nationals."

²⁰¹ See, e.g., *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 1179, 1184–89 (2001) (Eur. Ct. H.R.); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, 641–46 (1999) (Eur. Ct. H.R.); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 750–53 (1997) (Eur. Ct. H.R.); *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686, 704–08 (1997) (Eur. Ct. H.R.).

²⁰² See Convention, *supra* note 17, at 230; see, e.g., *Boultif*, 33 Eur. H.R. Rep. at 1189; *Mehemi*, 30 Eur. H.R. Rep. at 753.

²⁰³ See Convention, *supra* note 17, at 230; see, e.g., *Boultif*, 33 Eur. H.R. Rep. at 1189; *Mehemi*, 30 Eur. H.R. Rep. at 753.

²⁰⁴ Convention, *supra* note 17, at 222–23.

dence.²⁰⁵ Article 8 of the Convention establishes an individual's right to respect for his private and family life.²⁰⁶ The Article states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.²⁰⁷

Thus, paragraph one of Article 8 acknowledges that each individual possesses this right.²⁰⁸ Paragraph two asserts that no public authority may interfere with the exercise of this right unless the interference is (1) in accordance with the law, (2) necessary in a democratic society, and (3) in the interests of one of the stated aims.²⁰⁹

The ECHR has consistently held that the meaning of both "family life" and "private life" must be construed broadly.²¹⁰ The ECHR also broadly interprets a contracting state's duties under Article 8.²¹¹ The Article expressly forbids a public authority's arbitrary interference with this right; rather, it requires that any interference must fall within one of the specified legitimate aims.²¹²

²⁰⁵ Strossen, *supra* note 20, at 807.

²⁰⁶ Convention, *supra* note 17, at 230.

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ Strossen, *supra* note 20, at 843-44. The concept of family life clearly includes relationships between husbands and wives, parents and children, and near relatives, such as grandparents. Goran Cvetic, *Immigration Cases in Stasbourg: The Right to Family Life Under Article 8 of the European Convention*, 36 INT'L & COMP. L.Q. 647, 650-51 (1987). The Court has adopted a wider view of family, however, making no distinctions between children born to married parents and those born out of wedlock. Strossen, *supra* note 20, at 844 (citing *X v. Iceland*, 5 Eur. Comm'n H.R. 86, 87 (1976)); Cvetic, *supra*, at 651. Furthermore, the meaning of private life extends beyond "a right to live, as far as one wishes, protected from publicity" and includes the general right to establish and develop relationships with others, particularly for the fulfillment and growth of one's own personality. Strossen, *supra* note 20, at 843.

²¹¹ *See* Strossen, *supra* note 20, at 842.

²¹² *See* Convention, *supra* note 17, at 230. In some cases, the ECHR has actually extended a state's obligation beyond mere noninterference and imposed an affirmative duty on the state, as well as non-governmental actors, to protect this right. Strossen, *supra* note 20, at 846-49 (noting that the court imposed an affirmative duty on the Belgian government to invalidate discriminatory laws against children born out of wedlock, on the Irish

In addition, the ECHR has expressly stated that clauses limiting privacy rights, such as paragraph two of Article 8, must be narrowly interpreted.²¹³ Thus, the court has repeatedly affirmed that paragraph two of Article 8 requires that any intrusion be necessary for promoting the asserted government interest, rather than a mere convenience or preference.²¹⁴ Furthermore, the ECHR will not allow intrusions that would actually damage democratic values while purporting to promote them.²¹⁵ This requirement is derived from paragraph two's assertion that necessity must be considered within the context of a democratic society.²¹⁶ Considering these two elements together, the ECHR repeatedly explains that in order to be necessary in a democratic society, there must be a "pressing social need" and in particular, the intrusion "must be proportionate to the legitimate aim pursued."²¹⁷ Accordingly, the court has refused to allow interference with rights if there is a less intrusive method available.²¹⁸ Furthermore, the ECHR may still prohibit the alternative method if the attendant privacy invasion outweighs the government's interest.²¹⁹

An examination of the ECHR's approach to deportation orders issued on criminal grounds and contested under Article 8 allows for an interesting comparison between the actions of the court and the aggravated felony provisions of the INA. In such cases, the ECHR first considers whether the non-national actually maintains a family or private life in the deporting country.²²⁰ The court, as noted above, interprets the concept of family and private life broadly, so meeting this burden is not difficult.²²¹ Second, the court determines whether the state interfered with the individual's right to respect for private and

government to provide legal aid for individuals seeking judicially recognized marriage separations, and required alteration of a Belgian criminal law, even though the invasion was by a non-governmental actor); A.M. Connelly, *Problems of Interpretation of Article 8 of the European Convention on Human Rights*, 35 INT'L & COMP. L.Q. 567, 568-69 (1986).

²¹³ See Strossen, *supra* note 20, at 849.

²¹⁴ *Id.* at 850.

²¹⁵ *Id.* at 851.

²¹⁶ See Convention, *supra* note 17, at 230.

²¹⁷ See, e.g., *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 1179, 1184-89 (2001) (Eur. Ct. H.R.); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, 641-46 (1999) (Eur. Ct. H.R.); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 750-53 (1997) (Eur. Ct. H.R.); *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686, 704-08 (1997) (Eur. Ct. H.R.).

²¹⁸ See Strossen, *supra* note 20, at 853.

²¹⁹ See *id.* at 854.

²²⁰ See, e.g., *Boultif*, 33 Eur. H.R. Rep. at 1186; *Dalia*, 33 Eur. H.R. Rep. at 642; *Mehemi*, 30 Eur. H.R. Rep. at 750; *Bouchelkia*, 25 Eur. H.R. Rep. at 704.

²²¹ See *supra* note 210.

family life.²²² Applicants facing deportation generally focus on the state's interference with their family, rather than private, lives.²²³ In response, the court has consistently found that removing a person from a country where close members of his family are living constitutes an infringement of the right to respect for family life.²²⁴

If the court finds that deportation constitutes an interference under Article 8, it considers whether the interference is nevertheless acceptable under paragraph two.²²⁵ To satisfy the conditions of paragraph two, the deportation order must be "in accordance with the law," must pursue one of the specified legitimate aims, and must be "necessary in a democratic society" to achieve the stated aim.²²⁶

A state acts "in accordance with the law" as long as it adheres to a specific, recognized law.²²⁷ Furthermore, the states can typically establish that deportation of criminals furthers the legitimate aim of preventing disorder or crime.²²⁸ Generally, the sole point of contention is whether the individual's deportation is "necessary in a democratic society" to achieve that aim.²²⁹ This inquiry focuses on whether the state has established a "pressing social need" and whether the state's action is "proportionate to the legitimate aim pursued."²³⁰ In other words, the court considers whether the state has reached a fair balance between the individual's interest in her right to respect for fam-

²²² See *Boutlif*, 33 Eur. H.R. Rep. at 1186; *Dalia*, 33 Eur. H.R. Rep. at 642; *Mehemi*, 30 Eur. H.R. Rep. at 750; *Bouchelkia*, 25 Eur. H.R. Rep. at 704. The Court occasionally combines these first two inquiries. See *Boutlif*, 33 Eur. H.R. Rep. at 1186.

²²³ See Ann Sherlock, *Deportation of Aliens and Article 8 ECHR*, 23 EUR. L. REV. 62, 68, Checklist No. 1, (1998).

²²⁴ See *Boutlif*, 33 Eur. H.R. Rep. at 1186; *Dalia*, 33 Eur. H.R. Rep. at 643; *Mehemi*, 30 Eur. H.R. Rep. at 751; *Bouchelkia*, 25 Eur. H.R. Rep. at 705.

²²⁵ See Convention, *supra* note 17, at 230.

²²⁶ Convention, *supra* note 17, at 230.

²²⁷ *Boutlif*, 33 Eur. H.R. Rep. at 1186; *Dalia*, 33 Eur. H.R. Rep. at 643; *Mehemi*, 30 Eur. H.R. Rep. at 751; *Bouchelkia*, 25 Eur. H.R. Rep. at 705.

²²⁸ See *Boutlif*, 33 Eur. H.R. Rep. at 1186-87; *Dalia*, 33 Eur. H.R. Rep. at 643; *Mehemi*, 30 Eur. H.R. Rep. at 751; *Bouchelkia*, 25 Eur. H.R. Rep. at 706.

²²⁹ See Sherlock, *supra* note 223, at 64. When deciding whether a deportation order is necessary in a democratic society, the Court first recognizes that maintaining public order is the responsibility of the contracting states and that part of that duty is controlling the entry and continued residence of non-nationals, subject to any treaty obligations. *Id.* This power, of course, encompasses the right to deport aliens. *Id.* The Court then qualifies that power, however, asserting that if deportation interferes with the right to respect for family and private life, it must be justified as necessary in a democratic society. *Id.*

²³⁰ See *Boutlif*, 33 Eur. H.R. Rep. at 1187; *Dalia*, 33 Eur. H.R. Rep. at 644; *Mehemi*, 30 Eur. H.R. Rep. at 752; *Bouchelkia*, 25 Eur. H.R. Rep. at 707.

ily or private life and the state's interest in preventing disorder or crime.²³¹

To determine if this balance has been achieved, the ECHR considers the amount of time a non-national has lived in the deporting state, whether her family resides there, whether she has any ties to another state, her likelihood of successfully re-establishing family life in another state, and the effect of deportation on her family in the deporting state.²³² The court also considers the seriousness of the offense and the applicant's record since the offense was committed.²³³

Recent cases show that the ECHR is likely to find a violation of Article 8 in situations where the applicant has strong family ties in the deporting state and lacks such ties in his native nation.²³⁴ For example, in *Mehemi v. France*, the court found an Article 8 violation where the applicant had strong ties to France and lacked such ties to his native country of Algeria.²³⁵ Mr. Mehemi was actually born in France, but lost citizenship,²³⁶ received all of his schooling in France, and lived there until he was deported.²³⁷ Furthermore, his wife and children remained in France, and the court found that it would have been difficult for them to make a life in Algeria or in Italy, his wife's native country, because it would mean a "radical upheaval" for their children.²³⁸ In light of these considerations, the court found that even though the applicant's crime involved a conspiracy to import large quantities of marijuana, deporting him would be too great an interference in his family life.²³⁹

Moreover, the court has found a violation of Article 8 where the applicant had weaker family ties in the deporting state than did the applicant in *Mehemi*.²⁴⁰ In *Boultif v. Switzerland*, the applicant was recently married to a Swiss national.²⁴¹ Switzerland refused to renew Mr.

²³¹ See Sherlock, *supra* note 223, at 64.

²³² *Id.*; *Dalia*, 33 Eur. H.R. Rep. at 644-45; *Mehemi*, 30 Eur. H.R. Rep. at 753.

²³³ *Boultif*, 33 Eur. H.R. Rep. at 1187; *Dalia*, 33 Eur. H.R. Rep. at 645; *Mehemi*, 30 Eur. H.R. Rep. at 753; *Bouchelkia*, 25 Eur. H.R. Rep. at 707.

²³⁴ See *Boultif*, 33 Eur. H.R. Rep. at 1189; *Mehemi*, 30 Eur. H.R. Rep. at 753.

²³⁵ See *Mehemi*, 30 Eur. H.R. Rep. at 753.

²³⁶ *Id.* at 751-52. Mr. Mehemi's parents had failed to claim citizenship for him as required by legislation governing the effects of Algeria's independence on nationality. See *id.*

²³⁷ *Id.* at 753.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *Boultif*, 33 Eur. H.R. Rep. at 1189.

²⁴¹ *Id.* at 1188.

Boultif's residence permit,²⁴² based on a conviction for robbery, damage to property, and physically attacking another individual.²⁴³ Finding that the deportation order violated Article 8, the court focused on the effect of Mr. Boultif's deportation on his Swiss wife, reasoning that she could not be expected to follow her husband to Algeria because she had no ties there besides her mother-in-law and did not speak Arabic.²⁴⁴ In addition, although Mr. Boultif lawfully resided in Italy for three years after being forced to leave Switzerland, the state could not establish that Mr. Boultif and his wife could obtain authorization to live in Italy.²⁴⁵ The court also noted that Mr. Boultif had committed no further offenses since his crime six years before, that he was consistently employed, and that he had the possibility of continuing employment.²⁴⁶ Thus, the court found that the interference was disproportionate to the government's aim; allowing the applicant to remain in Switzerland presented a relatively limited danger to public order, whereas forbidding him from living there posed a serious impediment to his family life.²⁴⁷

By contrast, if the applicant's family ties in the deporting country are not very strong and the applicant has also maintained relationships in another country, the court generally finds no violation of Article 8.²⁴⁸ For example, in *Dalia v. France*, the court found the balance favored the government, even though many of Ms. Dalia's family members lived in France.²⁴⁹ The court noted that the applicant had lived in Algeria until the age of seventeen or eighteen (without her parents for two of those years), maintained family and social relationships there, and spoke the local language. Therefore, according to the court, "her Algerian nationality is not merely a legal fact but reflects certain social and emotional links."²⁵⁰ Furthermore, the applicant was convicted of heroin trafficking, which the court found to be

²⁴² This was functionally equivalent to deportation because he was required to leave Switzerland. *See id.* at 1181-82.

²⁴³ *See id.*

²⁴⁴ *See id.* at 1188.

²⁴⁵ *Boultif*, 33 Eur. H.R. Rep. at 1188.

²⁴⁶ *See id.* at 1189.

²⁴⁷ *Id.* at 1189.

²⁴⁸ *See Dalia*, 33 Eur. H.R. Rep. at 645; *Bouchelkia*, 25 Eur. H.R. Rep. at 707.

²⁴⁹ *See Dalia*, 33 Eur. H.R. Rep. at 644. The applicant's mother and seven brothers and sisters lived in France. *Id.* She had married a French national, but they were divorced. *Id.* She gave birth to a child of French nationality after the deportation was issued, but the Court only considers the circumstances at the time the order was issued. *See id.* at 644-45.

²⁵⁰ *Id.*

a serious offense.²⁵¹ Given the existence of family and social ties in Algeria and the seriousness of the crime, the court held that the deportation order was not disproportionate to the legitimate aim pursued by the state.²⁵²

Likewise, in *Bouchelkia v. France*, the court found no violation of Article 8.²⁵³ There, the court focused on the gravity of the crime, an aggravated rape, and Mr. Bouchelkia's subsequent convictions for attempting to escape from prison and obstructing a police officer in the execution of his duty.²⁵⁴ Additionally, although he had lived in France since age two and although many of his family members lived there,²⁵⁵ the applicant had close relatives in Algeria and understood the language.²⁵⁶ Thus, the court held that a fair balance was struck between the relevant interests of the applicant and the government and consequently, the decision to deport Mr. Bouchelkia was not disproportionate to the legitimate aims pursued.²⁵⁷

If the balancing test employed by the European Court of Human Rights were applied to assess the deportability of aggravated felons under United States immigration law, the deportation of lawful permanent residents convicted of relatively minor crimes would be forbidden.²⁵⁸ Xuan Wilson would not be forced to return to a long forgotten country because she forged a check for \$19.83.²⁵⁹ Al Correa would be permitted to remain with the rest of his family in Brooklyn, his home since age two, rather than struggle to survive in an utterly foreign land.²⁶⁰ Emma Mendez De Hay would not have been detained, separated from her family, or forced to fight a protracted court battle because of a "stupid mistake."²⁶¹ Anthony Cesar

²⁵¹ See *id.* at 645.

²⁵² See *id.*

²⁵³ *Bouchelkia*, 25 Eur. H.R. Rep. at 707.

²⁵⁴ See *id.* at 706–07.

²⁵⁵ The applicant's mother and siblings lived in France. *Id.* at 704–05. More importantly, even though his wife and daughter also lived there, those connections were formed after the deportation order was issued. See *id.* at 704. The Court does not consider family ties created after the deportation order was made. See *id.*

²⁵⁶ *Id.* at 706.

²⁵⁷ See *id.* at 707.

²⁵⁸ See *supra* notes 248–257 and accompanying text; *infra* notes 259–273 and accompanying text.

²⁵⁹ See *supra* notes 9–12, 248–258 and accompanying text, *infra* notes 260–273 and accompanying text.

²⁶⁰ See *supra* notes 83–92, 248–259 and accompanying text, *infra* notes 261–273 and accompanying text.

²⁶¹ See *supra* notes 177–187, 248–260 and accompanying text, *infra* notes 262–273 and accompanying text.

Chamorro's waiver of deportation would not have been retroactively revoked, forcing him out of the United States permanently and compelling his family members to choose between him and their country.²⁶² In each of these cases, the European Court almost certainly would find that deporting these individuals is not necessary in a democratic society.²⁶³ Deportation poses a grave threat to the family lives of these lawful permanent residents, whereas their relatively minor crimes present a limited danger to public order.²⁶⁴

III. Applying International Law to Achieve a Fair Balance in Deportation Decisions

The United States is not a party to the European Convention on Human Rights. It is, however, a member of the United Nations, which has adopted the Universal Declaration of Human Rights.²⁶⁵ In fact, the United States played a key role in drafting the Declaration.²⁶⁶ The European Convention was later implemented to encourage enforcement of the Declaration.²⁶⁷ Since that time, the enforcement tribunals of the Convention have produced the most developed body of international human rights jurisprudence.²⁶⁸ Moreover, U.S. court rulings have relied on the Convention, and the cases applying it, as a major source of international rights law.²⁶⁹ Thus, the Convention has become customary international law based upon its breadth, period of acceptance, and the opinions of scholars and judges.²⁷⁰

It is well established that U.S. courts may not ignore the precepts of customary international law.²⁷¹ Furthermore, customary interna-

²⁶² See *supra* notes 194–200, 248–261 and accompanying text, *infra* notes 263–273 and accompanying text.

²⁶³ See *supra* notes 246–250 and accompanying text.

²⁶⁴ See *supra* notes 246–250 and accompanying text..

²⁶⁵ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc A/810, at 71 (1948); see *Beharry v. Reno*, 183 F. Supp. 2d 584, 595 (E.D.N.Y. 2002).

²⁶⁶ See *Beharry*, 183 F. Supp. 2d at 595.

²⁶⁷ Convention, *supra* note 17, at 222.

²⁶⁸ Strossen, *supra* note 20, at 807.

²⁶⁹ *Id.*

²⁷⁰ See *Beharry*, 183 F. Supp. 2d at 597; *Filartiga v. Pena-Irala*, 630 F.2d. 876, 884 n.16 (2d Cir. 1980) (recognizing that judicial decisions constitute a source of customary international law and citing a decision issued by the European Court of Human Rights); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) (citing European Convention as one of the principal sources of fundamental human rights and "indicative of the customs and usages of civilized nations").

²⁷¹ See, e.g., *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *The Paquete Habana*, 175 U.S. 677, 700 (1899).

tional law is legally enforceable unless Congress unequivocally supercedes it by statute.²⁷² Thus, if Congress has not specifically stated that customary international law, such as the dictates of the Convention, are superceded, a court should construe a statute to bring it into conformity with international law.²⁷³

In addition, the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992.²⁷⁴ One prominent legal scholar noted that, although the customary human rights law of nations *already bound the United States*, the Covenant provided an "authoritative, textual exposition of protected rights and routinized mechanisms for their enforcement" lacking in customary human rights law.²⁷⁵ The ICCPR requires that a non-citizen be given an opportunity to submit his reasons against deportation and also mandates protection of family life.²⁷⁶ Article 13 of the International Covenant on Civil and Political Rights requires a state to provide an individual with the opportunity to oppose his deportation, absent compelling reasons of national security, stating:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purposes before, the competent authority or a person or persons especially designated by the competent authority.²⁷⁷

Furthermore, the ICCPR assures protection of family rights; Article 17 is very similar to Article 8 of the Convention, stating that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and that "everyone has the right to the protection of the law against such interference or attacks."²⁷⁸ Article

²⁷² See Beharry, 183 F. Supp. 2d. at 600; Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1165 (1990).

²⁷³ See *id.*

²⁷⁴ John Quigley, *Criminal Law and Human Rights: Implications of The United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 59 (1993) (emphasis added).

²⁷⁵ See *id.*

²⁷⁶ See ICCPR, *supra* note 17, at 176-77.

²⁷⁷ *Id.* at 176.

²⁷⁸ *Id.* at 177.

23(1) likewise emphasizes that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."²⁷⁹

Like customary international law, U.S. courts may not ignore treaty obligations and should construe domestic law in compliance with them whenever possible.²⁸⁰ Even though non-self-executing treaties, such as the ICCPR, do not automatically become domestic law, a few courts and commentators have suggested that non-self-executing treaties do have domestic effect as evidence of international law principles and as a tool of statutory construction.²⁸¹

In a recent unprecedented decision, Judge Weinstein of the Eastern District of New York applied the international legal concepts discussed above to overturn a deportation order pursuant to the aggravated felony provision.²⁸² In *Beharry v. Reno*, Mr. Beharry was ordered deported as an aggravated felon because he stole \$714.00.²⁸³ He had been a lawful permanent resident of the United States for twenty years, since age seven, completed school through the eleventh grade in the United States, and was consistently employed after leaving school.²⁸⁴ Mr. Beharry's mother was also an LPR, and his sister and six-year-old daughter were both United States citizens.²⁸⁵

At the time Mr. Beharry committed his crime, he was not considered an aggravated felon because the provision required a term of imprisonment of five years, and he only served four and a half.²⁸⁶ By the time he was convicted, however, Congress had passed IIRIRA, which requires a sentence of only one year to be considered an aggravated felon.²⁸⁷ In an effort to remain with his family, Mr. Beharry unsuccessfully sought a number of deportation waivers and was denied a hearing by the INS, primarily because the waivers were not available to aggravated felons after the changes made by the 1996 laws.²⁸⁸

²⁷⁹ *Id.* at 179.

²⁸⁰ *See, e.g.,* The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); The Paquete Habana, 175 U.S. 677, 700 (1899).

²⁸¹ *See* Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Beharry v. Reno, 183 F. Supp. 2d 584, 594-95 (E.D.N.Y. 2002) (citing cases from the Second and Ninth Circuit Courts of Appeals and legal scholarship). Ratified self-executing treaties do have the force of domestic law. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

²⁸² *See Beharry*, 183 F. Supp. 2d at 586.

²⁸³ 183 F. Supp. 2d at 586.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *See id.* at 588.

²⁸⁷ *See id.*

²⁸⁸ *See Beharry*, 183 F. Supp. 2d at 587.

Judge Weinstein determined that it was not clear whether the new definition of an aggravated felony applied to Mr. Beharry.²⁸⁹ Relying on sources of international law, he held that Mr. Beharry must be granted a hearing to show the effect that his deportation would have on his family and himself, weighed against the risks of allowing him to remain in the United States.²⁹⁰ Considering the effect of treaties and customary international law on domestic law, Judge Weinstein wrote that “[i]mmigration statutes must be woven into the seamless web of our national and international law.”²⁹¹

First, Judge Weinstein recognized that non self-executing treaties,²⁹² such as the ICCPR, have been accorded domestic effect in some United States federal courts and are evidence of binding principles of international law.²⁹³ In addition, he found it significant that the Senate Committee on Foreign Relations had noted that existing U.S. law generally complied with the ICCPR.²⁹⁴ Thus, he reasoned that deporting Mr. Beharry without giving him an opportunity to present reasons against his deportation violated the ICCPR’s Article 17 guarantee against arbitrary interference with one’s family and the Article 13 right to submit reasons against expulsion.²⁹⁵

Judge Weinstein also relied on principles protecting the right to a hearing before “arbitrary exile,” stated in the Universal Declaration and the protection of the family assured in the Convention on the Rights of the Child (CRC).²⁹⁶ He asserted that both of these instruments have the force of customary international law.²⁹⁷ Although the Declaration is not a treaty, it has become the “accepted general articulation of recognized rights.”²⁹⁸ The CRC, while not yet ratified by the United States, has been ratified by every other organized government in the world and codifies long-standing legal norms assisting and protecting the family.²⁹⁹

²⁸⁹ See *id.* at 589 (noting that the Supreme Court had not addressed whether the definition of aggravated felon applies retroactively when the crime itself predated the 1996 changes but the conviction came after the 1996 acts).

²⁹⁰ *Id.* at 586.

²⁹¹ *Id.* at 591.

²⁹² Self-executing treaties are effective immediately upon ratification without need for any implementing legislation. BLACK’S LAW DICTIONARY 1354 (7th ed. 1999).

²⁹³ *Beharry*, 183 F. Supp. 2d at 594–95.

²⁹⁴ *Id.* at 595.

²⁹⁵ *Id.* at 604.

²⁹⁶ *Id.* at 594–96.

²⁹⁷ *Id.* at 596.

²⁹⁸ See *Beharry*, 183 F. Supp. 2d at 596.

²⁹⁹ *Id.* at 600.

Judge Weinstein astutely noted another reason for applying international law to construe immigration statutes by comparing immigration law to admiralty law. He reasoned that the Supreme Court has most frequently addressed the concept of customary international law in admiralty cases, where domestic law is likely to clash with international law.³⁰⁰ Immigration law is likewise founded on concepts of international law; Congress's plenary power over immigration is based on the idea, derived from international law, that an essential power of sovereign nations is the ability to forbid entry to foreign nationals.³⁰¹ Thus, Congress would not hold such expansive power without the existence of international norms.³⁰² Given that immigration law is rooted in these norms, Judge Weinstein reasoned that it must likewise be limited by changing international law norms.³⁰³ Accordingly, "[i]t is inappropriate to sustain such plenary power based on a 1920 understanding of international law when the 2002 conception is radically different."³⁰⁴

Judge Weinstein's dependence on international agreements and customary international law results in a balancing test similar to that applied by the European Court of Human Rights in the deportation cases discussed above.³⁰⁵ It takes into account family relationships that would be seriously impeded by deportation and weighs the relative importance of those factors against the government's reasons to deport.³⁰⁶ Thus, this approach brings United States immigration law into conformity with international human rights law and incorporates the reasoning of the most prolific human rights tribunal.³⁰⁷

Given that Judge Weinstein's approach is based on a particular ambiguous provision of the INA, however, this compassionate and reasonable approach is available to only a small subset of individuals—namely, immigrants who committed a crime *before* that particular

³⁰⁰ See *id.* at 597–98. See generally *The Paquete Habana*, 175 U.S. 677 (1899); *The Neriede*, 13 U.S. 388 (1815).

³⁰¹ See *Beharry*, 183 F. Supp. 2d at 598.

³⁰² See *id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See *id.* at 586; *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 1179, 1187 (2001) (Eur. Ct. H.R.); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, 644 (1999) (Eur. Ct. H.R.); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 752 (1997) (Eur. Ct. H.R.); *Bouchelkia v. France*, App. No. 23018/93, 25 Eur. H.R. Rep. 686, 707 (1997) (Eur. Ct. H.R.); *Sherlock*, *supra* note 223, at 64.

³⁰⁶ See *Beharry*, 183 F. Supp. 2d at 604–05.

³⁰⁷ See *id.*; *Boultif*, 33 Eur. H.R. Rep. at 1187; *Dalia*, 33 Eur. H.R. Rep. at 644; *Mehemi*, 30 Eur. H.R. Rep. at 752; *Bouchelkia*, 25 Eur. H.R. Rep. at 707; *Strossen*, *supra* note 20 at 807.

crime was deemed an aggravated felony and who would have been otherwise eligible for a discretionary waiver.³⁰⁸ The few courts that have addressed the issue since *Beharry* have staunchly refused to extend the reasoning to individuals who do not meet this criterion.³⁰⁹ In addition, other jurisdictions are not bound to take a similar, compassionate approach. In fact, one court has already disagreed with Judge Weinstein's reasoning.³¹⁰ Thus, the majority of "aggravated felons"—all but those lucky few whose cases depend upon this ambiguous provision and who appear in front of a court willing to take a bold step like Judge Weinstein's—are still left with essentially no relief.

CONCLUSION

For lawful permanent residents convicted of aggravated felonies, deportation is perpetual exile.³¹¹ Judge Learned Hand noted in one deportation case,

[W]e think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.³¹²

Under current immigration law, U.S. lawful permanent residents convicted of minor crimes may be driven from the only home they know—leaving their families, careers, and friends behind.³¹³ Moreover, this is not a temporary situation—once deported, a convicted aggravated felon can never return to the United States.³¹⁴ These laws are not only cruel, but also wildly inconsistent, meting out the same pun-

³⁰⁸ See *Beharry*, 183 F. Supp. 2d. at 604-05.

³⁰⁹ See generally *Alvarez-Garcia v. INS* 234 F. Supp. 2d 283 (S.D.N.Y. 2002); *Gonzalez-Polanco v. INS*, 2002 WL 1796834, at *8 (S.D.N.Y. Aug. 5, 2002).

³¹⁰ *Guerra & Guerra v. Ashcroft*, 2002 U.S. Dist. LEXIS 2471, at *7 n.4 (N.D. Tex. Feb. 15, 2002).

³¹¹ See INA, 8 U.S.C. § 1182(a)(9)(A)(ii) (2000).

³¹² *U.S. ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (N.Y. 1926).

³¹³ See *supra* Part I.

³¹⁴ See INA § 1182(a)(9)(A)(ii).

ishment to lawful permanent residents who commit a misdemeanor offense as they do to undocumented non-citizens who enter the country to commit a terrorist act.³¹⁵

The European Court of Human Rights, a highly esteemed and knowledgeable tribunal, condemns as a human rights violation such arbitrary interference in an individual's private and family life.³¹⁶ In the past, United States immigration law did respect a person's ties to this country and waived deportation when those bonds were strong.³¹⁷ In 1996, however, that changed, as seemingly misplaced fear and distrust of non-citizens escalated.³¹⁸

Judge Weinstein's reasoning in *Beharry v. Reno* attempts to remedy this violation by complying with international law.³¹⁹ This approach, however, is limited because it rests on the ambiguity of a particular provision of the INA.³²⁰ When the proper interpretation of the statute is clear and unambiguous, courts may simply find it impossible to construe the statute in compliance with international law.³²¹ Therefore, to assure conformity with the fundamental right to respect for private and family life and cease this arbitrary banishment, the INA should be amended to include a balancing test that weighs the relevant interests of the non-citizen and the government.³²² Congress could meet this need by re-instituting aggravated felons' eligibility to apply for waivers of deportation and by providing for judicial review of waiver decisions, which would allow judges to apply a balancing test like that applied by the European court.³²³

This equitable change would duly recognize a fundamental human right, as well as provide for much needed harmonization of domestic and international law.³²⁴ At present, when immigration reforms

³¹⁵ See Bennett, *supra* note 8, at 1702-03; Marley, *supra* note 6, at 862, 866.

³¹⁶ See *supra* Part II.

³¹⁷ See *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (1978).

³¹⁸ See *supra* notes 89-101, 114-124 and accompanying text.

³¹⁹ See generally *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

³²⁰ See *id.* at 604-05.

³²¹ See *id.* at 604 (noting that Congress may override norms of customary law if it has expressed a clear intent to do so, but absent this clarity, a court should construe a statute in compliance with international law).

³²² See Convention, *supra* note 17, at 230; ICCPR, *supra* note 17, at 177; *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 1179, 1187 (2001) (Eur. Ct. H.R.); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, 644 (1999) (Eur. Ct. H.R.); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 752 (1997) (Eur. Ct. H.R.); *Bouchelkia v. France*, App. No. 23018/93, 25 Eur. H.R. Rep. 686, 707 (1997) (Eur. Ct. H.R.).

³²³ See *supra* notes 74-78, 111-12, 163-64 and accompanying text.

³²⁴ See Convention, *supra* note 17, at 230; ICCPR, *supra* note 17, at 176, 177; *Beharry*, 183 F. Supp. 2d at 599, 604-605.

based on fear and racial intolerance are an integral part of the political agenda, lawmakers and the citizens they represent should be especially aware of three things. First, when immigration laws are passed in the wake of terror and anti-immigrant sentiment, lawful permanent residents are likely to suffer the same fate as the terrorists. Second, the United States has a duty—both legally and morally—to comply with international human rights norms, rather than bend to reactionary political pressures. And finally, lawmakers must realize that Xuan Wilson, Al Correa, Emma Mendez De Hay, and Cesar Chamorro are Americans, even though their passports may say otherwise. What makes an American is not contained within a document, but depends upon an individual's relationship to this country—the very relationship that is ignored in the face of increasingly draconian immigration laws.

