United States Immigration Law as We Know It: *El Clandestino*, The American Gulag, Rounding Up the Usual Suspects[1]

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[1] The title recalls President Clinton's campaign promise, which he fulfilled, to "end welfare, as we know it." *See* Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345 (2004). Clinton can likewise take credit for ending most of the due process protections of U.S. immigration law in the legislation he reluctantly signed in 1996. Manu Chao's hit songs, *Clandestino* and *Desaparecido*, well describe the plight of America's fugitive class. MANU CHAO, CLANDESTINO (EMI International 2001). *American Gulag* is the title of Mark Dow's recent book on America's unprecedented use of imprisonment as its default mechanism for immigration control. MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004). Finally, "rounding up the usual suspects" refers to the racial profiling and counterproductive policies of former Attorney General John Ashcroft's contribution to the "war on terror." Attorney General Announcement with President Bush, Secretary of State Powell and FBI Director Mueller (Oct. 10, 2001), *available at* http://www.usdoj.gov/ag/speeches2001.html.

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The Board of Immigration Appeals generally follows A Uniform System of Citation ("Bluebook"), but digresses from that convention in certain instances. According to Board guidelines: "All precedent decisions should be cited as 'Matter of.' The use of 'In re' is not favored." Board of Immigration Appeals Practice Manual, Appendix J (Citation Guidelines), *available at* www.usdoj.gov/eoir/bia/qapracmanual/pracmanual/AppJ.pdf at J-3 (last visited Feb. 15, 2005). To conform to the Bluebook, this BIA guideline will not be followed in this Article. Instead, all BIA precedent decisions will be cited "In re."

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INTRODUCTION

This Article is dedicated to the millions of immigrants in the United States who remain in this country "without papers" or who the government has now determined are removable, subject to lengthy detention, or subject to imprisonment for immigration violations. While the culpability of this fugitive sector of our labor force and communities is debated, it cannot be denied that our economy and, indeed, our society have always consisted of large numbers of noncitizens whose legal status depends on the political climate of the time. The politics of immigration are not so simple as conservative versus liberal in that each political party has sharply differing views of immigration. Rather, what is more remarkable about our age is the absence of morality in our political discourse over immigration. The well-heeled anti-immigrant lobbies exploit xenophobic fears while couching their argument against "illegal immigration." Yet, these same lobbies seek to increase the numbers of those subject to removal and to restrict avenues that would provide legalization.

Although our culture is multiethnic, morality is often confused with values that are said to be driven by a Judeo-Christian ethic. Even this limited body of beliefs, however, emphasizes the importance of showing kindness to strangers. The Old Testament specifically addresses the morality of treating foreigners in our midst: "When a stranger sojourns with you in your land, you shall do him no wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall

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love him as yourself. . . ."[2] In the New Testament, Jesus is quoted as saying, "I was a stranger and you took me in. . . . Inasmuch as you have done it unto the least of these, my brethren, you have done it to me."[3]

The four parts of this Article address how current immigration policy disregards such moral mandates. Part I seeks to put a human face on the growing fugitive class created by the lifetime criminalization of immigrant workers who are convicted of criminal offenses. Part II describes the U.S. legislation from 1988 to 2003 which has created the legal environment described above. Part III discusses the nature of the American gulag of immigrant imprisonment. Finally, Part IV describes the USA PATRIOT Act, which follows the pattern of detention and criminalization of immigrants, this time in the name of fighting terrorism.

I. WHO ARE "*LOS CLANDESTINOS?*"

This part is dedicated to the hundreds of thousands of immigrant workers who cannot support themselves or their families in their native lands. These workers risk life and limb to enter developed countries for a less miserable existence.[4] Their plight is not of their own making, but is due to savage economic disparities;[5] political corruption, often in the

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[2] *Leviticus* 19:33-34 (Revised Standard Version).

[3] *Matthew* 25:34.

[4] Over 25% of the Mexican population suffers from malnutrition, and over 50% of the rural population, the area from which most undocumented Mexican immigrants come to the United States, live in poverty. Miriam de Regil, *Bajo la Linea de la Pobreza 52% de los Mexicanos* [*52% of Mexicans Live Under the Poverty Line*], EL FINANCIERO, July 2, 2004, at 9 (citing report of Economic Commission for Latin America of World Bank (CEPAL1)).

American employers have hired Mexican workers for well over a century, and there is no evidence that making their lives in the United States more miserable has or will alter this pattern. Although the immigration legislation described in this Article has raised the number of deportations, it has not slowed unlawful immigration. However, border deaths have increased, and immigrants who previously frequently returned to Mexico no longer do so. WAYNE CORNELIUS, EVALUATING ENHANCED U.S. BORDER ENFORCEMENT (Ctr. for Comparative Immigration Studies, U.C. San Diego, Working Paper No. 92, 2004), *available at* www.migrationinformation.org/USfocus/display.cfm?ID=223; *see, e.g.*, JAMES D. COCKCROFT, OUTLAWS IN THE PROMISED LAND: MEXICAN IMMIGRANT WORKERS AND AMERICA'S FUTURE (1986); PETER KWONG, FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR (New Press 1999) (1997); RUBEN MARTINEZ, CROSSING OVER: A MEXICAN FAMILY ON THE MIGRANT TRAIL (Metro. Books 2001); JOSHUA HOTOKA ROTH, BROKERED HOMELAND: JAPANESE BRAZILIAN MIGRANTS IN JAPAN (Cornell Univ. Press 2002).

[5] *See* World Bank, *World Development Indicators, 2.8: Distribution of Income or Consumption, available at* http://www.worldbank.org/data/wdi2001/pdfs/tab2_8.pdf (last visited Nov. 8, 2004).

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form of "campaign contributions";[6] and a rigged global trading regime.[7] The rich continue to get richer while the poor may get prison[8] (or

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[6] Corporate interests dominate the American political process and its media conglomerates whose special needs easily trump the public interest. *See generally* ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY (1999); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY (1993). Mexico's emerging democracy seems destined to follow the U.S. model of expensive and lengthy television campaigns, a game that only billionaires or those beholden to corporate interests can play. A prime example is the North American Free Trade Agreement's ("NAFTA") agriculture agreements, which permitted U.S. grain producers to flood Mexico with their subsidized products, thereby guaranteeing massive emigration of small and subsistence farmers who were driven from their ancestral lands by the millions. The well-heeled U.S. grain lobby, whose wealth is in large measure due to agricultural subsidies and protectionism, easily prevailed over the concerns of the millions of small Mexican farmers. Such one-sided reforms threaten the very existence of these farmers. The widely expected result was the mass emigration of these small farmers to Mexico's swollen cities and to the United States. *See* S. Robinson et al., *Agriculture Policies and Migration in a U.S.-Mexico Free Trade Area: A Computable General Equilibrium Analysis*, 15 J. POL'Y MODELING 673 (1993).

Despite the foreseeability of the mass migration of such a large sector of the Mexican population, their plight was blatantly ignored in a manner that would have never occurred in a thriving democracy (e.g., witness the fierce and effective resistance to neoliberal agricultural reforms in France and Japan). *See* James L. Kenworthy, *The Unraveling of the Seattle Conference and the Future of the WTO*, 5 GEO. PUB. POL'Y REV. 103, 108 (2000); Gregory C. Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 16 n.146 (2001). While other factors may have contributed to the increased migration, such as the peso devaluation and rural migration to the cities, it was the powerful economic sectors that controlled the terms of the free trade debate. The Zapatista rebellion commenced on January 1, 1994, the day NAFTA took effect, and its leaders cited it as their primary impetus for taking up arms. *See generally* Andy Gutierrez, *Codifying the Past, Erasing the Future: NAFTA and the Zapatista Uprising of 1994*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 143 (1998).

[7] The World Trade Organization ("WTO") and NAFTA partially liberalized trade in goods, services, and capital movement but pointedly ignored the need to allow free workers' movement. Jagdish Bhagwati, Colombia University's articulate advocate for genuine free trade in his classic work, *Protectionism*, has condemned these agreements as simply reflective of the status quo. Dominant countries known as the Quad (United States, Canada, Japan, and the European Union) aggressively seek access for their goods, services, and intellectual property in newly industrialized countries while protecting their uncompetitive sectors from competition. There are many notorious examples of this rigged system. A lawful example would be the maintenance of a heavily subsidized agricultural sector in the Quad that effectively excludes competition from less developed countries. An unlawful example would be President George W. Bush's illegal imposition of quotas on foreign steel. President Clinton continued to resist implementation of NAFTA's transportation provisions until a NAFTA panel unanimously found the U.S. measures violative of the treaty. *See* JAGDISH BHAGWATI, PROTECTIONISM (MIT Press 1988); Benjamin W. Putnam, *The Cross-Border Trucking Dispute: Finding a Way Out of the Conflict Between NAFTA and U.S. Environmental Law*, 82 TEX. L. REV. 1287, 1293 (2004); *WTO Decision Striking Down U.S. Steel Safeguard Measures*, 98 AM. J. INT'L L. 179, 179 (2004).

[8] *See generally* JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON (1998); *infra* Part II.E. This reality is so entrenched in the U.S. criminal justice system that

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immigrant detention as the case may be) for escaping their misery to enter the modern-day Babylon of developed countries, where employers eagerly await this unlimited supply of cheap labor.[9] The bittersweet lyrics of Manu Chou in his smash hit, "Clandestino," tells their story:

> Alone I go with my sorrow
> Alone I go with my sentence,
> To run is my destiny
> to escape the law,
> Lost in the heart
> of the great Babylon,
> they call me clandestine
> because I have no papers.
>
> To a city of the north
> I went to work,
> I left my life
> Between Ceuta and Gibraltar,
> I'm a stingray in the sea
> a ghost in the city,
> My life is forbidden
> So says the authority.

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there has been little commentary about the appalling fact that the Enron criminal conspiracy alone, which resulted in a $60 billion rip-off of pensioners, employees, and household consumers of electricity, will not be considered as serious an offense as a robbery of the corner liquor store. Few robberies result in lifetime injuries while the Enron conspiracy devastated thousands of lives. The Enron crimes resulted in a loss three times the annual property loss for burglary, robbery, and auto theft, some $18 billion, in the United States. The Enron conspirators may, at worst, draw a few years in prison while blue-collar property criminals or petty drug dealers are often sent away for much longer terms. In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the United States Supreme Court sustained the constitutionality of the sentence of 50 years to life for theft of six videocassettes. Lea Fastow, wife of Enron CFO Andrew Fastow, will serve her one-year sentence before her husband begins his ten-year term so that one parent will always be with their young children. *See Enron CFO's Wife Sentenced*, CBS NEWS (June 7, 2004), *available at* http://www.cbsnews.com/stories/2004/06/07/national/main621521.shtml. *See generally* DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE (1996) (documenting that corporate conspiracies resulting in the loss of lives of workers compelled to work in dangerous conditions, or that unlawfully devastate the environment, are rarely prosecuted).

[9] Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 253 (2003); Laura C. Oliveira, *A License to Exploit; The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 171 (2002).

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I am the lawbreaker
clandestine black labor
clandestine Peruvian
clandestine African
illegal marijuana.[10]

A. *Pablo, Jose, and Maria*

To illustrate the harsh reality and increasingly fugitive character of the lives of immigrant workers, fictionalized composites of three recent cases follow. These stories are the everyday product of the combination of U.S. reliance on immigrant workers and the harsh and unforgiving legal environment that awaits them. They are not unusual.

1. Pablo

Pablo is a Guatemalan national who immigrated to the United States as a refugee in the early 1990s. He immigrated to flee the death squads who considered him subversive for his activities in support of a teachers union.[11] He later adjusted his status to a lawful resident alien.[12]

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[10] *See* MANU CHAO, *supra* note 1. These are the lyrics as they appear in their original Spanish. The English translation is by the author.

Solo voy con mi pena
sola va mi condena,
Correr es mi distino
para burlar la ley,
Perdido en el corazon
de la grande Babylon,
Me dicen el clandestino
por no llevar papel.

Para una cuidad del norte
yo me fui a trabajar,
Mi vida la deje
entra Ceuta y Gibraltar,
Soy una raya en el mar
fantasma en la ciudad,
Mi vida va prohibida
Dice la autoridad.

yo soy que quebra la ley
mano negro clandestino
peruano clandestino
africano clandestino
marijuana ilegal

[11] The use of death squads to liquidate political opponents during Guatemala's civil war during the 1980s forced thousands to flee. Many of these refugees illegally entered the United States and later obtained political asylum. Although President Clinton apologized on behalf of the United States for its role in the bloody civil strife in Guatemala, when the Central Intelligence Agency ("CIA") overthrew a democratically elected government in 1954, this does not prevent the deportation of Guatemalans, like Pablo, back to Guatemala. For an account of the CIA's role in the overthrow, see STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1983). In *American Baptist Churches in the U.S. v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989), the government stipulated that for years it had so systematically and improperly denied Central American asylum that it agreed to rehear them. As a result of the immigration reforms described herein, the United States is deporting to their native lands large numbers of Central Americans who have trouble assimilating and are likely to become members of gangs or would simply carry their U.S. gang culture home with them. *See Bringing It All Back Home*, THE ECONOMIST, May 20, 2004, at 31. For an excellent account of the story of a

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Last year, while Pablo was visiting a friend, the police raided his friend's apartment for marijuana sales. The police arrested Pablo, and prosecutors charged him with conspiring to possess marijuana for sale. When Pablo told his attorney that he knew nothing about marijuana sales, the attorney told him that the jury would never believe him. The attorney further advised that because the prosecutor would not oppose probation, Pablo should just plead guilty and get it over with.[13] Pablo asked whether he would lose his green card (lawful residency). The attorney replied that he would not because he was in the United States legally. Pablo followed the advice and pled guilty. Immediately thereafter, the immigration authorities who filed a Notice to Appear detained him, commencing removal proceedings.

Pablo's common-law wife (a lawful permanent resident from Guatemala) contacted a different criminal defense lawyer that a friend had recommended. The lawyer told Pablo that they could return to

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Cambodian deportee, see Deborah Sontag, *In a Homeland Far From Home*, N.Y. TIMES, Nov. 16, 2003, at 48.

[12] *See* 8 U.S.C. § 1159 (1952).

[13] In the federal system and in most states, immigration consequences of a criminal conviction are considered collateral consequences and, thus, neither defense counsel nor the courts are required to warn immigrants of such consequences despite their severity and virtual inevitability. For example, the Ninth Circuit characterizes deportation consequences as "collateral" because the "deportation proceeding is one over which the trial judge had no responsibility or control." United States v. Garrett, 680 F.2d 64, 66 (9th Cir. 1982); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976).

In California, courts have ruled that the Sixth Amendment right to effective assistance of counsel requires counsel to investigate and inform noncitizens of the immigration consequences of entering a plea. *In re* Resendiz, 105 Cal. Rptr. 2d 431 (2001); People v. Bautista, 115 Cal. App. 4th 229 (2004); People v. Soriano, 240 Cal. Rptr. 328 (Ct. App. 1987). In a small minority of states (including California), the court is required, usually by statute, to warn defendants of possible adverse immigration consequences of entering a plea. *See* CAL. PENAL CODE § 1016.5(c) (West 2004); People v. Superior Court (Zamudio), 96 Cal. Rptr. 2d 463, 476 (2000). In *Mojica v. Reno*, 970 F. Supp. 130, 176 (E.D.N.Y. 1997), the court lists such statutes from 13 states. Such boilerplate warnings, while a step in the right direction, are usually part of a complex oral or written waiver formality before entry of a plea fails to meaningfully inform the noncitizen defendant of the immigration consequences. Criminal court personnel are buried in cases and often anxious to extract a guilty or no contest plea. Thus, they frequently gloss over the immigration consequences as benign or unknowable, which is rarely the case. While Pablo's criminal conviction and deportation are subject to attack, such legal proceedings are expensive and beyond the resources of most lawful immigrant workers.

The rest of the states and the federal courts have usually rejected such claims, whether due to the failure of defense counsel, the courts, or both, to warn noncitizen defendants of such claims. *See also* Scott A. Kozlov, *Deportation as a Collateral Consequence of a Guilty Plea: Why the Federal Precedent Should be Reevaluated*, 26 VAL. U. L. REV. 895 (1992); 90 A.L.R. FED. 748 (1990 & Supp. 1991); 65 A.L.R. 4th 719 (1988).

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court and withdraw his guilty plea because his former lawyer failed to properly advise him about immigration consequences. However, the fees for this service would be several thousand dollars. Pablo did not have such resources, as his time in jail prevented him from working in his landscaping business. At that time, he was facing a removal hearing, was in immigration detention, and did not have funds for an immigration lawyer.[14]

The immigration judge, government lawyer, and volunteer lawyer all agreed that nothing could be done to prevent Pablo's removal to Guatemala, as he had been convicted of illicit trafficking of drugs, an "aggravated felony."[15] The immigration judge ordered him removed. He was deported, but came back to be with his common law wife and his citizen child. He needed to return to his job as a landscaper to support his family and pay rent. Later, another immigration lawyer told him that he did have a defense to the deportation — withholding of removal due to the threat of persecution in Guatemala. The lawyer also told him that although he might now raise this defense in a motion to reopen, it was probably too late and, in any case, would cost thousands of dollars in legal fees.[16] Pablo saw no choice but to continue to live underground. He moved with his family and changed his name.

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[14] The Executive Office of Immigration Review, the administrative office of the Board of Immigration Appeals ("BIA") in the Department of Justice ("DOJ"), reports that more than 50% of the noncitizens who are ordered removed are not represented by counsel. EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICAL Y.B. 2002 app. G-1 (Apr. 2003) (stating that there is no right to appointment of counsel at public expense).

[15] Because Pablo was convicted of an aggravated felony (trafficking in controlled substance), as provided in 8 U.S.C. § 1101(a)(43)(B) (2000), he was subject to removal, as provided in 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

[16] If presented during his removal hearing, he might have been able to prevail on an application for withholding of removal, as provided in 8 U.S.C. § 1231(b)(3) (2000). However, John Ashcroft has ruled, in an opinion binding on the immigration courts, that a noncitizen convicted of a drug trafficking offense is precluded from this remedy because he has been convicted of a particularly serious crime. *In re* Y-L-, 23 I. & N. Dec. 270 (B.I.A. 2002). To seek to reopen the matter now, Pablo or his attorney would have to overcome very difficult legal hurdles such as filing a motion to reopen the order of removal on grounds of ineffective assistance of counsel. *In re* Lozada, 19 I. & N. Dec. 637 (B.I.A. 1998). But, even if well-presented, it is highly likely that the BIA would deny the motion on the grounds that it was not filed within 90 days of the order of removal. *See* 8 U.S.C. § 1229a(c)(6) (2000); Betouche v. Ashcroft, 357 F.3d 147 (1st Cir. 2004). While the Ninth Circuit might reverse through the doctrine of equitable tolling, such litigation is far too complex and expensive for most noncitizen defendants. Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001); Varela v. INS, 204 F.3d 1237 (9th Cir. 2000).

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2. Jose

Jose, a Mexican national, is a construction worker. He obtained a green card (lawful permanent resident status) in 1989, through the amnesty legalization program of 1986.[17] He has been residing in the United States since 1977. Jose is Pablo's friend and often refers customers to Pablo for landscaping jobs on new and remodeled homes.

One night, Jose drank too much at a bar, and the owner physically ejected him from the premises. Jose returned after closing and, in his drunken stupor, broke into the bar, intending to inflict some minor property damages as payback for the humiliation of being thrown out. He threw the nearly empty cash register out of the window, and a few coins spilled out onto the ground. There was no other damage. The police arrested Jose near the scene and he readily confessed.

Jose's lawyer advised him to plead guilty to a misdemeanor second-degree burglary charge. The lawyer thought the judge would sentence Jose to only a few months in jail and issue an order of restitution.[18] The lawyer also assured Jose that because it was a misdemeanor, he did not have to worry about being deported.[19] However, under the terms of the plea agreement, the judge could impose a sentence of up to one year. The rural county judge, known for his harsh sentencing of immigrants, sentenced Jose to the one year maximum in the county jail.[20] He was

[17] In 1986, Congress enacted the Immigration Reform and Control Act, which provided for the legalization of noncitizens who could establish residency beginning before 1982 or agricultural labor during 1985. 8 U.S.C. § 1160 (2000) (agricultural labor during 1985); 8 U.S.C. § 1255a (2000) (residency before 1982).

[18] In fact, Jose had a defense to the charge that his lawyer simply missed or ignored. Burglary is the breaking and entering of a structure with the intent to commit a felony therein. Where, as here, the defendant was either too drunk to form the required specific intent or his intent was not to commit larceny or a felony therein, the necessary elements of burglary are missing. *See* CALJIC No. 4.21 (July 2004); People v. Phelan, 93 Cal. 111, 113 (1892); People v. Rivera, 162 Cal. App. 3d 141, 145-46 (1984); *cf.* People v. Webb, 25 Cal. App. 2d 130, 132 (1938).

[19] The argument that a misdemeanor cannot be an aggravated felony has not prospered. *See* United States v. Graham, 169 F.3d 787 (3d Cir. 1999) (whether an offense is aggravated felony, for purposes of immigration and deportation, is determined by actual term of imprisonment imposed for that offense, not by statutory minimum for that offense, so lack of statutory minimum for particular offense does not preclude finding that offense was aggravated felony). The Third Circuit has observed that the one-year sentence demonstrates the aggravated nature of the offense. Bovkum v. Ashcroft, 283 F.3d 166, 171 (3d Cir. 2002).

[20] Because the court sentenced Jose to one year for burglary, Jose has been convicted of an aggravated felony. 8 U.S.C. § 1101(a)(43)(G) (2000). By the simple expedient of asking for a 364-day sentence, the aggravated felony would have been avoided. He might also be deemed to have committed a crime of violence based on the force used against property. Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000). A one year term of

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deported. His immigration lawyer told him nothing could be done because he had been convicted of an "aggravated felony."[21] Jose had not been to Mexico since he was a child and found it impossible to survive. He came back illegally to the United States to be with his extended family and sixteen-year-old son, who is a citizen. Jose is separated from his son's mother, also a citizen, who will remain in the United States. His family, including his elderly parents, brother Mariano, uncles, aunts, nephews, and nieces, are all lawful permanent residents or U.S. citizens living in the United States.[22]

3. Maria

Maria is Jose's sister-in-law. Sometime after the deportation and return of Pablo and Jose, she gave them a ride to the store and had a fender bender en route. She panicked because she did not have a driver's license. The authorities had refused to give her a license because she did not have lawful immigration status despite her marriage to Mariano, Jose's brother, who is a U.S. citizen. She also feared for Pablo and Jose. They had told her that any police check on their identity would lead to disaster. Maria drove away from the accident scene.[23]

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imprisonment for a crime of violence is likewise an aggravated felony. 8 U.S.C. § 1101(a)(43)(F) (2000). But, again, a 364-day term would not be considered an aggravated felony.

[21] His immigration lawyer was correct, insofar as immigration remedies are concerned, in that the only remedies available to one convicted of an aggravated felony are a claim for withholding or removal based on fear of persecution, or a clear probability that the government will torture him — claims highly unlikely for a Mexican national. The only other possible immigration remedy, that of adjustment of status and a waiver of criminal grounds of admissibility, is unavailable to a lawful permanent resident convicted of an aggravated felony. *See* 8 U.S.C. §§ 1182(h), 1225 (2000). However, if Jose could have raised several thousand dollars for a collateral attack on his conviction, he might have been able to vacate his conviction because the facts indicate that the necessary elements for a burglary conviction simply were not present. Moreover, if the burglary conviction took place in a state that allows collateral attacks on convictions due to the failure of defense counsel to adequately research and bargain to avoid the adverse immigration consequences, then such an attack may also lie. However, as noted above, collateral attacks are expensive, and most noncitizen defendants lack the resources to pursue these remedies.

[22] The plight of Pablo and Jose would have been avoided had they naturalized and become U.S. citizens, as citizens may not be deported. *See* State v. Mendoza, 638 N.W.2d 480, 482 (Minn. Ct. App. 2002).

[23] Several police chiefs and other law enforcement officials have opposed prohibiting the issuance of driver's licenses to undocumented workers because it increases hit and run offenses and hampers law enforcement's ability to know who is driving on the nation's highways. *See* Erin Kragh, *Forging a Common Culture: Integrating California's Illegal Immigrant Population*, 24 B.C. THIRD WORLD L.J. 373, 392 (2004) (citing Eduardo Porter, *No Going Back: Tighter Border Yields Odd Result: More Illegals Stay*, WALL ST. J., Oct. 10, 2003, at A1).

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Witnesses wrote down her license plate number, and soon, a squad car was right behind her. After briefly speeding up, she pulled over. She was charged with reckless driving and leaving the scene of an accident. She was later sentenced to one year in prison.[24] Although Maria was married to a U.S. citizen, she could not adjust her status because she entered without inspection, and her marriage took place after the latest deadline for such adjustments.[25]

B. *Making Workers Fugitives*

Pablo, Jose, and Maria have always had excellent work records and have no other arrests. Indeed, former employers and coworkers have signed petitions on their behalf asking that they not be deported. Yet, each has now been convicted of a crime that prevents them from acquiring legal status. Pablo's and Jose's cases are all too familiar to immigration attorneys who specialize in deportation defense. In both cases, the noncitizen defendants had a defense to the aggravated felony as charged and could have easily bargained for a disposition that

[24] In *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), *amended by* 366 F.3d 691 (9th Cir. 2004), the court held that a conviction for violation of California Vehicle Code Section 2800.2, driving a vehicle "in a willful or wanton disregard for the safety of persons or property," was a crime of violence. A one-year term of imprisonment for such offense makes it an aggravated felony. 8 U.S.C. §1101(a)(43)(F) (2000). Now Maria is permanently barred from the United States as someone convicted of an aggravated felony. While the Department of Homeland Security ("DHS") may waive such inadmissibility under the pertinent statute, new regulations bar the waiver for crimes of violence. 8 U.S.C. §§ 1182(a)(9)(A), 1182(h) (2000); *see* United States v. Fernandez-Antonia, 278 F.3d 150, 160 (2d Cir. 2002).

[25] While Maria, as the spouse of a U.S. citizen, qualifies for lawful permanent status, she is ineligible to adjust her status within the United States because she entered the country clandestinely. 8 U.S.C. § 1255(a) (2000). For many decades, the solution for someone like Maria was simply to return to her country of nationality and immigrate through consular processing at the United States embassy or consulate with jurisdiction over her residence. Effective April 1, 1997, Congress created a harsh and indefinite limbo for noncitizens like Maria — barring them from consular processing for 10 years if they leave the United States to do so, and if they have been in the United States for over one year. 8 U.S.C. § 1182(a)(9)(B) (2000); Immigration Naturalization Act ("INA") § 212(a)(9)(B) (West 2000). While the DHS may grant her advance permission to immigrate lawfully, such an application may not be made without exposing oneself to deportation or being excluded at the border. Thus, a noncitizen in Maria's situation has no meaningful option but to live underground until Congress extends the current deadlines specified in the Immigration and Nationality Act § 245(i), 8 U.S.C. § 1255(i) (2000) that permit adjustment of status within the United States upon payment of a $1000 fee. Section 245(i) currently restricts adjustment to noncitizens who filed the necessary application before April 30, 2001. Thousands of noncitizens like Maria, who qualify for lawful status, may neither apply for it inside or outside of the United States without risking indefinite separation from their spouse or family.

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avoided the aggravated felony.[26]

Criminal defense counsel, whether public defenders or private, are generally unfamiliar with immigration law, which is often said to rival income tax law in its complexity. When asked about immigration consequences, many consult with immigration lawyers. Others, however, anxious to get the case over with, gloss over their ignorance of the law or affirmatively misrepresent the consequences. Thus, thousands of plea bargains that guarantee the noncitizens banishment from the only home they have ever known are struck every day in the United States.[27]

The U.S. criminal justice system is designed to persuade defendants that it is in their interest to plead guilty, as it may be in most cases involving citizens. Often, lawyers engaged in plea bargaining carefully evaluate the strength of the defense and the risk of going to trial. In this sense, they greatly assist the client in making an informed decision about whether to take the deal.[28] In the case of noncitizens, however, the equation is often entirely different. Many, if not most, noncitizen defendants enter pleas with only the vaguest notion of how it might affect their immigration status. Often, their counsel or the court misinforms them. Typically, the direct criminal consequences are minimal (i.e., probation, a fine, or a few days in jail). For a low-income

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[26] In Pablo's case, he claimed no knowledge of the marijuana sales in an apartment that was not his. Certainly this weakened the prosecution's case. Alternative pleas such as accessory after the fact, so long as the term of imprisonment did not exceed one year, would have avoided the aggravated felony conviction. *In re* Batista-Hernandez, 21 I. & N. Dec. 955 (B.I.A 1997) (stating imprisonment for felony under 8 U.S.C. § 4, or "accessory after the fact" to controlled substance offense, under California Penal Code Section 32, is not deemed controlled substance offense). However, if the court imposes a term of imprisonment of one year or more, it would be an aggravated felony as obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) (2000). In California, pleading to the more serious "transportation" or "offering-to-sell" charge avoids the aggravated felony, and it is malpractice not to so bargain. People v. Bautista, 115 Cal. App. 4th 229 (2004).

[27] In 2003 there were 244,897 removal proceedings. *See* EXECUTIVE OFFICE OF IMMIGRANT REVIEW, U.S. DEP'T OF JUSTICE, FY 2003 STATISTICAL Y.B. (Apr. 2004), *available at* http://www.usdoj.gov/eoir/statpub/fy03syb.pdf (last visited Nov. 8, 2004).

[28] The Rules of Professional Responsibility make it abundantly clear that it is the client, not the attorney, who must decide whether to take the deal or insist on his or her constitutional right to go to trial, and that the attorney must advise the client of the legal consequences of pleading guilty. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004); STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-1.4 (3d ed. 1999); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2543 (2004). In the author's experience, some overworked defense counsel may leave the impression that a plea bargain is the only real alternative, and that going to trial is just too risky, without fully exploring that alternative. This can be particularly misleading if the lawyer does not advise the noncitizen of the immigration consequences of entering the plea, which are likely to be of much greater consequence to the defendant.

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defendant who cannot post bail, the promise of being immediately released from custody for "time served" is an overwhelming inducement for pleading guilty.[29] While some states and an occasional federal court may permit such defendants to withdraw, or seek to vacate their conviction on grounds of ineffective representation or failure of the court to advise them of immigration consequences, the courts do not appoint counsel for such collateral attacks. Furthermore, few noncitizen defendants have the resources for such litigation.[30] Thus, noncitizens who waive their right to trial without awareness of the immigration consequences have no effective remedy.[31]

Following the disposition of their criminal convictions, noncitizens who face deportation based on a conviction are subject to mandatory detention during the entire pendency of their removal proceedings. This is the case even if they prevail at the immigration judge level and if the government appeals.[32] This harsh policy persuades many noncitizens to forego whatever defense they may have to the removal proceeding and to accept deportation. In any case, even for noncitizen defendants who have family and assets in the United States, and those who have lived in the country for years, immigration lawyers may have no choice but to tell them that there is little they can do short of referring them to specialists for collateral attacks on their conviction. This usually entails expensive, lengthy, and uncertain litigation. In the meantime, they have no right to bail from their immigration detention.

Marginalizing the impact of deportation has a long historical pedigree in this country. In an 1893 case, a divided Supreme Court (5-4) ruled that deportation is not punishment and, therefore, raises no due process

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[29] *See* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1060 (2002).

[30] Even for those jurisdictions that do, the BIA has ruled that the setting aside of a conviction solely due to immigration hardship has no effect on the conviction as a grounds for deportation. *In re* Pickering, 23 I. & N. Dec. 621 (B.I.A. 2003). Thus, the conviction must be set aside on constitutional or legal grounds that render the entry of the plea subject to attack.

[31] Because it is so difficult, if not impossible, to unring the bell of a guilty or no contest plea (to a removable offense) through post conviction relief, it is extremely important to noncitizen defendants that their attorneys research this matter so that the defendants know the consequences of a plea and that counsel may bargain to avoid or lessen adverse immigration consequences. *See also* CLARK BOARDMAN, IMMIGRATION LAW AND CRIMES (1999); GORDON ET AL., 6 IMMIGRATION LAW AND PROCEDURE § 71.05 (1999). *See generally* KATHERINE A. BRADY ET AL., CALIFORNIA CRIMINAL LAW AND IMMIGRATION (2002); Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CAL. L. REV. 541, 583 (2004).

[32] *See* 8 U.S.C. § 1226(c) (2000); Demore v. Kim, 538 U.S. 510 (2003).

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claims.[33] Justice Brewer's sharp dissent quotes James Madison, author of the Bill of Rights:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, — a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind;. . . if, moreover, in the execution of the sentence against him, he is to be exposed,. . . possibly to vindictive purposes, which his immigration itself may have provoked, — if banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[34]

The Court later reversed itself, holding that deportation does invoke due process protections.[35] However, it has never questioned the doctrine that deportation is not punishment and, thus, whatever due process is due varies with the times.

The process that is due immigrants in deportation hearings has evolved from its due process lite origin of *Yamataya v. Fisher* [36] to the more exacting standard of the "essential standards of fairness" articulated in *Bridges v. Wixon*.[37] The Supreme Court is now returning to the *Yamataya* due process lite standard. The plurality opinion in *Demore v. Kim* rejected the minimal due process protections of individualized bail hearings. Justice Souter's dissent pointed out that denying persons facing deportation proceedings individualized bail hearings had the obviously coercive effect of forcing them to choose between due process and freedom from immigration detention.[38] Chief Justice Rehnquist was at his dismissive best in observing that "there is no constitutional prohibition against requiring parties to make [difficult] choices."[39]

The system, as described, causes wholesale denial of minimal due process protections for a noncitizen defendant who unknowingly seals his fate by entering ill-advised pleas. Having no realistic post conviction

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33 *See* Fong Yue Ting v. United States, 149 U. S. 698 (1893).

34 *Id.* at 740-41.

35 *See* Yamataya v. Fisher ("The Japanese Immigrant Case"), 189 U.S. 86, 101 (1903) (stating that administrative officers, when executing provisions of statute involving liberty of persons, may not disregard fundamental principles that inhere in due process of law).

36 *Id.* Even though the Court held that due process is applicable, it found no such violation despite the absence of an interpreter. *Id.* at 101-02.

37 Bridges v. Wixon, 326 U.S. 135, 154 (1945).

38 Demore v. Kim, 538 U.S. 510, 530 n.14 (2003).

39 *Id.* at 541.

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remedy, he awaits inevitable deportation (or at the very least is subject to a lengthy and debilitating detention during the removal process). Worse yet, if he returns to the United States — the only home he has ever known — he faces lengthy imprisonment in the federal Bureau of Prisons.[40]

Why has this nation of immigrants become so hostile to the more recent arrivals? There is no simple explanation. In part, the very use of the term "illegal alien"[41] suggests someone who is not only inferior to a citizen, but is an illegal person (as Manu Chao sings, like walking marijuana), justifying any abuse that may come their way. Our history well documents the law's singling out of some people as being essentially different. For example, slavery was perfectly legal.[42] At first, only a few extremists, like John Brown, questioned its morality. In addition, like the South's reliance on an enslaved work force, U.S. reliance on immigrant workers has been well institutionalized for over a century.[43] Indeed, with the current low birthrate and the aging of the U.S. native population, as in Western Europe and Japan, reliance on immigrant workers, whether legal or illegal, is inevitable.[44] Employers around the world continue to prefer immigrant workers for the low paid,

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[40] See *infra* Part II for a detailed examination of the legal parameters of the creation of the fugitive class.

[41] This popular slur has no legal basis; it is not used in legislation. Even if it were, it would be a gross oversimplification of the highly complex and confusing immigration statutes which in fact permit many noncitizens without legal status to remain in the United States. At any rate, it should be noted that having a huge class of workers without lawful immigration status is as much a part of a deliberate U.S. policy as one can imagine. Otherwise, employers who offer these workers employment would be targeted for violations — but they are not. *See generally* Johnson, *supra* note 9. Indeed, the empirical data strongly suggest that employers who are dependent on undocumented workers have little fear of being caught. *See* Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1046-55, 1057, 1060 (1990).

[42] *See* Dred Scott v. Sandford, 60 U.S. 393 (1856). The legal status of slaves as not full citizens was an argument for denying the most basic of human rights and of punishing those who assisted the fugitive slaves. A similar development occurred in the 1980s during the Reagan era, when death squads linked to the U.S.-supported military sent thousands of refugees to Mexico and the United States. Also, when the "Sanctuary movement" assisted those fleeing massacres, its participants were prosecuted for aiding persons known to lack "legal" immigration status. *See generally* IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES (1985); ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION (1988); Allan Nairn, *CIA Death Squads*, THE NATION, Apr. 16, 1995, at 511-13.

[43] Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 88-90 (1998); *see also* A DAY WITHOUT A MEXICAN (Televisa Cine 2004) (satirizing society's reliance on Mexican workers and fallout when they all mysteriously disappear).

[44] *See* Kevin Yamaga-Karns, *Pressing Japan: Illegal Foreign Workers Under International Human Rights Law and the Role of Cultural Relativism*, 30 TEX. INT'L L.J. 559, 560 (1995).

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dangerous, and undesirable jobs.[45] The disparities in types of jobs, income, and potential for advancement between natives and immigrants, as well as the overall percentage of foreign-born workers in the labor force, are striking.[46] Perhaps half of these foreign-born workers are not "legal," but nonetheless form a critical part of our labor force and community. Indeed, the skewed character of the rules of international trade that liberalize the free flow of goods, capital, and services, while continuing to sanction transnational labor migration, effectively and inevitably punishes workers for simply responding to the globalized economy.[47]

Notwithstanding, well-heeled, anti-immigrant think tanks generate scapegoating analyses that blame immigrants for all society's ills. They also propose repressive and often successful legislation to make the lives of these workers as miserable as possible.[48] While Alan Greenspan dryly notes that immigrant workers have sustained the low inflation rate of the

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[45] *See id.* at 560 (noting that prosperous, well-educated Japanese are unwilling to engage in jobs they perceive to be beneath them).

[46] *See* U.S. Census Bureau, *The Foreign-Born Population in the United States: March 2002, available at* http://www.census.gov/prod/2003pubs/p20-539.pdf.

[47] Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371, 371-73, 376-78 (1998).

[48] *See* Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?* 15 T.M. COOLEY L. REV. 361, 371 (1998); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 871 (1993). Hing notes that the "restrictionist" agenda of the Federation of Americans for Immigration Reform ("FAIR" — an acronym reminiscent of the USA PATRIOT Act, *infra* Part IV) seeks to give Americans some "breathing space" to perform the "task of assimilation." Hing, *supra*, at 871. Former Colorado governor and chair of FAIR's advisory board, Richard Lamm, most recently led the failed effort to overthrow the Sierra Club's internal governance to stack its board with anti-immigrant advocates by encouraging supporters to gain voting rights by becoming Sierra Club members, and by appealing to environmental concerns that immigrants are a major drain on our country's natural resources. *See* Joey Bunch, *Sierra Club Vote Rejects Lamm*, DENVER POST, Apr. 22, 2004, at A01; *see also*, Tom Barry, *Immigration Restrictionism Gains Political Clout*, (Oct. 14, 2004), *available at* http://rightweb.irc-online.org/index.php (last visited Nov. 10, 2004). (The site also offers a number of links to articles detailing the organizational architecture, biographies of principle members, and funding sources for groups interested in restricting immigration and the social services available to noncitizens already in this country).

There is a strong link between funding for the anti-immigration (or "immigration reform") movement and the "English only" lobby. *See* Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 452 (1999) (citing JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF "ENGLISH-ONLY" 157-58 (1992) (noting single donor's contributions of nearly $6 million to both English-only and anti-immigrant causes because of donor's concern that third world countries' population explosion will undermine Anglo-dominant culture).

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past business cycle, professional immigrant bashers and politicians are quick to point fingers at them for society's problems.[49] In fact, Americans enjoy the benefits of the lower cost of the goods and services immigrants produce.

Despite our national pride in our immigrant forefathers and foremothers, the blaming of immigrants for the shortcomings of others continues unabated. Congress continues to devise devilish ways to punish immigrants. It has also been unwilling to either provide the resources necessary to impose meaningful sanctions on employers who knowingly hire the undocumented, or to enforce labor laws to deter the exploitation of immigrant workers.[50]

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[49] *See* AM. IMMIGR. L. FOUND., IMMIGR. POL'Y REP.: IMMIGRANTS KEEPING INFLATION LOW (2000), *available at* http://www.ailf.org/ipc/policy_reports_2000_pr0010.htm.

Representative Tom Tancredo from Colorado espouses extremist views on immigration reform that even President Bush cannot endorse. *See* Congressional Immigration Reform Caucus, *available at* http://www.house.gov/tancredo/Immigration/PR.2003.09.22.html (last visited Jan. 6, 2005) (quoting Bush: "I fully do not support Congressman Tancredo's Bill against H1-Bs"); *see also Lou Dobbs Tonight* (CNN television broadcast, Nov. 20, 2003), *available at* http://www.cnn.com/TRANSCRIPTS/0311/20/ldt.00.html (interviewing Tancredo about his politically popular stance on immigration reform, "[My proposed legislation bill] recognizes . . . that the primary responsibility of the federal government of the United States is not to educate anybody's children. . . . [It] is to provide security for this nation, for its people and its property").

Immigrants are regularly blamed for taking away jobs from Americans, burdening the economy and social service programs, and adding to the environmental problems. With respect to job losses and burdening the economy, the general consensus is that there is no decisive "evidence that immigrants have a sizeable adverse impact on the earnings and employment opportunities of natives in the United States." GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 62-67 (1999); JAMES P. SMITH & BARRY EDMONSTON, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION (1997).

Workers in California, where the highest percentage of immigrants have settled, may experience lower wages for entry-level low-skill positions. However, these lower costs, in Borjas' words, permit "natives who hire these workers to specialize in the goods and services that better suit their skills." BORJAS, *supra*, at 62-67. Thus, as in all neoliberal equations, free movement of capital or labor tends to enhance specialization, economies of scale, and overall economic growth, while the less competitive native workers suffer losses.

[50] Regarding labor law, see *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002). The Court held that the National Labor Relations Board may not provide undocumented persons who are not authorized to work a backpay award because federal immigration policy forecloses the Board from such a remedy. In his dissent Justice Breyer notes, "Without the possibility of deterrence . . . the Board can impose only future-oriented obligations upon law-violating employers — for it has no other weapons in its remedial arsenal." *Id.* at 154. Breyer also asks, "May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once — secure in the knowledge that the Board cannot assess a monetary penalty?" *Id.* at 155; *see also* Marianne Staniunas, Comment, *All Employees Are Equal, but Some Employees Are More Equal than Others*, U. PA. J. LAB. & EMP. L. 393, 410-11 (2004); Robert M. Worster, III, *If It's*

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While the nation's reliance on immigrant workers has increased, so has workers' vulnerability to arbitrary deportation, summary hearings without meaningful due process, detention that forces them to accept deportation just to avoid jail, and criminalization. Immigrant workers with criminal convictions are becoming a large and growing fugitive class forced to live underground, constantly fearful of detection and the dire consequences that follow.[51] Such fear is not limited to those lacking status, as their lawfully present family members must also look out for more vulnerable family members and loved ones. This is creating a social order more stratified than ever, breeding the isolation and discrimination that undermine any civic society. The anti-immigrant lobby has championed depriving children without status of public education and health care,[52] prohibiting the issuance of driver's licenses,[53] and encouraging the use of police as immigration agents.[54] Such measures will not end our reliance on foreign labor, but rather stigmatize, alienate, and isolate these workers from the society that they labor to serve so they can survive.[55]

II. LEGISLATING THE FUGITIVE CLASS

From 1988 to 2003, Congress enacted a series of laws, and three successive presidents have implemented policies, that created the fugitive class described in Part I and the American Gulag described in Part III.[56] Five components of these congressional and executive acts and

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Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies, 38 U. RICH. L. REV. 1073, 1086-87 (2004).

[51] See *Clandestino* lyrics, *supra* note 10, regarding the fugitive class character of immigrant workers who migrate from underdeveloped to developed countries.

[52] In 1994, California passed the notoriously xenophobic Proposition 187 that sought to deny education and health services to immigrants without current lawful status. A federal district court later found it violative of equal protection. Cooper, *supra* note 1, at 345.

[53] Anti-immigrant groups' views on driver's licenses for immigrants differs markedly from those of law enforcement officials. *See supra* note 23.

[54] The Clear Law Enforcement for Criminal Alien Removal ("CLEAR") act, now pending in Congress, seeks to do just that. Many police officials oppose this misguided policy, noting that it will undermine community respect and cooperation with the police. *See* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 656-61 (2004).

[55] The exploitation and resentment that creation of an underground labor economy can foster was well depicted in the recent film *Dirty Pretty Things* in which British natives made a business out of harvesting kidneys from desperate and viciously exploited immigrants. DIRTY PRETTY THINGS (Miramax Films 2002).

[56] Part IV deals with post-9/11 U.S. policies and legislation which have also resulted in mass detentions and deportations based on the rationale of preventive detention for suspected terrorists or simply to investigate the possibility of a connection to terrorism.

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policies are described below: (A) expansion of the grounds for removal; (B) restriction of forms of relief from removal; (C) coercion of the waiver of the right to a removal hearing and the right to apply for relief from removal by mandatory detention; (D) elimination of judicial review; and (E) imprisonment for lengthy terms of noncitizens who stay in or return to the United States after being ordered removed. These components coalesce into a legal environment, pressuring immigrants underground and inviting employer exploitation.

A. *Expanding the Grounds for Removal*

In 1988, Congress enacted a concise and reasonable list of "aggravated felonies," targeting noncitizens convicted of such offenses for accelerated deportation proceedings and restricted, but did not eliminate, previously available forms of discretionary relief.[57] In 1990,[58] 1991,[59] 1994,[60] and

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[57] In the Anti-Drug Abuse Act of 1988 ("ADAA"), Congress first provided that conviction of an "aggravated felony" was a basis for deportation. Terry Coonan, *Dolphins Caught in Congressional Fishnets — Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 592 (1998). These offenses included murder, drug trafficking crimes, and illicit trafficking in firearms or destructive devices. *Id.*; Julie Anne Rah, Note, *The Removal of Aliens who Drink and Drive: Felony DWI as a Crime of Violence, under 18 U.S.C. § 16(b)*, 70 FORDHAM L. REV. 2109, 2117 (2002).

[58] In the Immigration Act of 1990 ("1990 Act"), Congress expanded the definition of "aggravated felony." Pub. L. No. 101-649, 104 Stat. 4978 (1990); Coonan, *supra* note 57, at 594; Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 702-03 (1998). The new definition included state, federal, and some international convictions where the prison term was completed within the prior fifteen years. Coonan, *supra* note 57, at 595. It added money laundering, crimes of violence, and additional controlled substance trafficking violations. *Id.* "Money laundering" was defined as any financial transactions where the proceeds of a "specified unlawful activity" are used for the purpose of promoting another "specified unlawful activity." *Id.* at 594 n.53. A "crime of violence" was defined in the 1990 Act (former 8 U.S.C. § 1101(a)(43)) to include crimes that, in themselves, involve the use of force or threatened use of force against persons or property, and crimes that naturally create a substantial risk of physical force against persons or property. *Id.* at 594 n.54.

[59] In 1991, Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments ("MTINA"). *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(13), 105 Stat. 1733, 1751 (1991) (codified as amended at 8 U.S.C. § 1101 (Supp. III 1991)). *See generally* Larry Carp & Mark Goldman, *An Overview of the Immigration Act of 1990*, *reprinted in* 1 1992-93 IMMIGRATION & NATIONALITY LAW HANDBOOK 22, 23 (R. Patrick Murphy et al., eds., 1992). The MTINA specified that the ADAA of 1988 had retroactive effect, and thus convictions that occurred prior to that date incurred the adverse consequences specified in that legislation. Newcomb, *supra* note 58, at 698. It also established that if a noncitizen served time in prison for more than one conviction, the aggregate period of time is considered in determining eligibility for a 212(c) wavier. Coonan, *supra* note 57, at 597 n.78.

[60] The Immigration and Nationality Technical Corrections Act of 1994 ("INTCA")

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particularly 1996, Congress repeatedly expanded the aggravated felony list. It eventually included offenses that are neither "aggravated" nor "felonies."[61] For example, a second offense of possession of marijuana,[62] petty theft,[63] joyriding,[64] indecent exposure,[65] having consensual sex with

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expanded aggravated felonies to include failure to appear for service of sentence; child pornography; convictions for explosives and firearms; theft and burglary offenses resulting in five or more year sentences; kidnapping for ransom; racketeering offenses; managing a prostitution business; slavery-related offenses; convictions related to espionage, sabotage, and treason; fraud resulting in more than $200,000 loss to the victim; tax evasion resulting in the government losing more than $200,000; alien smuggling for gain; and document fraud with a five-year or more sentence imposed. Immigration and National Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305 (1994) (adding subsection "d" to INA § 242A); Stephen Yale-Loehr, *New Developments to Combat Alien Smuggling and Document Fraud*, *reprinted in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 74, 85 (R. Patrick Murphy et al., eds., 1996); Coonan, *supra* note 57, at 598. The INTCA also gave U.S. district court judges the discretion to enter a judicial order of deportation at the time of sentencing an alien for a criminal conviction that would render the person deportable. Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 483 (1999). In 1994, Congress also passed the Violent Crime Control and Law Enforcement Act ("VCCLEA") of 1994. Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994); Newcomb, *supra* note 58, at 700 (changed the inadmissibility bar for an aggravated felon from 15 to 20 years).

[61] Several circuits have held that a misdemeanor conviction may qualify as an aggravated felony for some, if not all, of the 21 subsections of the aggravated felony definition. United States v. Graham, 169 F.3d 787 (3d Cir. 1999). Although the BIA initially took the position that at least one offense, sexual abuse of a minor, as provided in 8 U.S.C. § 1101(a)(43)(A), must be a felony, *In re* Crammond, 21 I. & N. Dec. 9 (B.I.A. 1999), *vacated by* 23 I. & N. Dec. 179 (B.I.A. 2001), it later ruled that it need not be, *In re* Small, 23 I. & N. Dec. 448 (B.I.A. 2002); *see also* United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001) (holding that misdemeanor conviction of sexual touching of minor was aggravated felony).

[62] Simple possession of a controlled substance as defined by the federal Controlled Substance Act (including marijuana) is an aggravated felony if the maximum penalty is more than one year. 8 U.S.C. § 1101(a)(43)(B) (2000). Thus, felony possession statutes, which are common, would qualify. *Id.*; United States v. Arrellano-Torres, 303 F.3d 1173 (9th Cir. 2002), *cited in* KATHERINE A. BRADY ET AL., *supra* (May 2003 Interim Update, at 6); United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002), *cited in* KATHERINE A. BRADY ET AL., *supra* (May 2003 Interim Update, at 4 n.2, 5); *In re* Santos-Lopez, 23 I. & N. Dec. 419 (B.I.A. 2002), *cited in* KATHERINE A. BRADY ET AL., *supra* (May 2003 Interim Update, at 4); *In re* Yanez-Garcia, 23 I. & N. Dec. 390 (B.I.A. 2002), *cited in* KATHERINE A. BRADY ET AL., *supra* note 31, (May 2003 Interim Update, at 4).

[63] In many jurisdictions, a crime of petty theft, such as a shoplifting offense, may be punished by one year or more in county jail. United States v. Pacheco, 225 F.3d 148, 152 (2d Cir. 2000); *Graham*, 169 F.3d at 791. If the court sentences a noncitizen defendant to a term of imprisonment of one year or more, it is an aggravated felony even if the court suspends the sentence in whole or in part. 8 U.S.C. §§ 1101(a)(43)(G), 1011(a)(47)(B).

[64] In *In re* V-Z-S-, 22 I. & N. Dec. 1338 (B.I.A. 2000), the BIA ruled that joyriding, namely a nonconsensual use of another's vehicle without the intent to permanently deprive the owner of his possessory interest, as provided in California Vehicle Code Section 10851, was a theft offense and an aggravated felony if the court sentences the noncitizen to a term of imprisonment of one year or more regardless of whether the court suspended the sentence in whole or in part.

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a person under eighteen years of age,[66] or assisting an undocumented person to enter the United States[67] can be an aggravated felony.

The 1996 legislation consisted of two acts. The first act, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), was purportedly passed in response to the 1995 bombing of the Murrah Building in Oklahoma City.[68] Six months after passing AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[69] This act is easily the most far-reaching expansion of grounds for deportation in the nation's history — notably in its devastating impact on the five components of the creation of the fugitive class.

IIRIRA greatly expanded the grounds for "removal" (the new term of art that replaced "deportation").[70] Before the Act, many crimes required

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[65] *In re* Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (B.I.A. 1999).

[66] The government continues to deport, as aggravated felons, any noncitizens convicted of violations of California's unlawful sexual intercourse law, which covers sexual intercourse where the perpetrator is three years older than a younger participant under the age of 18. CAL. PENAL CODE § 261.5(c) (West, 2004). The author orally argued such a case before the Ninth Circuit on September 9, 2003. The court has not issued an opinion as of publication of this Article. Tabalanza v. Ashcroft, No. 02-71969 (9th Cir. 2003) (unpublished). Petition for rehearing en banc is currently being considered by the court.

[67] *In re* Ruiz-Romero, 22 I. & N. Dec. 486 (B.I.A. 1999); United States v. Sanchez-Vargas, 878 F.2d 1163, 1166 n.1 (9th Cir. 1989).

[68] President Clinton signed AEDPA into law on April 24, 1996. AEDPA again expanded the list of "aggravated felonies," this time to include gambling and passport offenses. The phrase "gambling offenses" includes the transmission of wagering information. Coonan, *supra* note 57, at 600-01. Forging, counterfeiting, mutilating, or altering a passport constitutes an aggravated felony when a sentence of 18 months or longer is imposed. Other crimes added include transportation for purposes of prostitution; improper entry or re-entry; misrepresentation or concealment of facts by one previously deported for an aggravated felony; offenses where a sentence of five years or more may be imposed for commercial bribery; counterfeiting, forgery, or trafficking in vehicles with altered identification numbers; offenses in which a sentence of five years of more may be imposed for obstruction of justice; perjury, subornation of perjury, or bribery of a witness; an offense related to failure to appear before a court on a charge of a felony for which a sentence of two years or more may be imposed; alien smuggling in which a five year sentence is imposed after 1994. *Id.*; *see* former 8 U.S.C. § 1101(a)(43) (1994). AEDPA also made a single conviction for a "crime of moral turpitude" a deportable offense if it carried a sentence of one year or more. §1227(a)(2)(A)(i) (2004). The BIA has provided a broad interpretation of "moral turpitude" that heavily relies on a United States Supreme Court case that sustained the statutory phrase against an attack for being void for vagueness. *In re* Fualaau, 21 I. & N. Dec. 475 (B.I.A. 1996) (citing *Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951)), *cited in* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 311 (1997). *See generally* Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 109 (1999).

[69] Coonan, *supra* note 57, at 601.

[70] 8 U.S.C. § 1229a(e)(2) (2000). Although exclusion and deportation proceedings are

a sentence of five years or more to be considered an aggravated felony. The IIRIRA lowered the sentence requirement to one year for several crimes: any theft or "crime of violence" offense, gambling, commercial bribery, counterfeiting, forgery, trafficking in vehicles, obstruction of justice, perjury, document fraud, or subornation of perjury, and bribery of a witness.[71] It also expanded the definition of "aggravated felony" by lowering the monetary amount required for certain crimes from $200,000 or $100,000 to $10,000.[72] Furthermore, by creating new grounds of removal for "domestic violence," the Act sweeps into a one-size-fits-all category the infinitely varied circumstances that provoke a police response, arrest, and charge for domestic disturbance. For the millions of undocumented workers — who have been in this country working, paying taxes, and sending their citizen children to school — a domestic violence conviction now eliminates any hope of acquiring legal status.[73] While the Act appropriately criminalizes the relatively rare offense of female genital mutilation, it lists "sexual abuse of a minor" as an aggravated felony without defining it in any manner. The Department

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now both termed "removal proceedings," important differences, such as burdens of proof, remain. *See* 8 U.S.C. § 1229a(c)(3)(B); Richard L. Prinz, *Criminal Aliens Under the 1996 Immigration Reform Act*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 62, 69 (R. Patrick Murphy et al., eds., 1996). Proceedings commenced after IIRIRA's effective date, September 30, 1996, are "removal proceedings." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 309, *amended by* Pub. L. No. 104-302, §§ 2(2)-(3), 110 Stat. 3657 (1996).

[71] Coonan, *supra* note 57, at 602-03. For an extensive overview of document fraud changes in IIRIRA, see Yale-Loehr, *supra* note 60.

[72] For example, fraud and tax evasion previously required a loss of $200,000. Coonan, *supra* note 57, at 602-03. Under IIRIRA, that amount decreased to $10,000. *Id.* Similarly, money laundering was an aggravated felony if the funds involved exceeded $100,000. *Id.* This amount was also reduced to $10,000. *Id.* IIRIRA specified that the amended definition of an aggravated felony applied retroactively to convictions that occurred before the Act became law. *Id.* at 603-04; IIRIRA, Pub. L. No. 104-208, §§ 101(a)(43), 321(b)-(c), 110 Stat. 2009-546, 3009-628 (1996). Because deportation is not considered criminal punishment, immigrants are not protected from ex post facto laws. *See* Coonan, *supra* note 57, at 612-13.

[73] Under 8 U.S.C. § 1229b(b)(1)(C), an undocumented noncitizen who has incurred a "domestic violence" conviction (often the automatic result for the male despite the ambiguous circumstances and absence of injury) is rendered ineligible for cancellation of removal. This provision likewise frequently harms immigrant women. *See* Cecelia M. Espinoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 176 (1999) (arguing that new laws intending to benefit battered immigrant women often harm them). Mandatory arrest statutes, routine dual arrests in domestic violence disputes, and false accusations prevent immigrant women from benefiting from the Violence Against Women Act of 1994 ("VAWA") because they are unable to satisfy the good moral character requirement for relief. *Id.* Some of these concerns were subsequently addressed. *See generally* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

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of Homeland Security ("DHS")[74] has chosen to interpret the offense so expansively that it includes any sexual contact with a person under eighteen, regardless of the circumstances.[75] In a similarly expansive policy, the Board of Immigration Appeals ("BIA") interpreted "crimes of violence" to include driving under the influence. However, an overwhelming majority of the circuit courts invalidated this interpretation.[76]

Many common misdemeanor offenses, such as petty theft (shoplifting) or simple assault, qualify as aggravated felonies because they are punishable by a maximum of one year, even if the common state sentencing schemes of probation or community service and a suspended sentence are imposed.[77] This is because IIRIRA specifies that a deferred adjudication is considered a final conviction for immigration purposes although the conviction is later dismissed under state criminal procedures.[78] Court personnel, including judges, prosecutors, defense counsel, and probation officers, routinely assure noncitizen defendants

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[74] In this Article, "DHS" is used to refer to both the current department and the INS (which was abolished in name after the creation of the Department of Homeland Security). The DHS's law enforcement bureau for immigration matters is the Bureau of Immigration and Customs Enforcement ("ICE").

[75] IIRIRA created a new criminal provision for anyone who performs female genital mutilation on a person under 18 years of age. 18 U.S.C. § 116 (1996); Prinz, *supra* note 70, at 71. It added the undefined crimes of "sexual abuse of a minor" to the definition of "aggravated felony" without clarification or definition of its scope. Coonan, *supra* note 57, at 601.

[76] *See In re* Ramos, 23 I. & N. Dec. 336 (B.I.A. 2002) (overruling *In re* Magallanes-Garcia, 22 I. & N. Dec. 1 (B.I.A. 1998) (involving Arizona DUI statute)); *In re* Puente Salazar, 22 I. & N. Dec. 1006 (B.I.A. 1999) (involving Texas DUI statute). The *Ramos* decision noted that four of six circuits had disagreed with its interpretation and that two more had indicated they would join the majority. *In re* Ramos, 23 I. & N. Dec. 336 (B.I.A. 2002); *see, e.g.*, United States v. Portillo-Mendoza, 273 F.3d 1140 (9th Cir. 2001) (finding that conviction for driving under influence in violation of California Vehicle Code § 23152 was not crime of violence); United States v. Trinidad-Aquino, 259 F.3d 1224 (9th Cir. 2001). Although the BIA later reversed its earlier ruling, it has approved the removal of untold hundreds of noncitizens convicted of DUI under its earlier expansive reading of "crimes of violence." *See generally* Daniel M. Kowalski, *A Crime of Violence: Malum in Magallanes*, 46-JAN Fed. Law. 5 (1999).

[77] This is due to IIRIRA's expansive definitions of "conviction" and "terms of imprisonment" that are designed to make any plea and many sentencing alternatives qualify as grounds for removal. *See* 8 U.S.C. § 1101(a)(48) (1996).

[78] Coonan, *supra* note 57, at 613- 14. After IIRIRA, any of the following is considered a conviction: guilty finding; guilty plea; plea of no contest (nolo contendere); admission of facts that would "warrant a finding of guilt"; and judicial order of some "restraint on the alien's liberty." INA § 101(a)(48); Tsesis, *supra* note 68, at 123. A "restraint on liberty" can include a large range of orders beyond incarceration. Pilcher, *supra* note 68, at 320 n.220; *see In re* Punu, 22 I. & N. Dec. 224 (B.I.A. 1998) (holding that IIRIRA compelled them to apply federal law despite conflict with clearly expressed intent of Texas legislature that such pleas not be considered convictions).

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that a plea of no contest will not result in a conviction under state law. However, they fail to advise these noncitizens that under IIRIRA, it will be considered a conviction for immigration purposes. Similarly, IIRIRA expands the definition of "term of imprisonment" to include any period of confinement or incarceration ordered by a court, regardless of whether the sentence was suspended in whole or in part.[79] Thus, state legislative bodies have lost the capacity to determine their own criminal procedures; Congress now determines whether a dismissed conviction is deemed a conviction and whether a suspended term of imprisonment is deemed a term of imprisonment for immigration purposes. To avoid a deceptive and devastating game of bait and switch for unwary noncitizen defendants, legislative bodies and court personnel must either change their laws and practices to reflect federal standards or clearly advise noncitizen defendants of the immigration consequences of their convictions.[80] Unfortunately, most states have done neither.

B. *Restricting Relief from Removal*

While repeatedly expanding the number of aggravated felonies or other deportable offenses, Congress and the BIA also steadily eliminated nearly all forms of relief from removal for noncitizens convicted of any one of a very broad range of offenses. Those convicted of offenses that do not preclude discretionary relief were given the Hobson's choice of conceding deportability and departing with little chance of returning lawfully or staying in DHS detention for as long as it took the

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[79] IIRIRA's definition of "term of imprisonment" can make a common misdemeanor sentencing disposition an aggravated felony. *See* United States v. Graham, 169 F. 3d 787 (3d Cir. 1999). For example, a maximum misdemeanor sentence of one year, followed by suspended imposition or execution of the sentence and a grant of probation, may fall within the scope of a "one-year term of imprisonment," even though it is nothing of the sort, triggering aggravated felony status. The fact that a state has enacted an alternative sentencing arrangement to encourage no contest pleas and rehabilitation programs (i.e., anger management, drug treatment, family counseling) in order to avoid the stigma of a criminal conviction becomes irrelevant under IIRIRA and is a devastating trap for the unknowing.

[80] This distorting effect may be analogized to the types of programs that the United States Supreme Court has criticized and invalidated under its anti-commandeering doctrine. The Supreme Court developed its anti-commandeering doctrine in *New York v. United States*, 505 U.S. 144, 161 (1992), holding that "Congress may not . . . commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *See also* Printz v. United States, 521 U.S. 898 (1997). The Supreme Court has resolved that "the federal government may neither issue directives requiring the States to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

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immigration court and the BIA to decide the case, a process that might take years.[81] The combined effect of casting a broader net and eliminating relief has precluded any proportionality, or, indeed, rationality, in the law. Long-term permanent residents with lengthy and exceptional ties to the United States who have committed misdemeanor property or drug possession offenses decades ago are lumped with noncitizens who have recently entered without inspection and whose offenses may be violent felonies or major drug trafficking offenses. Although it may be within Congress' plenary power to enact such harsh legislation to determine who may enter and who may stay,[82] Congress also seeks to prevent judicial oversight of DHS and BIA interpretations of this muddled mix of statutorily prescribed offenses.[83]

Until 1996, a basic principle of immigration law was that noncitizens deportable on criminal grounds would have the opportunity to demonstrate the mitigating circumstances of their offense and rehabilitation. When the Anti-Drug Abuse Act of 1988 ("ADAA") first established that an aggravated felony conviction was a ground for deportation, it adhered to the established practice of permitting deportable "aggravated felons" who were long-term lawful permanent residents to apply for waiver of deportation as provided in former 8 U.S.C. § 1182(c) — the "Section 212(c) waiver."[84] Discretion to consider granting waivers in such cases encouraged immigration judges to take a second look at the circumstances of the offense and of the offender's post conviction rehabilitation.[85] Even murder cases may have extraordinary mitigating circumstances.[86] In the 1990 and particularly the 1996

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[81] See *infra* Part II.C.

[82] The Supreme Court has noted that such determinations are "largely immune from judicial review," but plainly arbitrary and irrational classifications may be struck down as a violation of the due process clause of the Fifth Amendment. Fiallo v. Bell, 430 U.S. 787 (1977) ("Our cases reflect acceptance of a limited responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . ."); Francis v. I.N.S., 532 F.2d 269 (2d Cir. 1976) (interpreting statute to avoid irrational distinction between eligibility of noncitizen for waiver from exclusion and deportation).

[83] See *infra* Part II.D.

[84] *Francis*, 532 F.2d at 268; *In re* Silva, 16 I. & N. Dec. 26 (B.I.A. 1976).

[85] *See In re* Marin, 16 I. & N. Dec. 581, 584-85 (B.I.A. 1976) (describing careful weighing process of positive and negative factors in 212(c) waiver case).

[86] *See* Elizabeth Fernandez, *Finally Free, Parolee Takes Slow Steps Toward a Normal Life*, S.F. CHRON., June 7, 2004, at A1. That parolee, Maria Suarez, was convicted over 20 years ago for her role in the murder of the man who bought her for $200 as a sex slave when she was 16 years old. *Id.* Under the 1988 legislation, Suarez could have applied for a waiver of deportation. *See* former 8 U.S.C. § 1182(c) (1989). More recent laws foreclosed that possibility. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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legislation, Congress aggressively eliminated or severely narrowed all forms of discretionary relief from deportation. The 1990 Act barred aggravated felons from applying for asylum or a stay of deportation.[87] It permanently precluded aggravated felons from demonstrating the "good moral character" necessary for naturalization.[88] It also eliminated executive pardons or Section 212(c) waivers if the noncitizen had served a prison sentence of five or more years. Moreover, it eliminated issuance of "Judicial Recommendation Against Deportation" ("JRAD"), which was a binding recommendation to the Attorney General that a particular defendant not be deported due to a criminal conviction. JRAD enabled judges to help prevent miscarriages of justice (i.e., deportation for minor crimes or the retroactive application of the law).[89] But, this was just a prelude to the sea change brought about by the 1996 enactments.

AEDPA eliminated the Section 212(c) waivers for the conviction of almost any deportable offense.[90] Following IIRIRA, persons convicted of aggravated felonies and removed are permanently barred from re-entering the United States.[91] If convicted of an aggravated felony, IIRIRA authorizes the DHS to remove and deport refugees to the country where they face persecution (unless they are sentenced to less than five years and the offense is not deemed a "particularly serious crime").[92] The only

("IIRIRA"), Pub. L. No. 104-208, § 309, *amended by* IIRIRA, Pub. L. 104-208, Div. C, § 309, *amended by* Pub. L. No. 104-302, §§ 2(2)-(3), 110 Stat. 3657 (1996). Now, only after a decade-long legal challenge, media attention, and community activism, was she released. Fernandez, *supra*, at A1.

[87] Coonan, *supra* note 57, at 595.

[88] *Id.* at 596.

[89] Lisa R. Fine, Note, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491, 506-07 (1998). In the 1990 Act, Congress barred automatic stays of deportation upon filing for judicial review and made aggravated felons inadmissible for 20 (rather than 10) years. Coonan, *supra* note 57, at 59-97.

[90] Prior to AEDPA's enactment, aliens who had been convicted of a crime and deemed deportable could apply for a Section 212(c) waiver. Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123 (1996). Section 212(c) permitted immigration judges to grant discretionary relief when there were certain mitigating factors present. *Id.* at 129. AEDPA essentially eliminated this form of relief for aliens deportable on aggravated felony grounds. *Id.*

[91] "Any alien ordered removed . . . who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony . . . is inadmissible." 8 U.S.C. § 1182(a)(9)(A)(i) (2000). *See also*, Coonan, *supra* note 57, at 605.

[92] *See* Coonan, *supra* note 57, at 606-07. A noncitizen convicted of an aggravated felony, but sentenced to less than five years imprisonment, may qualify for "withholding of removal" to a country where he or she would be persecuted. 8 U.S.C.A. § 1231(b)(3) (2000). In determining whether a conviction is for a "particularly serious crime," the BIA looks to the factual context of the crime "on a case-by-case basis," considering the seriousness of a crime, the nature of the conviction, the circumstances and underlying facts of the

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other remedy to avoid removal and persecution is under color of the Convention Against Torture.[93]

Cancellation of removal differs in several respects from the former discretionary remedies of the Section 212(c) waiver and suspension of deportation.[94] There are two forms of cancellation: one for residents (lawful permanent residents) and the other for any noncitizen who qualifies. Cancellation of removal requires continuous residence of seven years for residents and ten years continuous physical presence for nonresidents.[95] Conviction of an aggravated felony bars either form of cancellation.[96] Conviction of a removable offense within seven years of

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conviction, as well as whether the type and circumstances of the crime indicate that the alien will be a danger to the community. Beltran-Zavala v. INS, 912 F.2d 1027 (9th Cir. 1990) (holding that trafficking in marijuana is in violation of California Health & Safety Code Section 11360(a) and remanded for further consideration); Mahini v. INS, 779 F.2d 1419 (9th Cir. 1986) (holding that trafficking in heroin is particularly serious crime); *In re* S-S-, 21 I. & N. Dec. 900 (B.I.A. 1997) (stating that aggravated felony is to be decided on case-by-case basis); *In re* L-S-, 22 I. & N. Dec. 645 (B.I.A. 1999) (holding that bringing undocumented person into United States in violation of 8 U.S.C.A. § 1324(a)(2)(B)(iii) is not "particularly serious crime"); *In re* Q-T-M-T-, 21 I. & N. Dec 639 (B.I.A. 1996) (holding that several counts of armed robbery with use of firearm is particularly serious crime); *In re* Carbelle, 19 I. & N. 357, Dec. 360 (B.I.A. 1986); *In re* Frentescu, 18 I. & N. Dec. 244, 246 (B.I.A. 1982) (stating that burglary with intent to commit theft is not particularly serious crime).

[93] On March 23, 1999, the INS issued regulations implementing the international Convention Against Torture ("CAT") based on U.S. legislation. *See* Regulations Concerning the Convention Against Torture 64 Fed. Reg. 13,881 (March 23, 1999), 8 C.F.R. § 208.18 (2004). Unlike withholding of removal, the CAT does not exclude those convicted of certain criminal offenses. BRADY ET AL., *supra* note 31, at 11-23. This means that a noncitizen who would have been eligible for withholding of removal, but is disqualified for having committed a particularly serious crime, may still be eligible for deferral of removal. 8 C.F.R. § 208.17(a) (2000). To qualify for CAT deferral, the noncitizen must show by a preponderance of the evidence (more likely than not) that he or she would be tortured in the country of removal. 8 C.F.R. § 208.16(c)(2) (2000). However, deferral of removal does not mean that the noncitizen must be released from INS detention. 8 C.F.R. § 208.17(b)(1)(ii)(c) (2000); 8 C.F.R. § 208.18(b)(2) (2000); *see* Khourassany v. INS, 208 F.3d 1096 (9th Cir. 2000).

[94] See 8 U.S.C. § 1229b(a) (permanent resident cancellation) and (b) (nonpermanent resident cancellation). Also see former 8 U.S.C. § 1182(c) (Section 212(c) waiver) and former 8 U.S.C § 1254 (suspension of deportation). Pilcher, *supra* note 68, at 288-90.

[95] *See* 8 U.S.C. § 1229b(a)(2) (2000); 8 U.S.C. § 1229b(b)(1)(A) (2000); Sharon Cook Poorak, *Cancellation of Removal for Non-Lawful Permanent Residents*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 42 (R. Patrick Murphy et al., eds., 1996); Lawrence H. Rudnick, *Cancellation of Removal for Permanent Resident Aliens*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 51 (R. Patrick Murphy et al., eds., 1996).

[96] For permanent residents, see 8 U.S.C. § 1229b(a)(3) (2000). For nonpermanent residents, see 8 U.S.C. § 1229b(b)(1)(C) (2000), which includes by incorporation the aggravated felony removal ground of 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

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the resident's lawful entry disqualifies the resident from this relief.[97] Conviction of any offense rendering a nonresident removable, or precluding a nonresident from establishing good moral character, disqualifies the nonresident for cancellation.[98] The BIA has also interpreted the hardship requirement for cancellation in a very rigid manner, disqualifying most on that ground alone.[99] The most minimal form of discretionary relief, voluntary departure, may protect the noncitizen from being barred from re-entry and, most importantly, from being prosecuted criminally for the crime of felony federal re-entry.[100] However, a conviction of an aggravated felony bars this relief. In the case of a noncitizen who has one year or more of unlawful presence, and who seeks voluntary departure at the end of the hearing, any removable offense committed during the previous five years will render him or her ineligible.[101]

Not to be outdone, the executive branch (namely the BIA and Attorney General) has likewise moved aggressively to eliminate or restrict the few remaining forms of discretionary relief. First, the BIA interpreted IIRIRA to have eliminated the then fifty-year-old "expungement doctrine." Since 1942, immigration authorities have consistently ruled that a conviction for a crime involving moral turpitude that has been expunged or dismissed under state or federal rehabilitation or probation statutes no longer carries adverse immigration consequences.[102] In a sharply divided opinion in *In re Roldan-Santoyo*, the majority interpreted the IIRIRA definition of "conviction" as requiring the elimination of the expungement doctrine — a post conviction matter.[103] The Ninth Circuit, one of the first to review *Roldan-Santoyo*, characterized the BIA's reasoning as "highly unpersuasive" and overruled it with respect to first-time drug offenders.[104] However, a different panel termed its interpretation as at least "permissible," and on that basis deferred to it

[97] When a permanent resident is served a notice to appear to answer for a predicate conviction, the period of continuous presence stops. *See* 8 U.S.C. § 1229(d)(1)(A) (2000).

[98] *See* 8 U.S.C. § 1229b(b)(1)(B) (2000).

[99] *See, e.g., In re* Andazola, 23 I. & N. Dec. 319 (B.I.A. 2002); *In re* Romalez, 23 I. & N. Dec. 423 (B.I.A. 2002).

[100] 8 U.S.C. § 1229c (2000).

[101] Poorak, *supra* note 95, at 48.

[102] *In re* G-, 9 I. & N. Dec. 159, 165 (B.I.A. 1960); *In re* F-, 1 I. & N. Dec. 343, 349-50 (B.I.A. 1942); *In re* H-, 7 I. & N. Dec. 249, 250 (B.I.A. 1956); *In re* O-T-, 4 I. & N. Dec. 265, 266 (B.I.A. 1951).

[103] *In re* Roldan Santoyo, 22 I. & N. Dec. 512 (B.I.A. 1999).

[104] Lujan-Armendariz v. INS, 222 F.3d 728, 742 (9th Cir. 2000).

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under the *Chevron* doctrine of administrative law.[105]

As we have seen, the most important form of discretionary relief before AEDPA was the Section 212(c) waiver. When Congress repealed it, it did not state that the repeal was to be given retroactive effect. However, former Attorney General Janet Reno took it upon herself to declare the repeal retroactive.[106] The result was disastrous for thousands of lawful residents and their families. Noncitizen defendants had relied on the availability of such relief when plea bargaining, only to be later told that it was no longer available. The courts condemned such "mouse trapping."[107] Eventually, but well after thousands had been deported pursuant to the Attorney General's ruling, the Supreme Court declared that the Section 212(c) waiver repeal is not retroactive.[108] Unfortunately, and most unfairly, those deported were in no position to challenge their unlawful deportation. They could not move to reopen their deportation once having left the country.[109] If they return to attempt to do so, they run the risk of a lengthy federal penitentiary term for illegal re-entry.[110] In any case, the BIA would undoubtedly rule that the motion to reopen

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[105] Murillo-Espinoza v. INS, 261 F.3d 771, 773 (9th Cir. 2001). Unfortunately, the *Murillo* panel's *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis failed to consider the numerous grounds for not applying it, including the BIA's abrupt departure from half a century of administrative rulings that Congress had not explicitly addressed. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987). The express legislative history of the statute confirms that Congress intended to codify longstanding BIA precedent, except for modifying the administrative definition of "conviction" with respect to its treatment of deferred adjudications. Moreover, the BIA's interpretation completely ignores the longstanding lenity principle that deportation statutes must be interpreted narrowly. INS v. St. Cyr, 533 U.S. 289, 320 (2001) (affirming rule of lenity); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

[106] *In re* Soriano, 21 I. & N. Dec. 516, 525 (B.I.A. 1996).

[107] Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996) ("Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability.").

[108] In 2001, the Supreme Court struck down the retroactive application of the legislation. *See St. Cyr*, 533 U.S. 289; *see also* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1066 (2002).

[109] 8 C.F.R. § 1003.2(d) provides in relevant part that "[a] motion to reopen . . . shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his departure from the United States." 8 C.F.R. § 1003.2(d) (2004).

[110] 8 U.S.C. § 1326 provides for up to 10 or 20 years imprisonment for simply being found in the United States after a conviction of a felony or aggravated felony, respectively, if such conviction precedes an order of deportation or removal. 8 U.S.C. § 1326 (2000).

was untimely, citing IIRIRA's ninety-day time limit for motions to reopen.[111]

Another important form of discretionary relief is the Section 212(h) waiver.[112] It permits waiver of many of the criminal grounds of inadmissibility, including crimes involving moral turpitude and some aggravated felonies. On January 27, 2003, former Attorney General John Ashcroft issued a regulation that effectively rewrote section 212(h) by making persons convicted of "violent or dangerous crimes" ineligible for the waiver.[113] This rewrites the statute and is of questionable legality, but until successfully challenged, may bar hundreds, if not thousands, from 212(h) relief. Attorney General Ashcroft's greatest impact was procedural. He reduced the BIA's membership of twenty-three members to eleven, eliminated panels of three (except in rare cases), and promised a speeding-up of the appeals process by using single-member reviews that may "affirm decisions of Immigration Judges and the Service without opinion."[114]

C. *Using Lengthy Detention to Coerce Waiver of the Right to a Removal Hearing or to Apply for Discretionary Relief*

This section addresses the enormous impact of IIRIRA's mandatory detention statute (8 U.S.C. § 12236(c)), which denies bail to any noncitizen facing a removal proceeding on the basis of a criminal conviction.[115] It matters not whether the noncitizen is likely to obtain

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[111] 8 U.S.C. § 1229(c)(6) (2000).

[112] 8 U.S.C. § 1182(h) (2000).

[113] 8 C.F.R. § 212.7 (2004).

[114] *See* 8 C.F.R. §§ 1003(f)(5)-(7) (2004); Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1. The "streamlining" or "affirmance without appeal" regulations, as applied in *Haoud v. Ashcroft*, 350 F.3d 201, 207 (1st Cir. 2003), left no meaningful basis for judicial review, and, thus, the court remanded (noting the denial of asylum contrasted against another similar asylum case that BIA approved). To date, the circuit courts have found no due process violations in the streamlining regulations despite the obvious impact on litigants who must seek judicial review of an administrative record that is limited to the immigration judge's discretion. The records reviewed are often sparse because of the demands of a heavy docket. In *Carriche v. Ashcroft*, 350 F.3d 845, 850-53 (9th Cir. 2003), the court noted that the petitioners "have understandable concerns about the streamlining process," including "the lack of transparency in the process, the increasing frequency in which the process is invoked, the speed with which appeals are decided, and a belief that the BIA may be abdicating its statutorily-mandated role of appellate review."

[115] 8 U.S.C. §§ 1101(a)(48)(A), 1226(c) (including §§ 1182(a)(2)(A)-(E), 1227(a)(2)(A)(I), (a)(4)(B), (A)(ii), A(iii), (B)-(D); 1182(a)(3)(B) (1996); William A. Stock, *Mandatory Detention and Bond Eligibility*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 91, 93 (R. Patrick Murphy et al., eds., 1996). IIRIRA directs the Attorney

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discretionary relief or that he or she presents no flight or community risk. Thus, a noncitizen must face lengthy immigration imprisonment in order to challenge the legal basis for removal or to apply for discretionary relief. Even if the noncitizen successfully challenges the legal basis for his removal before the immigration judge, the government can, and frequently does, move to automatically stay the noncitizen's release from imprisonment pending appeal of either a preliminary or final ruling.[116] The message is clear to the noncitizen — even if you are successful in your defense, you will pay the price of lengthy detention.

Before the Supreme Court sustained the constitutionality of mandatory detention in a 5-4 plurality opinion,[117] the Third,[118] Fourth,[119] Ninth,[120] and Tenth[121] Circuits had ruled that the lack of individualized bail hearings violated due process. Indeed, in the only circuit court case to sustain the statute, the petitioner had no hope of mounting a successful defense to the removal proceedings and was simply seeking to delay his inevitable removal.[122] Writing for the Ninth Circuit, Judge William A. Fletcher described the liberty interest at stake for a lawful permanent resident alien:

> Of particular relevance to this case, lawful permanent resident aliens have the right to reside permanently in the United States. They retain that right until a final administrative order of removal is entered. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). An

General to take into custody any noncitizen inadmissible on criminal grounds who: has committed two or more crimes of moral turpitude; or has one conviction for a crime of moral turpitude if the sentence is longer than one year; or has been convicted of an aggravated felony, controlled substance violation, firearms offense, miscellaneous crimes related to espionage, selective service and alien smuggling; or for being a drug abuser or addict; and any alien inadmissible or deportable for having engaged in terrorist activity. Stock, *supra*, at 99.

[116] 8 C.F.R. § 1003.19(I)(2) (2004).

[117] Demore v. Kim, 538 U.S. 510 (2003). Chief Justice Rehnquist wrote the majority opinion. Justice O'Connor, with whom Justice Scalia and Justice Thomas join, concurred in the result but wrote separately to note that Congress had deprived the courts of jurisdiction over habeas corpus challenges to the constitutionality of the IIRIRA. *Id.* at 533. Significantly, Justice Kennedy wrote a separate concurrence. *Id.* at 531. Justice Souter wrote a dissenting opinion, which Justices Ginsburg and Stevens joined. Justice Breyer concurred in the dissent, but wrote a separate opinion. *Id.* at 540.

[118] Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).

[119] Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002).

[120] Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002).

[121] Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002).

[122] Parra v. Perryman, 172 F.3d 954, 957 (7th Cir. 1999) ("[The] immigration judge concluded that Parra is deportable and ineligible for any relief from removal; his motions papers in this court do not even hint at a substantive argument that he is entitled to remain in the United States.").

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> administrative order of removal cannot be entered against Kim until, at the earliest, an IJ finds that he is removable. That order will not be final until the Board of Immigration Appeals (BIA) affirms it, or until the period for seeking BIA review has expired. *See* 8 U.S.C. § 1101(a)(47)(B). . . . A lawful permanent resident alien has an obvious and important personal interest in his or her own liberty during the pendency of removal proceedings. This interest is important even if the alien is held, at the end of the proceedings, to be removable. A lawful permanent resident alien usually has family members (in most cases, American citizens) who are in the United States and will remain here after the alien is removed. The alien is facing the prospect of long-term separation, and if the no-bail provision is valid he or she will be unable to see his or her son, daughter, husband, wife, father, or mother except in detention facilities during the pendency of the removal proceedings. Such facilities are sometimes at great distances from where the alien lived and where the family members live. Further, many lawful permanent resident aliens own property and/or businesses. Not allowing the alien to wind up his or her affairs in an orderly and advantageous way will work to the disadvantage not only of the alien, but of all those (including American citizens) who depend on the property or business for their economic well-being.[123]

Justice Souter noted that denying bail to this population despite the absence of danger to the community or risk of flight would "impede the alien's ability to develop and present his case on the very issue of removability."[124] The Immigration and Naturalization Service ("INS") "can detain, transfer, and isolate aliens away from their lawyers, witnesses and evidence."[125] Chief Justice Rehnquist dismissed the concern that the length of detention may deter aliens from exercising their right to a hearing, as "there is no constitutional prohibition against requiring parties to make [difficult] choices."[126] There can be no doubt of the enormously coercive effect of forcing persons facing removal proceedings to remain imprisoned while they pursue their appeal. While Justice Rehnquist characterized this period of detention as brief, that is rarely the case where the noncitizen seeks a removal hearing and must await the final ruling of the BIA. As Justice Souter points out, the forty-five-day period cited by the majority is based on the average of

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[123] Ziglar, 276 F. 3d at 528-29.

[124] Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., dissenting).

[125] *Id.*

[126] *Id.* at 541 n.14.

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those who concede removability and those who have hearings.[127] As most persons facing removal are unrepresented by counsel and readily concede removal, this hardly demonstrates brevity for those who do not. Indeed, persons facing removal proceedings may wait weeks before they are served with the Notice to Appeal advising them of the alleged grounds for their removal.[128] In the author's experience, even detained noncitizens facing removal are likely to wait more than a year, and often longer, for their case to be finally determined at the administrative level. Indeed, for the noncitizen who endures mandatory detention through the final order of removal and then seeks judicial review, the DHS may continue to detain him or her by denying bail, setting a high bail, or imposing onerous electronic surveillance conditions that greatly restrict employment and family or social life.

D. *Restricting Judicial Review*

AEDPA eliminated the habeas corpus provisions of the Immigration and Nationality Act for noncitizens facing deportation.[129] At the same time, the AEDPA provision that precluded all judicial review of final orders of deportation regarding certain classes of criminal aliens[130] was the subject of extensive criticism.[131] The Supreme Court quickly took a case in which it determined that it had authority to issue petitions of habeas corpus under its original jurisdiction codified in 28 U.S.C. § 2241.[132] IIRIRA likewise appeared to eliminate habeas review, not only of orders of removal, but of almost any administrative act, no matter

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[127] *Id.* at 567 (Souter, J., dissenting).

[128] *Id.* Kim himself waited five weeks. *Id.*

[129] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in titles 8, 18, 22, 28, 40, 42 U.S.C.); 8 U.S.C. § 1105a (1996); James L. Kurka, *Across the Border and Over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 AM. J. CRIM. L. 385, 386 (2000).

[130] 8 U.S.C. § 1105a(a)(10) (1996) ("Any final order of deportation against an alien who is deportable by reason of having committed criminal offense [within certain enumerated classes] shall not be subject to review by any court."). *See* Antiterrorism and Effective Death Penalty Act of 1996 § 440 (amending 8 U.S.C. § 1105a(a)(10)), *repealed by* Omnibus Consolidate Appropriations Act, 1997, Pub. L. 104-208, Div. C, Title III, § 306(b), 110 Stat. 3009-612 (1996).

[131] Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Case*, 33 AKRON L. REV. 163, 194 n.179 (1999) (stating that Act violates most basic safeguards of due process and eliminates role of judiciary).

[132] Circuit courts have followed the Supreme Court regarding the power to grant habeas petition. Kurka, *supra* note 129, at 396.

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how unlawful. Again, the Supreme Court protected the Great Writ.[133]

In addition to imposing restrictions on habeas corpus ordinarily filed in the district courts, IIRIRA and AEDPA combined to severely limit appellate review of final removal orders for both aggravated felons and nonfelons. These reforms were later codified in 8 U.S.C. § 1252, entitled "Judicial Review of Orders of Removal."[134] Specifically, IIRIRA barred judicial review in three situations: summary removal proceedings, denials of discretionary relief from removal, and orders of removal based on criminal grounds.[135]

Summary removal proceedings occur at a port of entry when an immigration officer determines that an alien is "inadmissible."[136] Such an order of removal bars the noncitizen from re-entering the United States for five years.[137] IIRIRA precludes judicial review of summary removal provisions.[138] This confers tremendous power on immigration inspectors.[139] IIRIRA also bars judicial review of all forms of discretionary relief.[140] This includes Section 212(h) waivers,[141] cancellation of removal,[142] voluntary departure,[143] adjustment of status,[144] and fraud/misrepresentation waivers.[145] Furthermore, almost all noncitizens ordered removed on criminal grounds have no right to judicial review under IIRIRA.[146] In addition to limiting judicial review,

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[133] INS v. St. Cyr, 533 U.S. 289, 314-15 (2001).

[134] *See* Tarik H. Sultan, *Judicial Review Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT: AILA'S NEW LAW HANDBOOK 108, 118 (R. Patrick Murphy et al., eds., 1996).

[135] *Id.* at 111. Some circuit courts do accept jurisdiction to determine whether the criminal conviction alleged by the DHS is, as a matter of law, a removal offense. The court has "jurisdiction to determine whether jurisdiction exists." Aragon-Ayon v. INS, 206 F.3d 847, 849 (9th Cir. 2000); *see also* Xiong v. INS, 173 F.3d 601 (7th Cir. 1999).

[136] 8 U.S.C. § 1225(b)(1) (2000).

[137] 8 U.S.C. § 1182(a)(9)(A)(i) (2000).

[138] Sultan, *supra* note 134, at 111.

[139] *Id.* at 111-12. Limited habeas corpus relief is available, mostly for those persons who have been lawfully admitted for permanent residence. The habeas relief available is through a removal hearing. *Id.* at 112-13; 8 U.S.C. § 1252(e)(1)(2), (e)(4) (2000).

[140] 8 U.S.C. § 1252(a)(2)(B)(ii) (2000) (broad catch-all provision barring review).

[141] 8 U.S.C. §1184(h) (2000).

[142] 8 U.S.C. § 1226b (2000).

[143] 8 U.S.C. § 1229c (2000).

[144] 8 U.S.C. § 1225 (2000).

[145] 8 U.S.C. § 1182(a)(6) (2000); Sultan, *supra* note 134, at 114.

[146] None of the following final removal orders are reviewable: those based on crimes involving moral turpitude, controlled substances, multiple criminal convictions, controlled substance traffickers, prostitution and commercialized vice, aggravated felons, drug abusers or addicts, firearms offense, or multiple criminal convictions. Sultan, *supra* note 134, at 114-15.

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IIRIRA created more stringent procedures for seeking review in the federal courts.[147] These new procedures limited review to final orders, created a shorter time period in which to seek review, added venue restrictions, eliminated the automatic stay of removal, required consolidated review, and added new requirements for documents submitted with the petition.[148] Also, IIRIRA serves to limit the scope of review.[149] Findings of fact are conclusive, and the judge may only consider the administrative record.[150] IIRIRA also limits the injunctive relief available to aliens ordered removed.[151]

While the courts have not retreated from their constitutional role of reviewing the legality and constitutionality of U.S. immigration law, the jurisdictional barriers are complex and unpredictable. Accordingly, for the *pro se* petitioner, and even for experienced counsel, these barriers are formidable and often impede access to the courts, providing another barrier to due process that immigrants in removal proceedings must overcome. Many strong substantive claims fall by the wayside due to these barriers.

E. *Criminalizing Immigration Violations*

The criminalizing of immigration violations was previously reserved for smugglers and more egregious violators of immigration and criminal law. Times have changed.[152] Such criminalization has now become commonplace.[153] The most common immigration-related crime that a

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[147] See *id.* for a comprehensive overview of the changes regarding judicial review.

[148] Sultan, *supra* note 134, at 108-11. Although stays of removal are not automatic, defendants can file a Request for a Stay of the Order of Removal. 8 U.S.C. § 1252(b)(3)(B) (1996).

[149] Sultan, *supra* note 134, at 115.

[150] *Id.*; 8 U.S.C. §§ 1252(b)(4)(A)-(B) (1996). Determinations of eligibility for admission and asylum are also conclusive unless contrary to the law. 8 U.S.C. §§ 1252(b)(4)(C), (D). U.S. citizens have greater access to the federal courts. 8 U.S.C. § 1252(b)(5) (1996).

[151] Sultan, *supra* note 134, at 117. A court cannot enjoin the removal of an alien pursuant to a final removal order unless the alien demonstrates by clear and convincing evidence that the order of removal is prohibited as a matter of law. 8 U.S.C. § 1252(f)(2) (1996).

[152] *See* Hing, *supra* note 48, at 81 ("The process of criminalizing the immigrant and her dreams is multi-stepped. First the immigrant is labeled a problem through demonization, then she is dehumanized, until at last her actions or conditions are criminalized."); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (1997) ("Immigration law violations are being prosecuted at a higher rate and noncitizens with criminal records are being apprehended and deported at record rates.").

[153] *See* Marc L. Miller, *The 2002 Randolph W. Thrower Symposium on Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration*, 51

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noncitizen may be charged with is "illegal re-entry" under section 1326 of the Immigration Naturalization Act ("INA").[154] Federal defenders within the Ninth Circuit report that "Section 1326 cases" make up twenty percent of their entire case load, especially cases involving the felony offense of "being found in" the United States after a final order of

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EMORY L.J. 963, 963-64 (2002) ("In 2001 the federal government prosecuted around 57,000 offenders of which over thirty-three percent, or more than 19,000, were noncitizens. Over 8,900 defendants were convicted of immigration violations, of which eighty-nine percent (over 7,900) were noncitizens. Around 200,000 noncitizens are held in state prisons (roughly seven percent), and noncitizens make up almost thirty-six percent of the federal prison population. . . . The federal government expels even more people each year for immigration violations than it prosecutes for criminal charges — around 70,000 people a year. . . . The INS estimates that there is a potential pool of about 300,000 removable noncitizen offenders, not including the 1.7 million per year stopped or arrested at the border and immediately and voluntarily sent back. . . .").

[154] 8 U.S.C. § 1326 (2000). In pertinent part:

> (a) Subject to subsection (b), any alien who —
>
> > (1) has been denied admission, excluded, deported, or removed or has departed the US while an order of exclusion, deportation, or removal is outstanding, and thereafter
> >
> > (2) enters, attempts to enter, or is at any time found in the US, unless
> >
> > > (A) prior to his reembarkation at a place outside the US or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or
> > >
> > > (B) with respect to an alien previously denied admission and removed, unless alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) Notwithstanding subsection (a), in the case of any alien described in such subsection
>
> > (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;
> >
> > (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.

Id. Entering unlawfully into the United States has been a crime since 1952. Originally enacted as part of the Immigration and Nationality Act of 1952, the maximum penalty under section 276 was two years. In 1988, the statute was amended, substantially increasing the penalties for re-entry after deportation following a criminal conviction. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4471 (1988).

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removal.[155] Due to these changes, United States Attorneys now have the inviting prospect of almost-guaranteed convictions. One experienced federal defender described illegal re-entry prosecutions as follows:

> The fact is these are easy cases to make. Prosecutors have a vested interest in the total number of successful cases their office digests. Given the volume of such cases available in different jurisdictions, whether that volume is large or small, prosecuting what are essentially strict liability cases, invariably plea-bargained, presents an opportunity to enhance job performance and garner prosecutorial trophies.[156]

These cases are extremely difficult to defend against. The government need only prove alienage, a prior order of removal, and re-entry into, or presence in, the United States without application for re-admission. While the United States Supreme Court has ruled that due process requires that a section 1326 defendant have the opportunity to collaterally attack the underlying deportation or removal order,[157] Congress has severely restricted such attacks.[158] In most cases the predicate convictions are plea-bargained, followed by uncontested removal proceedings in which noncitizen defendants are never warned

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[155] Generally, "being found in" the United States does not require specific intent. United States v. Ortiz-Villegas, 49 F.3d 1435 (9th Cir. 1995). However, in the Ninth Circuit, "attempted illegal re-entry" is a specific intent crime. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1190 (9th Cir. 2000). For an excellent discussion of the issue of "general v. specific" intent in the context of a reasonable mistake defense to a section 1326 prosecution, see Larry Kupers, *Aliens Charged with Illegal Re-entry are Denied Due Process and Thereby Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861 (2005).

[156] Telephone Interview with Larry Kupers, Assistant Federal Public Defender in the Northern District of California, and former visiting counsel to the United States Sentencing Commission and to the Defender Services Division of the Administrative Office of the United States Courts (July 21, 2004) [hereinafter Kupers Interview].

[157] United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[158] *See* 8 U.S.C. § 1326(d) (2000). Only those who have filed a timely appeal of the immigration judge's order of removal may collaterally attack such an order. Because most removal (or deportation) respondents are not represented by counsel (due to lack of knowledge and resources to pursue an appeal) and must remain in detention even if an appeal is filed, most do not appeal their order of removal. If they subsequently become section 1326 defendants, they will not be permitted to collaterally attack the underlying removal order and predicate conviction. For example, if the noncitizen has failed to appeal his order of removal (which is likely as more than half of those removed are unrepresented), he may not collaterally attack the conviction. On the other hand, a noncitizen who does appeal his order of removal based on a criminal conviction is subject to mandatory detention until there is a final order of removal. *See supra* Part II.C. This may take years. Those with the tenacity and resources to seek judicial review of their order of removal may also be subject to detention despite a stay of removal. *Id.* Thus, noncitizens are effectively coerced to forego administrative and judicial review of the order of removal.

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of the immigration consequences[159] and severe criminal penalties[160] for any future illegal re-entry. As if the statutory exposure for illegal re-entry was not enough, once in custody for a section 1326 offense, a noncitizen would almost certainly be denied bail, remaining in pretrial incarceration until his conviction and sentence to federal prison.[161]

In some parts of the country, the shear number of section 1326 cases, which may involve collateral attacks, has overwhelmed judicial resources. Some United States attorneys have worked out "fast track" programs. These programs essentially offer a "charge bargain."[162] Besides section 1326, the second source of law concerning sentences imposed for illegal re-entry is the Federal Sentencing Guidelines.[163] Typically, following the guidelines, section 1326 defendants face a seventy-seven to ninety-six-month sentence.[164] If the predicate crime

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[159] Similarly, BIA case law on ineffective assistance of counsel does not impose nor recognize the duty of counsel to warn noncitizens facing removal of section 1326 consequences. *See In re* Assaad, 23 I. & N. Dec. 553 (B.I.A. 2002); *In re* Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1998).

[160] *See supra* Part I. Even states that recognize collateral attacks on such convictions or on predicate removal orders, or that require judicial warnings concerning immigration consequences, do not require warnings respecting section 1326 exposure.

[161] Under 18 U.S.C. § 3142 (2000), the burden of proof is on the government, when it seeks pretrial detention on flight-risk grounds, to show, by a preponderance of the evidence, that no combination of conditions can "reasonably assure" the defendant's appearance. *See* United States v. Simpkins, 826 F.2d 94, 96 (D.C. Cir. 1987); United States v. Magallan-Toro, 2002 WL 31757637 (N.D. Tex. Dec. 4, 2002). The author has interviewed federal defenders who represent section 1326 defendants who state that it is common practice for such defendants to be labeled a "flight-risk" and, thus, found ineligible for bail.

[162] Kupers Interview, *supra* note 156.

[163] The United States Sentencing Guidelines ("U.S.S.G.") set forth a system for calculating both the scores for specific offenses and for the defendant's criminal history. This system essentially configures a grid with the vertical axis reflecting the offense level and the horizontal axis reflecting the defendant's criminal history. Once a sentencing judge calculates the Offense Level and the Criminal History Category, he or she determines the sentence by means of a Sentencing Table, which prescribes a range of imprisonment expressed in months. *See* FEDERAL SENTENCING GUIDELINES MANUAL § 1B1.1 (West 2002) [hereinafter GUIDELINES], *available at* http://www.ussc.gov/2002guid/2002guid.pdf.

[164] Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after —

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

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prompting the original removal was not a "serious felony," under a fast track program, the defendant could plead to two counts of violating 8 U.S.C. § 1325[165] and accept the statutory maximum in exchange for dropping the section 1326 charge. This "bargain" offers a defendant a thirty-month sentence instead of seventy-seven to ninety-nine months. Because many other defense strategies that have been attempted have had limited success,[166] these offers are very tempting and, thus, combined with the difficulty of mounting a defense, not uncommonly turn out to be the tail that wags the dog.[167]

> (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;
>
> (C) a conviction for an aggravated felony, increase by 8 levels;
>
> (D) a conviction for any other felony, increase by 4 levels; or
>
> (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

> The basic Offense Level illegal re-entry is 8. Add 16 levels for a prior category aggravated felony. Subtract 3 levels for "accepting responsibility," usually attending a plea bargain. Based on a Criminal History Category of VI, the recommended sentence range is 77-99 months. Other factors may include departures or adjustments that a judge may grant at the time of the sentencing.

See GUIDELINES, *supra* note 163, at 287-316 (ch. 3), 317- 43 (ch. 4).

[165] *See* 8 U.S.C. § 1325 (2000). Under section 1325(a), for the first commission of illegal re-entry (without having been previously removed), a person can be imprisoned for not more than six months. A subsequent re-entry entails a term not exceeding two years, the statutory maximum.

[166] *See generally* Gerald P. Seipp, *Defense of INA §276 Re-entry After Removal Prosecutions: Circuit Confusion on the Collateral Attack Defense*, IMMIGR. BRIEFINGS (July 2004) (discussing limited success of different defense strategies in case law).

[167] Kupers Interview, *supra* note 156. Kupers described this program as in place in San Diego. But, not all districts offer such a program. Arizona offers a different version of "fast track," a four-level decrease called a "guideline bargain." The goal of the Sentencing Reform Act, which created the federal sentencing guidelines, was to create a system that (a) reflected a focus on the specific conduct of given crimes to achieve some degree of *proportionality*, and (b) enabled a greater degree of sentencing *uniformity*. As applied in section 1326 prosecutions, the guideline outcomes are neither proportional nor uniform. Violator "conduct" is limited to returning to the United States without permission. All other differentiating conduct is incorporated into sentencing factors. *See* Almendarez-Torres v. United States, 523 U.S. 224 (1999). In *Blakely v. Washington*, 2004 WL 1402697 (U.S. June 24, 2004) (applying rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stating that other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed maximum must be submitted to jury and proved beyond reasonable doubt)), the Court invalidated Washington's sentencing guideline scheme as violating the Sixth Amendment for allowing facts neither included in the indictment nor presented to a jury to determine the extent of the sentence imposed when judicially noticed by a preponderance of the evidence at sentencing hearings. How *Blakely* might affect guideline application in section 1326 prosecutions is uncertain.

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III. THE AMERICAN GULAG

Thirty years ago, Aleksandr Solzhenitsyn presented his account of the Soviet gulag — the prison and labor camps that dotted the Soviet Union's landscape in the first half of the twentieth century.[168] Ironically, U.S. immigration detention policy has come to resemble its Cold War adversary's prison system — a network of detention facilities littering the country and shrouded in secrecy. Being out of sight (and thus, the government hopes, out of mind), the immigration gulag has become a fixture of an American immigration policy lacking disclosure, accountability, clear objective, and uniformity.[169]

The 1996 statutory changes and the events of September 11, 2001, created a sea change in attitudes toward immigrant detention. Authorities have adopted detention as their default posture, preferring to lock up any noncitizen who comes to their attention and then pass the buck to federal and immigration judges. Former Attorney General John Ashcroft recently exercised his broad authority to vacate a decision of the BIA, which had allowed an asylum-seeker to remain out of custody on bond.[170] The DHS had appealed the decision of the immigration judge to release the asylum-seeker on bond, arguing that because the asylum-seeker arrived on a boat lift from Haiti, releasing him on bond would create a threat to national security.[171] It further argued that releasing the asylum-seeker would encourage more Haitian migration and that "in light of the terrorist attacks of September 11, 2001, there is an increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspection process."[172] Thus under the Ashcroft ruling, the inspection process that is designed to evaluate asylum-seekers' suitability for bail by assessing the danger they pose to the community or their flight risk is eliminated by executive fiat.[173]

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[168] ALEXANDER L. SOLZHENITSYN, THE GULAG ARCHIPELAGO: 1918-56 (Thomas P. Whitney trans., 1973).

[169] *See* Amnesty International, *Lost in the Labyrinth: Detention of Asylum Seekers* (1999), *available at* http://web.amnesty.org/library/pdf/AMR510511999ENGLISH/$File/AMR 5105199.pdf [hereinafter Amnesty Int'l, *Labyrinth*]; Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (Sept. 1998), *available at* http://www.hrw.org/reports98/us-immig/ [hereinafter Human Rights Watch].

[170] *In re* D-J-, 23 I. & N. Dec. 572, 573 (B.I.A. 2003).

[171] *Id.* at 577.

[172] *Id.*

[173] 8 U.S.C. § 1101(a)(13)(A); 8 U.S.C. §1182(a)(5)(A)(B); *see also In re* Valdez-Valdez, 21 I. & N. Dec. 703, Interim Decision (BIA) 3302, 1997 WL 80989 (BIA).

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From 1994 to 2001, the detention population in U.S. facilities more than tripled, rising from 5,532 to 19,533.[174] The rise is due to a combination of the immigration laws of 1996, a renewed xenophobia, and the Supreme Court's confinement of due process and liberty protections for noncitizens to a "due process lite" constitutional twilight zone where negative stereotypes justify mass deprivation of liberty.[175] This expanded and growing population includes those seeking asylum,[176] those removable on the basis of a criminal conviction but choosing to exercise their right to a removal hearing,[177] those whose country of nationality will not repatriate its nationals,[178] and those who are unable to post the bail set by immigration authorities.[179] The DHS detained approximately

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[174] MARK DOW, AMERICAN GULAG 9 (Univ. of California Press 2004).

[175] In *Demore v. Kim*, 538 U.S. 510 (2003), the Court, in a 5-4 plurality opinion, sustained the constitutionality of preventive detention (mandatory detention) for any immigrant who chooses to exercise his right to a removal proceeding on the basis of alleged criminal grounds despite the absence of any indicia of flight risk or danger to the community. *See* Coonan, *supra* note 57, at 593 n.42; *infra* Part IV. David A. Martin, former general counsel to the INS, testified before the 9/11 Commission that for many decades, before September 11, 2001, U.S. immigration authorities had used immigration detention sparingly as an exception to the general rule that immigrants should only be detained, as part of the removal process, if an immigrant is a danger to the community or a flight risk. Martin criticizes the recent changes as needlessly depriving thousands of their liberty without having any measurable pay-off in terms of protecting the community or national security. *See* David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate — Testimony Before the National Commission on Terrorist Attacks Upon the United States*, 18 GEO. IMMIGR. L.J. 305, 308-09 (2004).

[176] Alison Siskin, *Immigration-Related Detention: Current Legislative Issues*, CRS REPORT FOR CONGRESS, at 12 (Apr. 28, 2004), *available at* www.fas.org/irp/crs/RL32369.pdf.

[177] 8 U.S.C. § 1226(a), (c) (2000); *Demore*, 538 U.S. at 540.

[178] The Supreme Court has recognized and sought to limit indefinite detention for such "nonreturnable detainees," but, as a practical matter, many remain in such detention. Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (finding implicit reasonableness restriction in Immigration and Nationality Act's post-removal-program detention provision). Detainees subject to the type of post-removal detention at issue in *Zadvydas* are commonly referred to as indefinite detainees, or "lifers." The continued use of a term suggestive of criminal prisoners is troubling and illustrates the failure of the system to adapt to, and adopt, *Zadvydas*. One such example is of a Liberian national whose removal order was finalized in January 2003. The Liberian consulate has ignored his verbal and written requests for travel documents. As such, his removal is not likely to be effectuated in the reasonably foreseeable future. The DHS has the burden of proving that he will indeed be removed in the reasonably foreseeable future in order to justify his detention. It has not done so, yet he remains in detention. *See The Post-Order Custody Review Process: Is There Really any Process*, NEWS FROM CLINIC'S CASE FILES (Catholic Legal Immigration Network, Inc.), Feb. 2004, at 6, *available at* http://www.ilw.com/lawyers/articles/2004,0930-clinic.shtm.

[179] Mr. E is an asylum-seeker from Cameroon who is being aided by the U.C. Davis Immigration Law Clinic. He immigrated to the United States after repeated persecution and imprisonment for his role as an activist for a politically oppressed minority, escaping prison by bribing guards, and leaving behind a regime which subjected him to repeated torture, and which had killed his father during political demonstrations. Mr. E used

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202,000 noncitizens in fiscal year 2002.[180] Approximately fifty-one percent had criminal records.[181] The average daily detention population in 2002 was 20,282.[182] In fiscal year 2004, the average daily detention population grew to 22,812.[183] Such growth has outpaced the capacity of the DHS to house all detainees in its Service Processing Centers ("SPCs").[184] To bridge the gap, the DHS contracts with private facilities[185] and local jails[186] to provide the necessary detention space. The dispersal of detainees among these different tiers of facilities creates difficulty in maintaining uniform standards for detention. In a report on the treatment of detainees held in connection with the September 11 investigations, the Inspector General noted the difference between the treatment of detainees at the Metropolitan Detention Center ("MDC") in

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another's travel documents in order to escape his country without detection, but, upon arrival in the United States, he was arrested at the airport because he had no proper visa. As such, he was subjected to expedited removal and mandatory detention. Mr. E immediately disclosed his fear of being returned to his native country and was given a credible fear interview, which subsequently placed him in regular removal proceedings. However, he was still subject to mandatory detention until he could lobby for parole and pay a bond or prevail at the full asylum merits hearing. Though parole was approved, it was conditioned on posting a $10,000 bond. Neither Mr. E nor his only U.S. contact has the several thousand dollar deposit and collateral (house) that bond companies require. Thus, Mr. E remained in custody for over seven months, longer than most criminal inmates housed in the same county jail. Mr. E was eventually granted asylum and released on the same day. Case on file with the author. *See generally In re* D-J-, 23 I. & N. Dec. 572, 573 (B.I.A. 2003) (the Attorney General has broad discretion in bond proceedings and neither section 236(a) of the Act nor applicable regulations confer on alien right to release on bond); *In re* Rojas, 23 I. & N. Dec. 117 (B.I.A. 2001) (criminal aliens released from criminal custody subject to mandatory detention even if alien not immediately taken into custody); *In re* Adeniji, 22 I. & N. Dec. 1102 (B.I.A. 1999) (criminal alien in custody determination under section 236(a) of the Act must establish to the satisfaction of the IJ and BIA that he doesn't present a danger to property or persons); *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999) (persons released from criminal detention after October 8, 1998, at a hearing, may be able to show he/she not subject to mandatory detention as not properly included in mandatory detention category); *In re* Joseph, 22 I. & N. Dec. 660 (B.I.A. 1999) (when government files Notice of INS Intent to Appeal Custody Redetermination, automatic stay of IJ release order is triggered).

[180] Office of Immigr. Stat., Dep't of Homeland Sec., (Congressional Session), 2003 Y.B. of Immigr. Stat., at 175, *available at* http://uscis.gov/graphics/shared/aboutus/statistics/Yearbook2002.pdf (last visited Dec. 28, 2004).

[181] *Id.*

[182] *Id.*

[183] Siskin, *supra* note 176, at 12.

[184] The DHS operates nine Service Processing Centers located in California, New York, Texas, Florida, Arizona, and Puerto Rico. These centers are insufficient when compared to the demand for detention space. Amnesty Int'l, *Labyrinth*, *supra* note 169, at 33.

[185] *Id.* Six private facilities are located in Colorado, New York, New Jersey, Washington, and Texas.

[186] *Id.* There are some 475 such local jails with DHS contracts.

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Brooklyn, New York (operated by the Bureau of Prisons) and at the Passaic County Jail in New Jersey (county jail under contract with the DHS).[187] Detainees' experiences depended on their location. Reports from MDC depicted a harsh and restrictive environment, whereas detainees at Passaic were treated like regular DHS detainees.[188] The disparity between these two nearby centers is not unique. Instead, it is indicative of a nationwide failure to provide a uniform immigration detention policy.

The draconian practices of U.S. immigration detention have been protected by a veil of secrecy secured by the federal government. With detainees warehoused in remote locations with limited access to telephones or legal counsel, attempts to track detainees (even by family members) can be a daunting and often impossible task.[189] The secrecy of immigration detention, however, predates the secrecy provisions of the USA PATRIOT Act and government reaction to the September 11 attacks.

Legislation passed after September 11 broadened the government's power to conduct investigations in secret, citing a national security need. However, at the same time, increased attention from nongovernmental organizations ("NGOs") and the media has cast light upon secretive practices that went unnoticed for years. With increased scrutiny has come increased political pressure for accountability. That pressure most clearly manifested itself in the Inspector General's report on treatment of immigration detainees held during the investigation of the September 11 attacks.[190]

The Inspector General conducted the report in response to allegations of abuse within detention facilities. It serves as an overdue critique of the detention system and the Bush Administration's attempt to effectuate a sweeping lock-up of aliens with possible connections to the attacks.[191] Primary among the report's charges was the FBI's failure to distinguish between aliens who were the focus of the September 11 investigation and other aliens encountered in the process of pursuing those focal

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[187] *See generally* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) [hereinafter INSPECTOR GENERAL REPORT], *available at* http://www.usdoj.gov/oig/special/0306/index.htm.

[188] The DOJ reported allegations of abuse at Passaic, but found no evidence supporting such claims. *Id.* at 177.

[189] *Id.* at 113-14.

[190] *Id.*

[191] *Id.*

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suspects.[192] Standards regarding detainee processing were often ignored. Detainees were not given notice of charges within the seventy-two-hour period promulgated by the DHS, which affected their ability to understand the grounds for their detention, get access to counsel, and request a bond hearing.[193] Moreover, the DHS adhered to the FBI's "hold until cleared" policy, which was based on the erroneous assumption that such a clearance process would be swift.[194]

Confinement conditions and detainee abuses have long concerned immigration lawyers and rights activists. The brutality of abuses[195] and the lack of consequences for vicious correctional officers are shocking, but have rarely incited the American public's outrage.[196] Physical abuses are rampant, as are episodes of psychological abuse, which take a debilitating toll on detainees.[197] The Inspector General noted alleged physical and verbal abuses by MDC officers, especially in the first few months following the September 11 attacks.[198] Tragically, the findings and recommendations of the Inspector General have had no discernable impact on the American gulag. Indeed, the Department of Justice's ("DOJ's") response was dismissive, making "no apologies" for its violations of basic human rights.[199]

The condition of DHS facilities and local jails take a similar toll on detainees while freeing corrections officers and DHS officials from liabilities associated with direct abuse. The Inspector General reported that the eighty-four detainees housed at MDC endured a twenty-three-

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[192] *Id.* at 40-42.

[193] *Id.* at 35-36.

[194] In fact, FBI agents were often not focused on the aliens once they were detained, and they remained in custody for months while no clearance investigations took place. *Id.* at 70-71.

[195] *See* Human Rights Watch, *supra* note 169, at 73-77 (reporting abuses, including detainee beaten and shut in solitary confinement for five days for questioning ban on looking out of window and for demanding compensation from guards who broke his eyeglasses when battering his face into wall; guards at Louisiana jail beating detainee with lead pipe; guards battering detainee after learning that he was going to complain about their treatment of him; and shocking detainees with electric batons and shields).

[196] *See* DAVID COLE, ENEMY ALIENS 5-6 (2003).

[197] Examples of psychological abuses include racial taunting, giving detainees the silent treatment (not responding when spoken to), withholding toilet paper, and giving orders in English and then punishing non-English speaking detainees for noncompliance. *See* Amnesty Int'l, *Labyrinth*, *supra* note 169, at 43-47; Human Rights Watch, *supra* note 169, at 44.

[198] INSPECTOR GENERAL REPORT, *supra* note 187, at 142.

[199] *See* Martin, *supra* note 175, at 311 (citing Statement of Barbara Comstock, Director of Public Affairs, Regarding the IG's Report on 9/11 Detainees (June 2, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/June/03_opa_324.html).

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hour lock down each day; "4-man hold" escort procedures with handcuffs, leg irons, and chains; and a limit of one legal telephone call per week and one social call per month.[200] Even with the possibility of finding legal counsel, the list of pro bono attorneys given to detainees had inaccurate and outdated information.[201] Such policies endured even after Ashcroft declined to release detainees' names for several weeks following the attacks, making locating detainees very difficult for attorneys, families, and law enforcement.[202]

Though the media has cast the spotlight upon treatment of Arab and Muslim detainees, primitive conditions existed nationwide for years, especially in contract jails. Confinement to cells for eighteen hours per day; beds under a toilet from which urine splattered the sleeper; unusual meal times (breakfast at 3:30 a.m.); meals that disregard religious dietary prescriptions; and lack of hygienic supplies such as soap, toothpaste, and toothbrushes are just some of the many reported conditions that detainees are forced to endure.[203] Additionally, the debilitating effect of the language barrier between detainees and jail staff is another problem that reforms are unlikely to remedy.[204]

Such conditions are all the more inhumane when asylum-seekers are held alongside convicted criminals and other DHS detainees. The mere fact that asylum-seekers may be detained has drawn criticism as contrary to both international law and the mandate given to the DHS through immigration legislation.[205] Although top DHS officials assign low detention priority to asylum-seekers, that priority is not reflected in practice.[206] As a matter of course, the DHS detains immigrants who have strong asylum cases and eventually do receive asylum, those the DHS thinks have genuine asylum claims, and even those granted asylum

[200] Such telephone policies prevented many detainees from even securing legal counsel, because most did not have attorneys prior to their detention. Moreover, MDC officials would not ask detainees if they wanted their weekly phone call, making it difficult for detainees to keep track of when such calls were due them, and putting them at risk of abuses if they demanded their call. *See* Martin, *supra* note 175, at 130-35, 157.

[201] *Id.* at 137-38.

[202] *Id.* at 113-14.

[203] Human Rights Watch, *supra* note 169, at 43-48.

[204] *Id.* at 52-53 (quoting wardens as follows: "You'd be surprised what can be done with hand gestures"; "we have staff members who speak . . . Oriental [sic]"; "I can understand detainees just fine").

[205] *INS Oversight and Reform: Detention: Hearings Before the Senate Judiciary Comm. Subcomm. on Immigration*, 1998 WL 767386 (105th Cong.) (1998) (statement of Representative Spencer Abraham); *see also* Amnesty Int'l, *Labyrinth*, *supra* note 169, at 52.

[206] Amnesty Int'l, *Labyrinth*, *supra* note 169, at 36.

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whose orders the DHS has appealed.[207] In their fight for asylum, many immigrants escape the harsh conditions of their home country only to be confronted with similarly harsh detention upon arrival in the United States.[208]

Standardizing rules governing DHS detention facilities has proven difficult. All facilities housing DHS detainees are required to provide twenty-four-hour supervision, meals, emergency medical care, and to comply with safety and emergency codes.[209] However, some supplemental SPC standards are inadequate and do not extend to contract facilities.[210] For example, government-run SPCs are subject to additional standards that require access to legal materials, telephones, and visitors, among other provisions.[211] Similarly, the DHS has no clear policy on how to monitor contract facilities' compliance with DHS guidelines. An especially glaring example of this absence of a clear detention policy is DHS reliance on American Correctional Association ("ACA") standards to form the foundation of its detention guidelines. ACA standards were promulgated to regulate criminal prisoners, not the noncriminal detainees (or even asylum-seekers) who comprise a large number of those housed by the DHS.[212] Thus, in local jails, noncriminal DHS detainees often find themselves subject to the same conditions and treatment as regular inmates.[213] On paper, agency standards do exist. The existence of such token regulations serves administrators well when deflecting blame for abuses within the system.[214]

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[207] One such person was still detained a year after being granted asylum. *Id.* at 52-54 (stating that DHS refused to explain to Amnesty International why five foreign nationals who had credible asylum claims were still detained).

[208] *Id.* Some seeking asylum will use fake papers to escape their country, only to be detained for arriving in the United States with fake papers. Human Rights Watch, *supra* note 169, at 81-82. See Elizabeth Amon, *Wretched Refuge*, CITY LIMITS MONTHLY, Apr. 2004, *available at* http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=1117 for an account of dehumanizing treatment accorded asylum applicants upon arrival.

[209] 8 C.F.R. § 235.3(e) (2004).

[210] Over 50% of DHS detainees are housed in county jails under contract with the federal government. *INS Detention: Hearing Before the Judiciary Subcomm. on Immigration*, (105th Cong.) (1998) (statement of Wendy A. Young, Washington Liason, and Staff Attorney); Human Rights Watch, *supra* note 169, at 25.

[211] Other provisions include: access to voluntary work programs, religious practices, group legal rights presentations, clean clothing, bedding, linen, towels, medical care, freedom to conduct hunger strikes, suicide counseling and prevention, and chance to marry (upon request). Human Rights Watch, *supra* note 169, at 17 n.31.

[212] Human Rights Watch, *supra* note 169, at 18.

[213] Steve Ritea, *Profits from Detainees Come Under Scrutiny*, TIMES-PICAYUNE, Jan. 31, 2000, at A1.

[214] DOW, *supra* note 174, at 13 (noting government's concerted effort to "operate outside

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Even with substandard facilities, contract jails are still able to operate as healthy businesses in warehousing detainees for the DHS. The DHS pays jails twice the amount that states pay for housing prisoners.[215] Nor can the DHS be too discriminating when selecting local facilities to house detainees because of the general lack of detention space.[216] The possibility of detentions of Arabs and Muslims post-September 11 was another boon for private prisons. With space already short, the demand to house those rounded up in connection with the terror attacks meant big business.[217] This was the next step in what has become a "growth industry"[218] for private prison owners. As of February 1998, the DHS had more than 1000 private warehousing contracts,[219] with contracted local jails holding approximately sixty percent of all DHS detainees.[220]

Commercialization of detention services is connected to numerous problems. First and foremost, these private facilities are businesses primarily concerned with profits. Thus, with both eyes on the bottom line, basic services for detainees fall by the wayside.[221] Second, when enterprising facility owners (private contractors and local jails) enter the detention market with increasingly competitive bids for federal detention dollars, the impact on local communities is significant.[222] Such reliance on federal money is troubling. Should the need for warehousing space increase in the short term (as it has post-September 11), municipalities will increasingly rely on detention monies to supplement or supplant[223] other sources of revenue, and local governments will no doubt show reluctance to cut back on detention services when federal needs decrease.

In the never-ending quest to deny responsibility for the program's failures, politicians and bureaucrats engage in stone-throwing contests in an effort to cast blame elsewhere. DHS bureaucrats respond that they

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the bounds of enforceable law").

[215] Human Rights Watch, *supra* note 169, at 14; Ritea, *supra* note 213, at A1.

[216] *See* Human Rights Watch, *supra* note 169; *see also* Human Rights Watch, *Immigration Detainees in Jail* (1999), *available at* http://www.hrw.org/about/initiatives/insjails.htm.

[217] DOW, *supra* note 174, at 10.

[218] Amnesty Int'l *Labyrinth*, *supra* note 169, at 4.

[219] Human Rights Watch, *supra* note 169, at 16 (citing DHS Deportation and Detention Statistics, February 25, 1998).

[220] *Id.* at 14.

[221] DHS provides a list of legal materials that every detention center and privately contracted facility should carry, at a cost of $1500 per set. However, local jails are not obliged to provide this material for detainees. *Id.* at 64.

[222] *Id.* at 16-17. Reportedly, York County, PA, cut back property taxes when it earned more than $2 million from housing DHS detainees in 1998. *Id.*

[223] *Id.*

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are merely the executors of the legislative will — a position substantially supported by the breadth of the 1996 immigration laws.[224] Although these laws afford the DHS some discretion in declining to deport those immigrants with exceptional circumstances, the agency has done little to accommodate for such cases or to relieve the pressure on the heavily burdened detention system. The zeal with which the DHS prosecutes removal proceedings is disproportionate to the need for such proceedings, though the broad mandate of the 1996 legislation supports such action.[225] As former INS Commissioner Doris Meissner made clear, the breadth of the 1996 legislation renders the exercise of prosecutorial discretion indispensable.[226]

Alternatives to the blanket policy of strict detention and removal do exist. For one, once the removal period runs, the DHS can grant supervised conditional release on bond to detainees who are not a flight risk.[227] DHS regulations require a multifactor inquiry into whether a detainee presents a community and/or flight risk, but the agency often denies applications for such supervised release without conducting such an inquiry.[228] Thus, detention facilities remain needlessly overcrowded, and federal resources are spent litigating detention decisions that do not survive judicial scrutiny.[229]

Other alternatives include pilot programs such as the Appearance Assistance Project ("AAP"). The AAP pairs released detainees with

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[224] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in titles 8, 18, 22, 28, 40, 42 U.S.C.); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (1996).

[225] Courts have attacked the DHS for misuse of prosecutorial discretion in initiating mandatory removal of criminal aliens even when there is no question that the alien subject to the proceedings is removable under the law. *See* Carranza v. INS, 89 F. Supp. 2d 91, 96 (D. Mass. 2000) (dicta critical of DHS for improvident exercise of prosecutorial discretion).

[226] Meissner issued a memorandum indicating that "Service officers are not only authorized by law but expected to exercise discretion in a judicious manner." Meissner, Commissioner Memo, HQOPP 50/4 (Nov. 27, 2000), *available at* www.immigrationlinks.com/news/prosecutorial%20discretion%20memo%202 .pdf (regarding prosecutorial discretion).

[227] *See* 8 C.F.R. § 241.3(a); Ma v. Reno, 208 F.3d 815, 819-20 (9th Cir. 2000); Ngo v. INS, 192 F.3d 390, 398-400 (3d Cir. 1999).

[228] *See* 8 C.F.R. § 241.3(a); *Ma*, 208 F.3d at 819-20; *Ngo*, 192 F.3d at 398-400 (strongly worded opinion critical of agency violation of regulation and of internal agency standards).

[229] Such waste of legal resources is more glaring in light of the 44% increase in aliens granted relief from removal from 1994 to 1999 because of DHS's attorney shortage. *See The President's FY 2001 Budget Request: Hearing Before the S. Appropriations Comm*, 106th Cong., (2000) (testimony of commissioner Doris Meissner for the Immigration and Naturalization Service), *available at* http://uscis.gov/graphics/aboutus/Congress /testimonies/2000/meissner2K0307.pdf.

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community sponsors who have a verified address where the detainee will reside until removal is effectuated.[230] The federal government is also contemplating methods of implementing enforceable, at-home detention policies.[231]

Recently, the federal government began experimenting with Operation Compliance, a pilot program to cure the problem of absconders (those defying orders to leave the country).[232] The program directs officers to arrest promptly those ordered to leave the country after losing their immigration cases.[233] Once arrested, they are held in detention until opportunities for appeal are over or until bond has been posted. While hailed by government officials as a necessary fix to cure the problem of absconders, immigration lawyers are quick to highlight the program's many flaws.[234] Decisions on detention were previously made on a case-by-case basis. This blanket policy, however, may ignore the fundamental difference between aliens who purposely overstay their visas and asylum-seekers.[235] Moreover, it is unclear whether immigration facilities could bear the burden of such a program on a national scale.[236]

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[230] Human Rights Watch, *supra* note 169, at 23 (citing THE APPEARANCE ASSISTANCE PROJECT, ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION (Vera Inst. of Justice, 1998) (reporting 80% compliance rate: 188 appearances made out of 220 required).

[231] Enforceable by electronic monitoring devices ("EMDs"), anklets, or telephone call-in with voice recognition. Ricardo Alonso-Zaldivar, *Foreigners Fighting Orders to Leave U.S. May Face Jail*, L.A. TIMES, Apr. 25, 2004, at A28. The DHS (or, specifically, the ICE) currently operates an EMD program in Miami, Detroit, and Anchorage. CLINIC (Catholic Legal Immigration Network, Inc.) has objected to the EMD program on several grounds. For example, in Miami, the ICE is using EMDs on asylum-seekers who would otherwise be eligible for release on parole. Often, program participants do not receive written instructions regarding the conditions of the program. This may cause innocent violations resulting in unnecessary re-detention of program participants. In addition, the policy regarding the hours during which program participants are allowed to leave their homes appears to be unnecessarily restrictive. *See News from CLINIC's Case Files: Electronic Monitoring Pilot Program Fraught with Problems*, CLINIC NEWSLETTER, No. 2, Feb. 2004, at 7.

[232] Currently being tested in Atlanta and Denver, it may be expanded if proven successful, and is part of a larger DHS plan to expel all deportable aliens. Alonso-Zaldivar, *supra* note 231, at A28.

[233] Such cases are usually civil, not criminal. *Id.*

[234] *Id.* (noting that Operation Compliance targets offenders without criminal records who are merely exercising their rights in judicial system, that bail is often set higher than detainees can afford, and that program ignores plight of asylum-seekers). Further, such a program is another example of wasteful government spending in efforts to fix the holes in current immigration policy. Moreover, the threat of automatic arrest could incite aliens to go underground (when they might otherwise follow legal procedures).

[235] *Id.*

[236] Space in detention facilities is already limited, with priority going to aliens with

Additionally, the government introduced the Intensive Supervision Appearance Program ("ISAP") on June 21, 2004 — another pilot program designed to "promote integrity in the immigration system" and to "relieve pressure on detention space."[237] ISAP assigns groups of voluntary participants (immigration detainees) to supervisors charged with overseeing the detainees' activities through the use of electronic monitoring devices ("EMDs"). The supervisors monitor home and work visits as well as telephone conversations.[238] While such pilot programs are designed to be practical and serve noble goals, their development is long overdue, and their effectiveness is still unproven.

At the end of its report on the September 11 detainees, the Inspector General outlined twenty-one recommendations to ameliorate the process of detaining those held in connection with terrorist investigations.[239] These recommendations include adopting a uniform arrest and detainee classification system, improving information sharing between federal agencies, expediting the FBI clearance process, and improving monitoring of contract facilities that house detainees.[240] Many of the recommendations are so simple that one wonders why they are not a part of the detention system as a matter of course. But, is the government's failure to adopt such simple measures really that surprising, given decades of an ad hoc detention policy lacking both uniformity and accountability? Even to an untrained observer, it is not.

Alternatives to the inhumanity of our current system do indeed exist and do not call for a radical overhaul. Sadly though, real reform is unlikely unless those ultimately accountable for implementing and enforcing immigration law are faced with political consequences for their misfeasance. Short of such a resolution, the judicial system is still the best opportunity for most detainees to contest the oppressiveness of detention. Rights activists and NGOs have also played key roles in lifting the veil of secrecy from over the gulag. Unless reforms are made

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criminal records. *Id.*

[237] Press Release, U.S. Immigration and Customs Enforcement, *ICE Unveils New Alternative to Detention* (June 17, 2004), *available at* http://www.ice.gov/graphics/news/newsrel/articles/061704det.htm (quoting Acting Director of Detention and Removal Operations Victor Cerda). The program will be implemented in eight cities: Baltimore, Philadelphia, Miami, St. Paul, Denver, Kansas City, San Francisco, and Portland, Oregon.

[238] *Id.* Supervisors are also charged with aiding participants in procuring pro bono legal counsel.

[239] INSPECTOR GENERAL REPORT, *supra* note 187, at 186-94. The Report includes suggestions to adopt a uniform arrest and detainee classification system, to improve information sharing between federal agencies, to expedite the FBI clearance process, and to improve monitoring of contract facilities that house detainees.

[240] *Id.*

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at the source, however, retrospective complaint and investigation will serve only as a temporary salve, not a permanent fix.

IV. ROUNDING UP THE USUAL SUSPECTS: POLICY IN THE WAKE OF SEPTEMBER 11

In the aftermath of the September 11 terror attacks, the government scrambled to find ways to fight against a nationless, secretive enemy who had brought its war to U.S. soil. In the modern age of warfare, we have not been confronted with such a nontraditional threat: one independent from any one country, one not easily identified, and one that had already infiltrated our borders. As such, the government could not fall back to the politically popular course of action of bringing the war directly to the enemy. Though it is generally accepted that the President enjoys broader powers in foreign affairs and in wartime, debate regarding what power the Commander in Chief would have in such a new situation arose. With domestic and international support peaking, the government began to make reforms perceived necessary to ensure that it could fight this twenty-first century war. At the Bush Administration's urging, Congress expanded the executive's mandate to combat terrorism and provided the "appropriate tools" to do so by enacting the USA PATRIOT Act in November 2001.[241] Through unilateral executive actions and the USA PATRIOT Act, the tension between the need for security and the need to preserve individual liberties arose.

This part argues that the Bush Administration's response to the terrorist threat to our country — so powerfully revealed in the deadly attacks of September 11 — has been misguided at home and abroad. The Administration's emphasis has been on the public relations of a "war on terror," not its substance. Its domestic response, largely directed by former Attorney General John Ashcroft, was to arrest and detain thousands of noncitizens of Middle Eastern descent or Islamic faith who had no connection with the attacks. The Attorney General held these detainees for lengthy periods without charge under the pretext that it somehow advanced our goals in the "war on terror."[242] While this

[241] The USA PATRIOT Act's full title, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, is illustrative of the political rhetoric surrounding post-9/11 policy making meant to provide as broad a mandate as possible while minimizing opposition. *See* COLE, *supra* note 196, at 57.

[242] *See* COLE, *supra* note 196, at 25-26 (noting that over 5000 noncitizens were detained as of May 2003, but that none had been charged with complicity in the 9/11 attacks; only

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"rounding up of the usual suspects" approach may have initially given the Administration good press, it drove a wedge of fear and distrust between law enforcement and these communities.[243] The prolonged detention without charge of Yaser Hamdi, an American citizen of Middle Eastern descent, was recently condemned as unconstitutional by the United States Supreme Court.[244] It is yet another example of our government needlessly violating basic constitutional protections and alienating important domestic communities in the war on terror without any identifiable gain. After months of hearings and a carefully balanced report, the 9/11 Commission concluded that this round-up, with all of the earmarks of racial profiling, was, at best, ineffectual and, at worst, counterproductive.[245]

The misguided international response has more obvious signs of failure. The Administration failed to capture Osama Bin Laden, the inspiration, if not the architect, of the attack, and, instead, focused on the liberation of Iraq.[246] The occupation of Iraq, a country never demonstrated to have ties to the September 11 attacks or al Qaeda, has undoubtedly served as an excellent recruiting tool for jihad against America.[247] Bin Laden could not have bought better public relations than that he reaped by the devastating impact of the photos of the abused Iraqi prisoners that were reported throughout the media in March and April of 2004. The images of goggled detainees at Guantánamo serve as more fodder for terrorist propaganda. The assertion that such detention

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Zacarias Moussaoui, arrested before the attacks, was charged); *see also* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 24, n.98 (2003) [hereinafter Cole, *The New McCarthyism*].

[243] *See* COLE, *supra* note 196, at 190-93; Martin, *supra* note 175, at 308-09.

[244] Hamdi v. Rumsfeld, 124 S.Ct. 2633 (June 28, 2004) (holding that due process gave Hamdi, American citizen, meaningful opportunity to contest factual basis for his detention).

[245] *See* NAT'L COMM. ON TERRORIST ACTIVITIES UPON THE UNITED STATES, STAFF STATEMENT NO. 10: THREATS AND RESPONSES IN 2001, at 12-13 (Apr. 10, 2004), *available at* http://www.9-11commission.gov/staff_statements/staff_statement_10.pdf [hereinafter STAFF STATEMENT NO. 10].

[246] *See generally* RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR (2004) (arguing that critical resources and focus were diverted from destroying al Qaeda in Afghanistan, only to inflame Arab world by elective occupation of Iraq).

[247] Despite billions of dollars spent, and over one year of occupation, neither weapons of mass destruction nor an Iraq-al Qaeda connection has been discovered. Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link is Dismissed*, WASH. POST, June 17, 2004, at A1; *see also* National Commission on Terrorist Attacks Upon the United States, Statement of the 9-11 Commission's Chair and Vice Chair, July 6, 2004 (noting adequate evidence in reaching Commission's prior determination of lack of connection between Iraq and al Qaeda), *available at* http://permanent.access.gpo.gov/websites/www.9-11commission.gov/press/pr_2004-07-06.pdf.

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was lawless is close behind. All of this comes at enormous cost to the United States (in lives, funds, and reputation) with no gain, but rather clear losses, in the war against terror.

Professor David Cole forcefully has reminded us that we have been here before — responding to a national security crisis by engaging in high profile mass arrests and detention of disfavored immigrants as a purportedly justified response to the crisis.[248] Sadly, "[t]hose who cannot remember the past are condemned to repeat it."[249] Professor Cole's historical analysis demonstrates how the political system of the United States reacts to a national security crisis. Perhaps most reminiscent of the post-September 11 round-up are the Palmer Raids of 1919.[250] J. Edgar Hoover[251] started his meteoric rise to direct the FBI by rounding up the usual suspects of that crisis. In response to the anarchist and syndicalist bombings and sometimes violent labor unrest, including several shootouts between the International Workers of the World ("Wobblies"), Pinkerton Detectives, and local and federal law enforcement and military, Hoover and his media allies — most notably the *New York Times* — called for mass arrests and deportation of immigrants from Southern and Eastern Europe and Russia.[252] These hapless victims of guilt by association suffered great abuse despite the absence of any connection with the real terrorist threat of their day. World War II and the Japanese internment centers reveal that it was not just immigrants, but citizens exclusively identified by race who were arrested and detained in the most shameful round-up in U.S. history.[253] The Cold War brought its

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[248] *See* Cole, *The New McCarthyism*, *supra* note 242, at 1-8; *see also* COLE, *supra* note 196, at 88-153.

[249] 1 GEORGE SANTAYANA, THE LIFE OF REASON: OR, REASON IN COMMON SENSE 284 (1905).

[250] *See* COLE, *supra* note 196, at 116.

[251] *See* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS (Norton 2001) for an excellent biography of J. Edgar Hoover.

[252] *See* COLE, *supra* note 196, at 119-20. Indeed, the ACLU was created in response to the Palmer Raid era. Attorney General A. Mitchell Palmer's own home was bombed and the blast killed the bomber, whose body and clothing fragments designated him as an Italian immigrant. Palmer himself was apparently not prone to turn the bombing into a national witch hunt, but others were. However, public officials and politicians do not have a monopoly over repeating the follies of the past. Even the venerable *New York Times* has engaged in shameless war cheerleading, not only during the Palmer Raid, but during its one-sided coverage of the Bush Administration's WMD-justification of the Iraq war. *Id.* at 120; *see* Michael Massing, *Now They Tell Us*, 51 N.Y. REV. OF BOOKS 3 (Feb. 26, 2004), *available at* http://www.nybooks.com/articles/article-preview?article_id=16922.

[253] In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court sustained the constitutionality of the mass detention as an exercise of military power that deserved judicial deference.

own round-up of immigrants, including former Communists who did not benefit from the distinction between party members who had the specific intent to overthrow the government and those who did not.[254] Again, the round-up had no connection to party members who were engaged in violent acts against the established order. In each of these instances of threats to national security, however, the political leaders of the day found it convenient to round up and deport disfavored immigrants publicly, despite the disconnect with effective law enforcement and national safety.

Following September 11, immigration law seemed a logical fount from which anti-terrorist policy could be drawn and effected.[255] Although the Oklahoma City bombing was perpetrated by white American citizens, all the suspected hijackers in the September 11 attacks were Arab and Muslim noncitizens.[256] Immigration law already provided government officials with broad latitude to detain foreigners held on any variety of charges. Just a week after the attacks, the DHS was given authority to detain aliens for forty-eight hours without charge, an increase over the prior twenty-four-hour grace period.[257] Moreover, the Justice Department provided that the DHS could now detain aliens for a "reasonable period of time," which in practice means indefinitely if confronted with an "emergency or other extraordinary circumstance."[258] Other provisions within the USA PATRIOT Act further extended DHS authority to effectuate indefinite detentions.[259]

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[254] In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the High Court genuflected toward the First Amendment rights of aliens, but nonetheless sustained the deportation of noncitizens who were past party members. The Court later required individual guilt for criminal prosecutions based on Communist party membership. Scales v. United States, 367 U.S. 203 (1961).

[255] David A. Martin, former General Counsel for the INS, testified before the 9/11 Commission that unless we close our borders entirely, something clearly not in our national interest, "it will rarely be immigration enforcement as such . . . that develops the crucial information. . . . Such information will continue to come primarily from terrorism-specific investigation and intelligence, and the main players for these purposes will continue to be the FBI, CIA, and related agencies." Martin, *supra* note 175, at 307. The Commission adopted a similar opinion. *See* STAFF STATEMENT NO. 10, *supra* note 245.

[256] Indeed, 15 of the 19 terrorists were nationals of Saudi Arabia. Yet, the Bush Administration ordered special flights for Bin Laden's relatives and other influential Saudis shortly after the 9/11 attacks. *See* STAFF STATEMENT NO. 10, *supra* note 245, at 12.

[257] DOW, *supra* note 174, at 23.

[258] *Id.* Dow also noted the Justice Department's new power to impose an "automatic stay" to override the decision of an immigration judge to release a detainee. Immigration judges are created and employed by the Justice Department, and, thus, do not enjoy the political and administrative independence of federal judges created under Article III of the Constitution.

[259] *Id.* at 24.

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Professor Cole argues that waging the battle against terrorism through a race-driven agenda will undermine national security.[260] The point is that individual guilt and information must be the criteria, not race. But, has it been? John Walker Lindh and Yaser Hamdi were both Americans captured in Afghanistan after September 11, 2001. Both were held under essentially the same auspices: they were terror suspects and had ties to the Taliban and/or al Qaeda.[261] While Lindh was notified of the charges against him and brought before a civilian court with the full constitutional protections granted to normal criminal defendants (including the right to counsel),[262] Hamdi was labeled an "enemy combatant" and detained at a military brig in the United States without the same procedural rights.[263] American media were quick to label Lindh the "American Taliban," whereas Hamdi's capture and detention received little attention, much less a nickname indicative of his status as an American citizen.[264] What is the difference between the two suspects? Lindh is a white American who converted to Islam, while Hamdi is an American of Middle Eastern ancestry.[265] Again, the targeting of ethnic and racial minorities is not a new policy and has been a pervasive theme in U.S. response to crises of the past century.[266]

The post-attack round-ups of mostly Arab and Muslim immigrants likely were conducted under two assumptions: that the Administration would receive good press for protecting its citizens and that it might get lucky enough to detain some individuals who might later be found to have terrorist connections.[267] With a lack of intelligence, and a lack of

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[260] COLE, *supra* note 196, at 184.

[261] Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 13 (2002) [hereinafter Saito, *Will Force Trump Legality After September 11?*]

[262] As Justice Scalia (joined by Justice Stevens) noted in his dissenting opinion in *Hamdi v. Rumsfeld*, "The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States *was* subjected to criminal process and convicted upon a guilty plea." Hamdi v. Rumsfeld, 124 S. Ct. 2633 (June 28, 2004) (Scalia, J., dissenting) (citing *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (denying motions for dismissal) and Katherine Q. Seelye, *Threats and Responses: The American in Taliban*, N.Y. TIMES, Oct. 5, 2002, p. A1, col. 5).

[263] *Hamdi*, 124 S. Ct. at 2635-38.

[264] Natsu Taylor Saito, *For "Our" Security: Who Is an "American" and What Is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 30 (2003) [hereinafter Saito, *For "Our" Security*].

[265] *Id.*; Saito, *Will Force Trump Legality After September 11?*, *supra* note 261, at 13.

[266] *See generally* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997).

[267] *See* INSPECTOR GENERAL REPORT, *supra* note 187 (reporting that many of those

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evidence that detainees were indeed associated with terrorism, came a need for secrecy to cover up the government's shotgun approach. Thus, the use of immigration law to implement the government's anti-terror policy makes even more sense given the secretive history of INS detention.[268]

Given the array of detailed requirements for immigrating to or legally visiting the United States, it is not difficult for federal agents to detain noncitizens for failing to comply with one or more such technicalities.[269] The DOJ created the Foreign Terrorist Tracking Force in October 2001. Also, when speaking at the National Conference of U.S. Attorneys the following year, John Ashcroft instructed them to "neutralize potential terrorist threats by getting violators off the street by any lawful means possible, as quickly as possible" and to "[d]etain individuals who pose a national security risk for any violations of criminal or immigration laws."[270] Thus, an individual could be arrested on a minor immigration violation and be held indefinitely until a concrete criminal charge or terrorist ties could be found.

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detained in post-September 11 investigations were individuals whom government merely encountered while pursuing other suspects), *available at* www.usdoj.gov/oig/special/0306/chapter2.htm#11.

[268] It is worth reiterating that the September 11 attacks created a felt need for secrecy, but that secrecy has long been the hallmark of INS detention. See DOW, *supra* note 174, at 29-30, which notes that detentions were making worldwide and national news because it was story that the press would cover. An example of the impact of such coverage was the Canadian government's issuance of a travel advisory to its citizens of Middle Eastern and Muslim background about the dangers of traveling to the United States. *Id.*

Generally, the secrecy of immigration detention has been ignored by the public because of a general ignorance of what occurs in these facilities, and also because the citizenry is more willing to tolerate abuses within the system as long as they are directed at convicted criminals and noncitizens. *See* COLE, *supra* note 196, at 6. NGOs and humanitarian organizations have long been aware of the pernicious pattern of government secrecy and have indeed reported on it. But, a by-product of the media frenzy to cover all things terror has been increased scrutiny of the executive branch's desire to wage the war against terror behind closed doors.

[269] COLE, *supra* note 196, at 24 (noting that for years, immigrants who violated immigration rule have been tolerated because of country's economic reliance on immigrants (especially illegal immigrants) to make up certain sectors of workforce); *see supra* Part III.

[270] COLE, *supra* note 196, at 22 (citing Department of Justice, Remarks of Attorney General John Ashcroft, U.S. Attorneys Conference, New York City, Oct. 1, 2002). Although such a goal and means of accomplishing it seem well-intentioned, Cole notes that Ashcroft's reliance on pretextual law enforcement is unsupported by the criminal laws of "conspiracy" or "attempt," which require an overt act before the suspect can be held criminally liable. Thus, immigration law serves Ashcroft's purposes in an indirect but more legal fashion. *Id.* at 23-24.

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Ashcroft's Justice Department used three different strategies in their round-up. The first was simply the largely racial profiling technique of arresting Middle Easterners who crossed the path of law enforcement officials; the second was to target those in the same group who had outstanding orders of removal; and the third was to target young men who responded to the Special Registration program requiring nationals of designated Middle Eastern and Islamic countries to register.[271]

The next phase was to provide for criminal prosecutions of immigrants associated with suspect groups. The text of the USA PATRIOT Act provides sharply different standards for terrorism, depending on whether the individual is an American citizen or foreign national. To begin, the term "domestic terrorism" is used when referring to citizens and "terrorist activity" in the context of immigration regulation.[272] "Domestic terrorism" is defined as "acts dangerous to human life that are a violation of the criminal laws. . . [and] that appear to be intended. . . to influence the policy of a government by intimidation or coercion."[273] "Terrorist activity," however, is defined more broadly and encompasses many activities not unlawful on their face, which raises issues about basic constitutional rights. For one, under the Act, the DOJ can hold noncitizens for supporting a group's otherwise benign and lawful activities if that group has used violence in the past.[274] Another provision makes threatening to use, or actually using, a weapon against a person or property "other than for mere personal monetary gain" a form of such "terrorist activity."[275] The dual standards of the Act subject a foreign national to prosecution for actions which would not be a terrorist activity if done by a citizen.[276]

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[271] The DOJ published numbers of those arrested at 1,182, but critics pointed out that none had actually been charged with terrorism. Later, some 1,000 more were arrested under the Absconders Apprehension Initiative ("AAI"), under which noncitizens who had lost administrative appeal of their deportation cases and, thus, were eligible for judicial review were again simply locked up. This program expressly targeted the 6,000 Middle Easterners out of some 300,000 noncitizens in this situation. A third group of racially selected immigrants was young men from Middle Eastern and Muslim countries who were required to report to the local DHS office to register. In Los Angeles alone, 500 Iranians were taken into custody. This effort resulted in some 2,747 detentions. *Id.* at 49-50.

[272] *Id.* at 57-58 (citing USA PATRIOT ACT §§ 411(a), 802 (2001)).

[273] *Id.* at 58.

[274] *Id.* Guilt by association resurrects the type of now widely criticized government practices employed during the Red Scare. *Id.* at 62, 64.

[275] *Id.* at 58 (noting that definition of "domestic terrorism" fits traditional notions of terrorism but that for noncitizens definition casts much wider net).

[276] *Id.* at 221-23. From a constitutional standpoint, noncitizens are entitled to equal protection of the laws and the same due process when life, liberty, or property is in question. The only constitutional rights reserved exclusively for citizens are the right to

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The USA PATRIOT Act states that anyone who provides "material support or resources" to a designated organization is subject to criminal penalties, including life in prison.[277] Sami Omar al-Hussayen, a Saudi Arabian immigrant pursuing his doctorate in the United States, was charged under this provision for "providing expert advice or assistance" to terrorists by maintaining websites for Muslim organizations, including the Islamic Assembly of North America.[278] On June 10, 2004, a jury acquitted al-Hussayen of all three terrorism charges.[279] Ashcroft had specifically referenced al-Hussayen's case as part of "a terrorist threat to Americans that is fanatical, and. . . fierce," alleging that "al-Hussayen knew and intended that his computer service and expertise would be used to recruit and raise funds for violent jihad. . . ."[280] Such rhetoric did not sway a jury that focused on al-Hussayen's First Amendment rights in reaching an acquittal. One juror explained that they "weren't going to step on anybody's rights to hold the opinion [the Islamic Assembly of North America] had."[281]

The government also failed to overcome a prior constitutional challenge to the same "expert advice or assistance" provision in the Act under which al-Hussayen was indicted.[282] In a Los Angeles federal court, the Humanitarian Law Project brought a lawsuit to challenge affirmatively the provision's constitutionality on behalf of plaintiffs seeking to assist Kurdish refugees residing in Turkey.[283] In striking down the provision, District Court Judge Audrey Collins focused on the Act's lack of distinction between supporting violent and nonviolent activities.[284] Another constitutional challenge to the USA PATRIOT Act

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run for federal elective office and the right to vote. This provision of the USA PATRIOT Act establishes a lower threshold for guilt by association for noncitizens than citizens.

[277] 18 U.S.C. § 2339A(a) (2003).

[278] *See* Second Superseding Indictment, United States v. Al-Hussayen (D. Idaho 2004), *available at* http://news.findlaw.com/hdocs/docs/terrorism/usalhussyn304sind2.pdf.

[279] Terry Frieden, *Saudi Grad Student Cleared of Terror Charges* (June 6, 2004), *at* http://www.cnn.com/2004/LAW/06/11/computer.terrorism/index.html.

[280] *Id.*

[281] *Id.*

[282] Humanitarian Law Project v. Ashcroft, No. CV 03-6107, 2004 WL 112760 (C.D. Cal. Jan. 22, 2004), *amended by* 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

[283] Terry Frieden, *Federal Judge Rules Part of Patriot Act Unconstitutional* (Jan. 27, 2004), *at* http://www.cnn.com/2004/LAW/01/27/patriot.act/index.html.

[284] *Id.* While the Court held the phrase "expert advice and assistance" void for vagueness, it denied summary judgment respecting the phrase "material support or resources." *See* Ryan C. Craig, *Developments in the Judicial Branch:* Humanitarian Law Project v. Ashcroft, 18 GEO. IMMIGR. L.J. 437 (2004).

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was filed in the U.S. District Court of Michigan on July 30, 2003.[285] This time, the American Civil Liberties Union ("ACLU"), attacking section 215 of the USA PATRIOT Act, sued on behalf of six Arab and Muslim-American groups. The ACLU claimed that the Act's allowance for secret searches of confidential and personal records violates the First, Fourth, and Fifth Amendments.[286] Furthermore, in *United States v. Koubriti*, defendants were charged under the "material support" provision in a case that the Attorney General publicized as an example of the DOJ's effective use of the USA PATRIOT Act.[287] The court later admonished Ashcroft for violating a court order prohibiting public disclosure of case information.[288] The ramifications of these USA PATRIOT Act rulings differ depending on who is spinning the information. While prosecutors and government officials are quick to dismiss such verdicts as anomalies in a broader anti-terrorism strategy, rights organizations hail judicial recognition that constitutional rights trump the provisions of the USA PATRIOT Act as new chinks in the Act's armor.[289]

A critical component of the Administration's war on terror has been the President's right to imprison U.S. citizens, whether arrested on U.S. soil or abroad, by declaring them "enemy combatants." Those imprisoned do not have access to counsel or the civilian criminal justice system. Guantánamo Bay, Cuba, dubbed a "legal black-hole" by a British court, has been the Administration's venue of choice for detaining these terror suspects.[290] The Administration chose Guantánamo as a lawless haven for indefinite imprisonment of persons captured in Afghanistan whose status (al Qaeda, Taliban, or innocent bystander) was never adjudicated by a neutral arbiter.[291] After two years of such

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[285] *See* Complaint for Declaratory and Injunctive Relief, Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, Civil Action No. 03-72913 (E.D. Mich. July 30, 2003), *available at* http://news.findlaw.com/hdocs/docs/aclu/mcaa2ash73003cmp.pdf.

[286] Kevin Bohn, *ACLU Files Lawsuit Against Patriot Act* (July 30, 2003), *at* http://www.cnn.com/2003/LAW/07/30/patriot.act/index.html (case still pending).

[287] United States v. Koubriti, 305 F. Supp. 2d 723 (E.D. Mich. 2003).

[288] *Id.* at 764 (responding to Order Regarding Defendants' Motion to Require Attorney General to Show Cause why he should not be Held in Contempt — stemming from public statements made during press briefings before and during trial). However, the judge stopped short of imposing criminal contempt sanctions. *Id.* at 763

[289] *See* Frieden, *supra* note 283. The latest dent, not only in the Act's armor, but also in the Administration's anti-terrorist policy, is the trio of June 28, 2004 Supreme Court cases. *See infra* note 292.

[290] *See* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 267 (2004) (citing R. *on application of* Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, C.A., Nov. 6, 2002), and noting that Guantánamo detention population totaled 660 at end of 2003).

[291] *Id.* at 278.

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detention and a storm of international criticism, the Supreme Court has ruled against the Administration's detention policy with respect to Hamdi and those held at Guantánamo Bay.[292]

International criticism of Guantánamo detention policy focuses primarily around article 5 of the Third Geneva Convention, which requires tribunals to determine if prisoners are entitled to prisoner of war ("POW") status if that status is in doubt.[293] The United States was a signatory of article 5, but only ratified the First Additional Protocol, which refined the provisions of article 5, mandating that prisoners are presumed eligible for POW status and that they may challenge any reclassification of their status before a "competent" tribunal.[294] Although the Conventions identify two classes of military prisoners, the Bush Administration created the appellation "unlawful combatant," a term not contained in the Conventions' text, thus excepting those labeled as such from the Conventions' procedural safeguards.[295] In contrast, during the Gulf War in Iraq in 1992, the military conducted almost 1200 hearings to determine the status of those captured in combat and found that two-thirds of those apprehended were not combatants at all.[296] To date, U.S. occupation of Iraq has produced no such tribunals, and the government has engaged in a blanket policy of rounding up and detaining our enemies, both real and perceived.[297]

Our credibility and competence as a nation has been tested during the war on terror. Though the government demonstrates its commitment to fighting terrorism through its unwavering focus on Iraq and the arrests

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[292] However, the recent trio of Supreme Court decisions has drastically altered the legal landscape of the Administration's "enemy combatant" detention policy. *See* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). In *Rasul*, the Court rejected the Administration's arguments, previously sustained by the lower courts, in holding that U.S. federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals labeled "enemy combatants" who are incarcerated at Guantánamo Bay. *See* Amann, *supra* note 290, at 281-82; John Hendren, *Detainees May Be Moved off Cuba Base*, L.A. TIMES, June 30, 2004, at A1; John Hendren, *Suits Filed for Military Detainees*, L.A. TIMES, July 3, 2004, at A29; Neil A. Lewis & David E. Sanger, *Administration Changing Review at Guantánamo Bay*, N.Y. TIMES, July 1, 2004, at A12, *available at* http://www.christusrex.org/www1/icons/nyt-7-1-04e.html.

[293] *See* Ronald Dworkin, *Terror and the Attack on Civil Liberties*, 50 N.Y. REV. of Books 17, Nov. 6, 2003, at 37-39, *available at* http://www.nybooks.com/articles/article-preview?article_id=16738.

[294] *Id.* Ratification means the United States supports the provision, but will not bind itself to following the provision.

[295] *Id.*

[296] COLE, *supra* note 196, at 42.

[297] *Id.* at 41-42.

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of enemy combatants, its efforts to attack the lifeblood of terrorism — its funding networks — have been largely overlooked.[298] At the end of 2003, the Office of Foreign Assets Control ("OFAC") employed only four agents to track terror money, while almost two dozen worked on tracking Cuban embargo violations.[299] Senator Charles Grassley, R-Iowa, the chairman of the tax-writing Senate panel, lamented: "OFAC obviously needs to enforce the law with regard to U.S. policy on Cuba, but the United States is at war against terrorism, and al Qaeda is the biggest threat to our national security. Cutting off [that] blood money... must be a priority when it comes to resources."[300] The only justification for this otherwise inexplicable prioritizing of Cuba over al Qaeda is the perceived need to pander to the Cuban-American vote in Florida, a state of notorious importance in the presidential election with its twenty-five electoral votes.[301]

The politicizing of the "war against terror" has not been limited to Cuban-Americans. Recently, the Sierra Club reported the symbiosis of a Denver-based mining company and Islamic militant groups in the Philippines.[302] In exchange for cash payments to various radical Muslim groups, the Echo Bay mining facility received protection and security assurances from the insurgent armies.[303] Company brass conscientiously budgeted in such payments as a relatively small sacrifice in reaping the profit potentials of the ore-rich islands. More disturbing, the government has turned a blind eye to this blatant company-sanctioned support of groups alleged for years to have al Qaeda ties.[304] Not surprisingly, the Echo Bay Company has supported past Republican campaigns, and the mining industry as a whole accounted for over $5

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[298] *See* John Solomon, *More Agents Tracking Castro than Bin Laden*, MILWAUKEE J. SENT., May 1, 2004, at 16A.

[299] *Id.* (noting that since 1994, $8 million in fines have been collected for Cuban embargo investigations, but only $9,425 for terrorism financing violations).

[300] *Id.*

[301] The Bush Administration has now adopted the extreme views of Miami anti-Castro groups as official policy — cutting off family visits and remittances to, and academic research in, Cuba to hasten "the arrival of a transition in Cuba." *Commission for Assistance to a Free Cuba, Preface to* REPORT TO THE PRESIDENT, at xi, May 2004, *available at* http://www.state.gov/documents/organization/32331.pdf.

[302] Marilyn Berlin Snell, *The Cost of Doing Business*, SIERRA MAG., May/June 2004, at 34.

[303] *Id.* at 36. Echo Bay's "security donation expenses" totaled $29,804 in February 1997, and $116,914 in September 1997. Total payments to terrorist groups on Mindano were reported at $1.7 million. By comparison, the 2002 Bali nightclub bombing cost an estimated $35,000, and the 9/11 attacks an estimated $500,000 to plan and perpetrate. *Id.* at 39.

[304] *Id.* at 78-79.

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million in campaign contributions to Republicans in the 2000 elections.[305]

Since March 2004, a wave of criticism has flowed due to reports of the Abu Ghraib prison abuse scandal, the erroneous State Department report on terror data, and a panel of former government officials' general disapproval of the Bush Administration. The State Department's April 2004 report, "Patterns of Global Terrorism," declared that the number of terrorist attacks worldwide had reached a thirty-four-year low.[306] Deputy Secretary of State Richard L. Armitage contended that the report was "clear evidence that we are prevailing in the fight [against terrorism]."[307] When subsequently scrutinized by academics and politicians, the report proved wholly inaccurate, and the State Department later conceded that the report was generally and mostly incorrect.[308] Such swift and probing reaction to the executive branch's report is indicative of the skepticism with which many view any administration claims that purport to justify its foreign policy.

Days later, a bipartisan, twenty-six-member group of former diplomats and military officials issued a statement condemning the Bush Administration's foreign policy and charging it with jeopardizing national security.[309] Interestingly, several members of the group served under former Presidents Ronald Reagan and George H. W. Bush, but were still adamant that George W. Bush should be voted out of office in the upcoming presidential election.[310] At the same time, reports emerged that top officials in the Bush Administration had approved the physical abuse of detainees in Iraq and at Guantánamo Bay.[311]

Ultimately, preserving international credibility has too often yielded to domestically popular policy making. In April 2004, reports showed that public support for the USA PATRIOT Act was higher than expected.[312] Although polls indicated strong general support for the Act, they also

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[305] *Id.* at 79.

[306] R. Jeffrey Smith, *State Dept. Concedes Errors in Terror Data*, WASH. POST, June 10, 2004, at A17.

[307] *Id.*

[308] *Id.*

[309] Ronald Brownstein, *Retired Officials Say Bush Must Go*, L.A. TIMES, June 14, 2004, at A1.

[310] *Id.*

[311] Julian Coman, *Interrogation Abuses Were 'Approved at Highest Levels,'* SUNDAY TELEGRAPH, June 13, 2004, at 26. The report stems from a Red Cross investigation exposing practices contrary to the Pentagon's statements that abuse at Abu Ghraib prison was an isolated incident.

[312] Peter Wallsten, *Politics of Patriot Act Turn Right for Bush*, L.A. TIMES, Apr. 25, 2004, at A1 (citing Washington Post/ABC News poll that 63% of Americans approved of Bush's handling of war on terrorism).

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revealed that certain aspects of the Act are unpopular when explained to voters.[313] Furthermore, the law's popularity fluctuates, growing, at least in the short term, when attacks in countries such as Iraq, Saudi Arabia, and Spain renew fears of domestic attacks.[314] Such superficial awareness of the intricacies of the USA PATRIOT Act reflect a more widely held attitude that provisions targeted at immigrants and minorities are acceptable as a means to ensuring national security.[315] While the sound bite brilliance of entitling this legislation the "USA PATRIOT Act" has short term political appeal, its undermining of the critical importance of individual guilt, as opposed to guilt by association (i.e., racial or religious profiling), will needlessly alienate Middle Eastern and Islamic communities and divert resources from a more targeted and effective domestic anti-terror strategy.[316]

CONCLUSION

Immigration law and policy must be rationally related to a legitimate policy goal in order to serve the public and to avoid irrational discrimination. U.S. immigration policy is part of the larger political economy of providing open access to our markets in order to assure reciprocal access to foreign markets for U.S. goods, services, capital, and intellectual property. This is essential to our economy, which depends significantly on international trade.

Similarly, the strength of the U.S. economy attracts tourists, students, and workers who are admitted on temporary visas from all over the world. Thus, it is inconceivable that the United States will close its borders. The greater-than-2000-mile U.S.-Mexican border, however, poses a special dilemma for our relationship with our neighbor to the south. On the one hand, U.S. employers in many sectors — including agriculture, packing plants, vineyards, horse racing, restaurants, hotels, janitorial services, preschool care, teacher's aid, rest home and hospital orderlies, to name a few — depend on Mexican workers and have done

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[313] *Id.*

[314] *Id.*

[315] *See* COLE, *supra* note 196, at 17. Although public opinion generally tolerated infringement on liberties of noncitizens after September 11, when "Operation TIPS" (Terrorism Information and Prevention System) was proposed, it drew heavy bipartisan criticism. Operation TIPS involved recruiting utility employees, delivery personnel, and millions of private individuals to spy on and report suspicious actions of fellow citizens. *Id.* at 6.

[316] See *id.* at 189 for a discussion of the national security consequences of current U.S. foreign affairs, immigration, and detention policies.

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so for generations. Hence, employers tend to resist policies that would cut off this customary supply of cheap and reliable labor. Poverty-stricken areas in North Central Mexico, especially the rural zones of Aguas Calientes, Jalisco, Zacatecas, and San Luis Potosi, have been sending their citizens to "el otro lado" (the other side) for generations. These economies have depended on remittances from Mexican workers in the United States for generations. Until the mid-1960s, there were few meaningful restrictions on the entry of these workers. Since then, Congress has enacted a series of laws to make this population's entry not only illegal, but also criminal.[317] For the employers, however, little has changed, because they may still hire as they choose, without fear.[318]

It is easy to use immigrants as scapegoats for all of the nation's ills — blaming them for taking away jobs, using social services, increasing criminal activity, and creating environmental problems — whether or not these immigrants are "legal." The existence of our immigrant labor force, which has always included legal, almost legal, and undocumented workers (often within the same family unit), is an inevitable consequence of far-higher U.S. wages and demand for such workers. The groups that favor restrictionist policies have neither prioritized, nor been successful, in establishing meaningful enforcement of employer sanction laws. Thus, employers accustomed to hiring undocumented workers have no credible disincentive from doing so.[319] Still, these groups have been enormously successful in making the lives of immigrant workers miserable. Recent legislation, as outlined in Parts I, II, and III of this Article, has created a massive class of persons who are qualified to immigrate, but ineligible to do so once they have illegally entered the United States.[320] Furthermore, they are barred from emigrating from their country of nationality for ten years if they appear at a U.S.

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[317] *See* James F. Smith, *A Nation that Welcomes Immigrants?: An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 233-35 (1995).

[318] *See, e.g.*, Maria's case, *supra* Part I.A.3. Thus, if an immigrant who entered without inspection marries a U.S. citizen, she is perfectly qualified to lawfully immigrate, except she cannot do so while in the United States. If she returns to Mexico to apply at a Mexican consulate, she is subject to a 10-year bar of inadmissibility if she was unlawfully in the United States for one year or more. While the bar may be waived, it is an entirely discretionary nonreviewable waiver. As such, the thousands of Marias and their citizen spouses are in an indefinite legal purgatory. In the meantime, she is unable to get a driver's license in many states, and is subject to arrest and removal. Unless she has been here for over 10 years, the fact that she has citizen children and extensive ties to the United States are of no import. *See* 8 U.S.C. § 1182(a)(9)(B) (2000).

[319] *See* 8 U.S.C. § 1182(a)(9)(B) (2000).

[320] *See supra* note 318.

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consulate abroad.[321]

When arrested, due to the overwhelming pressure to plea bargain, especially in minor cases, defendants, whether citizens or not, routinely accept bargains that carry little or no adverse criminal consequences, such as a few days in jail (i.e., time served), a fine, probation, and a promise that the conviction will be dismissed under state law. In the case of a noncitizen, however, unless she meaningfully is advised of the draconian immigration consequences of such a plea, which is all too often not the case, one cannot say that her plea was knowing and intelligent. Upon leaving the state courthouse, she rightfully may resent the way she was pressured to plead guilty to something she feels she did not do, although she is free to go. Or is she? The DHS or Immigration Control and Enforcement ("ICE") may well have placed a detainer on her and place her in immigration detention where she will be subject to a removal proceeding without the benefit of publicly paid counsel. This bait and switch process occurs nearly every day in hundreds of cases in courthouses throughout the country. In removal proceedings, these unrepresented respondents have no real hope of any relief unless they can afford experienced counsel, which is financially unrealistic, or find an experienced pro bono attorney.

This bait and switch process is nothing less than "mouse trapping" and is devoid of any factual or legal integrity.[322] To make matters worse, the lack of legal counsel undermines the possibility of successfully raising any defense. The absence of counsel, in turn, often results in the failure to file an appeal from an order of removal, and, thus, virtually ends any chance of challenging the order in federal court.[323] While no legal system is perfect, the criminal conviction/deportation process is certainly misleading, and, in many cases, fraudulent in the sense that pleas are extracted on the basis of false representation to the noncitizen defendant. The mean-spirited nature of the system is revealed by the

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[321] *Id.*

[322] See Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996), in which Judge Posner describes the unfairness of considering a concession of deportation binding when the immigrant is led to believe she will be eligible for relief from deportation but that is not in fact the case.

[323] The denial of counsel deprives the noncitizen of administrative and judicial review and the opportunity to attack a prior deportation or removal order in a collateral attack in a criminal prosecution for illegal entry. *See* 18 U.S.C. § 1326(d) (2000); Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169 (9th Cir. 2001) (stating that one cannot attack reinstated removal order without having appealed to BIA); Castro-Cortez v. INS, 239 F.3d 1037 (9th Cir. 2001); Lakha v. INS, 215 F.3d 889, 903 (9th Cir. 2000) (stating that to exhaust administrative remedies, one must appeal deportation or removal order to BIA); Ortiz v. INS, 179 F.3d 1152, 1153 (9th Cir. 1999) (stating that same holds true for asylum claims).

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hundreds, if not thousands, of immigrants who were deported pursuant to interpretations by the executive branch, which were later found to be erroneous by the courts.[324] If these deported individuals attempt to present a motion to reopen, it undoubtedly will fail as untimely. Furthermore, if they return to present such a motion, they are subject to federal criminal prosecution for illegal re-entry.[325] Those who do present timely defenses or claims for relief face months or years of mandatory detention, although they present no danger to the community or flight risk.[326]

So what has been gained by the deportation of thousands of immigrants, a large percentage of whom did not have a meaningful opportunity to defend themselves? Has it slowed the flow of immigrants that enter without inspection? There is no evidence of such slowing. By so unfairly criminalizing a significant sector of our labor force, America begins to take on an apartheid character, with untold thousands on our highways and in our communities who have been abused by the U.S. legal system and fear any contact with public officials. This creates and sustains an underground labor force, essentially a caste system that will erode democracy and respect for the law.

A key component of the creation of the fugitive class is the repeal of section 212(c). That repeal eliminated waivers. Now, however, despite the extraordinary circumstances of certain cases, immigrants convicted of criminal offenses are denied any individual consideration either with respect to bail or discretionary relief because they are statutorily ineligible for such consideration.[327] A wave of criticism followed AEDPA and IIRIRA's elimination of the individual consideration provisions. A substantial number of congressional representatives sought to "Fix '96" and to repeal these changes.[328] They have been unable to do so, however.

[324] For example, driving under the influence without any accident or injury was once interpreted as a crime of violence and, thus, a potential aggravated felony several years before the BIA reversed itself due to an overwhelming majority of the circuit courts rejecting that interpretation. Similarly, for several years, the BIA and immigration judges refused to provide Section 212(c) waiver hearings to persons who were in proceedings on April 24, 1996, an interpretation mandated by former Attorney General Janet Reno, and later rejected by the Supreme Court. INS v. St. Cyr, 533 U.S. 289, 326 (2001).

[325] 8 U.S.C. § 1229a(c)(6) (2000); 18 U.S.C. § 1326 (2000).

[326] *See supra* Part II.C.

[327] For example, a noncitizen facing a removal proceeding is generally ineligible for bail. *See supra* Part II.C. A noncitizen convicted of an "aggravated felony," covering a wide array of offenses that are often neither aggravated or a felony is ineligible for almost any form of discretionary relief from removal. *See supra* Part II.B.

[328] *See* Cooper, *supra* note 1, at 366-69.

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It is always politically easier to legislate against immigrants than on their behalf.

Has the emergence of the American gulag, on balance, advanced legitimate policy goals? Unless coercing immigrants to forego their legal defenses and forcing asylum applicants to endure conditions akin to those that led them to flee their native lands are counted as successes, it seems clear that the human costs to immigrants and their families cannot be justified by any claimed reduction in crime or flight. Indeed, were that same logic applied to our criminal justice system, bail would be abolished and all sentences would be for an extensive period. Here, we are not dealing with criminal justice, but with an administrative process for persons who have already completed their criminal sentence — if any was imposed. Surely there are more compelling needs for the millions of dollars now spent on imprisoning immigrants.

It is instructive to compare these relatively recent U.S. immigration policy changes to the experiences of other developed countries with similar immigration problems. In Austria, the penalty for failing to comply with an order of deportation, an "administrative infraction," is a fine and term of imprisonment of up to fourteen days.[329] In the case of a criminal conviction, the decision of whether to deport is not automatic and is subject to administrative review.[330] German deportation for a criminal conviction appears to be limited to persons "involved in human trafficking if they'd been sentenced to at least one year in prison."[331] In the United Kingdom, the range of immigration sanctions is somewhat akin to those in the United States, but with the fundamental difference of *proportionality* and individual discretion — namely, a reasoned effort to correlate individual factors, such as the immigrant's history and ties with the United Kingdom, with the seriousness of her conviction in determining whether deportation is justified.[332]

Another striking difference between U.K. and U.S. immigrant detention policies is the public response to imprisonment of asylum-seekers. While there has been some public opposition to the U.S. practice

[329] Austria's Federal Law concerning the Entry, Residence and Settlement of Aliens (1997 Aliens Act), Article 107, *available at* www.unhcr.at/pdf/200.pdf.

[330] *Id.* Article 72. "[I]t must be shown that deportation is in the public interest as past convictions alone will not necessarily lead to the exercise of the power to deport." *Id.*

[331] *See The Immigration Compromise in Brief*, DEUTSCHE WELLE, *available at* http://www.dw-world.de/english/0,3367,1430_A_1217370_1_A,00.html (last visited Nov. 19, 2004).

[332] *See generally* Immigration & Nationality Directorate, *available at* http://www.ind.homeoffice.gov.uk/content/ind/en/home.html.

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of imprisoning asylum applicants,[333] it has been minimal and has had little impact. In the United Kingdom, hardly a stranger to terrorist attacks, the detention center's proposals for immigrants, in general, and asylum applicants, in particular, have been "controversial" and characterized as "likely to generate tremendous opposition."[334] British courts have ruled that "denying [public assistance] benefits to asylum seekers put[s] genuine asylum seekers in the untenable position of choosing between being destitute while their claims are pending, and returning to countries where they face persecution. . . ."[335] In contrast, asylum-seekers in the United States are not only ineligible for public benefits, but also are not allowed to work for the first six months after their claim is filed. Most significantly, however, in the case of arriving applicants, they must endure a lengthy detention in order to have their application considered. In contrast, the asylum detention practices in the United Kingdom resolve any questions in a matter of days.[336]

On a final comparative note, there is no indication that our allies in the "war against terror" who have considerable experience with terrorist attacks — whether in Spain or elsewhere — have engaged in the round-up tactics described in Part IV. What is needed in these difficult times is a dispassionate, reasoned, and proportionate response to immigration issues. Surely the United States has the capacity to resist race-based round ups and the blunt and demonstrably over-broad instruments of mass deportation, which exist without discretionary relief or meaningful administrative or judicial review, because these policies cannot be justified under a cost/benefit analysis. Otherwise, the United States faces becoming a mushrooming gulag. As H.L. Mencken once wrote, "[T]here is always a well-known solution to every human problem — neat, plausible and wrong."[337]

[333] *See* Anthony Lewis, *The Road to Asylum*, N.Y. TIMES, Dec. 8, 1997, at A25.

[334] Elizabeth Keyes, Note, *Expansion and Restriction: Competing Pressures on United Kingdom Asylum Policy*, 18 GEO. IMMIGR. L.J. 395, 409-10 (2004).

[335] *Id.* at 411.

[336] *Id.*

[337] H.L. MENCKEN, PREJUDICES 2d 158 (1977).

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