Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*

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This Comment is dedicated to Dr. Hugh A. Marley and Ruth M. Marley, my parents and my first teachers. I thank them for guiding me through many of the important lessons in my life.

The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.[1]

Listen to complaints among your kinsmen, and administer true justice to both parties even if one of them is an alien.[2]

I. INTRODUCTION

Refugio Rubio has been a legal resident of the United States for thirty-four years. He is fifty-seven years old, a field hand and laborer, and the patriarch of a family that includes seven U.S. citizen sons and seven U.S. citizen grandchildren. Recently, Rubio attended an Immigration and Naturalization Service (INS) interview as part of the naturalization process. There he was arrested as an aggravated felon.[3] The reason? Twenty-seven years ago, in 1972, Refugio Rubio was convicted of a possession with intent to distribute marijuana violation. Since then, he has never been in any trouble with the law. He raised a family, built his own home, and has been a model "citizen" in every way. In 1996, however, Congress passed legislation that retroactively classified people such as Rubio as aggravated felons, regardless of how long ago they committed their offenses. As one of the "new felons," Rubio will be deported, and he will be denied any form of discretionary relief from deportation. Although he was already punished twenty-seven years ago for his offense, Rubio will be banished from his family, his work, and his home. He will be returned to a country where he has nothing, a country he left thirty-four years ago. He will be banned from entering the United States for a minimum of twenty years.[4]

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1. Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting).
2. *Deuteronomy 1:16* (New Catholic ed.).
3. Aggravated felonies, defined at 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1997), have no specific connection with criminal law. They are simply a Congressionally-dubbed and defined class of conduct deemed sufficiently egregious to warrant adverse immigration action. Congress may characterize any offense—or any behavior at all—as an aggravated felony. *See* Evangeline G. Abriel, *The Effect of Criminal Conduct Upon Refugee and Asylum Status*, 3 SW. J.L. & TRADE AM. 359, 367-68 (1996); Donald Ungar, *Aggravated Felonies, in* KEY ISSUES IN IMMIGRATION LAW 130 (Philip A. Boyle et al. eds., 1992).
4. *See* Patrick J. McDonnell, *Criminal Past Comes Back to Haunt Some Immigrants*, L.A. TIMES, Jan. 20, 1997, at A1.

Aliens who commit serious crimes must undoubtedly be deported. American citizens need neither endure the atrocities committed by alien terrorists nor continue to subsidize the unstoppable river of illegal aliens flowing across the borders. Today, over four million illegal aliens[5] live in the United States;[6] at least a quarter of a million more undocumented aliens enter this country each year,[7] contributing to the serious immigration problems suffered by the United States. Though the concerns raised by immigration policies have periodically surfaced during the last few decades, both legal immigrants and illegal aliens were largely ignored or tolerated during much of the 1970s and 1980s, partly because the United States had, at various times, a large and unmet labor demand.[8]

The economic slowdown of the early 1990's and the accompanying dissipation of the economic need for and social tolerance of immigrants begged a scapegoat. The American immigrant population was popularly perceived as being responsible for a myriad of ills, including the high unemployment, drug abuse, and crime rates, as well as for the rising costs for services such as social welfare and medical programs.[9] In 1996, an election year, Congress seized upon the rising swell of anti-immigrant sentiment and passed a series of laws intended to curb illegal immigration and its purported adverse consequences, namely crime, terrorism, and welfare abuse. Among the most important of these laws were the Antiterrorism and Effective Death Penalty Act of 1996

5. Within this Comment, the term "immigrant" is used instead of the "alien" designation, which is the generic term for those persons "not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3) (1994). The term "immigrant," itself defined in over 200 lines at 8 U.S.C. § 1101(a)(15) (1994), is both used popularly and used commonly by immigration practitioners in place of "alien," and this Comment generally follows that practice except where necessary to make clear a distinction between the two terms.

6. *See* John Boehner, *Immigration in the National Interest Act*, FED. DOCUMENT CLEARING HOUSE at 4, (Mar. 18, 1996) *available in* 1996 WL 8784701.

7. *See INS Releases Updated Estimates of U.S. Illegal Population*, NEWS RELEASE (U.S. Dep't of Justice, Immigration and Naturalization Service, Wash. D.C.), Feb. 7, 1997, at 1, *quoted in* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883 (1997).

8. *See generally* Smith & Grant, *supra* note 7. This article, co-authored by the chairman and counsel, respectively, of the Subcommittee on Immigration and Claims, Committee on the Judiciary, U.S. House of Representatives, presents, along with much relevant data, a justification of the recent overhaul of immigration law.

9. *See* Nancy San Martin, *Tougher Laws, Tougher Lives*, FT. LAUDERDALE SUN-SENTINEL, Mar. 30, 1997, at 1A; *see also* Smith & Grant, *supra* note 7, at 891.

(AEDPA)[10] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[11] Congress' effort was largely successful: the new laws addressed the publicly-expounded aims of expediting the expulsion of immigrants suspected of terrorism, denying immigrants social benefits, speeding up the deportation of criminal aliens,[12] and reforming the immigration system in general.

There was very little political or popular resistance to these measures. After all, disenfranchisement of an unpopular, scapegoat community that does not enjoy suffrage carries no political risk.[13] Who, after all, would speak out *in support of* immigrant terrorists? Of illegal aliens? Of criminal immigrants? Not surprisingly, few did.

In its legislative zeal, however, Congress lumped together lawful permanent residents[14] with illegal aliens, terrorists, and drug traffickers. Lawful permanent residents, many of whom have resided in the United States for decades, have fought wars in the name of the United States, and have owned businesses that provided employment for thousands of American citizens, are in significant portions of the AEDPA and the IIRIRA treated no differently than illegal alien terrorists.[15]

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10. Pub. L. No. 104-132, 110 Stat. 1214 (relevant portions codified as amended in scattered sections of 8 U.S.C.) [hereinafter AEDPA].

11. Pub. L. No. 104-208, 110 Stat. 3009 (relevant portions codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

12. *See* San Martin, *supra* note 9, at A1 (quoting Paul Virtue, acting executive assistant INS commissioner, as saying: "Our priority is removal of criminal aliens.").

13. "It is difficult to imagine a group generating less sympathy on Capitol Hill than aliens who have engaged in criminal conduct." Howard S. (Sam) Myers, III, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996—Congress Gets Tough on Illegal Immigration, Tight with Benefits*, *in* FEDERAL IMMIGRATION LAWS AND REGULATIONS v, xv (1997).

14. Lawful permanent residents are those aliens who have the "status of having been lawfully accorded the privilege of residing permanently in the United States." 8 U.S.C. § 1101(a)(20) (1994). Lawful permanent residents, popularly known as "green card holders," generally intend to, and are authorized to, reside in the United States permanently. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS 7-2 to 7-3 (3d ed. 1994). Within this Comment, lawful permanent residents are also referred to as permanent residents and legal immigrants. Aliens not lawfully admitted for permanent residence are generally and interchangeably referred to as "undocumented aliens," "illegal aliens," and "undocumented immigrants."

15. For an example of some immigration-practitioner reaction to the 1996 legislation, see the foreword to Volume One of the American Immigration Lawyers Association's 1997-98 *Immigration & Nationality Law Handbook* which discusses the "truly evil nature of the 1996 laws" and states:

> The Immigration and Nationality Act and related statutes are now vicious, vindictive, petty, and mean-spirited. . . . The . . . likely result is the creation of a truly exploited and exploitable under class as we have never before known in the United States. Taking control of the borders of the United States is one thing, elimination of forgiveness and redemption in immigration and nationality matters is another thing altogether.

Margaret H. McCormick & R. Patrick Murphy, *Foreword* to 1 - 1997-98 IMMIGRATION

Part II of this Comment traces the development of the "aggravated felony" classification, focusing on the expansion promulgated by the 1996 legislation. The redefinition enumerates new crimes that are now considered aggravated felonies and, more important to permanent residents, amplifies the previous definition to encompass offenses that are properly neither felonies nor "aggravated."[16] Because an aggravated felony offense is generally dependent on a "conviction" and "term of imprisonment,"[17] concomitant with the expansion of "aggravated felony," IIRIRA mutates established judicial constructions of the terms "conviction" and "term of imprisonment," thereby imposing upon the greatest possible number of immigrants the designation of "aggravated felon."[18]

The ramifications to an immigrant caught within the expanded definition of aggravated felony are considerable and permeate throughout the Immigration and Nationality Act (INA).[19] Part III of this Comment focuses on the effects, both past and present, of an aggravated felony conviction on admission to and removal from the United States. Lawful permanent residents, even those unaware of the IIRIRA-conceived transmogrification of their prior petty offenses into aggravated felonies, who leave the United States may be inadmissible (formerly, "excludable") upon return.[20] Lawful permanent residents

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AND NATIONALITY LAW HANDBOOK at i (R. Patrick Murphy et al. eds., 1997).

16. 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1997). *See* discussion *infra* Part II.B.

17. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (1994) (amended in 1996) (defining an aggravated felony as a theft or burglary offense for which the "term of imprisonment imposed" is at least five years).

18. *See* IIRIRA, *supra* note 11, § 322(a) (codified as 8 U.S.C.A. § 1101(a)(48)) (West 1970 & Supp. 1997). *See* discussion *infra* Part II.B.

19. 8 U.S.C. §§ 1101 - 1537 (1994). INA, the "immigrant's bible," is the Immigration and Nationality Act of 1952, as amended through the enactment of the IIRIRA on September 30, 1996. When necessary to refer to pre-AEDPA or pre-IIRIRA amended versions of the INA, the date of the INA referred to is provided.

20. 8 U.S.C.A. § 1182(a)(2) (West 1970 & Supp. 1997). Although aggravated felonies are not an enumerated ground of inadmissibility, most aggravated felonies fall into another enumerated ground of inadmissibility—moral turpitude crimes, for instance. Thus, because theft could be considered either an aggravated felony or a crime of moral turpitude, it may be characterized as either. Characterization of the theft offense as an aggravated felony would not necessarily make the crime one barring admission of an alien under immigration law, but if the crime were categorized as one involving moral turpitude it would bar entry. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994). Rather than acting as a ground of inadmissibility, an aggravated felony conviction acts as a bar to some waivers of inadmissibility. *See id.* § 1182(h) (barring certain aggravated felons from seeking a "212(h)" waiver to inadmissibility); *see also* discussion *infra* Part III.B.2.

seeking citizenship in an attempt to avert or mitigate the effects of the AEDPA and IIRIRA, may be detained during naturalization proceedings if a background check reveals a decades-old offense that has retroactively become an aggravated felony. Removal (formerly called "deportation") from the United States follows.[21]

Part III also discusses the "barbaric consequences"[22] of the decline and eventual elimination of discretionary relief from deportation afforded to the growing pool of immigrants considered aggravated felons.[23] The 1996 legislation essentially denied any form of relief from deportation for all aggravated felons, and just as significant, severely restricted or eliminated judicial review over most denials of discretionary relief or final orders of deportation.[24] The most critical immigration processes

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The effects of non-aggravated felony bars to admissibility to the United States are similar to those faced by permanent residents convicted of aggravated felonies. For instance, Lorraine Parris, a Guyana native who had been a resident of the United States since 1970, whose spouse and 18-year-old son are American citizens, was detained and imprisoned after returning to New York from a belated honeymoon. Her crime was a late-1970's marijuana possession conviction, for which she likely faces deportation today. Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1.

21. *See* discussion *infra* Part III.A.

22. Letter from Professor Stephen Legomsky to President Clinton, *quoted in* Anthony Lewis, *Covering up Cruelty*, N.Y. TIMES, Sept. 27, 1996, at 33.

23. *See* discussion *infra* Part III.B.

24. Although a full discussion of the constitutional implications of the elimination of judicial review is outside the scope of this Comment, judicial review considerations as they apply to aggravated felons specifically will be addressed in relevant context. *See infra* Part III.A. (application to admission, removal, and voluntary departure); Part III.B. (application to discretionary relief and asylum). Perhaps the most complex interrelationships between Congress' plenary power over immigration and the due process rights of aliens occur when Congress circumscribes judicial review of immigration decisions, particularly those relating to the admission or deportation of legal immigrants. *See generally* Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861 (1994); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850 (1997). In brief, aliens, especially lawful permanent residents present in the United States, are entitled to constitutional due process. *See* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). Congress, however, retains absolute control over alien admission and expulsion from the United States, an exercise of plenary power that repeatedly withstands attack. For example, the U.S. Supreme Court has stated: "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977), (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). Congress also, of course, has the almost absolute power to prescribe the jurisdiction of the federal courts. U.S. CONST. art III, § 1. When, however, a deportable or excludable immigrant's already limited judicial remedies, prescribed as "the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States," 8 U.S.C. § 1105a(a) (1994), *repealed by* IIRIRA § 306(b), are further circumscribed or eliminated by Congress, the potential for serious due process concerns arises. *See* 8 U.S.C.A. § 1252 (West 1970 & Supp. 1997). As of the writing of this Comment, post-

were thus isolated and shielded from judicial scrutiny. Further, IIRIRA generally mandates that aggravated felons be detained until they are deported, greatly exacerbating the difficulties of a long-term permanent resident who likely has critical family, property, and financial concerns to attend to.

Part IV of this Comment discusses the retroactive application of the expanded definition of "aggravated felony." In the most serious blow to the established permanent resident community, the redefinition of aggravated felonies was specifically made retroactive. With a single-sentence amendment, Congress extended the chronological reach of the redefinition of aggravated felonies, allowing it to apply to offenses "regardless of whether the conviction was entered before, on, or after the date of enactment," of the IIRIRA.[25] Immigrants who had been convicted of a petty offense, such as shoplifting, thirty years before the enactment of IIRIRA would now, if they fit within the liberal IIRIRA concepts of "term of imprisonment" (which requires no actual imprisonment) and "conviction" (which does not necessarily require a true conviction), thus became aggravated felons for immigration purposes.

The potential for gross inequities in immigration law today is apparent. Take, for instance, the case of Olga Gonzalez, a U.S. resident for twenty-five years.[26] Gonzalez was arrested in 1987 in a police raid that targeted her ex-husband and was convicted of criminal facilitation in a drug purchase. Since then, Gonzalez has led the life of a model American "citizen." She earned a college degree. She worked for New York City Mayor David Dinkins when he was a borough president and

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IIRIRA cases have generally deferred to Congress' power in this area, with the exception of a few judicial decisions which base their exceptions on judicial discretion allowed during the initial transitional period. Not surprisingly, much recent legal commentary has addressed this dynamic issue. Some relevant discussions include the following: Sara Candioto, *The Antiterrorism and Effective Death Penalty Act of 1996: Implications Arising from the Abolition of Judicial Review of Deportation Orders*, 23 NOTRE DAME J. LEGIS. 159 (1997); Peter Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?*, 44 FED. LAW. 45, (Mar.-Apr. 1997); at 43; Paul S. Jones, Note and Comment, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915 (1997).

25. IIRIRA, *supra* note 11, § 322(a) (codified as 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1997)).

26. *See* Lena Williams, *supra* note 20, at A1; Jonathan S. Landay, *Legal Immigrants Deported If They Have a Criminal Past*, CHRISTIAN SCI. MONITOR , Sept. 5, 1996, at 1.

then followed him to City Hall, where she worked as Dinkins' secretary until his re-election defeat in 1994. She then worked as a social worker for children.

Gonzalez was scheduled to be sworn in as a U.S. citizen on May 30, 1997. The day before the ceremony, May 29, she rushed to Colombia for her mother's funeral. On her return, she was arrested and placed into detention, where she remained for two months.[27] Gonzalez will be deported, and if classified as an aggravated felon, she will have no discretionary relief or judicial review available to her.

Since AEDPA and IIRIRA were enacted in 1996, prior offenses as minor as shoplifting subject a long-term permanent resident to the same consequences as those faced by Gonzalez.[28] In fact, lawful permanent residents with a petty prior offense that has been retroactively recharacterized as an aggravated felony are treated in exactly the same manner as illegal aliens who enter the United States in 1998 specifically to commit a terrorist act.

American society need not tolerate serious criminal activity from those immigrants who are allowed the privilege of living in the United States. Congress' 1996 immigration reforms will likely achieve many of the stated—and necessary—aims of expeditiously deporting alien criminals and slowing illegal immigration. To ensure that fewer targeted aliens would escape the consequences of the legislation directed at them, Congress specifically eliminated the administrative and judicial discretion once available in various phases of the immigration process. However, by prohibiting all avenues of discretionary relief to the targeted aliens, Congress also attacks and forces the removal of the very immigrants who are most desirable: long-term lawful permanent residents. The most "American" of immigrants, lawful permanent residents, particularly those retroactively-baptized "new felons," face the most dire immigration consequences, ironically inspired by legislation intended to, among other things, protect them and their families from the very classification of alien they now find themselves a part of.

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27. The detention of Gonzalez was likely necessary because of IIRIRA-mandated custody of criminals until deportation. 8 U.S.C.A. § 1252(a) (West 1970 & Supp. 1997). For example, the recent case of *United States v. Zadvydas*, 986 F. Supp. 1011 (E.D. La. 1997), details the facts behind the detention of Zadvydas, a U.S. resident for 41 years, who was imprisoned for "nearly four years with no end in sight" while awaiting deportation for his aggravated felony conviction. *See infra* notes 154-59 and accompanying text. Current immigration law allows for limited exceptions to the mandatory custody requirements, which likely accounts for Gonzalez's release after two months. 8 U.S.C.A. § 1252(b) (West 1970 & Supp. 1997).

28. *See, e.g.*, Patrick J. McDonnell, *Criminal Past Comes Back to Haunt Some Immigrants*, L.A. TIMES, Jan. 20, 1997, at A1 (describing the impending deportation to Nigeria of a 20-year U.S. resident for pre-IIRIRA shoplifting offenses).

II. EXPANSION OF THE DEFINITION OF AGGRAVATED FELONY

A. Aggravated Felonies and Their Consequences Before 1996

"Aggravated felonies,"[29] a class of crimes created by Congress and applicable to all aliens,[30] were first defined in the Anti-Drug Abuse Act of 1988[31] (ADAA). In 1988, aggravated felonies included only serious crimes, such as murder, illicit trafficking in controlled substances, and firearms trafficking, all offenses that unarguably deserve a sentence of deportation after the alien has completed his or her criminal sentence in the United States.[32] The definition of "aggravated felony," however, underwent a rapid expansion via the enactment of the Immigration Act of 1990[33] to include crimes of violence[34] for which the term of

29. Aggravated felonies are generally defined at 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1997).

30. The definition of aggravated felony, *id.* § 1101(a)(43), applies only to Chapter 12 of Title 8 of the U.S. Code, which covers immigration and nationality matters. 8 U.S.C. § 1101(a) (1994).

31. Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (codified as amended at 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1997)) [hereinafter ADAA].

32. *Id.*

33. Pub. L. No. 101-649, § 501, 104 Stat. 4978 (1990).

34. Before 1996, any crime of violence for which a five year term of imprisonment was imposed was considered an aggravated felony. The name given this classification of crimes is not entirely accurate as no actual violence is required. An attempt to use violence or even a simple threat of violence is sufficient for an offender to fall within this subclassification. Any offense that has "as an element the use, attempted use, or threatened use of physical force against the person or property of another" constitutes a crime of violence. 18 U.S.C. § 16(a) (1994). The aggravated felony definition, 8 U.S.C.A. § 1101(a)(43)(F) (West 1970 & Supp. 1997), refers to and uses the Title 18 definition of crime of violence. It is thus not the particulars of a specific crime that matter; rather, if the nature of the offense is one in which there is a risk of physical force, a crime of violence has been committed. Ramsey v. INS, 55 F.3d 580, 583 (11th Cir. 1995) (finding that a crime of violence involves "a substantial risk that physical force may be used against the victim"). What is determinative, then, is not the specific facts of the offense in question, but the generic "nature of the predicate offense." PHILIP HORNIK, IMMIGRATION ACT OF 1990 HANDBOOK 12-8 n.32 (1997). In determining whether a crime is one of violence, the courts "look to the statutory definition, not the facts underlying the conviction." *See In Re* S-S-, Interim Decision 3317 (B.I.A. 1997), 1997 WL 258946 (1997) (finding that "a substantial risk that physical force may be used" is sufficient to constitute a crime of violence). *See also* United States v. Moore, 38 F.3d 977 (8th Cir. 1994); United States v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991) (defining a crime of violence).

Under this accepted definition, crimes such as involuntary manslaughter are considered crimes of violence, and, potentially, aggravated felonies. *See* Matter of Alcantar, 20 I. & N. Dec. 801 (B.I.A. 1994) (finding that a conviction for involuntary

imprisonment was at least five years, and money laundering. The 1990 Act also enlarged the ADAA-defined sphere of "illicit trafficking in controlled substances" to encompass various drug-related crimes.[35] For instance, mere "possession of a controlled substance alone, even if not for the purpose of distribution or sale" became a "drug trafficking" crime and thus an aggravated felony.[36]

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA)[37] further expanded the definition to encompass certain Racketeer Influenced and Corrupt Organizations Act (RICO) offenses, theft and burglary offenses for which the term of imprisonment was at least five years, income tax evasion and fraud where the loss exceeded $200,000,[38] and alien smuggling for commercial advantage.[39] Despite the increasing number of crimes deemed serious enough to be considered aggravated felonies, until 1996 the crimes characterized as such were unarguably offenses serious enough to warrant expulsion from the United States.[40]

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manslaughter where a sentence of 10 years was imposed is an aggravated felony crime of violence).

35. Drug trafficking crimes defined in 18 U.S.C. § 924(c) were included by section 501 of the Immigration Act of 1990, 104 Stat. 4978 (1990).

36. *See e.g.* United States v. Miramontes-Lamas, No. 97-4130, 1998 U.S. App. LEXIS 1807 (10th Cir. Feb 9, 1998). The court in that case belittled Miramontes-Lamas's understanding of the plain meaning of "trafficking":

> Citing only Webster's Dictionary as authority, Mr. Miramontes-Lamas also contends that mere possession of narcotics cannot qualify as "drug trafficking," because "trafficking" necessarily involves some element of trade or exchange. Unfortunately for Mr. Miramontes-Lamas, Webster's Dictionary is not controlling authority in this circuit. However, Valenzuela-Escalente is, and in that case we held that possession of a controlled substance alone, even if not for the purpose of distribution or sale, is sufficient to qualify as "drug trafficking" under *18 U.S.C. § 924(c)*, thus triggering the aggravated felony enhancement . . . .

Id. at *4.

37. Pub. L. No. 103-416, § 222, 108 Stat. 4320 (1994) [hereinafter INTCA].

38. *See, e.g.*, Bazuaye v. INS, 97 Civ. 1280 (HB), 1997 U.S. Dist. LEXIS 2996 (S.D.N.Y. Mar. 17, 1997). Bazuaye was convicted in 1992 of a "fraud" offense involving approximately $15,000, an amount that did not meet the $200,000 aggravated felony threshold. In 1996, however, this same offense was retroactively designated an aggravated felony. *See* discussion *infra* Part IV.A.

39. INTCA, *supra* note 37, § 222. *See* Richard L. Prinz, *Criminal Aliens Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, *in* 1 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK 528-29 (R. Patrick Murphy et al. eds., 1997). *See generally* HORNIK, *supra* note 34, at 12-3 to 12-5.

40. To summarize, before the enactment of AEDPA and IIRIRA, aggravated felony offenses included:

(A) murder;
(B) illicit trafficking in a controlled substance;
(C) illicit trafficking in firearms or destructive devices or in explosive materials;
(D) "money laundering" of amounts over $100,000;

B. Aggravated Felonies after IIRIRA

No single immigration-related finding has as pernicious an effect on an alien, particularly a lawful permanent resident, as does a conviction for an aggravated felony.[41] Notwithstanding the increasingly severe consequences of the designation, the concept of aggravated felonies as exceptionally serious crimes began to change in 1996 with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. The AEDPA broadened previously existing categories of aggravated felonies, for example, by making failure to appear for service of sentence an aggravated felony if the underlying sentence was punishable by imprisonment of five years or more, rather than the previous fifteen years or more.[42] In addition, failure to appear before a court to answer to a felony charge,[43] gambling offenses, document fraud, and offenses related to perjury and obstruction of justice were deemed aggravated

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(E) certain firearms and explosive material offenses;
(F) a crime of violence for which the term of imprisonment imposed was at least five years;
(G) a theft offense (including receipt of stolen property) for which the term of imprisonment imposed was at least five years;
(H) ransom (kidnapping) offenses;
(I) child pornography offenses;
(J) RICO offenses for which a sentence of at least five years' imprisonment may be imposed;
(K) involuntary servitude and management of prostitution offenses;
(L) national security and treason offenses;
(M) fraud or tax evasion where the loss exceeds $200,000;
(N) alien smuggling for commercial advantage;
(O) a trafficking in fraudulent documents offense
(P) failure to appear for service of sentence if the underlying sentence is punishable by a term of imprisonment of 15 years or more;
(Q) an attempt or conspiracy to commit an aggravated felony.
8 U.S.C. §1101(a)(43) (1994).

41. *See e.g.*, Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 272 (1997) (noting that "the most harshly treated class [of immigrants] is that of 'aggravated felons'"). Alien terrorists who, after the enactment of the Antiterrorism and Effective Death Penalty Act, are subject to extremely abbreviated immigration proceedings, are likely treated as harshly as are aggravated felons. Many of the provisions of AEDPA, however, are also applicable to lawful permanent residents who are designated aggravated felons although they have committed only petty offenses.

42. AEDPA, *supra* note 10, § 440(e) (codified as amended at 8 U.S.C.A. § 1101(a)(43)(P) (West 1970 & Supp. 1997)).

43. Failure to appear became an aggravated felony if a sentence of two years' imprisonment or more could be imposed for the underlying felony. 8 U.S.C.A. § 1101(a)(43)(T) (West 1970 & Supp. 1997)).

felonies.[44] Despite this shift toward less serious crimes, AEDPA's definition of aggravated felonies applied only to convictions entered into on or after the date of enactment of the AEDPA,[45] leaving ambiguous (and therefore non-retroactive) the date of application of the new definition.[46]

Once IIRIRA was enacted, it became clear to many immigration practitioners that an aggravated felony was no longer a protective device to shield American society from the most heinous crimes. Rather, an aggravated felony became a sword, one that hewed indiscriminately through the ranks of the immigrant community.[47] Although IIRIRA did include some grave crimes within its redefinition,[48] for the most part it greatly liberalized existing definitions, thereby labeling many more immigrants as aggravated felons. For instance, the threshold amount for money laundering and tax evasion offenses was lowered to $10,000 from $100,000 and $200,000 respectively.[49]

Other nominal aggravated felonies were created by lowering the "term of imprisonment" threshold for theft and receipt of stolen goods offenses from five years to one year.[50] Also, of particular concern to lawful permanent residents attempting to reunite their families was the elimination of the "term of imprisonment" threshold for alien smuggling.[51] After IIRIRA was enacted, assisting family members with clandestine entry into the United States became an aggravated felony, as did passport alteration or other document fraud offenses.[52] Among the

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44. *Id.* §§ 1101(a)(43)(J), (P), (S).

45. AEDPA, *supra* note 10, § 440(f). An exception was made for alien smuggling offenses, for which the effective date of the amended definition was made retroactive to the effective date of the INTCA.

46. *See id.*; for a discussion of the retroactive application of immigration statutes, see Part IV, *infra.*

47. *See generally*, "Everyone is an Aggravated Felon," in Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1324 (1997).

48. The only two such crimes added by IIRIRA were sexual abuse of a minor and rape. IIRIRA, *supra* note 11, § 321 (codified as 8 U.S.C.A. § 1101(a)(43)(A) (West 1970 & Supp. 1997)).

49. *See id.* § 321(a)(2) (codified as 8 U.S.C.A. § 1101(a)(43)(D) (West 1970 & Supp. 1997)); *see also id.* § 321(a)(7) (codified as 8 U.S.C. § 1101(a)(43)(M) (1994)); Bazuaye v. INS, 97 Civ. 1280 (HB) 1997 U.S. Dist. LEXIS 2996 (S.D.N.Y. Mar. 17, 1997) (finding that a pre-IIRIRA 1992 conviction for a "fraud or deceit" (counterfeiting) offense that involved $15,000 was an aggravated felony in 1997).

50. IIRIRA, *supra* note 11, § 321(a)(3) (codified as 8 U.S.C.A. § 1101(a)(43)(G) (West 1970 & Supp. 1997)).

51. *Id.* § 321(a)(8) (codified as 8 U.S.C.A. § 1101(a)(43)(N) (West 1970 & Supp. 1997)).

52. *See id.* § 321(a)(9) (codified as 8 U.S.C. § 1101(a)(43)(P)(1994)). IIRIRA allows limited exceptions for first offenses committed to assist certain members of an alien's immediate family. *See id.* § 321(a)(8) (codified as 8 U.S.C. § 1101(a)(43)(N) (1994)).

several offenses for which IIRIRA lowered the "term of imprisonment" threshold were all "crimes of violence."[53] A crime of violence became sufficiently egregious to constitute an aggravated felony if the offender was sentenced to a year of imprisonment.[54]

1. Redefinition of "Conviction" and "Term of Imprisonment" for Aggravated Felony Purposes

Before 1996, immigration law did not have a statutory definition of "conviction."[55] Instead, the generally accepted Board of Immigration Appeals decision, *Matter of Ozkok*, which instituted a three-prong test to determine the meaning of "conviction" for immigration purposes, was used.[56] The test required that: 1) a judge or jury find the defendant guilty or that the defendant admit guilt or sufficient facts to support a finding of guilt; 2) the judge order some form of punishment, penalty, or restraint on the defendant's liberty; 3) a defendant who received probation under a deferred adjudication scheme have no further hearings as to guilt or innocence in the event that she or he violated the terms of probation.[57] Under *Ozkok*, deferred adjudication, for example, was in many instances not considered a conviction, which created a situation relatively favorable toward immigrants.[58]

IIRIRA created an entirely new meaning of the word "conviction," which applies only to aliens.[59] The comprehensive etymological stretch that constitutes a "conviction" acts, in effect, as a multiplier of the expanded definition of "aggravated felony": the exponential reach of the terms acting in concert is considerable. As a result, immigrants, including lawful permanent residents, no longer need to be convicted of an aggravated felony in order to be deported as a "convicted" aggravated felon.[60] This redefinition "reflects the extent Congress has gone to insure

53. *Id.* § 321(a)(3) (codified as 8 U.S.C. § 1101(a)(43)(F) (1994)). See *supra* note 34 for a general discussion of crimes of violence.

54. *See* 8 U.S.C. § 1101(a)(43)(F) (1994).

55. *See* Katherine Brady & Dan Kesselbrenner, *Recent Developments in the Immigration Consequences of Criminal Conduct*, *in* 2 - 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK, *supra* note 39, at 289.

56. *See* Matter of Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988); *see also* Brady & Kesselbrenner, *supra* note 55, at 289.

57. *See* Brady & Kesselbrenner, *supra* note 55, at 289.

58. *See* Matter of Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988).

59. IIRIRA, *supra* note 11, § 322(a) (codified as 8 U.S.C. § 1101(a)(48)(A) (1994)).

60. IIRIRA section 322 reads, in part:

that aliens charged with crimes are ordered removed or denied admission regardless of the extent of their guilt, length of residence, prior record, or family situation."[61]

Congress specifically stated that the purpose of IIRIRA section 322 was to "deliberately broaden[s] the scope of the definition of 'conviction.'"[62] According to Congress, because then-current law[63] did "not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended," IIRIRA section 322 "clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of immigration laws."[64]

In addition to enlarging the scope of a "conviction," IIRIRA deleted the "imposed" or "actually imposed" requirement of most "term of imprisonment" provisions of the INA, affecting in particular those provisions that serve as a requirement for an aggravated felony conviction.[65] In place of an "imposed" requirement on the length of a term of imprisonment, Congress enacted a new definition of imprisonment for immigration purposes.[66] Congress stated that "this new definition clarifies that in cases where immigration consequences attach depending on the length of term of sentence, any court-ordered sentence is considered to be 'actually imposed,' including where the

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The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendre or has admitted sufficient facts to warrant a finding of guilt, and

(ii)the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C.A. § 1101 (a)(48)(A) (1970 & Supp. 1996).

61. Prinz, *supra* note 39, at 535.

62. Joint Explanatory Statement of the Committee of Conference, 142 CONG. REC. H10899 (daily ed. Sept. 24, 1996).

63. *Id* (citing Matter of Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988)). Congress expressed their intent to eliminate the third prong of the three-prong test defining "conviction" established by that case. *See also supra* note 56.

64. 142 CONG. REC. H10899 (daily ed. Sept. 24, 1996).

65. IIRIRA section 322(a)(2) strikes "imposed (regardless of any suspension of imprisonment)" from each place it appears in 8 U.S.C. section 1101(a)(43) (defining "aggravated felony") and strikes "actually imposed" from 8 U.S.C. section 212(a)(2)(B) (relating to criminal grounds of inadmissibility). A theft offense, for example, which, prior to IIRIRA, not only required at least a five-year term of imprisonment but also required that the sentence be "imposed" 8 U.S.C. § 1101(a)(43)(G) (1994), now escalates into an aggravated felony for an "offense for which the term of imprisonment at least one year [sic]." 8 U.S.C.A. § 1101 (a)(43)(G) (West 1970 & Supp. 1996).

66. "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." IIRIRA, *supra* note 11, § 322(a)(1)(B).

court has suspended the imposition of the sentence."[67] For a permanent resident convicted of a minor theft offense, shoplifting for instance, this definition is significant. A plea bargain for a one year suspended sentence with no time served—which nonetheless is considered a term of imprisonment of a year—will likely carry far more severe immigration consequences, including deportation, than an eleven month jail term. The former sentence will cause the offense to be categorized as an aggravated felony, with its attendant harsh consequences, whereas the latter is likely to have no immigration consequences as of 1996.[68]

The IIRIRA-promulgated definition of "imprisonment" shows a marked lack of respect for state and federal courts that attempted to shape criminal sentences to ameliorate some of the attendant immigration repercussions. Before 1996, even courts faced with sentencing guidelines could limit the number of days that an immigrant served, and could thereby minimize or eliminate adverse immigration consequences in cases that begged for equitable treatment. Today, however, courts have no such discretion, even when faced with cases that obviously do not warrant deportation. Regardless of any court's attempts to the contrary, an indeterminate sentence as applied to immigrants—and only to immigrants—is considered a sentence for the maximum term imposed for exclusion and deportation purposes.[69] A sentence for a term "not to exceed one year," then, is a term of imprisonment for one year—whether or not even one single day was served.[70]

In sum, the designation of "aggravated felony," the most deleterious

67. 142 CONG. REC. H10899 (daily ed. Sept. 24, 1996).

68. *See* 8 U.S.C. § 1101(a)(43)(G) (1994) (defining as an aggravated felony a theft offense for which a sentence of a year or more is imposed); *id.* § 1101(a)(48)(B) (defining term of imprisonment); *id.* § 1227(a)(2)(A)(iii) (mandating the deportation of aggravated felons).

69. IIRIRA, *supra* note 11, § 322(a)(1) (codified as 8 U.S.C.A § 1101(a)(48)(B) (West 1970 & Supp. 1997)).

70. For instance, in *In re S-S-*, an aggravated felon was sentenced for an "an indeterminate term not to exceed 5 years." The Board of Immigration Appeals found that although the entire sentence was suspended and the alien had served no time, under IIRIRA "the fact that his sentence was suspended is irrelevant to the analysis, as is the length of time actually served, if any." The alien was thus deportable and was also found ineligible for asylum or withholding of deportation as a result of the length of the maximum indeterminate sentence imposed upon him. *In re* S-S-, Interim Decision 3317 (B.I.A. 1997), 1997 WL 258946 (publication pages not available). *See also* Pichardo v. INS, 104 F.3d 756, 759 (5th Cir. 1997) (finding that a sentence of 11 1/2 to 23 months for an aggravated felony conviction is to be considered a 23 month imprisonment).

immigration-specific designation applicable to immigrants, and one particularly harmful to permanent residents who have long-term vested interests in the United States, has bloated until it is unrecognizable from its intended incarnation. Behavior such as shoplifting, turnstile-jumping, and simple drug possession that, though undoubtedly offensive and deserving of some punishment, has, by being designated an aggravated felony, been elevated to a level of crime best reserved for far more serious offenses. Further, by torturing the semantic construction of terms such as "conviction" and "imprisonment" for immigration purposes, Congress created a huge class of "new felons" who, despite only having committed a minor offense years or decades before the IIRIRA was conceived, became deportable aggravated felons in 1996.

III. CONSEQUENCES OF AN AGGRAVATED FELONY CONVICTION AFTER IIRIRA

A. Effects on Admission and Removal

Immigration law has historically divided the immigrant expulsion process into two distinct procedures, exclusion[71] and deportation.[72] The difference was once significant: unlike aliens who were physically present in the United States, aliens who were attempting to enter could

71. Lawful permanent residents seeking re-entry to the United States are subject to the grounds of exclusion. The nine general grounds or classes of exclusion are: 1) Health-related grounds; 2) Criminal and related grounds; 3) Security and related grounds; 4) Public charge; 5) Labor certification and qualifications for certain immigrants; 6) Illegal Entrants or immigration violators; 7) Documentation requirements; 8) Ineligible for citizenship; and 9) Miscellaneous. 8 U.S.C. § 1182(a) (1994). Waivers were available for criminal aliens under certain conditions. *See, e.g., id.* § 1182(h) (1994). IIRIRA section 348 removes the possibility of a section 212(h) waiver for permanent residents who have been convicted of an aggravated felony since admission.

72. Deportation is the procedure through which aliens are removed from the United States. There were five general grounds for deportability: 1) Excludable at time of entry or of adjustment of status or violates status; 2) Criminal offenses; 3) Failure to register and falsification of documents; 4) Security and related grounds; and 5) Public charge. 8 U.S.C. § 1251(a) (1994). Any alien, however, who was excludable at the time he entered was also deportable. Any ground of exclusion, therefore, if applicable to an alien when he entered, could be incorporated into the deportation grounds.

Significantly, the grounds of exclusion and deportation are not always parallel. For instance a permanent resident who is sentenced to more than six months' imprisonment for a moral turpitude crime is excludable, but is not deportable unless convicted of the crime of moral turpitude within five years after entry and sentenced to a term of imprisonment of one year or longer. *See* HORNIK, *supra* note 34, at 10-4; 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (1994); *id.* § 1251(a)(2)(A)(i)(I). He must, therefore, not leave the U.S. for any significant purpose, *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), or he may be subject to exclusion.

be "excluded" with few procedural due process requirements.[73] Of extreme importance to permanent residents returning home to the United States, the statutory grounds for exclusion did not specifically include aggravated felonies, unless the aggravated felony fit into another exclusionary ground.[74] A permanent resident aggravated felon could, then, leave the United States, and not necessarily face the abbreviated exclusion process upon return.[75]

Aliens who were subject to "deportation" were those who had made an "entry,"[76] legal or otherwise,[77] into the United States.[78] Once an "entry" was effected, an alien became a constitutionally protected "person," and was entitled to, at a minimum, constitutionally guaranteed

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73. *See* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (stating that "whatever" procedure Congress authorizes "is due process as far as an alien denied entry is concerned"); Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953) (allowing indefinite detention of aliens seeking entry if no other countries would accept them); *see also* Dulce Foster, *Judge, Jury and Executioner: INS Summary-Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 82 MINN. L. REV. 209 (1997); FRAGOMEN & BELL, *supra* note 14, at 7-2 to 7-3; Paul S. Jones, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915 (1997).

74. Crimes of "moral turpitude" and controlled substance violations are the categories within the criminal grounds for exclusion most likely to encompass aggravated felonies. Moral turpitude crimes are undefined within the INA, but generally involve almost all offenses against the person and property of others. FRAGOMEN & BELL, *supra* note 14, at 1-23.

Under the so-called *Fleuti* doctrine, an exception was made for permanent residents who took trips outside the United States that were "innocent, casual, and brief." Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). These permanent residents were not subject to exclusion upon reentry, but only to deportation, with its attendant procedural due process protections. *Id.*

75. This distinction, however, is ultimately almost moot as it applies to aggravated felons. Aggravated felons are deportable. At best, this non-exclusion provision allows a permanent resident to leave the United States for a foreign emergency, only to face deportation proceedings—with their attendant procedural advantages—rather than exclusion proceedings, if detected upon entering the United States. The result of either proceeding for an aggravated felon is likely to be the same.

76. An entry is any "coming of an alien into the United States," 8 U.S.C. § 1101(a)(13) (1994). This was a much debated definition that retains little relevance in light of IIRIRA provisions, which make the legal concept of entry almost irrelevant.

77. An intentional evasion of immigration officials is enough to constitute an entry if the alien is physically present in the United States and is free from official restraint. *In re* Chin & Chen, 19 I. & N. Dec. 203 (B.I.A. 1973). *But see* 8 U.S.C.A. § 1101(a)(13) (West 1970 & Supp. 1997), a 1996 amendment, which requires inspection for an admission to be effected.

78. *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 575 (1990).

procedural due process.[79] Significant, particularly in light of the future expansion of the definition of aggravated felony, was the provision defining as deportable[80] any alien convicted of an aggravated felony.[81]

IIRIRA eliminates the concept of "entry," replacing it instead with the concept of "admission."[82] Today, only lawful entries after inspection and authorization are admissions.[83] Under IIRIRA, aliens who have not been admitted, though present in the United States are subject to the grounds of "inadmissibility" (formerly exclusion), rather than the more stringent grounds of removal (formerly deportation).[84] Lawful permanent residents re-entering the United States are not considered to be seeking an admission, unless they meet select criteria.[85] However, lawful permanent residents who have "committed an offense identified in section 212(a)(2)," that is, criminal lawful permanent residents who have not been granted relief, must be admitted, and are thus subject to the more uncompromising exclusion procedures, including summary exclusion.[86] An aggravated felony conviction, then, in certain circumstances, may bar the readmission to the United States of a lawful permanent resident, and it always acts as a bar to a discretionary waiver of inadmissibility.[87]

IIRIRA consolidates deportation and exclusion proceedings into euphemistically named "removal proceeding."[88] As discussed above,

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79. Wong Yang Sung v. McGrath, 339 U.S. 33, 48-53 (1950) (requiring that deportable aliens receive, at a minimum, an impartial administrative hearing); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212-13 (1953); *see also* Foster, *supra* note 73, at 209.

80. Although IIRIRA renames deportation and exclusion proceedings and combines them into a "removal proceeding," 8 U.S.C.A. § 1229a (1970 & Supp. 1997), the sections describing "deportable" aliens, 8 U.S.C. § 1227, and "excludable" aliens, 8 U.S.C. § 1182, retain the original "deportation" and "exclusion" language.

81. Unlike the grounds for exclusion, grounds for deportation specifically include conviction for an aggravated felony: "Any alien who is convicted of an aggravated felony at any time after entry is deportable." 8 U.S.C. § 1251(a)(2)(A)(iii) (1994); *see also id.* § 1251(a)(2)(A)(iii).

82. IIRIRA, *supra* note 11, § 301 (codified as 8 U.S.C.A. § 1101(a)(13) (West 1970 & Supp. 1997)).

83. *See* 8 U.S.C.A. § 1225(a)(1) (West 1970 & Supp. 1997).

84. *Id.* § 1101(a)(13).

85. These include continuous absence for a period of 180 days, engaging in illegal activity after having departed the United States, or attempting to enter at a time or place other than as designated by immigration officers. IIRIRA, *supra* note 11, § 301 (codified as 8 U.S.C.A. § 1101(a)(13)(C) (West 1970 & Supp. 1997)); *see also Fleuti* doctrine discussion, *supra* note 74.

86. IIRIRA, § 301 (codified as 8 U.S.C.A. § 1101(a)(13)(C)(v) (West 1970 & Supp. 1997)).

87. 8 U.S.C.A. § 1182(h) (West 1970 & Supp. 1997); *see* discussion *infra* Part III.C.2

88. IIRIRA Section 304(a) creates new INA section 240, 8 U.S.C. 1229a , entitled "Removal proceedings."

lawful permanent residents and illegal aliens who are deemed "aggravated felons," regardless of when the offense occurred, will be removed from the United States.[89] Although IIRIRA allows lawful permanent residents to retain a few privileges not enjoyed by undocumented aliens, an aggravated felony conviction generally initiates the same strict exclusionary and deportability standards that apply to all aliens, regardless of status.

IIRIRA also creates a new section entitled "Expedited removal of aliens convicted of committing aggravated felonies."[90] Although this section applies to all aliens, the most draconian provisions—and those raising the most serious constitutional questions—are those that allow non-permanent-resident aggravated felons and lawful permanent residents who have fewer than two years of permanent residency to be placed in expedited administrative removal proceedings, where they may be deported without ever seeing an immigration judge.[91] Also, in another attempt to speed the deportation of criminal aliens, federal judges in 1996 were authorized to issue deportation orders concurrently with the judgment of sentence in federal criminal cases.[92] IIRIRA further created a new INA section entitled "Detention and removal of aliens ordered removed."[93] This section mandates that once an immigrant is ordered removed, he shall not be released under any circumstances until deported.[94]

Finally, Congress, in section 306 of the IIRIRA, prohibited and

89. IIRIRA section 305 struck INA section 237 (8 U.S.C. § 1227 (1994)), then redesignated amended INA section 241 (8 U.S.C.A. § 1251 as amended 1996) as INA section 237 (8 U.S.C.A. § 1227 (West 1970 & Supp. 1997)). The applicable subsection is unambiguous: "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 1970 & Supp. 1997). For purposes of expedited removal, a lawful permanent resident aggravated felon "shall be conclusively presumed to be deportable from the United States." 8 U.S.C.A. § 1228(c) [sic] (West 1970 & Supp. 1997) (IIRIRA's redesignation and relettering created two subsections lettered "(c)").

90. 8 U.S.C.A. § 1228 (West 1970 & Supp. 1997).

91. *See* IIRIRA § 308(b)(5) (codified as amended as 8 U.S.C.A. § 1228(b)) (West 1970 & Supp. 1997). *See also* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1325.

92. *See* 8 U.S.C.A. § 1228(c) (West 1970 & Supp. 1997); *see also* Pilcher, *supra* note 41, at 273. This merging of criminal law and immigration law raises questions about the historical practice of applying differing constitutional standards between the criminal proceeding and the subsequent "administrative" or "civil" deportation proceeding. *See* discussion *infra* Part IV.

93. 8 U.S.C.A. § 1231 (West 1970 & Supp. 1997).

94. *See id.* § 1231(a)(2).

severely circumscribed the possibility of judicial review over removal orders, thus forbidding most judicial remedies once available.[95] Congress specifically removed from all courts the jurisdiction to review any final order of removal against an alien deportable as an aggravated felon.[96]

B. Limits on Discretionary Relief

Before the AEDPA and IIRIRA were enacted, a lawful permanent resident ordered excluded or deported had a few, albeit difficult to secure, options. He could attempt to obtain discretionary relief under section 212(c) of the INA (commonly called "212(c) relief"), even if his deportation or exclusion was on criminal grounds, including, in certain circumstances, aggravated felony grounds.[97] He could also seek a waiver of exclusion or deportation under section 212(h) of the INA (commonly called "212(h) waiver"), even if he had committed an (unrelated) aggravated felony.[98] He could apply for asylum[99] or "withholding of deportation"[100] if his life or freedom were likely to be in jeopardy in the country to which he was being deported. He could also, of course, ignore the deportation order and remain in the United States, or, allow himself to be deported, and then re-enter legally or otherwise, and face relatively minimal penalties.[101]

Today, a lawful permanent resident who falls within the 1996 definition of aggravated felon has almost none of the above options. Regardless of the pettiness of his crime, regardless of how unfair it may be to exile him from his adopted country and his family, and regardless of the punishment, including death, he may receive at his country of origin, he is no longer eligible for discretionary relief, and, in some cases, no longer eligible for relief mandated by international law. He also has absolutely no right to judicial review of denials of discretionary grants of relief, no matter how overtly unfair the administrative denial may have been. It is perhaps here, in the last desperate hours before

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95. *See* IIRIRA, § 306 (codified as 8 U.S.C.A. § 1252 (West 1970 & Supp. 1997)); *see also* discussion *supra* note 24; Lenni B. Benson, *The "New World" of Judicial Review of Removal Orders*, *in* 2 - 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK 32, 35-37 (R. Patrick Murphy et al. eds., 1997)

96. 8 U.S.C.A. § 1252(a)(2)(C) (West 1970 & Supp. 1997).

97. 8 U.S.C. § 1182(c) (1994). Serving a term of imprisonment of at least five years for an aggravated felony conviction precluded relief under this section. *See id.*

98. 8 U.S.C. § 1182(h) (1994).

99. *See id.* § 1158(a).

100. *Id.* § 1253(h).

101. For a discussion of the AEDPA and IIRIRA-enhanced penalties imposed on aggravated felons who remain in the United States or re-enter the country after a final order of deportation, see *infra* Part III.C.2.

deportation when a person is forced to leave behind "all that makes life worth living"[102] because of a petty offense committed decades before, that the essence of the "truly evil nature of the 1996 laws"[103] is revealed.

1. Section 212(c) Relief

INA section 212(c)[104] for many years provided discretionary relief for long-term lawful permanent residents who faced exclusion and deportation from the United States, even if the exclusion or deportation was for criminal activity.[105] Though plainly written as a waiver of inadmissibility, rather than one of deportation, the 212(c) waiver, after several contentious judicial interpretations,[106] was eventually allowed to serve as a discretionary waiver to deportable offenses as long as there remained a "comparable ground" for exclusion.[107] Before 1996, aggravated felons who could show that deportation would impose an inequitable hardship upon them were eligible for a section 212(c) waiver, unless they had actually served a term of imprisonment of at least five years.[108] In *In re Marin*, the Board of Immigration Appeals detailed some of the factors that would be weighed in determining the applicability of section 212(c) relief.[109] These included family ties, length of residence, rehabilitation, service in the armed forces, history of employment, community service, and hardship to family members.[110] These factors were weighed against the severity of the offense, thus

102. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
103. McCormick & Murphy, *supra* note 15, at i.
104. 8 U.S.C. § 1182(c) (1994).
105. The alien applying for a 212(c) waiver had to be a lawful permanent resident and have a "lawful unrelinquished domicile of seven consecutive years." *Id.*
106. These interpretations ranged from the denial of the 212(c) waiver to aliens who had not left and reentered the country, *Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (B.I.A. 1971) *aff'd, Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir. 1972), to a complete disconnection between any grounds for exclusion and deportation in order for an alien to be eligible for section 212(c) relief. *See* Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (B.I.A. 1990), *rev'd*, 20 I. & N. Dec. 280 (Att'y Gen. 1991). *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 781-93 (1997) (tracing the discretion inherent in the 212(c) waiver through its various legal and historical permutations).
107. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).
108. A 212(c) waiver "shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. § 1182(c) (1994).
109. *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978).
110. *Id.* at 584-85. For an in-depth analysis of various aspects of the Section 212(c) waiver, see Kanstroom, *supra* note 106, at 780-801.

allowing long-term lawful permanent residents who were convicted of aggravated felonies at least the possibility of remaining in the United States.

Congress, acting through the 1996 legislation, removed this possibility of discretionary relief for aggravated felons. First, AEDPA specifically disallowed section 212(c) relief for aggravated felons,[111] then IIRIRA completely repealed section 212(c).[112] In its place was instituted "cancellation of removal," the new discretionary relief procedure for aliens who are inadmissible or deportable.[113] Any possibility or hope of relief for those long-term permanent residents who "became" aggravated felons under the IIRIRA was eviscerated by this IIRIRA section, which absolutely bars cancellation of removal relief for all aggravated felons.[114] There is no discretion to weigh inequities; there is no possibility of judicial review.[115]

2. *Section 212(h) Relief*

Another limited grant of discretionary relief provided by immigration laws to aggravated felons was the pre-IIRIRA INA section 212(h) waiver.[116] This section allowed the Attorney General to waive certain criminal grounds to exclusion, specifically marijuana possession;[117] importantly it did not specifically include aggravated felonies as a bar to the waiver.[118] Although the 212(h) waiver is an exclusion rather than deportation waiver, thus seeming to apply only to immigrants attempting to re-enter the United States, courts have invoked the Equal Protection Clause to allow permanent residents who have not left the U.S. to use this waiver as well.[119] Any immigrant,[120] including an aggravated felon,

111. Before 1996, aggravated felons who had "served" a term of imprisonment of at least five years were ineligible for section 212(c) relief. AEDPA § 440(d) eliminated the term of imprisonment requirement, thus eliminating relief for any aggravated felon, regardless of the length of the term of imprisonment. AEDPA § 440(d) (codified as amended as 8 U.S.C.A. § 1182(c) (West 1970 & Supp. 1997)).

112. *See* IIRIRA § 304(b).

113. IIRIRA section 304(a) created new INA section 240A, 8 U.S.C.A. § 1229b (West 1970 & Supp. 1997), called "CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS." IIRIRA § 304(a).

114. *See* 8 U.S.C.A. § 1229b(a)(3) (West 1970 & Supp. 1997).

115. "[N]o court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 240A . . . ." *Id.* § 1252(a)(2)(B)(i).

116. 8 U.S.C. § 1182(h) (1994).

117. *See id.*

118. 8 U.S.C. § 1182(a)(2) (1994), which enumerates the classes of excludable aliens, did not specifically bar aliens convicted of a single aggravated felony. An aggravated felony that falls within one of the other grounds of exclusion, a crime of moral turpitude for example, will, of course, make an alien inadmissible.

119. *See* Yeung v. INS, 76 F.3d 337 (11th Cir. 1995) (although the United States Court of Appeals for the Eleventh Circuit instructed the Board of Immigration Appeals

who could establish that his exclusion or deportation would cause "extreme hardship" to his U.S. citizen or lawful permanent resident spouse, parent, or child was eligible[121] for this waiver.[122] IIRIRA section 348 amends relief under this provision to deny a section 212 (h) waiver to any lawful permanent resident who has been convicted of an aggravated felony.[123]

After eviscerating section 212(h) waivers for the ever-expanding pool of immigrant aggravated felons, Congress further insured the inaccessibility of permanent residents to this discretionary relief by providing that "[n]o court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver."[124] Permanent residents who have recently been baptized aggravated felons and ordered deported, then, have effectively been cut off and isolated from any form of discretionary relief or judicial review of denials of grants of relief.

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to reconsider its dismissal of Yeung's appeal of a denial of a 212(h) waiver, IIRIRA's subsequent redefinition of aggravated felony, and its accompanying 212(h) amendment, made Yeung ineligible for relief, despite the Eleventh Circuit's instructions); *see also* Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

120. The 212(h) waiver is applicable to two different groups of immigrants. The more stringent section applies to "any immigrant" and offers only a limited "complete" waiver for prostitution offenses; all other offenses have to have been committed "more than 15 years before the date of the alien's application for a visa, entry, or adjustment of status." The alien must be rehabilitated and must not be a security risk to the United States. 8 U.S.C. § 1182(h)(1)(A) (1994). For an immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident, a showing of "extreme hardship" to the family members described above is sufficient to show eligibility for this waiver. *See id.* § 1182(h)(1)(B). In all cases, extremely serious crimes such as murder or torture preclude eligibility. *See id.* § 1182(h).

121. For the factors used to determine a favorable exercise of section 212(h) relief, see HORNIK, *supra* note 34, at 9-35.

122. *See* 8 U.S.C. 1182(h)(1)(B) (1994).

123. Section 212(h) (8 U.S.C. 1182(h)) is amended by adding at the end the following:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . the alien has been convicted of an aggravated felony . . . .

IIRIRA, *supra* note 11, § 348(a) (codified as 8 U.S.C.A. § 1182(h) (West 1970 & Supp. 1997)). Several authors, in interpreting the above section exactly as it is written, have noted that in an apparent Congressional oversight, section 212(h) relief, though proscribed for lawful permanent residents, may remain available for non-permanent resident aliens who are aggravated felons. Courts that have considered this argument have rejected it. *See* Morgan v. McElroy, 981 F. Supp. 873 (S.D.N.Y 1997). This oversight will undoubtedly be amended in a technical correction to the INA.

124. IIRIRA § 348(a) (codified as 8 U.S.C.A. § 1182(h) (West 1970 & Supp. 1997)). *See supra* note 24.

3. *Asylum and Withholding of Deportation*

Aggravated felon aliens were statutorily ineligible for asylum[125] prior to the enactment of the 1996 legislation.[126] The post-IIRIRA asylum statute precludes a grant of asylum to aliens who have been convicted of a "particularly serious crime."[127] Aggravated felonies, regardless of any time served, are deemed particularly serious crimes for asylum purposes,[128] thereby precluding any relief for permanent residents who are designated as such.[129] In any case, because IIRIRA mandates that applications for asylum must be filed within one year of the alien's arrival in the United States, asylum is unlikely to be relevant to many lawful permanent residents.[130]

Because judicial and administrative interpretations of these changes in asylum law have been strict,[131] far more important to permanent residents facing deportation to countries in which their lives may be endangered are the IIRIRA amended provisions for "withholding of deportation," now known as "restriction on removal."[132] "Withholding of deportation or return," a doctrine that mandated that the Attorney General "shall" not deport any alien to a country where the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion,[133] is analogous to the United Nations doctrine of "nonrefoulment," to which the United States is bound.[134] Withholding was disallowed to an alien who, "having been

125. Although a full discussion of asylum law is beyond the scope of this paper, a grant of asylum requires that an alien have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1101(a)(42) (West 1970 & Supp. 1997).

126. "An alien who has been convicted of an aggravated felony . . . may not apply for or be granted asylum." 8 U.S.C. § 1158(d) (1994). Judicial interpretation of the post-IIRIRA asylum statute has been strict. *See, e.g.*, Sebastian v. INS, No. 96-9538 (10th Cir. July 30, 1997); Garcia v. INS, No. 96-9523 (10th Cir. June 5, 1997).

127. IIRIRA § 604 (codified at 8 U.S.C.A. § 1158(b)(2)(a)(2) (West 1970 & Supp. 1997)).

128. 8 U.S.C.A. § 1158(b)(2)(B)(i) (West 1970 & Supp. 1997). *But cf. id.* § 1231(b)(3) to (b)(3)(ii) (defining, for purposes of restricting removal to a country where an alien's life or freedom would be threatened, a particularly serious crime, *inter alia*, as an "aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years").

129. *See In re* L-S-J, Interim Decision 3322, 1997 WL 423130 (B.I.A. Jul. 29, 1997) (finding that a crime of violence for which the sentence is at least one year is an aggravated felony that precludes eligibility for asylum).

130. 8 U.S.C.A. § 1158(a)(2)(B) (West 1970 & Supp. 1997).

131. *See In re* S-S-, Interim Decision 3317, 1997 WL 258946 (B.I.A. May 6, 1997) (denying asylum to a refugee convicted of an aggravated felony).

132. 8 U.S.C.A. § 1231(b)(3)(A) (West 1970 & Supp. 1997).

133. *See id.* § 1253(h)(1).

134. For recent commentary regarding possible violations of international law by the United States in the context of the withholding of deportation, see Bobbie Marie

convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."[135] Aliens who had been convicted of an aggravated felony were considered to have committed a "particularly serious crime."[136] The test, however, has two parts; aliens who committed aggravated felonies, which are deemed particularly serious crimes, still had to constitute a danger to the United States community in order to be ineligible for withholding of deportation. Unfortunately, administrative and judicial decisions sealed this potential escape route by determining that persons who commit aggravated felonies (particularly serious crimes) are necessarily a danger to the community.[137]

The effects of an IIRIRA-promulgated aggravated felony conviction permeate into "restriction on removal," the renamed, amended, and renumbered INA section that replaces statutory withholding of deportation.[138] The restriction on removal section is similar to its predecessor,[139] and it contains a similar exception for aliens who, having being convicted of committing a "particularly serious crime" constitute, in the Attorney General's determination, "a danger to the community of the United States."[140]

Here too, Congress has made it easier to the "new felons" to be deported, under the general, undebatable premise that citizens of other countries who commit particularly serious crimes and are a danger to U.S. society should not be allowed to remain in the United States. For instance, the pre-AEDPA and IIRIRA withholding of deportation statute specifically included aggravated felonies—using, without explicitly stating so, the then-current five year term of imprisonment standard required to make most offenses into aggravated felonies—as particularly

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Guerra, Comment, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L.J. 941 (1996).

135. 8 U.S.C. § 1253(h)(2)(B) (1994).

136. *Id.* § 1253(h).

137. *See* Donald Ungar, *Aggravated Felonies*, *in* KEY ISSUES IN IMMIGRATION LAW 136 (1992).

138. 8 U.S.C.A. § 1231(b)(3) (West 1970 & Supp. 1997). *See also* Adalsinda "Alsy" Lomangino, *Representing the Criminal Alien: Forms of Relief Available*, *in* 2 - 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK, *supra* note 95, at 330-31.

139. 8 U.S.C.A. § 1231(b)(3)(A) (West 1970 & Supp. 1997) reads "the Attorney General may" rather than "shall," withhold deportation, in an apparent grant of greater discretion to the Attorney General.

140. IIRIRA § 305 (codified at 8 U.S.C.A. § 1231(b)(3)(B)(ii) (West 1970 & Supp. 1997)).

serious crimes.[141] IIRIRA made specific the five year "aggregate term of imprisonment" requirement which serves to make an aggravated felony into a particularly serious crime for restriction on removal purposes,[142] but added a new sentence allowing the Attorney General to deem an aggravated felony a particularly serious crime regardless of the length of the sentence imposed.[143]

The additional restrictions IIRIRA places on asylum may create an argument against deportation for immigrants who are deemed aggravated felons even though their offenses do not in any way make them a danger to the community. Historically, because the standard for withholding of deportation was more stringent than that for asylum, aliens who could not establish eligibility for asylum could not establish eligibility for withholding of deportation.[144] However, because an alien must now apply for asylum within one year of his arrival to the United States,[145] a restriction that does not encumber restriction on removal, presumably in 1996, then, ineligibility for asylum is not a fortiori ineligibility for "restriction on removal." Because denying an aggravated felon eligibility from restriction on removal is arguably a two part test, requiring both a finding of a "particularly serious crime" and that the alien "is a danger to the community of the United States,"[146] and since the 1996 definition of aggravated felony incorporates many offenders who are in no way a danger to the United States community, an aggravated felon, even one sentenced to more than five years of imprisonment, could perhaps make a claim of the inapplicability of the statute to him.[147]

If, however, a conviction for an aggravated felony means that the offender is inherently a danger to the community, grave inequities will result. In 1992, the Second Circuit Court of Appeals, in *Saleh v. INS,*[148]

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141. "[A]n alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime." 8 U.S.C. § 1253(h) (1994).

142. "[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." IIRIRA § 305, (codified as 8 U.S.C.A. § 1231(b)(3)(B) (West 1970 & Supp. 1997)).

143. The Attorney General has the discretion to determine that, "notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime." *Id.* This subsection is somewhat poorly drafted, as it is unclear if the sentence refers to all crimes, which would be unlikely, or only to the aggravated felonies referred to in the preceding sentence.

144. *See* Saleh v. INS, 962 F.2d 234, 240 (2d Cir. 1992) (stating that ineligibility "for asylum establishes a fortiori that . . . deportation may not be withheld").

145. *See* 8 U.S.C.A. § 1158(a)(2)(B) (West 1970 & Supp. 1997).

146. *Id.* § 1231(b)(3)(B)(ii).

147. *See* Barbara Hines, *Asylum and Withholding of Removal, in* 2 - 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK, *supra* note 95, at 441.

148. 962 F.2d 234 (2d Cir. 1992).

denied a request to review a denial of asylum and withholding of deportation to Saleh, a lawful permanent resident. Convicted of manslaughter, sentenced, and ordered deported from the United States, Saleh had also been tried *in absentia* in Yemen for his U.S. offense. An Islamic court exercised jurisdiction over him based on his religion, and he was sentenced to death, with the slight possibility of a reprieve if the victim's family were to choose to waive the death sentence and instead elect to receive between $180,000 and $360,000 in "blood money" from Saleh. After the U.S. State Department's Bureau of Human Rights and Humanitarian Affairs ascertained the facts of the Yemeni conviction, the court nonetheless found Saleh ineligible for asylum, and, as an aggravated felon, ineligible for withholding of deportation.[149]

As stated before, immigrants who commit serious crimes should be deported, regardless of the consequences. Perhaps an immigrant convicted of manslaughter who has served his prison sentence should be deported to an almost-sure death. IIRIRA, however, assures that immigrants convicted of far lesser offenses committed decades ago will be deported to the same fate as faced Saleh. Legislation that treats petty offenders who are long-term residents of the United States in essentially the same manner as it treats illegal aliens who commit serious crimes is inherently unfair and inequitable.

4. Voluntary Departure

Voluntary departure is a discretionary procedure by which deportable aliens who agree to leave the United States within a preset time frame are allowed to leave of their own means and at their own expense.[150] Thus, in exchange for paying for their own expulsion, immigrants are granted a limited amount of time to tend to family and personal business before leaving the United States. Aliens convicted of aggravated felonies, however, were prohibited a grant of voluntary departure.[151]

IIRIRA section 304(a) created INA section 240B, which details the new guidelines for voluntary departure from the United States.[152] The

149. *See id.* at 240-41.
150. *See* 8 U.S.C. § 1254(e)(1) (1994).
151. "The authority contained in paragraph (1) [relating to voluntary departure] shall not apply to any alien who is deportable because of a conviction for an aggravated felony." *Id.* § 1254 (e)(2).
152. INA section 240B divides voluntary departure into two distinct categories, a less restrictive grant of voluntary departure allowed in lieu of or before the completion of

new INA section 240B continues to preclude aggravated felons from being granted voluntary departure, both before and after removal proceedings.[153] The public safety is therefore served by not allowing criminal aliens who have completed their sentences any freedom once they are ordered deported. (Criminal citizens who have completed their sentences, and presumably pose as great a recidivist risk, have no similar restrictions on their freedom.) In a seemingly arbitrary restriction, only aggravated felons and alien terrorists are denied the privilege of voluntary departure before the conclusion of deportation proceedings,[154] thus allowing criminal aliens who do not fit within the aggravated felon classification, but who may be far more dangerous, to remain free until they voluntarily depart the United States.

IIRIRA further creates a presumption against the pre-deportation release of any aggravated felon.[155] A long-term permanent resident therefore faces the possibility of detention until he is removed from the United States, compounding the difficulties for himself and his family. The case of *United States v. Zadvydas*[156] presents an example of the possible consequences of IIRIRA-enforced detention until deportation. Zadvydas was born in 1948 in a displaced person's camp governed by the United States in Germany. He was admitted to the United States in

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removal proceedings, and a more restrictive grant of voluntary departure permitted after removal proceedings were concluded. The period of time before departure had to be effected was restricted to 120 and 60 days respectively. IIRIRA § 304(a) (codified as 8 U.S.C.A. §§ 1229c(a) to (b) (West 1970 & Supp. 1997)).

153. 8 U.S.C.A. §§ 1229c(a)(1), 1229c(b)(1).

154. Aliens seeking pre-deportation proceeding voluntary departure are eligible "if the alien is not deportable under section 237(a)(2)(A)(iii) [relating to aggravated felons] or section 237(a)(4)(B) [relating to terrorist acts]" 8 U.S.C.A. § 1229c(a)(1) (West 1970 & Supp. 1997). Post-deportation-proceeding voluntary departure imposes additional restrictions on aliens, such as a showing of good moral character, which would make ineligible additional classes of criminal aliens. *Id.* § 1229c(b)(1).

155. 8 U.S.C.A. § 1252, subparagraph (A) first establishes that:

> The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

8 U.S.C.A. § 1252(a)(2)(A) (West 1970 & Supp. 1997).

Subparagraph (B) then allows the following exceptions:

> The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Id. § 1252(a)(2)(B).

156. 986 F. Supp. 1011 (E.D. La. 1997).

1956, when he was eight years old, as part of a post-World War II program for the relocation of displaced persons. Between his first offense in 1966 and his last in 1987, "he married, parented a child, was gainfully employed, filed income tax returns, and obtained an extension or reissuance of his immigration card (green card)."[157] After his 1987 offense, he was ordered deported. Because Zadvydas, who had then lived in the United States for 41 years, was not a citizen of any country, the INS could not deport him anywhere. Therefore they simply kept him incarcerated for almost four years. The court found that although "there is statutory authority allowing indefinite detention of an alien who is classified as an aggravated felon under immigration law . . . it is unclear how long this detention can continue without becoming violative of an alien's constitutional rights."[158] The court also found that "the petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement" was excessive and "'shock[ed] the conscience' of the Court," and he ordered Zadvydas released within thirty-five days.[159] Zadvydas had, of course, already served his punishment. He was only incarcerated pending deportation for his past aggravated felony conviction.

Current immigration law does not empower any judicial or administrative figure the authority to grant voluntary departure to lawful permanent residents who have been convicted of aggravated felonies, even if the immigrant poses no public safety or flight risk. Lawful permanent residents who have lived in the United States for several decades are likely to have medical, economic, and familial interests that require attention before deportation. IIRIRA's retroactively-applied definition of aggravated felony leads to the illogical and inequitable result that persons who, prior to the enactment of IIRIRA, were neither public safety nor flight risks, suddenly become both and must be confined until deported.

The lack of discretion given to immigration authorities is likely to lead to many tragic situations for lawful permanent residents with large financial or personal stakes in the United States. The significance is not simply one of convenience for the permanent resident. Aggravated felons are generally barred from seeking re-entry for twenty years.[160]

157. *Id.* at 1014.
158. *Id.* at 1026.
159. *See id.* at 1027.
160. 8 U.S.C.A. § 1182(a)(9)(A)(ii) (West 1970 & Supp. 1997).

Because lawful permanent residents must generally be deported rather than excluded,[161] any permanent resident aggravated felon who is subject to deportation proceedings upon re-entry into the United States, and is deported as a consequence "at the end of proceedings," is *forever* inadmissible to the United States.[162] In an exercise of perfectly circular, Hydra-like reasoning, aggravated felons are ineligible for voluntary departure before deportation proceedings[163] and must, therefore, subject themselves to the proceedings, thus potentially becoming permanently ineligible for re-entry.[164] Although neither provision is especially palatable—the Dobson's choice between banishment from family and home for twenty years and permanent exile is, after all, not a choice but a statutory requirement—the difference will be important to many permanent residents whose business and family connections in the United States are significant enough to warrant returning after twenty years.[165]

In a final blow to permanent residents ineligible for voluntary departure who may seek a judicial remedy, IIRIRA expressly removes the right to seek judicial review for most denials of voluntary departure.[166] In 1996, then, a lawful permanent resident convicted of an aggravated felony will not have the privilege of voluntary departure.

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161. *See* discussion *supra* Part III.A.

162. "Any alien who has been ordered removed . . . at the end of proceedings under section 240 ["Removal proceedings"] initiated upon the alien's arrival in the United States and who again seeks admission . . . (at any time in the case of an alien convicted of an aggravated felony) is inadmissible." 8 U.S.C.A. § 1182(a)(9)(A)(i) (West 1970 & Supp. 1997). This section applies only to those aliens who have been previously removed (or found inadmissible) in the course of a previous admission, who are now seeking entry. Whereas an alien already present in the United States who deported for an aggravated felony conviction would face only the less stringent 20 year ban detailed in 8 U.S.C.A. § 1182(a)(9)(A)(ii), a lawful permanent resident aggravated felon who was deported pursuant to proceedings initiated during an "arrival," would face a lifetime ban on re-entry.

163. *See* 8 U.S.C.A. § 1229c(a)(1) (West 1970 & Supp. 1997).

164. If, for instance, a permanent resident aggravated felon who was found deportable due to (but not at the end of) proceedings initiated upon his arrival in the United States, and if he were eligible for voluntary departure before removal proceedings were completed, he would not have been "ordered removed . . . at the end of proceedings," 8 U.S.C.A. § 1182(a)(9)(A)(i) (West 1970 & Supp. 1997), and would be banned from admission for only 20 years. *See id.* § 1182(a)(9)(A)(ii).

165. This assumes, of course, an amelioration of current immigration law, for, in another exercise of circular reasoning, though an aggravated felon is not necessarily inadmissible, he is always deportable, perhaps even if readmitted twenty years after removal.

166. "No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) [pertaining to voluntary departure at the conclusion of deportation proceedings], nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." IIRIRA § 304(a) (codified as 8 U.S.C.A. § 1229c(f) (West 1970 & Supp. 1997)).

Partly due to this provision, he, though a long-term resident of the United States and free from any restrictions at all on his freedom on September 29, 1996, may, on any day after September 30, 1996—the day of IIRIRA's enactment—find himself detained and, without being afforded the privilege to tend to any critical medical, financial, or familial concerns, deported and possibly never allowed to enter the United States again.

C. *Collateral Consequences of an Aggravated Felony Conviction*

1. *Naturalization*

The goal, indeed the dream, for most lawful permanent residents is United States citizenship. Here too, an aggravated felony conviction acts as a bar, specifically precluding a finding of "good moral character,"[167] a necessary prerequisite for naturalization.[168] Because aggravated felony convictions have no chronological limits, long-term permanent residents who were convicted of the offense "at any time" are presumed ineligible for citizenship.[169]

2. *Re-entry Repercussions*

Once deported, an aggravated felon is barred from returning to the United States for at least twenty years.[170] The penalty for an aggravated felons who attempts to rejoin his family in the United States after he has been deported is imprisonment for up to twenty years.[171] A recent judicial decision, however, weighed the equities in the case of an alien,

167. "No person shall be regarded as, or found to be, a person of good moral character, who . . . . at any time has been convicted of an aggravated felony." 8 U.S.C.A. § 1101(f)(8) (West 1970 & Supp. 1997).

168. "No person . . . shall be naturalized unless such applicant . . . during all the period referred to in this subsection has been and still is a person of good moral character. . . ." *Id.* § 1427(a).

169. *But see* Mark T. Kenmore, *Relief for Crimes, In Transition, in* 2 - 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK, *supra* note 95, at 308 (arguing that even though dates are presumably irrelevant in defining an aggravated felony, the date of conviction may nonetheless still affect whether a disability, such as ineligibility for naturalization, flows from an aggravated felony conviction).

170. 8 U.S.C.A. § 1182(a)(9)(A) (West 1970 & Supp. 1997).

171. In the case of any alien "whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title [Title 18], imprisoned not more than 20 years, or both." *Id.* § 1326(b)(2).

Ortega-Mendoza, who re-entered the United States after an aggravated felony conviction, and allowed a significant downward departure from the prescribed sentencing guidelines.[172] The court noted that the alien's "entire family lives in the United States . . . . [T]hey are leading lawful and useful lives and would offer defendant a strong support network were he to be released into the community."[173] The court also noted the scars on Ortega-Mendoza's chest and back where he had been shot in El Salvador due, in part, to his political affiliations. Most importantly, the court noted the "significant overstatement" of the prior aggravated felony, which was for the attempted distribution of two-tenths of a gram of a controlled substance.[174]

Despite the *Ortega-Mendoza* decision, almost no other cases evaluating the punishment for the re-entry of an aggravated felon balance the equities of the case in favor of the immigrant. Thus, a permanent resident with broad ties to the United States and absolutely no connection to any other country essentially has two choices: remain separated from his home and family for a minimum of twenty years, or attempt to resume his life in the U.S. and face up to twenty years of imprisonment.

IV. RETROACTIVE APPLICATION OF THE 1996 LEGISLATION

The comprehensive reach of the IIRIRA and AEDPA is of particular concern to legal permanent residents, the immigrant community with the deepest and most long-lasting ties to the United States. The broad range of conduct deemed worthy of the redefined "aggravated felony" label will ensure the removal of large numbers of permanent residents in the future. The "truly evil nature" of the new laws,[175] however, is in their lack of temporal limitations. As did the recharacterization of "conviction" and "imprisonment" exponentially increase the reach of an aggravated felony designation upon which immigration consequences attach,[176] so too does the infinite chronological reach of relevant parts of the IIRIRA act again to multiply the number of lawful permanent residents who are labeled "aggravated felons." The results of these combined effects can border on bizarre. For example, an offense that, when committed in 1958 was only a minor infraction is transformed by 1996 into a heinous act, an aggravated felony; a deferred adjudication for the 1958 offense that emphatically was not a conviction

172. United States v. Ortega-Mendoza, 981 F. Supp. 694 (D.D.C. 1997).
173. *Id.* at 696.
174. *Id.*
175. *See* McCormick & Murphy, *supra* note 15, at i.
176. *See* discussion *infra* Part II.B.1.

metamorphosizes into a "conviction" in 1996; a suspended sentence not worthy of a single day in jail for a 1958 transgression transmogrifies itself into "imprisonment" worthy of deportation in 1996.

Aliens who commit serious crimes today should undoubtedly be deported. Aliens previously ordered deported for serious crimes should also be deported as expeditiously as possible. But thousands of lawful permanent residents who were neither convicted nor imprisoned, whose past offenses have been recharacterized as deportable offenses, and who have lived model American lives for the past several decades, have become trapped in a burst of knee-jerk lawmaking that removes the discretion necessary to separate the immigration "wheat"—those permanent residents whose contributions to society far outweigh the societal effect of a minor, past offense—from the "chaff"—illegal alien terrorists and drug dealers.

A. Retroactive Application of Definitions and Consequences

Prior to 1996, each potential aggravated felony offense committed by an alien had to be independently examined to determine whether it was an aggravated felony at the time of the conviction. Legislation amending the definition generally provided for effective dates of the definition.[177] For instance, amendments made to the definition of aggravated felony by the Immigration Act of 1990 regarded some offenses as within the definition only if they were committed after the effective date of the legislation.[178] Aggravated felony consequences, similarly, had varying effective dates. For example, although the Immigration Act of 1990 prohibited aggravated felons from seeking asylum, this provision applied only to applications made after the date of enactment of the Act.[179]

177. ADAA § 7344 provided that the deportation ground applied to noncitizens convicted on or after the date of enactment, November 18, 1988.

178. Money laundering and crimes of violence were considered aggravated felonies only if the offenses were committed after the effective date of the Immigration Act of 1990 legislation, November 29, 1990. Immigration Act of 1990, Pub. L. No. 101-649, § 501(b), 194 Stat. 5048 (1990). Definitions for other enumerated crimes that were aggravated felonies were deemed effective as of the date of the ADAA, November 18, 1988. *Id.*; *see also* Matter of Alcantar, 20 I. & N. Dec. 801 (B.I.A. 1994) (stating that the "inclusion of 'crimes of violence' in the definition of 'aggravated felony' . . . applies to offenses committed on or after November 29, 1990").

179. An aggravated felon who had applied for asylum before the enactment of the 1990 immigration legislation was thus entitled to an asylum using pre-Immigration Act of 1990 law. *See* Saleh v. INS, 962 F.2d 234, 238 (2d Cir. 1992) (evaluating the

IIRIRA eliminated the varying effective dates for various redefinitions of aggravated felonies by making the new, expanded definition retroactive to any conviction entered "before, on, or after the date of enactment" of the redefinition.[180] The new definition applies to "actions taken on or after"[181] the enactment of the IIRIRA, "regardless of when the conviction occurred."[182] In addition, the newly-created and enlarged definitions of "conviction" and "term of imprisonment" for which immigration consequences attach were also made to apply to all "convictions and sentences entered before, on, or after" the enactment of the IIRIRA.[183] In just three sentences, thus, practically every offense, major or minor, ever committed by any immigrant, regardless of how many years had passed since he had been convicted and served his sentence—perhaps regardless of whether he had ever been convicted or served a day—comes back to haunt him again in 1996.

A recent post-IIRIRA case, *Bazuaye v. INS*[184] illustrates the retroactive application of the amended definition of aggravated felonies to immigrants. In 1992, Bazuaye was convicted and sentenced for a counterfeiting offense involving approximately $15,000, an act that was

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applicability of asylum provisions to immigrants and denying asylum on other grounds).

180. IIRIRA § 321(b) reads in full:

> EFFECTIVE DATE OF DEFINITION. —Section 101(a)(43) (8 U.S.C. 1101(a)(43)) [definition of aggravated felony] is amended by adding at the end the following new sentence: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment [September 30, 1996] of this paragraph.

8 U.S.C.A § 1101(a)(43) (West 1970 & Supp. 1997).

181. The Ninth Circuit has, in some instances, temporarily stalled the characterization of past offenses as aggravated felonies. *See* Valderrama-Fonseca v. INS, 116 F.3d 853 (9th Cir. 1997) (reasoning that before IIRIRA's retroactive aggravated felony characterization can attach to past conduct, an "action"—defined as "orders and decisions issued against an alien by the Attorney General acting through the B.I.A. or Immigration Judge"—must be taken after IIRIRA's date of enactment). Under this reasoning, any "action" taken by the Attorney General against an alien after September 30, 1996 is apparently enough for the aggravated felony designation to attach to past conduct.

182. IIRIRA § 321(c). *But cf.* Brady & Kesselbrenner, *supra* note 55, at 295 (arguing that an aggravated felon should not be deportable under INA § 241 for a crime committed before the ADAA introduced the definition of aggravated felony).

183. IIRIRA § 322(c) reads:

> EFFECTIVE DATE.—The amendments made by subsection (a) [definitions of conviction and term of imprisonment] shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act. Subparagraphs (B) and (C) of section 240(c)(3) of the Immigration and Nationality Act, as inserted by section 304(a)(3) of this division [referring to newly created "proof provisions], shall apply to proving such convictions.

IIRIRA, *supra* note 11, § 322(c).

184. 97 Civ. 1280 (HB), 1997 U.S. Dist. LEXIS 2996 (S.D.N.Y. 1997).

not an aggravated felony when it was committed.[185] In 1997, the INS charged Bazuaye as deportable because the IIRIRA retroactively designated "fraud or deceit" offenses as aggravated felonies if the amount of the loss was $10,000 rather than 1992 threshold amount of $200,000.[186] The court found that although the retroactive application of immigration laws was "troubling," "IIRIRA is explicit in its application of the new definition of aggravated felony to convictions entered prior to the passage of the Act."[187] The court decided that as an aggravated felon, Bazuaye was thus properly detained by the INS.[188]

Statutes such as IIRIRA that retroactively make past conduct a deportable offense are possible because deportation has consistently been viewed as a civil or administrative procedure, and not as a criminal punishment.[189] The stringent prohibition against retroactivity inherent in the ex post facto clause[190] of the Constitution is thus not triggered.[191] As such, Congress enjoys an almost unlimited power[192] to make retroactive any law whose aim it is to control the entry or deportation of immigrants.[193]

The idea that deportation is not punishment is central to immigration statutes, such as those promulgated by AEDPA and IIRIRA. Although

185. *See id* at *2.

186. [U]nder the law as it existed at the time of plaintiff's 1992 conviction, his conviction did not qualify as an 'aggravated felony,' because the estimated loss to his victims was only $15,000. IIRIRA, however, changed the definition of 'aggravated felony' by changing the requisite loss amount from $200,000 to $10,000.

Id. at *4-*5 (citing IIRIRA § 321(a)(7)).

187. *Id.* at *5.

188. *See id.* at *6-7.

189. As early as 1893, the U.S. Supreme Court stated: "The order of deportation is not a punishment for a crime. It is not a banishment . . . . It is but a method of enforcing the return to his own country of an alien . . . ." Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). *See also* Harisiades v. Shaughnessy, 342 U.S. 580, 593-95 (1952).

190. U.S. CONST. art. I, § 9, cl. 3.

191. *See* Chow v. INS, 113 F.3d 659, 667 (7th Cir. 1997); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952) (finding that the ex post facto clause does not apply to deportation proceedings); Galvan v. Press, 347 U.S. 522, 530-32 (1954).

192. The U.S. Supreme Court, in 1977, said: "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977), *quoting* Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

193. *See generally* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Pilcher, *supra* note 41; Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against the Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420 (1997).

is has been variously termed by the U.S. Supreme Court as a deprivation of "all that makes life worth living"[194] and "the equivalent of banishment or exile,"[195] deportation, nonetheless, is considered simply a collateral administrative matter,[196] or, at best, a civil proceeding.[197] Thus, because of the accepted legal fiction that retroactively defining an action, such as an aggravated felony, in a manner so as to make deportation a consequence of the action does not "inflict[s] a greater punishment" or "make[s] it [a crime] greater than it was, when committed," Congressional reclassification of past conduct of an immigrant as an aggravated felony is not violative of the Constitution.[198]

The U.S. Supreme Court recently addressed the constitutionality of arguably retroactive civil, rather than criminal, statutes in *Landgraf v. USI Film Products, Inc.*[199] In sum, the Court concluded that if Congress clearly and unambiguously intended a civil statute to apply retroactively, it would have retroactive effect.[200] If congressional intent as to retroactive effect is ambiguous, then a "presumption against retroactivity" applies. The test to determine whether a new civil statute acted retroactively was whether it attached "new legal consequences to events completed before its enactment."[201] Therefore, in order for immigration statutes to violate the ex post facto clause's "stringent prohibition against retroactivity,"[202] they must first be considered criminal in nature, which they conclusively are not.[203] As civil statutes, then, in order to receive the *Landgraf* "presumption against

194. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
195. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)
196. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 593-95 (1952). Justice Douglas's view of deportation is a sharp contrast to that of the majority:

> Banishment is punishment . . . . It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

Id. at 600 (Douglas, J., dissenting).
197. *See* Innis v. INS, No. 96-1314 (1st Cir. Sept. 27, 1996).
198. An early analysis of the reach of the ex post fact clause made it applicable to: "Every law that aggravates a crime, or makes it greater than it was, when committed. . . . Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). *See generally* Gregory K. Porter, Note, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 545-46 (1997).
199. 511 U.S. 244 (1994).
200. *See id.* at 280.
201. *Id.* at 270.
202. Chow v. INS, 113 F.3d 659, 667 (7th Cir. 1997).
203. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952).

retroactivity," Congress must not have expressed its intent for the statutes to be applied retroactively.[204] In relevant sections of the IIRIRA, however, particularly those concerned with aggravated felonies and their consequences, Congress clearly expressed its intent for the statutes to be applied to conduct "before, on, or after" the date of enactment of the IIRIRA.[205]

Thus, legislation mandating or allowing deportation for a prior act—although deportation was not a consequence of an act at the time the act was committed—is not violative of the ex post facto clause.[206] In a rather tortured semantic construction, deportation, then, is considered neither a "new liability" nor a "consequence" of prior acts.[207] This construction contrasts vividly with prior U.S. Supreme Court statements which found deportation a deprivation of "all that makes life worth living,"[208] a fate seemingly consequential enough to constitute a new liability.

In addition, recent legislation that makes deportation proceedings a part of criminal proceedings raises new questions as to retroactive application of civil statutes.[209] For instance, the judicial removal proceedings outlined in the IIRIRA allow a United States District Court "to enter a judicial order of removal at the time of sentencing against an alien who is deportable."[210] In response, a commentator wrote:

[L]egislation which 'substantially alters the consequences attached to a crime already completed, and therefore changes the 'quantum of punishment'' is prohibited as an ex post facto law.... Where deportation is ordered as part of a criminal sentence, for example as a condition of probation, a very strong argument can be made that

204. *Landgraf*, 511 U.S. at 280.
205. *See* IIRIRA §§ 321(b), 321(c), 322(c).
206. *See* Marcello v. Bonds, 349 U.S. 302, 314, (1954) (allowing deportation based on conviction that was not a deportable offense at the time the alien was convicted); Hamama v. INS, 78 F.3d 233, 235-36 (6th Cir. 1996).
207. *Chow*, 113 F.3d at 667.
208. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
209. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1053 (1984) (White, J., dissenting) (arguing that because "deportation proceedings are to INS agents what criminal trials are to police officers," constitutional protections, specifically the exclusionary rule, should apply to deportation hearings). *See generally* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431 (1997).
210. 8 U.S.C.A. § 1228(c) [sic] (the adjacent section is identically numbered) (West 1970 & Supp. 1997).

amendments to the INA made effective after commission of the defendant's criminal act cannot constitutionally be applied retroactively to the defendant, regardless of legislative direction to the contrary.[211]

The deportation of "criminal" aliens is in many ways intrinsically inseparable from the criminal conduct for which the alien is being deported.[212] A new legal interpretation[213] of what constitutes a criminal proceeding is perhaps a retroactively-designated aggravated felon's best possibility for post-IIRIRA relief from deportation.[214] This issue will undoubtedly be explored further by the judiciary as post-IIRIRA immigration litigation develops.

B. Elimination of Pre-existing Remedies and Relief

Not only can acts that were not grounds for deportation when committed—or perhaps not even criminal when committed—be labeled aggravated felonies and thus become deportable offenses retroactively, but, similarly, remedies and procedural protections available at the time of the conduct, such as section 212(c) and section 212(h) relief,[215] and the availability of judicial review,[216] can be retroactively circumscribed or proscribed entirely.[217]

Courts have deemed judicial review of removal orders a purely procedural matter. For instance, the court in a recent Seventh Circuit case, *Chow v. INS*,[218] reasoned that although judicial review of a deportation order for an alien's conduct was available at the time the

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211. Pilcher, *supra* note 41, at 279 (citing Weaver v. Graham, 450 U.S. 24, 33 (1981)).

212. Some factors favoring the designation of judicial deportation as a criminal proceeding are: 1) the proceedings are closely intertwined; 2) the "court, in a criminal sentencing proceeding, is exercising criminal jurisdiction over the [alien] defendant"; 3) the government is represented by a "criminal prosecutor" and the defendant alien "is represented by criminal defense counsel"; and 4) the "sentencing hearing itself is recognized for Sixth Amendment purposes as a 'critical stage' in a criminal prosecution." *Id.*

213. *See* Schuck, *supra* note 193, at 26 (noting that once deportation was deemed civil, the Supreme Court has never questioned the classification). Schuck also finds that deportation "has little in common with civil sanctions," and instead "serves as an important adjunct and supplement to criminal law enforcement." *Id.*

214. *See* Porter, *supra* note 198, at 580-81 (listing factors used to determine civil versus criminal sanctions, and stating that courts making immigration decisions have ignored these factors and instead relied on the legal precedent that deportation is per se civil).

215. *See* discussion of discretionary relief *supra* Part III.B.

216. *See supra* note 24.

217. *See* Landgraf v. USI Film Products, Inc., 511 U.S. 244, 275 (1994) (stating that procedural and jurisdictional rules generally are not entitled to the presumption against retroactivity); *see generally* Pilcher, *supra* note 41, *passim*.

218. 113 F.3d 659 (7th Cir. 1997).

conduct was effected, future deprivations of judicial review were merely intervening procedural changes, which, though they operate to a criminal defendant's disadvantage, do not violate the ex post facto clause.[219]

The inequities and extreme confusion inherent in a system of immigration law that permits a series of arguably unconstitutional ex post facto laws to be applied to aliens were partly addressed by at least one federal court. In *Yesil v. Reno*,[220] the Board of Immigration Appeals erred in computing the number of years Yesil was a lawful permanent resident and thus declared him ineligible for a waiver of deportation.[221] The federal district court held that Yesil, who was in deportation proceedings two years before AEDPA became law, would have been entitled to apply for pre-AEDPA section 212(c) relief but for the Board of Immigration Appeals' mistake and therefore should be allowed to forward his petition for a writ of habeas corpus relief.[222] The government moved for reconsideration based on the recently-enacted, and retroactively-applied IIRIRA section 306(d), which, in the interim, by retroactively amending AEDPA section 440(d) (which had already retroactively amended the INA), had made Yesil ineligible for INA section 212(c) relief.[223] To further compound and confuse the matter, IIRIRA had then again amended the INA by repealing section 212(c) entirely.[224]

The government's argument that even if its motion for reconsideration were denied, the INS would nonetheless deport Yesil pursuant to the newly-enacted section 309(c)(3) of the IIRIRA,[225] which allows retroactive application of IIRIRA-induced changes onto existing proceedings, was labeled by the court as "a display of sheer arrogance."[226] In this instance, the government was ordered, finally, not to apply the retroactive IIRIRA statutes to Yesil and to grant him a hearing on the merits of his appeal for pre-AEDPA and pre-IIRIRA

219. *Id.* at 667; *see also Landgraf*, 511 U.S. at 244 (1994).
220. 973 F. Supp. 372 (S.D.N.Y. 1997)
221. *See id.* at 375. The section 212 (c) waiver in question was only available to immigrants who had been U.S. residents for seven years. 8 U.S.C. § 1182(c) (1994).
222. *See Yesil*, 973 F. Supp. at 384.
223. IIRIRA § 306, which amends AEDPA § 440.
224. IIRIRA § 304(b). *See* discussion *supra* Part III.B.1.
225. Section 309(c)(3) of the IIRIRA gives the Attorney General the option to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under the post-IIRIRA laws. Further, any determination in the terminated proceeding shall not be binding on the reinstated proceeding. *Id.* § 309(c)(3).
226. *Yesil*, 973 F. Supp. at 374.

relief.[227]

It is unlikely, however, that many other courts will challenge the "clear" intent of Congress in the manner that the holding in *Yesil* court did. Instead, because immigration laws in general, and deportation statutes in particular, are deemed civil, thereby depriving them of much of the protection against ex post facto application, lawful permanent residents who have already paid the price society demanded of them for their past offenses can and will be retroactively designated as convicted aggravated felons and will be removed from the United States.

V. CONCLUSION

In 1996, to sate the legitimate national concerns with the harm wrought by illegal and criminal aliens, Congress exercised its almost-unlimited constitutional power to decide which immigrants may remain in the United States. In several broad legislative sweeps, Congress expanded, semantically and temporally, the scope of conduct deemed sufficiently egregious to warrant expulsion from the United States. To seal any possible loopholes, Congress coupled the redefinitions of "aggravated felony," "conviction," and "term of imprisonment" with the elimination of almost any avenue of discretionary relief available to criminal aliens, and further reduced the possibility of a judicial remedy to aliens ordered excluded, thus creating some horrific injustices and inequities for the lawful permanent resident community.

The deportation of criminal aliens has been, and should remain, a priority of immigration law. Not every alien is a criminal, however, and not every immigrant who commits an infraction or minor offense deserves to be deported. In particular, those long-term lawful permanent residents who have already repaid their debt to society and have since become valuable, contributing members of society should not be forced to abandon everything they have worked for for decades because of a meaningless offense committed many years before. Perhaps a more sensible exercise of the unbridled power Congress holds over the lives of thousands of these residents would allow for more discretion in the expulsion of those long-term lawful permanent residents who are far more American than foreign in every facet of their lives.

The 1996 legislation was necessary to strengthen the immigration laws and to rid the United States of criminal and terrorist aliens. The legislation, however, could be equally effective and much more equitable if it had allowed the administrative agencies and courts to retain some discretion while making their immigration decisions. The

227. *Id.* at 384. For further comments by the court in this case, see *infra* Part V.

simple truth is criminal and terrorist aliens who deserve to be deported would likely not have received favorable discretionary treatment under pre-1996 immigration law. The new legislation, however, guarantees the expulsion of many lawful permanent residents who have made significant contributions to the U.S. and do not deserve to be deported. The federal judiciary, though relatively powerless to challenge Congress' plenary power to legislate immigration, recognizes and at times condemns the inequity inherent in the 1996 legislation. Judge Chin's commentary in *Yesil v. Reno*[228] provides a final illustration of one example of the consequences of the 1996 legislation on lawful permanent residents, the most American of the "new felons":

> The Government's mean-spirited relentlessness is difficult to comprehend, in view of the equities of the case.
>
> From the Government's point of view, what is at stake is nothing more than giving Yesil a hearing, an opportunity to say "I deserve another chance," an opportunity to present evidence to an Immigration Judge who will fairly examine the circumstances and decide whether Yesil is in fact deserving of a second chance. . . .
>
> On the other hand, from Yesil's point of view, much more is at stake. If he is not given an opportunity to be heard on his section 212(c) application, he will be exiled. He will be banished from what has become his country and home and he will be separated from his family and friends. He will be deported back to a country that he left some 18 years ago, when he was only 16 years old. And the efforts that he has made since he committed his crime in 1987—acknowledging his mistake, pleading guilty, cooperating with law enforcement authorities, risking his life to infiltrate a drug ring, providing leads to a number of arrests and the confiscation of drugs, establishing two legitimate businesses employing hundreds of people, and otherwise becoming a productive and positive member of society—will be swept aside, for no rational purpose and to no apparent end.[229]

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228. 973 F. Supp. 372, 384 (S.D.N.Y. 1997).
229. *Id.*


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