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RETHINKING THE INCREASED FOCUS ON PENAL MEASURES IN IMMIGRATION LAW AS REFLECTED IN THE EXPANSION OF THE "AGGRAVATED FELONY" CONCEPT

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This Comment discusses how the Immigration Acts of 1996 have focused on poor predictors of character and how they have created inconsistency in immigration law, increased litigation, and heightened incentives for illegality and dishonesty. First, the Comment discusses the current state of the criminal provisions present in immigration law. Then, it analyzes the primary anti-immigration arguments that motivated these laws. The Comment goes on to argue that the mainstream perception that there is a link between increased immigration and increased crime is unsupported by statistical data, and that in fact, the Immigration Acts of 1996 have resulted in increased illegality and criminality in the immigration context. Finally, it will advocate that refocusing on rehabilitation in immigration law will better achieve the goals of preventing illegality and criminal behavior in immigration, and that rehabilitation is a better predictor of character. The goal of this Comment is to identify methods for reforming immigration law by first recognizing the inequity and inefficiencies of the current system.

I. INTRODUCTION

Imagine the following scenario, based on an actual case.[1] Mary is a legal permanent resident who has lived in the United States since she was one year old.[2] When she was in her mid-twenties, Mary pulled a woman's hair in a quarrel over a man.[3] Upon the advice of her public defender, Mary pleaded guilty to a misdemeanor and was given a one-year sentence,

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[1] Anthony Lewis, *This Has Got Me in Some Kind of Whirlwind*, N.Y. TIMES, Jan. 8, 2000, at A13.

[2] *Id.*

[3] *Id.*

suspended for a year's probation.[4] More than ten years later, Mary applied to be naturalized as a U.S. citizen, and she revealed her misdemeanor conviction in her application for naturalization.[5] Instead of being sworn in as a U.S. citizen, Mary was presented with a deportation hearing notice, based on her conviction more than ten years earlier.[6] What Mary did not know was that the Immigration Acts of 1996 (the 1996 Acts) defined her trivial misdemeanor, with its one-year suspended sentence, as an "aggravated felony" requiring deportation, and the law applied retroactively to her conviction.[7] The public defender who advised Mary to plead guilty, and the judge who gave her a one-year suspended sentence, could not have foreseen the drastic repercussions this conviction would have on Mary's life ten years later.[8] Mary's case seems like an unbelievable aberration from Congress's intent to remove criminal immigrants from the United States, but unfortunately Mary's case is a common application of the 1996 Acts and their overly expansive "aggravated felony" definition.[9]

The 1996 Acts were Congress's response to a growing anti-immigration political movement.[10] Comprised of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[11] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[12] the 1996 Acts were aimed at precluding criminal immigrants from seeking legal permanent residence and U.S. citizenship.[13] The passage of these laws blurred the line between penal reform and immigration law.[14]

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Since 1997, the more than 156,000 "aggravated felons" who have been removed from the United States had been in the country an average of fifteen years prior to being placed in removal proceedings, and 25% had been in the United States for over twenty years. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC IMMIGRATION REPORT: HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED (2006), http://trac.syr.edu/immigration/reports/158/. Many of these individually were lawfully residing in the United States. *Id.*

[10] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (discussing the trend towards criminalization of immigration law).

[11] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 21, 28, 42 U.S.C. (2006)).

[12] Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, U.S.C. (2006)).

[13] AEDPA of 1996 §§ 435, 438, 440-42, 110 Stat. at 1273-81 (codified as amended at 8 U.S.C. §§ 1101, 1105a, 1182, 1326, 1251-52); IIRIRA of 1996 § 321, 110 Stat. at 3009-627 to -628 (codified as amended at 8 U.S.C. § 1101(a)(43)).

[14] Legomsky, *supra* note 10, at 500.

The definition of aggravated felony for the purpose of removing individuals from the United States has been expanded so that now an aggravated felony need no longer be either aggravated or a felony.[15] Today, many individuals facing deportation are legal permanent residents whose deportations involve conduct that took place before the 1996 Acts, when the person did not have notice that his or her conduct would at some point in the future result in removal from his or her home, job, and family to a country to which he or she may no longer have any ties.

This Comment explains how these developments have placed a focus on poor predictors of the character of potential U.S. citizens, and how they have resulted in inconsistency, increased litigation, and heightened incentives for illegality and dishonesty. Part II discusses the current state of the criminal provisions present in immigration law as a result of the 1996 Acts. Part III discusses the primary anti-immigration arguments that these laws were trying to address. Part IV argues that the mainstream perception that immigrants are responsible for many of the crimes committed in the United States is unsupported by statistical data, and that in fact, the inconsistent application of the 1996 Acts has resulted in the escalation of the illegality and criminality that these laws were designed to ameliorate. Part V will advocate that reestablishing a rehabilitation focus in immigration law will better address the goals of preventing illegality and criminal behavior in immigration, and that rehabilitation is a better predictor of future productive U.S. citizenship than today's focus on criminality.

II. THE CURRENT STATE OF CRIMINAL PROVISIONS IN IMMIGRATION LAW

Immigration law has always contained some elements of penal law in its attempt to preempt criminal aliens from seeking naturalization in the United States,[16] but the lines between immigration and penal law have recently become increasingly blurred. Over the past twenty years, there has been a trend toward criminalizing immigration law, as the United States has imported criminal justice norms into a domain that is subject to civil regulation.[17] The Anti-Drug Abuse Act of 1988 (1988 Act)[18] introduced the concept of aggravated felony into immigration law, with a very narrow

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[15] Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 257 (2004) (discussing potential constitutional questions raised by the expanded definition of "aggravated felony").

[16] *See* Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: The Mixed Messages of Federal Policies*, 16 TEMP. POL. & CIV. RTS. L. REV. 367 (2007).

[17] *See, e.g.*, Legomsky, *supra* note 10, at 469.

[18] Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8, 15, 16, 18, 21-23, 26-29, 31, 41-42, 48 U.S.C. 2006)).

application consistent with its harsh penalties.[19] Since then, however, subsequent immigration acts have progressively expanded the application of aggravated felony in the immigration context and also increased the harshness of the penalties for being categorized under this expanded definition.[20] In particular, AEDPA and IIRIRA significantly altered both the Immigration and Nationality Act (INA) of 1990[21] and the 1988 Act.

A. THE HISTORICAL INTERSECTION OF PENAL LAW AND IMMIGRATION LAW

Criminal law and immigration law have been intertwined to some extent for the past two decades.[22] The requirement of "good moral character" for naturalization was already in place before the 1996 Acts to screen out potentially undesirable citizens. However, this screening process has become more drastic over the past twenty years and has increasingly become a tool for discrimination.

Section 101(f) of the INA describes the "good moral character" requirement by contrasting it to conduct that demonstrates a lack of good moral character and bars naturalization.[23] The following are barred: habitual drunkards, criminals, smugglers, aliens who were previously removed, people dependent on illegal gambling or who have a conviction of two or more gambling offenses, people who have given false testimony to obtain a benefit under the INA, people with a previous confinement for 180 days or more as a result of a conviction, and people convicted of an aggravated felony.[24]

Other aliens who are barred from naturalization under § 101(f) are those who have been convicted of a crime involving "moral turpitude," or those who admit to having committed a crime involving "moral turpitude"

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[19] *Id.* §§ 7343(a)(2), 7347, 7349, 102 Stat. at 4181, 4470-73 (codified as amended at 8 U.S.C. §§ 1182(a)(17), 1252(a)) (including in the definition of aggravated felony under this Act murder, drug trafficking, and illegal firearms trafficking).

[20] Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, §§ 433, 435, 438-43, 110 Stat. 1214, 1273-81 (codified as amended in scattered sections of 8, 18 U.S.C. (2006)); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. 3009-546, 3009-627 to -628 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)).

[21] Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8, 29 U.S.C. 2006)).

[22] *See generally* Legomsky, *supra* note 10, at 469 (discussing the asymmetric incorporation of criminal justice norms into immigration law, which is a system of civil regulation).

[23] 8 U.S.C. § 1101(f) (2006), as amended by INA of 1990 § 509(a), 101 Stat. at 5051.

[24] *Id.* § 101(f)(3)–(f)(8).

or acts that constitute the essential elements of such a crime.[25] However, deportation can only be ordered for a single crime involving moral turpitude if it was committed within five years after entry and resulted in the imposition of a sentence of one year or more.[26] Two or more convictions of crimes involving moral turpitude subject an alien to deportation without time limit, if they did not arise out of a "single scheme of criminal misconduct."[27]

Courts have never clearly defined the term "moral turpitude." However, the term is generally understood to connote something more than mere illegality or criminality, and consequently, it is evaluated based on moral, rather than legal, standards.[28] Courts have described moral turpitude as "an act of baseness, vileness[,] or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."[29] Specific crimes that have been held to involve moral turpitude include the following: deceptive practices designed to affect the public market price of stocks or shares at the expense of the investing public,[30] obtaining student loans by fraud or false statements,[31] tax evasion,[32] receiving stolen property,[33] conspiracy to launder the proceeds of illegal drug trafficking,[34] knowingly providing false information to a police officer to prevent apprehension or obstruct the prosecution of a person,[35] and aggravated assault against a peace officer.[36] Although morality has always been a requirement for naturalization—with *morality* defined to include undesirable moral traits as well as some crimes—deportation was generally reserved for repeat offenders. The 1988 Act was the first in a series of acts that expanded the nature of the offenses mandating deportation.

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[25] 8 U.S.C. § 1227(a)(2)(A) (2006).

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, Guarneri v. Kessler, 98 F.2d 580 (5th Cir. 1938); Wing v. United States, 46 F.2d 755 (7th Cir. 1931).

[29] BOUVIER'S LAW DICTIONARY: A CONCISE ENCYCLOPEDIA OF THE LAW 2246 (Francis Rawle ed., 3d rev., 8th ed., West Pub. 1914); *see, e.g.*, Matter of Mueller, 11 I. & N. Dec. 268 (B.I.A. 1965).

[30] Matter of McNaughton, 16 I. & N. Dec. 569, 569 (B.I.A. 1978).

[31] Kabongo v. I.N.S., 837 F.2d 753, 758 (6th Cir. 1988).

[32] Chu v. Cornell, 247 F.2d 929, 933 (9th Cir. 1957) (noting that the intent to defraud the government is a prerequisite to conviction).

[33] De Leon-Reynoso v. Ashcroft, 293 F.3d 633, 635 (3d Cir. 2002).

[34] Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003).

[35] Padilla v. Gonzales, 397 F.3d 1016, 1020 (7th Cir. 2005).

[36] Matter of Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988).

B. THE 1988 ACT INTRODUCED THE NOTION OF AGGRAVATED FELONY AS A BASIS FOR REMOVAL

The policy goal of the 1988 Act was a "drug free America."[37] The Act sought to curb drug abuse by reducing the number of drug users and decreasing the availability of illegal drugs.[38] The 1988 Act introduced the definition of aggravated felony to immigration law, to which it attached harsh penalties for immigrants.[39] The penalties for an aggravated felony conviction included detention, expedited deportation proceedings, and an expanded bar on reentry into the United States.[40] An aggravated felony conviction mandated removal if the defendant received a sentence of at least five years imprisonment.[41] Because of the severity of these penalties for immigrants, the 1988 Act advanced a very narrow definition of aggravated felony, which included only murder, weapons trafficking, and drug trafficking.[42]

C. DISCRETIONARY RELIEF FROM DEPORTATION UNDER THE IMMIGRATION AND NATIONALITY ACT OF 1990

Through the INA, the Attorney General gained broad discretion to deport aliens, and the deportation of certain criminal aliens became compulsory.[43] However, the Attorney General cannot deport an alien when the deportation "would threaten his life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion," except in cases where the alien was convicted of a serious crime that "constitutes a danger to the community."[44] The INA historically contained § 212(c), which provided that the Attorney General could exercise discretion in deciding whether to waive deportation of an alien

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[37] Office of Nat'l Drug Control Policy, Legislation Fact Sheet, http://www.whitehousedrugpolicy.gov/about/legislation.html (last visited Jan. 15, 2009).

[38] *Id.*

[39] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(2), 102 Stat. 4181, 4470 (codified as amended at 8 U.S.C. § 1252(a) (2006)).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* Immigration and Nationality Act (INA) of 1990, 8 U.S.C. §§ 1227, 1451(h) (1994), *amended by* IIRIRA of 1996, Pub. L. No. 104-208, Div. C., § 307(a), 110 Stat. 3009-546, -612.

[44] *Id.* § 1253(h)(1)-(h)(2)(B); Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 705 (1998) (discussing decisions made by each branch of government in the progression of immigration law).

subject to deportation or removal.[45] In order to qualify for § 212(c) suspension of deportation, the alien had to demonstrate that deportation would cause "extreme hardship" to the alien or his or her family, that the alien had accrued at least seven years of continuous presence in the United States, that his or her individual absences from the United States were "brief, casual, and innocent," and that he or she had good moral character.[46] These factors made it easier for aliens with strong family ties to the United States to escape deportation.

The 1996 Acts made the waiver contained in § 212(c) unavailable to legal permanent residents who had committed an aggravated felony and served at least five years for the crime.[47] Making § 212(c) unavailable to legal permanent residents undermined the Attorney General's discretionary power to consider the individual's rehabilitation since the conviction. As a result, a long-time legal permanent resident who has proven to be an upstanding member of the community since a long-ago conviction will be removed from possibly the only country that he or she has ever known.

D. THE PROGRESSION OF THE EXPANSION OF AGGRAVATED FELONY THROUGH THE 1996 ACTS

The congressional legislation passed prior to the 1996 Acts laid the groundwork for the extent to which criminal activity may now affect a non-citizen's deportability.[48] The 1996 Acts expanded the definition of aggravated felony, applied it retroactively to convictions entered prior to these acts, and restricted the circumstances under which aliens could seek relief from the Attorney General or other officials.[49] The result is that some

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[45] INA of 1990, 8 U.S.C. § 1182, *repealed by* IIRIRA of 1996 § 304(b), 110 Stat. at 3009-597.

[46] Mark R. von Sternberg, *Cancellation of Removal Under the Immigration and Nationality Act: Emerging Restrictions on the Availability of "Humanitarian" Remedies*, *in* BASIC IMMIGRATION LAW 305, 307 (Stephen W. Yale-Loehr ed., 2007) (providing a practical guide to removal proceedings).

[47] *Id.* at 320.

[48] The Immigration and Nationality Act of 1990 expanded the list of "aggravated felonies" while at the same time decreasing procedural safeguards. § 501, 104 Stat. at 5048 (codified as amended at 8 U.S.C. § 1101). Four years later, the Immigration and Nationality Technical Corrections Act added white collar crimes to the definition of aggravated felony. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101 (2006)). That same year Congress expedited the procedures for removing alien offenders from the country, thereby limiting the procedural safeguards available to aliens facing deportation. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 130004, -05, -07, 108 Stat. 1796-2156, -2027 to -2029 (codified as amended at 8 U.S.C. §§ 1105, 1158, 1252, 1252a (2006)).

[49] Salinas, *supra* note 15, at 255-56.

crimes that qualify for removal are no longer either aggravated, or felonies.[50] Some scholars argue that under federal criminal law the term *aggravated* simply refers to a criminal activity made worse, or more severe, by violence, but the 1996 Acts categorize many offenses that do not involve violence, or any circumstances making them more severe, as aggravated felonies.[51] *Felony* is described in the Federal Criminal Code as "any offense punishable by death or imprisonment for a term exceeding one year," a definition in direct conflict with the so-called felonies included in the 1996 Acts, many of which are in fact merely misdemeanors under the Federal Criminal Code—for example, theft or burglary offenses.[52] Under the 1996 Acts, "conviction" is defined as:

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication 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 contendere or has admitted sufficient facts to warrant finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[53]

On its face, this definition includes an alien who receives a deferred adjudication—such as probation or community supervision—even if his or her record is cleared by the dismissal of the conviction.[54] Under the 1996 Acts an aggravated felony conviction bars naturalization for five years.[55]

The 1996 Acts further provide that immigration judges may not consider mitigating factors because the determinative factor is conviction of an aggravated felony.[56] Furthermore, the Acts stripped deportation of judicial review until the Supreme Court created a caveat to this policy in 2001, holding that "the provision denying persons with pre-1996 aggravated felony convictions the opportunity to file for a waiver under former § 212(c) of the INA violated the principles of retroactivity."[57] This ruling gave a small break to non-citizens convicted prior to the enactment of AEDPA and IIRIRA, provided that their convictions were the product of

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[50] *Id.* at 257.

[51] *Id.* at 256.

[52] *Id.* at 257.

[53] *Id.* at 267 (emphasis omitted) (quoting IIRIRA of 1996, 8 U.S.C. § 1101(a)(48)(A)).

[54] *Id.*

[55] *See* Immigration Defense Project, N.Y. State Defenders Ass'n, *Citizenship Alert for Lawful Permanent Residents with Criminal Convictions*, http://www.nysda.org/idp/webPages/citizenshipAlert.htm (last visited Jan. 15, 2009).

[56] *Id.*

[57] Barbara Hines, *Immigration Law*, 35 TEX. TECH L. REV. 923, 925 (2004) (surveying immigration cases dealing with habeas corpus jurisdiction (citing INS v. St. Cyr, 533 U.S. 289 (2001))).

plea bargaining and that the aliens were eligible for § 212(c) relief at the time the convictions were entered.[58]

E. ILL-ADVISED CHANGES IN IMMIGRATION LAWS UNDER AEDPA

AEDPA, also passed in 1996, contained drastic provisions affecting non-citizens, including controversial summary exclusion procedures, an expansion of the grounds of deportability, the restriction of discretionary relief, and the required detention of almost all criminal offenders.[59] AEDPA also changed the terminology from *deportation* or *exclusion* to *removal*, and it expansively and retroactively made legal permanent residents removable for past crimes.[60] Additionally, AEDPA weakened the sentencing requirements for qualification as an aggravated felony and added more crimes to its definition.[61] With the passing of AEDPA, the aggravated felony definition was expanded to include offenses such as commercial bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness.[62] In signing AEDPA, President Bill Clinton stated that the bill "makes a number of major, ill-advised changes in our immigration laws" and he urged Congress to "correct them in the pending immigration reform legislation."[63] However, instead of heeding the President's advice, Congress expanded

[58] 533 U.S. at 314-15. Consider how § 212(c) of the INA would have affected Mary, whose case was introduced at the beginning of this Comment. Prior to the Supreme Court's holding in *INS v. St. Cyr* in 2001, Mary would have been ineligible for a waiver of deportation under § 212(c). After *St. Cyr*, Mary would be able to apply for the waiver of deportation since her conviction occurred prior to 1996, when the Immigration Acts were passed. In considering Mary's request for a waiver of deportation under § 212(c), the Attorney General could exercise discretion in deciding whether to waive her deportation. Mary would likely qualify for a suspension of deportation since the deportation would cause "extreme hardship" to her or her family given that she has known no other home besides the United States, she had accrued at least seven years of continuous presence in the United States with only brief absences, and she is a person of good moral character as she never committed any crime of moral turpitude and has lived as a model citizen with the exception of the quarrel that was the subject of her conviction.

[59] Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-78 (codified as amended at 8 U.S.C. §§ 1101, 1105a, 1182, 1252, 1252a (2006)).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 431 (2007) (arguing that deportation of convicted criminals is a second punishment and thus violates the Double Jeopardy Clause).

those "ill-advised" provisions of AEDPA by enacting the Illegal Immigration Reform and Responsibility Act (IIRIRA) a few months later.[64]

F. IIRIRA: FROM ILL-ADVISED TO DRACONIAN

IIRIRA, enacted shortly after AEDPA, focused on the apprehension and removal of undocumented immigrants.[65] The statute substantively limited the removal criteria and the availability of discretionary relief, and created different expedited procedures for removal.[66] Procedurally, IIRIRA decreased remedies available to criminal immigrants when it further expanded the scope of aggravated felony in the immigration context.[67] Offenses labeled aggravated felonies under IIRIRA include petty larceny, assault, second-degree theft, burglary, and transporting an illegal alien into the United States.[68] IIRIRA also further reduced the sentencing requirement for categorization as an aggravated felony from the initial five-year requirement to a one-year requirement, thus dramatically expanding the set of potential aggravated felonies.[69] The IIRIRA changes apply retroactively to convictions that were entered at a time when they were not considered aggravated felonies for the purposes of the application of immigration laws.[70]

Through IIRIRA, Congress repealed § 212(c) of the INA and replaced it with a new section excluding those persons previously convicted of any aggravated felony from the class of persons entitled to relief from removal at the discretion of the Attorney General.[71] IIRIRA also replaced the discretionary relief of § 212(c) with a more limited "cancellation of removal" available under § 240(a) of the INA.[72] Section 240(a)'s

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[64] *Id.*

[65] Brooke Hardin, Fernandez-Vargas v. Gonzales*: An Examination of Retroactivity and the Effect of the Illegal Immigration Reform and Immigrant Responsibility Act*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 291, 296-97 (2007).

[66] Quinn H. Vandenberg, *How Can the United States Rectify Its Post-9/11 Stance on Noncitizens' Rights?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 619 (2004) (arguing that AEDPA, IIRIRA, and the USA PATRIOT Act lead to a "rights-deprived" environment for immigrants).

[67] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, § 671, 110 Stat. 3009-546, 3009-720 to -722 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)).

[68] *Id.*

[69] *Id.*

[70] *See* Bazuaye v. INS, No. 94-CV-1280, 1997 WL 187355, at *1 (S.D.N.Y. Apr. 15, 1997) (holding that an alien was deportable as an aggravated felon based on a 1992 conviction for an offense that was added to the definition of "aggravated felony" in 1994).

[71] Salinas, *supra* note 15, at 255.

[72] IIRIRA of 1996 § 304, 110 Stat. at 3009-589 to -595 (codified as amended at 8 U.S.C. § 1229b(a)-(b) (2006)). Cancellation of removal requires longer periods of physical

cancellation of removal differs significantly from § 212(c)'s suspension of deportation and renders obtaining such a waiver almost impossible. The statutory standard for the waiver changed from the broad requirement of a showing of extreme hardship to the alien or his or her family to the narrow "exceptional and extremely unusual hardship" to the alien's U.S. citizen or legal permanent resident family.[73] Hardship to the alien no longer matters. Furthermore, to qualify for cancellation of removal an alien must show ten years of continuous physical presence in the United States.[74] Under IIRIRA, aliens convicted of an aggravated felony do not qualify for cancellation of removal.[75]

With IIRIRA, Congress effectively made conviction of a crime grounds for removal without any real possibility of relief, by vesting the power of expedited removal in individual immigration officers whose decisions are subject to neither judicial nor administrative review.[76] Furthermore, under IIRIRA the conviction need not be final for the purposes of removal.[77] Finally, the statute broadens the scope of convictions that render an alien removable by changing the relevant sentence from that which *is* actually imposed, to the one that *may be* imposed.[78] IIRIRA increases the chances that a non-citizen will be deported by eliminating the finality of a conviction through the application of subsequent immigration repercussions resulting from the conviction and by broadening the sentence to be considered under the IIRIRA.[79]

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presence in the United States and has more disqualifying provisions, making it much more difficult to obtain relief. *Id.*

[73] Von Sternberg, *supra* note 46, at 305-06. There is not a lot of precedent describing what exactly constitutes exceptional and extremely unusual hardship under the current statute, making it hard to predict which cases would qualify for cancellation of removal under this standard. *See id.* at 307. Several courts have determined that cancellation claims are not subject to federal court review since the determination of exceptional and extremely unusual hardship to the relative entails a "subjective, discretionary" judgment. *Id.* at 324 n.30; *see* Romero-Torres v. Ashcroft, 327 F.3d 887, 888 (9th Cir. 2003); Gonzalez-Oropeza v. U.S. Att'y Gen., 321 F.3d 1331, 1332 (11th Cir. 2003).

[74] Von Sternberg, *supra* note 46, at 305.

[75] *Id.*

[76] Vandenberg, *supra* note 66, at 620.

[77] *Id.* at 620-21.

[78] *Id.* at 620.

[79] *Id.* at 620-21.

G. USA PATRIOT ACT: VESTING DISCRETIONARY DETAINMENT POWER IN ENTRY-LEVEL BUREAUCRATS

The USA PATRIOT Act,[80] passed in 2001, makes non-citizens removable for "wholly innocent associational activity, excludable for pure speech, and detainable at the Attorney General's discretion, without a hearing and without a finding that they pose a danger or flight risk."[81] Section 236(a) gives the Attorney General the discretion to certify and detain any non-citizen if the Attorney General has "reasonable grounds to believe" that the non-citizen has participated in an activity that "endangers the national security of the United States."[82] The USA PATRIOT Act defines "terrorist activity" very broadly as, among other things, the use or threat to use a weapon, and "terrorist organization" equally as broadly, as a group of two or more persons that has used or threatened to use a weapon.[83] The open-ended definitions have had a dramatic effect on non-citizens because state and local law enforcement agencies, unaware of current immigration law, can destroy an immigrant's life through the wording of a particular criminal charge, indictment, or plea.[84] The expansion of the grounds for removal provided by the USA PATRIOT Act is the culmination of a series of drastic such expansions adversely affecting non-citizens.

III. ANTI-IMMIGRATION BIASES OF THE RECENT LAWS

Three justifications emerge from the examination of the rhetoric behind the recent immigration laws—the perception that non-citizens are the reason for increasing criminality in the United States, a desire to protect of the economic interests of citizens, and a blurred line between crime control efforts related to non-citizens and protection of national security.[85]

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[80] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, 50 U.S.C. (2006)).

[81] Vandenberg, *supra* note 66, at 621 (quoting David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966 (2002)).

[82] USA PATRIOT Act of 2001 § 412, 115 Stat. at 351 (codified as amended at 8 U.S.C.A. § 1226(a)(3)).

[83] *Id.* § 411, 115 Stat. at 346 (codified as amended at 8 U.S.C. § 1182(a)(3)(B)). The USA PATRIOT Act defines association with a terrorist organization as engagement or intended engagement "solely, principally, or *incidentally* in activities that could endanger the welfare, safety, or security of the United States." *Id.* (codified as amended at 8 U.S.C.A. § 1182(a)(3)(B)(iii)) (emphasis added).

[84] Vandenberg, *supra* note 66, at 623.

[85] *See* Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (arguing that removal provisions are ill-suited to achieving national security or other immigration policy goals).

In the late 1980s, the Office of Immigration and Naturalization Service (INS) noted that as immigration levels increased in the United States, the rate of criminal activities attributable to aliens and the percentage of aliens in the prison population rose, leading the INS to conclude that expedition of the deportation process is critical in reducing prison overcrowding.[86] The weakness of this argument is that it looks solely at the number of immigrants in prisons, instead of the percentage due to increased immigration levels. In passing the INA, Congress responded to the INS's inefficiency in investigating, detaining, and deporting alien criminal offenders.[87] Congress was also responding to concerns that aliens were using frivolous arguments to delay or avoid deportation,[88] prompting the introduction of expedited deportation proceedings with the goal of "dismissing all criminal aliens' appeals as a matter of law."[89]

In the years immediately prior to the 1996 Acts, the justification for various laws affecting non-citizens was to prevent immigrants from taking advantage of economic benefits at the expense of U.S. citizens, but the rhetoric drew upon the public perception that immigrants are criminals.[90] IIRIRA also contained a provision for denying public benefits to unauthorized non-citizens based, in part, on the public perception that immigrants receive public benefits that they do not pay for with taxes.[91] The rhetoric of the debates surrounding the IIRIRA focused on a supposed

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[86] *See* U.S. IMMIGRATION & NATURALIZATION SERV., IMMIGRATION ACT OF 1990 REPORT ON CRIMINAL ALIENS (1992).

[87] *See* 136 CONG. REC. 27,073 (1990).

[88] *See* 136 CONG. REC. 35,612 (1990).

[89] Newcomb, *supra* note 44, at 702-03 (citing Peter Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?*, FED. LAW., Mar-Apr. 1997, at 43, 44).

[90] In 1994, California passed Proposition 187, which prevented illegal immigrants from taking advantage of social services, health care, and public education. Chacón, *supra* note 85, at 1840. The advocates of the measure were apparently concerned with competition for public benefits, but the rhetoric for justifying the measure portrayed migrants as criminals. *Id.* at 1840-41. Barbara Coe, who was the drafter of the measure, stated:

> You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact.... You're not dealing with a lot of shiny face, little kiddies.... You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system. And we're paying them to do it.

Id. at 1841. In a 2005 speech, Coe continued to perpetuate her view that immigrants are criminals when she referred to undocumented immigrants as "illegal barbarians who are cutting off [the] heads and appendages of blind, white, disabled gringos." *Id.* (citing Daphne Eviatar, *Nightly Nativism*, NATION, Aug. 28, 2006, at 18, 22).

[91] *See* Chacón, *supra* note 85, at 1842-43.

link between immigrants and crime in the United States to gain public support and capitalize on public misconceptions.[92]

However, the primary motivation behind the 1996 Acts and the USA PATRIOT Act was a concern over national security.[93] AEDPA was passed in response to the Oklahoma City bombings—a terrorist act ironically perpetrated by a U.S. citizen—and to the 1992 World Trade Center bombings.[94] In discussing AEDPA, Congress used crime and terrorism interchangeably with respect to immigration removal proceedings.[95] Since the September 11, 2001 terrorist attacks, the immigration debate has focused around the term *national security*, and the removal of non-citizens for criminal offenses is frequently depicted as national security policy.[96] The term "border security" has become "a ubiquitous descriptive term for immigration reform . . . ."[97] Despite the fact that IIRIRA is a crime control measure, it has been referred to as a border security regulation in the years since its passing.[98] These characterizations highlight how beliefs and rhetoric on immigration, crime, and national security issues have become fused into one indistinct concept.[99]

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[92] Representative Orrin Hatch (R-UT) claimed that "a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people." 142 CONG. REC. 25,362 (1996).

[93] During the debate over IIRIRA, Senator Spencer Abraham emphasized that he drew "a sharp distinction between immigrants who come to this country to make better lives for themselves and those who come to break our laws and prey upon our citizens." 142 CONG. REC. 26,684 (1996).

[94] *See, e.g.*, 142 CONG. REC. 7960-68 (1996) (statement of Rep. Hyde) (alternating discussion of the Oklahoma City bombing and criminal aliens).

[95] Representative Hyde read excerpts from the letter of the widow of a victim of the Oklahoma City bombing advocating for the antiterrorism bill as a victory over extremists. *Id.* Representative Hyde then immediately proceeded to respond to the excerpt he read by advocating for the bill's provisions for the deportation of criminal aliens, thereby connecting the terrorist attack in Oklahoma City, perpetrated by an American, with criminal aliens. *Id.*

[96] Chacón, *supra* note 85, at 1853.

[97] *Id.* at 1853-54.

[98] *Id.* at 1854.

[99] *Id.* To demonstrate the interwoven nature of criminal alien measures and national security, Chacón quotes a statement made by CNN anchor Lou Dobbs, in which Dobbs equates illegal immigration with crime and then adds the threat of terrorism into the picture. *Id.*

IV. THE ANTI-IMMIGRATION SENTIMENT BEHIND THE 1996 ACTS AND THE ACTS' INCONSISTENT APPLICATION HAVE LED TO AN ESCALATION OF THE VERY SAME PROBLEMS TARGETED BY THE ACTS

A. ANTI-IMMIGRATION ARGUMENTS REGARDING CRIMINAL PROPENSITIES OF IMMIGRANTS ARE UNFOUNDED

The view that immigrants are inclined to commit crimes prevails in our society, despite a lack of empirical support.[100] A study by sociologists at the University of California, Irvine, based on census data from the year 2000, found that the incarceration rate of U.S.-born persons was almost four times higher than that of foreign-born persons.[101] This study supports earlier research revealing that "increased immigration is actually a major factor associated with lower crime rates" and that incarceration rates are extremely low among immigrants and increase rapidly by the second generation.[102] Because the immigrant population as a whole is younger, more male, and less educated than the average native-born American, other studies have taken into account specific crime predictors, such as gender, age, and education.[103] Even when taking into account these factors, immigrants' crime rates are dramatically lower than those of demographically similar native-born Americans, as well as those of the native-born population as a whole.[104] Sociological data suggest that first-generation immigrants are 45% less likely to commit violent crimes than third-generation Americans, and second-generation immigrants are 22% less likely.[105] These findings suggest that the problem rests with American society and not with the immigrant communities, because crime increases dramatically as non-citizens assimilate into society.[106]

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[100] In a survey of a nationally representative sample of adults conducted in 2000 by the General Social Survey, almost three quarters of those surveyed believed that there is a causal link between immigration and increased crime rates, with 25% of those surveyed stating that it is very likely that more immigrants are the cause of higher crime rates. *Id.* at 1840.

[101] *Id.* at 1879. The incarceration rate of U.S.-born persons was 3.51%, while that of foreign-born persons was 0.86%. *Id.* White U.S.-born citizens are twice as likely to be incarcerated as foreign-born citizens. *Id.*

[102] *Id.* at 1879-80; Matthew T. Lee et al., *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 560, 571 (2001) (finding no correlation between immigration and higher homicide rates); Robert J. Sampson, Op-Ed., *Open Doors Don't Invite Criminals*, N.Y. TIMES, Mar. 11, 2006, at A15.

[103] Legomsky, *supra* note 10, at 501.

[104] *Id.* at 501-02.

[105] Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L 195, 210 (2007).

[106] *Id.*

Despite the empirical reality, a survey conducted in 2000 found that nearly 75% of Americans surveyed thought that immigrants are "somewhat likely" or "very likely" to increase crime rates in the United States.[107] One observer has noted that the misperception that immigration results in higher crime rates may be attributed to assumptions that conflate immigration generally with illegal immigration, racial stereotypes, crime, and terrorism.[108] Political discourse and media coverage highlight illegal immigration and immigrant involvement in terrorism, supporting the public's perception that a positive correlation exists between crime and immigration.[109] Because there is little attempt to distinguish between legal and illegal immigration in public discourse, the general public rarely differentiates between the two when opining on immigration or crime control measures.

Furthermore, there is no evidence that the escalation in the removal of aliens has had a positive impact on reducing crime, since violent crime is still increasing.[110] Indeed, in many cases, long-time lawful permanent residents have been deported because of criminal convictions that the general population would regard as trivial violations.[111] These deportations remove individuals who pose no actual threat to society and, therefore, effect no real reduction of the number of dangerous criminals in the country.[112]

B. THE INCONSISTENT APPLICATION OF THE 1996 ACTS HAS RESULTED IN THE ESCALATION OF IMMIGRATION PROBLEMS

1. The Definition of Aggravated Felony in the 1996 Acts Has Resulted in Inconsistent Applications

Courts and administrative agencies have applied the concept of aggravated felony inconsistently.[113] As a result, immigrants face removal

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[107] *Id.*

[108] Legomsky, *supra* note 10, at 502-03.

[109] *Id.*

[110] *See* Chacón, *supra* note 85, at 1878.

[111] *See* Hem v. Maurer, 458 F.3d 1185, 1186 (10th Cir. 2006) (evaluating a removal order against a paraplegic Cambodian native convicted of assaulting a police officer); United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001); *see also* United States v. Graham, 169 F.3d 787 (3d Cir. 1999) (holding that the defendant's conviction of misdemeanor for petty larceny was sufficient to meet the statutory requirement for aggravated felony because the defendant had received the maximum sentence of one year's imprisonment).

[112] *See* Chacón, *supra* note 85, at 1884.

[113] *See, e.g.*, Daniel J. Murphy, *Guilty Pleas and the Hidden Minefield of Immigration Consequences for Alien Defendants: Achieving a "Just Result" by Adjusting Maine's Rule 11 Procedure*, 54 ME. L. REV. 157, 158-59 (2002).

after receiving either suspended sentences or the maximum sentence for a particular offense.[114] In contrast, immigrants who received a less-than-maximum sentence for the same offense successfully escape classification as aggravated felons and the immigration consequences of such classification.[115] The laws also apply to immigrant defendants who accepted a plea bargain in a criminal prosecution prior to the charged offense being defined as an aggravated felony.[116] Finally, there are jurisdictional inconsistencies in the statutory definitions of criminal offenses leading to classification of the offense as an aggravated felony in certain jurisdictions, but not in others.

2. Suspended and Maximum Sentences, and Vacated Convictions

Many criminal defense attorneys and judges believe that deferred judgments[117] do not result in immigration consequences when in fact "the controlling factor in finding a conviction for purposes of immigration law is an admission of the essential elements of the offense charged followed by some form of restraint on the defendant's liberty," including probation.[118] In *United States v. Christopher*, the defendant faced removal after his conviction for shoplifting, which is a misdemeanor, resulted in a suspended sentence of twelve months' imprisonment.[119] The removal occurred because, for immigration purposes, all that is required for classification as an aggravated felony is a conviction with a sentence of at least one year.[120] In *United States v. Graham*, the defendant's conviction for petty larceny satisfied the statutory requirement for aggravated felony because the defendant received the maximum sentence of one years' imprisonment.[121] These examples demonstrate the importance of sentencing distinctions in determining immigration consequences under the 1996 Acts. In

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[114] *Id.*

[115] *Id.*

[116] *See* Salinas, *supra* note 15, at 256-59 (discussing the retroactive application of IIRIRA and the change in the definition of aggravated felony to include conviction for which the alien receives a sentence of at least one year, as opposed to the five-year sentence requirement of pre-IIRIRA laws).

[117] With a deferred judgment, although a plea may be taken, the adjudication of guilt is not entered at that time. The adjudication of guilt is deferred either until the completion of probation or until there is a violation of probation. BLACK'S LAW DICTIONARY 859 (8th ed. 2004).

[118] Jeff Joseph, *Immigration Consequences of Criminal Pleas and Convictions*, COLO. LAW., Oct. 2006, at 55, 56 (providing an overview of immigration issues that criminal attorneys should consider).

[119] 239 F.3d 1191, 1191-92 (11th Cir. 2001).

[120] *See id.* at 1193.

[121] 169 F.3d 787, 787-88 (3d Cir. 1999).

Christopher, the defendant's sentence was suspended, yet this made no difference for immigration purposes. In *Graham*, if the defendant had received a sentence that was even one day shorter, he might have escaped removal. The immigration consequences can be drastically different depending on whether the defendant receives a maximum sentence or something less, and a suspended sentence does not spare the defendant from removal.

Even a vacated conviction carries immigration consequences. The Fifth Circuit examined the effect of a vacated federal conviction on immigration proceedings as a matter of first impression in *Renteria-Gonzales v. INS*.[122] The Fifth Circuit determined that if Congress intended to exclude vacated convictions from the definition it could have done so explicitly.[123] The court reasoned that the issue of vacated convictions occurred so frequently that Congress must have anticipated this scenario.[124] Congress's silence on the issue, according to the court, "strongly implies that Congress did not intend such an exception."[125]

3. Plea Bargaining and Its Unforeseen Future Repercussions on Immigration Status

Non-citizen defendants are often not informed about the possible immigration repercussions of pleading "guilty" or "no contest" to a criminal charge.[126] Most jurisdictions do not require the court or the defense counsel to inform non-citizen criminal defendants that their conviction may lead to deportation.[127] Plea agreements that may seem appealing because they require no imprisonment can lead to deportation and extended exclusion from the United States.[128] For example, an alien's plea of no contest to a drug charge in a Wyoming state court constituted a conviction for the purpose of removal under the aggravated felony classification, even though the imposition of the sentence was deferred and the alien was placed on

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[122] 322 F.3d 804, 812-13 (5th Cir. 2002).

[123] *Id.* at 813.

[124] *Id.*

[125] *Id.*; *see also* Ekwutozia U. Nwabuzor, *The Cry of the Collosus:* Discipio v. Ashcroft, *Nonacquiescence, and Judicial Deference in Immigration Law*, 50 HOW. L.J. 575, 579 (2007) (discussing a circuit split on the issue of whether a conviction vacated for substantive errors should be used for the purpose of deportation).

[126] *See, e.g.*, Murphy, *supra* note 113, at 158.

[127] John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J. L. REFORM 691, 693 (2003).

[128] *Id.* (arguing that non-citizen criminal defendants should be afforded greater latitude in withdrawing guilty pleas when they are made without awareness of potential immigration consequences).

probation without entry of a judgment of guilt.[129] In another instance, an alien's guilty-plea conviction for theft rendered him ineligible for discretionary relief from removal where the conviction amounted to an aggravated felony under the statute enacted after the date of the alien's plea.[130]

Although the defendant's lack of knowledge as to the potential ramifications of pleading guilty raises the question of whether the pleas taken in these circumstances are voluntarily entered, the failure to advise a client about potential deportation does not constitute grounds for withdrawing the guilty plea.[131] This is because deportation is viewed as a collateral, rather than a direct, consequence of the criminal conviction, and collateral consequences are not a valid basis for withdrawing a guilty plea.[132] Courts have held that what makes the immigration effects of a plea "collateral" is the fact that deportation is "not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he [or she] has no responsibility."[133] Courts have further held that despite the fact that immigration consequences arise "virtually by operation of law," they are not direct consequences of a criminal conviction.[134] Furthermore, courts have argued that the defendant's due process is not violated in this situation because due process does not require that the court inform the defendant about immigration consequences.[135]

4. Statutory Definitions of Criminal Offenses, Differences in the Records of Conviction, and Exercise of Judicial Discretion Create Inconsistency in the Application of Immigration Consequences

The inconsistency in the application of the immigration laws reflects the injustice of the legislation and its ineffectiveness in reducing crime.

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[129] Gradiz v. Gonzales, 490 F.3d 1206 (10th Cir. 2007).

[130] Alvaranga v. INS, 232 F. App'x 56 (2d Cir. 2007).

[131] Francis, *supra* note 127, at 694.

[132] *Id.* Deportation has been viewed as a civil penalty. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). Collateral consequences are not a valid basis for withdrawing a guilty plea. *See, e.g.*, Hutchinson v. United States, 450 F.2d 930, 931 (10th Cir. 1971) (holding that failure to advise a client that a plea will result in loss of good time credit does not render it invalid); United States v. Vermeulen, 436 F.2d 72, 75 (2d Cir. 1970) (omitting discussion on the record about possibly imposing consecutive sentences did not render the plea defective so long as the court used a reasonable means to ascertain defendant's understanding of his plea).

[133] State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (citing United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000)).

[134] *See id.*

[135] *Id.*

Immigration judges have adopted a categorical approach in evaluating a non-citizen's criminal conviction for the purpose of deportability.[136] Under this approach, the immigration judge is limited to the wording of the statute under which the defendant was convicted and must determine whether the defendant is removable based only on the length of the sentence given to the defendant.[137] There are two exceptions to the application of this approach: (1) if the language of the particular subsection of the statute at issue defining the term *aggravated felony* invites inquiry into the underlying facts of the case, or (2) if the statute is "divisible."[138] A statute is said to be divisible when the statutory language contains some offenses that would qualify as aggravated felonies and others that would not.[139] If the provisions of the statute are divisible or vague, then the immigration judge applies a modified categorical approach.[140] The modified categorical approach allows the court to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive.[141] In this instance the immigration judge must look to the record of conviction, including the indictment, the plea, the verdict, and the sentence, to determine the offense for which the alien was convicted.[142] The subjective nature of this evaluative approach leads to starkly contrasting determinations reached by immigration judges even within the same jurisdiction.

Even a single judge's evaluation of the record of conviction for different defendants can lead to different results depending on the wording of the documents in the record of conviction.[143] The sentencing judge will consider the defendant's conduct as it is described in his or her indictment; depending on the wording and level of detail in particular indictment, the judge may choose a more severe or more lenient sentence. Another

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[136] Joseph, *supra* note 118, at 56; Michael Vastine, *Being Careful What You Wish For: Divisible Statutes—Identifying a Non-Deportable Solution to a Non-Citizen's Criminal Problem*, 29 CAMPBELL L. REV. 203, 208 (2007) (discussing the complications in evaluating whether convictions under divisible statutes result in immigration consequences).

[137] *Id.*

[138] *See, e.g.*, Joseph v. Att'y Gen. of U.S., 465 F.3d 123, 127 (3d Cir. 2006).

[139] Obasohan v. U.S. Att'y. Gen., 479 F.3d 785, 788 (11th Cir. 2007).

[140] *See, e.g.*, Martinez-Perez v. Gonzales, 417 F.3d 1022, 1025-26 (9th Cir. 2005).

[141] *Id.*

[142] *Id.*

[143] *See generally* Vastine, *supra* note 136, at 225 (explaining that where a record of conviction is consistent, determining the offense for which the alien was convicted is straightforward, but that in many instances the record of conviction contains different terminology in the indictment, plea, and judgment, so defense counsel must argue all of the possible interpretations of the record to shield an alien from removal).

complication arises in situations where a single record of conviction contains inconsistencies. In cases where the record of conviction does not track and restate the criminal statute, different terminology may be employed in the indictment, plea, and judgment.[144]

Furthermore, different judges place different weight on the collateral consequences of the offender's immigration status. First, offenders are not required to disclose their immigration status in state criminal proceedings, and indeed they are not generally asked about their legal status.[145] Second, judges have reacted differently upon discovering the offender's immigration status, from disregarding it during sentencing and ignoring the collateral immigration consequences of the sentence imposed to reducing the sentence imposed to avoid immigration consequences on the offender.[146]

Consider Mary's case, discussed in the introduction of this Comment.[147] Mary faced removal as the result of a simple assault conviction arising from a dispute over a man more than ten years before removal proceedings were initiated against her.[148] Contrast Mary's case with the brutal assault and stabbing of twenty-three year old Micah Painter by a group of non-citizens, motivated by Micah's sexual orientation.[149] Three men brutally stabbed Micah with broken bottles while yelling abusive comments such as, "You're going to die faggot!"[150] After they were found guilty, the judge, who was apprised of the potential immigration consequences to the three perpetrators, reduced the one-year sentence he had initially given the men by a single day so that they would avoid the collateral immigration consequences.[151] A sentence of at least one year for the crime of violence they had committed would have rendered the perpetrators aggravated felons for immigration purposes, subjecting them to

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[144] An example of this is the case of a non-citizen who was granted permanent legal residence in the United States in 1971. *Id.* at 225. Mr. R- and several others were charged in 2004 for conspiring to embezzle Section 8 housing-designated federal funds. *Id.* Mr. R- was charged on four separate counts of a federal indictment. As a result of a plea agreement, Mr. R- admitted one count of the indictment, "Conspiracy to Steal Government Funds." *Id.* However the indictment described in detail conduct "possibly including embezzlement, theft, and fraud." *Id.* As a result, after Mr. R- was sentenced to three years' probation, the Department of Homeland Security took him into custody for immigration. *Id.*

[145] Joseph, *supra* note 118, at 56.

[146] *See generally* David S. Keenan, *The Difference a Day Makes: How Courts Circumvent Federal Immigration Law at Sentencing*, 31 SEATTLE U. L. REV. 139, 163 (2007) (arguing that judges unconstitutionally sentence non-citizen criminal defendants with the goal of preventing criminal consequences).

[147] *See supra* Part I.

[148] Lewis, *supra* note 1.

[149] Keenan, *supra* note 146, at 139-41.

[150] *Id.* at 140.

[151] *Id.* at 141.

removal.[152] Because this judge chose to consider the offenders' immigration status when he sentenced them, they were not removed.[153] This inconsistency not only reflects the injustice that may result from judicial differences, but also underscores the ineffectiveness of the legislation in reducing criminality in the United States.

5. Increased Inconsistency and Unpredictability Creates Incentives for Illegality and Criminality in Immigration

The 1996 Acts were introduced to reduce the presence of undocumented immigrants already in the country and to deter new illegal immigration. However, the laws have failed to achieve these goals. Although they eliminate older immigration law loopholes that seemed to reward immigrants for remaining in the country illegally, the 1996 Acts do not offer any incentive for aliens to leave the country.[154] Since the passage of IIRIRA, there has been a dramatic growth in the number of undocumented individuals.[155] Undocumented aliens have an incentive to remain here covertly for as long as possible rather than try to legalize their status; if they are discovered as having illegal status in the process of trying to legalize it, they will be removed, with a bar to reentry of up to ten years.[156]

The increasing number of immigration prosecutions is taking federal resources away from addressing dangerous criminal offenders. Between the years 2000 and 2004, federal prosecutions of persons for violating immigration laws have increased by 125%, making immigration violations the single largest category of federal crimes—surpassing even drug prosecutions.[157] In 2004, prosecutions for illegal entry after removal made up 59% of the immigration prosecutions in federal district courts, and in 2006, these prosecutions continued to be the largest category of immigration prosecutions.[158] The Immigration and Customs Enforcement

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[152] *Id.*

[153] *Id.*

[154] Hardin, *supra* note 65, at 320 (critiquing the Court's reasoning in *Fernandez-Vargas* and anticipating the effects the decision would have on future deportation proceedings in the United States).

[155] Bernstein-Baker, *supra* note 16, at 374 (arguing that although naturalization is a powerful form of integration into society, the recent laws have made citizenship more difficult to obtain).

[156] Hardin, *supra* note 65, at 320.

[157] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC REPORT: TIMELY NEW JUSTICE DEPARTMENT DATA SHOW PROSECUTIONS CLIMB DURING BUSH YEARS (2005), http://trac.syr.edu/tracreports/crim/136.

[158] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL IMMIGRATION PROSECUTIONS FOR MAY 2006 (2006), http://trac.syr.edu/tracreports/bulletins/immigration/.

(ICE) agency claims that it is successfully targeting criminal aliens, but it does not provide any data on the nature of the crimes committed by the fugitives it targets.[159]

The expansion of the aggravated felony definition, its retroactive application, and the lengthy or permanent bars to reentry undermine any deterrent effect the measures were intended to have. Those who already face removal without the availability of discretionary relief and who may also face permanent or long-term bars to reentry have no additional incentive to refrain from engaging in further criminal activity.[160] Moreover, if the criminal alien faces a permanent bar to reentry into the United States, there is an incentive for that alien to continue to enter the country illegally—often to visit family members who remain here legally—since there is no legal means by which the alien could enter the United States, and the worst he or she faces is another removal with a permanent ban.[161]

Furthermore, the current immigration laws have left non-citizens with a deep mistrust of the government and a motivation to perpetuate criminality. Non-citizens are often afraid to report crime because of fear of being placed in removal procedures.[162] The fear of removal extends to both undocumented immigrants without a criminal conviction and to legal permanent residents who have been convicted of crimes. This was observed in places like Palm Beach, Florida, where non-citizens from several Latin American and Caribbean countries are targeted by criminals because they are less likely to report crime.[163] Removals have also torn families apart, often taking away a family's sole breadwinner and leaving other members of the family in a precarious position, sometimes unable to support themselves.[164] Cases like this create prime situations for the

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monthlymay06; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC INS REPORT: NEW FINDINGS (2005), http://trac.syr.edu/tracins/latest/131/.

[159] Chacón, *supra* note 85, at 1847.

[160] *Id.* at 1885 (noting that when § 212(c) discretionary relief was available, immigration judges routinely warned aliens who were given relief that relief in the future would be unlikely if they were involved in criminal activity again).

[161] A study funded by the Pew Hispanic Foundation demonstrated that after the enactment of the 1996 laws and the alarming number of removals that followed, "the number of immigrants coming into the United States actually soared, with the number of undocumented migrants growing faster than other segments of the immigrant population." *Id.* at 1889 (noting that the policy failed both as national security or crime control, and also as immigration control).

[162] Chacón, *supra* note 85, at 1886.

[163] *Id.*

[164] One woman left behind to raise her son alone, after her husband was deported as a result of the aggravated felony measures of the 1996 Acts, described the experience this way:

impoverished and emotionally battered families of deported immigrants to resort to crime to make ends meet and to feel alienated from the government and from the population at large.[165]

In the 2008 presidential campaigns, issues related to illegality and non-citizens were debated in the context of providing driver's licenses to undocumented immigrants.[166] The argument against providing driver's licenses to undocumented residents suggests that doing so would enable their illegal presence by allowing them to blend into society.[167] Proponents of this view often tie the availability of driver's licenses for undocumented aliens with terrorism, arguing that the driver's license is used for many purposes other than driving, including boarding airplanes.[168] The other side of the debate recognizes that providing undocumented aliens the option to drive legally will promote public safety by enabling undocumented aliens to obtain automobile insurance, which is not possible without a valid license.[169] Many undocumented aliens drive unlicensed and thus uninsured.[170] Maintaining the status quo and denying licenses to undocumented individuals will incentivize them to drive covertly and shun responsibility in the case of accidents for fear of their own removal. Furthermore, drivers without licenses are more prone to accidents because they may not be familiar with the rules of the road.[171]

> [M]y husband (father of our 2 kids) was deported in 2003. My son was 11 at the time and he was in the immigration courtroom at the time the judge told Martin he was to be deported and not allowed to come back for at least ten years. I had not seen my son cry too often but I saw his heart break that day .... Martin was deported for a crime that was a misdemeanor he committed 6 years prior and spent 30 days in jail for. Martin is a great father and husband he is not a criminal, so when we went to court I thought everything would be ok but our lives have changed forever. Martin was the sole supporter of our family .... I lost our apt. in Feb. and since I have no family that would help us I took my kids to Mexico and we stayed there with Martin and his family. My kids have missed school and lived in poverty that most people could never comprehend.

Kanstroom, *supra* note 105, at 215-16 (responding to Professor Chacón's discussion of immigration reform).

[165] *See* Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 574 (2004).

[166] Adam Nagourney, *A Day Later, Clinton Embraces Spitzer's License Effort*, THE CAUCUS, Oct. 31, 2007, http://thecaucus.blogs.nytimes.com/2007/10/31/a-day-later-clinton-embraces-spitzers-license-effort/.

[167] Domenico Maceri, *Driver's Licenses for Illegal Immigrants*, NEW AMERICA MEDIA, Oct. 28, 2007, http://news.newamericamedia.org/news/view_article.html?article_id=40a7e69186a1d789a3ae10786841a6bd&from=rss.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

Immigration attorneys have few options to offer at-risk, non-citizen clients who wish to challenge the application of the aggravated felony status to their convictions, often for non-violent misdemeanors. Non-citizens convicted of even a minor crime that falls within the expansive aggravated felony definition face nearly certain removal, which in many cases means separation from U.S.-citizen family members. Therefore, non-citizens convicted of an aggravated felony have no incentive to adjust their status to legal permanent resident if they are currently undocumented or to seek naturalization if they are already legal permanent residents. Instead, the best strategy for these individuals for avoiding removal is to refrain from drawing any attention to their status in the hope of escaping the reach of the 1996 Acts. The harsh penalties imposed by the 1996 Acts, and the inconsistent application of their provisions, have increased the illegality that the 1996 Acts were in fact trying to prevent.

V. RE-ESTABLISHING A FOCUS ON REHABILITATION IN IMMIGRATION LAW WILL DETER CRIMINAL BEHAVIOR, REDUCE THE BURDEN ON THE COURTS, AND ACCURATELY PREDICT THE DESIRABILITY OF PROSPECTIVE U.S. CITIZENS

A. FOCUSING ON REHABILITATION IN IMMIGRATION LAW WILL DETER CRIMINAL BEHAVIOR AND REDUCE LITIGATION IN THE IMMIGRATION CONTEXT

Focusing on the rehabilitation of the criminal offender in immigration law would better deter further criminal activity than the current regime, which sanctions immigrants years after they served their sentences and even after they have proved to be responsible members of society. The previous availability of § 212(c)'s discretionary waiver of deportation focused on rehabilitation. Immigration judges were charged with evaluating various factors such as the rehabilitation efforts of the immigrant since his or her conviction, his or her family ties, and the potential family impact of deportation.[172] Giving the criminal alien a second chance provides an incentive to refrain from further negative contact with the government.[173] There are also economic and societal benefits because first-generation immigrants are better members of society, statistically committing fewer crimes than native-born citizens.[174]

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[172] Bill Ong Hing, Response, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1903-05 (2007) (discussing the problems with deportation as crime control in the context of international law).

[173] *See generally id.*

[174] *See* Chacón, *supra* note 85, at 1879-81.

Non-citizens increasingly wish to challenge their predicament due to these measures.[175] These challenges have overburdened the courts to the extent that in the past five years, the number of Board of Immigration Appeals (BIA) decisions challenged in appeals courts has more than tripled, increasing from 7% to 25%.[176] Legislative enactments since 1996 have resulted in a sharp increase in litigation in the federal courts on immigration matters affecting criminal aliens. Long-time residents of the United States will continue to fight their removal from the country because of the ties they have established in the country. They will continue to overburden the courts with litigation over the application of the 1996 Acts, particularly in cases where they face deportation as a result of a relatively minor criminal conviction. The combination of the aggravated felony measures and the Supreme Court's holding in *St. Cyr*—reinstating the possibility of § 212(c) relief from removal to individuals with pre-1996 convictions—has resulted in a jump in motions to reopen immigration cases affected by AEDPA or IIRIRA where the alien may still be eligible to apply for § 212(c) relief.[177]

After the passage of AEDPA and IIRIRA, the government adopted a policy of moving to dismiss petitions to review in federal courts of appeals, which led to increased habeas litigation over deportation orders.[178] The government realized this and reversed its policy, attempting to preserve jurisdiction in the courts of appeals, but by then it was too late; there was already an established practice for habeas litigation.[179] The jurisdiction-stripping measures of the 1996 Acts caused more cases to be litigated in both the courts of appeals (petitions for judicial review of administrative orders) and in the district courts (habeas petitions challenging removal orders).[180] Furthermore, courts of appeals are now also reviewing the habeas decisions rendered in the district courts, resulting in an overall

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[175] *See* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2006).

[176] *Id.* at 20.

[177] *See, e.g.*, 8 C.F.R. § 1003.44 (2008) (explaining that prior to *St. Cyr* these immigrants could not take advantage of the more lenient § 212(c) relief from removal, but after *St. Cyr* those immigrants with convictions prior to 1996, which was the enactment date of IIRIRA, can now re-open their case to take advantage of § 212(c) relief, which looks to the hardship posed by removal to both the immigrant and his family).

[178] Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 116 (2007) (exploring judicial review in the context of litigation over the 1996 immigration laws).

[179] *Id.* at 42-43.

[180] Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 42 (2007) (discussing the impact of the judicial review restrictions of the immigration laws on the administrative process).

increase at all levels of judicial review.[181] The measures aimed at streamlining the process led to litigation over the process itself and litigation over the accuracy of the decisions rendered by the BIA.[182]

The courts are also burdened by aliens who pled guilty to criminal convictions and are now facing deportation. These aliens have fought their removal either by trying to withdraw their guilty pleas on grounds that the trial court did not inform them about the immigration consequences of the plea, or by claiming ineffective assistance of counsel in violation of the Sixth Amendment; both arguments have been largely unsuccessful.[183]

If Congress provides reasonable means of relief from removal for non-citizens who have committed minor offenses, especially when these offenses were committed many years before the removal proceeding, it will reduce the incentive for non-citizens to fight the measures through the judicial system. Although a limited waiver of deportation at the discretion of the Attorney General is available in some circumstances, the alien generally has to wait outside the United States for the Attorney General's determination.[184] Therefore the alien has to weigh the risk of never being able to return to the United States against the risk of remaining in the country illegally for as long as possible. The availability of "reasonable and realistic opportunities" for a non-citizen who is facing deportation to legally immigrate in the future creates incentives to comply with administrative decisions and stop litigating about the boundaries, including federal court review of orders of removal and federal habeas petitions.[185]

B. COURTS SHOULD ASSESS THE IMMIGRANT'S ABILITY TO REFORM AS A PRODUCTIVE AND MORAL U.S. CITIZEN RATHER THAN FOCUS ON PUNISHMENT

Many of the non-citizens affected by the expanded definition of aggravated felony and its drastic repercussions are persons who have committed minor offenses in the past and have since lived exemplary lives. The federal sentencing guidelines allow for a reduction in the sentence of an offender based on evidence of rehabilitation, among other factors, and

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[181] *Id.*

[182] *Id.* at 46.

[183] Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation* May *or* May Not *Violate* Strickland*'s Performance Prong*, 51 ST. LOUIS U. L.J. 267, 268 (2006) (discussing how aliens who pled guilty to criminal offenses have challenged the validity of their pleas in light of the collateral immigration consequences).

[184] Benson, *supra* note 180, at 66.

[185] *Id.* at 68.

judges frequently apply this factor in determining a particular sentence.[186] Furthermore, evidence of continued perpetration of criminal activity allows a judge to enhance the sentence recommended for a particular offense.[187] This illustrates a legislative and judicial perception that the rehabilitation efforts made by the offender are suggestive of the defendant's future conduct and ability to integrate into society.

Americans have long aspired to achieve the "American dream." The American dream's depiction of people from humble backgrounds being able to achieve great things has become a key American ideal.[188] Many of the non-citizens affected by the 1996 Acts have achieved their own version of the American dream since their commission of a crime and now face the very real possibility of having their dream shattered without regard to their current contributions to society.[189]

This situation is not only inconsistent with social perspectives ingrained in American culture, but it is also counterproductive from an economic perspective. The laws attempt to eliminate from this country non-citizens who are now productive workers and would generate revenue income and provide employment opportunities for others.

VI. CONCLUSION

The expansion of the aggravated felony concept through recent immigration legislation was aimed at reducing the presence of criminal aliens and deterring criminal conduct in the immigration context. The public discourse surrounding the passage of these laws reflected the general misunderstanding regarding the impact of non-citizens on the increasing crime and incarceration rates in the United States. The aggravated felony restrictions expanded the scope of the convictions covered to include

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[186] *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 600-01 (2007).

[187] *Id.*

[188] *See generally* JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA (Little, Brown & Co. 1941) (using the term "American dream" to refer to equality of opportunity based on personal ability rather than social status).

[189] One of many examples is the case of Humberto Fenandez-Vargas, who was deported in the 1970s after being in the country illegally. Hardin, *supra* note 65, at 291, 299-301. Fernandez-Vargas reentered the United States and lived here covertly until 2001, when his original thirty-year-old deportation was reinstated pursuant to IIRIRA. *Id.* In the thirty years that he lived in the United States, Fernandez-Vargas had a son who is a United States citizen, married, and established a successful trucking business. *Id.* Fernandez-Vargas was discovered by authorities when he attempted to legalize his status through his wife, who was a legal permanent resident. *Id.* Based on the new laws, Fenandez-Vargas, who was now a responsible and productive member of this country, was removed from his home, family, and business. *Id.*

criminal conduct that is neither aggravated nor a felony by federal criminal law standards.

The implementation of the laws, particularly with regard to the aggravated felony classification and mandated removal, has resulted in an inconsistent and unpredictable application. The main areas of inconsistency involve the subjective evaluation of a non-citizen's record of conviction, which is often itself inconsistent among its different components, differing statutory definition for crimes in different jurisdictions, and the different sentences applied for the same conviction within a single jurisdiction.

The unpredictability and inconsistency inherent in the implementation of AEDPA and IIRIRA and the restriction of the waivers of removals, even with respect to long-time, legal permanent residents, have provided incentives for illegality in the immigration context and have promoted criminality in immigrant communities. The laws have resulted in the unintended consequence of encouraging illegal immigrants in the United States to continue to live in the country covertly for fear of removal and barred reentry for extended periods of time.

The expansion of the aggravated felony concept has also led to increased litigation and the overburdening of federal courts at all levels. Long-time residents are challenging both procedural and substantive aspects of the laws in record numbers because the costs of adhering to administrative determinations are too high, often involving the loss of one's family, home, and employment. The laws have forced long-time residents to challenge these laws at all levels in order to attempt to escape or delay the drastic consequences.

Finally, the shift away from rehabilitation to punishment has not resulted in a better evaluation of who would be desirable citizens for the country. Long-time residents who have committed a criminal offense in the past but have since demonstrated that they have been rehabilitated by refraining from criminal activity, maintaining regular employment, and becoming integrated into American society, should be allowed to pursue legalization of their status and naturalization. These immigrants have the potential to become productive citizens and to make significant contributions to society.