

AMERICAN DIASPORA: THE DEPORTATION OF LAWFUL RESIDENTS FROM THE UNITED STATES AND THE DESTRUCTION OF THEIR FAMILIES

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Dear Dad, I miss you and I hope to see you soon. Today was my award ceremony and I wish you could have been there, I received 5 awards and a special prize of \$35.00 on a gift certificate for a perfect score on my science test which you helped me with. I am also letting mom take the awards with her for you to see them. I was very happy that mom was at the ceremony but upset you couldn't come. Anyway, I miss you very much and hope to see you soon because I have a lot planned for the summer and something special for your birthday. I miss our walks and little talks that we used to have and I am looking forward to doing more of that.

– Letter to immigration detainee Hemnauth Mohabir
from his twelve-year-old son.¹

For Hemnauth Mohabir, Brooklyn, New York, was home.² It was where he lived, worked, raised a family, and worshiped. Born in Guyana, he came to the United States as a lawful permanent resident in 1993, when he was thirty-two years old. He married another Guyanese immigrant who had become a United States citizen. He planned to become a citizen himself. They had a son. After working a number of minimum-wage jobs, Hemnauth attended a technical school in New York City and became a skilled heating and air conditioning technician. A religious man and talented musician, he regularly performed at Hindu services. He paid his taxes.

Hemnauth's American dream came to an end in 2002. After taking a brief trip to Guyana to visit his ailing mother, he was stopped at John F. Kennedy Airport by immigration authorities and detained because of a five-year-old con-

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1. Letter from Hemnauth Mohabir's son (name withheld) to Hemnauth Mohabir (June 25, 2002) (on file with the New York University Review of Law & Social Change).

2. Hemnauth Mohabir was a client of the author and the subject of a radio story by Daniel Zwerdling. *All Things Considered: Immigrant Detainees Claim Brutal Treatment and Abuse by Guards and Dogs at the Passaic County Jail in New Jersey* (Nat'l Pub. Radio broadcast Nov. 17, 2004).

viction for possessing \$5 worth of cocaine, for which he had been fined \$250. In September 2002, an immigration judge ordered Hemnauth deported.³ The judge expressed regret at having to do so, but he was constrained by current immigration law, which gave him no discretion.⁴ Nothing about Hemnauth's life in the United States mattered, as a matter of law: not his U.S. citizen wife, not his U.S. citizen son, not his work history, not the letters of support from Hindu and Christian clergy. It was not until April 2004, however, that U.S. Immigration and Customs Enforcement (ICE) finally sent Hemnauth back to Guyana. He had spent two years in immigration detention.

Hemnauth's case illustrates the harsh intersection of our criminal and immigration laws, the extreme and unforgiving nature of our immigration laws, the cruelties of detention mandated by our immigration laws, and the pain and loss suffered by families—because of our immigration laws. Yet for all the passion of recent immigration debate, with its rhetoric of border security and cries for legalization, nary a word has been spoken of our policy of deporting lawful permanent residents—our family members, neighbors, co-workers, and friends living lawfully in the United States—simply because they crossed paths, as is true for tens of millions of U.S. citizens, even minimally with the criminal justice system.⁵

Given the lack of public discussion of this topic,⁶ I will focus in this article on lawful permanent residents faced with deportation because of criminal convictions, and the effect of deportation on their families. I will emphasize the utter lack of rationality, compassion, and flexibility in the administration of immigration law and the need for reassessment of the current deportation regime. Part I reviews the legal and historical foundation for deportation, specifically the effects of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Part II outlines the process of deportation. Part III chronicles the disruption of the lives of the U.S. citizen spouses, children, and parents of deportees and the misery of permanent exile the deportee faces. Part IV calls upon

3. The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101 *et seq.*), employs the term "removal" in place of the more widely known "deportation." For the sake of clarity, this article will use the term "deportation."

4. Matter of Mohabir (2002) (on file with the author). Immigration judges' decisions are not reported.

5. See, e.g., SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006) (noting that one in three New Yorkers goes through the criminal justice system at some point in her lifetime), available at <http://www.nysba.org/MSTemplate.cfm?MicrositeID=100> (follow "Report on Re-entry and Reintegration: The Road to Public Safety" hyperlink).

6. As this article was being prepared for publication, Human Rights Watch released a comprehensive assessment of U.S. deportation practices over the past ten years. See HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY (July 2007), available at <http://hrw.org/reports/2007/us0707>.

Congress to carefully reevaluate IIRAIRA and argues that increased attention must be paid to the social costs of deportation. While the deportation of so-called criminal aliens may often be an appropriate sanction and legitimate public policy, IIRAIRA requires automatic use of mandatory detention and deportation for people like Hemnauth Mohabir, at the price of destroying their families. This policy is beyond reason and contrary to our traditional notions of justice and the national interest.

I.

THE LEGAL AND HISTORICAL FOUNDATIONS OF DEPORTATION

A. The Rise of Deportation as a Method of Crime Control

The United States government grants lawful permanent residents the privilege of living in this country for an indefinite period and the opportunity to eventually become citizens.⁷ While living in the United States, lawful permanent residents enjoy full and equal protection of the law.⁸ Like citizens, they go to school, raise families, work, and pay taxes. Many come here as children. In short, the United States is their home. They are, however, subject to an important distinction from citizens: they can be deported at any time if they are convicted of any of a wide range of crimes.⁹

Over the past twenty years this distinction has become increasingly pronounced. The numbers speak for themselves. The annual rate at which the United States deported non-citizens because of criminal convictions has risen from 1,978 in the year 1986, to over 88,000 in 2005.¹⁰ In a country that prides itself on equality under the law, the United States now has a two-tiered system of criminal justice, in which lawful residents are punished far more harshly than

7. 8 U.S.C. § 1101(a)(20) (2000) (“The term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”); § 1427(a) (permitting naturalization only after lawful permanent residence of at least five years).

8. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

9. 8 U.S.C. § 1227(a)(2) (2000). *See also* *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (“Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . . The Government’s power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.”) (internal footnotes omitted).

10. MARY DOUGHERTY, DENISE WILSON & AMY WU, U.S. DEP’T OF HOMELAND SEC. [DHS], OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS 2004, at 6 & tbl.4 (2005) [hereinafter ANNUAL REPORT], available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>. This number reflects the total number of criminal deportees, including both lawful residents and undocumented aliens. The failure to distinguish criminal deportees by immigration status is the subject of Part IV of this article.

their citizen counterparts for even the most trivial offenses.¹¹

The Constitution contains no explicit provision authorizing Congress to order the deportation of lawful residents; indeed, it makes only scant mention of citizenship.¹² At most, the power to deport may be inferred through the Naturalization,¹³ Commerce,¹⁴ and War Power Clauses.¹⁵ Otherwise, the document is silent on the legal status of immigrants. It is not clear that the founders of this country intended to create federal authority to deport lawful residents at all.¹⁶

The Supreme Court first held in 1893 that the power to deport people “rests upon the same grounds, and is absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”¹⁷ In *Fong Yue Ting*, the Court upheld the deportation of a long-term Chinese resident not because of any misconduct, but because of his failure to obtain proper proof of his lawful presence.¹⁸ The Court held that deportation was not punishment but merely an administrative method of enforcing immigration law.¹⁹ As such, the alien had “not been

11. See *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting) (noting that lawful residents who have been convicted of crimes involving moral turpitude may be “punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts”). Consider the fate of Linden Corrica, who was deported after serving a short sentence for selling marijuana. Robert Polner, *Burned by the System: Immigrant Caught with \$10 Worth of Pot Served 8 Days at Rikers in 2003 But Since Has Been Held by Feds and Now Faces Deportation*, N.Y. NEWSDAY, Mar. 13, 2005, at A8. In contrast, Noelle Bush, daughter of Florida Governor Jeb Bush, was sentenced to ten days in jail for contempt of court after she was found in possession of crack cocaine at a court-ordered drug rehabilitation program. She had been sent to the program after being arrested for attempting to fill a false prescription. *Noelle Bush Given 10 Day in Jail for Contempt*, CNN, Aug. 8, 2003, <http://archives.cnn.com/2002/LAW/10/17/noelle.bush/index.html>. Ms. Bush was able to go home to her family, but Linden Corrica was not. Because controlled-substance convictions render aliens inadmissible to the United States under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and there is no statutory waiver allowing admission for persons with controlled-substance convictions, Corrica’s deportation means he can never return to the United States.

12. Citizenship is mentioned only in terms of qualification for federal offices. See U.S. CONST. art. I, § 2, cl. 2; art I, § 3, cl. 3; art. II, § 1, cl. 4.

13. U.S. CONST. art. I, § 8, cl. 4.

14. U.S. CONST. art. I, § 8, cl. 3.

15. U.S. CONST. art. I, § 8, cl. 11. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting) (“The power of deportation is therefore an implied one.”).

16. During the debates on the Alien and Sedition Acts of 1798, James Madison questioned the source of authority to deport aliens and rejected the notion that once admitted, an alien’s presence in the country was revocable at any time. See James Madison, *James Madison’s Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., 2d ed. 1836). Even though aliens were not “parties to the Constitution,” it did not follow that they had no right to its protections. *Id.* After all, “aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.” *Id.* See also GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 52–71 (2005).

17. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

18. *Id.* at 731–32.

19. *Id.* at 730.

deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishment have no application.”²⁰

The earliest deportation laws were therefore corrective measures aimed at the deportation of aliens who should not have been permitted to enter the country in the first place. Therefore, early in its history, deportation bore some nexus to immigration enforcement.²¹ But it was not long before the Supreme Court sustained Congressional authority to deport aliens who had committed crimes after their entry: in *Bugajewitz v. Adams*, Justice Holmes, writing for the Court, upheld the deportation of a prostitute based on her misconduct after entering the United States.²² He made no effort to explain how the immigrant’s deportation was not punishment or was otherwise necessary for the sound enforcement of immigration law.²³ Instead, he relied on Congress’s “power to order the deportation of aliens whose presence in the country it deems hurtful” and to “refus[e] to harbor persons whom it does not want.”²⁴ Since *Bugajewitz*, deportation has increasingly become a surrogate for criminal law, bearing many of criminal law’s characteristics, including incapacitation, deterrence, and retribution.²⁵

It was not until the 1980s, however, that deportation of lawful permanent residents fully became the method of crime control it is today. In 1986, amid the war on drugs and the resulting explosion of the nation’s prison population,²⁶ the General Accounting Office (GAO)²⁷ began to investigate the prevalence of

20. *Id.*

21. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 500 (4th ed. 2005).

22. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

23. *See id.*

24. *Id.*

25. See Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the War on Terrorism*, 51 EMORY L.J. 1059, 1068–73 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1892–97 (2000). *But cf.* Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 127 (1977) (“In addition to being overly broad, the mass deportation of convicted aliens is ineffective because it fails to incapacitate the offenders at whom it is aimed. Once deported, the alien will be under powerful pressure to try to return, and many will succeed [F]amily and other ties may prove to be an irresistible lure to the deported alien.”). Indeed, of the 16,495 persons referred to U.S. Attorneys for prosecution for immigration crimes in 2000, 50% were charged with illegal re-entry after removal. JOHN SCALIA & MARIKA F.X. LITRAS, U.S. DEP’T OF JUSTICE [DOJ], *IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000*, at 2 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iofcs00.pdf>.

26. See *How the War on Drugs Influences the Health and Well-being of Minority Communities*, DPRC NEWSLETTER (RAND Drug Policy Research Ctr., Santa Monica, Cal.), June 2001, at 1, 1 (“Between 1983 and 1998, annual drug admissions to state and federal prisons increased almost 16-fold to about 170,000.”), available at <http://www.rand.org/multi/dprc/pubs/CP201.01.pdf>.

27. In 2004, the General Accounting Office was renamed the Government Accountability Office. The acronym GAO refers to the office under either name, as contextually appropriate.

crime among aliens in New York City and opened similar investigations in several other cities the following year.²⁸ Although it was quite apparent at the time that the failure to remove criminal aliens was due to administrative and resource allocation failure, “both Congress and the INS [Immigration and Naturalization Service²⁹] focused instead on restricting aliens’ procedural rights. Compared to the costly reforms necessary to improve the system, procedural fixes seemed easy and cheap.”³⁰

B. From Judicial Discretion to Mandatory Deportation

Before 1996, a lawful permanent resident placed in deportation proceedings because of a criminal conviction could apply for a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act.³¹ To prevail in such a case, the lawful permanent resident needed to show that the positive factors or other equities in his life, such as length of residence, education, employment history, tax payments, rehabilitation, and family ties outweighed the negative factors of his conviction.³² Between 1989 and 1995, approximately 10,000 lawful resident aliens were granted waivers under 212(c).³³

With the passage of AEDPA³⁴ and IIRAIRA,³⁵ however, Congress wrought a sea change. AEDPA greatly expanded the polyglot class of crimes known as “aggravated felonies,”³⁶ while IIRAIRA eliminated 212(c) relief and replaced it with a new form of relief called cancellation of removal.³⁷ Cancellation is similar to the old 212(c) waiver in that a lawful resident facing deportation may still obtain a discretionary waiver of deportation by showing that the positive factors

28. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 425–27, 429 (1999).

29. The INS ceased to exist on March 1, 2003, when most of its responsibilities were transferred to the newly created Department of Homeland Security. See Homeland Security Act of 2002 Amendments, P.L. 108-7, Div. L., § 105(a)(1) (amending Homeland Security Act of 2002, P.L. 107-296, § 1102); 8 C.F.R. § 2.1 (2007).

30. Schuck & Williams, *supra* note 28, at 423–24.

31. 8 U.S.C. § 1182(c) (1994) (repealed by § 304(b) of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 [IIRAIRA], Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996)). See also Immigration and Nationality Act of 1952 [INA], Pub. L. No. 82-414, 66 Stat. 163 (1952).

32. *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978).

33. *I.N.S. v. St. Cyr*, 533 U.S. 289, 295–96, 296 n.5 (2001).

34. Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], Pub. L. No. 104-132, 110 Stat. 1214 (1996).

35. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 [IIRAIRA], Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996).

36. AEDPA § 440(d) (expanding the list of deportable offenses); 8 U.S.C. § 1101(a)(43) (listing aggravated felonies).

37. IIRAIRA § 304(b) (repealing 212(c) relief); 8 U.S.C. § 1229b(a) (2000) (authorizing cancellation of removal for certain permanent residents).

of her life outweigh the negative.³⁸ The difference is that the cancellation-of-removal statute creates two additional statutory bars that can prevent lawful permanent residents from seeking such an exercise of discretion: a lawful permanent resident is ineligible to apply for cancellation if she has committed either: (1) an “aggravated felony”³⁹ or (2) any of a list of minor offenses within seven years of her arrival.⁴⁰ If she fails either of these requirements, she is subject to mandatory deportation.⁴¹

The problem with this scheme is that aggravated felonies, as defined in the statute, need not be felonies, or even convictions.⁴² Depending on the length of the sentence or the monetary loss involved, many misdemeanors under state law, such as shoplifting, may be considered aggravated felonies for deportation purposes.⁴³ Moreover, the requirement of seven years of lawful presence prior to the commission of even a minor criminal offense can lead to deportation even if the government does not seek deportation until many years after the commission

38. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (adopting the standards enunciated in *Matter of Marin* for purposes of cancellation of removal).

39. 8 U.S.C. § 1229b(a)(3) (barring cancellation of removal of permanent residents convicted of an aggravated felony).

40. 8 U.S.C. § 1229b(a)(2) (seven-year requirement), (d)(1)(B) (continuous residence deemed to end upon commission of an offense referred to in §§ 1182(a)(2), 1227(a)(2), or 1227(a)(4)) (2000). Aggravated felonies also bar adjustment of status, asylum, and voluntary departure. § 1182(h) (barring adjustment of status); § 1158(b)(2)(A)(ii), (B)(i) (barring asylum); § 1229c(a)(1) (barring voluntary departure).

41. The only exception would be a form of relief known as withholding of removal, which prohibits the deportation of an alien to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership in a social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A). However, aliens convicted of “particularly serious crimes” are ineligible for this relief. 8 U.S.C. § 1231(b)(3)(B)(ii). Convictions for aggravated felonies with a sentence of five years or more are presumed by statute to be particularly serious. 8 U.S.C. § 1231(b)(3)(B)(iv). Moreover, the attorney general has deemed all convictions for drug trafficking as presumptively particularly serious. *See Matter of Y-L, A-G-, R-S-R*, 23 I. & N. Dec. 270 (2002). A lawful permanent resident facing deportation for a minor crime would most likely be ineligible for asylum even if they had a reasonable fear of persecution because applications for asylum must be filed within one year of the alien’s arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). Further, a conviction for any aggravated felony, no matter what the sentence, is deemed a particularly serious crime barring asylum. 8 U.S.C. § 1158(B)(i).

42. 8 U.S.C. § 1101(a)(48)(A) (2000) (defining conviction as “a formal judgment of guilt . . . 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 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”). *See also Matter of Roldan*, 22 I. & N. Dec. 512, 523 (B.I.A. 1999) (holding that state rehabilitative statutes expunging records of guilt have no effect in determining whether an alien has been convicted, for immigration purposes).

43. For example, aggravated felonies include theft offenses for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(G). In New York, petit larceny (shoplifting) is a misdemeanor punishable by a maximum of one year. N.Y. PENAL LAW §§ 70.15(1), 155.25. Thus, a conviction in New York for the misdemeanor of petit larceny where a sentence of one year is imposed will be an aggravated felony for immigration purposes.

of the crime.⁴⁴

These provisions are the source of much hardship faced by lawful residents today. Because of these categorical prerequisites, immigration judges deciding deportation cases often lack discretion to consider important aspects of the lawful residents appearing before them. As the Court of Appeals for the Second Circuit has noted, a lawful permanent resident “convicted of an aggravated felony is automatically subject to removal, and no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation.”⁴⁵ Their families, the circumstances of their crimes, the length of time they lived in the United States, the age at which they arrived, their ability to survive elsewhere, and, most disgracefully in my view, their military service to the United States—none of these factors may enter the equation if the lawful permanent resident falls into one of the two statutory categories.⁴⁶

C. IIRAIRA’s Imposition of Mandatory Detention

IIRAIRA also contains mandatory-detention provisions requiring that non-citizens deportable because of criminal convictions be detained without bond, pending resolution of their cases in immigration court, a process that can take months or even years.⁴⁷ In 2003, over 235,000 aliens were detained by immigration authorities.⁴⁸ While IIRAIRA’s mandatory-detention provisions were the

44. See § 1229b(d)(1)(B) (tolling the accrual of continuous residence upon commission of a removable offense). See also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1942 (2000) (“Because there is no statute of limitations on deportation proceedings, it will not matter when the INS chooses to enforce the law or how much time the person will have lived in this country since the crime.”).

45. *United States v. Cuto*, 311 F.3d 179, 190 (2d Cir. 2002).

46. See *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) (upholding removal of Vietnam veteran). See also Mirta Ojito, *Veterans Lead a New Charge: Fighting Mandatory Deportation*, N.Y. TIMES, Apr. 4, 1999, § 4, at 3 (describing efforts of five veterans, including one disabled during his service, to avoid mandatory removal); Solana Payne, *Gulf War Veteran Continues His Struggle to Avoid Deportation*, NY1.com, June 26, 2006 (on file with the New York University Review of Law & Social Change).

47. See IIRAIRA § 303 (codified at 8 U.S.C. § 1226(c)(1)); *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding mandatory detention).

48. DHS, OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS 2004, at 5 (2005). ICE is the world’s largest agency with a purpose to apprehend people. MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 9 (2004). Detention space alone cost over \$1,500,000 per day in 2002. ALISON SISKIN, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS 13 (Apr. 28, 2004). In fact, immigration detention is the fastest growing segment of the nation’s corrections population. MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 151 (2002). For the private corrections industry and communities where detainees are held, the immigration-detention boom has been a boon. David Crary, *Private Prisons Experience Business Surge*, ASSOCIATED PRESS, July 31, 2005, available at <http://www.justicepolicy.org/news/news050731private-prisons.dwt>. Most recently, if not ominously, the well-connected Halliburton Corporation gained a lucrative contract for the construction of “emergency immigration detention

result of Congress's frustration with the high rate at which aliens failed to appear at hearings or to depart when ordered,⁴⁹ the reasons for this high absconder rate were varied and not entirely the fault of the aliens.⁵⁰ As with criminal deportation in general, Congress responded with unnecessarily harsh and overly broad legislation.⁵¹ Although detention of some immigrants may be a necessary evil,⁵² the categorical detention of lawful permanent residents without bond is an unnecessary administrative burden when applied to residents who have close community ties and are eligible for cancellation of removal. More importantly, it is also antithetical to fundamental notions of liberty, which dictate individualized determinations of the necessity of detention.⁵³

facilities" to be used in the event of an unexpected influx of immigrants that may result from new programs. Rachel L. Swarns, *Halliburton Subsidiary Gets Contract to Add Temporary Immigration Detention Centers*, N.Y. TIMES, Feb. 4, 2006.

49. See *Demore*, 538 U.S. at 513.

50. Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 537 (1999) (noting that before mandatory detention was imposed, approximately one-third of aliens not detained failed to appear for their immigration hearings and about 90% of those ordered removed failed to surrender themselves for removal, but that such failures to comply with immigration-court orders were often due to misunderstanding or lack of notice).

51. After a three-year experiment, the VERA Institute of Justice concluded that supervised release of criminal aliens was a less-expensive alternative than detention for the duration of deportation proceedings. EILLEN SULLIVAN, FELINDA MOTTINO, AGAY KHASHU & MOIRA O'NEIL, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 7 (VERA INST. OF JUSTICE 2004). The VERA Institute reported that criminal aliens released by the former INS into supervised release appeared 94% of the time. *Id.* at 8 tbl.1. Further, 69% of those in the program complied with the final order of deportation (i.e., the person actually left the country as required), compared to 38% in the comparison group. *Id.* at 5. More significantly, the cost per person in the program was \$3871, compared to \$4575 spent per person on continued detention. *Id.* at 8 tbl.1. The report, however, has been shelved. OFFICE OF THE INSPECTOR GEN. [OIG], DHS, AUDIT REPORT: THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS, Report # 1-2003-004, at iv (2003). However, writing for the majority in *Demore*, Justice Rehnquist dismissed the study as "of limited value" because the participants of the study "were admitted into the study group only after being screened for 'strength of family and community ties, appearance rates in prior legal proceedings, and eligibility to apply for a legal remedy.'" *Demore*, 538 U.S. at 519 n.5. Justice Souter, in dissent, replied, "That the Institute considered various screening criteria before authorizing supervised release does not undermine the value of the study, since any program adopted by the INS in lieu of mandatory detention could do the same." *Id.* at 565 n.21 (citations omitted).

52. See *Wing Wong v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); THOMAS ALENIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 697 (5th ed. 2003) (setting forth several justifications for detention).

53. See LEGOMSKY, *supra* note 21, at 544 ("[O]ut of deference to the liberty interests at stake, we willingly accept the cost of pretrial hearings before we detain people suspected of crimes. Why should we be any less willing to provide hearings before detaining people suspected to be removable?"); Peter H. Shuck, *INS Detention and Removal: A "White Paper"*, 11 GEO. IMMIGR. L.J. 667, 670 (1997) ("[W]idely-shared humanitarian values cause the public properly to view detention as

Thus, the dilemma of Hemnauth Mohabir: because he was convicted of misdemeanor possession of a controlled substance in 1997, within seven years of his arrival in the United States in 1993, he was ineligible for cancellation of removal even though the government made no effort to deport him until 2002. Moreover, his conviction subjected him to mandatory detention for the two years while his case was pending. In the end, he was ultimately deported. At no time were his wife and son, both U.S. citizens, considered as positive factors in his case.

II.

THE ADMINISTRATIVE PROCESS OF DEPORTATION

In the face of all indications to the contrary, the Supreme Court has stubbornly maintained the fiction that deportation is not punishment.⁵⁴ Thus, Congress has the power to design removal proceedings providing none of the constitutional protections that citizens take for granted.⁵⁵ Decisions finding that resident aliens are "persons" for purposes of due process has only moderately

the remedy of last resort, even where the alien does not possess a strong legal claim to release.").

54. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.") (internal citation omitted).

55. *See, e.g., I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (finding that the exclusionary rule barring admission of unlawfully obtained evidence does not apply in deportation proceedings); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (finding the prohibition of *ex post facto* laws in Article I does not apply in deportation proceedings); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (finding that certain provisions of the Constitution, including right to trial by jury, prohibition of unreasonable search and seizure, and prohibition of cruel and unusual punishment, do not apply to a person in deportation proceedings); *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (finding the double-jeopardy clause of the Fifth Amendment does not apply to deportation proceedings); *Bustos-Torres v. I.N.S.*, 898 F.2d 1053, 1056 (5th Cir. 1990) (finding *Miranda* warnings not required in the deportation context); *Vides-Vides v. I.N.S.*, 783 F.2d 1463, 1469 (9th Cir. 1986) (finding the Sixth Amendment right to counsel does not apply in deportation proceedings); *Chabolla-Delgado v. I.N.S.*, 384 F.2d 360, 360 (9th Cir. 1967) (finding the cruel-and-unusual-punishment provision of the Eighth Amendment does not apply to deportation proceedings), *cert. denied*, 393 U.S. 865 (1968). *But see Rios-Berrios v. I.N.S.*, 776 F.2d 859, 862 (9th Cir. 1985) (finding an alien entitled to due process in deportation proceedings under the Fifth Amendment). Ironically, courts have held that sentencing an alien to banishment in a criminal case may constitute cruel and unusual punishment. *Dear Wing Jung v. United States*, 312 F.2d 73, 76 (9th Cir. 1962) ("The condition is equivalent to a 'banishment' from this country and from [Petitioner's] wife and children, who will presumably remain here. This is either a 'cruel and unusual' punishment or a denial of due process of law. Be it one or the other, the condition is unconstitutional."); *State v. Sanchez*, 462 So.2d 1304, 1309-10 (La. Ct. App. 1985) (holding that suspension of sentence on the condition of defendant's permanently leaving the United States violated either due process or equal protection). Banishment of naturalized citizens has similarly been denounced. *See Klapprott v. United States*, 335 U.S. 601, 616-17 (1949) (Rutledge, J., concurring) ("To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power.").

tempered this deference to Congress's plenary power, by letting aliens decide how they are deported, but still allowing Congress broad discretion as to whether they are deported.⁵⁶

The deportation process can begin quite suddenly and without warning. Arrest by immigration authorities often happens years after a lawful permanent resident committed a crime and served the punishment for it. Lawful permanent residents returning from a trip abroad, such as Hemnauth Mohabir, may be shocked to learn that they are deemed inadmissible arriving aliens subject to deportation and mandatory detention because of their minor crimes years ago.⁵⁷ Similarly, lawful permanent residents who go to immigration offices to renew expired green cards, as required by law,⁵⁸ are increasingly being arrested when background checks reveal that they had been convicted of a crime that rendered them deportable.⁵⁹ U.S. Citizenship and Immigration Services (USCIS), the agency responsible for processing applications for naturalization and family-based green cards, has a policy of notifying ICE when applicants may be subject to deportation.⁶⁰ In addition, ICE has instituted a number of special initiatives to apprehend deportable aliens at their homes, jobs, or probation offices.⁶¹ Finally, lawful permanent residents convicted of crimes and sentenced to jail are increasingly being identified at the time of conviction by ICE. ICE then lodges a detainer with local authorities, requesting that the individual be placed in ICE's

56. *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903). See *Landon v. Plascencia*, 459 U.S. 21, 25–28 (1982); Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 737–39 (1995).

57. Lawful permanent residents returning from a brief trip abroad are generally not deemed “arriving aliens” unless they have been convicted of certain criminal offenses, including simple controlled-substance offenses or the ubiquitous “crimes involving moral turpitude.” See 8 U.S.C. § 1101(13)(C)(v) (2000); 8 C.F.R. § 1.1(q) (2006) (defining “arriving alien”). The designation of “arriving alien” is critical, as it triggers the mandatory detention provisions of 8 U.S.C. § 1225(b)(2)(A) (2000).

58. 8 C.F.R. § 264.5 (2006). See JAMES L. BUCK, IMMIGRATION & NATURALIZATION SERV., MEMORANDUM, ALIEN REGISTRATION DOCUMENTATION (FORM I-551) (July 18, 1989) (announcing ten-year expiration of green cards), reprinted in 66 No. 29 INTERPRETER RELEASES 869 app.III (1989).

59. See generally Interoffice Memorandum from Michael Aytes, DHS, U.S. Citizenship & Immigration Servs. [USCIS], *Disposition of Cases Involving Removable Aliens* (July 11, 2006) (on file with the New York University Review of Law & Social Change).

60. *Id.*; DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 3 (2007) (“From 1999 to 2004, some 3.6 million naturalization petitions were filed. More than one third—about 1.3 million—were denied, with many denied applicants immediately placed in deportation proceedings.”).

61. Fact Sheets—ICE IMMIGRATION ENFORCEMENT INITIATIVES, http://www.ice.gov/pi/news/factsheets/immigration_enforcement_initiatives.htm. In 2004, for example, some 150 people were apprehended at New York parole offices precisely because they were complying with the terms of their parole. Igor Gonzalez, *El estado tiende trampas a los inmigrantes*, HOY, June 15, 2004. See also OIG, AN ASSESSMENT OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENTS FUGITIVE OPERATIONS TEAMS, OIG-07-34, at 24 (2007) (noting the importance of state departments of corrections, parole, and probation in apprehensions), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf.

custody upon completion of her criminal sentence.⁶² For legal permanent residents who pled guilty to a minor crime on the understanding that they would have to serve a sentence of only days or weeks, this involvement by ICE is particularly surprising. Only eighteen states and the District of Columbia have laws requiring courts to advise criminal defendants of the potential immigration consequences of guilty pleas.⁶³ In the other states, including New York, neither criminal-defense attorneys nor the courts are required to advise non-citizen defendants that a guilty plea may result in deportation.⁶⁴

Once ICE has apprehended an individual, the Justice Department has broad discretion to determine where the individual will be detained.⁶⁵ Detainees may be held either in one of sixteen large processing centers run by ICE or by private contractors, or in one of the hundreds of local jails and temporary tent cities used for immigration detention. Most detention facilities are in rural locations, making access to lawyers, legal materials, and families extremely difficult.⁶⁶ For

62. 8 C.F.R. § 287.7 (2006).

63. See RE-ENTRY AND REINTEGRATION, *supra* note 5, at 368; ARIZ. R. CRIM. P. 17.2 (1998); CAL. PENAL CODE § 1016.5 (1985); CONN. GEN. STAT. § 54-1j (2001); D.C. CODE ANN. § 16-713 (2005); FLA. R. CRIM. P. 3.172(c)(8) (1999); GA. CODE ANN. § 17-7-93 (2004); HAW. REV. STAT. § 802E-2 (1993); 725 ILL. COMP. STAT. 5/113-8 (1993); MASS. GEN. LAWS ch. 278, § 29D (1998 & Supp. 2006); MINN. R. 15.01 (2006 & Supp. 2007); MONT. CODE ANN. § 46-12-210 (2005); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2002 & Supp. 2007) (Even with such a statute, the New York Court of Appeals has held that the failure of a trial judge to follow it does not render a plea involuntary and that defense counsel are not required to advise non-citizen defendants that a guilty plea may result in deportation.); N.C. GEN. STAT. § 15A-1022 (2000); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385 (2005); R.I. GEN. LAWS § 12-12-22 (2002); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989 & Supp. 2006); WASH. REV. CODE ANN. § 10.40.200 (2002); WIS. STAT. § 971.08 (1998). See also Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CAL. L. REV. 541, 554-55 (2004).

64. See *People v. Ford*, 657 N.E.2d 265, 269 (N.Y. 1995) (finding that neither counsel's nor the court's failure to advise the defendant of the immigration consequences of his guilty plea rendered the plea involuntary). *But see* *People v. Soriano*, 240 Cal. Rptr. 328, 336 (Cal. Ct. App. 1987) (finding that the defendant received ineffective assistance of counsel by counsel's failure to advise adequately of the immigration consequences of his plea); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."). The commentary to the American Bar Association Standards notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* at § 14-3.2(f) cmt.

65. See Comm. of Cent. Am. Refugees v. I.N.S., 795 F.2d 1434, 1437-38 (9th Cir. 1986) (noting that the Attorney General has a great deal of discretion in deciding where a person will be detained), *amended by* 807 F.2d 769 (9th Cir. 1987). *Cf.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554, 556, 557 n.13 (9th Cir. 1990) (finding that a transfer of a detainee that interferes with the legal representation of a detainee may constitute a violation of the right to counsel under the due process clause).

66. COMM'N ON IMMIGRATION, ABA, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 68

example, there is currently no immigration detention facility in New York City. Lawful permanent residents from New York subject to detention are initially held in one of several county jails in New Jersey while ICE decides where to schedule their cases.⁶⁷ Most detainees are transferred to detention facilities in other states, such as Louisiana, Texas, Arizona, and New Mexico, where costs of detention are cheaper.⁶⁸ ICE's decision whether to detain someone across the country or near New York is based solely on the availability of transportation and local bed space.⁶⁹ Location of the detainee's family, availability of evidence she may need to defend herself, and the accessibility of free or low-cost legal services are of no significance to ICE.⁷⁰

Detainees have regularly reported verbal, physical, and sexual abuse; lack of medical care; disrespect for religious practices; inedible food; and unsanitary conditions.⁷¹ These same concerns and complaints have been raised for over a

(2004). For a list of ICE processing centers, see <http://www.ice.gov/pi/dro/facilities.htm>. See also DOW, *supra* note 48, at 9; HUMAN RIGHTS WATCH, *LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES at INS Detention System* (1998) (reporting that the INS maintained contracts with 1041 local jails), available at <http://www.hrw.org/reports98/us-immig/>; Spencer S. Hsu & Sylvia Moreno, *Border Policy's Success Strains Resources: Tent City in Texas Among Immigrant Holding Sites Drawing Criticism*, WASH. POST, Feb. 2, 2007 (reporting that at one Texas tent facility, "immigrants are confined 23 hours a day in windowless tents made of a Kevlar-like material, often with insufficient food, clothing, medical care and access to telephones. Many are transferred from the East Coast, 1,500 miles from relatives and lawyers, virtually cutting off access to counsel.").

67. See generally ACLU OF N.J., *BEHIND BARS: THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF IMMIGRATION DETAINEES IN NEW JERSEY* (2007), available at <http://www.aclu-nj.org/downloads/051507DetentionReport.pdf>.

68. See Hsu & Moreno, *supra* note 66; *Crossing the Border: Immigrants in Detention and Victims of Trafficking, Part I: Hearing Before Subcomm. on Border, Maritime & Global Counterterrorism of the H. Comm. on Homeland Security* (Mar. 15, 2007) (testimony of Christina Fiflis) (noting that ICE has been transferring detainees from East Coast facilities to South Texas), available at <http://homeland.house.gov/SiteDocuments/20070315162756-61525.pdf> (see page 5). For a listing of detention facilities around the country, see <http://www.detentionwatchnetwork.org/dwnmap/> or <http://www.ice.gov/pi/dro/facilities.htm>.

69. See Hsu & Moreno, *supra* note 66; *Crossing the Border* (testimony of Christina Fiflis), *supra* note 68, at 5.

70. While I worked at the Legal Aid Society in New York City, ICE repeatedly refused or was unable to consider my requests for particular individuals to be detained in New Jersey during their proceedings, when they were eligible for waivers of deportation and had volunteer attorneys willing to represent them. Instead, ICE sent them to Oakdale, Louisiana, where there were no volunteer lawyers and where their families had difficulty attending their hearings. Equally frustrating was my inability to gain information about detainees' cases and whereabouts. In New York City, for example, the ICE office at Varick Street in charge of arresting and detaining aliens has no operator to answer the phone, and there is no automated answering system permitting people to leave a message.

71. See generally DOW, *supra* note 48; Brian Donohue & Tome Feeney, *Federal Detainees, County Headaches: Jersey Jails Trouble Increasing*, STAR-LEDGER, June 3, 2005. A December 2006 audit of five detention facilities revealed problems regarding health care, food, sanitation, grievance procedures, and access to counsel. OIG, DHS, *TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES*, OIG-07-01 (2006). In November 2004, Daniel Zwerdling of National Public Radio exposed the use of attack dogs at the

decade.⁷² Although detention facilities are supposed to operate in compliance with detailed standards established by the former INS,⁷³ these standards are informal and unenforceable.⁷⁴ The Department of Homeland Security (DHS) has opposed making the standards into enforceable regulations. The agency maintains that direct regulation would impede its ability to enforce the standards and would deter prisons from seeking contracts with ICE, further reducing the available bed space for immigration detention.⁷⁵ However, adherence to the stan-

Passaic County Jail, one of the jails audited by the OIG, to intimidate immigration detainees. Zwerdling followed up a year later with a report about a man who died of a heart attack in the Oakdale, Louisiana, facility following apparent neglect by facility staff. Zwerdling, *supra* note 2. See also *The Death of Richard Rust* (Nat'l Pub. Radio broadcast Dec. 5, 2005). The organization Stop Prison Rape has reported that "[t]hreats of violence and deportation have been used by immigration staff to coerce detainees into performing sex acts. Staff members have watched female detainees when they are dressing, showering, or using the toilet, and some regularly engage in verbal degradation and harassment of detainees." STOP PRISON RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION (2004), available at www.spr.org/pdf/NoRefugeHere.pdf. Two former detainees at the Passaic County Jail who had AIDS reported that the jail gave one detainee incorrect medication, made the other wait several days before providing his medication, prescribed medications that should not be taken in combination, failed to act promptly on blood tests, and discussed the detainees' medical conditions in front of other inmates and corrections officers. Asjlylyn Loder, *Two Men Say Passaic Jail Denied Them AIDS Drugs*, HERALD NEWS, Aug. 24, 2005. In May 2007, ICE prevented Jorge Bustamante, the United Nations Special Rapporteur on the Human Rights of Migrants, from fulfilling previously scheduled tours of various immigration detention facilities in the United States. Julia Preston, *U.N. Official Says He's Been Denied Access to U.S. Immigrant Jails*, N.Y. TIMES, May 15, 2007 (quoting Bustamante as stating, "My interpretation is that someone in the United States government is not proud of what is happening in those centers").

72. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1111-28 (1995).

73. DHS, DETENTIONS OPERATION MANUAL (last modified Oct. 12, 2006), available at <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

74. Interview with Christina DeConcini, Dir. of Policy, Nat'l Immigration Forum (Dec. 12, 2006).

75. *Id.* In October 2006, ICE announced:

To protect the well-being of its detainees at all times, ICE has begun supplementing its review of detention facilities by creating a new unit to provide oversight of these facilities within OPR [Office of Professional Responsibility]. This new unit will provide enhanced oversight of DRO [Detention and Removal Office] to ensure that detention standards are met. The unit will also facilitate examination being conducted by members of DHS Office of Civil Rights and Civil Liberties.

DHS, FACT SHEET: ICE ACCOMPLISHMENTS IN FISCAL YEAR 2006 (2006). It remains to be seen whether the creation of this new unit will have any effect, but I should note that the Office of Civil Rights and Civil Liberties has only four staff members. See *The Elimination of Prison Rape: Immigration Facilities and Personnel/Staffing/Labor Relations: Hearing Before the Nat'l Prison Rape Elimination Comm'n* (Dec. 14, 2007) (testimony of Rebekah Tosado, Dir. of Review & Compliance, Office of Civil Rights & Civil Liberties, DHS), available at http://www.nprec.us/docs/sximmigrdet_d13_strategies_qa.pdf (see page 0266). In August 2006, the DHS Inspector General reported that allegations of misconduct by ICE personnel which had been substantiated were not receiving timely or effective agency attention. OIG, DHS, A REVIEW OF IMMIGRATION AND CUSTOMS ENFORCEMENT DISCIPLINE PROCEDURES, OIG-06-57 (2006).

dards is not a condition for jails to obtain a contract.⁷⁶

The lawful permanent resident's lot improves little once immigration-court proceedings begin. The Immigration and Nationality Act, particularly after AEDPA's and IIRAIRA's amendments, is ridiculously complex.⁷⁷ One federal judge has derided contemporary immigration law as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the government and petitioners alike."⁷⁸ The Court of Appeals for the First Circuit recently lamented that the "current structure of deportation law, greatly complicated by rapid amendments and loop-hole plugging, is now something closer to a many-layered archeological dig than a rational construct."⁷⁹ Given the complexity of the law, the need for learned counsel is obvious. However, while the law allows aliens in removal proceedings to be represented by counsel, those who cannot afford counsel must represent themselves.⁸⁰ In 2005, sixty-five percent of the people whose cases in immigration court were completed—204,592 cases—proceeded without counsel.⁸¹

Moreover, the immigration judges presiding over deportation cases, who are employees of the Executive Office for Immigration Review (EOIR) within the Department of Justice, have been the subject of increasing scrutiny and criticism. Reports of judges' intemperate conduct have called into question the fairness of immigration proceedings.⁸² Meanwhile, "procedural reforms" initiated in 2002

76. For example, the Intergovernmental Service Agreements for the housing of immigration detainees at the Passaic and Bergen County Jails in New Jersey make no mention of the detention standards. INTERGOVERNMENTAL SERVICE AGREEMENTS (on file with the New York University Review of Law & Social Change).

77. See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101 *et seq.* (2000)).

78. *Drax v. Reno*, 338 F.3d 98, 99–100 (2d Cir. 2003).

79. *Kim v. Gonzalez*, 468 F.3d 58, 63 (1st Cir. 2006).

80. 8 U.S.C. § 1362 (2000) ("[T]he person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.").

81. BUREAU OF PLANNING, ANALYSIS & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DOJ, FY 2005 STATISTICAL YEARBOOK G-1 (2006).

82. Judge Posner has complained that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzalez*, 430 F. 3d 828, 830 (7th Cir. 2005). In 2006, Attorney General Alberto Gonzalez commissioned a study "to assess the strengths and weaknesses of the immigration court system." As a result, the Attorney General directed the implementation of a number of reforms intended to improve performance and oversight in the courts. DOJ, MEASURE TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS (2006). To be fair, immigration judges have been burdened with crushing caseloads, been provided little administrative support, and come under increasing interference by the Justice Department in the independence of their decision making. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006) (noting "the emerging fear [among immigration judges] that ruling against the government in a deportation case can be hazardous to one's job"). On the other hand, at hearings before the House Judiciary Committee this year, Monica M. Goodling, a former aide to Alberto Gonzalez, testified that immigration judges were screened for their political credentials and loyalty to the Republican Party rather than expertise in immigration law. *Hearing on: The Continuing Investigation into the U.S.*

at the Board of Immigration Appeals,⁸³ the unit of the EOIR that hears appeals from the immigration judges, have resulted in little more than a notable decline in the quality of Board review.⁸⁴ The result of this “reform” effort has been a more-than-threelfold increase in the number of appeals to federal circuit courts, whose review powers have also been limited by Congress.⁸⁵ If the situation was not bad enough, in 2005, Congress eliminated habeas corpus for aliens facing deportation, depriving them of a critical means of review of their cases.⁸⁶

III.

THE DESTRUCTION OF FAMILIES BY DEPORTATION

One of the predominant, if not paramount, features of United States immigration policy over the past eighty-five years has been the promotion of family unity.⁸⁷ Immigration by immediate relatives of U.S. citizens—spouses, children, and parents—is not subject to the same numerical limitations as other categories of immigration.⁸⁸ The Supreme Court has recognized that “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁸⁹ But the salient point—that U.S. citizen children suffer and an American family is destroyed when a parent is removed—was lost on Congress when it enacted IIRAIRA.

Justice Louis Brandeis noted this tragic dimension of deportation, writing

Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary (May 23, 2007) (remarks of Monica M. Goodling), available at <http://judiciary.house.gov/media/pdfs/Goodling11070523.pdf>; Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 30, 2007.

83. 8 C.F.R. § 1003 (2006) (reducing the availability of three-member panel review, greatly expanding use of affirmances without opinion, forbidding de novo review of factual findings, and eliminating half of the Board members.)

84. See, e.g., *Benslimane*, 430 F.3d at 829 (listing a dozen cases where the quality of administrative decisions was found to be below acceptable standards of due process); Legomsky, *supra* note 82, at 375.

85. See 8 U.S.C. § 1252(e) (2000); DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT (2003), available at http://www.dorsey.com/files/tbl_s21Publications/PDFUpload141/455/DorseyStudyABA_8mgPDF.pdf.

86. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302–11 (2005).

87. Legomsky, *supra* note 82, at 250; Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 729–30 (1996).

88. 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (“[T]he term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizen shall be at least 21 years of age.”).

89. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion) (holding that a municipal ordinance barring a grandmother from living with her grandson violated fundamental liberty interests in the family).

that it can destroy “all that makes life worth living.”⁹⁰ When people are deported, they are forcibly separated from spouses, children, and parents; they are torn away from their homes, sometimes the only homes they have ever known. When the deportee is a primary breadwinner, her family suffers extreme financial hardship. In this way, middle-class families have been reduced to poverty, rendered homeless, and forced to seek public assistance. This was certainly true for Carol McDonald, whose husband was ordered deported because of a conviction for sale of marijuana, for which he had already served twenty days.⁹¹ As McDonald states,

[r]aising a daughter without any help is a struggle. Natasha got sick last week and begged “Mommy, I need you, I need you, don’t leave.” She started to throw up. No matter how much it hurt, I had to send her to school and go to work as a home health aid. Our landlord tried to evict us three days before Christmas because he wanted more money. We had to fight to stay in the apartment, and must now pay a higher rent.⁹²

For innocent family members, particularly children, the deportation of a loved one can be psychologically and emotionally devastating. Birdette Gardiner-Parkinson, Director of the Caribbean Community Mental Health Program at Kingsboro Jewish Medical Center in Brooklyn, counsels the families of people facing deportation. Her experience working with these families suggests that children of deportees may suffer from identity-individuation trauma and attachment trauma.⁹³ She notes that early childhood trauma, such as the deportation of a parent, can “adversely affect[] attachment and interrupt the sequence [of] emotional development.”⁹⁴ Traumatic experiences in children can also affect “the thought process, learning, memory, self perception, and individual feeling about self and others.”⁹⁵ Children with severe attachment disorders may “exhibit signs of depression, aggression, or withdrawal. Some children with severe attachment disorders may exhibit signs of sleep disturbance, hoarding food, excessive eating, self-stimulation, rocking, or failure to thrive.”⁹⁶

Similarly, deportation of an elderly person or of the children of an older person confronts the older individual with “atypical challenges during a phase of life that should be reflective and self-affirming.”⁹⁷ At a deportation hearing

90. *Ng Fung Ho v. White*, 290 U.S. 276, 284 (1922).

91. See Polner, *supra* note 11.

92. Barbara Facey & Carol McDonald, *Bring Our Husbands Home*, ALTERNET, June 8, 2004, <http://www.alternet.org/story/18904/>.

93. Birdette Gardiner-Parkinson & Martine Cesaire-Francoise, *Immigration Laws and Impact on Caribbean Families*, 4–6 (2005) (presented at Social Work Educators Conference, Kingston, Jam.) (on file with the New York University Review of Law & Social Change).

94. *Id.* at 6.

95. *Id.* at 5.

96. *Id.* (internal citations omitted).

97. *Id.* at 7.

witnessed by sociology professor David Brotherton, a 75-year-old father begged in vain for mercy for his son, pitifully proclaiming, “We have been here for thirty years. America has been good to us. We love America.”⁹⁸ At the end of his testimony:

The father walks somewhat bewilderedly back to the center of the room and sits down a couple seats to my left. I look at him and smile but he fails to respond. His face expresses a mixture of disbelief, frustration and anxiety. How can this be happening to him at this stage in his life? He has gone through countless hardships to raise his six children. He left the country of his birth in 1972, seven years after the Revolution, in the middle of the bloody Berlaguer dictatorship with his entire family. He never had another child in the United States. He has managed so far to keep all his family together. Everyone was doing so well with the exception recently of his son. His daughters got married, they had beautiful children, lots of them. He still lives in the same house as when he moved here in that fateful year . . . and now this. How could he prepare himself for this moment when the very country that he has believed in all these years, that gave him an opportunity to be somebody, to live decently, to experience joy and happiness, how can this country do this to him, to his son? It doesn’t make sense. It just doesn’t make sense.⁹⁹

A 2004 study of the psychological impact of IIRAIRA which surveyed deportees, family members, and “parties connected to detainees/family members” found that 70% of respondents showed symptoms of post traumatic stress disorder.¹⁰⁰ “The most prevalent symptoms experienced as a result of the law were hopelessness/despair, sadness, shock and fear.”¹⁰¹ Children forced to leave the United States with their deported parents experience the wrenching loss of their homeland. While tens of thousands of U.S. citizen children have been left behind, sometimes in foster care, thousands of others have left the United States, their country of birth, to remain with their parents in countries they do not know.¹⁰²

98. DAVID C. BROTHERTON, NAT’L IMMIGRATION PROJECT, EXILING NEW YORKERS, available at <http://www.nationalimmigrationproject.org/KHA/Exiling%20New%20Yorkers.html>.

99. *Id.*

100. Dr. Luz Maria Villanueva, Psychological Impact of IIRAIRA on Legal Permanent U.S. Residents and Their Families (2005) (unpublished Ph.D. dissertation, San Diego Univ. for Integrative Stud.).

101. *Id.* (noting that study subjects “described [IIRAIRA] as Hitlerian, un-American, an example of Nazism. They point out that it strikes down the judicial branch of government and violates the constitution, while destroying family integrity and betraying its own U.S.-born children. They question IIRAIRA’s purpose, its unfairness, its inherent injustice, and discriminatory actions flowing from it.”)

102. See Nina Bernstein, *Caught Between Parents and the Law; In Deportation, Fate of Children Is Often an Afterthought*, N.Y. TIMES, Feb. 17, 2005, at B1 (noting that ICE “does not

The deportation of a family member dramatically increases the stress on families. Few countries offer any assistance to deportees in readjusting to their new home. Financially strapped countries like Trinidad & Tobago and Jamaica can afford to offer little more than advice and emotional support.¹⁰³ “In El Salvador . . . the criminal deportees are greeted at the airport by Roman Catholic charities workers, given a sandwich and bus fare, and sent on their way.”¹⁰⁴ In Guyana, the “lives of many of those deportees have fallen apart amidst loneliness, addiction and unemployment,”¹⁰⁵ while in Trinidad, “drug-addicted deportees sleep in downtown Port of Spain or scramble for casual labour to pay rent.”¹⁰⁶ Even harder, lawful permanent residents who have been deported lose all Social Security benefits they earned in the United States.¹⁰⁷ Consequently, the burden of supporting the deportee during readjustment to life in the home country often falls upon those left behind.¹⁰⁸

Deportees are the object of intense scorn throughout the Caribbean, where government officials have blamed them for an increase in crime.¹⁰⁹ U.S. diplo-

keep track of how many adults took along children who were citizens. But immigration experts say that just as thousands of such children are being left behind, thousands of others have been thrust, helter-skelter, into foreign lives”). See also *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977) (holding no violation of the right to live in the United States for citizen children of deportees who would be forced to leave the United States by virtue of their parents’ deportation because “[i]n the case of an infant below the age of discretion the right is purely theoretical . . . since the infant is incapable of exercising it”).

103. See, e.g., Sherwin Long, *Far from Home*, TRINIDAD GUARDIAN, Aug. 1, 2005 (describing the lack of services for deportees in Trinidad), available at <http://www.guardian.co.tt/archives/2005-08-01/features1.html>. One proposal under consideration in Jamaica is the creation of a farm village where deportees could learn to work the land. The program would be a collaboration between a non-profit organization and a trade association. No start date has been set. Tenesha Thomas, *Deportees to Get a Second Chance – Proposed Farm Village to Reintegrate Persons in Society*, JAMAICA GLEANER, Oct. 3, 2006, available at <http://www.jamaica-gleaner.com/gleaner/20061003/lead/lead9.html>. One existing government program for deportees in the Azores provides temporary housing and health insurance and helps deportees find jobs. Ric Oliveira, *Deportees Expect Hard Journey to Azores*, STANDARD-TIMES, May 17, 1999, available at <http://archive.southcoasttoday.com/daily/05-99/05-17-99/a01lo008.htm>.

104. Richard Randall, *The Deportation of Crime: U.S. Policy Causing Problems Elsewhere*, SEATTLE TIMES, Nov. 17, 2003, at A3.

105. Mike Ceaser, *The Burden of Being Sent ‘Home’*, BBC NEWS, Jan. 22, 2004, available at <http://news.bbc.co.uk/1/hi/world/americas/3417329.stm>.

106. *Id.*

107. 42 U.S.C. § 402(n) (2000).

108. See Randall, *supra* note 104 (“Some sink into despair, foraging for food or living on handouts sent by family members left behind in America.”); Mike Ceaser, *Convicts Deported from US Find Little Chance for New Start*, BOS. GLOBE, Feb. 1, 2004, at A4 (“Andrew Liddell, 33, left Guyana with his family for New York at age six, but found himself back again last August after serving two years in prison for cocaine possession. Surviving on money sent by U.S. relatives, he sees no prospects for finding a job.”).

109. Marc Lacey, *No Paradise for Criminals Deported to Jamaica*, N.Y. TIMES, Mar. 21, 2007 (“When deportees arrive, they find politicians and police officers blaming them for the island’s spiraling crime, and neighbors and even relatives turning their backs on them.”); Don Bohning, *Crime Problem in Jamaica Worsened by Deportees from U.S.*, OFFICIAL SAYS, MIAMI HERALD,

mats deny that there is a connection between deportees and crime in receiving countries, begging the question of how their deportation made the U.S. any safer to begin with.¹¹⁰ In any event, the governments of receiving countries have complained that deportees are often returned without notice or adequate information about their criminal histories, and that their criminal justice systems cannot handle the additional strain.¹¹¹ One Guyanese official commented, "By sending the criminal deportees back to the Caribbean countries where there are almost no rehabilitative programs to assist them, these countries are being penalized by a State whose social environment the criminalizing of these persons developed."¹¹²

Official resentment in Guyana has resulted in draconian legislation authorizing the surveillance of certain deportees.¹¹³ By far the worst official treatment endured by deportees occurs in Haiti, where they are typically taken directly to

Sept. 27, 1999, at A8. In 2004, a report commissioned by the U.S. embassy in Jamaica found that most criminal deportees returned to Jamaica had immigrated to the United States in their early twenties, disproving the commonly held belief that Jamaican immigrants learned criminal behavior while growing up in the United States. These data did not move government officials, who still blame deportees for contributing to the rise of crime in Jamaica. See Vernon Davidson, *Study Shatters Deportee 'Myth': US Data Show Criminal Behaviour Not Learnt in America*, JAMAICA OBSERVER, Sept. 28, 2004, available at http://www.jamaicaobserver.com/news/html/20040927t230000-0500_66758_obs_study_shatters_deportee_myth_esp. More recently, a Jamaican government study found that the crime rate was unaffected by deportees entering the country. *Govt Study Finds Direct Correlation Between Deportation and Crime*, JAM. INFO. SERVS., Sept. 14, 2006, available at http://www.jis.gov.jm/finance_planning/html/20060913t120000-0500_9999_jis_govt_study_finds_direct_correlation_between_deportation_and_crime.asp. See also Ana Menendez, *Deportees Face Animosity Upon Return*, MIAMI HERALD, Apr. 15, 2007, § A (quoting a recent deportee as saying, "The [Haitian] police be following you, people be blaming you. You got to watch yourself. They're scared of me and I'm scared of them.").

110. For example, the U.S. Ambassador to Trinidad & Tobago has pointed out that deportees make a "miniscule contribution" to the number of crimes in the receiving country (fewer than two percent of crimes reported in Trinidad & Tobago in 2000–2001), are not the most dangerous criminals in the United States, and had left their home countries at an age that belied the notion that they were socialized to be criminals in the United States. Press Release, U.S. Embassy at Trinidad & Tobago, *Much Ado About Criminal Deportees Crime Contribution* (Nov. 2003) (on file with the New York University Review of Law & Social Change).

111. Margaret H. Taylor & T. Alexander Aleinikoff, *Deportation of Criminal Aliens: A Geopolitical Perspective* 2, 6 (Inter-American Dialogue working paper, 1998) (on file with the New York University Review of Law & Social Change).

112. Odeen Ishmael, Ambassador of Guyana, Address at the Prince George Community College Caribbean Festival (May 7, 2000), available at http://guyana.org/Speeches/Ishmael_georgecollegemay7.html.

113. Response from USCIS, DHS, to U.N. High Commissioner for Refugees Request for Information, *Guyana: Information on the Treatment of Criminal Deportees*, available at <http://www.unhcr.org/home/RSDCOI/414ef10d4.html> (regarding the treatment of deportees to Guyana and describing the Prevention of Crimes Act of 2002 and criticisms leveled by opponents). See also GOV'T INFO. AGENCY OF GUYANA, *MONITORING OF DEPORTEES* (2003) (on file with the New York University Review of Law & Social Change) (noting measures by Guyanese police to monitor deportees but that there are "factors that hinder the monitoring process").

jail and held indefinitely upon their arrival in Port-au-Prince.¹¹⁴ Commenting on the conditions faced by deportees in the Haitian prison system, the Court of Appeals for the Third Circuit noted:

The prison population is held in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day. Many of the cells lack basic furniture, such as chairs, mattresses, washbasins or toilets, and are full of vermin, including roaches, rats, mice and lizards. Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two to three days. Because cells lack basic sanitation facilities, prisoners are provided with buckets or plastic bags in which to urinate and defecate; the bags are often not collected for days and spill onto the floor, leaving the floors covered with urine and feces. There are also indications that prison authorities provide little or no food or water, and malnutrition and starvation is a continuous problem. Nor is medical treatment provided to prisoners, who suffer from a host of diseases including tuberculosis, HIV/AIDS, and Beriberi, a life-threatening disease caused by malnutrition. . . . There are also reports of beatings of prisoners by guards. State Department reports on conditions in Haiti in 2001 and 2002 discussed police mistreatment of prisoners and noted that there were isolated allegations of torture by electric shock, as well as instances in which inmates were burned with cigarettes, choked, or were severely boxed on the ears, causing ear damage.¹¹⁵

One Haitian government official publicly stated that the purpose of the government's policy of detaining deportees in such deplorable conditions is to send a message to the new arrivals that this is what awaits them should they commit a crime in Haiti.¹¹⁶ Sadly, the effort to send this message is so excessive that some deportees do not survive their detention in Haiti.¹¹⁷ In other countries,

114. *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) ("Since at least 2000, it has been the policy of the Haitian government to detain deported Haitians, who have incurred a criminal record while residing in the United States and who have already served their sentences, in preventive detention."); Richard Chacon, *Imprisoned by Policy: Convicts Deported by US Languish in Haitian Jails*, BOS. GLOBE, Oct. 19, 2000, at A1.

115. *Auguste*, 395 F.3d at 129–30 (upholding the BIA's decision that the Haitian government's policy of detaining deportees under these circumstances does not violate U.S. obligations under the Convention Against Torture not to *refouler*, or send people to countries where they would face torture). See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), June 26, 1987, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85.

116. See Claude Adams, *Deported or Dumped?*, HAITI INSIGHT ONLINE, http://www.nchr.org/rmp/deported_dumped.htm (government official stating, "We want them to know what it means in Haiti when you get caught for breaking the law.").

117. Mara Delt, *Mother of Two, Deported to Haiti, Dies in Haitian Jail*, HAÏTI PROGRÈS, Sept. 27, 2000, available at <http://www.haitiprogres.com/2000/sm000927/XENG0927.htm>. In

such as El Salvador and Honduras, deportees endure widespread fear and contempt, rather than imprisonment by the government. Unofficial resentment in those countries has resulted in murders of deportees suspected of gang membership. According to one press account, "Regarded as pariahs in their native lands, [deportees] are hunted by vigilante squads, some shot down within days of stepping off the unmarked U.S. Marshal's Service Jetliners that carry them into exile several days every week."¹¹⁸

IV.

A POLICY STEEPED IN IGNORANCE

While it would be comforting to believe that AEDPA and IIRAIRA were enacted upon careful deliberation, the reality was different. Prior to passage of AEDPA, Senator Patrick Leahy commented, "I dare suggest, there are not five Senators in here who have even read the conference report or have the foggiest notion of what it is they are voting on."¹¹⁹ Congressional leadership was more concerned with passing symbolic legislation for the one-year anniversary of the Oklahoma City bombing and with emphasizing enforcement before the 1998 midterm elections than with enacting sound immigration legislation.¹²⁰

The media have drawn attention to IIRAIRA's effects and made famous some of the most extreme cases: the woman who was nearly deported for having pulled another woman's hair,¹²¹ the woman who sewed her mouth shut in protest of her son's deportation,¹²² the unemployed chef who was detained and placed in deportation proceedings for selling swipes on his metro card,¹²³ the boy who committed suicide after his father's deportation for possession of marijuana.¹²⁴ But while these articles, like Hemnauth Mohabir's story, make for heartbreaking tales, they are only occasional. Admittedly, many people subject to criminal deportation do not have clean hands; they committed crimes, albeit often very

2006, a Haitian penitentiary experienced a serious outbreak of beriberi, a disease caused by vitamin B₁ deficiency that attacks the nervous system, leading to the death of numerous deportees. Jeb Sprague & Eunida Alexandra, *Haiti: Mysterious Prison Ailment Traced to U.S. Rice*, INTER PRESS SERV. NEWS AGENCY, Jan. 17, 2007, available at <http://www.ipsnews.net/print.asp?idnews=36204>.

118. Randall, *supra* note 104.

119. 142 CONG. REC. S3427-04 (statement of Sen. Leahy); PHILIP G. SCHRAG, A WELL FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 153 (2000). Although he signed it into law, President Bill Clinton criticized AEDPA's "ill advised changes" eliminating relief from deportation for lawful residents. Statement on Signing the Anti-terrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 720 (Apr. 24, 1996).

120. See SCHRAG, *supra* note 119, at 153; FORCED APART, *supra* note 6, at 16-18 (discussing Congress's hasty deliberations over AEDPA and IIRAIRA).

121. Anthony Lewis, *Measure of Justice*, N.Y. TIMES, July 15, 2000, at A13.

122. Augustín Durán, *Se cose los labios en protesta*, EL DIARIO, Apr. 29, 2005, at 2.

123. Nina Bernstein, *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, N.Y. TIMES, Oct. 11, 2004, at B1.

124. Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1.

minor ones, for which they have been punished.¹²⁵ The issue, often missed by the media, is not whether innocents are being deported because of an irrational law, but whether and when deportation is an appropriate punishment for lawful residents who commit crimes.

Extreme cases in isolation do not even begin to express the depth of misery caused by criminal deportation law. Any fleeting impact these stories have on the public psyche is neutralized by vying news accounts and official propaganda touting government efforts to round up potentially dangerous fugitives and predators.¹²⁶ A recent DHS annual report on enforcement of immigration laws reads like a corporate newsletter, boasting of a greater number of criminal deportations than in previous years.¹²⁷ In reporting the crimes that most often lead to deportation, DHS simply lists eleven broad categories,¹²⁸ which leave the impression that everyone who was removed was a sociopath. For example, simply reporting that 37.5% of the deportations were based on convictions for “dangerous drugs”¹²⁹ tells us nothing. It is a category so broad that it encompasses those convicted of drug dealing and sentenced to long prison terms, as well as those who, like Hemnauth Mohabir, had been convicted of simple possession and sentenced to pay a fine.¹³⁰

So the questions remain. Who are these criminal aliens we are deporting? Where did they come from? How many were lawful residents? How old were they when they came to the United States? How long have they lived here? Are they married? Do they have children? Are their children and spouses U.S. citizens? Were deported family members the primary breadwinners? How integrated were they into their communities? What were the actual crimes that gave rise to their deportation? And how serious, really, were their crimes? Did they even go to jail? How many crimes did they commit, and how long ago did they

125. It is as equally unhelpful and misleading to isolate cases involving heinous or violent crimes to create broad hyperbolic comparisons of aliens with criminal records to terrorists. See, e.g., MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002).

126. See, e.g., *Raids Round Up 'Fugitive' Immigrants: Feds Increase Crackdown On Illegal Immigrants Convicted Of Crimes* (CBS television broadcast Aug. 10, 2006); *422 Fugitives Arrested During Six Month Period by ICE's Fugitive Operations Unit in Atlanta*, U.S. FED NEWS, Aug. 1, 2005 (quoting ICE press release); Brian Donahue, *Awaiting Next Stop: Deportation Dragnet Widens: Program Tracks Those Who Spurned Orders*, STAR-LEDGER, Mar. 2, 2004, at 19; Jerry Seper, *Initiative Targets Child Exploitation*, WASH. TIMES, July 9, 2003. See also Fact Sheet: Operation Predator, <http://www.whitehouse.gov/news/releases/2004/07/20040707-10.html>.

127. See ANNUAL REPORT, *supra* note 10, at 6.

128. *Id.* at 6 tbl.4. The categories are: dangerous drugs, immigration, assault, burglary, robbery, larceny, sexual assault, family offenses, sex offenses, stolen vehicles, other.

129. *Id.* at 5. Another report indicates that only 30,000 of the 139,000 criminal aliens removed in FY 1999 and FY 2000 were deemed so dangerous as to warrant escorts to their home countries. OIG, REPORT NO. I-2001-005, *THE INS ESCORT OF CRIMINAL ALIENS* (2001).

130. See FORCED APART, *supra* note 6, at 41–42 (noting that while “ICE prefers to highlight the worst, most violent offenses,” in fact, 64.6% of the deportations were for non-violent crimes).

commit them? The government, of course, does not report any statistics about the lives of people it deports, or about the “collateral” damage of deportation.¹³¹

Nina Siulc, an anthropologist at New York University, has studied the lives of deportees in the Dominican Republic. According to Siulc, 70% of the deportees she interviewed had been lawful permanent residents; 65% had lived in the United States for more than ten years; and more than 50% had left behind a U.S. citizen spouse or child.¹³² The Legal Aid Society in New York City, which maintains a hotline for detainees and their families to call for counsel and advice, gathers data about its callers.¹³³ Of the more than 300 callers to the hotline between January 1 and June 30, 2006, approximately 31% were lawful permanent residents.¹³⁴ Among these lawful permanent residents, 51% came to the United States under the age of eighteen; 45% had lived in the United States for more than twenty years; and 88% left behind a U.S. citizen spouse, child, or parent.¹³⁵

One study estimates that up to a third of non-citizens with criminal records are lawful residents.¹³⁶ Thus, of the nearly 90,000 criminal deportations in 2004, over 22,000 would likely have been of lawful permanent residents.¹³⁷ Employing a conservative assumption that only half of them had immediate family members who were U.S. citizens, the result would be the tearing apart of 11,000 families in that year alone. Human Rights Watch estimates that “at least 1.6 million family members, including husbands, wives, sons and daughters,

131. Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1; Bernstein, *supra* note 102. As part of its recent report, Human Rights Watch filed a request under the Freedom of Information Act requesting that ICE provide basic demographic information regarding the deportees, but after a year ICE had not provided the information. FORCED APART, *supra* note 6, at 43–44. As HRW noted, “[t]he history of ICE’s response to our repeated requests suggests at best a lack of commitment to transparency and the goals behind the FOIA legislation; at worst it suggests deliberate stonewalling.” *Id.* at 44. The Government Accountability Office has also complained that DHS had impeded its investigation into phone services for immigration detainees by delaying the release of documents, which were almost entirely redacted when finally turned over. *DHS Secrecy Blocks GAO Access*, UNITED PRESS INT’L, Apr. 26, 2007, available at http://www.upi.com/Security_Terrorism/Briefing/2007/04/26/dhs_secrecy_blocks_gao_access/1192.

132. *ABA Panel Discusses Detention and Removal Policies*, 83 NO. 9 INTERPRETER RELEASES 399, 401 (Feb. 27, 2006) (comments of Nina Siulc, VERA Institute of Justice).

133. The hotline is maintained with the assistance of volunteer attorneys from the law firm of Hughes Hubbard & Reed LLP.

134. Report on file with the New York University Review of Law & Social Change.

135. *Id.*

136. See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 382 (1999) (also estimating that the percentage of lawful residents among aliens with criminal records may be as low as 25%). As late as 2005, the Government Accountability Office still only reported on the total number of criminal aliens without distinguishing lawful residents from illegal aliens. See U.S. GENERAL ACCOUNTABILITY OFFICE, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS (2005).

137. See ANNUAL REPORT, *supra* note 10, at 6; DHS, 2003 YEARBOOK OF IMMIGRATION STATISTICS tbl.43 (2004).

have been separated from loved ones by deportations since 1997.”¹³⁸

None of this comes as a surprise. There has been no shortage of legal scholarship critical of IIRAIRA, with suggestions for its reform.¹³⁹ Unfortunately, of the few legislative proposals made during the 109th Congress to address the immigration consequences of criminal convictions, most proposed expanding the grounds for removal, rather than narrowing or reforming them.¹⁴⁰

Rather than create additional grounds for removal and subject more families to destruction, Congress should consider restoring immigration judges’ discretion in cases involving lawful permanent residents who are the parents of U.S. citizen children.¹⁴¹ This could be achieved by carving out a parental exception to the aggravated-felony and seven-year-lawful-presence prerequisites for eligibility for cancellation of removal.¹⁴² Besides restoring a modicum of humanity

138. FORCED APART, *supra* note 6, at 44 (further estimating that, of the 1.6 million family members affected by deportation, approximately 540,000 would have been U.S. citizens).

139. E.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (citing IIRAIRA as one of the latest and most egregious reasons for the “rather complete convergence” of criminal and deportation law, necessitating a re-evaluation of whether the constitutional norms applicable in criminal cases should apply in deportation cases); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (criticizing IIRAIRA’s per se list of criminal convictions mandating deportation without examination of individual circumstances, and arguing for the restoration of discretion to immigration judges to review each case individually); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (criticizing the retroactivity of IIRAIRA); Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000) (arguing that since deportation is now essentially used as a means to punish criminal behavior, deportation proceedings should be treated as “quasi-criminal” with some of the constitutional safeguards found in criminal proceedings); Schuck & Williams, *supra* note 136 (examining the political and policy failures leading up to IIRAIRA and suggesting a more federalist approach to enforcement).

140. H.R. 4437 (Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005) and S. 2611 (Comprehensive Immigration Reform Act of 2006) would have expanded the definition of aggravated felony to include aiding or abetting the commission of an aggravated felony, third drunk-driving convictions, false claims of citizenship, Social Security fraud, identification-document fraud, and certain visa frauds. H.R. 4437, 109th Cong., 1st Sess. § 805 (2005); S. 2611, 109th Cong., 2d Sess. (2006).

141. It did not take long before members of Congress, even supporters of the 1996 acts, realized that AEDPA and IIRIRA had gone too far in their harsh treatment of lawful residents, but several efforts to ameliorate the damage have failed. See FORCED APART, *supra* note 6, at 34–37.

142. See *supra* Part I. One bill currently before Congress would go even further by restoring discretion to immigration judges in cases involving undocumented aliens with children as well as lawful residents with children:

Section 1. DISCRETIONARY AUTHORITY WITH RESPECT TO REMOVAL OF PARENTS OF CITIZEN CHILDREN.

Section 240(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1229a(c)(4)) is amended by adding at the end the following:

‘(D) DISCRETION OF JUDGE IN CASE OF CITIZEN CHILD— In the case of an alien deportable under section 237 who is the parent of a child who is a citizen of the United States, the immigration judge may exercise discretion to decline to order the alien removed from the United States if the

to the deportation regime, such a modest provision would bring the United States into conformity with goals of the United Nations, which has recognized the need to consider the interests and rights of children in matters of deportation.¹⁴³ Such a provision would not prohibit immigration judges from ordering the deportation of parents who commit serious crimes, but merely allow judges to exercise common sense and rational compassion in appropriate cases involving U.S. citizen children. Had such a provision been in place in 2002, Hemnauth Mohabir might now be supporting his son in Brooklyn, instead of looking for work in Guyana.

Given political reality, however, members of Congress will be unwilling to risk appearing soft on crime (even if it means being pro-family) by agreeing to roll back “get tough” immigration legislation. Changing their minds will require

judge determines that such removal is clearly against the best interests of the child, except that this subparagraph shall not apply to any alien who the judge determines—

- ‘(i) is described in section 237(a)(4) [security and related grounds]; or
- ‘(ii) has engaged in conduct described in paragraph (8) or (9) of section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).’

H.R. 213, 110th Cong., 1st Sess. (2007).

143. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The preamble states that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance” Article 3 states that “[i]n all actions concerning children, whether undertaken by private or public social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.” Article 7 states that “as far as possible, [the child has] the right to know and be cared for by his parents.” The United States and Somalia are the only countries that have not ratified the Convention. Article 9, section 3, declares, “Where such separation [of a child from a parent] results from . . . deportation . . . that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.” See FORCED APART, *supra* note 6, at 49, 60 (noting that sixty-one governments around the world “offer non-citizens an opportunity to raise family unity concerns, proportionality, ties to a particular country, and/or other human rights standards prior to deportations” and that fifty-two governments actually require weighing family relationships when considering deportation). See also *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (finding that customary international law embodied in the Convention on the Rights of the Child, Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights requires that a lawful resident with citizen children be afforded the opportunity to argue for a waiver of deportation under INA § 212(h) if she has been in the United States for seven years and if her crime was classified as an aggravated felony after she committed it), *rev’d on exhaustion grounds sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), *abrogated by* *Guaylupo-Moya v. Gonzalez*, 423 F.3d 121, 136 (2d Cir. 2005) (rejecting *Beharry*’s reasoning that international law required consideration of family unity before deportation). *But see Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.) (noting that the Covenant on the Rights of the Child had “no direct application within Canadian law. Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”). See generally *Nora V. Demleitner, How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273 (2003).

solid proof that the current regime is not only unconscionably cruel, but costly to society as a whole. Therefore, Congress should require that ICE provide more comprehensive enforcement statistics, including the proportion of criminal deportees who are lawful permanent residents; the proportion who have U.S. citizen spouses, children, and parents; the number of citizen family members concerned; the ranges of ages and lengths of residency of the deportees; the types of crimes they committed; the ranges of their prison sentences; and their rates of recidivism. Faced with this evidence of the unfairness and devastation caused by the deportation system, Congress may finally recognize the need for reform.

Congress already requires collection and reporting of data on the lengths of detentions, transfers between facilities, reasons for releases (if any), and the number of criminal aliens apprehended but not detained.¹⁴⁴ Moreover, the Office of Immigration Statistics has reported that, through its Deportable Alien Control System (DACS), ICE collects information on “immigration status, type of entry into the United States, reasons for removal, history of criminal activity, limited employment information, and basic demographic information such as date of birth, gender, marital status, country of birth, country of citizenship, and country to which deported.”¹⁴⁵ Since ICE already tabulates such extensive information, comprehensive reporting of the data I describe should be within ICE’s abilities.

CONCLUSION

Ten years and hundreds of thousands of lives later, it is time for Congress to reflect on the impact IIRAIRA has had on American families and to determine whether the act’s supposed crime control benefits outweigh the social costs of taking parents from their children. If we must break up families and deport lawful permanent residents for their criminal conduct, let us do so only when necessary and in a manner that is rational, fair, consistent with our traditional notions of due process, and let us do so with our eyes wide open.

144. See Haitian Refugee Immigration Fairness Act, 8 U.S.C. §§ 1377–1378 (2000).

145. ANNUAL REPORT, *supra* note 10, at 3. However, the Inspector General of DHS has reported that for purposes of tracking their location within the detention system “DACS does not always contain accurate information on detainees.” OIG, OIG-07-08, REVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S DETAINEE TRACKING PROCESS (2006).

