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Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons

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Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons

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I. INTRODUCTION

Haroon Rashid has experienced a recent string of very bad luck. Following the attacks of September 11, 2001, he and his family, like many Americans of the Islamic faith, felt persecuted by their neighbors, despite having had nothing to do with the terrorist attacks on the World Trade Center and the Pentagon.¹ Mr. Rashid felt intimidated by people following him and calling his home to accuse him of complicity in the September 11 attacks.² After weeks of harassment, Mr. Rashid's family contacted the police.³ Unfortunately for Mr. Rashid, however, he shared a name with a suspected terrorist.⁴ Thus, instead of addressing Rashid's concerns, the U.S. government began to suspect him as well.⁵ Then, on April 17, 2003, Rashid was involved in a physical confrontation with some of the same local troublemakers who had been harassing his family during the previous two years.⁶ He claimed self-defense, but the prosecutor disagreed and charged him with third-degree assault, a misdemeanor,⁷ for which he was sentenced to 401 days in prison, most of which was suspended.⁸ Despite his relatively minor offense (he served well under one year in jail), the crime constituted an aggravated felony under federal immigration law. This meant that the government could deport Mr. Rashid without the procedural safeguards normally available to those facing deportation through a process known as expedited removal.⁹ The government wanted to separate Mr. Rashid from his home and family even though the law appeared unjustly applied in his case.¹⁰ Mr. Rashid had done nothing but share the name of a noted terrorist, yet the government singled him out for persecution under an overly broad immigration law.¹¹

1. Bill Johnson, *Who Committed the Real Crime? The Feds*, ROCKY MOUNTAIN NEWS (Denver), Sept. 20, 2006, at 7A.

2. *Id.*

3. *Id.*

4. *Id.*; see also Alan Rimmer, *Blitz on Britain: Evil Bin Laden's Bodyguard? He's a Man Utd Fan, Had a White Girlfriend and Left School with Half an O Level*, SUNDAY MIRROR (London), Aug. 7, 2005, at 16 (relating the history of similarly named Haroon Rashid Aswat, who allegedly masterminded the July, 2005 London transit bombings).

5. Johnson, *supra* note 1.

6. *Id.*

7. *Id.*

8. Bruce Finley, *Pakistani Could Be Deported As Immigration Case Dropped*, DENV. POST, Nov. 3, 2006, at A-01.

9. *Id.*; see also Immigration and Nationality Act of 1952 § 238, 8 U.S.C. § 1228(a) (2000) (enacting expedited removal procedures).

10. Johnson, *supra* note 1.

11. See *id.* (noting that federal name misidentification led to Rashid's deportation).

Deportation is one of the most serious penalties that any system of justice can administer.¹² Expedited removals, however, appear less like punishments and more like actions to deport dangerous aggravated felons quickly for public safety concerns.¹³ Nevertheless, immeasurable punitive consequences accompany deportation as a matter of course. Like Mr. Rashid, deported immigrants face the loss of their adopted homeland and potential separation from their families and loved ones. They often return to a country where they do not have relatives, friends, or a place to stay. In many cases, they do not even speak the language. Thus, the government should exercise extreme caution in crafting the laws that regulate this harsh punishment. In practice, however, the government has been haphazard and oblivious to such concerns when it comes to those immigrants convicted of aggravated felonies.¹⁴

An alien convicted of an offense defined as an aggravated felony is not entitled to procedural safeguards like appeals, judicial discretion, and asylum, which may prolong or forestall her deportation; instead, she is subject to expedited removal from the United States with no possibility of reentry.¹⁵ The concept of the aggravated felony in U.S. immigration law was designed to provide as few barriers as possible to the removal of dangerous aliens and thereby make the system run more efficiently.¹⁶ The definition of “aggravated felony,” however, has evolved since Congress enacted the statute in 1988. Then, the term only encompassed the most serious crimes, such as murder and drug trafficking.¹⁷ In the years that followed, Congress added other crimes to the list, including paradigmatic examples of aggravated felonies such as theft, burglary, possession of child pornography, and

12. See, e.g., *Lehman v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) (noting that deportation is “punishment of the most drastic kind”).

13. See 8 U.S.C. § 1228(a) (enacting deportation procedures as separate from incarceration and punishment procedures); see also *id.* § 1101(a)(43) (2000 & Supp. V 2005) (defining aggravated felonies as vicious crimes such as murder, rape, and sexual abuse of minors, among others).

14. See *infra* Part II (discussing the controversial history of federal deportation law).

15. See 8 U.S.C. § 1228(a)-(b) (2000) (granting Attorney General wide discretion to establish expedited removal procedures without protections typical to deportations).

16. See 136 CONG. REC. S17, 117-18 (1990) (statement of Sen. Graham) (“The aggravated felony aliens’ provisions in the 1988 [Anti-Drug Abuse Act] were important steps toward solving a major problem . . . of how to expeditiously remove from our streets those aliens who are convicted of [violent crimes].”); see also 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE § 2.04(10)(c)(i) (2007) (describing the Anti-Drug Abuse Act of 1988 as “a major statutory effort to cope with the epidemic of narcotics traffic”).

17. See Linda Drazga Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 529 (2003) (describing changes in the definition of an aggravated felony).

“crimes of violence.”¹⁸ Congressional reforms have continued to expand the list of aggravated reforms to the point where today many of these offenses would not even be considered “aggravated” by most people. Indeed, some of them are not even felonies.¹⁹ Some jurisdictions even have incorporated minor offenses, such as possessing small amounts of drugs and shoplifting, into the aggravated felony definition.²⁰ This expansion does not comport with the original goals of expedited removal.²¹ After all, shoplifters are not tremendous dangers to the public, and their deportation does little to make the United States a safer place.

Mr. Rashid’s case is far from an isolated incident. Many immigrants convicted of minor offenses have been victims of unjust expedited removal.²² Increasing enforcement in recent years has exacerbated the problem. In 2006, the United States deported more than 23,000 aggravated felons through expedited removal—more than double the number of those deported through the process fifteen years ago.²³ With concerns about border security, terrorism, and illegal immigration dominating the nation’s political landscape, politicians from both sides of the aisle have raised proposals to increase the law’s scope.²⁴ In the near future, Congress could expand the concept to include illegal entry into the country.²⁵ Already, the current scope of aggravated felonies is overreaching, and additional expansion would only exacerbate the problem. While some may contend that all offenses committed by immigrants should be sufficient to warrant deportation, the reality is that deportation, especially expedited removal, is such a serious consequence that society should impose it on only the most serious offenders.

18. *Id.*

19. *See, e.g.*, Patrick McGee, *Deportations Have Spiked Over Decade*, FORT WORTH STAR-TELEGRAM, Sept. 17, 2006, at A17 (noting legislative trend in classifying minor crimes as “aggravated felonies” to widen deportation options).

20. *Id.*

21. *See* 136 CONG. REC. S17,117-18 (1990).

22. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 513 (2003) (reviewing petition of an immigrant who was ordered to be deported under aggravated felony rules after burglary and petty theft convictions); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1154 (9th Cir. 2002) (reviewing petition of an immigrant who was ordered to be deported under aggravated felony rules after petty mail theft conviction).

23. Lara Jakes Jordan, *Re-Arrest Rate Among Illegal Immigrants High, Study Says; Group Questions How “Felon” Was Defined in the Report*, FORT LAUDERDALE SUN-SENTINEL, Jan. 9, 2007, at 3A.

24. *See, e.g.*, Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (proposing bi-partisan immigration reform).

25. *Id.* § 202 (proposing adding the crimes of illegal entry and reentry, which carry a sentence of one year or more, to the list of aggravated felonies).

The law's expansive scope highlights the difficulty legislators face when balancing immigrants' legal rights with concerns for the security of the general populace. Immigrants facing deportation have the right to an expedient and fair resolution to their cases. On the other hand, Americans have a right to protection from dangerous criminals. Procedural due process is at odds with procedural efficiency and domestic security in this case. This Note will argue that a serious imbalance exists, with due process taking a back seat to the other two concerns. It also will explore ways to modify the law of aggravated felonies to protect the American people from the most serious offenders without eviscerating the rights of offenders facing the prospect of undeserved deportation.

Part II of this Note will discuss the history of aggravated felonies under immigration law and explore how the definition has expanded from a straightforward list of offenses to the all-inclusive list that exists today. Part III will analyze the tension between the competing interests of domestic security and the rights of those facing deportation. Finally, Part IV will propose a solution that reconciles these two interests and curtails the seemingly unending expansion of the list of aggravated felonies.

II. BACKGROUND: THE HISTORY OF THE ROLE OF AGGRAVATED FELONIES IN UNITED STATES IMMIGRATION LAW

Given the importance of both immigration and crime reduction in American politics, it seems logical that the federal government would design an immigration policy that bolsters domestic security. Hence, one would assume that procedures have been in place for decades through which the government could deport immigrants convicted of serious felonies as soon as they serve their sentences. After all, the United States implemented procedures for deporting aliens who have proven that they no longer deserve the right to stay in this country long ago.²⁶ Furthermore, both non-citizens and convicted felons, members of the affected group, cannot vote, so little political backlash would result from a harsh deportation policy for convicted felons.²⁷ Surprisingly, however, only in the last few decades have concerns about recidivism among immigrants convicted of serious felonies

26. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181, 4471-72 (1988) (codified as amended at 8 U.S.C. § 1228 (2000)) (authorizing expedited removal of immigrant aggravated felons).

27. See U.S. CONST. amends. XIX, XXIV, XXVI (extending the right to vote only to United States citizens older than age 18); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996) (affirming state power to deny the right to vote to convicted felons).

led to a system of expedited removal. Once in place, the process did not remain static for long; it evolved through a rapid series of amendments made in the past two decades.²⁸

A. *The Penalty for Aggravated Felons*

Naturally, aliens convicted of aggravated felonies are subject to deportation proceedings;²⁹ however, many other adverse consequences accompany these proceedings. Immigrants convicted of aggravated felonies are held without bail pending deportation.³⁰ Unlike immigrants subject to deportation for other reasons, aggravated felons may not be permitted to apply for discretionary relief to the Attorney General³¹ or for writs of habeas corpus.³² Furthermore, the burden of hardship that they must demonstrate to establish extenuating circumstances is higher than it is for other immigrants facing deportation,³³ and a trial judge may not at his or her discretion decide that deportation is not the right course of action.³⁴ Unlike other immigrants facing deportation, the government will not allow those convicted of aggravated felonies to leave the country voluntarily to avoid deportation proceedings.³⁵ Therefore, once convicted of an aggravated felony, regardless of any extenuating circumstances, there is little chance that an immigrant will avoid deportation.³⁶

The current aggravated felony statute contains a number of presumptions that make the prospect of deportation for a convicted aggravated felony a near certainty. First, the law presumes that an aggravated felon is deportable.³⁷ Therefore, the immigrant bears the burden of showing that she is entitled to remain in the country, a dif-

28. See *infra* Part II.B (discussing the rapid changes in the expedited removal law since its 1988 introduction).

29. Immigration and Nationality Act of 1952 § 238, 8 U.S.C. § 1228(a) (2000).

30. *Id.* § 1226(c)(1); see also *Demore v. Kim*, 538 U.S. 510, 517 (2003) (holding that the government may deny bail when detaining immigrants convicted of aggravated felonies under 8 U.S.C. section 1226(c) without violating the Fifth Amendment's Due Process clause).

31. 8 U.S.C. § 1226(e). Although the statute was deemed unconstitutional by the Third, Fourth, Ninth, and Tenth Circuits, the Supreme Court affirmed its constitutionality in *Demore v. Kim*, 538 U.S. at 515-16.

32. *Demore*, 538 U.S. at 541 (Souter, J., dissenting).

33. 8 U.S.C. § 1182(h) (denying issuance of a "waiver" from Attorney General to aggravated felons).

34. Immigration and Nationality Act of 1952 § 238, 8 U.S.C. § 1228(a) (2000).

35. *Id.* § 1254a.

36. *Id.* Even if an immigrant can obtain review of the decision to deport her, such appeals seldom result in favorable decisions for aggravated felons. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 16, § 72.05(2)(c).

37. *Id.* § 72.05(2)(a).

ficult burden to overcome.³⁸ An aggravated felon is also ineligible for asylum,³⁹ cancellation of removal,⁴⁰ or voluntary departure⁴¹ because aggravated felons, by statutory definition, lack “good moral character.”⁴² Because of the natural flight risk of such offenders, they are subject to mandatory detention without bond.⁴³ Unlike most other judicial proceedings in the United States, hearings for aggravated felons do not include a right to judicial review of their deportation orders.⁴⁴ Hence, there is a greater danger of an uncorrected lower court error than in most other proceedings where appellate courts serve as a check against errors.

Perhaps the most serious consequences for the aggravated felon transpire after deportation. The law permanently bars aggravated felons from reentering the United States.⁴⁵ Furthermore, if aggravated felons do reenter the country, they face potential fines and imprisonment in addition to the normal penalties for the crime of illegal reentry after deportation.⁴⁶ Although the statute does not specify a mandatory minimum sentence, it does indicate a significant upgrade in the immigrant’s offense under the federal sentencing guidelines.⁴⁷ While the guidelines are no longer mandatory, they are certainly persuasive,⁴⁸ especially when coupled with the immigrant’s prior felony.

B. The Development of the Aggravated Felony Provision

The Immigration and Nationality Act of 1952 has regulated deportation procedures for more than half a century.⁴⁹ Not until the passage of the Anti-Drug Abuse Act of 1988,⁵⁰ however, did Congress incorporate the aggravated felony concept into U.S. immigration law. Originally designed to reduce international drug trafficking, the statute defined an aggravated felony as “murder; . . . any drug trafficking

38. *Id.*

39. *Id.* § 72.05(2)(c).

40. *Id.*

41. *Id.*

42. *Id.* (citing 8 U.S.C. § 1259(c) (2000)).

43. *Id.* § 72.05(2)(b)(i). *See also* Immigration and Nationality Act of 1952 § 238, 8 U.S.C. § 1228(a) (2000).

44. 8 U.S.C. § 1252 (2000 & Supp. V 2005).

45. *Id.* § 1182 (2000).

46. *Id.* § 1326.

47. 8 U.S.C. § 1101; *see also* Maxfield, *supra* note 17, at 530.

48. *United States v. Booker*, 543 U.S. 220, 237-39 (2005) (holding that federal sentencing guidelines could not be mandatory because they violated the Due Process Clause by punishing an offender to a predetermined level without consideration of her individual circumstances).

49. *See* 8 U.S.C. § 1227 (2000 & Supp. V 2005) (categorizing deportable aliens).

50. Pub L. No. 100-690, 102 Stat. 4181 (codified in scattered titles and sections of U.S.C.).

crime[;] . . . any illicit trafficking in any firearms or destructive devices[;] . . . or any attempt or conspiracy to commit any such act.”⁵¹ Under this statute, the only non-drug related crimes deemed aggravated felonies were murder and attempted murder.⁵² This indicates that, at the time of the statute’s passage, Congress did not intend to use the aggravated felony provision to rid the country of all immigrant criminals or violent offenders.⁵³ Rather, the provision was primarily an effort to curtail the international drug trade, with a provision to rid the country of the most dangerous criminals—murderers.⁵⁴ Considering the frequency with which drugs cross the borders and the fact that they are often transported by non-citizens, immigration reform and tighter border control logically should curtail the flow of drugs into the United States.⁵⁵ Congress may have had immigration concerns in mind, but they were secondary to the drug trafficking problems.⁵⁶

Congress intended to apprehend drug traffickers in any way possible.⁵⁷ If it could not catch them importing the drugs, it would catch them possessing or selling the drugs or even disposing of their drug money.⁵⁸ By focusing so heavily on drug-related offenses, Congress made a system of removing dangerous offenders from this country, a premise that seemed pragmatic and beneficial for the public.⁵⁹ However, due to the problematic manner in which Congress designed these regulations,⁶⁰ it created a system that was ripe for excessive expansion. It did not take long for the system to become excessively expansive.⁶¹ Although Congress enacted the statute to control drug trafficking, it simultaneously gave itself an avenue to address and punish the most serious crimes committed by immigrants with the potential for expansion into lesser crimes.⁶²

51. *Id.* § 7342 (codified as amended at 8 U.S.C. § 1101(a)(43)).

52. *Id.*

53. Theresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 625-26 (2003).

54. *Id.*

55. *Id.*

56. *Id.*

57. *See, e.g.*, 136 CONG. REC. S17,106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy).

58. *See* Miller, *supra* note 53.

59. *Id.*

60. *See infra* text accompanying notes 100-06.

61. *See infra* Parts III & IV.

62. *See* Anti-Drug Abuse Act of 1988 § 4108.

C. The Inclusion of Additional Crimes Including Crimes of Violence

In 1990, Congress exploited the opportunity for expansion by expanding the definition of aggravated felony to include any “crimes of violence.” In the Immigration Act of 1990, Congress provided that any “crime of violence . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least one year” also would be considered an aggravated felony.⁶³ Thus, Congress created a non-exhaustive list of offenses through which the government could remove dangerous offenders from the populace.⁶⁴ Surprisingly, truly heinous crimes like rape, kidnapping, and assault with a deadly weapon were not included as aggravated felonies until Congress added these crimes of violence.⁶⁵ In expanding the scope of the aggravated felony, Congress had two goals in mind, neither of which sought to address the inherent danger to the public of violent offenders. Congress expanded the definition “to capture those egregious crimes of violence that are often concomitant with drug related crimes.”⁶⁶ Congress also sought to reduce the strain on the judicial system imposed by immigrants who contest deportation solely to prolong their stays in the country.⁶⁷

Additional congressional action supports the contention that Congress created and expanded the statute to combat the drug trade.⁶⁸ Prior to the crime-of-violence amendments, only those drug trafficking offenses that were listed in the statute fell under the definition of aggravated felony. The post-1990 definition included “any illicit trafficking in any controlled substance,”⁶⁹ which increased the number of covered drug offenses. The amendments also added money laundering to the list of aggravated felonies.⁷⁰ Because money laundering plays an important role in the international drug trade, its in-

63. 8 U.S.C. § 1101 (2000 & Supp. V 2005).

64. *Id.*

65. See 136 CONG. REC. S6586, S6603 (daily ed. May 18, 1990) (noting that as of May 18, 1990, the definition of “aggravated felony” was limited to occurrences of murder, drug trafficking, and firearms/weapons trafficking).

66. *Id.*

67. See 136 CONG. REC. S17106, S17109 (daily ed. Oct. 26, 1990) (discussing problems faced by the judicial system in deporting convicted aliens).

68. See Brian Haynes, Comment, *Matter of A-A: The Board of Immigration Appeals’ Statutory Misinterpretation Denies Discretionary Relief to Aggravated Felons*, 34 SANTA CLARA L. REV. 247, 254-55 (1993) (discussing expansion of the “aggravated felony” definition to include drug offenses).

69. Immigration Act of 1990 § 501, 8 U.S.C. § 1101(a) (2000 & Supp. V 2005).

70. *Id.*

clusion in the definition augments the original purpose of the statute.⁷¹

Finally, Congress modified the law to include state law convictions in the definition of aggravated felony.⁷² This expansion was logical because a regulation that punishes immigrants who commit felonies that happen to violate federal but not state law would create inequitable results. Furthermore, because the bulk of crimes committed in this country violate state law,⁷³ the law would be highly ineffective if it excluded state law offenses. Whether Congress intended the term "aggravated felony" to reduce the number of violent criminals on the street or reduce the flow of drugs across the border, neither end could be accomplished effectively if state law offenders were immune. Therefore, this expansion made enforcement of the law uniform and extensive.

In 1991, Congress again broadened the definition of aggravated felony, but not to the extent that it had the year before.⁷⁴ Most importantly for the purposes of this Note, the 1991 amendments established that an immigrant no longer had to commit a single offense punishable by five or more years imprisonment to constitute an aggravated felon. Under the new definition, the law aggregated multiple offenses to reach the five-year minimum.⁷⁵ Again, it became easier for the government to classify an offender as an aggravated felon. Though this change appears relatively insignificant, these amendments began to erode the "felony" element of "aggravated felony." Perhaps if Congress's purpose in defining the term had been a more logical one—to protect the public from dangerous offenders—there may not have been as much potential for expansion of the term into areas in which it has no place.⁷⁶

71. See Scott Ehlers, *Drug Trafficking and Money Laundering*, FOREIGN POL'Y FOCUS, June 1998, at 1-3 (detailing the connection between money laundering and the drug trade); see also Peter J. Kacarab, *An In Depth Analysis of the New Money Laundering Statutes*, 8 AKRON TAX J. 1, 66-67 (1991) (describing money laundering as "the lifeblood of the drug trade and other criminal organizations").

72. 8 U.S.C. § 1101(a).

73. See generally UNITED STATES DEPARTMENT OF JUSTICE, PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT (2006), available at <http://www.fbi.gov/ucr/prelim06/index.html> (providing crime statistics by region).

74. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751 (1991) (codified as amended at 8 U.S.C. § 1182).

75. *Id.*

76. See *infra* Part IV (discussing possible solutions to aggravated felony issues).

D. The Effect of Terrorism on the Definition

The attacks of September 11 intertwined society's understanding of terrorism and immigration reform.⁷⁷ However, it was actually a decade earlier, after the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, that Congress began to address the issue of domestic terrorism through immigration reform, particularly in the arena of aggravated felonies. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act.⁷⁸ The second of these acts reduced the sentence length necessary to trigger a crime-of-violence designation from five years to one year⁷⁹ and increased the number of categories of crimes that qualify as aggravated felonies by eight.⁸⁰ Consequently, a number of crimes that are hardly "aggravated" and some that are not felonies in all jurisdictions can subject an offender to deportation as an aggravated felon.

Through the 1996 acts, Congress addressed aggravated felonies in an arena other than drug enforcement.⁸¹ However, it still did not intend to protect the public from dangerous recidivist offenders; rather, its purpose was to prevent terrorism.⁸² Although the link between immigration and terrorism may be obvious in a post-9/11 world, it was less clear in 1996.⁸³ The Oklahoma City bombing was the primary impetus for these reforms, even though United States citizens executed the attack.⁸⁴ Despite this fact,⁸⁵ potentially dangerous immigrants provided a convenient scapegoat for the American people. During deliberations, a number of congressmen questioned the tenuous link between an immigrant's commission of a crime and that

77. See generally Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63 (2002) (describing the effect that the September 11 attacks had on American immigration policies).

78. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-79 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)).

79. Immigration Reform and Immigrant Responsibility Act § 321.

80. *Id.*

81. Illegal Immigration Reform and Immigrant Responsibility Act § 321; Antiterrorism and Effective Death Penalty Act § 440.

82. Illegal Immigration Reform and Immigrant Responsibility Act § 321; Antiterrorism and Effective Death Penalty Act § 1.

83. See Taylor, *supra* note 77, at 73.

84. Ralph Blumenthal, *Release of Oklahoma City Bombing Figure Kindles Fears*, N.Y. TIMES, Jan. 19, 2006, at A3.

85. *Id.*

immigrant's status as a terrorist or drug trafficker.⁸⁶ However, the statute passed successfully, and the minimum sentence constituting a crime of violence stands at one year.⁸⁷

Perhaps the most serious consequence of the 1996 reforms is that Congress incorporated offenses committed prior to 1996 as aggravated felonies that could subject an immigrant to deportation.⁸⁸ Hence, an immigrant could have committed an offense and pled guilty (or perhaps did not commit an offense but pled guilty to avoid trial), believing that the guilty plea would not have any immigration consequences, and then suddenly faced deportation.⁸⁹ If the government had provided immigrants with notice that their guilty pleas could lead to deportation, they may have altered their trial strategies. It offends our sense of fairness to impose these post hoc penalties on offenders.

In 1996, Congress had the opportunity to limit the definition of aggravated felonies to include only those crimes that should merit the severity of summary deportation without the normal procedural safeguards such as judicial review and the possibility for a suspended sentence or community correction mitigating the punishment.⁹⁰ Six years after the original inclusion of crimes of violence into the definition of aggravated felony, Congress could have adjusted the law so that it would serve the goal of protecting the American people. Instead, Congress chose to use immigration policy to make a statement on the cause du jour.⁹¹ Had the definition of aggravated felony been more expansive before 1996, it would not have stopped the Oklahoma City bombing from happening. It did not stop the terrorist attacks of September 11 either.

86. 142 CONG. REC. E645 (daily ed. Apr. 25, 1996) (statement of Patsy T. Mink) (“[I]t is wrong to place upon legal immigrants a higher penalty for crimes which in themselves are not related to terroristic actions. Deportation should be reserved for only the most heinous of crimes rendering the person unfit to remain in the country.”).

87. 8 U.S.C. § 1101(a)(43)(F) (2000 & Supp. V 2005).

88. See Kevin Dayton, *Old Crimes Still Count for Some Non-Citizens*, HONOLULU ADVERTISER, Dec. 21, 2006, at A1, available at <http://the.honoluluadvertiser.com/article/2006/Dec/21/lh/FP612210331.html> (discussing how the 1996 aggravated felony definition reform affects immigrants).

89. *Id.*

90. See generally 8 U.S.C. § 1101(a)(43) (2000 & Supp. V 2005) (enumerating offenses that qualify as aggravated felonies).

91. See generally *id.*

E. The Aggravated Felony Provision as it Exists Today

Today, the definition and the consequences of an aggravated felony conviction are broader than they have ever been.⁹² The definition of aggravated felony currently encompasses twenty categories of offenses that can subject a non-citizen to expedited removal.⁹³ They range from the most serious offenses, such as rape and murder, to significantly less serious offenses including driving under the influence and perjury.⁹⁴ Further, the USA Patriot Act has strengthened terrorism's nexus with punishing aggravated felons.⁹⁵ The USA Patriot Act, in conjunction with the law surrounding aggravated felonies, gives the justice department virtually unfettered discretion in detaining immigrants.

In recent years, members of Congress have proposed both scaling back the definition of aggravated felonies to its pre-1996 parameters and increasing the consequences of aggravated felonies to unprecedented levels.⁹⁶ It is difficult to predict congressional action, but inductive reasoning indicates that the definition will continue to expand.

III. ANALYSIS: THE PRESENT STATE OF THE LAW OF AGGRAVATED

92. *See id.*

93. As it stands today, the twenty categories of offenses are: (1) "murder, rape, or sexual abuse of a minor"; (2) drug trafficking offenses; (3) weapons trafficking offenses; (4) money laundering offenses; (5) firearms offenses; (6) "crime[s] of violence"; (7) theft offenses; (8) offenses involving ransom demands (9) child pornography offenses; (10) RICO and gambling offenses (11) prostitution and slavery offenses; (12) fraud offenses; (14) alien smuggling offenses; (15) offenses committed by those previously deported; (15) document fraud offenses; (16) failure to appear (17) bribery, forgery or counterfeiting; (18) obstruction of justice and perjury offenses; (19) additional failure to appear offenses; and (20) inchoate offenses related to the other enumerated offenses. *Id.*

94. *Id.*; see also Matt Birkbeck, *Feds Giving Boot to More Immigrants: Aggressive One-Strike-and-Out Deportation Policy Targets Criminals*, MORNING CALL (Allentown), May 21, 2006, at A1 (describing proposed bills in both the Senate and the House that propose expanding the definition of aggravated felonies); see also Lisa Hoppenjans, *Family Searches for Answers; "Whose Mom Is It Going to Take to Make a Difference?"*, NEWS & OBSERVER (Raleigh), Apr. 25, 2006, at B1 (mentioning a proposal to expand aggravated felonies to include DUI offenses); *Face the Nation: Congressman James Sensenbrenner and Diek Durbin Discuss Controversies Over Illegal Immigration* (CBS television broadcast Apr. 2, 2006) (discussing a proposed bill that would make all undocumented aliens aggravated felons and therefore expand "aggravated felony" exponentially).

95. Kathryn Harrigan Christian, *National Security and the Victims of Immigration Law: Crimes of Violence After Leocal v. Ashcroft*, 35 STETSON L. REV. 1001, 1004 (2006).

96. Restoration of Fairness in Immigration Act of 2003, H.R. 47, 108th Cong. § 202 (2003); Gang Prevention and Effective Deterrence Act of 2004, S. 1735, 108th Cong. §§ 104(1)(B), 106-107, 208(b)(3)(A)(ii), 208(b)(3)(B), 209 (as reported by S. Comm. on the Judiciary, July 16, 2004); 149 CONG. REC. E32-33 (daily ed. Jan. 8, 2003) (statement of Rep. Conyers).

FELONIES

In recent years, the obstacles facing immigrants convicted of aggravated felonies have increased in two ways. First, the list of offenses constituting aggravated felonies and warranting expedited removal is more expansive than ever before.⁹⁷ Indeed, Congress seems likely to expand the list until it eradicates conventional deportation procedures.⁹⁸ Second, Congress has shortened the list of remedies available to those immigrants convicted of aggravated felonies who wish to suspend their deportation.⁹⁹

A. Unprecedented Level of Qualifying Offenses

One of the most glaring problems with the aggravated felonies list is that Congress did not design it with a single goal in mind, but to address two different goals, which do not necessarily coincide.¹⁰⁰ Furthermore, those goals that it most reasonably seeks to accomplish, namely protecting the general population from violent repeat offenders and creating a more efficient deportation system, were not the foremost concerns at any stage of the law's development. Rather, Congress expanded the law to combat whatever issues concerned the American people at the time of each amendment's passage.¹⁰¹ The consequences of this patchwork have been twofold. First, Congress has expanded only the list of offenses because there is never a concern where the politically popular response is to allow more potentially dangerous immigrants to stay in the United States. Second, the law's random grouping of offenses creates notice and reliance problems for immigrants.

For the crimes of violence category of aggravated felonies, the conditions that make a crime an aggravated felony are especially confusing. For a crime of violence to qualify as an aggravated felony, it must meet two prerequisites: first, a particular offense must be committed; and second, the length of sentence must exceed twelve months in prison.¹⁰² Other aggravated felonies, such as theft offenses and per-

97. 8 U.S.C. § 1101(a)(43) (2000 Supp. V 2005).

98. See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 203 (2006) (expanding the list of aggravated felonies).

99. Immigration Act of 1990 §§ 505, 514, 515, 8 U.S.C. §§ 1158 (b)(2)(B)(i), 1182(a)(9)(A)(i), 1227(a)(2)(A)(iii), 1227(b), 1228(5) (2000); see also Haynes, *supra* note 68, at 258 (summarizing those barriers that currently exist).

100. See *supra* text accompanying notes 66-67.

101. See *supra* Part II (illustrating the various impetuses for expansion of the definition of aggravated felonies, none of which were primarily immigration related).

102. 8 U.S.C. § 1101(a)(43)(F) (2000 & Supp. V 2005).

jury, contain similar restrictions preventing them from qualifying as aggravated felonies unless they meet certain criteria.¹⁰³ These guidelines provide a valuable safeguard against relatively minor offenses being included in the definition of aggravated felonies, but they are not comprehensive enough. For example, the suspension or modification of an immigrant's sentence does not affect her status as an aggravated felon.¹⁰⁴ Therefore, in a number of circumstances, an immigrant may commit an offense that technically subjects her to a sentence in excess of one year in prison, but does not do so in actuality.¹⁰⁵ The current system subjects that offender to expedited removal just as if she had actually served more than a year in prison¹⁰⁶ Thus, the government can get around the requirement that an immigrant's sentence exceed twelve months in prison.

The Supreme Court intervened and attempted to make the system uniform and fair, but it created the opposite result through inconsistent rulings.¹⁰⁷ In *Lopez v. Gonzales*, the Court held that drug possession offenses that constitute state but not federal felonies and do not involve trafficking are not aggravated felonies.¹⁰⁸ This holding addressed two of the major concerns with the current law of aggravated felonies. First, it eliminated one class of offenses that are not actual felonies, namely minor drug offenses, from the definition. Second, it eliminated a number of inconsistencies among the state laws. However, the decision constitutes only one small step in the right direction.

Subsequently, the Court took a step back in *Gonzalez v. Duenas-Alvarez*. It held that aiding and abetting a trafficking offense even after the fact could constitute an aggravated felony.¹⁰⁹ This holding negated the positive ramifications of *Lopez*. By some estimates, the

103. *Id.* § 1101(a)(43)(G), (S).

104. Antiterrorism and Effective Death Penalty Act § 435, 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2000) (providing that it is now irrelevant whether an offense has been served fully, but rather whether the original sentence was in excess of one year); see also Atilla Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 31 (2003) (defining the status of those who had previously pled guilty to aggravated felonies as one in which they are in danger of being deported in the future).

105. For example, the sentence could be suspended or the defendant could be sentenced to probation or community correction.

106. See Bogdan, *supra* note 104.

107. Compare *Lopez v. Gonzales*, 127 S. Ct. 625, 627 (2006) (exempting state felonies that do not involve trafficking from the definition of "aggravated felonies"), with *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007) (holding that aiding and abetting the theft of a vehicle qualifies as a deportable offense, because theft can be punishable by a sentence of more than a year in California).

108. 127 S. Ct. at 627.

109. *Duenas-Alvarez*, 127 S. Ct. at 818.

holding in *Duenas-Alvarez* will modify the immigration status of over eight thousand immigrants in the Ninth Circuit alone.¹¹⁰ Prior to *Duenas-Alvarez*, those eight thousand immigrants were criminals, but not aggravated felons. Now, they are aggravated felons and the government may deport them despite the fact that they were not deportable at the time of their convictions. Although *Lopez* hinted that the Roberts Court would restore fairness and reasonableness to the law of aggravated felonies, the *Duenas-Alvarez* decision suggests that the Court is no better than Congress at resolving these concerns.¹¹¹

More problematic, of the seven enumerated types of offenses, only four specify any length of sentence that must be met before they qualify as aggravated felonies.¹¹² Many of the offenses, including those most likely to subject an immigrant to a sentence well under one year in prison, may subject an immigrant to expedited removal regardless of sentence length.¹¹³ For other crimes, like that of fraud, the amount of money in question must exceed a certain sum.¹¹⁴ Though it may be practical to determine the severity of an offense before determining whether it is an aggravated felony, the law does not provide a uniform measuring stick. While uniformity and fairness often may be at odds, there is overlap here. This is because the law currently does not permit consideration of individual circumstances—if a judge convicts an immigrant of an aggravated felony, she may not consider the immigrant's individual circumstances.¹¹⁵ The current system does not provide a uniform metric for evaluating all offenses committed by immigrants.

Because a significant number of criminal trials end in guilty pleas, immigrants may subject themselves to deportation unknowingly by pleading guilty to an offense classified as an aggravated felony. Though many states require that attorneys apprise their clients of the potential immigration consequences of a guilty plea, some, including New York, do not.¹¹⁶ Proposals to implement such a requirement na-

110. David Savage, *Ruling Could Lead to Deporting 8,000—High Court Says Legal Immigrants Can Be Ousted For Role in Car Theft*, BALTIMORE SUN, Jan. 18, 2007, at 6A (reporting that government lawyers estimate that 8,000 immigrants had not been deported because of the 9th Circuit Court's prior ruling, which opposed the Supreme Court's holding).

111. See *Duenas-Alvarez*, 127 S. Ct. at 818 (2007) (holding that aiding and abetting the theft of a vehicle, since a theft crime in California with a possible punishment over one year, qualifies as a deportable offense); *Lopez*, 127 S. Ct. at 632-33 (2006) (holding that state felonies that are not federal felonies and do not involve trafficking are not aggravated felonies).

112. 8 U.S.C. § 1101(a)(43)(F), (G), (J), (Q)-(T) (2000 & Supp. V 2005).

113. *Id.* § 1101(a)(43)(A)-(E), (H)-(I), (K)-(P), (U).

114. *Id.* § 1101(a)(43)(M).

115. See *id.* § 1228.

116. Bryan Loney, *Op-Ed., Forced to Go Home Again*, N.Y. TIMES, Feb. 27, 2005, at 11; see Bogdan, *supra* note 104, at 49-50 (noting that for states that do not have such a requirement, un-

tionwide have yet to succeed.¹¹⁷ Even if Congress instituted this requirement, the problem of attorneys finding the current system confusing would persist. Attorneys may misinform their clients about the consequences of pleading guilty. The government's ability to deport immigrants for offenses that did not constitute aggravated felonies when committed, coupled with the notice concerns outlined above, raises a serious due process concern.¹¹⁸ The current law unjustly burdens immigrants with consequences they were not aware of and thus took no steps to avoid.¹¹⁹

B. Dwindling Available Remedies

Most immigrants subject to deportation can pursue a number of opportunities to prevent their removal from the country.¹²⁰ Immigrants convicted of aggravated felonies, however, do not have the same options. Since Congress introduced the concept of aggravated felonies into immigration law, it gradually has streamlined the procedure for deporting such immigrants. Today, an immigrant who commits an aggravated felony has few, if any, remedies at her disposal to prevent even the most serious injustices.¹²¹

Congress eliminated a number of these appellate options from aggravated felons for efficiency reasons.¹²² As the term indicates, expedited removal consumes less time and resources than the alternative. Aggravated felons cannot make the same number of judicial appeals as other non-citizens facing deportation.¹²³ Similarly, aggravated felons cannot even apply for reentry into the United States presumably because their chances for approval would be slim at best.¹²⁴ The rationale for these provisions is clear: to keep the judicial system from being bogged down by appeals that have no chance of success. Fur-

der the current convoluted system of aggravated felonies, an immigrant could quite possibly sign away her right to stay in this country without even realizing it).

117. Lonagan, *supra* note 116 (noting that there is no current proposal to remedy the situation)

118. *Id.*

119. *See id.*

120. 8 U.S.C. §§ 1229a(b)(4), (b)(5)(C), (c)(4), 1229b (2000 & Supp. V 2005).

121. These immigrants have had their day in court to contest their original felony convictions. Considering the gravity of the consequences of deportation, however, that is not the most sufficient safeguard, especially when considering the fact that they may have been unaware of the immigration consequences of a conviction or guilty plea at the time of trial. *See id.* § 1228 (describing the expedited removal process for aggravated felons).

122. *See id.*

123. *Id.* § 1228(a)(3)(A), (c)(3).

124. *See id.* § 1182(a)(2)(A) (describing classes of aliens convicted of certain crimes who are inadmissible).

thermore, in committing an aggravated felony, an immigrant forfeits some of her rights just as an American citizen would. These procedural rights are logical ones to strip from aggravated felons. However, the system deprives aggravated felons of other rights granted to most would-be deportees without any corresponding efficiency gains.

Under the current law, a trial judge is essentially powerless to waive the deportation of an aggravated felon convicted in his courtroom,¹²⁵ regardless of any extenuating circumstances. In a situation like Mr. Rashid's,¹²⁶ a judge could not consider that an immigrant has no familiarity with the country of destination or that her entire family in the United States depends on her for support. The Supreme Court has held recently that with regard to criminal sentences, federal judges must have discretion to depart from federal sentencing guidelines, consider extenuating circumstances, and modify sentences accordingly.¹²⁷ The same reasoning conceivably applies in the immigration context; thus, judicial discretion should exist therein.

Likewise, an aggravated felon does not have the right to leave the country voluntarily.¹²⁸ Immigrants other than aggravated felons facing deportation can seek voluntary removal. Under voluntary removal, a would-be deportee may leave the country prior to deportation proceedings.¹²⁹ Therefore, she may improve her situation and situate herself so that she may reenter the United States legally. However, an aggravated felon may not leave the country voluntarily. Rather, she must be deported, and therefore she will never be able to reenter the country.

The dilution of remedies available to aggravated felons also has punitive consequences that continue after deportation, including the inability to apply for asylum in the United States.¹³⁰ Congress's motivation for this restriction was to prevent aggravated felons from trying to circumvent expedited removal by pleading for asylum.¹³¹ Designating a certain class of people as unable to apply for asylum, however, thwarts the purpose of asylum in general.¹³² If an offender convicted of

125. See J. Ryan Moore, Note, *Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for "Aggravated Felons" in Light of International Law: Extending Beharry v. Reno*, 21 ARIZ J. INT'L & COMP. L. 535, 537-38 (2004) (explaining that immigrants have no recourse to judicial review of deportation orders incident to conviction for an aggravated felony).

126. See *supra* text accompanying notes 1-11.

127. *U.S. v. Booker*, 543 U.S. 259 (2005).

128. 8 U.S.C. § 1254.

129. 8 U.S.C. § 1229c.

130. See *supra* text accompanying note 39.

131. See *supra* Part II.

132. See *supra* notes 14-20 and accompanying text.

a relatively minor offense cannot enter the United States even when facing extreme persecution in her home country, justice is not being served.

Another long-term consequence of aggravated felony conviction is a harsher penalty for illegal reentry into the country.¹³³ Congress, however, should not modify this provision. If the government deports appropriately, in only the most serious of circumstances, then this consequence is necessary and should remain part of the law. Immigrants convicted of true aggravated felonies are people that the government justifiably wants to remove from the country because they pose a real danger to the public. Therefore, the provision imposing a longer sentence for reentry by an aggravated felon is one of the few beneficial portions of the statute.

Although Congress may have removed these safeguards for efficiency's sake, serious injustices without any checks on the system have resulted.¹³⁴ An immigrant convicted of an aggravated felony can no longer appeal her case to the same extent or seek judicial mercy.¹³⁵ Hence, the error of one decisionmaker can have drastic consequences. If an immigrant does not have the capacity to plead her case, demonstrate her hardship, or prove the erroneous application of a law via an appeal, the trial court's mistakes are exacerbated. The system needs some sort of check to ensure that courts apply the law in a fair and impartial manner.

IV. SOLUTION: STRIKING A BALANCE BETWEEN PERSONAL SECURITY AND JUSTICE

As it stands now, the system serves no one's interests fully. Some immigrants are deported simply because they happened to commit the wrong crime at the wrong time, while other more serious offenders may escape punishment because of the law's patchwork design. The law does not punish those most deserving of punishment.

A. A More Lenient Solution

One way to alleviate the inequities discussed in this Note would be to eliminate the system of aggravated felonies and subject all

133. 8 U.S.C. § 1326; *see supra* text accompanying notes 45-48.

134. *See supra* text accompanying notes 2-14 (discussing potential effects of a lack of safeguards in the deportation proceedings, including loss of an immigrant's adopted home, separation from loved ones and involuntary removal to a birthplace with which she may have little or no connection).

135. *See supra* text accompanying notes 29-48.

persons facing deportation to the same laws. This solution essentially would restore the immigration system to its form during the decades between the passage of the Immigration and Nationality Act and the early 1990s, when Congress started to expand the law by passing the Anti-Drug Abuse Act of 1988.¹³⁶ Under this solution, no unique obstacles would stand in the way of aggravated felons seeking relief from deportation.¹³⁷ Although this solution may resolve many of the current system's problems, namely the injustices perpetrated upon those immigrants who stand to be deported for relatively minor offenses, it ignores the principal concern that prompted the most recent reforms, namely the protection of the American people from the most violent offenders.¹³⁸ Under such a system, deportation proceedings of even the most serious offenders, who unquestionably deserve removal from the country, would clog the system and create delay and expense for all parties involved.¹³⁹ Furthermore, this system would result in an increase in violent crimes committed by offenders who would be deported under the current system.¹⁴⁰ Thus, we need a procedure for expedited removal, just not the one that is currently in place.

B. A More Rigid Solution

At the other end of the spectrum, expedited removal of all immigrants convicted of offenses, regardless of how trivial, would increase judicial efficiency and public safety.¹⁴¹ For example, some politicians call for subjecting any immigrant convicted of a DUI, ordinarily only a misdemeanor offense, to expedited removal.¹⁴² Although this solution would protect the American populace from recidivist offenders, as no immigrants would have an opportunity to commit a second offense, and provide a much cheaper and more streamlined

136. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4108, 102 Stat. 4181, (putting into place the system of deportation of aggravated felons).

137. See *supra* Part II.A (discussing current obstacles, including ineligibility for asylum, fewer opportunities to appeal, and inability to leave the country voluntarily).

138. See 136 CONG. REC. S17,117-18 (1990) (statement of Sen. Graham); see *supra* note 16.

139. See *supra* text accompanying notes 122-124 (discussing the desire for efficiency as one goal of eliminating procedural safeguards).

140. See *supra* Part III.

141. It appears that if left unchecked, this is the direction in which the law is headed. In twenty years, Congress has steadily expanded the class of offenses considered aggravated felonies without ever reducing it. See *supra* Part II.E. That, coupled with increasing public concerns about the dangers presented by immigrants, indicates that the current path of the law leads us towards a much stricter definition of aggravated felony.

142. See Hoppenjans, *supra* note 94 (discussing U.S. Representative Sue Myrick's proposal to deport any illegal immigrant convicted of driving while intoxicated).

system of immigration justice, it would not be fair to immigrants.¹⁴³ Immigrants face enormous collateral consequences when they are deported. Frequently, deportation separates immigrants from their families and sends them to a country of which they have no knowledge. Essentially, immigrants face two punishments for the same offense—a penalty that should be reserved for serious offenses.

C. A More Moderate Approach

The proper solution to the problem is a more moderate approach that reduces the unwarranted penalties in the current law without eliminating the concept of aggravated felonies. Any reforms first must address the broad classification of crimes that qualify as aggravated felonies. Rather than a patchwork of offenses geared toward curtailing the drug trade, a simple, uniform rule aimed at protecting the American people would be more fair and effective. This solution could be increasing the minimum sentence length required to classify a crime as an aggravated felony, along with other reforms. Furthermore, the current system unjustly deprives aggravated felons of procedural remedies available to similar offenders. Rather than eliminating all avenues for relief, the system should provide an opportunity for appeal in the event of a miscarriage of justice or extreme hardship without providing all of the traditional appeals and thereby clogging the judicial system. Congress made previous reforms with unrelated goals in mind,¹⁴⁴ without concern for long-term consequences or case-by-case effects. The solution advocated here seeks to reform the immigration system and protect the American people from recidivist aggravated felons. That simplified purpose represents a significant step toward a just and effective system of expedited removal.

1. Modifying the List of Included Offenses

Black's Law Dictionary defines the term "aggravated," when it pertains to a crime, as "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime."¹⁴⁵ Even assuming that this definition is broader than is required in today's society or even broader than the immigration context requires, "aggravated" clearly modifies the word "felony." Therefore, it is absurd to contend that a felony is aggravated

143. See *supra* text accompanying note 14 (discussing the extensive collateral consequences that accompany deportation).

144. See *supra* Part II.

145. BLACK'S LAW DICTIONARY 71 (8th ed. 2004).

merely because the sentence exceeds twelve months, because no additional circumstances make the felony "worse or more serious." Therefore, any amendment must restore meaning to the term "aggravated."¹⁴⁶

In addition to the minimum sentence length requirement, the law also should include an exhaustive list of truly "aggravated offenses."¹⁴⁷ This change would provide another independent check to ensure that the particular circumstances warrant deportation, the most serious of immigration punishments. The new list ought to include the most serious criminal offenses, such as murder, rape, and kidnapping, with the revised purpose of protecting Americans from the most serious crime. For the same reason, it ought to include those offenses currently considered "crimes of violence" under the existing law of aggravated felonies, such as kidnapping, rape, and murder. Lastly, the definition can include those elements present in the Black's Law Dictionary definition of "aggravated," namely violence, use of a weapon, or intent to commit another crime. These situations must be included because it is only in such a system that the interest of security is emphasized. The ideal list would be much more streamlined than the current one, but still could include many of the classes of offenses that exist. However, the list should not contain any catchall provisions, which would create a system in which unintended minor offenses could creep back into the definition.

This modification would work in conjunction with the provision regarding requisite sentence length outlined in the following Section. The two provisions would provide a check on one another to accomplish the ultimate goal of properly balancing efficiency and security with justice.

2. Increasing the Minimum Sentence Length

Akin to the definition of "aggravated," the term "felony" has been manipulated to the point that it no longer describes accurately all of those offenses considered aggravated felonies. Black's Law Dictionary defines a felony as "a serious crime usu[ally] punishable by

146. Granted, one could argue that the term "aggravated felony" is a mere anachronism and the true purpose of the law as it stands today is to provide for expedited removal of all immigrants convicted of any type of felony. However, such an approach turns a blind eye to the problem of the conflict between the statutory text and its application. The punishment was installed for a reason and that reason needs to be addressed, not ignored.

147. Such a list would include those offenses which normally would be considered aggravated, such as murder and rape, as well as those which fit within the Black's Law Dictionary definition of aggravated crimes.

imprisonment for more than one year or by death.”¹⁴⁸ At face value, the law of aggravated felonies meets the minimum requirements of this definition.¹⁴⁹ Nonetheless, in many circumstances, it falls well short of the definition’s natural interpretation.¹⁵⁰ Because the law provides for expedited removal if a portion of the sentence is served in a halfway house or is suspended and thus not served at all, and it permits the aggregation of multiple misdemeanors to reach the one-year requirement,¹⁵¹ many offenses that can lead to expedited removal are not felonies at all. Congress must redefine the term “felony” with the law’s purpose in mind.

When Congress introduced the sentence length standard into the law of aggravated felonies, it was much less harsh than it is today, only subjecting offenders to expedited removal if the punishment for their offenses exceeded five years in prison.¹⁵² Under the old provision, the likelihood of expedited removal for an offense that did not actually constitute a felony was minimal. Although restoring the five-year rule effectively would protect immigrants who are not aggravated felons from expedited removal, it would not accomplish the other goals of the law of aggravated felonies. Namely, it would enable offenders who have committed relatively serious offenses to clog the justice system and potentially return to the general population.

Although the current system provides a malleable standard for determining the seriousness of a particular offense, it creates serious problems. First, there is already an established standard of penalties for crimes, namely the list of penalties enumerated in the justice system. Every crime on the list must have been evaluated in the context of the other crimes on the books when its penalty was affixed. Therefore, the sentence for the same offense should be comparable across jurisdictions. There should not be much difficulty in comparing sentence lengths among offenders. Such a comparison is currently done in determining whether sentences happen to fit the requirements that would make them aggravated felonies. There is no reason why they must be compared using different standards. If anything, it merely creates additional confusion, especially if an offense meets one standard but not another.

148. BLACK’S LAW DICTIONARY 651 (8th ed. 2004).

149. 8 U.S.C. § 1228 (2000); *see also id.* § 1231.

150. *See supra* text accompanying note 20 (discussing instances in which shoplifting and other minor offenses may be classified as an aggravated felonies).

151. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(II) (“Any alien who . . . is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.”).

152. *Id.*

The problem with having different standards of seriousness for different offenses is that Congress already grouped the offenses into various types of offenses.¹⁵³ As it stands, certain offenses require a sentence of one year in jail or more to qualify as an aggravated felony while others require a particular dollar figure to be in question or no specific circumstances at all. This system creates needless confusion and does not accomplish the goal of finding a better way to determine a baseline of offense level to qualify crimes as aggravated felonies.

In the proposed system, the court would sentence all offenders using a uniform metric, namely the judicial sentencing guidelines.¹⁵⁴ This standard would prevent relatively minor offenses, which do not carry a heightened sentence requirement, from subjecting an immigrant to the drastic penalty of deportation. Furthermore, it would make the system less complicated and minimize the opportunity for attorneys and defendants to err in calculating the length of the sentence or the relation of the sentence to deportation and, in doing so, pleading guilty to an offense that carries a much greater penalty than they believed.

A modification in the length of sentence required for a crime to be an aggravated felony would have to be coupled with an increase in the length of sentence required for an offense to qualify as an aggravated felony. Although five years is admittedly too long, one year is clearly insufficient because it often ensnares undeserving offenders. A shift from twelve months to twenty-four months would protect the rights of immigrants subjected to these offenses while still providing substantial protection to the public. Furthermore, it is only logical that the sentence itself must constitute twenty-four months in prison, not a suspended sentence or community correction.¹⁵⁵ If a system gives judges discretion to reduce an immigrant's sentence, it makes sense that the judge should not be bound by a draconian rule for a secondary sentence that accompanies the original one. If a judge determines that an offender need not serve her full sentence in prison, that judge does not believe that the offense is severe enough to warrant the entire sentence. By extension, he would not believe deportation is warranted and should not be forced to compromise one of those beliefs in order to prevent two inconsistent punishments.

153. See 8 U.S.C. § 1227 (the statute delineates 5 different categories of criminal behavior by aliens, each with its own subcategories).

154. U.S. SENTENCING COMM'N, 2005 FEDERAL SENTENCING GUIDELINE MANUAL §3E1.1 (Nov. 2005), available at http://www.ussc.gov/2005guid/tabcon05_1.htm.

155. Community correction is the current nomenclature for a halfway house. Considering that it is categorically different from a prison setting, sentences served in community correction should not be incorporated into the calculation of time served in prison under a sentence.

The modifications discussed above would eliminate the possibility of minor offenses resulting in expedited removal. Currently, certain offenses carry the penalty of deportation, but simply should not. Revising the definition of aggravated felony so that only serious offenses are punishable by expedited removal and by further limiting expedited removal to cases in which an immigrant has served more than two years in prison would alleviate concerns about the civil liberties of immigrants without significantly increasing the danger to the public or the backlog of the judicial system.

3. Providing a Streamlined but Efficient List of Remedies

Moreover, Congress must reestablish certain procedural remedies that previously were available to convicted offenders. Although Congress eliminated many of the existing remedies because of their expense in terms of resources, Congress could reestablish these procedures with minimal effects on the efficiency of the judicial process. In any judicial system, there should be some form of oversight to ensure that the law is not applied inappropriately. As it stands, the law denies immigrants who deserve a second chance that opportunity because they cannot contest their fates. However, in restoring such procedures, the legislature must be cautious not to reestablish remedies that would diminish greatly the efficiency of the judicial system.

Congress could reinstate a number of remedies, such as permitting judicial discretion at sentencing, with few efficiency repercussions. The trial judge would have an intricate knowledge of the facts and would not waste any time relearning them. Furthermore, he would be able to interpret any mitigating factor that might prevent the immigrant from proving a substantial degree of hardship. Currently, it is quite difficult for an aggravated felon to obtain a reprieve from deportation because the standard for hardship is extremely high and no person reviewing an aggravated felon's case has in-depth knowledge of the situation. Allowing the trial judge to grant discretionary relief to aggravated felons in cases of great hardship would prevent the immigration system from doing injustices not only to those convicted of aggravated felonies, but also to innocent third parties like the families of aggravated felons as well.

Second, Congress could reinstate voluntary removal.¹⁵⁶ It would not create additional safety concerns because an immigrant with a record of aggravated felony convictions likely would not apply for reentry given the near certainty that her application would be de-

156. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 16, § 72.05.

nied. If anything, this option would streamline the system because it would not require a trial. This increased efficiency would probably offset any decrease in efficiency from preventing those convicted of aggravated felonies from applying for reentry. Therefore, reinstating the opportunity for voluntary removal would be a positive solution overall.

Another necessary part of the solution would allow aggravated felons to plead for asylum. Although this would have negative efficiency consequences, it would benefit social justice throughout the world. The United States should not turn away those truly in need of asylum just because they have a criminal history. However, a higher standard of necessity should be required to prevent undeserving aggravated felons from taking advantage of the system and clogging the judicial process.

Perhaps most importantly in terms of due process, national law must mandate that criminal defense attorneys inform their clients of the potential immigration effects of a guilty plea. This solution would prevent immigrants from causing their own deportation despite having the capacity to avoid it had they understood the law. This effort would be aided by the reforms already advocated in this Section because the system would be much easier to understand for those attorneys involved in the process.

Certain elements of the current system must remain, however. There still should be greater penalties for aggravated felons illegally reentering the United States than there are for those who are not aggravated felons. Aggravated felons are the immigrants that Congress has the greatest interest in keeping out of the country. Therefore, the greatest penalties for entering the country should be reserved for them. Importantly, a system that deports only the most serious offenders should make their deportations effective. Therefore, the increased reentry punishment should remain.

4. Tailoring the Reforms to the Issue of Immigration

Congress must tailor the new system specifically to immigration concerns. The current system appears inefficient and unjust because it is a patchwork of laws that Congress designed to address different concerns.¹⁵⁷ Congress would pass the new law as one cohesive unit, with the goals of promoting justice for those subject to deportation while preserving the efficiency of the judicial system and the security of the public.

157. See *supra* Part II (analyzing the different laws, passed at different times for different purposes, that affect the rights of immigrants).

A reform law directed specifically at immigration reform would have the corollary effect of obviating future expansions of the law of aggravated felonies. Currently, immigration reform is a fallback for Congress whenever any serious concerns arise. Rather than addressing these issues directly, Congress instead blames the problem on illegal immigration. It then passes a law that further restricts immigration in an effort to keep immigrants from exacerbating the problem at hand, a method that is as ineffective as it is unfair. The reforms presented in this Note send a clear message that aggravated felons will no longer be scapegoats for problems that Congress may be trying to solve. Even if Congress wanted to continue tinkering with the law of aggravated felonies to combat future issues, these reforms would greatly hinder, if not completely prevent, their ability to do so. Because these reforms would provide an exhaustive list of crimes that merit expedited removal and attach a further condition of sentence length, it would be very difficult for Congress to add new offenses without repealing the entire law.

The current state of the law concerning aggravated felonies is quite punitive but it pales in comparison to what it may become in the near future.¹⁵⁸ Unless Congress halts the expansion of the list of aggravated felonies, it is likely that within a short period there will no longer be any conventional deportation procedures.¹⁵⁹ Rather, all immigrants facing deportation will be governed in some capacity by the law regarding aggravated felonies and will therefore be subject to expedited removal.¹⁶⁰ Through the implementation of these reforms, immigration law will not only be restored to a reasonable condition, but potentially serious problems will be averted.

V. CONCLUSION

The current system of expedited removal for those immigrants convicted of aggravated felonies is markedly flawed. The source of the problem is a patchwork of legislation that Congress created to combat a series of concerns, none of which directly related to immigration. Furthermore, Congress steadily expanded the law's scope over the years and shows no indication of ceasing. If Congress does not change tack, it appears that the entire deportation system will collapse into the rules applying to aggravated felonies. Currently, the list of of-

158. See Birkbeck, *supra* note 94 (describing efforts by both the U. S. Senate and the House of Representatives to prioritize deportation of criminal aliens).

159. See *supra* Part III.A (discussing the likelihood that the ever-expanding list of aggravated felonies will eventually eliminate the use of conventional deportation procedures).

160. See *id.*

fenses that qualify as aggravated felonies is too long and the list of remedies available to immigrants convicted of aggravated felonies seeking to forestall their deportation is too short. Consequently, Congress must promulgate a solution in which a more cohesive and less expansive list of offenses constitute aggravated felonies. In the same vein, Congress must restore certain procedural safeguards that were once available to those convicted of certain aggravated felonies so that justice may be served. With regard to the current system of expedited removal for aggravated felons, there are three competing goals that must be considered: efficiency, security, and justice. Currently, efficiency and security predominate over justice. However, if equilibrium among the interests is restored, the system will function in a significantly smoother manner. Only through reforms such as those advocated in this Note will injustices like the one that befell Mr. Rashid be avoided.

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