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## Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons"

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# Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons”

## ABSTRACT

*Any foreign national who is convicted of an “aggravated felony,” as that term is defined in the Immigration and Nationality Act, is subject to deportation from the United States. Deportation of so-called “aggravated felons” is in no way contingent upon the particular facts and circumstances in a given case. More troublingly, on the judiciary has no authority to review a deportation order based “aggravated felony” grounds. In the past decade, Congress has expanded the definition of “aggravated felony” to encompass many minor crimes that are neither aggravated nor felonious.*

*The deportation of foreign nationals on “aggravated felony” grounds is effectively mandatory, and as such does not comport with international human rights principles. A number of treaties and other instruments of international law that have been ratified by the United States are in tension with this deportation scheme. Provisions of these instruments that run contrary to the current regime include a prohibition on arbitrary expulsion, a bar on the return of refugees except where national security and public safety require, an absolute bar on the return of any person who would be subject to torture in her home country, and the recognition of an individual’s right not to suffer undue governmental interference with his family and private life. The automatic deportation of foreign nationals convicted of “aggravated felonies” is also at odds with constitutional guarantees of due process.*

*In order to reconcile the statutory authorization of the removal of foreign nationals for “aggravated felony” convictions with international law, Congress should revise the relevant statutes to require a balancing of public safety concerns against the hardship to the deportee and his resident family members, and Congress should reinstate judicial review of deportation orders based on “aggravated felony” convictions. To preserve genuine rights of due process, the courts must make a fundamental change in their analysis of deportation cases by departing from the traditional characterization of deportation as a non-punitive sanction.*

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## I. INTRODUCTION

"Few punishments are more drastic than expelling persons from this country when their family members are residents" according to the Ninth Circuit Court of Appeals.<sup>1</sup> Yet during the last decade, Congress has enacted and amended legislation that mandates deportation for many long-time, lawful residents with strong family ties in the United States when these non-citizen residents have been convicted of certain criminal offenses.<sup>2</sup> To many, the deportation of criminal foreign nationals may appear to be an exercise of good policy whatever the extent to which such foreign nationals have established personal, professional, or family lives in this country. It is difficult to say that a policy of expelling non-citizens convicted of serious crimes within the United States is improper. Such non-citizens may be perceived justifiably to pose an intolerable threat to both U.S. citizens and resident non-citizens. People expect the government to protect them from dangerous foreign nationals; this expectation is particularly evident in the wake of the 2001 terrorist attacks and the perceived ongoing threat of future terrorist activity.<sup>3</sup>

Upon examination of the statutes governing criminal grounds for deportation a significant problem emerges: the category for deportation-triggering offenses is so broad that it includes many crimes that bear little, if any, relation to an actual threat to public safety.<sup>4</sup> Because the current statutes can result in essentially automatic deportation of foreign nationals for convictions as minor as

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1. *Yepes-Prado v. I.N.S.*, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993).

2. Deportation under the current statutory scheme is not absolutely mandatory, because the INS still exercises discretion over when and whether it will institute deportation proceedings against non-citizens who are rendered deportable by a criminal conviction. *U.S. v. Couto*, 311 F.3d 179, 189 (2d Cir. 2002); *Johns v. Dept. of Justice*, 653 F.2d 884, 889 (5th Cir. 1981).

3. See Romesh Ratnesar, *The State of Our Defense*, TIME, Feb. 24, 2003, at 24 ("While the Administration demonstrated again last week its determination to remind Americans of the dangers of terrorism, it has done far less to prepare the country for actually defending against it . . . [B]ad guys may still be slipping in—or eluding detection."); U.S. Newswire, *CIS: 800,000 Plus Illegals Entering Annually in Late '90s; New INS Report Also Finds 80,000 from Middle East* (Feb. 4, 2003) available at <http://releases.usnewswire.com/GetRelease.asp?id=116-02042003> ("We can't protect ourselves from terrorism without dealing with illegal immigration.")

4. Few would argue that a foreign national who twice jumps a New York City subway turnstile poses a threat to public safety, but in *Mojica v. Reno*, a district court noted that such an offender is subject to automatic deportation. 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (noting that turnstile jumping qualifies as a "crime of moral turpitude," and thus subjects an offender to automatic deportation under the Antiterrorism and Effective Death Penalty Act of 1996).

petty theft,<sup>5</sup> urinating in public,<sup>6</sup> and the forgery of a check for less than twenty dollars,<sup>7</sup> many scholars and practitioners disparage the utility of such a sweeping mandatory deportation scheme.<sup>8</sup>

A particularly compelling example of the severity of the current criminal alien deportation statutes is found in the case of Jose Velasquez.<sup>9</sup> Velasquez, a native of the Republic of Panama, was born to a member of the Panamanian diplomatic service in 1947.<sup>10</sup> His mother was a U.S. citizen.<sup>11</sup> During his childhood, Velasquez frequently accompanied his father to the United States for extended, official visits.<sup>12</sup> In 1960, at the age of thirteen, Velasquez was admitted to the United States as a lawful permanent resident.<sup>13</sup> At that time, he elected to stay in the United States to complete his high school education at West Catholic High School in Philadelphia, despite his father's departure from the United States.<sup>14</sup> Since 1960, he has continuously resided in the United States.<sup>15</sup> Both of Velasquez's older siblings are U.S. citizens, as are his wife of thirty-four years and his three adult children.<sup>16</sup> For many years, he operated a delicatessen in Philadelphia, and he owns a home with his wife in Pennsylvania.<sup>17</sup> Removal proceedings were initiated against Velasquez in 1998, when he returned to the United States after a brief trip to Panama to visit his mother, who was undergoing hip-

5. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000) (referring to a Third Circuit holding that a conviction for the misdemeanor of petty theft constitutes an aggravated felony).

6. See Lise Olsen, *Deportee Struggles to Find a Life in a 'Foreign' Land*, SEATTLE POST-INTELLIGENCER, June 30, 2003, at P-1 (stating that one of fifty-six criminal aliens returned to Cambodia after that country began accepting deportees in 2002).

7. After residing in the United States since her early childhood, Xuan Wilson faced automatic deportation for a nine-year-old forgery conviction, involving a check for \$19.38. See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 591 (1998).

8. See generally *id.*; Lisa R. Fine, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491 (1998); Hakeem Ishola, *INS v. St. Cyr: The Supreme Court and Draconian Congressional Criminal-Immigration Laws*, 14 UTAH B.J. 8 (Dec. 2001); Morawetz, *supra* note 5; Kathleen O'Rourke, *Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law*, 79 DENV. U. L. REV. 353 (2002).

9. *Velasquez v. Reno*, 37 F. Supp. 2d 663, 664 (D.N.J. 1999).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Velazquez*, 37 F. Supp. 2d at 664.

15. *Id.*

16. *Id.*

17. *Id.*

replacement surgery.<sup>18</sup> Upon his arrival at Newark Airport, Velasquez was taken into INS custody.<sup>19</sup>

The grounds for Velasquez's removal were Section 212(a)(2)(C) of the Immigration and Nationality Act (INA), which renders excludable "an alien who has been, or has aided or conspired with, an illicit trafficker in a controlled substance," and INA Section 212(a)(2)(A)(i)(II), which renders excludable "an alien who has been convicted of . . . a violation of, or a conspiracy to violate, a state or federal law relating to a controlled substance."<sup>20</sup> The drug convictions that compelled Velasquez's removal occurred nearly two decades earlier, when he pled guilty to two charges, conspiracy to sell and the sale or delivery of a controlled substance.<sup>21</sup> The facts surrounding the guilty plea were uncontested by the INS.<sup>22</sup> In 1980, Velasquez was approached by a friend at a party who asked Velasquez if he sold cocaine.<sup>23</sup> Velasquez answered that he did not, but he indicated another man at the party who might be selling it.<sup>24</sup> No evidence suggested that Velasquez expected compensation for any subsequent transaction between his friend and the man who Velasquez pointed to as a possible source of the drug.<sup>25</sup> After he entered his guilty plea, Velasquez was fined \$5,000 and sentenced to five years probation.<sup>26</sup> The District Court of New Jersey found that "[f]rom all accounts, [Velasquez] led an exemplary life prior to the incident in 1980, and he surely has led an exemplary life since then."<sup>27</sup> Nonetheless, due to legislation enacted in 1996, Velasquez is subject to removal from the United States because his prior convictions amount to "aggravated felonies" under current immigration law,<sup>28</sup> and neither an Immigration Judge nor the Board of Immigration Appeals has

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18. *Id.*

19. *Id.*

20. *Velazquez*, 375 F. Supp. 2d at 664-65.

21. *Id.* at 665.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Velazquez*, 375 F. Supp. 2d at 665.

26. *Id.*

27. *Id.*

28. The *Velasquez* court does not actually discuss the merits of Velasquez' removal, because the issue before the court was the legality of his detention pending his removal proceeding. *Id.* ("Petitioner now challenges the application of the mandatory detention provision to him."). However, because his convictions fall under the "aggravated felony" definition in Section 101(43)(a) of the Immigration and Nationality Act, he was subject to mandatory deportation. Morawetz, *supra* note 5, at 1940-41.

discretionary power to allow him to stay in the country.<sup>29</sup> Moreover, no Article III court has jurisdiction to review his deportation.<sup>30</sup>

Although certain criminal convictions subjected foreign nationals to deportation before the legislative changes of 1996 were enacted, the potential harshness of the statutory scheme was mitigated by two factors: the narrower range of crimes that rendered a foreign national deportable, and the availability of a discretionary waiver of deportation.<sup>31</sup> When a resident foreign national was found deportable by virtue of a criminal conviction, that individual could apply for a discretionary waiver under Section 212(c),<sup>32</sup> unless the foreign national had been convicted of at least one of several enumerated serious crimes and had served at least five years in prison.<sup>33</sup>

Catalina Arreguin de Rodriguez is a non-citizen resident who benefited from the prior availability of the 212(c) waiver.<sup>34</sup> Her case, juxtaposed with *Velasquez*, illustrates why the discretionary waiver is vital for a statutory scheme that calls for the deportation of foreign nationals who have any of a wide range of criminal convictions. Only four years before *Velasquez* was decided, the Board of Immigration Appeals granted de Rodriguez, a 41-year old mother of five U.S. citizens, a discretionary waiver, because it found that unusual and outstanding equities countervailed the seriousness of the underlying criminal conviction that rendered her deportable.<sup>35</sup> In 1993, de Rodriguez was convicted of importing 78.45 kilograms of marijuana from Mexico.<sup>36</sup> The Board "balance[d] the adverse factors evidencing [de Rodriguez's] undesirability as a permanent resident with the social and humane considerations presented in her behalf to determine whether the granting of Section 212(c) relief appear[ed] to be in the best interests of this country."<sup>37</sup> In its decision, the Board

29. See Immigration and Nationality Act § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000) ("The Attorney General may cancel removal . . . if the alien has not been convicted of any aggravated felony.").

30. See Immigration and Nationality Act §242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) ("Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order or removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 237(a)(2)(A)(iii)."). INA § 237(a)(2)(A)(iii) states that any alien convicted of an aggravated felony at any time is deportable.

31. See *Yepes-Prado v. INS*, 10 F.3d 1363, 1365 (9th Cir. 1993) ("Section 212(c) of the [INA] allows the attorney general to grant discretionary relief from deportation. . . ."); Morawetz, *supra* note 5, at 1939-40 ("[T]he most publicized aspect of the new laws is their Alice-in-Wonderland-like definition of the term 'aggravated felony.'").

32. See *infra* Part I.C. and accompanying notes for a more detailed discussion of the 212(c) waiver.

33. *Yepes-Prado*, 10 F.3d at 1371.

34. *In re de Rodriguez*, 21 I. & N. Dec. 38 (BIA 1995).

35. *Id.* at 40-43.

36. *Id.* at 39.

37. *Id.*

cited the following as favorable factors: (1) de Rodriguez had no other criminal convictions; (2) she accepted responsibility and expressed remorse for her crime; (3) she had resided in the United States for a total of twenty-five years, and her presence in the United States was legal for all but five of those years; (4) she had five resident children in the United States, two of whom were still minors; (5) she had "advanced her meager education by voluntarily pursuing GED studies" while in prison; (6) she had no prison infractions; (7) a letter was submitted to the Board stating that she would be offered full-time employment upon her release; (8) she had supported herself and her children during most of her twenty-five years in this country; and (9) she had resorted to welfare for only two short time periods.<sup>38</sup> The adverse factors cited by the Board included the gravity of de Rodriguez' drug offense and an apprehension report which showed that she had been arrested on suspicion of alien smuggling for gain for which prosecution was declined.<sup>39</sup>

Had the INS addressed Velasquez's criminal convictions while the Section 212(c) waiver was still available, there is little doubt that the immigration court would have found that, as in the case of Catalina de Rodriguez, unusual and outstanding equities called for relief from deportation for Velasquez.<sup>40</sup> Unfortunately for him, the INS paid Velasquez no attention until he left the country and reentered U.S. borders again in 1998—two years after Congress eliminated the 212(c) waiver. Thus, had his mother's hip surgery occurred in 1995, instead of 1998, Velasquez also would have been a likely beneficiary of the discretionary waiver.

There is little momentum for public attention to the inequities suffered by foreign nationals with criminal convictions amid daily color-coded terrorist warnings and doomsday-happy media accounts of plots threatening Americans beyond and within our borders.<sup>41</sup>

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38. *Id.* at 40-41.

39. *In re Rodriguez*, 21 I. & N. Dec. at 42.

40. The record in Velasquez's case demonstrates that he had at least as many social and humane factors in his favor, and fewer adverse ones. *See* discussion *supra* notes 9-27 and accompanying text. For example, Velasquez would have the following equities in his favor: (1) he had no other criminal convictions, (2) he had two siblings, a wife, and three children who are all U.S. citizens, (3) he resided in the United States continuously and legally for nearly forty years, (4) he owned a home with his wife in the United States, and he also owned a business in the United States for many years, (5) he neither received nor anticipated compensation for his crime, and (7) he successfully completed his probation and "led an exemplary life" prior to and after his crime. *Velasquez v. Reno*, 37 F. Supp. 2d 663, 665 (D.N.J. 1999).

41. *See* Dan Eggen & Susan Schmidt, *Bin Laden Calls Iraqis to Arms; On Tape, Al Qaeda Leader Urges Suicide Attacks Against U.S.*, WASH. POST, Feb. 12, 2003, at A1 (referring to a "surge in intelligence indicating that al Qaeda may be planning attacks with poisons, viruses or radiological 'dirty bombs' domestically and overseas"); Andrew Miga, *Feds Issue Terror Warning; Country on Alert for Attack Anniversary*, BOSTON HERALD, Sept. 10, 2002, at 07 ("[T]he Homeland Security Office's official



Thus, foreign nationals who come under the umbrella of the automatic deportation scheme for even minor criminal convictions are in an increasingly perilous position. While the rules at issue have been on the books since 1996, enforcement has sharply increased since 2001.<sup>42</sup> It may be tempting to conclude that the hardships caused by this deportation regime are temporary, then, and will blow over as soon as the hype about terrorism diminishes—that this is just another September 11 issue.

However, the present criminalization of immigration is part of a long-standing pattern in the history of this so-called “melting pot,” and thus has implications beyond the specific problems arising in the post-September 11 context.<sup>43</sup> This pattern can be traced back to the Federalists’ characterization of Thomas Jefferson’s Republican party as “French Revolutionaries and unwashed Irish immigrants,” the internment of Japanese immigrants during the World War II, and the deportation of suspected Communists during the McCarthy era.<sup>44</sup> If the lessons of history are any guide, a meaningful change in immigration policy is unlikely in the near future,<sup>45</sup> despite some very persuasive arguments for a major revision of this area of law.<sup>46</sup> The

terrorist threat level remains at yellow.”); Robert Schlesinger & Anne Kornblut, *U.S. Sure Terrorists will Strike, Uncertain Where or When*, BOSTON GLOBE, May 22, 2002, at A28 (“Terrorist groups are certain to obtain nuclear, chemical, or biological weapons and use them against the United States.”); Susan Schmidt & Dan Eggen, *Detainee Called Key Al Qaeda Figure in Southeast Asia*, WASH. POST, Sept. 12, 2002, at A30 (“Information provided . . . led the government to elevate the terrorist threat status Tuesday to ‘Orange,’ reflecting a ‘high’ chance of attack on U.S. interests.”); Cam Simpson, *US Terror Alert Lowered a Notch; Americans Told to Keep Guard Up Amid Iraqi Crisis*, CHI. TRIB., Feb. 28, 2003, at 8 (referring to the code orange terror alert: “officials had ‘specific intelligence’ indicating a high risk of Al Qaeda attacks. They also said chemical, biological or radioactive weapons could be used.”).

42. See Tom Mccann, *Lawyers Scramble to Help Immigrants Caught in the Net of Tighter Enforcement*, CHI. LAW., Aug. 2003, at 8 (quoting immigration attorney Royal F. Berg: “The problem is the government is adopting an absolute zero-tolerance policy. . . . The government is not showing any hesitance to deport people with things like shoplifting arrests, small-time drug charges and other minor offences that might appear as aggravated felonies.”).

43. See generally Michael Maggio, *The Lawyer and Our History: Practicing Immigration Law has Rarely Been More Important to the Country*, LEGAL TIMES, July 28, 2003, at 34.

44. *Id.*

45. Legislation which would mitigate some of the harsh and arbitrary consequences of the law governing the deportation of aliens with criminal convictions was introduced in the House of Representatives in January 2003, but no action has been taken regarding the bill since it was referred to the Subcommittee on Immigration, Border Security, and Claims. Unity, Security, Accountability, and Family Act of 2003, H.R. 440, 108th Cong. (2003) (“The purpose of this Act is to create a system that recognizes and reflects the enormous contribution immigrants make to our work force and economy . . .”).

46. See generally Coonan, *supra* note 7; Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593 (2001); Morawetz, *supra* note 5; Robert Pauw,

pattern of arbitrarily punishing selected groups of foreign nationals and immigrants generally during times of national crises will probably not end when the "war on terror" is over; it will undoubtedly emerge again at a later date. For this reason, it is imperative that the laws, as written, be less amenable to sweeping application and widely variable enforcement policies.

The government has recently announced several new enforcement programs designed to ensure that foreign nationals deportable under the mandatory scheme do not slip through the government's fingers due to administrative oversight. For example, the Department of Homeland Security recently announced two enforcement initiatives, "Operation Tarmac" and "Operation Predator,"<sup>47</sup> and new legislation was introduced in the House of Representatives in July 2003 to enlist local police in the national effort to ensure the apprehension and removal of foreign nationals deportable on criminal grounds.<sup>48</sup> Immigration officers at U.S. ports of entry have been given new expansive access to criminal databases in the last year, enabling those officers to discover deportable foreign nationals who have left the country temporarily upon reentry.<sup>49</sup> While both of these enforcement measures provide the INS with potentially useful tools for ensuring national security, they also create the possibility of unchecked abuse and have already resulted in the deportation of numerous unsuspecting immigrants on the basis of decades-old misdemeanor convictions.<sup>50</sup> Though ridding the country of any criminal element attributable to a foreign source may be a laudable goal in the abstract, aside from any national security rationale, that policy overlooks several relevant considerations. These considerations include: (1) the impact the policy has on citizen family members and employers; (2) the fact that many deportable foreign nationals have resided in the United States since infancy, and thus it is arguably poor policy to loose home-grown convicted criminals in a foreign country, assuming they are actually dangerous enough to

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*Plenary Power: An Outdated Doctrine that Should not Limit IIRIRA Reform*, 51 EMORY L.J. 1095 (2002); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143 (2002).

47. "Operation Tarmac" targets non-citizen airport employees with past criminal convictions. See Colleen Mastony, *Couple Face Deportation, Leaving Kids; Immigrants Built American Life*, CHICAGO TRIB., Feb. 25, 2003, at 1. "Operation Predator" targets non-citizens with past sex offense convictions. Of the Department's goal to deport all aliens with qualifying criminal convictions, special agent Leigh Winchell said "[w]e're focusing first on the worst of the worst and taking strategically one step at a time from there." Chris McGann, *Federal Agency Targets Sex Predators; Homeland Security Brings Immigration Law to Bear in New Initiative*, SEATTLE POST-INTELLIGENCER, July 10, 2003.

48. Julia Malone, *Norwood Seeks Use of Police to Deport; Convicted Illegals Slip through Cracks*, ATLANTA JOURNAL-CONSTITUTION, July 10, 2003, at 3A.

49. Mccann, *supra* note 42, at 8.

50. *Id.*

justify deportation; and (3) the extent to which the policy implies the criminal justice system is such a failure that criminals who have served sentences imposed upon them by U.S. courts should be expelled, whenever possible, from our borders immediately thereafter, in order to protect the public.<sup>51</sup> Apart from these policy and fairness considerations, the current scheme of mandatory deportation of foreign nationals with criminal convictions conflicts with requirements of international human rights law and falls outside the spirit of Constitutional guarantees of due process. These latter two concerns form the primary focus of this note.

Part I of this Note will trace the creation and expansion of the “aggravated felony” ground of exclusion and deportation, and it will explore the evolution of Section 212(c) and its replacement, Section 240A, as they have applied to foreign nationals deported on aggravated felony grounds. Part II of the Note will analyze how the combined effect of the changes to Section 212(c), the enactment of 240A in its place, and the expansion of the “aggravated felony” category raise significant legal and policy concerns in both the international and domestic arenas. Finally, Part III will posit some recommendations, modeled in part on comparable provisions governing deportation of criminal foreign nationals in the United Kingdom, for legislative alterations of the existing law that would provide for a more equitable treatment of criminal foreign nationals without compromising the purpose of Congress’ most recent changes in immigration law, promotion of public safety and national security.

## II. HISTORY

### *A. Overview of Recent Changes to Immigration Law Concerning Status of Criminal Foreign Nationals*

Over the past decade, Congress has enacted a series of amendments to the Immigration and Nationality Act (INA), resulting in a convoluted landscape of deportation and exclusion provisions, many of which have left even the most sophisticated immigration lawyers and their clients confused and exasperated.<sup>52</sup> Adding to the

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51. See, e.g., Morawetz, *supra* note 5, at 1950-54 (discussing the imposition of permanent family separation as unduly harmful to family members of deportees); Americas Review World of Information, *Jamaica—Review*, Sept. 29, 2003, 2003 WL 65466471, at 1 (stating that many analysts attribute the crisis of rising crime rates in Jamaica to criminals deported from the United States).

52. The loose and expanding definition of “aggravated felony” has been dubbed “a practitioner’s nightmare,” and the effective dates of provisions “equally baffling.” Coonan, *supra* note 7, at 216, n.99 (quoting Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGIS. J. 201, 230 (1993)).

confusion, in the last year the INS has been dissolved and reorganized as three different bodies under the Department of Homeland Security. The enforcement arm of the new organization, which is responsible for removal of deportable foreign nationals, is the Bureau of Immigration and Customs Enforcement.<sup>53</sup>

The creation and expansion of the category of "aggravated felony" as a ground for which a foreign national can be deported or excluded has, in particular, undergone an array of dramatic changes.<sup>54</sup> At the same time, the provision by which a foreign national convicted of a crime may seek relief from deportation or exclusion has seen a great deal of transformation in recent legislative history.<sup>55</sup> The changes in these two areas of immigration law, the concurrent expansion of the "aggravated felony" definition and contraction of the availability of discretionary relief from deportation and exclusion, has resulted in the unchecked removal of some foreign nationals whose crimes were, ironically, neither aggravated nor felonious.<sup>56</sup> Because of the retroactive application of Congress' most recent definition of "aggravated felony," cases have emerged in which legal permanent residents who have been in the United States for nearly all their lives are being deported to countries of which they have no memory and to which they have no familial or linguistic ties, due only to the fact that years before they committed a crime as trivial as pulling the hair of another person.<sup>57</sup>

### B. Expansion of the Meaning of "Aggravated Felony"

The inception of the "aggravated felony" category in the immigration context occurred in 1988, when Congress incorporated

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53. Mccann, *supra* note 42.

54. Coonan, *supra* note 7, at 590; see Ishola, *supra* note 8, at 8; O'Rourke, *supra* note 8, at 354. See also discussion *infra* notes 58-84 and accompanying text for a more detailed discussion of the creation of the "aggravated felony" category in the Anti-Drug Abuse Act of 1988 (ADAA) and its expansion by the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994 (INTCA), the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

55. See discussion *infra* notes 85-105 and accompanying text for a discussion of the history of the availability of waiver authorized by Immigration and Nationality Act § 212(c) and its replacement, cancellation of removal, found in Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (2000).

56. Coonan, *supra* note 7, at 609.

57. Morawetz, *supra* note 5, at 1943 (discussing the case of Mary Ann Gehris, whose conviction for battery fits within the definition of "aggravated felony" as a crime of violence, despite the fact that her conviction was based simply on her pulling the hair of another woman, for which she received a one-year suspended sentence); see also Coonan, *supra* note 7, at 591; Fine, *supra* note 8, at 492; O'Rourke, *supra* note 8, at 355; Vincent J. Schodolski, *Immigrants Face Deportation for Old Crimes Under New Laws; Reform Snares Legal Residents*, CHI. TRIB., Oct. 12, 1997, at 3.

the term into the Anti-Drug Abuse Act (ADAA).<sup>58</sup> At that time, the definition of “aggravated felony” included only murder, drug trafficking, firearms trafficking, or the conspiracy to commit any of these offenses.<sup>59</sup> Under the ADAA, classification as an aggravated felon in the immigration context had several implications for a resident foreign national: (1) he would be presumed to be deportable, (2) he would be ineligible for voluntary departure—thus the only available form of relief from deportation was the 212(c) discretionary waiver, and (3) he would be prohibited from applying to reenter the United States within the ten years following his deportation.<sup>60</sup>

The ADAA reflected “a Congressional effort to rid the nation of its least desirable aliens.”<sup>61</sup> However, Congress was clearly unsatisfied with the breadth (or lack thereof) of the new category of undesirables, and so amended the definition of “aggravated felony” in the Immigration Act of 1990 (IMMACT), again in the Immigration and Nationality Technical Corrections Act of 1994 (INCTA), and yet again in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>62</sup> Despite the fact that AEDPA and its predecessors had already added numerous crimes to the definition of “aggravated felony,” greatly expanding the category, Congress decided to go at it one more time in 1996 with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), in which it stretched the Section 101(a)(43) definition of “aggravated felony” to its present form.<sup>63</sup> The scope of the definition as it has stood since 1996 hardly resembles the category of the “least desirables” described in 1988.

In order to appreciate how extraordinarily broad the INA definition of “aggravated felony” is, it is necessary to review the laundry list of criminal offenses that are included in the category. Under INA Section 101(a)(43), the definition of “aggravated felony,” for immigration purposes, covers all of the following self-explanatory offenses: murder, rape, sexual abuse of minor, drug trafficking and related crimes, trafficking of firearms or explosives, kidnapping for ransom, and child pornography offenses.<sup>64</sup> More problematic or controversial are the offenses that qualify as “aggravated felonies” depending upon either the sentence available or the sentence actually imposed for the offense. These include any theft or burglary offense for which the punishment is at least one year of imprisonment; RICO offenses or gambling offenses for which a term of imprisonment of one

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58. *Anti-Drug Abuse Act*, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

59. *Id.*

60. See Coonan, *supra* note 7, at 593.

61. O'Rourke, *supra* note 8, at 354.

62. See Coonan, *supra* note 7, at 592-605.

63. See *id.*

64. Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000).

year or more may be imposed; forgery or other document fraud for which the term of imprisonment is at least one year; commercial bribery, counterfeiting, forgery, or trafficking of vehicles with altered identification numbers for which a prison sentence of at least one year has been imposed; obstruction of justice, perjury or subornation of perjury, or bribery of a witness for which a sentence of at least one year has been imposed; failure to appear to answer a felony charge for which the underlying offense may result in a sentence of two years or more; failure to appear for service of sentence if the underlying offense is one for which a term of imprisonment of five years or more may be imposed.<sup>65</sup> Other crimes included in the definition are: money laundering for which amounts exceed \$10,000; fraud or tax evasion for which the loss to victim or government exceeds \$10,000; alien smuggling or transport; illegal entry or reentry into the US after deportation on grounds of aggravated felony conviction; any crime of violence; crimes related to prostitution; and national security related offenses.<sup>66</sup>

There are four features of the definition of "aggravated felony" and its application that are particularly relevant in an analysis of the statute's fairness, utility, and inconsistency with international law. First, highly significant to the application of the statute is the fact that the definition applies retroactively to crimes for which convictions were entered at any time, both before and after the enactment of AEDPA and IIRIRA.<sup>67</sup> Second, adding to the weight of the definition's impact, if a foreign national's conviction falls within the parameters of Section 101(a)(43), it is irrelevant whether that crime is actually classified as "aggravated" or as a "felony" under state or federal criminal law.<sup>68</sup>

In *United States v. Urias-Escobar*, the Fifth Circuit Court of Appeals stated that "[w]hatever the wisdom of Congress' decision to alter the historic one-year line between a misdemeanor and a felony, the statute is unambiguous in its sweep."<sup>69</sup> In that case, the Court determined that Urias-Escobar's state conviction for misdemeanor assault with bodily injury, for which he received a one-year suspended sentence, constituted an aggravated felony under Section 101(a)(43)(F) as a crime of violence. A third aspect of the "aggravated felony" definition is that deportation for several crimes within the category hinges on the term of imprisonment that could be sentenced, not upon the term of imprisonment that is actually ordered by the sentencing judge.<sup>70</sup> Hence, a foreign national can be deported even

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65. *Id.*

66. *Id.*

67. *Id.*

68. *United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir. 2002).

69. *Id.* at 168.

70. Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000).

when a judge deemed the offense so minor as to warrant no jail time at all.<sup>71</sup> Finally, the highly inclusive nature of two categories of offenses listed as “aggravated felonies” renders the definition even broader than it may first appear.<sup>72</sup> The “crime of violence” component of the definition has proved particularly inclusive of a wide variety of criminal offenses as applied by the courts, drawing under its label DUI offenses,<sup>73</sup> simple assault,<sup>74</sup> and acts of self-defense by women who are victims of domestic violence.<sup>75</sup> The “drug-trafficking crimes” referred to in Section 101(43)(a)(C) have also included criminal offenses that are traditionally regarded as not very serious. For example, two or more simple possession of marijuana offenses constitute an “aggravated felony” under this provision.<sup>76</sup> In July of 2003, the Seventh Circuit Court of Appeals held that an immigrant who had entered a guilty plea and agreed to a term of probation for cocaine possession as a first-time offender, in exchange for having his adjudication of guilt withheld, had been convicted of an “aggravated felony” for purposes of Section 101(a)(43).<sup>77</sup>

Recognition of some other changes that AEDPA and IIRIRA made to the process of deportation is also pertinent to the comprehension of why the effects of the expansion of the “aggravated felony” definition conflict with international law and notions of due process. The changes made by those legislative acts call for mandatory deportation of any foreign national convicted of an aggravated felony without any possibility for meaningful judicial review;<sup>78</sup> the only issue a court may review is whether or not the crime for which a foreign national is convicted is reached by the definition in 101(a)(43).<sup>79</sup> Additionally, mandatory detention of those foreign nationals pending their deportation hearings is required.<sup>80</sup> The deportation and detention provisions for foreign nationals with aggravated felony convictions operate without regard to the factual circumstances or gravity of the underlying offenses.<sup>81</sup> Robert Pauw

71. *Urias-Escobar*, 281 F.3d at 166-67.

72. *See infra* notes 73-77 and accompanying text.

73. *See, e.g.,* *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001). *But see* *United States v. Chapa-Garza*, 243 F.3d 921, 927-28 (5th Cir. 2001) (holding that a DUI does not constitute a “crime of violence” under Section 101(a)(43)(F)).

74. *See Urias-Escobar*, 281 F.3d at 167-68 (“Whatever the wisdom of Congress’s decision to alter the historic one-year line between a misdemeanor and a felony, the statute is unambiguous in its sweep.”).

75. *See* Cecilia M. Espinoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersection*, 83 MARQ. L. REV. 163, 215-16 (1999).

76. *See* Pauw, *supra* note 46, at 1098.

77. *Gill v. Ashcroft*, 335 F.3d 574, 574 (7th Cir. 2003).

78. Pauw, *supra* note 46, at 1095.

79. Immigration and Nationality Act § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2000). *See also infra*, note 104; Pauw, *supra* note 46, at 1095.

80. Pauw, *supra* note 46, at 1095.

81. *Id.*

identifies one of the critical problems of what he dubs these "draconian" measures: "[t]here is no sense of proportion, no possibility for balancing social and humane factors against the seriousness of the underlying offense."<sup>82</sup> As stated above, prior to 1996, a discretionary waiver of deportation for criminal foreign nationals was available in 212(c) to provide relief for foreign nationals whose equities outweighed their criminal conduct.<sup>83</sup> IIRIRA eliminated the 212(c) waiver, replacing it with the provision of Section 240A cancellation of removal, which is absolutely unavailable to foreign nationals convicted of aggravated felonies.<sup>84</sup>

*C. Elimination of the 212(c) Waiver and the Introduction of its Replacement, 240A Cancellation of Removal*

Well before the introduction of "aggravated felony" into the statutory scheme, Congress provided discretionary relief for a deportable criminal alien in order to alleviate the hardship to resident family members of the foreign national, in limited circumstances.<sup>85</sup> That relief was supplied by INA Section 212(c).<sup>86</sup> As one commentator has noted, "few legal subjects are as complicated as the history of the so-called Section 212(c) waiver."<sup>87</sup> This Note will focus on Section 212(c)'s limited historical relationship with the "aggravated felony," except where it is necessary to look briefly at the equal protection issues that arose in relation to the section before the introduction of the aggravated felony category.

On its face, Section 212(c) originally provided relief only to "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation,

82. *Id.*

83. *See supra* notes 31-33 and accompanying text.

84. Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. 104-208, Div. C, Title III, § 304, Sept. 30, 1996, 110 Stat. 3009-597.

85. *See* Sonia Chen, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Another Congressional Hurdle for the Courts*, 8 *IND. J. GLOBAL LEGAL STUD.* 169, 187 (2000).

86. Before Section 212(c) of the Immigration and Nationality Act was replaced with Section 240A in 1996, Section 212(c) stated:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (3) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion rested in him under Section 211(b).

8 U.S.C. § 1182(c) (1994).

87. Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 *GEO. IMMIGR. L.J.* 413, 428 (2002).



and who are returning” to the United States.<sup>88</sup> In other words, the remedy in Section 212(c) appeared to be available only to excludable, and not deportable, aliens.<sup>89</sup> However, in 1976, the Second Circuit Court of Appeals found Section 212(c) violated a foreign national’s equal protection rights in so far as it arbitrarily provided a remedy for legal permanent residents who had temporarily left the country but provided no such remedy for those who had not left the country at all.<sup>90</sup> Ultimately, the Board of Immigration Appeals and other circuits followed the Second Circuit, and Section 212(c) was thereafter read to apply in both exclusion and deportation proceedings.<sup>91</sup>

Since the Second Circuit initiated application of Section 212(c) to both deportable and excludable foreign nationals, the statute underwent a facelift, only to be ultimately repealed and replaced with a new remedial provision, cancellation of removal, found in INA Section 240A.<sup>92</sup> The most recent version of Section 212(c), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is being applied to exclusion and deportation proceedings initiated prior to April 1, 1997, and Section 240A is being applied to proceedings initiated on or after that date.<sup>93</sup> Facially, the AEDPA-amended Section 212(c) offers relief only to foreign nationals convicted of aggravated felonies who are in exclusion, not deportation, proceedings, and Section 240A completely bars relief for all foreign nationals convicted of aggravated felonies.<sup>94</sup> While the AEDPA version of Section 212(c) would seem constitutionally defective for the same reasons the Second Circuit found its predecessor violated the Equal Protection Clause in 1976, most courts, including the Second Circuit, have held that no equal protection violation exists in this

88. See *Francis v. INS*, 532 F.2d 268, 270 (2d Cir. 1976).

89. Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 GEO. IMMIGR. L.J. 65, 66 (1997). See also *Tapia-Acuna v. INS* 640 F.2d 223, 224 (9th Cir. 1981); *Francis*, 532 F.2d at 271.

90. *Francis*, 532 F.2d at 273.

91. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 784 n.495 (1997) (citing *Matter of Silva*, 16 I. & N. Dec. 26, 29-30 (B.I.A. 1976)); *Tapia-Acuna*, 640 F.2d at 224.

92. See Immigration and Nationality Act § 212(c) (as amended by Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)), in the former 8 U.S.C. § 1182(c) (1996); Immigration and Nationality Act § 240A (enacted by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to replace § 212(c)), 8 U.S.C. § 1229(b) (1996). IIRIRA was enacted a few months after AEDPA. See *In re Fuentes-Campos*, 21 I. & N. Dec. 905, 905-06 (B.I.A. 1997). See also Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 580 n.144 (2001).

93. Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 LAW & INEQ. 567, 658 (1999).

94. *Fuentes-Campos*, 21 I. & N. at 913.

version of the statute.<sup>95</sup> However, a recently released Ninth Circuit opinion challenges those decisions.<sup>96</sup> In any case, whatever the distinction between exclusion and deportation for purposes of Section 212(c), only those whose removal proceedings were initiated prior to April 1, 1997 may benefit at present. Once again, it would seem that the timing of Velasquez's mother's hip surgery could have made all the difference.<sup>97</sup>

As previously noted, the relationship between the aggravated felony ground for exclusion and deportation with the Section 212(c) waiver has been a limited one.<sup>98</sup> Two years after it introduced the category of "aggravated felony" in the ADAA, Congress enacted the Immigration Act of 1990 (IMMACT), amending the existing Section 212(c) waiver such that any "alien who has been convicted of an aggravated felony and has served a term of imprisonment for at least five years" was barred from relief under Section 212(c).<sup>99</sup> In April of 1996, Congress amended the 212(c) waiver once more when it enacted AEDPA, this time legislating that no relief would be available to "an alien who is deportable by reason of having committed" any aggravated felony, among other crimes.<sup>100</sup> This is the version of Section 212(c) that applies in removal proceedings initiated prior to April 1, 1997.<sup>101</sup>

With the enactment of IIRIRA, Congress simultaneously expanded the definition of "aggravated felony," totally repealed Section 212(c), and replaced the waiver relief with a new remedy, cancellation of removal, found in Section 240A.<sup>102</sup> The new remedy acts as an absolute bar to relief for any foreign national whose conviction meets the statutory definition of "aggravated felony."<sup>103</sup> Prior to the enactment of IIRIRA, approximately half of all applications for Section 212(c) waivers were granted to long-time permanent residents of the United States.<sup>104</sup> Because no other relief

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95. See *Laguerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000); *Jurado-Gutierrez v. Greens*, 190 F.3d 1135, 1152-53 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *DeSousa v. Reno*, 190 F.3d 175, 183-84 (3d Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 308-09 (5th Cir. 1999); *Almon v. Reno*, 192 F.3d 28, 31 (1st Cir. 1999); *Asad v. Reno*, 242 F.3d 702, 706 (6th Cir. 2001).

96. See generally *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002).

97. Velasquez's removal proceeding was initiated in 1998. See discussion *supra* notes 9-15 and accompanying text.

98. See *supra* notes 31-33, 60, 85-89 and accompanying text.

99. See Trina Realmuto, *St. Cyr's Impact on Pre-IIRIRA Bars to § 212(c) Eligibility*, IMMIGR. CURRENT AWARENESS NEWS., Aug. 22, 2002, at 8.

100. See Immigration and Nationality Act § 212(c) (as amended by AEDPA), 8 U.S.C. § 1182(c) (repealed as of Sept. 1996).

101. See discussion *supra* notes 31-33 and accompanying text.

102. 8 U.S.C. § 1229(b) (1996).

103. *Id.*

104. Michelle Slayton, Comment, *Interim Decision No. 3333: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG. L. REV. 1029, 1069 (1999).

is available under the immigration code, all foreign nationals who have been convicted of aggravated felonies, a category which now includes a wide array of crimes ranging from the dangerous and violent to "nonviolent crimes and even victimless habits,"<sup>105</sup> are essentially automatically deported.

### III. ANALYSIS

#### *A. Mandatory Deportation of Criminal Foreign Nationals Poses Potential Conflicts with International Human Rights Law*

The mandatory deportation of foreign nationals who are convicted of crimes that fall under the statutory definition of "aggravated felony" presents conflicts with at least three important bodies of international law: the 1967 Protocol Relating to the Status of Refugees (hereinafter Refugee Protocol), to which the United States acceded in 1968;<sup>106</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention against Torture), which the United States ratified in 1994;<sup>107</sup> and the Universal Declaration of Human Rights (hereinafter Universal Declaration),<sup>108</sup> which, though not a treaty, is increasingly regarded as imposing some legal obligations upon members of the U.N. Charter.<sup>109</sup> Barring narrow exceptions discussed below, any statute that mandates the deportation of foreign nationals without any sort of judicial or discretionary review runs contrary to these instruments of international human rights law.

#### 1. The Refugee Protocol

The United States acceded to the Refugee Protocol in 1968.<sup>110</sup> The Supreme Court has recognized that "[t]he Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to 'refugees' as defined in Article 1.12 of the Protocol."<sup>111</sup>

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105. Johnston, *supra* note 46, at 2599.

106. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Refugee Protocol].

107. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

108. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948).

109. See Pauw, *supra* note 46, at 1117 n.94.

110. *INS v. Stevic*, 467 U.S. 407, 416 (1984).

111. *Id.* The Court notes that the United States was not a signatory of the Convention itself. *Id.* at 416 n.9.

Pertinent to the mandatory deportation of foreign nationals convicted of crimes qualifying as aggravated felonies under Section 101(a)(43) are Articles 32 and 33 of the Convention Relating to the Status of Refugees (hereinafter the Refugee Convention).<sup>112</sup>

Article 32.1 provides that "Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."<sup>113</sup> Because Section 101(a)(43) has such a broad reach, many crimes that qualify for deportation under it do not rise to the level of a threat to national security or public order.<sup>114</sup> It would be absurd to argue that Jose Velasquez, in casually identifying another man at a party as someone who might sell cocaine, was deportable on grounds of national security. Similarly, a person who is convicted of shoplifting and receives a suspended sentence of 365 days—who is likewise subject to automatic deportation—does not pose a threat to national security; the court that imposed the suspended sentence has determined as much in deciding incarceration of the offender was unnecessary.<sup>115</sup>

As to whether aggravated felons pose a threat to public order, it may be a stretch to say that Jose Velasquez posed a threat to public order at the time he was convicted of his crime; it is patently absurd to posit that nearly two decades later he poses a threat to public order, when he has not only maintained a clean record throughout that span of time, but has also retained gainful employment, raised a family, owned a home and led an otherwise exemplary life since the time of his conviction.<sup>116</sup> Thus, INA Section 101(43)(a), which defines aggravated felonies, in combination with INA Section 237(a)(2)(iii), which requires deportation of aggravated felons, is in direct conflict with the Refugee Protocol when the aggravated felon meets the definition of "refugee"<sup>117</sup> and when his or her conviction does not rise to grounds of national security or public order for deportation purposes.<sup>118</sup>

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112. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

113. *Id.*

114. See discussion *supra* notes 4-7, 57, 65-77 and accompanying text.

115. See Pauw, *supra* note 46, at 1100.

116. Velasquez v. Reno, 37 F. Supp. 2d 663, 664-65 (D.N.J. 1999).

117. Article 1.2 of the Protocol defines a refugee as an individual who:

[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Refugee Protocol, *supra* note 106, at 6225.

118. Refugee Convention, *supra* note 112, at 174.

Article 32.2 of the Refugee Convention guarantees a refugee who is expelled within the parameters of 32.1 a right of due process:

The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.<sup>119</sup>

This provision is also violated by the IIRIRA-amended deportation scheme when the deportee meets the “refugee” definition. Because the statute unconditionally mandates deportation of foreign nationals convicted of aggravated felonies, there is no meaningful hearing on the deportation order itself.<sup>120</sup> The statute explicitly bars judicial review of deportation orders for aggravated felons.<sup>121</sup> Though several circuit courts have held that federal courts retain appellate review as to whether the conviction triggering deportation meets the statutory definition of “aggravated felony,”<sup>122</sup> there is no point at which a foreign national deported under Section 237(a)(2) is entitled to administrative or judicial review on the question of whether the deportee poses a threat to national security or public order.<sup>123</sup>

Article 33.1 of the Refugee Convention<sup>124</sup> prohibits the deportation or return of a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>125</sup> Article 33.2 carves out an exception to the 33.1 ban on refoulement for a refugee for whom “there are reasonable grounds for regarding as a danger to the security of the country in which he is in, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>126</sup> The effect of Article 33 is to heighten the standard by which a refugee who would face death or imprisonment in his home country may be deported,<sup>127</sup> providing only two narrow exceptions. The

119. *Id.*

120. The absence of a meaningful hearing does not comport with the requisite “decision reached in accordance with due process of law” in Article 32.2. *Id.*

121. INA § 242(a)(2), 8 U.S.C. § 1252(a)(2).

122. Julie Ann Rah, *The Removal of Aliens Who Drink and Drive: Felony DWI as a “Crime of Violence” under 18 U.S.C. §16(b)*, 70 *FORDHAM L. REV.* 2109, 2124 n.118 (2002).

123. See discussion *infra* notes 181-98 (discussing a case, later overruled, where a district court found that a limited hearing was required in certain circumstances).

124. This provision is often referred to as the “non-refoulement” provision.

125. Refugee Convention, *supra* note 112, at 176.

126. *Id.* (emphasis added).

127. The definition of “refugee” merely requires that the alien have a “well-founded fear” that he would face persecution. *Id.* at 152. To meet Article 33, a showing that the alien would be killed or imprisoned is required. *Id.* The strong mandate against refoulement in Article 33 reflects the Convention signatories’ intent to prevent

first exception, attaching to a refugee who poses a danger to national security has been construed narrowly,<sup>128</sup> such that it has been "largely subsumed" by the second exception.<sup>129</sup> The second exception has two requirements: (1) that the refugee have committed a "particularly serious crime", and (2) that the refugee pose a danger to his community.<sup>130</sup>

Precisely what constitutes a "particularly serious crime," and when a danger to the community is present, are difficult to nail down, but some themes emerge from a review of various international interpretations of Article 33. Courts typically employ principles of proportionality in weighing the underlying offense and the severity of the consequences of refoulement, examine the underlying facts of the criminal offense, consider patterns of criminal behavior, and contemplate alternative means of ensuring safety of the community.<sup>131</sup> Despite the weight of international interpretation, however, the United States has, since the enactment of AEDPA and IIRIRA, effectively interpreted the "particularly serious crime" category to be coextensive with that of "aggravated felony."<sup>132</sup>

INA Section 241(b)(3)(B)(ii) addresses the meaning of "particularly serious crimes" for purposes of Article 33.<sup>133</sup> It states that "an alien who has been convicted of an aggravated felony . . . for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime" in the context of refoulement.<sup>134</sup> That provision further states that "[t]he previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a serious crime."<sup>135</sup> In March 2002, the Attorney General directed the BIA to refer a case to him in which he could address, for the first time, what was meant by Section

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a recurrence of the events that had transpired in the Holocaust era, in which many European Jewish refugees were returned to their nations of origin only to face death or imprisonment. Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 183 (1999).

128. See GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 221 (1989).

129. Keller, *supra* note 127, at 188.

130. *Id.*

131. *Id.* at 188-89.

132. Gwendolyn M. Holinka, Comment, *Q-T-M-T: The Denial of Humanitarian Relief for Aggravated Felons*, 13 EMORY INT'L L. REV. 405, 407 (1999).

133. Immigration and Nationality Act § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(b)(ii) (2000).

134. *Id.*

135. *Id.*

241(b)(3)(B)(ii).<sup>136</sup> The Attorney General criticized the BIA's prior interpretation of that section:

Prior to today, the Attorney General has had no occasion to consider which aggravated felonies might amount to "particularly serious crimes" where the prison sentence imposed upon conviction is less than five years. Operating in this void, the BIA has seen fit to employ a case-by-case approach, applying an individualized, and often haphazard, assessment as to the "seriousness" of an alien defendant's crime. Not surprisingly, this methodology has led to results that are both inconsistent and, as plainly evident here, illogical.<sup>137</sup>

Setting aside the rather troubling fact that the Attorney General is both responsible for interpreting the scope of his own power and the Congressional intent behind the statute he is charged with executing, it is certainly noteworthy that the Attorney General deems a case-by-case approach that contemplates the seriousness of an underlying offense as "illogical." That approach is, as previously stated, one endorsed by many of the member states of the Refugee Convention,<sup>138</sup> and it is an important part of the approach recommended by the U.N. High Commissioner for Refugees' guidelines.<sup>139</sup> The Attorney General goes on to hold that aggravated felonies involving drug offenses "presumptively constitute 'particularly serious crimes.'"<sup>140</sup> The Attorney General limits his analysis to drug offenses (the offenses at issue in the case) and does not address any other offenses that fall under the "aggravated felony" category, but he emphasizes that Section 241(b)(3)(B)(ii) does not mean that aggravated felonies for which sentences of less than five years were imposed are entitled to any presumption that such offenses are not particularly serious crimes.<sup>141</sup>

The duty of non-refoulement imposed on member states in Article 33 is a particularly serious one that arose from the Convention's recognition of the grave errors many countries, including the United States, committed in turning Jewish refugees away from their borders during the Holocaust.<sup>142</sup> The effect of the

136. *In re Y-L*, 23 I.&N. Dec. 270, 270, 273 (B.I.A. 2002).

137. *Id.* at 273. The "illogical" result at hand was that the Board of Immigration Appeals (BIA) had found that the cocaine-related convictions of the three aliens discussed in the Attorney General's opinion did not amount to particularly serious crimes. *Id.* at 271. The BIA had based its decision on factors such as the aliens' cooperation with federal investigators in other cases, their limited criminal histories, and the fact that each received sentences at the low-end of sentencing guideline ranges. *Id.* at 272. The BIA also found that the aliens probably faced persecution or torture if they were returned to their home countries. *Id.* Thus, the BIA had held the aliens should not be deported. *Id.* at 272.

138. See discussion *supra* note 132 and accompanying text.

139. See Keller, *supra* note 127, at 188-89.

140. *In re Y-L*, 23 I. & N. Dec. at 274.

141. See *id.* at 273-75.

142. See *supra* note 127.

mandatory deportation provisions for criminal foreign nationals and the Attorney General's interpretation of "particularly serious crimes" has drastically reduced the force of Article 33 as it applies to refugees who would face a serious threat upon their life or liberty upon return to their home countries.<sup>143</sup> As such, the United States runs a high risk of violating its duty of non-refoulement in the context of foreign nationals who have committed crimes the INA deems "aggravated felonies."

## 2. The Convention against Torture

The Convention against Torture, ratified by the United States in 1994,<sup>144</sup> presents a problem for Section 237(a)(2)(iii) that is similar to the one raised by the Refugee Convention. Article 3 of the Convention against Torture states that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>145</sup> The mandatory deportation of criminal foreign nationals facially conflicts with Article 3 when a foreign national who has been convicted of an aggravated felony would be subject to torture in her country of origin.<sup>146</sup> However, in 1998, a narrow exception to the rule of mandatory deportation was carved out to bring the United States somewhat closer to conformity with the Convention.<sup>147</sup>

There are two important features of Article 3 of the Convention against Torture that give it greater force than Article 33 of the Refugee Convention: (1) the language of the provision refers to "persons" rather than to "refugees," thus an alien seeking to avoid deportation on the ground that she will be subject to torture in her nation of origin does not have to show that she will be subject to persecution due to her membership in a particular social group; and (2) there are no exceptions to the prohibition on expelling an alien who would be subject to torture in her home country.<sup>148</sup> Accordingly, Article 3 absolutely prohibits the deportation of such foreign nationals, at least in theory, even if the ground for deportation is an aggravated felony conviction.<sup>149</sup> Despite the facial inconsistency

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143. See Coonan, *supra* note 7, at 606-07.

144. Convention against Torture, *supra* note 107.

145. *Id.*

146. See 8 U.S.C. § 1227(a)(2)(A)(iii).

147. See 8 U.S.C. § 1227(a)(2)(A)(v).

148. Andrea Montavon-McKillip, *Cat Among Pigeons: The Convention against Torture, A Precarious Intersection between International Human Rights and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 252 (2002).

149. Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 540 (1998).



between the content of U.S. immigration law and the Convention against Torture, it appears that after a shaky start, Congress and the INS have decided that aggravated felons are in fact entitled to at least some relief under Article 3 if they can show that they would risk torture upon return to their home countries.<sup>150</sup> Nonetheless, there are some significant limitations to the protection extended to aggravated felons however.

Before 1998, many immigration judges denied applications for relief under the Convention against Torture because Congress had not yet enacted enabling legislation.<sup>151</sup> In 1998, ten years after the United States signed the Convention and four years after it became a full member of the treaty, Congress ordered the INS to comply with the Convention against Torture.<sup>152</sup> The INS promulgated rules 208.16-18 in accordance with Congress' order.<sup>153</sup>

While the rules do include relief for aggravated felons, they provide ostensibly less protection for aggravated felons than Article 3 itself does.<sup>154</sup> By reference of Section 241(b)(3)(ii), Rule 208.16(b) requires a foreign national who has committed a particularly serious crime to individually carry the burden of proof that he will "more likely than not" be subject to torture if he is deported.<sup>155</sup> Further, the foreign national's deportation is not actually cancelled; it is merely deferred, and as such, the foreign national can be deported at a later date if the government shows the risk of torture has dissipated.<sup>156</sup> When the government initiates termination proceedings, the foreign national can have as little as ten days to prepare to show, under de novo review, that he is still more likely than not to be tortured upon return to his home country.<sup>157</sup> An aggravated felon's protection may also be terminated if the State Department receives "diplomatic assurances" from the deportee's county of origin that she will not be tortured.<sup>158</sup> These provisions arguably deal purely with procedure and thus present no real conflict with Article 3 of the Convention. Perhaps it can be said that it is simply the case that more liberal procedures are in place for foreign nationals who have not committed particularly serious crimes. However, some scholars suggest that the deferral of removal procedures for foreign nationals who fall under Section 241(b)(3)(ii) could present an opportunity for the government

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150. See *Wang v. Ashcroft*, 320 F.3d 130, 134-35 (2d Cir. 2003); 8 C.F.R. 208.16.

151. See *Montavon-McKillip*, *supra* note 148, at 251.

152. Kristen B. Rosati, *International Human Rights Treaties Can Make a Difference*, 28 HUM. RTS. 14, 14 (Winter 2001).

153. *Id.* at 15.

154. *Id.* at 16.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Deferral of Removal Under the Convention against Torture*, 8 C.F.R. § 208.17(f) (2003).

to harass a foreign national by repeatedly initiating termination procedures, or could put a foreign national in the dangerous position of subjecting "Convention claims to the vagaries of international politics."<sup>159</sup>

A more substantive concern raised in the context of the Convention against Torture, affecting not only aggravated felons but all foreign nationals who make Article 3 claims, is that the United States may be interpreting Article 3 more narrowly than most or all of their international counterparts.<sup>160</sup> The "more likely than not" burden of proof appears to be more stringent than that applied by other nations, at least in this relatively early stage of the Convention's existence.<sup>161</sup> The United States does not extend Article 3 protections to family members of a successful Convention claimant.<sup>162</sup> Moreover, a foreign national who is conferred protection under the Convention against Torture does not receive legal permanent residency, which automatically carries the benefit of permission to work in the United States.<sup>163</sup> Foreign Nationals who have not been convicted of particularly serious crimes also may be subject to a reopening of their cases if conditions in their home countries change, although they are not subjected to the problematic streamlined procedures that make it easy for the government to initiate an unlimited number of removal proceedings against a Section 241(b)(3)(ii) foreign national.<sup>164</sup> The effect of the United States' treatment of Convention claimants, thus, is to greatly impinge on the security of the Convention's benefit for the foreign national because the benefit received by the foreign national is subject to change at any time at which the foreign national's home country is determined a safe place for the foreign national.<sup>165</sup>

Once again, the United States' compliance with international law is not demonstrably within the spirit of the treaty—or, at least, its implementation of the treaty is not as rigorously protective of foreign nationals' human rights as that of its international counterparts.<sup>166</sup> Compounding the problem, in July of 2003, the House of Representatives Subcommittee on Immigration, Border Security, and Claims held an oversight hearing to air concerns and propose changes related to the deferral provision available to otherwise deportable foreign nationals based upon the Convention

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159. Rosati, *supra* note 152, at 16.

160. See Montavon-McKillip, *supra* note 148, at 260.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 260-61.

165. *Id.*

166. *Id.* at 260.

against Torture.<sup>167</sup> During that hearing, members of the Subcommittee criticized the anti-torture provision, characterizing it as a “disturbing and dangerous loophole” for foreign criminals.<sup>168</sup>

### 3. The Universal Declaration of Human Rights

As mentioned above, the Universal Declaration is not a binding treaty, it is simply a declaration that provides guidance in settling issues of international human rights law.<sup>169</sup> While U.S. courts have used the Universal Declaration in interpreting domestic laws on at least a few occasions,<sup>170</sup> the recognition of the human rights protections in the Universal Declaration has largely been limited to circumstances in which the norms at issue “rise to the level of *jus cogens*.”<sup>171</sup> Thus, in such cases, the Universal Declaration is essentially an extraneous source of authority and has not developed consequential legal teeth of its own in the United States.

The right to family life that was put forth in the Universal Declaration and has subsequently appeared in a treaty to which the United States is a party, the International Covenant on Civil and Political Rights, is particularly relevant to the mandatory deportation provision for aggravated felons.<sup>172</sup> Article 16.3 of the Declaration states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>173</sup> Article 12 states that “[n]o one shall be subjected to arbitrary interference with his . . . family.”<sup>174</sup> Further, Article 9 prohibits arbitrary exile of individuals.<sup>175</sup> In the context of deportation of aggravated felons when the Section 212(c) waiver is available (in cases arising prior to April 1997), U.S. courts have recognized the right to family life as a principle of international customary law and have identified it as a factor to consider in granting relief from

167. *News Advisory: Hostettler Subcommittee Hearing Friday on Alien Criminals and Human Rights Violators Being Released onto U.S. Streets Because of the Convention Against Torture* (July 10, 2003), at <http://www.house.gov/judiciary/news071003.htm>.

168. Rachel L. Swarns, *Lawmakers Attack Immigrants' Use of Antitorture Law to Block Deportation*, N.Y. TIMES, July 12, 2003, at A8.

169. See discussion *supra* note 109 and accompanying text.

170. See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1338 (10th Cir. 1981); *Mojica v. Reno*, 970 F. Supp. 130, 147-52 (E.D.N.Y. 1997).

171. *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (stating that kidnapping is not a *jus cogens* norm). Examples of *jus cogens* norms are torture, murder, genocide, and slavery.

172. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 595 (E.D.N.Y. 2002).

173. Universal Declaration, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948).

174. *Id.*

175. *Id.*

deportation.<sup>176</sup> However, with the enactment of IIRIRA and the elimination of the discretionary waiver, no factors may be considered; no relief from deportation may be granted.<sup>177</sup> Given that the right to family life, and freedom of unnecessary interference with that right, has already been recognized by at least some courts in the United States, it seems all the more clear that the mandatory deportation of aggravated felons who have long-term, family ties in the United States is at odds with international law.

Furthermore, because there is no review of the underlying facts of the criminal offense that mandates deportation,<sup>178</sup> and because many case examples show that those underlying facts reveal at times that the triggering offense was not a very serious or dangerous one,<sup>179</sup> it is hard to construe the mandatory deportation scheme as non-arbitrary. The scheme simultaneously reaches foreign nationals who pose a serious threat to the public, and foreign nationals who have committed non-dangerous, sometimes trivial, crimes and led otherwise exemplary lives. If the mandatory deportation regime is in fact arbitrary, it runs contrary to the Universal Declaration prohibitions against arbitrary exile and arbitrary interference with family life.<sup>180</sup>

#### 4. The United States' Conflicting Interest in Compliance with International Law and Sovereignty in the Field of Immigration

One U.S. court has held that in order to bring the INA into conformance with several international treaties and customary international law, a foreign national ordered deported on the grounds of an aggravated felony conviction must be allowed a hearing to show that his deportation would result in "extreme hardship" to his family.<sup>181</sup> In that case, *Beharry v. Reno*, the district court limited its decision to a narrow set of circumstances, holding that the facially inapplicable Section 212(h) waiver would be available to certain aliens:

The statutory provision 'No waiver shall be provided . . . if . . . the alien has been convicted of an aggravated felony' should be narrowly construed so as to accord with international law. That can be done by ruling that section 212(h) waivers are available for aliens, including petitioner, who meet its stringent requirements for seven years residence and 'extreme hardship' to family—if these aliens have been convicted of an 'aggravated felony' as defined after they committed

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176. See, e.g., *Maria v. McElroy*, 68 F. Supp. 2d 206, 232-34 (E.D.N.Y. 1999).

177. See discussion *infra* Part II.C.

178. *Id.*

179. See *supra* Part I.

180. Universal Declaration, *supra* note 173.

181. *Beharry*, 183 F. Supp. 2d at 605.

their crime, but which was not so categorized when they committed the crime.<sup>182</sup>

Section 212(h) permits a waiver of deportation for foreign nationals who have not been admitted to the United States as lawful permanent residents but have resided in the country for a continuous period of seven years and can show special reasons why deportation would cause extreme hardship to a citizen spouse or child.<sup>183</sup> *Beharry* was admitted as a lawful permanent resident.<sup>184</sup> Section 212(h) has been the subject of numerous equal protection challenges due to its availability to persons residing in the country illegally, but not to those residing here legally none of those challenges has succeeded to date.<sup>185</sup>

*Beharry* raised the hopes of immigrant advocates because despite the long-standing presumption employed by courts that a statute should be construed as consistent with international law unless no other construction is possible, no U.S. court had ever accepted an argument based on international law in the context of deportation on “aggravated felony” grounds.<sup>186</sup> In the summer of 2003, however, the District Court decision in *Beharry* was overruled by the Second Circuit Court of Appeals.<sup>187</sup>

While the Second Circuit reversed the lower court’s decision specifically on the ground that *Beharry* had not exhausted the administrative remedies available to him because he had not asked for a Section 212(h) waiver at his initial deportation hearing before the Immigration Judge, the Court also noted that “[n]othing in our decision to reverse on other grounds . . . should be seen as an endorsement of the district court’s holding that interpretation of the INA in this case is influenced or controlled by international law.”<sup>188</sup> At the same time the Second Circuit also stated that it “would not have been futile” for *Beharry* to raise his 212(h) claim before the immigration judge.<sup>189</sup> Thus it is unclear what, if any, impact these decisions may have on future judicial interpretations of the INA and its conflicts with international law. However, given the long line of precedent denying foreign nationals convicted of aggravated felonies any relief, and the clear statutory mandate against such relief, change in the law and its application appears unlikely to come from the courts.

182. *Id.*

183. *Id.* at 592.

184. *Id.* at 586.

185. *Id.*; see also *Jankowski-Burczyk v. INS*, 291 F.3d 172, 181 (2d Cir. 2002).

186. Laura Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 998 (2002).

187. *Beharry v. Ashcroft*, 329 F.3d 51, 64 (2d Cir. 2003).

188. *Id.* at 63.

189. *Id.*

Immigration is an area in which the sovereignty of U.S. law is jealously guarded because the right to regulate immigration is inherent in the concept of sovereignty.<sup>190</sup> As such, it is one of the areas in which the United States is most reluctant to comply with international law.<sup>191</sup> It is beyond the scope of this note to discuss in detail the necessity or importance of compliance with international law and all of the implications thereof. However, keeping in mind that the provisions governing deportations on aggravated felony grounds directly contravene some seminal human rights treaties, it is worth noting a couple of fundamental political and practical reasons for respecting norms of international human rights law.<sup>192</sup> Members of the international community are increasingly skeptical of U.S. adherence to the human rights principles it promotes, due to its attachment to the death penalty, its recent treatment of non-citizen detainees, and its reluctance to become a member of international agreements such as the Kyoto Protocol,<sup>193</sup> the comprehensive test ban treaty or the landmines convention,<sup>194</sup> and the International Criminal Court.<sup>195</sup> Countries with far worse human rights records than the United States frequently use these notorious human rights demerits as "diplomatic ammunition" against the United States.<sup>196</sup> The country's credibility with the international community would be greater if it abided by the terms of its agreements, and it might thus encounter a more cooperative spirit from other countries whenever it seeks international support for its own initiatives, such as those it recently undertook in Afghanistan and Iraq.<sup>197</sup> Perhaps more

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190. Adams, *supra* note 186, at 997.

191. *Id.*

192. For further discussion of the merits and drawbacks of adherence to concepts of international human rights law, see generally, e.g., Adams, *supra* note 186; Natasha Fain, *Human Rights within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607 (2003); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999).

193. Emma Lewis, *Colin Powell Faces Anti-US Summit Jeers*, W. DAILY PRESS, Sept. 5, 2002, at 2 ("The United States has been strongly criticized by leaders and activists at the summit for President George Bush's decision last year to reject the Kyoto Protocol.").

194. See Peter Willetts, *Saddam and Bush Isolated*, FIN. TIMES, Feb. 8, 2003, at 10 ("There is near universal antipathy to US hypocrisy. Much is made of Iraq's weapons of mass destruction, yet the US has refused to ratify the comprehensive test ban treaty or the landmines convention.").

195. See Guy Dinmore, *A Prudent Soldier Fighting on the Battlefield of Diplomacy*, FIN. TIMES, Feb. 1, 2003 at P13 (Colin Powell's political capital abroad has been eroded by the president's perceived litany of errors, from the U.S. refusing to ratify the International Criminal Court, to its rejection of arms control treaties.').

196. Koh, *supra* note 192, at 310.

197. See Pamela Bone, *The Moral Doubts about 'Peace'*, THE AGE, Feb. 20, 2003, at 17 ("When it calls for international unity, the Bush Administration would have more credibility if it were not so jealous of America's own national sovereignty."); *All Things*

importantly, from a policy perspective, the United States has held itself out as a global model for recognition of human rights, particularly in the last century. To maintain its credibility as a committed leader in the field of human rights, and successfully to influence other governments to uphold the human rights of individuals within their own borders, it is arguable that the United States needs to be more rigorous in its own application of international human rights law.<sup>198</sup>

*B. Mandatory Deportation Raises Significant Legal and Policy Concerns within the Domestic Arena*

Turning briefly to an important constitutional concern raised by the mandatory deportation scheme,<sup>199</sup> foreign nationals present in the United States have consistently been held to be entitled to the constitutional protection of due process in deportation proceedings.<sup>200</sup> However, the right to due process in deportation proceedings is more relaxed than in criminal proceedings, because courts have also persistently held that deportation is a civil sanction, not a criminal punishment: "Because removal proceedings are civil rather than criminal, various due process protections normally associated with criminal trials are not required."<sup>201</sup> Examples of due process protections that are not present in deportation proceedings are a right to appointed counsel<sup>202</sup> and adherence to the Federal Rules of Evidence.<sup>203</sup>

*Considered: U.N. Security Council Agreement Essential to Legitimize an Attack on Iraq* (NPR radio broadcast, Feb. 18, 2003) ("The French argue that if America attacks Iraq without consensus, it will be a victory for the law of the strongest, and they are right.").

198. Even before the Bush administration's post-September 11 adoption of policies that have drawn much criticism from human rights watchers, the director of Amnesty International expressed his concerns about Washington's observation of international human rights law. See Thera Lue Bird, *Threat to Freedom*, SALT LAKE TRIB., July 9, 2001, at A6 (citing President Bush's opposition to the International Criminal Court: "William Schulz, director of Amnesty International USA, said the United States no longer has a prominent government leader sounding the call for human rights.").

199. Many scholars have urged various constitutional arguments relating to the mandatory deportation scheme. See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the limited Scope of Proposed Reform*, 113 HARV. L. REV. 1936 (2000). The scope here is limited to due process concerns arising from the characterization of deportation as a civil, rather than a criminal, sanction.

200. See, e.g., *Woodby v. INS*, 385 U.S. 276, 276 (1966).

201. *U.S. v. Fernandez-Antonia*, 278 F.3d 150, 156 (2d Cir. 2002).

202. *Julmiste v. Ashcroft*, 212 F. Supp. 2d 341, 349 (D.N.J. 2002).

203. *Obianuju-Ezeagwu v. Ashcroft*, 301 F.3d 116 (3d Cir. 2002) ("The sole test governing the admission of evidence in deportation proceedings is whether the evidence is probative and whether its admission is fundamentally fair.")

The characterization of deportation as nonpunitive is at best questionable.<sup>204</sup> Judge Learned Hand "likened deportation to exile, 'a dreadful punishment, abandoned by the common consent of all civilized people.'"<sup>205</sup> Given the absence of any public safety or deterrence rationale for retroactive application of new rules to deport an individual for a minor, decades-old infraction, the characterization of deportation as a nonpunitive sanction in the case of a foreign national such as Jose Velasquez is untenable.<sup>206</sup> As Robert Pauw argues, "[i]n these cases, where the person is deported without any possible consideration of the remedial purposes of the statute and there are no waivers available to ensure that the civil sanction is fairly calibrated to the remedial goal, the statutory framework is inherently penal."<sup>207</sup> Pauw states that at least some additional due process protections should be imposed in deportation proceedings when the ground for removal is an aggravated felony conviction.<sup>208</sup> His argument that deportation in aggravated felony cases is in fact punitive,<sup>209</sup> and thus deserving of fuller due process protection, is a strong one. It seems self-evident that deportation is punitive when it is automatically triggered by the conviction of a crime with no regard to the public threat posed by the offender. What other justification, if not public safety, can there be for mandating the deportation of foreign nationals who commit any of such a broad range of crimes?

The characterization of deportation as nonpunitive raises a noteworthy policy concern. In calling deportation nonpunitive despite its overwhelmingly punitive consequences—separation from family, return to what may be a completely unfamiliar country where the foreign national has no familial or linguistic ties, or economic loss—neither Congress nor the courts face the question of whether such foreign nationals should be punished in such an extreme manner.

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204. See discussion *supra* note 1 and accompanying text.

205. Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States*, 21 LAW & HIST. REV. 69, 96 (2003).

206. See *id.*

207. Robert Pauw, *A New Look at Why Deportation is Punishment, Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 339 (2000).

208. *Id.* at 338.

209. *Id.* at 325.



## IV. COMPARISON AND RECOMMENDATION

A. *Article 8 of the European Convention of Human Rights and the Deportation of Criminal Foreign Nationals*

In addition to reexamining the international law to which the United States is a party, Congress could glean from the policies and practices of its European allies that human rights concerns implicate the current U.S. mandatory deportation scheme for foreign nationals convicted of "aggravated felonies" as draconian and inhumane. Governing all member states of the European Union, Article 8 of the European Convention on Human Rights requires that a proportionality test be applied when the expulsion of a resident alien is at issue, particularly when that alien is integrated into the society of the expelling country, however serious the underlying offense may be.<sup>210</sup>

Sue Farran notes that the European Commission on Human Rights has consistently held "that only in exceptional circumstances will it be considered proportionate to deport an alien to a country where he has no family or other social links."<sup>211</sup> For example, in *Moustaquim v. Belgium*, the European Court of Human Rights held that it was disproportionate to deport a Moroccan national, who had lived in Belgium since the age of three, after he was charged with numerous counts of theft-related crimes and assault crimes as a juvenile.<sup>212</sup> The court relied heavily upon the right to family life in finding that, despite the Belgian government's legitimate interest in preventing disorder, the deportation order against Moustaquim unlawfully interfered with his right to a family and private life. In particular, the court noted that Moustaquim had spent almost all of his life in Belgium and that all of his family resided there.<sup>213</sup>

The proportionality test required by Article 8 calls for the balancing of two goals: (1) maintenance of public order and safety, and (2) protection of alien residents against the harsh result of expulsion from their homes and families where the totality of circumstances show that deportation would be inequitable.<sup>214</sup> The standard to be applied in determining whether public safety concerns outweigh individual hardship is whether deportation is "necessary in

210. See generally Colin Warbrick, *The Structure of Article 8*, 1998 EUR. HUM. RTS. L. REV. 32, 32-44.

211. Sue Farran, *Facing Contemporary Challenges*, 22 EUR. L. REV., HRS/17-HRS/31 (1997).

212. *Moustaquim v. Belgium*, 193 EUR. CT. H.R. (Ser. A) at 9 (1991).

213. *Id.*

214. See generally Farran, *supra* note 211.

a democratic society.”<sup>215</sup> The flexibility of this standard allows courts to consider a wide range of factors in determining the deportability of a criminal resident foreign national, including the span of time the foreign national has lived in the country, the age of the foreign national at the time of the commission of the underlying offenses, and the family ties the foreign national has within the expelling country and within his country of origin.<sup>216</sup> Further, a court may consider, among a multitude of other factors, whether the criminal foreign national will face a significant risk of harm in her home country if deported.<sup>217</sup>

### *B. Deporting Criminal Foreign Nationals in the United Kingdom*

While Article 8 sets a basic standard for its member states in the consideration of deportation of criminal foreign nationals, the United Kingdom has a statutory scheme that serves as a useful model for legislating the deportation of criminal foreign nationals.<sup>218</sup> Four features in particular that distinguish it from the harsh rules of the U.S. mandatory deportation of aggravated felons are: (1) the recommendation to deport a criminal alien is a discretionary one that weighs the proportionality of deportation against the gravity of the underlying criminal offense and the individual factors that render deportation a harsh consequence for resident aliens; (2) the initial exercise of discretion occurs at the criminal court; (3) a recommendation order of deportation of a criminal alien is subject to appeal in a higher court, and (4) where there is a judicial recommendation, the Secretary of State, who exercises deportation authority, confirms the final deportation decision.<sup>219</sup> The wide discretion conferred upon criminal and appellate courts in making deportation recommendations regarding criminal foreign nationals allows the government to protect public safety and national security interests while avoiding the inequitable deportation of long-time resident foreign nationals, such as that of Velasquez, discussed above.<sup>220</sup>

*R. v. Hikmet Bozat and Others* illustrates the usefulness of a discretionary scheme in the criminal alien context.<sup>221</sup> In this case, the British appellate court considered the deportation recommendation of

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215. *Moustaquim*, 193 Eur. Ct. H.R. (Ser. A) at 9.

216. *Id.*

217. See Ann Sherlock & John Anderws, *Judgments of the Court of Human Rights—Human Rights Survey 1997, 1998* EUR. L. REV. HR/120, HR/121 (discussing *Aydin v. Turkey*, 25 E.H.R.R.R. 251 (1998)).

218. See Immigration Act, 1971, c. 77 (Eng.).

219. *Id.*

220. See *id.* pt. I.

221. *R. v. Hikmet Bozat and Others*, 1 Cr. App. R. (S.) 270 (1996).

three foreign nationals convicted of conspiracy to commit arson with intent to endanger life.<sup>222</sup> One of the three, Ozen, was eighteen years old at the time of the offense, more than ten years younger than the other two charged as co-conspirators.<sup>223</sup> The criminal court had found no evidence of conspiracy against Ozen except for his relatively inactive participation in the substantive offense.<sup>224</sup> The appellate court described Ozen as a "conscientious, hard-working student, a respectable young man who had never been in any trouble before."<sup>225</sup> The court took into account the fact that Ozen had resided in the United Kingdom since the age of thirteen, that his close family resided in the United Kingdom and were supportive of him, that he was "clearly well thought of in his community," and that he had continued to pursue his education while in prison.<sup>226</sup> Reasoning that his youthful immaturity and susceptibility to being misled by senior persons in his community probably "played its part in [his] offences," the court quashed Ozen's—but not those of the other convicted conspirators—deportation recommendations.<sup>227</sup>

*C. Congress Should Amend the Deportation Scheme of Criminal Foreign Nationals, Borrowing the Basic Structure of the United Kingdom's Corresponding Provision*

By placing the initial exercise of discretion with the criminal court judge, the United Kingdom's criminal deportation scheme enables the court that has first-hand access to the facts of the underlying criminal case to make a preliminary recommendation for deportation.<sup>228</sup> The criminal court judge has the opportunity to evaluate the seriousness of the actual crime in considering the necessity of deportation.<sup>229</sup> Furthermore, because the trial judge makes a decision regarding deportation, and because the British case law requires trial judges to "spell out the reasons for making a recommendation for deportation,"<sup>230</sup> a record is made of the first-hand observations made by the criminal court that inform the decision. Thus, an appellate court would have access to information such as the trial judge's assessment of witness credibility, the level of remorse displayed by the alien-defendant, the level of the defendant's participation in the crime, and other helpful underlying facts and

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222. *Id.* at 272.

223. *Id.* at 273.

224. *Id.*

225. *R. v. Hikmet Bozart*, 1 Cr. App. R. (S.) at 273.

226. *Id.*

227. *Id.* at 274.

228. *See generally* Immigration Act, 1971, c. 77 (Eng.).

229. *Id.*

230. *R. v. Hikmet Bozart*, 1 Cr. App. R. (S.) at 274.

circumstances.<sup>231</sup> In contrast, the rigid schedule of aggravated felonies under Section 101(a)(43), coupled with the Section 237(a)(2)(iii) deportation requirement, prohibits judges at all levels from considering the facts surrounding any particular crime, or the gravity thereof. The sole determination for immigration and appellate courts is whether a crime committed by a foreign national meets the expansive 101(a)(43) definition.<sup>232</sup>

Because the lack of judicial discretion in the U.S. statutory scheme is rendered particularly unacceptable by the very broad, comprehensive character of the "aggravated felony" definition, it is critical that Congress revise the INA provisions which prohibit judicial review of deportations based on criminal convictions. The United Kingdom's conferral of a right to appellate review of deportation recommendations, coupled with the European Convention's requirement that a proportionality test be employed, conforms more closely to notions of due process for resident foreign nationals than do the U.S. provisions.<sup>233</sup> The British statute enables courts to demonstrate sensitivity to the harsh consequences that follow deportation in some cases: "the courts have no wish to break up families or impose hardship on innocent people and the court is required to consider the effect an order recommending deportation will have on others who are not before the court."<sup>234</sup>

Application of this kind of consideration would benefit the family of Jose Velasquez. If a court balanced the risk Velasquez might pose to society against the hardship that would be imposed on his wife of more than thirty years, his children, and his siblings, the court would almost certainly find that deportation would unjustifiably harm Velasquez's family. An appellate court may, at times, be in a better position than a criminal court to apply this kind of balancing test because the role of the appellate court is not focused on punishment to the same extent the role of a criminal trial court is. Perhaps most importantly, the application of a proportionality standard would bring the deportation of criminal foreign nationals within the genuine requirements of due process. Though it goes against a long line of precedent, it is imperative that the punitive aspects of deportation be acknowledged in the context of deportation, at least where deportation decisions rely on criminal grounds. Where public safety is not a viable rationale for deportation, as it is not in the case of Jose Velasquez and many others like him, the most readily discernible explanation for deportation is that it is punishment for breaking the law.

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231. *Id.*

232. INA § 242(a)(2); 8 U.S.C. § 1252(a)(2).

233. For a general discussion of the problems of the absence of judicial review in the deportation context see Pauw, *supra* note 46.

234. *R. v. Hikmet Bozart*, 1 Cr. App. R. (S.) at 275.

For these reasons, Congress should reinstate some form of discretionary consideration of crime-based deportation orders. The 212(c) waiver was a preferable measure to the current total absence of relief, but, even better would be one similar to the British scheme, in which there is no presumption for deportation based on an arbitrarily comprehensive list of crimes.<sup>235</sup> Rather, a deportation recommendation is a measure available to a trial court, but it is not to be imposed unless a balancing test is performed that requires consideration of whether the alien-defendant poses a threat to the public and consideration of the harm to the alien-defendant and his family if he is deported.

Finally, in support of a statutory scheme that resembles that of the United Kingdom, once the judicial recommendations are made, the ultimate discretion of the British Secretary of State over deportation power allows a final check to ensure that resident foreign nationals are being deported in conformity with public safety and national security policies.<sup>236</sup> The courts recognize that the Secretary of State "has access to information that is not available to the court about circumstances pertaining in the offender's country of origin."<sup>237</sup> As such, if Congress were to adopt a similar system, the Department of Homeland Security would be able to evaluate the advisability of a deportation order in light of the risk that a deportee might be subject to torture or persecution in his home country and in light of national security concerns.

## V. CONCLUSION

The notion that a criminal sentencing judge should play a part in the deportation decision regarding a criminal foreign national is not foreign to U.S. immigration law. Prior to 1990, criminal sentencing judges had a limited role in the deportation process for foreign nationals who had been convicted of "crimes of moral turpitude,"<sup>238</sup> a category of crimes that existed long before the creation of "aggravated felony" category in the INA.<sup>239</sup> When a criminal judge was sentencing a foreign national who had committed an offense that would qualify

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235. See discussion *supra* note 218 and accompanying text.

236. *R. v. Hikmet Bozat*, 1 Cr. App. R. (S.) at 274-76.

237. *Id.* at 275.

238. Taylor & Wright, *supra* note 46, at 1143.

239. The category of "crime of moral turpitude" is still present in the INA. The consequences of a conviction for a crime that qualifies as "moral turpitude" are less dramatic because discretionary waiver is still available unless multiple convictions of such crimes put an alien within the scope of an aggravated felony. Over its history the "crime of moral turpitude" has been the subject of much controversy. See generally Jay Wilson, *The Definitional Problems with "Moral Turpitude,"* 16 J. LEGAL PROF. 261 (1991).

as a crime of moral turpitude, the sentencing judge could, within her discretion, recommend that the offender not be deported.<sup>240</sup> The INS was bound by the sentencing judge's recommendation in so far as the criminal ground for deportation was concerned.<sup>241</sup> The legislative history of the 1917 statute that empowered criminal judges to recommend against deportation reveals that Congress believed sentencing judges were in the best position to evaluate whether deportation of a criminal foreign national was necessary.<sup>242</sup> Congress should reconsider its severance of the criminal sentencing judge from the deportation process. The U.K. statutory scheme for deportation of criminal foreign nationals is preferable to the current U.S. model because it has a flexibility of application that would protect a foreign national like Jose Velasquez from summary deportation; it allows sentencing judges who are more intimately familiar with a foreign national's crime and profile have some input into the deportation decision; and it preserves both a foreign national's right to appeal to a higher court and the state's right to perform its function of ensuring public safety and national security.<sup>243</sup>

More important than the adoption of a particular remedy, however, is that Congress address the problems created by AEDPA and IIRIRA in *some* manner. Ultimately, the law should be changed because in its present form it leads to some fundamentally unfair and absurd results.

*Valerie Neal\**

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240. See Taylor & Wright, *supra* note 46, at 1143.

241. *Id.*

242. *Id.* at 1144.

243. See discussion *supra* notes 218, 221 and accompanying text.

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