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Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration law & How Recent Changes In Those Laws May Affect Your Criminal Cases

Melinda Smith

CRIMINAL DEFENSE ATTORNEYS AND NONCITIZEN CLIENTS: UNDERSTANDING IMMIGRANTS, BASIC IMMIGRATION LAW & HOW RECENT CHANGES IN THOSE LAWS MAY AFFECT YOUR CRIMINAL CASES.

I. INTRODUCTION

A political scientist recently described the benefit American society has gained from immigrants in the following terms:

> 'Immigrants contribute to the stability of American society and support their adopted country's political system, even though conventional political theory argues that ethnic diversity is disruptive or threatening to the political equilibrium of a democracy. Even more than native born Americans, immigrants are enthusiastic and ardent supporters of the American experience, in part because they chose to come to this country and because the country they chose to live in has provided them with a better life than the one they had, or could expect to have had in their country of birth. By comparison then, the United States is a society that deserves and receives their respect and loyalty.'[1]

However, we do not seem to return either the immigrants' respect or their loyalty. As a people, we are generally "suspicious and mistrustful" when it comes to immigration.[2] Immigration policy debate has raged anew over the past decade in the political as well as social realms.[3]

It may have been a desire to quench some of that anti-immigration sentiment which motivated the 104th Congress to enact the extremely harsh provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA),[4] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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[1] Rita J. Simon, *Immigration and Public Opinion*, *in* 18 IN DEFENSE OF THE ALIEN 58, 67 (Lydio F. Tomasi ed., 1996).

[2] *Id.* at 59. Even though every non-native American can trace his or her own roots to some immigrant ancestors, we express generally negative opinions regarding immigration today. *Id.*

[3] Susan L. Pilcher, *Justice Without A Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 272 (1997).

[4] Pub. L. No. 104-132, 100 Stat. 1214 (1996)(codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.).

(IIRIRA).[5] These two pieces of legislation narrow the scope of the traditional constitutional rights of legal resident aliens to an unprecedented low.[6]

When aliens commit crimes, the intricacies of immigration law become inextricably bound to the criminal law issues involved.[7] The effects of decisions made at various stages of a client's case may have completely different consequences for a noncitizen defendant than for a client who is a U.S. citizen.[8] The severe restrictions placed on immigration over the past decade have affected those aliens involved in the criminal justice system more profoundly than any other group.[9] As the criminal justice system is increasingly intertwined with immigration law, it has become ethically imperative for criminal defense attorneys to have some knowledge of immigration law.[10] Given these changes, criminal defense attorneys today must understand the social and historical context of immigration law to have any insight into their immigrant-clients' situation as criminal defendants.

This paper provides criminal defense attorneys with a basic background for understanding their noncitizen clients. First, this paper presents a sociological look at immigration in Part II, including a look at modern anti-immigration sentiment, the assimilation process, and the psychological effects of readjustment. Part III explains the basics of immigration law as well as the legal backdrop for the drastic changes in the laws affecting immigrants that took place in 1996. This segment includes a discussion of the constitutional rights historically afforded aliens, as well as the ways in which the scope of those rights has been narrowed by both Congress and by the Supreme Court.

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[5] Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Ella Dlin, *The Antiterrorism And Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 50 (1998).

[6] *See* Lisa C. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381, 1382 (1997).

[7] Pilcher, *supra* note 3, at 269.

[8] *See* Franco Capriotti, et al., *Small-Time Crime Big-Time Trouble: The New Immigration Laws*, 13-SUM CRIM. JUST. 4, 5 (1998).

[9] Pilcher, *supra* note 3, at 272. "Congress has enacted major immigration law reform legislation . . . numerous times in the last ten years, and nearly every legislative effort has expanded the classes of aliens subjected to harsh treatment as a result of involvement with the criminal justice system." *Id*.

[10] *See* Pilcher, *supra* note 3, at 328. Tempting as it is to leave confusing immigration issues to specialists, "[c]ompetent representation demands thorough assessments of all legal problems associated with a client's case, regardless of counsel's practice specialty." *Id*. at 330.

The 1996 measures and their consequences will be examined in Part IV with a focus on those laws affecting the criminal defendant.

II. IMMIGRATION: THE SOCIOLOGICAL BACKGROUND

A. The History of Immigration in America

America is commonly referred to as "a nation of immigrants."[11] Indeed, with the exception of Native Americans, every American family was transplanted here from some other country.[12] America enjoyed an open door policy, for Europeans at least,[13] from the time of the first permanent English settlement at Jamestown, Virginia in 1607 until 1875 when the United States Supreme Court ruled that immigration was within the purview of the federal government.[14] During this era, the majority of immigrants came from Europe[15] and the immigration policy was aimed at rejecting undesirable groups such as criminals, paupers, and Irish servants.[16]

The First Great Wave of immigration began in the 1840s and lasted twenty years.[17] This era brought a sharp rise in the number of immigrants entering the United States annually.[18] The First Great Wave was characterized

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[11] LOUIS DESIPIO & ROLDOLFO O. DE LA GARZA, MAKING AMERICANS, REMAKING AMERICA 15 (1998).

[12] *Id.* at 17. In fact, even Native Americans are believed to have migrated from Asia. *Id*. at 17-21.

[13] *Id*. at 25.

[14] PETER BRIMELOW, ALIEN NATION xi-xii (1995).

[15] DESIPIO & DE LA GARZA, *supra* note 11, at 19-21. From the 1820s until the 1880s, Ireland, Germany and the United Kingdom were the three largest contributors of human capital to America. *Id.* The second largest group, after the Europeans, were the African slaves. *Id.* at 22. This forced migration of Africans to America continued from 1619 until 1808. *Id*. at 21; BRIMELOW, *supra* note14, at xii.

[16] BRIMELOW, *supra* note 14, at xi. During this period immigration policy was regulated by the colonies and then by states. *Id*. Immigration levels remained low from the time of the Revolutionary War until the late 1830s. *Id.* This era has been called "the 'First Great Lull.'" *Id.* The other groups which states sought to exclude during this era were "vagrants, the physically disabled, people with diseases, and the mentally ill." JAMES G. GIMPEL & JAMES R. EDWARDS, JR., THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 11 (1999).

[17] DESIPIO & DE LA GARZA, *supra* note 11, at 29.

[18] *Id.* Annual immigration levels rose from 14,000 in the 1820s and 60,000 the following decade to 171,000 in the 1840s and 260,000 by the 1850s. *Id.* (citing the U.S. Immigration and Naturalization Service 1993).

by an increasing proportion of Irish Catholics and German Jews.[19] Both of these groups settled largely in northeastern cities.[20]

The Second Great Wave of immigration began in 1870 and lasted until the federal reform measures of 1920 took effect.[21] This was a period of increasing immigration as well as an ever increasing selectivity regarding who qualified for entrance.[22] This wave brought more than 26 million people to our nation.[23] These immigrants came not only from Europe, but also from Asia and the Americas.[24] Rather than concentrating in northeastern cities as their European predecessors had, these groups settled throughout the country.[25] Many of those in the Second Great Wave moved directly into industrial jobs which had been advertised in their home countries.[26]

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[19] *Id*. The proportion of Irish and German immigrants rose from four in ten immigrants during the 1820s to seven of every ten by the 1840s and 1850s. *Id.* Many of the Germans were emigrating to avoid the generally poor agricultural and political climate of the times. *Id.* The Irish were largely fleeing the Great Potato Famine of 1841 to 1851. *Id.* at 30.

[20] *Id*. These immigrants were mostly unskilled workers whose influx to the cities helped stimulate urban growth and development during this era. *Id*.

[21] DESIPIO & DE LA GARZA, *supra* note 11, at 32.

[22] *Id*. The great influx of people with varying religions and languages led to an anti-immigrant movement. *Id* at 33. This most recent wave brought a people which the native born population saw as less like themselves. *Id.* This group was seen as "less capable than their predecessors—less capable of working, less capable of learning American ways, less capable of assimilating." *Id.* It was this anti-immigrant sentiment that led to the most severe restrictions ever created in American immigration law. *Id.* The movement culminated in the National Origin Restrictions (Quota Acts) of the 1920s. *Id.* at 33. *See also*, *infra* § III A, for a discussion of the history of immigration law and policy.

[23] DESIPIO & DE LA GARZA, *supra* note 11, at 32. The number of immigrants entering in these 50 years was greater than the entire population of this nation in 1850. *Id.*

[24] *Id.* The ethnic composition of immigration changed as people from southern and eastern European countries began to replace those from the northern and western European countries. *Id.* Between 1890 and 1920, immigrants from Italy, Austria-Hungary and Russia composed 40 percent of the total immigrant population. *Id.* at 32-33. Canada and Mexico also began to account for increasing numbers of immigrants to the United States during the Second Great Wave. *Id*. at 33.

[25] DESIPIO & DE LA GARZA, *supra* note 11, at 32. The vast majority of this group settled in cities of the east and midwest. *Id*. at 33. However, some of these immigrants, especially those from Mexico, Scandanavia and Germany, settled in rural areas. *Id.*

[26] DESIPIO & DE LA GARZA, *supra* note 11, at 33.

From the 1920s until the 1950s immigration sagged at rather low levels.[27] As a consequence of the 1965 legislative changes, immigration began to increase steadily, soon returning to turn of the century levels.[28] This Third Great Wave of immigration continues today.[29] This era has brought a large number of immigrants from Latin America and Asia[30] and these groups have settled disproportionately in just a few cities.[31] Although the factory jobs that supplied work for the second wave of immigrants have largely disappeared today, immigrant households often overcome this problem through multiple

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[27] *Id.* at 17. The 1930s brought the lowest immigration levels America had seen in 100 years. *Id.* This period has been called "The Second Great Lull." BRIMELOW, *supra* note 14, at xii.

[28] DESIPIO & DE LA GARZA, *supra* note 11, at 42; *See also* discussion regarding The Immigration and Nationality Act of 1965, *infra* § III C. Depending upon the perspective taken, current immigration levels could be described as being at record high levels or just at moderate levels. DESIPIO & DE LA GARZA, *supra* note 11, at 49. The reason is that although the actual numbers of immigrants are high, the nation's overall population is much larger than at the turn of the century. *Id*. Therefore, the percentage of immigrants in the population is actually lower than it was during the Second Great Wave of immigration. DESIPIO & DE LA GARZA, *supra* note 11, at 49. In fact, one source reports a population of 260 million with immigration in the area of 800,000 per year including refugees. Jacob Weisberg, *Xenophobia For Beginners*, 28 N.Y. MAG. 24, (1995), *reprinted in* 68 THE REFERENCE SHELF: IMMIGRATION 149 (Robert Emmet Long ed.) (1996). Only 7 percent of the current population of the United States is foreign born. *Id.*

[29] DESIPIO & DE LA GARZA, *supra* note 11, at 42. This third wave has brought between 700,000 and one million legal immigrants entering the United States as permanent residents annually. *Id*. It is estimated that another 300,000 enter illegally every year. *Id*.

[30] *Id.* at 50. The percentage of total immigrants arriving from Asia and Latin America increased from 58 percent in the 1960s to 84 percent in 1990 through 1993. *Id.* at 51. The five leading countries of origin for legal immigrants in 1996 were Mexico, the Philippines, India, Vietnam, and mainland China. PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENERS 12 (1998).

[31] DESIPIO & DE LA GARZA, *supra* note 11, at 51. For the most part, today's immigrants settle in those cities with superior international travel connections. *Id.* For example, almost two-thirds of America's 1993 immigrants reported they intended to live in just five states (i.e., California, New York, Texas, Florida and New Jersey). *Id.* More than 25 percent of them intended to live in either New York or Los Angeles. *Id.* (citing U.S. Immigration and Naturalization Service 1994, table 19).

wage earners, each holding down multiple jobs.[32] There are also many highly skilled immigrants currently entering the United States.[33]

In addition to the documented, there are an estimated 300,000 undocumented immigrants entering the United States each year.[34] It is estimated that of the five million undocumented immigrants living in the United States in 1996, 40 percent lived in California.[35] It is believed the greatest proportion of these immigrants come from Mexico and other Latin American countries.[36] The population of undocumented residents blends with the documented in that many households contain both.[37] The undocumented often are forced to take jobs in construction, textiles and service where there are few labor protections available due to the risks of employing undocumented residents.[38] It is this final group of immigrants, the undocumented, that engender the most violent antipathy and debate regarding restrictions.[39]

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[32] *Id.* at 51. Additionally, "immigrant households have higher savings rates than comparably situated U.S.-born households." *Id.*

[33] DESIPIO & DE LA GARZA, *supra* note 11, at 52. For example, a large number of immigrants arriving from the Philippines and India each year are medical professionals. *Id*.

[34] *Id.* at 53.

[35] *Id.* at 53. New York, Texas, Florida, Illinois, New Jersey and Arizona each reported an estimate of more than 100,000 undocumented immigrants residing within their borders in 1996. *Id.*

[36] DESIPIO & DE LA GARZA, *supra* note 11, at 53. In addition to Mexico, the other top countries of origin for illegal immigrants to the United States include nine Latin American countries, four from the English-speaking Caribbean and four Asian countries. *Id.*

[37] DESIPIO & DE LA GARZA, *supra* note 11, at 53.

[38] *Id.* Due to their status, this group is more likely to be subjected to violations in other employment laws such as overtime and minimum wage laws. *Id*. Many businesses specifically exploit illegal workers who do not speak English and are often unaware of America's labor laws. GIMPEL, *supra* note 16, at 71. These unskilled laborers are especially vulnerable to the business owner's exploitation because their illegal status makes them afraid to seek legal help against an abusive employer. *Id*. There have even been reports of employers running prison-like compounds where undocumented workers are kept like slaves. DESIPIO & DE LA GARZA, *supra* note 11, at 53; Anna Dubrovsky, *Slave Labor Stings: Rep. Bill Goodling Went Undercover to Investigate Labor Abuses in NYC Sweat Shops*, YORK DAILY REC., Apr. 2, 1998, at C1.

[39] *See* Dlin, *supra* note 5, at 57. Although American anti-immigration sentiment follows a cyclical path, it has never before reached such heights. *Id*. One reason for the overwhelmingly negative reaction toward immigration at this point is the feeling that America "'has lost control of its own borders.'" *Id.*

B. America's Acceptance of Outsiders: Anti-Immigrant Sentiment

Despite our country's pride in it's unique history of immigration, Americans have usually opposed increased immigration.[40] Public opinion regarding immigrants is generally more positive than public opinion regarding immigration.[41] However, Americans seem ambivalent about the impact immigration has on our society.[42] Although a majority of Americans feel that

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[40] KENNETH K. LEE, HUDDLED MASSES, MUDDLED LAWS: WHY CONTEMPORARY IMMIGRATION POLICY FAILS TO REFLECT PUBLIC OPINION 21 (1998). "City districts like Little Italy and Little Saigon, booming with annual parades and bustling ethnic stores, are a testament to the country's immigrant heritage." *Id.* Yet, "[n]ative-born Americans have always feared that the newcomers will take their jobs away or lower wages and pose a fiscal burden on local governments." *Id.*

[41] *Id.* at 26. One source reported that two-thirds of Americans polled felt that immigrants are "'productive citizens once they get their feet on the ground,' and 58 percent believe that they are 'basically good, honest people.'" *Id.* at 27 (quoting Roper Center at University of Connecticut Public Opinion Online, Roper, US NEWS & WORLD REPORT, CNN, June 11, 1986). However, by the late 1970s a majority of Americans favored decreasing immigration. *Id.* at 22. Although a "majority of U.S. citizens favors cuts in current immigration levels, many fondly characterize their own immigrant ancestry as one of noble struggle stemming from the purest of motives." GIMPEL, *supra* note 16, at 29. One researcher aptly summarized the results of various public opinion polls regarding immigrants:

> The physical image that seems to best describe the American public's attitude toward immigrants is that we view them with rose-colored glasses turned backwards. In other words, those immigrants who came earlier, whenever "earlier" happens to be, are viewed as having made important and positive contributions to our society, economy, and culture. But . . . those who seek entry now, whenever "now" happens to be, are viewed at best with ambivalence, and more likely with distrust and hostility.

Simon, *supra* note 1, at 59-60.

[42] LEE, *supra* note 40, at 27. Anti-immigrant sentiment has always risen in periods of higher immigration flow. ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA 300 (2nd ed. 1996). The current anti-immigrant sentiment resembles that of the 1910s and 1920s and it will eventually be just as discredited. *Id.*

> Immigrants and refugees will continue to give rise to viable communities, infusing new blood in local labor markets, filling positions at different levels of the economy, and adding to the diversity of sounds, sights, and tastes of American cities. The history of this 'nation of nations' has been, to a large extent, the history of the arrival, struggles, and absorption of its immigrants. While the voices of the small-minded—xenophobes of various stripes—have always been heard in periods of high immigration, in

immigrants are mostly hard workers and say that "they have made a 'contribution to our country by enriching our culture,'" 61 percent also report that immigrants "'take jobs away from Americans,' and 59 percent said they 'end up on welfare.'"[43]

America's acceptance of foreigners today depends greatly upon the popular views of two specific factors.[44] The first factor is the immigrants' legal versus illegal immigration status.[45] The second factor is the popular view of which ethnic groups benefit American society and which merely burden our economic and social structures.[46]

> the end they have been silenced by the sheer weight of the achievements of the allegedly inferior races and their descendants.

Id.

[43] LEE, *supra* note 40, at 27. So, although a majority of Americans ascribe positive characteristics to immigrants generally, a similar majority feel immigration has gotten out of control and must be curbed. *Id.* In fact, immigrant work force participation levels are higher than those of the native born population. Linda Chavez, *What To Do About Immigration*, 99 COMMENTARY 29 (1995), *reprinted in* 68 THE REFERENCE SHELF: IMMIGRATION 123 (Robert Emmet Long ed.) (1996). Immigrants between the ages of 15 and 64 years (i.e., those of working age) are less likely than natives to receive welfare benefits. *Id.*

[44] *See* DESIPIO & DE LA GARZA, *supra* note 11, at 127.

[45] *Id.* Although concern about illegal immigration tends to focus on land border crossings by Mexicans,

> a consequential proportion of illegal immigrants have entered from Canada and even Poland. Land border crossings are not the only source of illegal immigration. Some illegals are smuggled into the country aboard ocean-going vessels. Nearly half of all illegal residents are those who overstay student and tourist visas; in other words, they enter the country legally, but remain after their temporary visas have expired.

GIMPEL, *supra* note 16, at 12-13.

[46] DESIPIO & DE LA GARZA, *supra* note 11, at 127. Anti-immigrant sentiment has come in waves in our nation's history. *See* TIMOTHY J. HATTON & JEFFERY G. WILLIAMSON, THE AGE OF MASS MIGRATION: CAUSES AND ECONOMIC IMPACT 124 (1998). Ethnicity of the immigrants themselves has been the driving force for anti-immigrant sentiment in the past. *Id.*

> Attitudes toward immigration and immigrants ebbed and flowed in late nineteenth-century America. Anti-immigration movements such as the Know-Nothing movement of the 1850s, came and went. Renewed anti-immigrant sentiment emerged in the 1880s, and heightened public concern was reflected by a series of official enquiries, notably the Industrial Commission (1901), into the problems of immigrant assimilation in labor

If the estimate of five million undocumented immigrants currently living in America is correct, legal permanent residents far outnumber illegal immigrants.[47] Yet, public perception is just the opposite.[48] In a 1993 Gallup poll, two-thirds of Americans surveyed reported a belief that the majority of immigrants in the United States are undocumented.[49] Although this perception is inaccurate, it has a very real effect on the immigration debate in this country.[50] The public has developed a fear of an immigration crisis, fueled by the disproportionate press coverage of illegal immigration from the 1970s to the present.[51] Some of these accounts misrepresented the numbers of illegal

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> markets as well as their wider social and political impact . . . [Five years later] Congress, supported by President Theodore Roosevelt, set up a fact-finding commission that it hoped would resolve the issue once and for all.
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> The 'chief basis of the Commission's work was the changed character of the immigration movement to the United States during the past twenty-five years.' . . . [T]he Commission drew a sharp racial distinction between the old immigrants (those from Belgium, Great Britian, Ireland, France, Germany, the Netherlands, Scandinavia, and Switzerland) and the new immigrants (those from Austria-Hungary, Bulgaria, Greece, Italy, Montenegro, Poland, Portugal, Romania, Russia, Serbia, Spain, and Turkey). The Commission concluded that . . . they were 'far less intelligent' and were 'actuated by different ideals' than the old immigrants.

Id. (citations omitted).

[47] DESIPIO & DE LA GARZA, *supra* note 11, at 55. In fact, using that estimate, there are three documented legal permanent residents for every illegal immigrant. *Id.*

[48] *Id.* at 55.

[49] DESIPIO & DE LA GARZA, *supra* note 11, at 127. The truth is that scholars agree no more than 30 percent of the immigrants entering each year are actually undocumented. *Id*.

[50] DESIPIO & DE LA GARZA, *supra* note 11, at 128. A 1993 poll indicated 48 percent of Americans reported "a great deal" of concern over illegal immigration while only 15 percent indicated "a great deal" of concern regarding legal immigration. *Id*.

[51] Lee, *supra* note 40, at 61. This disproportionate coverage of illegal immigration versus legal immigration made the problem of illegal immigration appear worse than it actually was. *Id.*

> [T]he New York Times paid very little attention to illegal immigration prior to 1975, while legal immigration received modest coverage. In 1965, only one article was devoted to illegal immigration, but legal immigration received 58 articles. Illegal immigration was not a major problem in 1965, so it is not surprising that the Times devoted only one article to it. By 1975-

immigrants believed to be present in America and others provided stories of illegal immigrants abusing the social service system.[52] While legal immigration received a disproportionate amount of largely negative coverage, which fueled the fires of discontent among the native born population, legal immigration received a similarly disproportionate amount of positive coverage.[53] This disparity is one factor which influenced the increasingly negative public opinion regarding immigration from the 1970s to the present.[54]

Americans today are concerned not only with the numbers of immigrants arriving in the United States each year, but also the "kind of people who are coming, how they got here, and whether they are likely to become a benefit or a burden to our society."[55] Recent polls indicate that how Americans feel about immigration depends largely upon the national origin of the immigrants in question.[56] A majority of respondents indicated that society benefits from the immigration of Chinese, Korean, Irish and Polish ethnic groups.[57] However, the majority indicated that the problems caused by

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> as illegal immigration began to increase-media coverage on illegal immigration increased and had surpassed legal immigration coverage. It would continue to do so for almost every year afterwards. Except for two years in this survey, the number of articles on illegal immigration was higher than that of legal immigration.

Id.

[52] Lee, *supra* note 40, at 63.

[53] *Id.* at 64.

[54] *See generally Id.* at 59-66 (discussing the influence disproportionate media coverage has had on public opinion of immigration).

[55] Chavez, *supra* note 43, at 115. Studies show that racial prejudice of native Caucasians "clearly do influence attitudes on immigrant admissions." GIMPEL, *supra* note 16, at 41. However, prejudice is just one factor among several. *Id.* Actually it is attitudes about whether immigrants take natives' jobs that is the best predictor of native attitudes toward immigrants. *Id.* at 40. Respondents with more education were far less likely to oppose immigration. *Id.* These results "reconfirm[ed] the notion that the unskilled are opposed to immigration even when prejudice and attitudes toward employment are taken explicitly into account. *Id.* at 40-41. "The effects of [racial] prejudice were most dramatic for attitudes toward admitting Haitians, Vietnamese, and Russian Jews, with those of high prejudice registering overwhelming opposition to the immigration of these groups. Predictably, those of high prejudice were least opposed to Northern European and Italian immigrants." *Id.* at 40.

[56] DESIPIO & DE LA GARZA, *supra* note 11, at 128.

[57] *Id.* Studies report a general pattern of preference by the native population for "nonrefugee immigrants from predominantly Caucasian countries." GIMPEL, *supra* note 16, at 39.

Mexican, Cuban, Haitian and Vietnamese immigrants outweigh the benefits society gains from such immigration.[58] However, according to at least one source, public opinion may be shifting.[59]

In a 1997 poll, just as many Americans expressed the opinion that immigration is good for the country as those who feel it is bad.[60] Furthermore, two-thirds of respondents reported they were not "at all worried" or only a "little worried" about large numbers of Asian and Hispanic immigrants entering the country today.[61] If that poll is in fact indicative of a recent trend toward greater acceptance of immigration, and less restrictionist views, it may bode well for future immigrants.

C. Immigration: An Adjustment Disorder

1. Assimilation

The process of assimilation is often viewed as an "inevitable process in which ethnic separatism succumbs before the all-resolving centripetal force of a common national culture."[62] However, there have actually been three major phases in the evolution of the concept of assimilation in America.[63] The view of assimilation which prevailed until the end of the nineteenth century treated

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[58] DESIPIO & DE LA GARZA, *supra* note 11, at 128. When Americans were asked in 1986 what came to mind when they thought of Latin American immigrants, 58.6 percent gave negative responses including "overpopulation, drugs, and illegal aliens." Gimpel, *supra* note 16, at 29. When asked about Asian immigrants only 39 percent of those same respondents offered clearly negative responses such as "'overpopulation,' 'poverty,' and 'taking jobs from natives.'" *Id.*

[59] DAVID M. REIMERS, UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION 148 (1998).

[60] *Id.* The poll was sponsored by Knight-Ridder newspaper. *Id.* This type of result has been sporadically apparent. For example, a study conducted in 1986 by CBS News/*New York Times* revealed that roughly equal numbers of people responded with positive words as those who responded with negative words when asked what comes to mind upon hearing the word immigrant. GIMPEL, *supra* note 16, at 29. Some the most common positive responses were: (1) "freedom, opportunity", (2) "U.S. is the land of immigrants" and (3) "came to better themselves." *Id.* at 29-30. Among the most common negative responses were: (1) "too many, overpopulation"; (2) "take jobs, use resources"; and (3) "needy, poor." *Id.* at 30.

[61] REIMERS, *supra* note 59, at 148. This same percentage was equally unconcerned by the prediction that whites will some day be in the minority. *Id.*

[62] BRENT A. NELSON, AMERICA BALKANIZED: IMMIGRATION'S CHALLENGE TO GOVERNMENT 11 (1994).

[63] *Id.* These stages were defined by Milton M. Gordon in *Assimilation in American Life: The Role of Race, Religion, and National Origins*. *Id.*

"Anglo-conformity" as the ideal.[64] Under this doctrine, immigrants were expected to completely abandon their own culture and values in favor of those of the Anglo-Saxon majority.[65] The first two decades of the twentieth century "heralded 'a biogical merger of the Anglo-Saxon peoples with other immigrant groups and a blending of their respective cultures into a new indigenous American type.'"[66] This phase has been dubbed the "'melting pot'" ideal.[67] The third and final phase in the evolution of the concept of assimilation in American thought is the ideal of "'cultural pluralism.'"[68] This view focuses on political and economic integration into the dominant society, while allowing for the "'preservation of the communal life and significant portions of the culture of the immigrant groups.'"[69] Today, a variant of this final phase has taken hold.[70]

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[64] *Id.* This view of the concept of assimilation is reflected by Michael-Guillaume-Jean de Crevecoeur (1735-1813) near the end of the American Revolution: "[Immigrants] must cast off the European skin, never to resume it. They must look forward to their posterity rather than backward to their ancestors; they must be sure that whatever their own feelings may be, those of their children will cling to the prejudices of this country." ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 118 (1990).

[65] NELSON, *supra* note 62, at 11. A more modern take on that same ideal is:

> Their parents were expected to work hard to remove accents from their own and their children's speech, help them dress in a style that did not distinguish them from their American friends, develop tastes for hamburgers, hot dogs, ice cream and apple pie, allow them to become aficionados of baseball, football (the American version) and basketball; and inculcate them with the all-American Horatio Alger dream of moving from newspaper boy or mailroom clerk to the top of the heap.

Simon, *supra* note 1, at 65.

[66] NELSON, *supra* note 62, at 11 (quoting Milton M. Gordon, *Assimilation in American Life: The Role of Race, Religion, and National Origins*).

[67] *Id.*

[68] *Id.*

[69] *Id.*

> The homogenization and assimilation image remained intact until relatively recently, perhaps up to the past twenty years, when it has gradually been replaced by a more pluralistic multiethnic image. The recognition that the United States is a 'country of immigrants' and that each group brings to its new homeland some distinguishing characteristics that should be retained and perhaps adapted by their hosts has gained ascendancy over the earlier beliefs that newcomers must blend into their new environment and lose their own distinctiveness.

Simon, *supra* note 1, at 65.

[70] NELSON, *supra* note 62, at 12 (quoting Milton M. Gordon, *Assimilation in*

The current view has been referred to as "'corporate pluralism.'"[71] This perspective provides for formal recognition of ethnic groups, and allows for "'patterns of political power and economic reward . . . [to be] based on a distributive formula which postulates group rights, and defines group membership as an important factor in the outcome for individuals.'"[72]

Historically, immigrants may have started out in enclaves, but they were expected to eventually disperse and conform to the Anglo way of life.[73]

> There was never any question that immigrants would be expected to learn English and to conform to the laws, customs, and traditions of their new country. . . . And immigrants themselves—especially their children—eagerly wanted to adapt. Public schools taught newcomers not only a new language, but new dress, manners, history, myths, and even hygiene to transform them into Americans who sounded, looked, acted, thought, and smelled the part.[74]

Today, some immigrants are able to live their entire lives in ethnic enclaves, perpetuating a cultural and political existence separate from that of the American mainstream.[75] America provides bilingual public education, as well

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American Life: The Role of Race, Religion, and National Origins).

[71] *Id.* Today the image is likely to focus on multiethnic pluralism, "multiculturalism and mixed strands coming together to form a new mosaic." Simon, *supra* note 1, at 66.

[72] NELSON, *supra* note 62, at 12 (quoting Milton M. Gordon, *Assimilation in American Life: The Role of Race, Religion, and National Origins*). Thus, many Americans today hyphenate their heritage. Simon, *supra* note 1, at 65-66. For example, Italian-Americans and Polish-Americans are often found living in ethnic middle and upper class neighborhoods and sponsoring cultural festivals for the larger community. *Id*. at 66.

[73] Chavez, *supra* note 43, at 115.

[74] *Id*. at 115-116.

[75] NELSON, *supra* note 62, at 13-16. Nelson reports a study comparing the widely dispersed settlement pattern of the Mexican immigrants with the ethnic enclaves of Cubans in the Miami area. *Id.* at 12-13. This study was conducted by Alejandro Portes, a leading scholar in migration studies. *Id*. at 12. The study concluded that:

> While one-third of the Mexicans had no knowledge of English after

as other public and private services in languages other than English.[76] Although any system that allows for ethnic separateness is criticized by scholars on both sides of the political immigration debate, studies have shown that immigrant enclaves may actually be a better route to successful adaptation.[77]

Many restrictionists fear the ethnic pride movements among immigrant groups today.[78] However, the rise of ethnic pride is part of the cycle of

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> six years of residence in the U.S., fully 45 percent of the Cubans had no such knowledge after the same period; living in the Miami area, which had Spanish-language media, the Cubans had less need to learn English than did the more widely scattered Mexicans, whose greater degree of cultural assimilation did not yield for them the benefit of upward economic mobility enjoyed by the Cubans.

Id. at 13. A 1984 study, undertaken by the polling firm of Yankelovich, Skelly and White, indicated that eight out of ten Hispanics interviewed described themselves as "Hispanic first and American second." *Id*. at 15. The San Diego Tribune reported:

> Nearly 40 percent of Hispanics in the United States have failed to assimilate into the culture and may spend their lives immersed in communities where Spanish is the only language needed to survive, . . . The study concluded this segment will find it can exist very well without learning English, remaining immersed in Spanish-language media, products, civic organizations and value systems.

Id. (quoting *U.S. Hispanics Largely Staying in Own Culture*, SAN DIEGO TRIB., Apr. 14, 1989, § A, at 28).

[76] Chavez, *supra* note 43, at 122. Chavez , a self proclaimed immigrant enthusiast, argues that "nearly thirty years of experience demonstrat[es] that bilingual education helps children neither to learn English nor to do better in school." *Id.* She finds bilingual education programs to be "expensive, ineffective, and wasteful." *Id*. Chavez further argues that at least government services ought to be offered solely in English because "[a] common language has been critical to our success in forging a sense of national identity." *Id*.

[77] NELSON, *supra* note 62, at 12-13. Alejandro Portes reported that "'[i]mmigrant enclaves tend to promote self-employment. Their absence tends to keep immigrants in wage labor. Self-employed immigrants and others working within an ethnic enclave seem to do better than those in wage labor on the outside.'" *Id*. at 13 (quoting Robert Pear, *Aliens Who Stay in Clusters Are Said to Do Better*, N.Y. TIMES, Mar. 11, 1982, § A, at 24).

[78] PORTES, *supra* note 42, at 138.

> Increasingly, the political power of more than fifteen million Hispanics is being used not to support assimilation but to advance "ethnic pride" in belonging to a different culture. The multiplication

immigration and readjustment repeated throughout the course of American history.[79] "The reaffirmation of distinct cultural identities. . . has been the rule among foreign groups and has represented the first effective step in their social and political incorporation."[80] Thus, it is not necessary to force immigrants to surrender their language, culture and religion in order to avoid the "fragmentation of America."[81]

2. Acculturation & the Psychological Effects of Readjustment

Acculturation has been defined as the "cultural exchange resulting from continuous, first-hand contact between two distinct groups."[82] Acculturation occurs not just with immigrant groups, but also with the "absorbing society."[83]

> of outsiders is not a model for a viable society . . . . If immigrants do not feel that they are fully part of this society, as American as everyone else, then we are failing.

Id. (quoting Richard D. Lamm in *The Immigration Time Bomb: The Fragmenting of America*).

[79] *Id.* Assimilation has rarely been achieved as swiftly as some restrictionists argue should be the new immigrants' goal. *Id.* at 139.

[80] *Id.* The first step in the process of assimilation is to identify with other co-nationals as a group. *Id.* This provides the beginning of incorporation into the American social and political spectrum through block voting for co-national candidates. *Id.* These local politicians are then able to act as "interpreters of national values and aspirations." *Id.*

[81] PORTES, *supra*, note 42, at 140.

> Back in the early 1900s, the United States was receiving two to four times the present number of immigrants per year; foreigners represented up to 21 percent of the American labor force and close to half of the urban population; groups like the Germans had succeeded in literally transplanting their nations into America. The country was certainly far more 'fragmented' then than now. What held it together then and continues to do so today is not forced cultural homogeneity, but the strength of its political institutions and the durable framework that they offered for the process of ethnic reaffirmation and mobilization to play itself out. Defense of their own particular interests—defined along ethnic lines—was the school in which many immigrants and their descendants learned to identify with the interests of the nation as a whole. With different actors and in new languages, the process continues today.

Id.

[82] ZEEV BEN-SIRA, IMMIGRATION, STRESS, AND READJUSTMENT 1 (1997).

[83] *Id.* at 2. Ben-Sira explains that the dominant group into which the immigrants are to be absorbed must also readjust to some extent. *Id.* Without some

The process of immigration causes incredible psychological distress which severely tests the immigrant's emotional fortitude.[84] Successful adaptation requires the immigrant to cope with a vast array of changes in everything from physical surroundings and biological processes to political, cultural and social issues.[85] The dominant society must acknowledge the cultural differences and realize that immigration "transforms the cultural, social, and economic systems of both immigrants *and the absorbing society* in ways that often differ from their expectations."[86]

The stress of immigration related changes in the personality, values and behavior of immigrants may cause psychological problems.[87] Early studies

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readjustment by the dominant or absorbing group, the immigration is likely to be unsuccessful. *Id*.

[84] PORTES, *supra*, note 42, at 156. Portes outlines earlier historical accounts of immigration and its consequences focusing on the recurrent themes of alienation and loneliness:

> The immigrants lived in crisis because they were uprooted. In transplantation, while the old roots were sundered, before the new were established, the immigrants existed in an extreme situation. The shock, and the effects of the shock, persisted for many years . . . . Their most passionate desires were doomed to failure; their lives were those of the feeble little birds which hawks attack, which lose strength from want of food . . . . Sadness was the tone of life . . . . The end of life was an end to hopeless striving, to ceaseless pain, and to the endless succession of disappointment.

Id. at 157. The immigrant has been dubbed "the marginal man" by some scholars who focus on the "inner turmoil, instability, restlessness, and malaise" often exhibited by immigrants as they pass through this state of flux. *Id.* at 158. "The individual undergoes transformation in the social, mental, and emotional aspects of his personality, each reacting upon the other. Some immigrants speak of these changes as constituting a second birth or childhood." *Id*. at 159.

[85] BEN-SIRA, *supra* note 82, at 2. Immigrants must deal with changes in their physical surroundings such as a new place to live which is often different from that to which they are accustomed. *Id*. Immigration commonly exposes people to biological changes such as strange diseases and completely different nutritional sources. *Id*. Often the immigrant must adapt to new types of employment involving unfamiliar skills. *Id*. Furthermore, there is often language and cultural barriers to overcome. *Id*. These can be extremely frustrating as immigrants must learn acceptable communication skills in a new language. *Id.* That is, they must learn how to interact socially in a foreign culture which may be in some ways completely opposite from their own. *Id.*

[86] BEN-SIRA, *supra* note 82, at 1 (emphasis added).

[87] *See generally* BEN-SIRA, *supra* note 82, at 3-6 (discussing the connection between immigration and stress).

of the association between immigration and mental disorders revealed a higher rate of suicide among the foreign born than among the native population.[88] In the nineteenth century, authors noted that the proportion of immigrants hospitalized for mental illness was notably larger than for natives.[89] In the twentieth century, numerous studies have found that immigration, with all of its attendant demands, is related to an increase in psychological stress.[90] The

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[88] PORTES, *supra* note 42, at 159. The suicide rate in Chicago in 1930 was more than three times greater among the foreign born than that which existed among natives. *Id*. Furthermore, "the suicide rate for each immigrant group in the United States was found to be two to three times higher than for the same nationality in Europe." *Id*.

[89] *Id*. at 160. The first study regarding the link between American immigration and psychopathology was conducted by Edward Jarvis in Massachusetts in 1855. *Id*. He found that "[a]lthough the insane represented 1 in 445 in the native population, they amounted to 1 in 368 among aliens in the state." *Id.* Furthermore, 93 percent of the foreigners institutionalized in the mental asylums of Massachusetts were found to be poor. PORTES, *supra* note 42, at 160. Jarvis drew the conclusion that immigrants must necessarily have a larger proportion of mental illness within their population due to the frustrations of being poor and struggling to support themselves in a strange land. *Id.* While one in 66 natives were paupers at the time of this study, one in every 25 aliens were paupers. PORTES, *supra*, note 42, at 160. However, it is important to note that variables such as age of the population and spatial distribution significantly lessen the disparity in the insanity rates. *Id.* at 161-62. The numbers were artificially inflated because insanity increases with age and there were few children among the newly arriving immigrants. *Id*. at 162. Additionally, immigrants had settled disproportionately in northeastern cities where hospitalization was more likely and they were, therefore, more likely to be counted in such studies than if they had settled in southeastern states. *Id.* Recent studies reveal conflicting results. BEN-SIRA, *supra* note 82, at 5. While some twentieth century studies report high levels of mental disturbance among immigrants, others report lower mental hospitalization rates among immigrants than among native populations. *Id*. at 4-5 (citing studies regarding Asian immigrants in the United Kingdom and immigrants versus native populations of Canada and Singapore).

[90] *See* BEN-SIRA, *supra* note 82, at 3-4. One study found that the level of stress among second generation American Greeks was correlated with the extent to which they had adopted American values. *Id*. at 3. The internal conflict created by the competition between the Greek and American cultural systems is offered as a possible explanation of these findings. *Id*. Another researcher, working with Chinese immigrants, found that culture shock and social isolation related to immigration correlated positively with psychological disturbance. *Id*. Four basic patterns emerged in the psychological distress studies of the 1950s. PORTES, *supra*, note 42, at 165. First, psychological distress is lessened with higher socioeconomic status. *Id*. Second, men were less distressed than women overall. *Id*. Third, married people were less distressed than single individuals. *Id.* at 165-

hurdles created by our immigration policy present additional stress-inducing obstacles in the path of each immigrant in America today.

III. IMMIGRATION: THE LEGAL BACKGROUND

A. Immigration Law: Historical Analysis

1. "The melting pot"

The Open Door Era of American immigration lasted until 1875.[91] For the first century of American history, immigration laws were essentially nonexistent and America could truly be called a melting pot.[92] The first federal naturalization law was enacted in 1790 required that applicants be 'free white persons.'[93]

2. Federalism

In 1875, the Supreme Court ruled that immigration issues were to be decided by federal rather than state authorities.[94] The first federal restrictions effectively banned nearly all Asian immigration.[95] However, it wasn't until the early 1920s that immigration laws began to affect the shape of immigration on a

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66. Finally, the fewer "undesirable life events," the lower the incidence of psychological distress. *Id.* at 166. The results were aptly summarized by one author who stated:

> Inability to reach one's goals in life and powerlessness to control or affect events—more common among lower-class people, women, and the less socially established—result in greater levels of distress and associated mental disorder….The marginal position of immigrants is one of powerlessness and alienation; like other subordinate groups, they would be expected to exhibit higher rates of psychopathogenic symptoms.

Id. at 166.

[91] BRIMELOW, *supra* note 14, at xi.

[92] SCHUCK, *supra* note 30**,** at 11. The only exceptions to a complete open door policy at that time were: (1) state-enforced public health restrictions and (2) slavery. *Id.* During that first century of American history, immigration and migration patterns depended upon economic, political, ethnic and religious concerns rather than immigration laws. *Id.*

[93] BRIMELOW, *supra* note 14, at xii. Blacks were not guaranteed citizenship until the passage of the Fourteenth Amendment to the United States Constitution in 1868. *Id.*

[94] *Id.*

[95] BRIMELOW, *supra* note 14, at xii.

grand scale.[96] The National Origins or "Quota Act" of 1921 and the Immigration Act of 1924 severely limited immigration and imposed a series of national-origin quotas.[97] In 1952, the Immigration and Nationality Act (INA) was passed.[98] Also referred to as the McCarran-Walter Act, the INA was "restrictionist in its reaffirmation of the quota system [however,] in order to secure its passage two provisions were included that did involve opening new doors."[99] The Act allowed for tiny token quotas from formerly excluded nations which formed the "'Asian-Pacific Triangle.'"[100] Additionally, the bill would not pass without the "Texas Proviso" which essentially legalized the hiring of illegal aliens.[101]

Sweeping amendments were made to the INA in 1965.[102] These changes abolished the quota system which has, based upon national origins, instead focused primarily upon family reunification, and to a lesser extent on occupational skills and refugee status.[103] The 1965 version of the INA provides the basis for much of our immigration policy today.[104]

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[96] *See* SCHUCK, *supra* note 30**,** at 11.

[97] BRIMELOW, *supra* note 14, at xii. The National Origins Act of 1921 capped total annual immigration at 150,000 Europeans while instituting a quota system which favored the traditional source countries of the British Isles, Germany and Scandinavia. SCHUCK, *supra* note 30, at 12. Meanwhile, immigration from Japan was completely prohibited. *Id*.

[98] BRIMELOW, *supra* note 14, at xii.

[99] MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 10 (1994).

[100] *Id*. This provision allowed the first opportunity for Asian immigration to the United States since the late 1880s and the 1920s. *Id*.

[101] *Id*. The migratory pattern of farm workers crossing the border from Mexico for picking seasons was established in the 1940s by the Bracero program. *Id*. This program provided for needed agricultural laborers during World War II by allowing Mexicans to temporarily enter the United States without being counted in the quota system. *Id*. When these temporary work permits were halted in 1964 by the Johnson administration, the illegal entry problem increased as employers who had depended upon the Bracero program for a constant supply of cheap labor simply turned to hiring illegal aliens. GIMPEL, *supra* note 16, at 12.

[102] LEMAY, *supra* note 99, at 9. The Immigration and Nationality of Act of 1965 was commonly referred to as the Kennedy Immigration law. *Id*.

[103] SCHUCK, *supra* note 30, at 12. The family reunification policy was created to allot visas on the basis of an applicant's familial ties to a U.S. citizen or permanent legal resident. GIMPEL, *supra* note 16, at 68. The authors of the 1965 Act intended family reunification to be a top priority in admission decisions. *Id*. In 1995, nearly two-thirds of the immigrants legally entering the United States were able to do so because they were closely related to someone already a citizen or legal resident. *Id*.

[104] *See id*. Similar elements include the identical per-country quotas and a

Political debate regarding immigration raged during the 1980s as immigration levels soared.[105] First, the Refugee Act established a legal structure for adjudication of claims of refugee and asylee status.[106] In 1986, the Immigration Reform and Control Act (IRCA) was instituted to bolster enforcement of immigration laws and provide amnesty programs for illegal aliens in the United States since the beginning of 1982.[107] Just four years after IRCA, the Immigration Act of 1990 was passed.[108] The Immigration Act constituted the most sweeping changes since the 1965 revamping of the immigration system.[109] The Act "defines and governs almost all legal admissions under the current immigration and naturalization system."[110] However, in 1996 significant changes were made to the law, which have wreaked havoc on the lives of even legal permanent resident aliens.[111] Among these changes is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[112] This Act provided for increased enforcement, and more stringent immigration policies.[113]

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preference for family members of those already settled in the United States in addition to those with needed job skills. *See id.*

[105] SCHUCK, *supra* note 30, at 12. The 1965 INA changes triggered a large increase in immigration levels. *See* GIMPEL, *supra* note 16, at 68.

[106] SCHUCK, *supra* note 30, at 13. This law, passed in 1980, marked the first time that Congress had developed a "systematic legal structure for controlling refugee admissions." *Id*.

[107] *Id.* IRCA created several amnesty programs for agricultural workers as well as other types of workers and Cubans and Haitians who had been illegally residing in the United States since January 1, 1982. *Id*. 2.67 million of the 2.76 million who applied for such amnesty were granted legal status. *Id.* IRCA also contained several new enforcement provisions. JASON JUFFRAS, IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE 7 (1991). These new provisions imposed civil liabilities upon employers of illegal immigrants. *Id.* The House Judiciary Committee referred to the employer sanction provisions of IRCA as "'the principal means of . . . curtailing future illegal immigration.'" *Id*. (quoting H.R., *Committee on the Judiciary*, *Immigration Control and Legalization Act Amendments of 1986*, Report 99-682, Part 1, 46).

[108] SCHUCK, *supra* note 30, at 13.

[109] *Id.* The Act was signed into law by President Bush. *Id.*

[110] *Id.*

[111] Dlin, *supra* note 5, at 61; *See also infra*, discussion at § IV.

[112] REIMERS, *supra* note 59, at 141.

[113] *See id*. The IIRIRA provided enhanced enforcement provisions such as additional border patrol for the Immigration and Naturalization Service (INS) and improved fencing along the California-Mexico border. *Id*. The law also added more stringent sanctions for illegal aliens violating immigration laws. *Id*. Furthermore, the IIRIRA made it more difficult to gain asylum and much more difficult for older

B. America's Immigration Debate

"Immigration law has helped determine what sort of a nation we are and will determine what we become. In many ways, immigration shapes what happens to and in America. What sorts of jobs will open and to whom they will be open are impacted by immigration."[114]

One primary concern of restrictionists is that immigration drains our economy.[115] Some argue that the community is forced to absorb much of the cost of cheap immigrant labor.[116] As this argument goes, taxpayers are forced to pay more for social services for impoverished immigrant workers as well as for native workers who lose jobs to the influx of immigrants.[117] Other costs may

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immigrants to sponsor new immigrant family members. *See id*. at 141-42. Many of these changes in the 1996 law will be discussed later. *See infra* § IV.

[114] LEMAY, *supra* note 99, at 9.

[115] ROY BECK, THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS 203 (1996).

[116] *Id.* Beck argues that the community must subsidize the cost of the cheap labor which benefits only business and capital owners. *Id.* Several economic sectors directly benefit from illegal immigrant labor (i.e., agriculture, manufacturing, food processing and hotels and restaurants). GIMPEL, *supra* note 16, at 15. However, because the illegal population is not evenly distributed across America whatever burdens they produce are born heavily by certain states. *See id*. California is believed to harbor 40 percent of the illegal immigrant population of this country. *Id*. And New York ranks second, likely containing 15 percent. *Id*.

[117] BECK, *supra* note 115, at 203. Illegal immigrants are forbidden to participate in social service programs such as AFDC (now called TANF, i.e., Temporary Assistance to Needy Families), "food stamps, Medicaid, Medicare, and Supplemental Security Income." GIMPEL, *supra* note 16, at 15. However, illegal immigrants are permitted to attend public school and utilize "indigent care medical facilities, such as county hospitals and clinics." *Id.* Illegal immigrants may also qualify for the federal supplemental food program for women, infants, and children called WIC. Michael Fix & Wendy Zimmermann, *When Should Immigrants Receive Public Benefits?*, *in* 18 IN DEFENSE OF THE ALIEN 75, 77 (Lydio F. Tomasi ed., 1996). There have been studies which show:

> illegal immigrants do not contribute in taxes as much as they consume in public services. And to the extent that illegal residents pay taxes, these funds accrue primarily to the federal government, not to states and localities . . . . Several of these studies have also raised questions about whether *legal* immigrants contribute in taxes as much as they extract in public benefits.

GIMPEL, *supra* note 16, at 15. However, another study found underutilization of

include school bonds to teach immigrant children, and additional infrastructure needs to handle the population increase, which comes without a concomitant increase in taxes revenue.[118] However, the benefits immigrants contribute to local communities should not be overlooked.[119]

Some studies suggest that "immigration has a positive multiplier effect on the economy and the earnings of natives and thus reduces the fiscal cost of immigration by indirectly increasing public revenues raised from the native-born."[120] Studies which attempt to estimate the net fiscal costs of providing public services to immigrants vary widely in their results.[121] However, some do report that "immigrants as a group contribute more in revenues than they consume in services."[122]

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welfare, considering the poverty rate among immigrants in the United States. The complex set of findings:

> suggest[s] . . . that the welfare burden of immigrants is in fact as much imposed by the institutional environment as by the characteristics of immigrants themselves. Despite *higher* levels of education of immigrants from all sources in the Untied States, the institutions of that country assign them *lower* status, and *so much so that they more often fall into poverty and require reliance on the welfare system.* The so-called welfare burden in these cases turns out to be a burden imposed by U.S. institutions on immigrants, rather than a burden imposed by immigrants on the United States. It is these mainstream social institutions which in effect assign immigrants to poverty status. This fact is made clear when we see that immigrants in Canada and Australia, who are in fact less well educated, turn out to have lower rates of poverty and lower reliance on their more generous welfare systems.

JEFFREY G. REITZ, WARMTH OF THE WELCOME: THE SOCIAL CAUSES OF ECONOMIC SUCCESS FOR IMMIGRANTS IN DIFFERENT NATIONS AND CITIES, 219 (1998).

[118] BECK, *supra* note 115, at 203.

[119] *See* GIMPEL, *supra* note 16, at 65. Immigrants often settle in the inner city where they rejuvenate declining housing and revitalize abandoned commercial areas with new businesses. *Id.* Many argue that immigrants do not adversely affect the economy or the social welfare system and their contribution to population growth encourages economic expansion. *Id.*

[120] GEORGES VERNEZ & KEVIN F. MCCARTHY, THE COSTS OF IMMIGRATION TO TAXPAYERS, 11 (1996).

[121] *Id.* The per capita costs of social services distributed to immigrants must be estimated because actual accountings of immigrants receiving a certain services are generally unavailable. *Id.* Likewise, the tax revenues gained from them must be estimated because the incidence of tax filings and remittances sent out of the country must also be estimated. *Id.*

[122] *Id.* at 13. Of the three major studies compared by Vernez & McCarthy, all

One argument raised by restrictionists is that immigrant professionals are competing with their native counterparts.[123] Senator Alan Simpson (R-Wyo.), claims that educated immigrants, such as scientists and engineers, are working for less pay than natives in order to legally reside in America.[124] However, the evidence shows that "the typical immigrant professional in science and engineering earns *more* than his or her native-born counterpart, not less. Evidence that the foreign born are not bidding down wage rates by being willing to work for far less than the native born."[125] Additionally, some restrictionists argue that colleges and universities are paying foreign born Ph.D.s less than natives in order to undercut the wages of native born Ph.D.s.[126] Again, the research proves there is no correlation between the unemployment rates of native Ph.D.s and the number of foreign-born Ph.D.s in a particular field.[127]

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agree on one thing. That is, "natives (including immigrants who have entered the country prior to 1970) contribute more revenues per capita than post-1970 immigrants." *Id*. at 14. Researchers believe the higher contribution from natives and earlier immigrants is a result of the higher estimated incomes among that group than those estimated for more recent immigrants. *Id.* Research summarized in one source found that immigrants have come to receive more public services over the past 30 years. George J. Borjas, *Immigration and Welfare: A Review of the Evidence*, *in* THE DEBATE IN THE UNITED STATES OVER IMMIGRATION 121, 122 (Peter Duignan & L.H. Gann eds., 1998). Immigrants were slightly less likely than natives to receive cash benefits in 1970 but during the 1980s immigrant households became more likely to receive benefits while native household usage declined. *Id*. at 123. By 1990, according to Borjas, immigrant participation in welfare programs was 1.7 percentage points higher than native usage rates. *Id*. However, the immigrant welfare participation rate in 1990 was still just 9.1 percent. *Id*. The difference between the immigrant and native participation rate in cash benefit programs was not numerically large. *Id*. Finally, the most recent studies are limited in their ability to accurately gather information and are thus able to prove little beyond the fact that more recent immigrants are poor and that "families with low incomes contribute less to public revenues than those with high incomes do. In essence, the finding that undocumented immigrants are net consumers of public services is more a product of their low incomes than of their immigration status." VERNEZ, *supra* note 120, at 45.

[123] Stuart Anderson, *The Effect of Immigrant Scientists and Engineers on Wages and Employment in High Technology, in* THE DEBATE IN THE UNITED STATES OVER IMMIGRATION 224-25 (Peter Duignan & L.H. Gann eds., 1998).

[124] *Id.* at 224 (citing *Borderline* (National Empowerment Television broadcast, Jan. 22, 1996)).

[125] *Id.* at 225.

[126] *Id.*

[127] *Id*. In fact, "[s]ome of the lowest unemployment rates are in the fields with the

At least one author has suggested an alternative approach to immigration policy.[128] Portes advocates balancing the contributions and problems associated with different types of immigration without considering uninformed pubic opinion.[129] Portes asserts that there are three basic types of immigration to be analyzed: (1) manual labor migrants; (2) professionals and entrepreneurs; and (3) refugees/asylees.[130] Studies show that even the largely illegal flow of manual labor migrants may actually be beneficial to our nation.[131]

C. Immigration Law: Basic Structure

1. Constitutional rights for aliens

In 1875, the Supreme Court ruled that immigration issues are to be determined by federal rather than state officials.[132] Since that time, states have

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highest concentrations of foreign born." *Id.* Some researchers have concluded it is the exceptional productivity of the foreign born that accounts for their wages. Anderson, *supra* note 123, at 225-26. This makes sense being that American employers are certainly not biased in favor of the foreign born and wages are a function of productivity. *Id.* at 225.

[128] PORTES, *supra* note 42, at 285.

[129] *Id.* Portes argues that the "amorphous concept of 'immigrant'" must be divided to consider the pros and cons of each group within the flow today. *Id.* Portes believes the xenophobia-induced anti-immigrant sentiment should be ignored when seriously analyzing whether these types of immigration are actually detrimental to our national interests. *Id.*

[130] *Id.* at 285-87. The manual labor migrants are mostly unauthorized border crossers or those overstaying their visas. *Id.* at 286. They come largely from Mexico, Dominican Repulic, El Salvador, and Guatemala. *Id.* The professionals and entrepreneurs are mostly Filipinos, Koreans, and Asian Indians. *Id.* They are legal, permanent residents for the most part. *Id.* They "bring capital and business expertise and help fill commercial niches neglected by mainstream firms, such as inner-city retailing and distribution of imported foods and exotic goods." *Id.* at 293. The refugees/asylees are either legal, temporary residents or illegal residents if their request for asylum was denied. *Id.* at 287. The refugees come from the former Soviet Union, Vietnam, and Iran while the asylees come from the former Soviet Union, former Yugoslavia, and Syria. *Id.* at 287.

[131] *See id.* at 285. Studies have shown that illegal immigrants have no significant impact on the wages of the native population. *Id.* at 288. In fact, the number of illegal immigrants may even marginally increase the wages of the natives. *Id.* Additionally, "the presence of foreign workers can help sustain the pace of economic growth and revive declining sectors such as manufacturing." *Id.* at 289.

[132] Peter J. Spiro, *Reconsidering the Role of Federalism in Immigration*

been effectively excluded from any decision making in this arena.[133] Although the Constitution does not expressly grant to Congress such jurisdiction, Congress does enjoy a plenary power over immigration law.[134]

The Supreme Court has outlined Constitutional constraints placed upon the States' power to institute laws which discriminate against aliens.[135] Most state attempts at discriminating against legal aliens have been struck down by the Supreme Court as violative of the Fourteenth Amendment's Equal Protection Clause.[136] That is precisely what happened to a law aimed at the denial of public education for illegal alien children in *Plyler v. Doe.*[137]

As early as 1886, the Supreme Court decided that aliens are "persons" within the meaning of the U.S. Constitution.[138] In the case of *Yick Wo v. Hopkins*[139] the Court explained:

Policymaking, in 18 IN DEFENSE OF THE ALIEN 91, 91 (Lydio F. Tomasi ed., 1996).

[133] *Id*. In fact, "state governments have consistently and categorically been found to lack legal competence in the area." *Id*. Some suggest that this issue of jurisdiction over immigration concerns is ripe for reconsideration in the face of political pressure from states hardest hit by the financial burdens of mostly illegal immigration. *Id*. at 91-92. These states include California and New York which boast large electoral votes. *Id*. at 92.

[134] Solbakken, *supra* note 6, at 1400. "[I]t has been stated that 'over no conceivable subject is the legislative power of Congress more complete than it is over (immigration).'" *Id*. (quoting Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). However, "[t]here has been substantial scholarly discussion over the erosion of the plenary doctrine, and the introduction of more conventional constitutional rights into the sphere of immigration law." Solbakken, *supra* note 6, at 1410 n.124 (citing Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 606 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 75 (1984)).

[135] Spiro, *supra* note 132, at 93.

[136] *Id.* The Supreme Court has decided that the alleged state interest of conservation of public resources is not actually furthered by laws with alienage classifications. *Id*.

[137] Plyler v. Doe, 457 U.S. 202 (1982). Here the Court recognized that "an alien's presence on American soil is not a 'constitutional irrelevancy,' and suggested that public education fell within the nebulous area upon the continuum of liberties that exist for aliens." Solbakken, *supra* note 6, at 1404.

[138] Natsu Taylor Saito, *Alien And Non-Alien Alike: Citizenship, "Foreigness," And Racial Heirarchy in American Law*, 76 OR. L. REV. 261, 331 (1997).

[139] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . .[Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[140]

This trend continued with a string of post-World War II decisions wherein the Court struck down various state laws which attempted to restrict noncitizens' rights.[141] The zenith of constitutional protections for aliens came with the 1971 Supreme Court decision in *Graham v. Richardson*.[142] In *Graham*, the Court applied strict scrutiny analysis to an inherently suspect alienage classification.[143] However, this trend of recognition of aliens' rights did not continue beyond the early 1970s.[144] The Court began limiting the scope of aliens' constitutional rights by distinguishing between the power of the States and the federal government to classify by alienage.[145] The shrinkage of legal

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[140] Saito, *supra* note 138, at 331 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[141] *Id*. at 332. California's alien land laws were struck down in the 1948 case of *Oyama v. California*. *Id*. (citing Oyama v. California, 332 U.S. 633 (1948)). Shortly thereafter the Court struck down another California statute aimed at restricting the issuance of fishing licenses to those who were 'ineligible to citizenship.' *Id*. (citing Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)). There the Court explained that "'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" *Id*. (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948)).

[142] Saito, *supra* note 138, at 332 (citing Graham v. Richardson, 403 U.S. 365 (1971)).

[143] *Id*. (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)). In striking down "state welfare laws which conditioned benefits on citizenship or on a durational residency requirement" as violative of the equal protection clause, the Court stated, "'[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.'" *Id*. (citing Graham v. Richardson, 403 U.S. 365, 372 (1971)). The Court applied strict scrutiny to a such a classification in the 1973 case of *Sugarman v. Dougall*. *Id*. (citing Sugarman v. Dougall, 413 U.S. 634 (1973)). There the Court held that a New York state statute which forbade aliens to work in that State's classified competitive civil service violated equal protection. *Id*.

[144] Saito, *supra* note 138, at 333.

[145] *Id*. (citing Matthews v. Diaz, 426 U.S. 67 (1976)). The earlier cases had

protections for aliens continued with the Court's announcement that, "[i]t would be inappropriate. . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny', because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'"[146] With the use of a mere rational relationship test for alienage classifications, the constitutional protection afforded noncitizens has eroded rapidly.[147]

2. Federal Control

a. Immigration and Naturalization Service

The Immigration and Naturalization Service (INS) is the segment of the Federal Department of Justice designed to control immigration by enforcement of the immigration laws.[148] The INS is divided into an enforcement section and a service section.[149] The enforcement section primarily attempts to stop illegal entrance, and to track down and expel those who either enter illegally, or overstay their proverbial welcome.[150] The service section of the INS approves the applications of those qualified for entry visas, legal resident status, and citizenship.[151]

b. Immigration Judges & Board of Immigration Appeals

The Immigration and Nationality Act (INA) empowers the Attorney General to regulate immigration in part through the process of removal

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widened the scope of constitutional rights for aliens by restricting state power to make restrictions on the basis of alienage due to the protective provisions of the Fourteenth Amendment. *Id.* However, it is the Fifth Amendment, not the Fourteenth, which applies to the federal government. *Id.* Although the language of the two amendments is similar, the Supreme Court began limiting the protective provisions of the Fifth Amendment through use of the federal government's plenary power over immigration issues. *Id.*

[146] Saito, *supra* note 138, at 334 (quoting Foley v. Connelie, 435 U.S. 291, 295 (1978)).

[147] *See id.* at 334-35. The culmination of this erosion may be the recent changes in immigration law. *See infra* § IV, discussion of AEDPA and IIRIRA.

[148] Juffras, *supra* note 107, at 2.

[149] *Id.* Juffras describes the INS as a "hybrid of a law enforcement agency and a human services agency." *Id.*

[150] *Id.* That is to say, INS agents are interested in finding and expelling illegal aliens who avoided proper INS entry procedures as well as those who originally entered legally but have since violated the terms of that legal entry. *Id.*

[151] *Id.* The service section of the INS refers to these as "immigration benefits." *Id.* at 2.

(formally referred to as "deportation").[152] The Attorney General accomplishes this through a civil administrative proceeding delegated to her administrative agents.[153] The administrative agency in charge of this process is the Executive Office of Immigration Review (EOIR).[154] The EOIR is composed of adjudicators called Immigration Judges (IJs) and the Board of Immigration Appeals (BIA).[155] Before the 1996 changes wrought by the IIRIRA and the AEDPA, "any alien facing deportation. . . [was] entitled to an administrative hearing, at which he may be represented by privately retained counsel, conducted in accordance with procedures outlined in the INA and accompanying regulations."[156] The INA then permitted *de novo* review by the BIA of any unfavorable decision rendered by an IJ and appealed by the alien.[157] BIA decisions of deportation could then

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[152] Pilcher, *supra* note 3, at 271 (citing 8 U.S.C. § 1227 (1998)). One of the changes enacted in 1996 was a consolidation of the traditional exclusion and deportation procedures into a single process called removal. *Id*. at 333 n.4. The key to the decision of whether a foreign national was to be placed in exclusion or deportation proceedings before the IIRIRA was whether the foreign national had managed to affect an "'entry.'" Ellen G. Yost, *Entry Issues*, 1021 PLI/CORP. 359, 366-67 (1997). Today the question has become whether the foreign national has been "'admitted.'" *Id*. at 367. "Admission" describes the legal entrance of a foreigner into the United States pursuant to the proper inspection and authorization procedures of the INS. *Id*. Those who have been admitted may later be charged with deportability under INA § 237(a), while those who have not may be charged with inadmissibility pursuant to the INA § 212(a). *Id*.

[153] Pilcher, *supra* note 3, at 271.

[154] *Id.*

[155] *Id*.

> The term 'immigration judge' means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

8 U.S.C. 1101(b)(4)(1998).

[156] Pilcher, *supra* note 3, at 271. *See infra* Part IV. A 1., for a discussion regarding lack of due process now available in deportation proceedings under the IIRIRA, *infra* Part IV. A 1. The term "alien" is used to refer to both those foreign nationals who have been granted legal status as well as those who are in the United States illegally. Robert D. Ahlgren, *Procedural Due Process In Exclusion/Deportation*, 964 PLI/CORP. 71, 73 (1996).

[157] Henry E. Velte, III, *Mansour v. INS: Sixth Circuit Holds Judicial Review of Final Orders of Deportation Against Certain Criminal Aliens Available Soley Through Habeas Corpus Review*, 6 TUL. J. INT'L & COMP. L. 671, 672 (1998). The BIA was

be appealed directly to the federal court of appeals for that jurisdiction.[158] Additionally, collateral habeas corpus review of BIA judgments was also available to those detained during the deportation process.[159]

3. Definitions

a. Refugee

The humanitarian gesture of granting asylum and accepting refugees has long been a part of American history.[160] "Refugees" has been defined as people who are "fleeing persecution or have a well-founded fear of persecution" in their own country because of their race, religion, nationality, membership in a particular social group, or political opinion." [161] Potential refugees must apply for such status from abroad and wait for America's response.[162] Traditionally, the President confers with Congress to set annual levels for admissions of refugees.[163]

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entitled to "'make its own findings and independently determine the legal sufficiency of the evidence.'" *Id.* (quoting IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 623 (5th ed. 1995)).

[158] *Id.* However, the federal circuit courts were limited in that they could not decide factual issues de novo. *Id*. at 672-73. Still, before the 1996 changes, nearly every EOIR decision based on errors of law were subject to review by the federal courts. *Id*.

[159] *Id*. at 673. This allowed the detained alien to "question whether detention by the government violated his or her right to liberty under the Fifth Amendment." *Id.* at 673.

[160] GIMPEL, *supra* note 16, at 72.

[161] *Id*. at 73 (citing Immigration and Nationality Act of 1995). For example, American officials granted admission to refugees of communist countries such as Cuba, Eastern European nations and the Soviet Union during the Cold War. GIMPEL, *supra* note 16, at 73.

> Persecution is an unjustified threat of serious harm, including a threat to life or freedom . . . . Punishment for failing to comply with precepts that are fundamentally abhorrent to an individual's deeply held convictions may amount to persecution. Persecution may be the result of governmental action or action by a nongovernmental entity that the government knowingly tolerates or is unable to control.

Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, 1021 PLI/CORP. 243, 246 (1997) (citations excluded).

[162] GIMPEL, *supra* note16, at 73. This is as opposed to Asylum status which can be granted once a person has arrived at a port of entry. *Id*. at 75.

[163] *Id*. at 73. These admission levels are adjusted when necessary to provide for emergency situations. *Id.*

b. Asylum

Immigrants may apply for asylum status if they meet the definition of "refugee."[164] That is, one "seeks protection from persecution" or has a "well-founded fear of persecution on the same grounds as a refugee."[165] If granted such status, the alien will be granted permission to work in the United States.[166] Furthermore, the alien's spouse and children may also be granted the same status if they join the alien.[167] However, the alien will not be granted asylum if he has been convicted of an "aggravated felony,"[168] or of a "particularly serious crime."[169] In fact, an alien will be refused asylum even without a conviction if

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[164] GIMPEL, *supra* note 16, at 75.

[165] *Id.* S*ee generally*, Helton, *supra*, note 161, 245-52 (for an in-depth discussion of the bases of qualification for asylum).

[166] GIMPEL, *supra* note 16, at 75. 8 U.S.C. 1158 § 208 (c) (1) (B) states: "In the case of an alien granted asylum under subsection (b), the Attorney General (B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization . . . . "

[167] 8 U.S.C. § 1158. Note the use of merely discretionary language. *Id*. Section 208 (b) (3) states that "[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien." *Id*.

[168] 8 U.S.C. § 1158 (a) (2) (A) (ii); 8 U.S.C.§ 1158 (b) (2) (B) (i).

[169] 8 U.S.C. § 1158 (b) (2) (A) (ii). However, asylum will not be granted, if the Attorney General determines that:

> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
> (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the Untied States prior to the arrival of the alien in the Unite States;
> (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
> (v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237 (a) (4) (B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 212 (a) (3) (B) (i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a

there are "serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to . . . arrival."[170] Further, even if granted asylum, that status is not permanent.[171] An asylee may be removed for any number of reasons, at any given time.[172]

IV. 1996 RESTRICTIONS ON THE RIGHTS OF THE CRIMINAL ALIEN

A. The AEDPA and IIRIRA: Targeting Criminal Aliens

The 1996 changes in immigration law have affected an "unprecedented restriction of the constitutional rights and judicial resources traditionally afforded to legal resident aliens."[173] The first of the two Acts which constituted the major overhaul of immigration policy in 1996 is the Anti-terrorism and Effective Death Penalty Act (AEDPA),[174] which President Clinton signed into law on April 24, 1996.[175] The AEDPA contains two particularly harsh provisions.[176] First, the AEDPA greatly expands the realm of criminal offenses for which an alien can be removed from this country.[177] Second, the AEDPA eliminates the

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danger to the security of the United States; or
(vi) the alien was firmly resettled in another country prior to arriving in the United States.

8 U.S.C.§ 1158 (b) (2) (A).

[170] 8 U.S.C.§ 1158 (b) (2) (A) (iii).

[171] 8 U.S.C.§ 1158 (c) (2).

[172] 8 U.S.C. § 1158 (c) (2). The asylee is entitled to remain in the United States only as long as is necessary for his protection from persecution. 8 U.S.C. § 1158 (c) (2) (A). Therefore, if circumstances in his home country substantially change, he may be removed. *Id.* Additionally, if the asylee is found at any time to meet any of the conditions described in subsection (b) (2) as reasons for denial of asylum, his status may be terminated. 8 U.S.C. 1158 § 208 (c) (2) (B).

[173] Solbakken, *supra* note 6, at 1382.

[174] *Id.* at 1381 (citing Pub. L. No. 104-132, 100 Stat. 1214 (1996)(codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.)). The AEDPA has been criticized as a knee-jerk reaction by Congress to the Oklahoma City bombing tragedy. *See* Dlin, *supra* note 5, at 51. The bill was originally meant to show Congressional commitment to fighting domestic and international terrorism while also assuaging public outrage over the bombing in Oklahoma which was originally assumed to be the work of an immigrant terrorist. *Id.* at 51. However, the initial focus of the bill was lost in the Congressional effort to make it a forum for immigration reform. *Id.* at 59. The final law was a much weaker version of the original bill and was expected to do little to stop terrorism. *Id.* at 61.

[175] Solbakken, *supra* note 6, at 1381. The law did not take effect until Novemeber 1, 1996. Dlin, *supra* note 5, at 66 n.8.

[176] Dlin, *supra* note 5, at 60.

[177] Solbakken, *supra* note 6, at 1382.

traditional judicial review of final removal orders.[178] It has been said that this legislative decision "'threaten(s) the most basic safeguards of due process and seek(s) to eliminate the meaningful role for the judiciary to perform its historic function of reviewing the implementation of immigration law.'"[179] By redefining what constitutes an aggravated felony and eliminating judicial review, the AEDPA has put legal resident aliens in jeopardy of removal for even minor offenses which may have been committed years ago.[180]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was passed shortly after the AEDPA, and modifies some of the AEDPA's more "problematic immigration provisions."[181] However, some of the IIRIRA's provisions have been described as "so harsh as to amount to 'national scapegoating' of immigrants."[182] For example, the IIRIRA severely restricts the role of the federal courts in making immigration decisions.[183] Criminal aliens are specifically targeted by provisions prohibiting review by any court of "any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in the enumerated sections."[184]

"The legitimacy of our legal system is put into question whenever basic due-process rights are denied, even when denied to 'undesirable' aliens."[185] Although the traditional due process rights owing to criminal defendants are not available in deportation proceedings, aliens have historically been protected by certain limited due process rights.[186] However, today those rights are being

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[178] *Id.* at 1383.

[179] *Id.* at 1383 (quoting Rhonda McMillion, *Immigration Rights a Concern: ABA Questions Bill Restricting Asylum*, *Benefits for Legal Aliens,* 82 A. B. A. J. 90 (Feb. 1996)).

[180] Solbakken, *supra* note 6, at 1399. "The enforcement of § 440(a) of the AEDPA permits what is 'essentially a police agency to also decide guilt and innocence.'" *Id.* (quoting Charles Finnie, *Playing Cop and Judge: Is the INS Suited to Handle the Deportation Powers it Gained Under New Anti-Terrorism Law?*, AMERICAN LAWYER MEDIA, L.P. THE RECORDER, May 10, 1996, at 1).

[181] Dlin, *supra* note 5, at 51.

[182] *Id.*

[183] *See* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction-Statutory Restrictions and Constitutional Rights*, 1021 PLI/CORP. 415, 417 (1997). In fact, some of the new provisions of the IIRIRA attempt to completely eliminate federal court review of certain INS decisions. *Id.*

[184] *Id.* at 423. This aspect of the IIRIRA is quite similar to section 440(a) of the AEDPA and would, therefore, be subject to many of the same challenges. *Id.*

[185] Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L. J. 693, 705 (1998).

[186] *See* Ahlgren, *supra* note 156, at 79-80. Both the immigration laws and the courts have bestowed some due process protections upon aliens. *Id.* at 80. For example, the Fourth

limited by "an overactive Congress bent on ill conceived escapades and, as a member of the BIA recently commented, in a dissent, sometimes giving the impression of trying to kill a fly with an elephant gun."[187] Aliens convicted of criminal offenses are hardest hit by these restrictions placed on aliens' rights and the increasing control by the executive branch.[188]

Amendment rights allowing for suppression of illegally obtained evidence as well as Sixth Amendment right to appointed counsel are not available in deportation proceedings. *Id*. at 79. Although the exclusionary rule does not apply in civil deportation proceedings, illegally obtained evidence may be suppressed if the manner in which it was obtained is egregious and interferes with basic fairness. *Id*. at 80.

[187] *Id*.

[188] *See* Pilcher, *supra* note 3, at 272. Over the past several years Congress has added several tools to the INS arsenal with the goal of targeting criminal aliens. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L. J. 883, 930 (1997). These new tools come in the form of powerful restrictions of noncitizens' rights. *See id*. Three primary tools used against the criminal alien today are the Institutional Hearing Program (IHP), expedited administrative deportation, and judicial deportation. *Id*. at 930-32.

The IHP is "'a joint effort between the INS, the Executive Office for Immigration Review (EOIR), and [s]tate and [f]ederal correctional officials to ensure that alien inmates receive orders of deportation prior to the end of their criminal sentences.'" *Id*. at 930 (quoting *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. On the Judiciary*, 104th Cong. 22 (1996) (statement of Anthony C. Moscato, Director, Executive Office for immigration Review)). IRCA made this program possible in 1986. *Id*. Since then the alien inmate population has been centralized by designating six federal prisons as criminal alien holding facilities. *Id*. This allows for expedited hearings and removal of criminal aliens. Smith, at 930. States have instituted similar centralizing programs for expediting hearings. *Id*.

Another tool in the INS arsenal targeting criminal aliens is the expedited administrative deportation process. *Id*. at 931. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, 2026-28 (codified as amended at 8 U.S.C.§§ 1105a, 1252a (1994)), amended the INA to create "expedited deportation procedures for aliens convicted of aggravated felonies who are not lawfully admitted for permanent residence to the United States and are not eligible for any relief from deportation." *Id*. at 931-32. This allows an INS official to issue deportation orders without the case being heard by an immigration judge. *Id*. at 932. Judicial review of the INS decision is severely limited. *Id*. The only questions on review are "whether the alien: (1) has been correctly identified, (2) has been convicted of an aggravated felony, and (3) has been afforded the limited procedural rights under this new provision.." *Id*. at 932.

Judicial deportation is another tool aimed at the elimination of criminal aliens. *Id*. This came about in 1994 through amended section 242A of the INA. *Id*. The new technique allows federal judges to order deportation at sentencing of a criminal alien rather than requiring the traditional separate deportation proceeding. *Id*. The criminal alien simply receives notice of the grounds under which deportation will be sought and an

Today, the INS is being given increased power over the lives of noncitizens.[189] For example, INS officers have an extremely broad power to arrest based upon the very low standard of "reason to believe the person is an alien."[190] Furthermore, § 440 of the AEDPA has broadened the categories of those aliens who are to be subjected to more restrictive removal procedures.[191] The new procedures allow for mandatory detention pending removal, expedited removal, and no judicial review of final removal orders.[192] The categories of individuals subject to these restrictive procedures include: "(1) aggravated felons, (2) those convicted of controlled substance violations, (3) drug addicts or drug abusers, (4) those convicted of certain firearm offenses, (5) those convicted of miscellaneous crimes, including espionage, sabotage, treason or sedition, (6) and those convicted of two separate crimes of moral turpitude."[193] The goal of the 1996 changes seems to have been "maximiz[ing] the number of criminal aliens who remain in detention and minimiz[ing] the number who avoid removal through the granting of discretionary relief or through legal technicalit[ies]."[194]

B. Expansion of the Grounds for Deportation

1. Crimes of Moral Turpitude

Toward that end, Congress enacted two amendments to the INA which expand the category of deportable criminal aliens.[195] First, § 435 of the AEDPA amended § 241(a)(2) of the INA to make a single conviction of a crime of moral

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opportunity to examine the evidence and refute the charges. *Id.*

The reason for targeting criminal aliens seems to be the perception that such tactics will have an affect on the crime rate. *See id*. at 929. The number of removals has increased to 37,000 criminal aliens removed in 1996. *Id*. at 929-30 (citing *Illegal Alien Removals Set Record*, UPI, Oct. 29, 1996). While in the early 1980s there were only 1,000 foreign born inmates in federal prisons, today there are 24,000. *Id*. at 929.

[189] *See* Smith, *supra* note 188, at 930.

[190] Ahlgren, *supra* note 156, at 80 (citing INA section 287(a)). This standard equates roughly to mere probable cause. *Id*. The Immigration Act of 1990 allows arrest on "grounds to believe a federal felony is or has been committed." *Id*. Furthermore, anyone falling into the classification of "aggravated felon" may be arrested at the end of their sentence and may then be detained without bond unless they meet three criteria: (1) they must be lawful permanent residents, (2) they must present no threat to the community, and (3) they must be likely to appear at subsequent hearings. *Id*. at 81.

[191] *See* Ahlgren, *supra* note 156, at 89.

[192] *Id*.

[193] Ahlgren, *supra* note 156, at 89.

[194] Smith, *supra* note 188, at 933.

[195] *Id*.

turpitude a deportable offense, if it carries a possible sentence of one year or more.[196] However, crimes of moral turpitude are nowhere specifically listed or defined in the INA.[197] The only guidance is provided by the Board of Immigration Appeals which has described moral turpitude as that which:

> shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.[198]

It is important to remember that because definitions of crimes vary widely by jurisdiction, the "'inherent nature of the crime as defined by the statute and as limited and described by the record of conviction (indictment, plea, verdict, and sentence)' must be assessed in order to determine whether a crime is one of moral turpitude."[199] Therefore, criminal defense attorneys must be aware of this assessment since such cases will always be a case of first impression unless there has been a prior immigration case regarding the same statute.[200]

The consequences of such a determination can be surprising to the noncitizen criminal defendant as well as to his or her attorney.[201] The most

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[196] *Id.* "An alien who commits two crimes of moral turpitude 'not arising out of a single scheme of criminal misconduct' is deportable; an alien who commits one crime of moral turpitude is deportable if the crime is (a) committed within a specified period of time after admission and (b) punishable by a sentence of one year or longer." Pilcher, *supra* note 3, at 311 (quoting 8 U.S.C. § 1227(a)(2)(A)(ii) (Supp. 1997)).

[197] *See id.* In fact, this class of crimes is considered to be one of the most "perplexing" of the offense categories created by the INA. *Id*.

[198] Pilcher, *supra* note 3, at 311 (quoting Matter of Fualaau, Int. Dec. 3285 (B.I.A. 1996) (citations omitted)).

[199] *Id*. at 311-12 (quoting Matter of Short, 20 I. & N. Dec. 136 (B.I.A. 1989)).

[200] Pilcher, *supra* note 3, at 313. The determination will vary with each statute. *Id*. at 312. For example, the BIA has decided that passing bad checks is a crime of moral turpitude under Georgia law because the statute requires an intent to defraud. *Id*. at 312-13. However, passing bad checks is not a crime of moral turpitude under the Pennsylvania statute which does not require the proof of an intent to defraud. *Id*. at 312.

[201] Pilcher, *supra* note 3, at 313. For example, in order to be inadmissible, the alien need not

pressing question is whether the crime can also be defined as an aggravated felony.[202] This is the most important issue because it is the classification of "aggravated felon" which carries the harshest immigration consequences for the noncitizen defendant.[203] The factors which will most likely determine whether a crime of moral turpitude is also an aggravated felony include the amount of harm caused by the crime, the length of the maximum possible sentence as well as the length of the actual sentence imposed.[204] In order for plea discussions to be sensitive to the relevant immigration issues, the criminal defense attorney must be aware of the consequences of each of these determinations.[205]

2. Expansion of the Definition of "Aggravated Felony"

The second major change Congress made which expands the category of deportable criminal aliens is the expansion of the definition of "aggravated felony."[206] The aggravated felony statute was first enacted in 1988 to make

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be convicted of such a crime. *Id*. The alien may be found inadmissible for simply admitting to having committed a crime of moral turpitude or admitting to having committed acts which constitute the essential elements of such a crime notwithstanding a lack of conviction. *Id*. at 313. Therefore, even avoiding the conviction for such a crime may not be enough to avoid the negative immigration consequences of the proceedings. *Id*. at 314.

[202] *See id*. at 314.

[203] Pilcher, *supra* note 3, at 314. Although crimes of moral turpitude are grounds for both inadmissibility (i.e., denial of entry) and deportability (i.e., removal after entry), aggravated felonies are only grounds for deportability. Cecelia M. Espenoza, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, 26-OCT. COLO. LAW. 89, 89 (1997). However, aggravated felonies include a bar to future reentry, whereas, crimes of moral turpitude do not. *Id*.

[204] Pilcher, *supra* note 3, at 314. For example, crimes which include fraud or deceit and the victim's loss is more than $10,000 will be aggravated felonies as well as crimes of moral turpitude. *Id*. at 333 n.193 (citing 8 U.S.C. § 1101(a)(43)(M)(i) (Supp. 1997)). Perjury is an aggravated felony where the maximum possible sentence is five years or more. *Id*. at 333 n. 191 (citing 8 U.S.C. § 1101(a)(43)(S) (Supp. 1997)). And when the term of imprisonment is at least one year, theft offenses are classified as aggravated felonies. *Id*. at 333 n.192 (citing 8 U.S.C. § 1101 (a)(43)(G) (Supp. 1997)).

[205] Pilcher, *supra* note 3, at 315.

[206] Smith, *supra* note 188, at 933. Section 440 of the AEDPA as well as certain provisions of the IIRIRA redefine "aggravated felony." Dlin, *supra* note 5, at 62-63. Before the AEDPA, the INA included crimes such as drug trafficking and murder within the ranks of the "aggravated felonies" for immigration purposes. Solbakken, *supra* note 6, at 1390. However, expanding the definition of "aggravated felony" through the AEDPA made less serious crimes such as gambling offenses, prostitution, and failure to appear before a court substantive grounds for

deportable any alien convicted of such a crime.[207] Ever since that time, Congress has consistently increased the range of crimes which fall under its ballooning definition.[208] In fact, there are many cases where crimes classified as misdemeanors, by the state law under which the alien defendant is convicted, will be considered "aggravated felonies" by today's immigration law standard.[209]

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deportation. *Id*.

[207] Capriotti, *supra* note 8, at 6. With such diverse levels and types of crimes now being classified as "aggravated felonies" for immigration purposes, aliens committing only minor offenses must endure particularly harsh penalties. *Id.*

[208] *Id*. Before the 1996 changes, immigration law defined "aggravated felonies" as any crimes carrying penalties of five or more years of imprisonment. Dlin, *supra* note 5, at 64. The AEDPA lowered those in many cases to penalties of just one year or more. Capriotti, *supra* note 8, at 6. Furthermore, the minimum monetary amounts sufficient to qualify a non-violent offense as an "aggravated felony" have been substantially reduced. Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW. 471, 474 (1998).

> Some of the crimes that qualify as aggravated felonies include:
> -a theft or burglary offense for which the term of imprisonment is at least one year;
> -child pornography;
> -certain firearms offenses;
> -fraud or deceit in which loss exceeds $10,000;
> -a crime of violence for which the term of imprisonment is at least one year;
> -alien smuggling;
> -obstruction of justice or perjury for which the term of imprisonment is at least one year;
> -falsely making, forging, counterfeiting, mutilating, or altering a passport for which the term of imprisonment is at least one year;
> -tax evasion in which the loss exceeds $10,000
> -certain gambling offenses for which a sentence of one year of imprisonment may be imposed;
> -illicit trafficking in controlled substances or firearms;
> -an attempt or conspiracy to commit any of the above stated offenses.

Capriotti, *supra* note 8, at 6 (citing INA § 101(a)(43); 8 U.S.C. § 1101 (a)(43)). Additionally, any attempt or conspiracy to commit any of these above mentioned crimes is also sufficient to qualify the offender as an "aggravated felon." Dlin, *supra* note 5, at 64.

[209] Espenoza, *supra* note 203, at 89. For example, most simple assault crimes are defined as "aggravated felonies" for immigration law purposes, making them deportable offenses, even though they are commonly considered only misdemeanors under state law. *See id*.

The consequences of being classified as an "aggravated felon" have worsened with the 1996 changes in the INA.[210] Contrary to the former changes which had been made in the definition of "aggravated felony," the IIRIRA applied its definition "fully retroactive[ly] to actions taken after. . . [its] enactment."[211] The IIRIRA also made the classification of a legal permanent resident as an "aggravated felon" a complete bar to relief from deportation.[212]

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[210] *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 154 (1998).

[211] *Id*. However, the aggravated felony conviction is still required to have been entered after 1988 in order for an alien to be deportable as a result of it. *Id*. at 161 n.261.

[212] Morawetz, *supra* note 210, at 155. Furthermore, any legal permanent resident deported in this manner is permanently barred from admission. *Id*. at 161 n.261 (citing INA § 212(a)(9)(A), 8 U.S.C. § 182(a)(9)(A) (Supp. II 1996)). Section 212(c) of the INA used to provide an avenue of relief from deportation for legal permanent residents who could accrue the required seven years of uninterrupted domicile in the United States before the final order of deportation was issued. Smith, *supra* note 188, at 935. This process has been limited in recent years to require the accrual of domicile to be completed before the alien is served notice of the deportation proceedings. *Id.* This form of discretionary relief from deportation is a judicially created right of appeal sometimes referred to as "Francis relief." Solbakken, *supra* note 6, at 1386. It was the Second Circuit that extended the INA section 212(c) waiver of exclusion to deportation proceedings. *Id*. at 1410 n.24 (citing Francis v. INS, 532 F.2d 268 (2d Cir. 1976)). The court based its decision on the equal protection doctrine because it found no distinction between the long-time residents being deported and those who had never gained entry being excluded. *Id*.

The discretionary decision of whether to grant the waiver was to be based upon a balance of equities. Solbakken, *supra* note 6, at 1387.

> Factors deemed favorable in the circuit court's analysis included: (1) family connections in the United States; (2) period of residence (particularly where this is for a long duration with its inception at a young age); (3) evidence of hardship that may occur to both the alien and her family if deportation is to occur; (4) history of employment; (5) the existence of either property or business ties; (6) evidence of community service; and (7) proof of rehabilitation. Factors that weighed unfavorably included: (1) the nature of the conviction which provided a basis for deportation; (2) the existence of a criminal record; and (3) the presence of other evidence that is deemed indicative of bad character, such as other violations of immigration law.

Id. (citations omitted).

The process is now called "cancellation of removal" under section 240A of

Additionally, such convictions result in expedited deportation proceedings, bail ineligibility, and mandatory detention during the course of the process.[213] In addition to increasing the number of deportable aliens by expanding the definition of "aggravated felony," the IIRIRA also denies all aggravated felons the right to seek relief from deportation.[214]

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the INA and is unavailable to aggravated felons regardless of the strength of their ties with the United States. Smith, *supra* note 188, at 935. Furthermore, section 440(d) of the AEDPA has made nearly all categories of criminal aliens ineligible from seeking this form of discretionary relief from deportation. *Id*. This discretionary relief from deportation is just another example of the removal of the procedural safeguards which used to protect legal resident aliens from an abuse of discretion by the INS in deportation decisions. Solbakken, *supra* note 6, at 1386. In the government's zeal to crack down on immigration, these procedures which used to safeguard the rights of legal resident aliens (versus those of illegal immigrants to whom such Francis relief was never available) are being abandoned. *See id*. at 1387-97. *See also*, 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 (1997).

[213] Espenoza, *supra* note 203, at 90. The law now requires the INS to either finish the deportation proceedings while the criminal alien is serving his or her sentence or take the alien into custody upon release from prison. *Id*.

[214] Morawetz, *supra* note 210, at 156. In addition to expansion of the definition of "aggravated felony," the INA as amended also redefines "term of imprisonment" and "conviction." Capriotti, *supra* note 8, at 5. The new definition of "term of imprisonment" increases the number of criminal aliens subject to these new provisions by including aliens sentenced to a certain term of incarceration regardless of any suspension of any part of that sentence. *Id*. "'[A]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.'" *Id*. (quoting INA sec. 101(a)(48)(B), 8 U.S.C. sec. 1101(A)(48)(B)).

Expansion of the term "conviction" has also increased the number of criminal aliens subject to these provisions because the sections are often triggered by a "conviction" of a certain type of crime. Pilcher, *supra* note 3, at 320. It is imperative that criminal defense attorneys become aware of the new definition's effect on plea bargaining in criminal cases. *See id*. In 1996, Congress enacted a broader definition with the goal of eliminating the ability of criminal aliens avoiding crime related immigration consequences through state diversion programs. *Id*. at 320-21. Prior to 1996, aliens in various states were treated differently under immigration law depending upon the state's use of "deferred adjudications" (i.e, subsequent review of the issue of guilt or innocence upon violation of the conditions of probation). *Id*. at 321. In 1996, the definition of "conviction" for immigration

3. Retroactivity

The retroactivity of the IIRIRA is especially troubling for criminal defense attorneys because it is likely to disrupt past expectations of the consequences of certain actions by criminal defense attorneys and their alien clients.[215] The retroactive application of the new, more expansive definition of "aggravated felony" will cause the summary deportation of aliens who made decisions in handling their criminal cases with the expectation that they would be permitted to live their lives in the United States.[216] These new provisions ensure that even a long time legal permanent resident who immigrated with his parents as a young child will necessarily be deported upon conviction of nearly any drug offense.[217] Deportation under these circumstances affects an extremely harsh penalty upon such a person who is forced out of what he considers his home

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purposes was changed to:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id. at 320 (quoting 8 U.S.C. sec. 1101(a)(48)(A) (Supp. 1997) (INA sec. 101(a)(48)(A)) (as amended by IIRIRA sec. 322(a)(1)).

[215] Morawetz, *supra* note 210, at 156. There is nothing in the legislative history of the IIRIRA which explains the reasons for the retroactivity. *Id.* at 155. Courts must be careful with retroactive application because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Ira J. Kurzban & Raquel M. Chaviano, *Immigration Law: 1997 Survey of Florida Law*, 22 NOVA. L. REV. 149, 164 (1997). Retroactive application of these laws can have serious detrimental effects on the criminal defendant. *See id.* at 169-70. For example, in the case of *United States v. Lazo-Oritiz*, 954 F. Supp. 254 (S.D. Fla. 1996), retroactive application of one section of the INA provided a ten year sentence enhancement for which the defendant's crime did not qualify at the time of commission. *Id.* The conviction for manslaughter was not defined as an "aggravated felony" for immigration purposes at the time of the offense. *Id.* at 170.

[216] Morawetz, *supra* note 210, at 156. Reform and rehabilitation can no longer be seen as grounds for avoiding deportation after a criminal conviction which is considered to be an aggravated felony under immigration law because deportation is no longer simply a possibility with such a conviction. *Id.* The IIRIRA has made deportation mandatory upon being classified an aggravated felon. *Id.*

[217] *Id.* at 156-57.

country and sent to some "foreign" country where he may not be acquainted with the language, customs, and people.[218] Thus, the INA as amended by the AEDPA, and the IIRIRA, imposes much harsher criminal penalties on aliens than are imposed upon citizen defendants accused of the very same crimes.[219] Therefore, it is imperative that criminal defense attorneys establish their clients' immigration status before entering into plea discussions in a criminal case.[220]

4. Specific Offenses as Grounds for Deportation

In addition to aggravated felonies, several specific categories of offenses trigger deportation proceedings under the amended INA.[221] Deportable offense categories now include controlled substance violations,[222] domestic violence, stalking, restraining order violations and child abuse,[223] as

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[218] Morawetz, *supra* note 210, at 157. In this scenario, the all too frequent pattern of experimentation with drugs would cause an alien defendant to have to endure the punishment of deportation even though he may have spent the same number of years in the United States as a comparable citizen offender. *Id*. at 156.

[219] Dlin, *supra* note 5, at 64-65. This is true because the automatic consequences include deportation in addition to imprisonment. *Id.* at 64.

[220] Espenoza, *supra* note 203, at 89. In fact, Colorado requires criminal defense attorneys to inform their clients of the probable immigration consequences of certain decisions made during the criminal case. *Id*. (citing *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (holding that the failure to advise a client of the immigration consequences of a criminal plea constitutes ineffective assistance of counsel)). Before aliens with criminal records apply for naturalization, they should be advised to consult an immigration attorney because most of these harsh statutes are applied retroactively. Carol Leslie Wolchok, *Demands And Anxiety: The Effects of the New Immigration Law*, 24-SPG. HUM. RTS. 12, 13 (1997). Therefore, aliens can be denied naturalization and/or be deported based upon prior convictions which were not deportable/excludable offenses at the time of commission or sentencing. *Id*.

[221] Capriotti, *supra* note 8, at 5-6.

[222] *Id*. at 6. Controlled substance violations outside the definition of "aggravated felony" are now deportable except for "a single offense involving possession for one's own use of 30 grams or less of marijuana." *Id.* at 6 (citing INA sec. 237(a)(2)(B)(i), 8 U.S.C. sec. 1227(a)(2)(B)(i)). Other than that one exception, any conviction after admission for a "violation (or a conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance" will result in deportation. *Id.*

[223] Capriotti, *supra* note 8, at 6 (citing INA sec. 237(a)(2)(E)(i), 8 U.S.C. sec. 1227(a)(2)(E)(i)). "[A]ny immigrant who violates an order that involves protection against 'credible threats of violence, repeated harassment, or bodily injury' is removable" under INA section 237(a)(2)(E)(ii). *Id*.

well as firearms offenses.[224] One important issue which criminal defense attorneys must be aware of is the addition of domestic violence convictions to the list of crimes presenting grounds for deportation.[225] The immigration consequences for both the batterer and the victim are extremely harsh and may be surprising to the criminal defense attorney who is not aware of these new provisions.[226]

The 1996 changes have wrought extensive damage in the area of immigrants' rights. The AEDPA has been criticized for unfairly discriminating against certain groups.[227] "The President himself acknowledged when signing the bill that it caused several 'major, ill-advised changes in our immigration laws

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[224] *Id*. at 6. The provision of the INA which provides for deportation of any alien who is convicted of any firearm offense at any time after admission makes no distinction between offenses charged as misdemeanors, felonies, or violations. *Id*. (citing INA sec. 237(a)(2)(C), 8 U.S.C. sec. 1227(a)(2)(C)).

[225] Espenoza, *supra* note 203, at 89. Deportation proceedings will begin against any alien convicted of any crime the court or prosecutor labels as involving domestic violence. *Id*. Deportation is likely if the violence was aimed at

> 'a current or former spouse of the person, [or] an individual with whom the person shares a child in common, [or] an individual who is cohabitating with or has cohabitated with the person as spouse, [or] an individual similarly situated to a spouse of the person under domestic or family violence laws of the jurisdiction where the offense occurs.'

Id. (quoting INA sec. 237(a)(E)(i), amended by sec. 350(a)(ii) of the IIRIRA). This is another example of an offense category which will trigger immigration consequences in response to even just a misdemeanor conviction. *Id.*

[226] *See* Espenoza, *supra* note 203, at 90. Because of the fact that many domestic violence cases involve both allegations and counter-allegations, the immigration consequences may be equally harsh for both the batterer and the victim. *Id*. Female victims may be eligible under the Violence Against Women Act (VAWA) to terminate their conditional residency status or petition on their own for permanent resident status. *Id*. However, in order to qualify for such relief, the woman must be able to show her good moral character. *Id.* Thus, a domestic violence conviction or aggravated felony on her record would prevent such relief and provide independent grounds for deportation. *Id*. Considering today's trend away from pleading down domestic violence charges, it may be necessary for all domestic violence cases involving aliens to be tried. *See id*.

[227] *See* Dlin, *supra* note 5, at 61-62. Various provisions of the AEDPA "preclude[ ] state death row inmates from seeking essential habeas corpus review, lessen[ ] the burden on the government to successfully deport criminal aliens, and facilitate[ ] denial of asylum to politically persecuted refugees and victims seeking the welcoming arms of liberty." *Id*. at 62 (citations omitted).

having nothing to do with fighting terrorism.'"[228] In fact, the AEDPA actually goes as far as to provide terrorist aliens with more procedural due process protection than it offers most other aliens.[229]

C. Restrictions on Judicial Review

Section 440(a) of the AEDPA amended § 106(a)(10) of the INA[230] to "extinguish[ ] a court of appeals' jurisdiction over petitions for review filed by aliens convicted of certain criminal offenses."[231] Additionally, the IIRIRA included similar provisions amending INA § 242 which eliminate judicial review of final orders of removal against certain groups of disfavored aliens.[232] Before

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[228] *Id.*

[229] *Id.* at 63. While the AEDPA ensures that long term permanent residents who have been convicted of only minor criminal offenses are specifically not entitled to appointed counsel, bond proceedings, court hearings, or judicial review in removal proceedings, alleged terrorists are specifically given each of those rights. *Id.* at 63-64.

[230] Velte, *supra* note 157, at 674.

[231] Bobbie Marie Guerra, Comment, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L. J. 941, 965 (1997). Section 106(a)(10) of the INA now prohibits judicial review of final removal orders for any alien "who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii) [aggravated felon], (B) [controlled substance violation], (C) [firearms or explosives charges], or (D) [sabotage, treason or sedition], or any offense covered by section 241(a)(2)(A)(ii) . . . for which both predicate offenses are covered by section 241(a)(2)(A)(i) . . . ." Velte, *supra* note 157, at 674 (quoting 8 U.S.C. section 1105(a)(10) (1997) (as amended by AEDPA section 440(a)).

[232] Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGRA. L. J. 233, 235 (1998). The INA preserves the right of judicial review of deportation orders for many aliens. *Id.* The right is eliminated in cases involving disfavored classes of aliens and where the case arises in certain limited procedural contexts. *Id.* Criminal aliens, as usual, are among those hurt by these new provisions. *Id.* at 248. Section 242(a)(2)(C) of the INA now provides that, "notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reasons of having committed a criminal offense covered [in various sections of the INA]." *Id.* There is a split of authority on the issue of whether a federal court may review the finding of removability itself. *Id.* The Tenth Circuit Court of Appeals has held that Congress did intend to remove the jurisdiction of the federal courts on the question of removability. *Id.* at 249 (citing Berehe v. INS, 114 F.3d 159 (10th Cir. 1997)). However, the Seventh Circuit developed two possible exceptions to full preclusion of review. The first exception is explained in *Yang v. INS*, 109 F.3d 1185 (7th Cir.

the AEDPA took effect, aliens had the right, under the INA, to petition federal courts with a writ of habeas corpus.[233] Judicial review of discretionary decisions was especially important because discretionary proceedings were intended "'to reconcile the rigid categories of the immigration laws with the claims of compassion in individual cases.'"[234] The elimination of judicial review by an Article III court leaves legal long-term aliens' constitutionally protected liberty interest "unprotected from arbitrary and unjust deportation determinations."[235]

1997), where the court decided it had jurisdiction over the question of whether the alien was deportable on the strength of a criminal conviction. *Id*. "'We think it highly unlikely that Congress meant to enable the Attorney General to expel an alien with a clean record just by stating that the person is a criminal, without any opportunity for judicial review of a claim of mistaken identity or political vendetta.'" *Id*. (quoting Yang, 109 F.3d at 1192). The second exception created by the Seventh Circuit Court of Appeals is useful only to those transitional defendants who can prove he or she was "'mouse-trapped' into conceding deportability, and relied on relief from removal or judicial review of the denial of relief, which had since been eliminated." *Id*.

[233] Trevor Morrison, Note, *Removed From the Constitution? Deportable Aliens' Access to Habeas Corpus Under the New Immigration Legislation*, 35 COLUM. J. TRANSNAT'L L. 697, 700 (1997). Before 1961, when the INA first enacted a statutory right to judicial review, aliens sought such relief through the writ of habeas corpus. Benson, *supra* note 232, at 256. During that time, the cases were largely guided by the Immigration Acts of 1891 and 1917. Andrea Lovell, Note & Comment, *The Proper Scope of Habeas Corpus Review in Civil Removal Proceedings*, 73 WASH. L. REV. 459, 467 (1998). Those Acts prohibited judicial review to the furthest extent permitted under the Constitution. *Id*. The United States Supreme Court discussed the history of judicial review of immigration decisions in the case of *Heikkila v. Barber*. Benson, *supra* note 232, at 256 (citing Heikkila v. Barber, 345 U.S. 229 (1953)). The *Heikkila* Court held that the Constitution guarantees the right to habeas corpus review as a constitutional minimum. *Id*.

The statutory right to review was added in Section 106(a)(10) of the INA which previously read, "'any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.'" Morrison, *supra* note 233, at 700. (quoting 8 U.S.C. sec. 1105(a)(10)). The writ of habeas corpus provided an "important safeguard of fundamental fairness" by providing a judicial check on the administrative decisions of the executive branch (i.e., the Justice Department is the source of power for the INS, BIA and the Immigration judges making the deportation decisions). *Id*.

[234] Lovell, *supra* note 233, at 469.

[235] Solbakken, *supra* note 6, at 1391. For example, the changes in the INA now make it mandatory that both the marijuana user and the espionage offender are summarily deported without judicial review of the INS decision. *Id.* Therefore, no account is taken of the alien's ties to this country, or how productive, rehabilitated

V. CONCLUSION

The 1996 amendments to the INA, which resulted from the anti-immigration sentiment in America today,[236] are designed specifically to target criminal aliens.[237] In light of the harsh immigration consequences wrought by these changes, it is imperative that criminal defense attorneys become aware of the immigration status of their clients, and the immigration issues involved in each criminal case.[238] Armed with an understanding of the experience of immigration, and an understanding of the basic elements of immigration law, criminal defense attorneys will be more competent advocates capable of providing truly zealous representation.

Melinda Smith

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or law abiding he or she is. *Id.* These amendments "harbor[ ] the potential for widespread abuse of discretion through arbitrary and erratic enforcement by INS officials." *Id*. at 1390.

The plain language of the Constitution does not answer the question of whether its protections apply to aliens as well as to citizens. Morrision, *supra* note 233, at 697. However, the history of the use of the writ of habeas corpus by aliens evidences an implicit recognition by the Supreme Court that the Suspension Clause of the Constitution applies equally to citizens and deportable aliens. *Id.* at 701. The Suspension Clause states that "'the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Id*. at 698 (quoting U.S. Const. art. I, sec. 9, cl. 2). And the Writ has traditionally been available for aliens in deportation proceedings to gain judicial review of the executive decisions in their case. *Id*.

Although a literal reading of the amendments would seem to suggest they are unconstitutional under *Heikkila*, the Supreme Court has yet to grant certiorari on the question. *Id*. at 702. In the meantime, a majority of the circuit courts which have upheld and applied section 440(a) of the AEDPA have held that the language does not restrict all access to habeas review for deportable aliens. Morrison, *supra* note 233, at 702. The Second Circuit faced the question in *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996). *Id*. There the court found that although the alien had no right to direct review of the deportation order, he could challenge any actual detention by the INS through a writ of habeas corpus. *Id*. at 702-03. As long as the statute can be read to preserve at least one other avenue of review, the statute will be found constitutional. *Id.* at 703.

[236] *See* Dlin, *supra* note 5, at 49.

[237] Pilcher, *supra* note 3, at 272.

[238] Espenoza, *supra* note 203, at 89.