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SENTENCED TO EXILE: THE AGGRAVATED FELONY PROVISION V. THE HUMAN RIGHTS OF U.S. LEGAL PERMANENT RESIDENTS

ABSTRACT

The concept of ‘aggravated felony’ was originally devised as an immigration policy aimed at bolstering domestic security. At the outset, it was used to combat only the most serious of crimes, namely murder, and drug and weapons trafficking. Nevertheless, over the course of twelve years, the meaning of the term has been significantly expanded to cover a vast array of criminal offenses, from the gravest to the most trivial. In fact, many of the aggravated felonies, like traffic violations, shoplifting, or riding the subway without a ticket, do not even classify as felonies under state law and frequently result in no imposed jail time. Only the perils lurking behind the application of the provision have remained unchanged. Invariably, it warrants deportation, coupled with a permanent bar from reentering the country. Yet despite the extraordinary severity of the collateral consequences, the remedies available for the immigrants’ defense, such as access to counsel, the appellate option, and even, in some cases, judicial oversight, have dwindled, raising serious due process concerns. Moreover, on broadening the catalogue of aggravated felonies, Congress instituted a retroactive application of the new standards, arbitrarily depriving hundreds of non-citizens of the chance to retain their permanent residence status. Finally, the law precludes any form of discretionary relief from removal. Not only does this compromise the principle of proportionality, it also undermines family unity and the universally-recognized right to a private life free from random governmental interference. The first part of the paper traces the evolution of the aggravated felony provision throughout the history of U.S. immigration law. The second examines the specific ways in which it prejudices the rights of those to whom it applies, with particular emphasis on the legal permanent residents.

KEYWORDS: USA, immigration law, aggravated felony, criminal offense, permanent resident, deportation, human rights

As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted.¹

José Guerrero entered the United States on March 28, 1979, accompanied by his parents.² He was admitted for legal permanent residence as an immigrant baby. At the time, he was barely two months old. On July 26, 1999, twenty-year-old Guerrero was placed in removal proceedings with a lifetime bar on lawful return to America.³ The events that led to Guerrero's expulsion were rather prosaic. At nineteen he engaged in consensual sex with his then fifteen-year-old girlfriend and charges were pressed.⁴ His guilty plea earned him a Class A misdemeanor conviction in an Illinois state court and a sentence of 30 days work release, on top of two years of sex offender probation.⁵ But the harshest punishment was yet to come. Soon after his criminal trial was over, Jose received a notice to appear before an immigration judge. Under sec. 237(a)(2)(A)(iii) of the INA, 8 U.S.C. sec. 1227(a)(2)(A)(iii) he had committed the aggravated felony of sexual abuse of a minor, as defined in sec. 101(a)(43)(A) of the INA, 8 U.S.C. sec. 1101(a)(43)(A), and an act of child abuse under sec. 237(a)(2)(E)(i) of the INA, 8 U.S.C. sec. 1227(a)(2)(E)(i). Regardless of any extenuating circumstances, and in spite of the fact that his offense constituted a mere misdemeanor, as an aggravated felony convict, Guerrero suddenly found himself under a deportation order. The legal qualification of his deed stripped him of any form of discretionary relief.⁶ His appeal bore no fruit, either, once the Seventh Circuit upheld the previous decision, concluding that "Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors."⁷

1 S. Field, Supreme Court Justice, in: *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893).

2 *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001), <http://openjurist.org/242/f3d/727>.

3 *Ibidem* (2).

4 *Ibidem* (7).

5 *Ibidem*.

6 INA § 240A(a).

7 *Guerrero-Perez v. INS*, 242 F.3d 727 (18), available at: <http://openjurist.org/242/f3d/727>.

Hence, exactly twenty-three years after his arrival, Guerrero was deported to Mexico, a country he could not so much as recall. Ahead lay permanent separation from everyone and everything he had identified with and loved all of his life.

Another immigrant, Nigerian native Olufolake Olaleye, became deportable following a far lesser crime. In 1994, the thirty-eight-year-old mother of two American-born children aged five and two was charged with shoplifting \$14.95 worth of baby clothes.⁸ She maintained that all she did was try to exchange a dress she had previously purchased for a different size, but had lost the receipt.⁹ Olaleye went to court *pro se*, because she could not afford to retain an attorney. As a result, she consented to plead guilty on the promise it would do her no harm.¹⁰ She then received an order to pay \$360 and was put on twelve months probation.¹¹ Olaleye had immigrated to the U.S. ten years earlier with hopes of finding a better future. In 1990 she attained the status of a legal permanent resident. She settled in Atlanta, where she built a life for herself and her two kids. She held a steady job as a cashier at a gas station, where she earned \$6.50 an hour. She had never lived on welfare and had no prior criminal record.¹² In 1996 Olaleye decided to file for citizenship. By October her application had been approved and she was scheduled to be sworn in. But 1996 was also marked by an important change in immigration law. The new legislation *retroactively* expanded the definition of ‘aggravated felony’ to include several petty offenses, among them shoplifting. Before long, Olaleye’s naturalization case was reopened and, subsequently, denied. Afterwards, she was ordered removed from the United States based solely on her past misdemeanor conviction.¹³ The magnitude of her infraction played no part in the

⁸ R. Weich, *Upsetting Checks and Balances: An ACLU Report*, ACLU October, 2001, p. 30.

⁹ E. Kurylo, *Nigerian woman faces deportation: Retroactive change in INS crime policy threatens citizenship of several legal immigrants in Atlanta*, *The Atlanta Constitution*, June 12, 1998, p. C.01.01.

¹⁰ A. Lewis, *Measure of Justice*, *New York Times*, July 15, 2000, p. 2, available at: <http://socheatchea.com/images/Articles/MeasureOfJustice.pdf>.

¹¹ R. Sampson, *Rights-U.S.: Immigrants Face Deportation for Minor Offenses*, May 1, 1999, <http://www.mail-archive.com/ctrl@listserv.aol.com/msg12094.html>.

¹² E. Kurylo, *op. cit.*, p. C.01.01

¹³ R. Sampson, *op. cit.*

decision, nor did her American-citizen children, or her impeccable conduct throughout her life.

Joao Herbert was even less fortunate. Orphaned in infancy, he spent his early childhood among the slums of Brazil's largest, poverty-stricken city, Sao Paulo.¹⁴ At the age of eight, however, the boy was adopted by an American couple who brought him to the United States. It seemed that things were looking up for him at last. For the following nine years, Joao grew up with his new family in Wadsworth, Ohio. His parents never formally pursued naturalization, therefore like many other adopted children, he retained the status of a legal permanent resident. When he was seventeen the application for citizenship was finally filed. A year later, however, it was still pending. That year, upon turning eighteen, Herbert made the fateful mistake of running afoul of the law. Along with two other Wadsworth High School graduates, he pleaded guilty to selling a small, 7-ounce bag of marijuana to an undercover policeman in his hometown. As a first-time offender, Joao Herbert got sentenced to probation. But it did not stop the enforcement of the immigration law that now branded him an aggravated felon. Thus, instead of walking free, the teenager was transferred directly into federal custody where he awaited removal from the country. The boy's desperate parents fought a long and exhaustive battle to keep him in the U.S. They sought help from congressional representatives and even from President Clinton. Jim Herbert, the father, a paraplegic bound to a wheelchair, knew he would not be able to leave the country with his son. Besides, there were also two other kids he had to care for. Even Brazil's ambassador to the United States, Rubens Barbosa, admitted that the possibility of Joao Herbert's expulsion seemed "inhumane."¹⁵ All the more so, in view of the fact that the law deemed adoption irrevocable.¹⁶ In jail, the young detainee pondered: I consider myself an American. But the way they label me, I'm labeled a foreigner. I asked an immigration officer, "Don't I have any rights?"; "You have no [expletive] rights," he told me.¹⁷

¹⁴ S. Levine, *On the Verge of Exile; For Children Adopted From Abroad, Lawbreaking Brings Deportation*, *The Washington Post*, March 5, 2000, p. A01.

¹⁵ G. Mace, M. Miller, *Brazilian boy adopted by U.S. parents 14 years ago now faces deportation*, Knight Ridder. Tribune Company. 2000 available at <http://www.highbeam.com>.

¹⁶ Rev. Code § 3107.084

¹⁷ S. Levine, *op. cit.*, p. A01

Meanwhile Herbert's helpless mother, Nancy Saunders, described the government's action as tantamount to "a death sentence."¹⁸ But to no avail. After twenty-two months of incarceration, then twenty-two-year-old Herbert was put on a plane to Brazil. As is the custom for reasons of security, his family members were not informed about the exact date or place of his deportation.¹⁹ Since his birth parents died when he was just a little baby, he had nobody to turn to and nowhere to go. He had also long forgotten his native tongue. But in spite of all this, the young man managed to survive in a rough neighborhood of Campinas and even open a school where he offered his services as an English teacher.²⁰ Four short years later, in 2004, Herbert was gunned down by the Brazilian police, unable to understand a command uttered in Portuguese that ordered him to put up his hands. "He never understood the ways of Brazil. Never," said his friend, a Baptist missionary in Campinas.²¹ Joao Herbert was only twenty-six years old.

The remainder of the long list of immigrants who have fallen prey to the aggressive enforcement of immigration law runs far beyond the scope of this paper. The common denominator for the vast majority of the cases, however, is found in a single provision of the so-called 'aggravated felony.' The concept was originally devised as an immigration policy aimed at bolstering domestic security. At the outset, it was used to combat only the most serious of crimes, namely murder, and drug and weapons trafficking. Nevertheless, over the course of twelve years, the meaning of the term has been significantly expanded to cover a vast array of criminal offenses, from the gravest to the most trivial. In fact, many of the aggravated felonies, like traffic violations, shoplifting, or riding the subway without a ticket, do not even classify as felonies under federal law and frequently result in no imposed jail time. Only the perils lurking behind the application of the provision have remained unchanged. Invariably, it warrants deportation, coupled presently with a permanent bar from reentering the country. Yet despite the extraordinary severity of the collateral consequences, the remedies available for the immigrants'

¹⁸ G. Mace, M. Miller, *op. cit.*

¹⁹ *Ibidem.*

²⁰ K.G. Hall, *Deported first offender dies in a homeland he never understood*, May 28, 2004, <http://poundpulegacy.org/node/17402>.

²¹ *Ibidem.*

defense, such as access to counsel, the appellate option, and even, in some cases, judicial oversight, have dwindled, raising serious due process concerns.²² Moreover, on broadening the catalogue of aggravated felonies, Congress instituted a retroactive application of the new standards, arbitrarily depriving hundreds of non-citizens of the chance to retain their permanent residence status. The potential for a major fairness issue is obviously apparent. As a matter of course, an aggravated felony sentence is accompanied by mandatory detention, which precedes deportation. The offenders are held without bond. As a result, the difficulty and costs associated with retaining an attorney and gathering evidence in order to contest the removal basis may increase greatly. In addition, aliens are incapacitated from handling their family and business affairs. To make matters worse, the current state of the law strips immigration judges of the authority to stop deportation based on aggravated felony grounds. Even more troubling, no court is permitted the opportunity to weigh the extenuating circumstances surrounding the cases, e.g. the hardship for the deportee and his or her family—with emphasis on the welfare and safety of minor children, duration of residence, age, military or other community service, and complete rehabilitation. Deportation is not, therefore, contingent on the factual aspects of the case, which are deemed immaterial. Finally, the law precludes any form of discretionary relief from removal. Not only does this compromise the principle of proportionality, it also undermines family unity and the universally-recognized right to a private life free from random governmental interference. The first part of the following paper will trace the evolution of the aggravated felony provision throughout the history of U.S. immigration law. The second will examine the specific ways in which it prejudices the rights of those to whom it applies, with particular emphasis on legal permanent residents.

The concept of aggravated felony has not always sparked controversy. In 1986 President Reagan signed the Anti-Drug Abuse Act, which was directly attributable to the ‘war on drugs’ launched in the early 1970s by President Nixon.²³ Introduced two years later as part of the ADAA,

22 Under INA § 238 aliens convicted of an aggravated felony who are not green card holders are subject to administrative removal, handled entirely by the Department of Homeland Security, without bringing the case before an immigration judge.

23 NPR, *Timeline: America's War on Drugs*, April 2, 2007, <http://www.npr.org/templates/story/story.php?storyId=9252490>.

the aggravated felony concept was originally intended as a measure to curtail crimes committed by non-citizens involved in the international drug trade.²⁴ The statutory definition of the term was initially limited to murder, and drug and firearms trafficking.²⁵ By enacting the provision, Congress hoped to target and weed out the most dangerous immigrant criminals. Pursuant to the ADAA, the commission of an aggravated felony subjected a convicted non-citizen to deportation. In addition, the law disqualified the perpetrator from seeking readmission to the U.S. for the period of ten years.²⁶ A special deportation procedure was also designed for aggravated felons, mandating the Attorney General to hold them in custody upon their release from jail, until the Immigration and Naturalization Service completes the deportation proceedings.²⁷ By 1990 the Immigration Act brought about the first in a line of inclusions of additional offenses, by incorporating lesser drug crimes (related predominantly to money laundering) and any crime of violence “for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years” into the provision.^{28 29} Thereby, Congress put together a non-exhaustive list of offenses that justified the deportation of foreign nationals. Interestingly enough, when stretching the ADAA-defined ‘illicit trafficking in controlled substances’ it classified possession of a controlled substance alone, even if not for the purpose of distribution or sale, as ‘drug trafficking,’ and hence an

24 W.J. Johnson, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, New York Law School Law Review, 2007/2008, vol. 52, p. 425.

25 Section 7342 of the Anti-Drug Abuse Act of 1988 defines the term “aggravated felony” to mean “murder, any drug trafficking crime (...), or any illicit trafficking in any firearms or destructive devices (...), or any attempt or conspiracy to commit any such act, committed within the United States.”

26 M. Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, Boston College Third World Law Journal, 2003, p. 299.

27 *Ibidem*.

28 Immigration Act of 1990 § 501(3) available at: <http://www.justice.gov/eoir/IM-MACT1990.pdf>.

29 “Crime of violence” as defined in section 16 of title 18, United States Code means “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or “involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

aggravated felony.³⁰ Several years later, Chief Justice John Roberts was still struggling with doubts, “It must give you pause that your analysis of a term ‘drug-trafficking’ offense... leads to the conclusion that simple possession equates with drug trafficking.”³¹ In his signing statement, President Bush elaborated on the rationale behind the amendment: “[The aggravated felony expansion] meets several objectives of my Administration’s war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country. These offenders, comprising nearly a quarter of our federal prison population, jeopardize the safety and well-being of every American resident.”³²

The increasing crime level among immigrants helped generate support for tougher regulations. Some critics, however, realized the statute’s implicit potential for harming legal permanent residents (LPRs), often overlooked by the lawmakers focused on dealing with the undocumented aliens.³³ LPRs, therefore, comprise an ever more vulnerable group of non-citizens, whose deportation virtually amounts to “banishment from one’s own home nation.”³⁴ As a natural course of action, they tend to develop strong family and professional relationships and establish longstanding ties with their country of permanent residence, which only magnifies the gravity of their exclusion.³⁵ They pay taxes,

30 B.R. Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, San Diego, Summer 1998, Vol. 35, Issue 3, p. 864.

31 Chief Justice John Roberts quoted in: P. Smith, *Cases of Immigrants Deported for Minor Drug Offenses Heard at US Supreme Court This Week*, October 5, 2006, http://stopthedrugwar.org/chronicle/456/supreme_court_hears_immigrant_drug_deportation_cases.

32 G. Bush, *Statement on Signing the Immigration Act of 1990*, November 29, 1990. <http://www.presidency.ucsb.edu/ws/index.php?pid=19117>.

33 M. Cook, *op. cit.*, p. 301. Immigration and Naturalization Act (INA) of 1996 § 101(a) (20), 8 U.S.C. § 1101(20) defines “legal” or “lawful permanent resident” (LPR) as a person who has “the status of having been lawfully accorded the privileged of residing permanently in the United States as an immigrant.” In other words, LPR are green cards holders who may become United States citizens. For a number of reasons, many LPRs never pursue naturalization. One possible explanation is the cost of the filing fee. As of April 5, 2010, it amounts to \$675 according to U.S. Citizenship and Immigration Services.

34 M. Cook, *op. cit.*, p. 301.

35 J.D. Smith, *Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitutionality of a Deportation Based on an Expired Conviction?*, Oklahoma Law Review, 2005, vol. 58:59, p. 65.

open businesses, and often provide jobs. Previously, LPRs were eligible to apply for the Immigration and Nationality Act Section 212(c) waiver of deportation, which allowed the Attorney General to balance the pros and the cons of removal. Positive factors included extreme hardship to family members, length of residence, service in the armed forces, history of employment, and rehabilitation. Negative ones dealt with the severity of the crime, the existence of a prior criminal record, and possible character flaws. Whenever the former outweighed the latter, deportation was suspended.³⁶ The Immigration Act of 1990 withdrew this form of relief from aggravated felons who had served a term of imprisonment of at least five years, thus stripping the Attorney General of his ability to consider mitigating factor in some portion of the cases.³⁷ Moreover, the bar on reentry post deportation was extended from ten to twenty years.³⁸ In 1991 Congress adopted the Miscellaneous and Technical Immigration and Naturalization Amendments, in which it introduced a new restriction on discretionary relief. Essentially, MTINA denied the Section 212(c) waiver to repeated offenders whose aggregated multiple offenses reached a five-year minimum prison sentence.³⁹ The second expansion of the aggravated felony definition took place in 1994, by means of the Immigration and Technical Corrections Act. Among the newest additions were: weapons offenses, some theft and burglary offenses, prostitution, tax evasion, and certain categories of fraud.⁴⁰ The 1993 World Trade Center Bombing and the 1995 Oklahoma City Bombing set the tone for further immigration reform. Leaving a total of one hundred sixty eight people dead and over six hundred others injured, the Oklahoma attack was initially er-

36 A. Parker, B. Root. *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, Human Rights Watch, April 15, 2009, p. 17.

37 Immigration Act of 1990 § 511(a), available at: <http://www.justice.gov/eoir/IMMACT1990.pdf>.

38 *Ibidem*, § 514(a)

39 Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(10) available at: <http://colosseumbuilders.com/Guild/h1b/library/laws/PL1991.pdf>. Previously a single offense carrying the aforementioned term of imprisonment was the norm.

40 Immigration and Technical Corrections Act of 1994 § 222 available at: <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-7752.html#0-0-0-817>.

roneously blamed on Middle-Eastern extremists.⁴¹ This perception led to a widespread public outcry demanding a tougher immigration law that would prevent foreign terrorists from entering the United States.⁴² It also uncovered a deep, anti-immigrant sentiment pervading contemporary society. One journalist wrote: “The shock of Oklahoma City and the instant assumption that outsiders were to blame had the effect of throwing gasoline on a fire already burning—the growing sentiment that something needs to be done to make it more difficult for foreigners to get into America and easier to throw them out and to make life more unpleasant for them while they are here. A Time/CNN poll last fall showed nearly three-quarters of the people as favoring strict limits on immigration. The roots of such sentiments go deeper than the fear of terrorism. They involved many factors, among them the feeling—in a time of general unease about the future—that noncitizens are worsening the country’s problems.”⁴³

Unfortunately, the approaching first anniversary of the tragic events coincided with the run-up to the presidential election of 1996. Seeking public support to win reelection, President Clinton succumbed to pressure and signed the Antiterrorism and Effective Death Penalty Act into law, against his better judgment.⁴⁴ Describing the new bill, Clinton warned that it made: “(...) a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents and restrict a key protection for battered spouses and children.”⁴⁵

The reservations were well-founded. Drafted in a rushed atmosphere, the new law’s primary objectives were symbolic rather than rational. Indeed, prior to its adoption Senator Patrick Leahy commented: “I dare

41 It was carried out by an American citizen by the name of Timothy McVeigh. The 1993 WTC bombing was in fact planned by a Kuwait national of Pakistani descent, Ramzi Yousef.

42 W.J. Johnson, *op. cit.*, p. 427

43 W.F. Woo, *A Nation No Longer Quite So Indivisible*, St. Louis Post–Dispatch, May 7, 1995, p. 01.B.

44 A. Parker, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, Human Rights Watch, Vol. 19, No 3(G), July 17, 2007, p. 16.

45 W. Clinton, *Statement on signing the Antiterrorism and Effective Death Penalty Act of 1996*, Weekly Compilation of Presidential Documents, Vol. 32, Issue 17. April 29, 1999, p. 719.

suggest, there are not five Senators in here who have even read the conference report or have the foggiest notion of what it is they are voting on.”⁴⁶ Even though the AEDPA was primarily designed to facilitate the prosecution of individuals charged with committing or planning terrorist attacks, according to the immigration officials it forced them to “detain and deport any non-citizen who has previously been convicted of a crime—no matter how small the infraction, how long ago it happened or if the immigrant served jail time.”⁴⁷ Under the guise of counterterrorism efforts, the aggravated felony provision was broadened to include several minor offenses, namely: counterfeiting or mutilating a passport, bribery, obstruction of justice, certain gambling offenses, and transportation for the purpose of prostitution.⁴⁸ Most importantly, however, the law categorically abolished the right to obtain the Section 212(c) waiver.⁴⁹ As a result, hundreds of legal permanent residents who were spouses and parents to U.S. citizens found themselves prone to deportation for petty crimes, without the possibility of applying for discretionary relief.⁵⁰ Therefore, the AEDPA once and for all denied the Attorney General the opportunity to weigh the merits of deportation, rendering all extenuating circumstances irrelevant. What transpired through this piece of legislation was a precarious association the Congress made between terrorist activity and non-citizens convicted of crimes.⁵¹ Sadly, this signaled a radical shift in American policy, whereby domestic problems were handled by addressing the issues surrounding immigration.⁵² Foreigners became convenient scapegoats for all modern evils, from high unemployment, drug abuse, and crime rates, to the rising costs of services, such as social

46 Senator P. Leahy, Congressional Record, Vol. 142, S3427–04, cited in: B. Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, N.Y.U. Review of Law & Social Change, January 23, 2008, Vol. 31:981, p. 1001.

47 *A Terror of a Law Series: Editorial*, St. Petersburg Times, July 18, 1996, p. 14.A.

48 Antiterrorism and Effective Death Penalty Act of 1996 § 440(e) available at: <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-8598.html#0-0-0-963>.

49 *Ibidem*, § 440(d)(2).

50 M. Cook, *op. cit.*, p. 305.

51 A. Parker, *Forced Apart: Families Separated...*, p. 17.

52 A.D. Kennedy, *Expedited Injustice: The Problem Regarding the Current Law of Expedited Removal of Aggravated Felons*, Vanderbilt Law Review, November, 2007, Vol. 60, Issue 6. p. 1851.

welfare and medical programs.⁵³ Some explained this attitude by “the rosy but false” portrayal of “yesterday’s immigrants as self-sufficient newcomers and today’s as dependent on the dole, and thus undesirable.”⁵⁴ The change in the ethnic make-up of today’s aliens was another potential contributing factor.⁵⁵ Seizing the rising swell of anti-immigrant feelings, the Illegal Immigration Reform and Immigrant Responsibility Act followed much in the same vein as the ADAA, six months later. Predictably, it introduced yet another group of criminal activities to be categorized as aggravated felony, among them sexual abuse of a minor.⁵⁶ Moreover, it lowered certain threshold requirements, further expanding the scope of the provision. For instance, prior to the enactment of the IIRIRA theft offenses and burglary fell into the category only if they resulted in a jail term of five years or more. The same standards applied to alien smuggling offenses and passport falsification. After the amendment, however, the term was shortened to merely one year.⁵⁷ Likewise, offenses involving fraud, deceit, and tax evasion were classified as aggravated felony on the stipulation that the loss to the victim exceeded \$200,000, but under the IIRIRA the amount was suddenly reduced to \$10,000.⁵⁸ The new law also explicitly forbade the release of non-citizens held under removal orders pending deportation.⁵⁹ By the same token, it was not uncommon for the detainees to be transferred across the country to facilities where their ability to collect documents necessary to build their cases and obtain legal advice was often severely restricted.⁶⁰ It bears emphasizing that non-citizens, including legal permanent residents, are not vested with the right to government-sponsored representation at any stage of the

53 B.R. Marley, *op. cit.*, p. 857.

54 W.F. Woo, *op. cit.*, p. 01.B

55 *Ibidem*. Earlier, immigrants arrived mostly from Europe and were Caucasian. Over time, they were basically indistinguishable from American citizens. Today, they are predominantly Hispanic and Asian, and they tend to assimilate more hesitantly, choosing to retain their distinct culture and language.

56 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(1), available at: <http://www.nacua.org/documents/iirira.pdf>.

57 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(3).

58 *Ibidem*. § 321(a)(7)

59 8 U.S.C. 1231(a)(2) available at: http://www.law.cornell.edu/uscode/8/uscode_sec_08_00001231----000-.html.

60 B. Loney, *op. cit.*, p. 993.

removal process.⁶¹ In addition, the law forced separation from family members and friends who could be of assistance and support, and thus the opportunity to raise the money necessary to cover considerable legal fees. When the prospect of lengthy detention met the uncertainty of a costly appeal, many simply conceded removal. Many others did so due to lack of counsel.⁶² Arguably, an even harsher measure went into effect as part of the section entitled “Expedited removal of aliens convicted of committing aggravated felonies,” intended to accelerate the process of deportation.⁶³ Even though the section concerns all non-citizens, those who have not been admitted for permanent residence or are legal permanent residents on a conditional basis are exposed to the most severe ramifications. Specifically, they may now be placed in expedited administrative removal proceedings and, subsequently, deprived of their chance of ever appearing before an immigration judge. Instead, the entire deportation process is singlehandedly conducted by the Department of Homeland Security, and completed with the issuance of the Final Administrative Removal Order.⁶⁴ Hence, the power conferred upon the DHS runs virtually unchecked. By and large, in the IIRIRA, Congress took the approach of either prohibiting or severely curtailing judicial review over removal orders. For instance, following in the footsteps of the AEDPA § 440(a), the new law continued to foreclose final orders of removal from the jurisdiction of any court.⁶⁵ Even when the statute generally preserved judicial review in certain cases, it still managed to insulate at

61 8 U.S.C. § 1228(b)(4)(B), available at: http://www.law.cornell.edu/uscode/8/usc_sec_08_00001228----000-.html.

62 M. Cook, *op. cit.*, p. 310.

63 8 U.S.C. § 1228 available at http://www.law.cornell.edu/uscode/8/usc_sec_08_00001228----000-.html.

64 R.P. Mosqueda, *Forms of Removal*, <http://www.mosquedalaw.com/IMM%2080.htm>.

65 The AEDPA § 440(a) states: “Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), 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), shall not be subject to review by any court.” The IIRIA § 306(a) reads accordingly: “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 reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both pre-

least a portion of the final removal order by way of precluding discretionary relief. While the AEDPA withdrew the right to the section 212(c) waiver from criminal aliens convicted as aggravated felons, the IIRIRA took matters a step further, and repealed section 212(c) altogether.⁶⁶ In lieu of the former waiver, “cancellation of removal” was established, from which aggravated felons were categorically barred.⁶⁷ Therefore, all avenues to relief were permanently denied. In his response, an immigration service spokesman in Washington, Bill Strassberger concluded: “The law is sweeping, even overreaching. (...) We have told Congress that changes need to be made and some discretion needs to be returned to our immigration judges.”⁶⁸ Most dramatically, the law introduced a lifelong ban on returning to America.⁶⁹ In accordance with the IIRIRA, any individual removed from the country was thereafter considered inadmissible. This made the consequences of deportation all the more dire and permanently tore apart thousands of families.⁷⁰ What is more, to seal any existing loopholes, the IIRIRA statutorily defined the meaning of ‘conviction’ and ‘term of imprisonment’ for immigration purposes.⁷¹ Earlier, most courts accepted the definition of conviction adopted by the Board of Immigration Appeals in *Matter of Ozkok*.⁷² The difference between the

dicare offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).” See also 8 U.S.C. § 1252(a)(2)(C).

⁶⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304(b).

⁶⁷ *Ibidem*, § 304(a).

⁶⁸ C. Hedges, *Deportation Law Descends Sternly, and Often by Surprise*, New York Times, August 30, 2000, p. B.1.

⁶⁹ 8 U.S.C. § 1229b(a)(3), available at: http://www.law.cornell.edu/uscode/8/usc_sec_08_00001229---b000-.html.

⁷⁰ One immigration expert remarked that “incredibly, [an LPR] convicted of shoplifting or of having smuggled a sister into the United States may now be separated for life from his or her United States citizen family.”: T. Coonan, *Dolphins Caught in the Congressional Fishnets—Immigration Law’s New Aggravated Felons*, quoted in: M. Cook, *op. cit.*, p. 307.

⁷¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 322(a)

⁷² The definition reads as follows: “As a general rule, a conviction will be found for immigration purposes where all of the following elements are present: (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person’s liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or

two was tremendous. The BIA version often worked to the alien's advantage, because it left room for the judge to defer adjudication, i.e. issue some form of probation in lieu of a sentence. So long as the terms of probation were not violated, no conviction was entered on the record, allowing the immigrant to avoid deportation.⁷³ In the IIRIRA Congress successfully sought to end this practice, which vastly expanded the reach of the aggravated felony provision. The redefined conviction is now handed down notwithstanding deferred adjudication, provided that there is sufficient evidence to establish guilt and some form of punishment, penalty, or restraint on the immigrant's liberty was imposed.⁷⁴ Paradoxically then, as one critic noted, "immigrants, including legal permanent residents, no longer need to be convicted of an aggravated felony in order to be deported as a 'convicted' aggravated felon."⁷⁵ It is also worth stressing that when a judge determines probation is sufficient punishment, he or she believes the infraction is simply not serious enough to call for incarceration, much less banishment from the country. Nonetheless, the U.S. immigration statutes are underpinned by the assumption that deportation as such is not a form of punishment, and hence cannot "inflict a greater punishment" on the alien.⁷⁶ Before the IIRIRA, in order to be designated as aggravated felonies, certain offences required the imposition of a prison sentence of a specified amount of

study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge." 19 I&N Dec. 546 (BIA 1988), available at: <http://www.uscis.gov/ilink/docView/INT/HTML/INT/0-0-0-65/0-0-0-4483.html#0-0-0-326>.

⁷³ B.R. Marley, *op. cit.*, p. 867.

⁷⁴ The congressional definition includes the first two elements of the BIA definition, but eliminates the final one. It reads as follows: "The term 'conviction' means 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." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Section 322(a)(1).

⁷⁵ B.R. Marley, *op. cit.*, p. 867.

⁷⁶ *Ibidem*, p. 890.

time. In case deportation was not justified, judges had the discretion to avoid it by suspending the sentence.⁷⁷ Post IIRIRA, however, ‘term of imprisonment’ began to refer to any court-ordered sentence regardless of whether it was actually imposed or executed.⁷⁸ Accordingly, a plea bargain for a one year suspended sentence with no time served would likely warrant deportation, while an eleven-month jail term for the same infraction would not.⁷⁹ To make matters even more serious, the new law was now applied retroactively, including the expanded aggravated felony provision.⁸⁰ Immigration consequences attached without regard to the length of time that elapsed since the conviction occurred and the circumstances surrounding it. Therefore, it is not difficult to imagine a situation in which an attorney encouraged his or her client to plead guilty to a minor infraction in order to avoid a lengthy and expensive process. At the time, it might have afforded the individual a suspended sentence that carried no consequences for their immigrant status. With the advent of the retroactive effect of the amended statute, however, the same person could presently face deportation on aggravated felony charges because their offense was re-classified as deportable, and have no right to any form of relief. Such a practice can hardly be viewed as fair treatment. The retroactive law gave rise to a wave of criticism that labeled it the “mother of all ex post facto laws forbidden by the Constitution.”⁸¹ The catch here, though, was that the *ex post facto* clause inscribed in the Article 1 of the U.S. Constitution applies solely to criminal punishment.⁸² Meanwhile, the Supreme Court holds deportation to be “a pure-

⁷⁷ *Ibidem*, p. 869.

⁷⁸ “Any 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”: Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Section 322(a)(1).

⁷⁹ B.R. Marley, *op. cit.*, p. 869.

⁸⁰ In compliance with the statute, the aggravated felony definition “applies regardless of whether the conviction was entered before, on, or after the date of [the law’s] enactment.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 322(b).

⁸¹ H. Ishola, *Of convictions and Removal: The Impact on New Immigration Law on Criminal Aliens*, cited in: M. Cook. *op. cit.*, p. 309.

⁸² “No Bill of Attainder or ex post facto Law shall be passed.” U.S. Const. art. 1, § 9, cl. 3; *Calder v. Bull*, 3 U.S. 386 (1798), *Carpenter v. Pennsylvania*, 58 U.S. 456 (1854).

ly civil action,” therefore, it does not meet the criteria of the clause.⁸³ In retrospect, the one-size-fits-all approach of the ADAA and IIRIR put an equal sign between legal permanent residents and illegal alien terrorists.⁸⁴ One critic went as far as to conclude that “lawful permanent residents with a petty prior offense that has been retroactively recharacterized as an aggravated felony are treated in exactly the same manner as illegal aliens who enter the United States (...) specifically to commit a terrorist act.”⁸⁵ The late Senator Edward Kennedy commented on the 1996 law, taking a similar tone: “It applies to all criminal aliens, regardless of the gravity of their offense (...) whether they are murderers or petty shoplifters. An immigrant with an American citizen wife and children sentenced to 1-year probation for minor tax evasion and fraud would be subject to this procedure. And under this provision, he would be treated the same as ax murderers and drug lords.”⁸⁶ All things considered, it is safe to assume that even the most ruthless deportation policy would not have provoked much political backlash. After all, the affected parties do not enjoy suffrage.⁸⁷

Control over immigration has long been construed as an essential and exclusive attribute of the legislative and executive branches of the government.⁸⁸ The U.S. Supreme Court has affirmed this position numerous times, declaring the exclusion of aliens “a fundamental act of sovereignty (...) inherent in the executive power to control the foreign affairs of the nation.”⁸⁹ Notwithstanding the freedom to regulate the exclusion proceedings and criteria, this power cannot be wielded unfettered. In particular, it may not infringe on the human rights of the de-

83 “A deportation proceeding is a purely civil action to determine a person’s eligibility to remain in this country. The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws”: *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

84 B.R. Marley, *op. cit.*, p. 858.

85 *Ibidem*, p. 862.

86 T. Kennedy, Congressional Record, vol. 141, S 7803, 104th Congress, 2nd Session, cited in: A. Parker. *Forced Apart: Families Separated...*, pp. 24–25.

87 B.R. Marley, *op. cit.*, p. 858.

88 Under the plenary power doctrine established in the late nineteenth century, the decision-making process in this realm of the law has been shielded from virtually any interference by the judiciary.

89 *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), available at: <http://supreme.justia.com/us/338/537/case.html>.

portees or violate international law standards. Unfortunately, the 1996 statutes contravene several universally-recognized principles. Most predominantly, they run afoul of the right to raise defenses to deportation, the right to family unity, and the principle of proportionality. Without a doubt, the individuals deported on aggravated felony charges have engaged in criminal conduct and broken the U.S. law. This fact alone, however, should not automatically trigger the blindfolded withdrawal of the privilege of living in a country; especially from those who entered lawfully and became legal permanent residents. The interests at stake are of paramount importance to any human being, and spread far beyond the immigrants themselves. The decision to deprive a person of all connections to what they may have rationally considered their home for the remainder of their life must be made with utmost caution. A fair and full hearing that allows the immigrants the opportunity to have all relevant factors of their cases heard and considered is imperative. Accordingly, the safeguards against unfair and unwarranted deportation, such as the section 212(c) waiver, must be reinstated into the system. While Congress should search for ways to protect the American public from the most dangerous criminals, trampling the human rights of offenders faced with the prospect of undeserved deportation is not the proper course of action. Efficiency reasons certainly cannot take precedence over human life. Pursuant to Article 7 of the International Covenant on Civil and Political Rights, to which the United States is a party: "An Alien lawfully in the territory of a State (...) may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."⁹⁰

The position of aliens under the Covenant was further clarified by the UN Human Rights Committee, which asserted that the "appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require," and "[a]n alien must be given full facilities for pursuing his

⁹⁰ International Covenant on Civil and Political Rights, December 16, 1966, available at: <http://www2.ohchr.org/english/law/individual.htm>.

remedy against expulsion so that this right will in all the circumstances of his case be an effective one.”⁹¹ The U.S. ratified the ICCPR in 1992 and entered no reservations, understandings, or declarations. In spite of that, in 1996, both the AEDPA and IIRIRA commonly denied the non-citizens their entitlement to raise any extenuating circumstances to their defense before the court. Another treaty binding the United States, the American Convention on Human Rights, proclaimed the right of recourse to the tribunals in the exercise of one’s due process rights already in 1977: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”⁹²

Moreover, Article 25 of the above-mentioned international Convention instituted the right to effective judicial protection:

- “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.”⁹³

Under the provisions of the IIRIRA, the recourse to judicial remedy is neither simple, nor prompt, or effective. In fact, after the abrogation of section 212(c) it is virtually nonexistent. Since the enactment of

⁹¹ UN Human Rights Committee, General Comment, No. 15, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>.

⁹² Article 8(1) of the American Convention on Human Rights “Pact of San Jose, Costa Rica”, available at: <http://www.oas.org/juridico/english/treaties/b-32.html>.

⁹³ Article 25 of the American Convention on Human Rights “Pact of San Jose, Costa Rica”.

the 1996 laws, many judges have expressed their exasperation with the feeling of powerlessness. “[I]n many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit,” commented one of them.⁹⁴ The way the law stands today, immigration judges may make only two determinations. First, that the person brought before the court is a non-citizen. Second, that he or she was found guilty of committing one of the broad list of crimes designated as aggravated felony. At that point, the hearing is to conclude with the mandatory removal order, to which the person can raise no defense. In other words, immigration judges “can do little more than run conveyer belt deportation hearings.”⁹⁵ Sadly, the factors that receive no consideration may easily lead to a breach of the aliens’ human rights and freedoms that the law should naturally enshrine, and the deportation will inevitably divest. Among the many issues that should be allowed an address in court is the length of legal residence. Not surprising, over an extended period of time immigrants tend to develop strong and lasting ties to their adoptive country. Naturally, they depend on the security their lawful residence affords them. Some, like Jose Guerrero and Joao Herbert, were brought to the U.S. in their infancy or early childhood, and could not even remember their original places of birth.⁹⁶ Some others gradually forgot their mother tongues. Growing up and living in the new culture, the immigrants eventually assimilate, and start to feel a sense of belonging. What is important, sometimes their new way of life is strikingly at odds with the standards and customs accepted by the other country, and could jeopardize their lives, safety, or freedom if they were to return. Finally, those who have lived in America for a number of years find that the ties they share with their country of citizenship are

94 J.P. Vandelto, *Perspective of an Immigration Judge*, Denver University Law Review, 2003, Vol. 80, p. 775, as quoted in: A. Parker, B. Root. *Forced Apart (By the Numbers)*..., p. 3.

95 A. Parker. *Forced Apart: Families Separated*..., p. 46.

96 In one of his deportation cases, Judge Learned Hand elaborated on this matter: “Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. (...) [D]eportation is to him exile”: United States ex rel. *Klonis v. Davis*, 13 F.2d 630.

much weaker (if at all existent) than those to the United States. As one critic pointed out: “What makes an American is not contained within a document, but depends upon an individual’s relationship to this country—the very relationship that is ignored in the face of increasingly draconian immigration laws.”⁹⁷ Once deported, they very often struggle to adjust to completely unfamiliar surroundings, turning into “helpless waif[s] in a strange land.”⁹⁸ This is why in the European Union the longstanding ties to the country of residence are carefully weighed in deportation proceedings.⁹⁹ Other vital considerations recognized by international human rights law include education, vocational training, and work experience in a host country. In the new environment, the deportees may lack marketable skills. Meanwhile, they are forced to leave behind businesses that close and entrepreneurs who lose their partners, creating a substantial loss in tax revenue. This, too, has no bearing on the removal orders issued by the United States. Neither does service in the United States armed forces or positive contributions to the local community. In 2008 an estimated 20,000 LPRs were serving in the military.¹⁰⁰ When a forty-two-year-old former U.S. soldier, father to U.S. citizen children, owner of an U.S.-based company, and legal permanent resident of thirty-six years, was placed under deportation proceedings on aggravated felony grounds, he wrote: “I have paid tax all my life to this country until DHS detained me. (...) All I ask for is a fair chance to fight for what is right and that is my family and my right to be in a country that I fought for in the military. When I joined the army they never asked me if I was an alien.”¹⁰¹

American immigration law makes no concessions to age and circumstances either. In 2004 a seventy-three-year-old man was deported to France for a minor offence committed decades earlier, after fifty-two years of U.S. legal permanent residence. The procedures commenced with a seven-month detention, only to conclude with the removal to a country where he had nothing and knew no one. Along the way,

⁹⁷ M. Cook, *op. cit.*, p. 329.

⁹⁸ United States ex rel. *Klonis v. Davis*, 13 F.2d 630.

⁹⁹ A. Parker. *Forced Apart: Families Separated...*, p. 72.

¹⁰⁰ J. Baum, R. Jones, C. Barry, *In the Child’s Best Interest? The consequences of losing a lawful immigrant parent to deportation*, Berkley Law University of California, March 2010, p. 3.

¹⁰¹ A. Parker. *Forced Apart: Families Separated...*, p. 76.

he also lost of all of his U.S. social security benefits.¹⁰² Perhaps the most important defense that non-citizens should be allowed to raise in court, however, is the protection of the well-being of their minor children. The immigration judges' impotence to intercede for the purpose of preserving family unity constitutes a marked divergence from International standards and practices. In accordance with the Universal Declaration of Human Rights adopted in 1948, "[t]he family is the natural and fundamental group unit of society," and as such is "entitled to protection by society and the State."¹⁰³ The same treaty, in Article 25(2) additionally emphasizes the position of motherhood and childhood, both worthy of "special care and assistance."¹⁰⁴ Adequate safeguards built into international agreements establish that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" and "[e]veryone has the right to the protection of the law against such interference or attack."¹⁰⁵ In addition, the UDHR as well as the International Covenant on Civil and Political Rights affirm that all men and women "without any limitation due to race, nationality or religion, have the right to marry and to found a family."¹⁰⁶ In principle, the right to found a family has been interpreted by the UN Human Rights Committee to implicate the right to "live together."¹⁰⁷ As stated by the UNHC, the latter right unequivocally sets bounds on the state's coercive power to deport.¹⁰⁸ Under the provisions of the ICCPR, the Human Rights Committee considered that: "[A] decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accom-

102 S. Davis, *Deported from America*, New Statesmen, November 22, 2004, available at: <http://www.newstatesman.com/200411220005>.

103 Article 16(3) of the Universal Declaration of Human Rights. December 10, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml#a16>.

104 *Ibidem*, Article 25(2).

105 *Ibidem*, Article 12, Article 17(1) of the International Covenant on Civil and Political Rights. December 16, 1966.

106 Article 23(2) of the ICCPR, Article 16(1) of the UDHR.

107 UN Human Rights Committee, *General Comment 19: Protection of the family, the right to marriage and equality of the spouses*, July 27, 1990, available at: <http://www1.umn.edu/humanrts/gencomm/hrcom19.htm>.

108 *Ibidem*, *General Comment 15: The position of aliens under the Covenant*, November 4, 1986.

panies his parents is to be considered ‘interference’ with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case.”¹⁰⁹

The concept of family unity has also been incorporated into the American domestic law. In fact, the Supreme Court recognized the “right to live together as a family” and the “parental role” to be an “enduring American tradition” established beyond debate.¹¹⁰ Regrettably, the United States is not discharging its obligation to provide protection to the family and the persons composing it with regard to its aliens. After the adoption of the 1996 immigration statutes Olufolake Olaleye, as well as many other parents convicted on the aggravated felony account, were rendered powerless to challenge and stop the forced separation from their American-born children. A recent report confirmed that between April 1997 and August 2007, the United States deported a total of 87,884 lawful permanent residents with criminal sentences, reaching an estimated annual rate of 8,700.¹¹¹ Preceding deportation, the LPRs lived in America approximately ten years on average, and many of them had started families.¹¹² At the time of deportation, more than half had at least one child living at home. Fifty percent of the children were below the age of five.¹¹³ Overall, in the short ten-year period more than 100,000 children lost a parent to deportation. A minimum of 88,000 were of U.S. citizenship. In addition, the deportations affected over 217,000 other immediate family members, including the American husbands, wives, brothers, and sisters of the deportees.¹¹⁴ Needless to say, the human cost of the unyielding immigration policy proved to be enormous. As expected, the psychological damage is most evident in children. The experience of psychological trauma associated with the deportation of one’s mother or father can manifest itself in a wide va-

¹⁰⁹ *Winata v. Australia*, Communication, No. 930/2000, July 26, 2001, CCPR/C/72/D/930/2000, available at: http://www.bayefsky.com/html/120_australia930.php.

¹¹⁰ *Moore v. City of Cleveland*, 431 U.S. 494 (1977), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), available at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=431&invol=494>.

¹¹¹ J. Baum, R. Jones, C. Barry, *op. cit.*, p. 4.

¹¹² *Ibidem*.

¹¹³ *Ibidem*.

¹¹⁴ *Ibidem*.

riety of symptoms, such as sleep disturbance, eating disorders, anxiety and emotional distress.¹¹⁵ It may also adversely affect the thought process, academic performance, memory, and self perception.¹¹⁶ Often, it brings out aggression, depression, or withdrawal.¹¹⁷ In addition, it can impinge on emotional development.¹¹⁸ Sometimes, like in the case of seventeen-year-old Gerardo Anthony Mosquera Jr., it is just too much to bear. Following the deportation of his father, a Colombian native and a U.S. legal permanent resident of twenty-nine years, the teenager became “a different person.”¹¹⁹ He started skipping classes, shutting himself in his room, acting moody, and eventually shot himself in the head. His father’s aggravated felony was a 1989 sale of a \$10-worth bag of marijuana; enough to make one cigarette.¹²⁰ Such tragedies could have been averted if sounder reasoning had prevailed in Congress, and judicial authority was not circumscribed. It is clear that the consequences of losing a lawful immigrant parent to deportation very often outweigh the state’s interest in deporting him or her. In his dissent to a 2007 decision to deport both parents of four U.S. citizen children, Judge Harry Pregerson found it was to inflict “egregious harm,” and deny the minor children their “birthrights” by forcing them “to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents.”¹²¹ In handwritten letters, the oldest daughter daughter of the deportees futilely pleaded with the court: “I don’t even want to imagine myself in Mexico. I wouldn’t be able to communicate with anyone, and my education would be finished. I want to graduate from high school and go to college. I also want my little brothers and sisters to study here so that they can be educated people when they’re grown up. I see how hard my parents work and how little they get paid for not having had the opportunity to study because they had to work instead. (...) This is really affecting me mentally.

¹¹⁵ *Ibidem*, p. 8.

¹¹⁶ B. Lonegan, *op. cit.*, p. 997 (citing Birdette Gardiner-Parkinson).

¹¹⁷ *Ibidem*.

¹¹⁸ B. Lonegan, *op. cit.*, p. 997 (citing Birdette Gardiner-Parkinson).

¹¹⁹ P.J. McDonnel, *Deportation Shatters Family*, Los Angeles Times, March 14, 1998, p. 1.

¹²⁰ *Ibidem*.

¹²¹ *Memije v. Gonzales* 481 F.3d 1163, 1165, available at: <http://caselaw.findlaw.com/us-9th-circuit/1187147.html>.

My grades are starting to go down because I can't concentrate on doing my homework and I can't pay attention in class. I can't imagine leaving all my cousins, uncles, and friends. They are really important to me.. When I was depressed they were the one who helped me out. This is really personal and I feel bad (...)! I DO NOT WANT TO MOVE TO MEXICO. [caps in original] I would not survive."¹²²

In another letter she wrote: "Please let me be all that I can be. My future lies in your hands and decision over my parents' case."¹²³ Meanwhile, Judge Pregerson concluded: "I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families."¹²⁴ By means of Article 3(1), the UN Convention on the Rights of the Child of September 2, 1990 enshrines the principle that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹²⁵ Even more relevant, in Article 9(1), it imposes a legal obligation to "ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."¹²⁶ In summation, the CRC acknowledges the human rights of children, establishing international law that commits the State Parties to provide special protection measures and assistance for all children, without discrimination in any form.¹²⁷ Unequivocally, the treaty validates the rights of non-citizens to contest deportations that collide with the best interest of their child. With 192 parties as of November 2005, it was ratified by more countries than any other human rights treaty in history.¹²⁸ Regrettably, along with Somalia, the U.S. remains one of the

¹²² *Ibidem.*

¹²³ *Ibidem.*

¹²⁴ *Ibidem.*

¹²⁵ Article 3(1) of the United Nations Convention on the Rights of the Child, available at: <http://www2.ohchr.org/english/law/crc.htm>.

¹²⁶ *Ibidem*, Article 9(1).

¹²⁷ Convention on the Rights of the Child, available at: http://www.unicef.org/crc/index_30229.html.

¹²⁸ *Ibidem.*

only two countries in the world that failed to do so.¹²⁹ Therefore, by denying the opportunity to consider the implications for the human rights of children to the deportee parents, American immigration law defies international standards, albeit not directly binding in this particular instance. On the other side of the spectrum, the unforgiving immigration law takes a high economic toll on the country as a whole. It has been estimated that the government spends an approximate \$2.55 billion per year solely on detention and removal operations. Around \$255 million of the money is designated for detaining and deporting the legal permanent residents.¹³⁰ In addition, it also produces profound secondary economic effects, as many families lose their sole or primary breadwinners and suffer severe financial strains. Studies have shown that most households left behind by the deportees experience a significant drop in income, which leads to housing instability, and scarcity of foodstuffs.¹³¹ In many cases public assistance in the form of cash welfare, free or reduced-price school meals, and the Supplemental Nutrition Program for Women, Infants, and Children proves to be indispensable.¹³² Had judicial intervention been permitted, the burden of providing for a number of these families could still rest entirely on the parents, rather than the government and the taxpayers. Irrespective of the devastating impact it exerts, deportation is technically not recognized as punishment under U.S. Constitution. This legal fiction was introduced by two separate Supreme Court decisions in the late nineteenth century.¹³³ Its ramifications are profound, as the constitutional limits on punishment are thereby rendered immaterial.¹³⁴ By the same token, the principle of proportionality is considered

¹²⁹ *Ibidem*.

¹³⁰ J. Baum, R. Jones, C. Barry, *op. cit.*, p. 5.

¹³¹ *Ibidem*.

¹³² *Ibidem*, p. 6.

¹³³ These Supreme Court decisions are *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and *Yue Ting v. United States*, 149 U.S. 698 (1893): “‘Deportation’ is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishments being imposed or contemplated either under the laws of the country or out of which he is sent or under those of the country he to which he is taken.” Available at: <http://supreme.justia.com/us/149/698/case.html>.

¹³⁴ R. Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Apply*, *Administrative Law Review*, 2000, Vol. 52, p. 305.

inapplicable in the context of immigration law. Concurrently, an essential safeguard against arbitrary denial of rights has been taken down. It is worth emphasizing that “the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aim and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.”¹³⁵ The basic premise of the principle in question is that the punishment should fit the crime. Therefore, if applied for immigration purposes, the severity of the consequences inherent in deportation should not outbalance the gravity of the aggravated felony itself. Without a doubt, the 1996 regulations changed the general perception of criminal aliens. Numerous misdemeanors, such as shoplifting or traffic violations found their way into the same category as murder, rape, and kidnapping, affording the perpetrators identical treatment. Moreover, the very definition of felony and misdemeanor changes across state lines, raising yet another fairness issue. Bill Piper, director of national affairs for the Drug Policy Alliance remarked, “[I]t looks like whether you get deported or not depends on which state you were convicted in. In those states those states were drug possession is a felony, you get kicked out; in those where it isn’t, you don’t.”¹³⁶ He also noted that it appears to “raises serious equal protection issues.”¹³⁷ As put by Justice David Souter, “state law and federal law are at odds in determining the gravity of the offense.”¹³⁸ Realizing the obvious dichotomy, Souter also pondered, “Isn’t that very strange that Congress would have wanted a reading of the statute that would turn its definition of a misdemeanor crime into an aggravated felony for purposes of the immigration law?”¹³⁹ Deputy Solicitor General Edwin Kneedler explained that the immigration law “looks to state law;” therefore, if an a given offense is a felony under state law, it is a deportable felony under federal law.¹⁴⁰ This line of thought constitutes a striking divergence from what

¹³⁵ UN Human Rights Committee, *General Comment 16: the right to respect of privacy, family, home and correspondence, and protection of honor and reputation*, August 4, 1988.

¹³⁶ Bill Piper, director of national affairs for the Drug Policy Alliance, quoted in: P. Smith, *op. cit.*

¹³⁷ *Ibidem.*

¹³⁸ Justice David Souter, quoted in: P. Smith, *op. cit.*

¹³⁹ *Ibidem.*

¹⁴⁰ *Ibidem.*, quoting Deputy Solicitor General Edwin Kneedler.

is commonly referred to as the rule of lenity. Described by some as the single “most important rule of statutory interpretation peculiar to immigration,” it advocates a narrow interpretation of deportation statutes, whereby any lingering ambiguities are construed in favor of the alien.¹⁴¹ Throughout the years, the Supreme Court has consistently reaffirmed the validity of this rule.¹⁴² It has been established that between the years 1997–2007 only twenty-three percent of the deported legal permanent residents were found guilty of violent or potentially violent crimes.¹⁴³ The remaining seventy-seven percent were removed on the grounds of nonviolent offenses.¹⁴⁴ Beyond a shadow of a doubt, after 1996 the class of aggravated felony is far from being uniform. Contrary to the traditional belief, in the vast majority of the cases deportation is grossly out of proportion to the actual infraction. The accompanying infringement upon rights is almost unparalleled: “The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution or even death.”¹⁴⁵

Finally, the very idea that it does not mete out punishment has been debunked from the outset and is not much more than a destructive myth, waiting to be dispelled.¹⁴⁶ In fact, deportation is almost always

¹⁴¹ S.H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America*, (1987), and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), quoted in: W.J. Johnson, *op. cit.*, p. 424

¹⁴² *Ibidem*.

¹⁴³ A. Parker, B. Root, *Forced Apart (By the Numbers)*..., p. 38.

¹⁴⁴ *Ibidem*. Interestingly enough, driving under the influence of alcohol was the second top most offence for all classes of removed aliens, comprising 7.2 percent of the cases. The first place, and 24 percent of deportations was ascribed to illegal entries committed by the undocumented portion of the immigrant population. Next in the line of deportable misdemeanors were marijuana possession (2.2 percent), traffic violations (1.5 percent), and disorderly conduct, such as public intoxication or urination (0.4 percent). As for the serious, violent crimes (felonies) robbery and aggravated assault comprised respectively 2.2 and 1.0 percent of all cases, while all forms of intentional homicide constituted a mere 0.3 percent among the deported aliens.

¹⁴⁵ *Bridges v. Wixson*, 326 U.S. 135, available at: <http://supreme.justia.com/us/326/135/case.html>.

¹⁴⁶ “That deportation is a penalty—at times, a most serious one—cannot be doubted.” *Bridges v. Wixson*, 326 U.S. 135, available at: <http://supreme.justia.com/us/326/135/case.html>.

the beginning of an new, ongoing punishment. It is the kind of deprivation that results “in loss of both property and life, or of all that makes life worth living.”¹⁴⁷ Its far-reaching scope and unyielding punitive consequences dismiss the Supreme Court’s traditional assumption as no longer tenable. The absence of an individualized removal hearing before an impartial adjudicator, during which both mitigating and aggravating circumstances could be weighted only adds to that equation. Since 1988, the aggravated felony provision has expanded several times, each time streamlining the available remedies. It is not entirely ludicrous to compare the present situation to double jeopardy. The only difference is that the aggravated felons are tried once, and punished twice.¹⁴⁸ The principle of proportionality has been incorporated into the legal systems across the world, and has been recognized by international law. It has been widely applied by bodies, such as the European Union, the Human Rights Committee, and the International Court of Justice, including rights violations in the context of deportation.¹⁴⁹ Ironic as it is, the principle also plays an integral part in the domestic system of justice in the United States.¹⁵⁰

In summation, the United States should direct its domestic security policy onto a path that respects and protects the human rights of legal immigrants to the same and equal degree it respects and protects the human rights of its own citizens. The right to the preservation of family and the best interest of minor children cannot take back seat to economic or political concerns. Deportation, with its immense punitive consequences should be reserved only for the most heinous criminal acts, as was the case at the inception of the aggravated felony provision. At all times, it should be accompanied by a careful consideration of the mitigating factors, and enforced solely as a measure of last resort. Neither the non-citizen status nor a conviction for a crime justifies encroachment upon human rights. To do so is simply unfair and un-American.

¹⁴⁷ *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

¹⁴⁸ P. Smith, *op. cit.* (mentioning a double standard and a double punishment).

¹⁴⁹ A. Parker. *Forced Apart: Families Separated...*, pp. 52–53.

¹⁵⁰ *Ibidem*. For instance, the concept of ‘strict scrutiny’ is used to examine state policies based on race by the Supreme Court. It affords the balance between the right to be free from discrimination and any compelling governmental interest in the policy under consideration.

STRESZCZENIE

Marzena Bąk

**SKAZANI NA BANICJĘ:
PRZESTĘPSTWA KWALIFIKOWANE KONTRA
PRAWA CZŁOWIEKA STAŁYCH REZYDENTÓW
STANÓW ZJEDNOCZONYCH AMERYKI PÓŁNOCNEJ**

Klauzula „przestępstwa kwalifikowanego” została wprowadzona do prawa imigracyjnego USA w 1988 r. na mocy ustawy o przeciwdziałaniu narkomanii (*Anti-Drug Abuse Act*). Powstała ona przede wszystkim z myślą o podwyższeniu bezpieczeństwa wewnętrznego kraju, jako środek mający na celu ukrócenie przestępczości wśród osób nieposiadających obywatelstwa amerykańskiego, którym udowodniono powiązania z międzynarodowym handlem narkotykami. Początkowo wykorzystywano ją do zwalczania wyłącznie najcięższych zbrodni, takich jak zabójstwo, a także obrót narkotykami i bronią. Niemniej jednak przyjmowane w bardzo krótkich odstępach czasu kolejne zmiany prawa imigracyjnego doprowadziły do stopniowego rozszerzenia katalogu desygnatów tego pojęcia na coraz łżejsze przewinienia. Proces ten trwa nieprzerwanie po dzień dzisiejszy. Na przestrzeni dwunastu lat, definicja legalna przestępstwa kwalifikowanego uległa więc daleko posuniętej transformacji, obejmując niezwykle szeroki zakres czynów zabronionych. W istocie, w obowiązującym stanie prawnym wiele spośród przestępstw kwalifikowanych – wymienić tu można chociażby drobną kradzież, wykroczenia drogowe albo naruszenia porządku publicznego – z punktu widzenia prawa federalnego nie spełnia wcale ustawowych przesłanek zbrodni czy też przestępstwa ciężkiego (*felony*), a ich popełnienie często nie spotyka się nawet z wymierzeniem kary pozbawiania wolności. Niezmiennie pozostają natomiast zagrożenia wynikające z zastosowania niniejszej klauzuli. Należy do nich w pierwszej kolejności deportacja, połączona obecnie z dożywotnim zakazem wstępu do Stanów Zjednoczonych. Niezależnie jednak od wagi potencjalnych konsekwencji, dostępność środków ochrony imigrantów, takich jak porada prawna, ścieżki odwoławcze, możliwość ubiegania się o zwolnienie z deportacji (*waiver*), a w niektórych przypadkach nawet sam nadzór sądowy, uległy w ciągu ostatniej dekady dotkliwym ograniczeniom, nasuwając poważne zastrzeżenia w zakresie właściwej procedury procesowej. Co więcej, Kongres, przyjmując w 1996 r. najsurowszą z dotychczasowych poprawek do prawa imigracyjnego, która w znacznym stopniu wpłynęła na kształt katalogu przestępstw kwalifikowanych, nadał nowym przepisom retroaktywną moc, arbitralnie pozbawiając setek imigrantów szansy zachowania posiadanego przez nich statusu imigracyjnego. Posunięcie to wzbudza do dzisiaj szereg kontrowersji, a krytycy upatrują jego motywów w reakcji na terrorystyczny zamach

bombowy z 1995 r., o który opinia publiczna początkowo niesłusznie obwiniała cudzoziemców. Nie bez znaczenia były również szerzące się nastroje antyimigracyjne.

Prawomocnie orzeczonemu wyrokowi za czyn należący do omawianej kategorii towarzyszy ponadto nakaz zatrzymania do czasu przeprowadzenia deportacji, bez możliwości zwolnienia za poręczeniem majątkowym. Przekazanie służbom imigracyjnym następuje niezwłocznie po odbyciu przez skazanego kary wymierzonej przez sąd. Prowadzić to może do znacznego wzrostu trudności i kosztów związanych ze znalezieniem i zatrudnieniem reprezentacji prawnej, a także gromadzeniem materiału dowodowego w celu podważenia podstaw do wydalenia z kraju. Warto zaznaczyć, iż obrona z urzędu nie przysługuje na żadnym etapie procesu wydalenia. Odbiera to wreszcie legalnym imigrantom wszelkie szanse na załatwienie swoich spraw osobistych i zawodowych przed opuszczeniem USA. Co więcej, przepisy z 1996 r. zniósły resztę kompetencji sędziów imigracyjnych do powstrzymania deportacji. Zgodnie z obecną regulacją żaden sąd bowiem nie ma uprawnień do uwzględnienia okoliczności łagodzących w rozpatrywanej sprawie, takich jak chociażby dolegliwość i konsekwencje deportacji dla imigranta i jego rodziny (ze szczególnym uwzględnieniem dobra i bezpieczeństwa małoletnich dzieci), czas trwania rezydencji w Stanach Zjednoczonych, wiek, służba w siłach zbrojnych USA, wkład do społeczności lokalnej czy całkowita resocjalizacja. Tym samym deportacja nie jest w żadnej mierze uwarunkowana stanem faktycznym sprawy, który z góry określić należy jako irrelevantny. Jednocześnie w świetle prawa stwierdzeniu podlega wyłącznie brak obywatelstwa amerykańskiego oraz fakt dokonania czynu klasyfikowanego jako przestępstwo kwalifikowane. Bez względu na wagę przewinienia, nie ma możliwości zwolnienia z deportacji.

Najbardziej poszkodowani na skutek zarysowanych nowelizacji prawa są bezspornie stali rezydenci Stanów Zjednoczonych (tj. osoby legitymujące się tzw. zielonymi kartami). Jest to grupa społeczna, którą z krajem zamieszkania łączy szczególnie silny związek. Jak pokazują statystki, po kilku latach pobytu stali rezydenci zakładają rodziny, wiążąc z USA swoje życie zawodowe i przyszłość. Deportacja bez możliwości powrotu oznacza dla nich zatem najczęściej dozgonną separację z dziećmi, przyjaciółmi i źródłem utrzymania, którą przyrównuje się do utraty „wszystkiego, co nadaje życiu sens”. Niejednokrotnie łączy się ona z ryzykiem prześladowań i zepchnięciem na margines społeczny w państwie pochodzenia, do którego nierzadko odsyła się ich po kilku dekadach nieobecności. Tym większy nacisk należy więc położyć na ochronę ich praw i interesów w państwie stałego pobytu. Niestety, w USA padają oni coraz częściej ofiarą ustaw tworzonych głównie z myślą o nielegalnej imigracji i zagrożeniu terroryzmem.

Pierwsza część niniejszego artykułu skoncentruje się na ewolucji klauzuli przestępstwa kwalifikowanego na tle prawa imigracyjnego USA. Uwzględnione zostaną w niej zarówno tło historyczne, jak i konsekwencje dla stałych rezydentów. Druga część natomiast poświęcona została analizie poszczególnych naruszeń praw człowie-

ka, których doznają dzisiaj stali rezydenci Stanów Zjednoczonych, przeprowadzonej na podstawie treści umów międzynarodowych, których stroną jest Ameryka.

SŁOWA KLUCZOWE: Stany Zjednoczone Ameryki, prawo imigracyjne, stały rezydent, przestępstwo kwalifikowane (*aggravated felony*), odpowiedzialność karna, deportacja, prawa człowieka