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THE LATINO LAWFUL PERMANENT RESIDENT REMOVAL CASES: A CASE STUDY OF NICARAGUA AND A CALL FOR FAIRNESS AND RESPONSIBILITY IN THE ADMINISTRATION OF U.S. IMMIGRATION LAW

Maritza I. Reyes¹

What has become of the descendants of the irresponsible adventurers, the scapegrace sons, the bond servants, the redemptionists and the indentured maidens, the undesirables, and even the criminals, which made up, not all, of course, but nevertheless a considerable part of, the earliest emigrants to these virgin countries? They have become the leaders of the thought of the world, the vanguard in the march of progress, the inspirers of liberty, the creators of national prosperity, the sponsors of universal education and enlightenment.²

INTRODUCTION

It is a fact worthy of judicial notice³ that the United States is an experiment that blossomed into the thriving democracy that it is today thanks to the land and natural resources contributed by the indigenous inhabitants of America and the labor of all the immigrants who have arrived here.⁴ “We

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² GORTON CARRUTH & EUGENE EHRLICH, *THE GIANT BOOK OF AMERICAN QUOTATIONS* 290 (1988) (quoting William Randolph Hearst's testimony before the American Crime Study Commission on May 19, 1929).

³ “A judicially noticed fact must be one not subject to reasonable dispute.” FED. R. EVID. 201(b).

⁴ See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 876-77 (1993) (“The genocide of Native Americans, brutal enslavement of African Americans, and exploitation and oppression of Asian and Latino Americans are

are a nation of immigrants. It is immigrants who brought to this land the skills of their hands and brains to make it a beacon of opportunity and of hope for all men.”⁵ But we conveniently forget our immigrant history whenever the loudest and sometimes most racially discriminatory voices in our country clamor against immigrants.⁶ In recent presidential debates, candidates were questioned about their opinions on “illegal” immigration.⁷ However, the subject of removal of *longtime lawful permanent residents*,⁸ most of them Latinos,⁹ for their entanglement in crime, even minor crimes,¹⁰ has not been addressed in the presidential election debates. This may be because lawful permanent residents, as with all other non-citizens, do not have the benefit of their own voices in the political process. Lawful perma-

harsh reminders of our nation’s past. In spite of the oppression, people of color have contributed to America’s history and development and are a vital part of its heritage.”).

⁵ *Permitting Admission of 400,000 Displaced Persons into the U.S.: Hearing on H.R. 2910 Before the H. Subcomm. on Immigration and Naturalization of the H. Comm. on the Judiciary*, 80th Cong. 381 (1947) (statement of Herbert H. Lehman, Nat’l Cmty. Relations Advisory Council).

⁶ In *Korematsu v. United States*, in the name of “public necessity,” the Supreme Court of the United States affirmed the conviction of a Japanese-American who had been prosecuted for violating an order that directed all persons of Japanese ancestry be excluded from a military area. 323 U.S. 214, 216 (1944). The majority opinion avoided the racism issue, but the dissent recognized that racist and economic prejudices were the underlying reasons for the discriminatory treatment of Japanese-Americans:

Special interest groups were extremely active in applying pressure for mass evacuation. Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that, “We’re charged with wanting to get rid of the Japs for selfish reasons. We do. It’s a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we’d never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don’t want them back when the war ends, either.”

Id. at 239 n.12 (Murphy, J., dissenting) (citations omitted).

⁷ The terms “illegal immigrant” or “illegal alien” do not appear in any of the legislation that has been enacted by Congress. However, this type of terminology has developed in the popular lexicon as a result of “Congress’s criminalization of unauthorized migration.” Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1838-39 (2007); see also Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 197 (2007) (“Immigration and Customs Enforcement does not define exactly what it means by ‘illegal aliens,’ which is in fact as much a pejorative as a legal term of art.”).

⁸ A lawful permanent resident is an alien who has “been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” Immigration and Nationality Act (INA) § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2000).

⁹ The terms “Latino” and “Hispanic” are used interchangeably throughout this Note and in materials cited herein to describe persons of Mexican, Puerto Rican, Cuban, Central or South American origin, or any other Hispanic origin identifiable by having ancestors from Spanish-speaking countries, regardless of race. See generally Gerald A. López, *Learning About Latinos*, 19 CHICANO-LATINO L. REV. 363, 392-99 (1998) (describing the use of different labels by Latinos for the purpose of self-identification). The term Latino, as used in this Note, is a gender-neutral term.

¹⁰ See Kanstroom, *supra* note 7, at 198.

nent residents are a discrete and insular minority group that cannot participate in the political process because they cannot exercise the right to vote.¹¹ Nonetheless, lawful permanent residents are our neighbors, classmates, and co-workers. Some of us worship with them in our religious institutions. Therefore, do we, as a country and as a people, owe them some sort of allegiance? Must we speak for their rights in the removal process because they cannot speak for themselves?¹² The answer to both questions is yes. We owe it to ourselves and to our country to raise our voices to ensure that lawful permanent residents receive fair adjudication, due process, and humanitarian treatment in the immigration system just as we would expect to receive if we were in their unfortunate predicament.¹³

This Note aims to contribute to the current dialogue by raising issues of fairness, responsibility, and human dignity that merit special consideration in any immigration reform proposal regarding the laws that apply to lawful permanent residents who have committed crimes. Part I analyzes the underlying motivation for the enactment of the immigration laws that were passed in 1996. This discussion hints at the racial undertone beneath the facially race/ethnicity-neutral laws that were drafted with full knowledge that their impact would be disproportionately suffered by the most recent immigrant population—Latinos. While the emphasis of this Note is not on the analysis of the applicable statutes that deal with the removal of lawful permanent residents for crimes,¹⁴ Part I includes a brief overview of some of the applicable statutory provisions to frame the subsequent sections that deal with the effects of those laws, the policy considerations, and the proposal for legisla-

¹¹ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also Daniel Kanstroom, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation*, 39 CONN. L. REV. 1911, 1918 (2007) ("In the immigration and deportation contexts the deepest danger, I believe, is that of targeting discrete, insular, (largely) politically powerless, ethnically, religiously or racially identified, and often voiceless minority groups.").

¹² Founding Father Thomas Jefferson voiced concern that attacks against aliens may be followed by the targeting of U.S. citizens. See Kanstroom, *supra* note 11, at 1920 (citing Thomas Jefferson, *The Kentucky and Virginia Resolutions of 1798*, in DOCUMENTS OF AM. HIST. 178, 181 (Henry Steele Commager ed., 8th ed. 1968)). In the 1920s and 1930s, there was public outcry against unjust deportations because the laws that had been enacted to exclude the "obnoxious Chinese" had begun to apply to other groups, such as anarchists and Europeans. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 90-93 (2003). A Jewish-American law professor passionately recognized, in a law review article about economic injustice towards undocumented immigrant families, her duty to speak up against "threats to human dignity, social justice, and civil rights everywhere" because her immigrant ancestors settled in the United States after escaping Nazi persecution and surviving unspeakable past atrocities. See Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736, 740 (2007).

¹³ Lawyers and policy analysts in the Latino community have a responsibility to raise their voices and promote thoughtful immigration reform. See Adela de la Torre & Julia Mendoza, *Immigration Policy and Immigration Flows: A Comparative Analysis of Immigration Law in the U.S. and Argentina*, 3 MOD. AM. 46, 50 (2007).

¹⁴ Since the passage of the laws in 1996, legal scholars have generously and repeatedly analyzed the specific laws and their application. Some of these materials are cited throughout the footnotes of this Note.

tive changes. Part II utilizes a case analysis of issues faced by deportees from Nicaragua to illustrate how the foreign policy of the United States affects the governments, economies, and migration trends of other countries. This country-specific analysis demonstrates why the United States has a special responsibility, as part of its immigration policy, to migrants who flee to the United States as a result of conditions created by U.S. foreign policy, including support of dictatorships and military intervention.¹⁵ This Part also substantiates that generally applicable immigration laws need to account for special circumstances such as whether removal of longtime lawful permanent residents to a particular country of origin warrants additional humanitarian safeguards. Parts III and IV borrow from the analysis in Part II to dispel the rhetoric about national security that has been used to promote mass deportations, and to suggest that deportations of longtime lawful permanent residents may not be in the best interest of the United States or its neighbors. Part V builds upon some of the material discussed in Parts I through IV and sets forth a simple, straight-forward recommendation for legislative reforms that would promote fairness in the removal process of lawful permanent residents.

I. HISPANIC POPULATION GROWTH AND IMMIGRATION REFORM ACTS OF 1996

Is it a coincidence that the harsh immigration laws passed in 1996 were enacted at a time when the "browning of America"¹⁶ was the topic of much publicity throughout the United States?¹⁷ Regretfully, American history demonstrates that this great nation did not always have good intentions when it developed immigration legislation and implemented immigration poli-

¹⁵ American adventurism and interventionism throughout the Americas under policy imperatives such as the Monroe Doctrine and the Cold War similarly has catalyzed Latinas/os' presence in the United States—it is no coincidence that Latina/o groups in the United States hail mostly from the places in which the United States has most interfered, such as Mexico, Puerto Rico, Cuba, Nicaragua, Guatemala, the Dominican Republic, and El Salvador.

Berta Hernández-Truyol et al., *Latcrit X Afterword: Beyond the First Decade: A Forward-Looking History of Latcrit Theory, Community and Praxis*, 26 CHICANA/O-LATINA/O L. REV. 237, 263 n.95 (2006) (citations omitted). For a discussion of U.S. foreign policy in Haiti and the resulting Haitian migration and immigration treatment upon arrival in the United States, see Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 60-63 (1998).

¹⁶ The phrase "browning of America" has been used by some observers to describe a phenomenon of increased racial minority presence in the United States. See, e.g., Thomas David Jones, *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis*, 18 SUFFOLK TRANSNAT'L L. REV. 427, 584 (1995).

¹⁷ At least one author has criticized the lack of immigration law scholarship that analyzes the influence of race in the "anti-immigrant backlash of the 1990s." Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 534-35.

cies.¹⁸ Racism has been the foundation for judicial decisions and legislation that, with the benefit of hindsight, we now recognize as an embarrassing and outrageous part of our nation's history.¹⁹ The enforcement of tougher immigration laws aimed at ridding the country of immigrants, most of whom are Latinos,²⁰ could very well mean that we are in the midst of engaging in actions that may become known to future generations as the *Latino Removal Cases*.

A. *The U.S. Census Projects Growth of Hispanic Population*

In 1993, based in large part on estimates and projections compiled by the U.S. Bureau of the Census, American newspapers spread the news about the rapid growth of the Hispanic population in the United States.²¹ In July 1995 the U.S. Bureau of the Census issued a report announcing that, for the first time, "the yearly estimated growth to the Hispanic population was numerically larger than that for the White, non-Hispanic population."²² The report estimated that the Hispanic population had grown by 886,000 between

¹⁸ See generally THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 171 (5th ed. 2003).

¹⁹ Indeed, who can forget *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)? Chinese laborers were initially welcomed when their hard labor was needed during the gold rush of 1848 and the construction of the Central Pacific Railroad between 1864 and 1869. See ALEINIKOFF ET AL., *supra* note 18, at 171. But after these ethnic minority laborers had contributed to the United States, they were no longer welcomed. *Id.*

²⁰ See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 810 (2007) (stating that most of the migrants who entered in the 1980s and 1990s are Hispanic); Kanstroom, *supra* note 7 at 197, 211 (stating that most of the individuals currently targeted for deportation come from Mexico and Central America).

²¹ See, e.g., Rob Martindale, *Hispanic Population Surges in U.S., State // Mexican Immigration, High Birth Rate Big Reason for Growth*, *Census Says*, TULSA WORLD, Nov. 18, 1993, at N1 ("[T]he United States' Hispanic population grew seven times as fast as the rest of the U.S. population between 1980 and 1990, the bureau said."); *Work-Force Diversity on Steep Rise*, SEATTLE TIMES, Nov. 13, 1993, at D3 ("The Census Bureau projects that by 2010 Hispanics will be the largest minority group in the nation. White non-Hispanics, 80 percent of the population in 1980, will be just over half the population by 2050. A good share of this increased diversity is coming through immigration . . ."); Chuck McCullough, *Americans Are Getting Wrapped Up in Tortillas*, SEATTLE POST-INTELLIGENCER, Nov. 3, 1993, at C1 ("The tortilla—the lifeblood of Latin America since ancient times—is quickly becoming a major food staple in the United States, and daily consumption is expected to surpass the all-American loaf of bread by the end of the decade. . . . Last year, salsa ended ketchup's 100-year reign as the nation's favorite condiment, . . . [One of the reasons for the tortilla boom] is the continuing immigration of Mexicans and Central Americans to the United States."); Melody Petersen, *Anti-Immigrant Groups Behind INS Crackdown*, SAN JOSE MERCURY NEWS, July 15, 1993, at 1A ("Mountain View's group, which vows to prevent the city 'from becoming a Third World outpost,' is forming while its Hispanic population grows and tensions increase between new arrivals and longtime residents.").

²² EDWIN R. BYERLY & KEVIN DEARDORFF, U.S. BUREAU OF THE CENSUS, NATIONAL AND STATE POPULATION ESTIMATES: 1990 TO 1994, at v (1995), available at <http://www.census.gov/prod/1/pop/p25-1127.pdf>. The Hispanic category included persons of any race. *Id.* at v n.1.

July 1993 and July 1994 whereas the White, non-Hispanic population had added 885,000 people.²³

In February 1996 the trumpet sounded again. The U.S. Bureau of the Census issued another report, even more explicit in terms of the projected numbers and percentage increase of the Hispanic population growth, stating:

Every year from now to 2050, the race/ethnic group adding the largest number of people to the population would be the Hispanic-origin population. In fact, after 2020 the Hispanic population is projected to add more people to the United States every year than would all other race/ethnic groups combined. By 2010, the Hispanic-origin population may become the second-largest race/ethnic group.²⁴

The report also indicated that immigration would be a predominant factor in future population growth and assumed that the Hispanic population would have the highest number of annual immigrants.²⁵ The report specified that "[i]f there were no net immigration after 1994, however, the racial composition of the U.S. population would be quite different than projected."²⁶ In fact, if immigration projections were decreased, the Hispanic population in 2050 would be less than nineteen percent of the total population as opposed to twenty-five percent if the net immigration effect developed as projected.²⁷ If the Hispanic population were kept at nineteen percent of the overall population, the non-Hispanic, White population would be sixty-one percent of the U.S. population in 2050.²⁸

The population projections were injected into the 1996 congressional debates on immigration reform, specifically during discussions in the House of Representatives on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).²⁹ The projections were used to support legislation against legal and illegal immigration.³⁰ Members of Congress demanded tougher immigration laws because their constituents were angry about immigration.³¹ U.S. Representative Anthony C. Beilenson repeatedly referred to the wishes of his constituency to curtail legal and illegal immigration.³² He specifically stated:

It is the 800,000, more or less, *legal immigrants*, more so than the estimated 300,000 illegal ones, who determine how fierce the

²³ *Id.* at v.

²⁴ JENNIFER CHEESEMAN DAY, U.S. BUREAU OF THE CENSUS, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 to 2050, at 1 (1996), available at <http://www.census.gov/prod/1/pop/p25-1130.pdf>.

²⁵ *Id.* at 23.

²⁶ *Id.*

²⁷ *Id.* at 13, 23.

²⁸ *Id.* at 23.

²⁹ See 142 CONG. REC. 24,774-24,802 (1996), available at 1996 WL 541057.

³⁰ *Id.* at 27,774-76.

³¹ *Id.* at 24,774-78.

³² *Id.* at 24,775.

competition for jobs is, how overcrowded our schools are, and how large and densely populated our urban areas are becoming. . . .

Natives of other lands who have settled here since the 1970's and their offspring account for more than half the population increase we have experienced in the last 25 years. The effects of immigration will be even more dramatic, however, in the future. By the year 2050, more than 90 percent of our annual growth will be attributable to immigrants who have settled here since the early 1990's. . . .³³

The Census reports clearly indicate that the immigrants from the 1990s to which the U.S. Representative referred are Hispanic.³⁴ The debates on immigration reform culminated in the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)³⁵ and IIRIRA.³⁶ These acts made the removal (deportation)³⁷ laws broader and tougher for all aliens, including lawful permanent residents.³⁸ Despite the damaging and broad impact of these laws, very little time was spent discussing or reviewing the removal provisions.³⁹ The result of these immigration laws has been a disparate impact in the removal of the Latino immigrants (from the 1990s), mostly Mexican and Central American.⁴⁰

³³ *Id.* at 24,776 (emphasis added).

³⁴ See generally DAY, *supra* note 24.

³⁵ Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA was passed, in large part, in response to the Oklahoma City bombings; the terrorists in that attack were U.S. citizens. See Chacón, *supra* note 7, at 1851.

³⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

³⁷ Prior to IIRIRA, the terms "exclusion" and "deportation" described two separate immigration proceedings. See, e.g., Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 385 n.4 (2007). Now these proceedings are combined into one "removal" proceeding. See INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2000). The term "deportation" and any related variations will be used in this Note to denote their ordinary meaning—expulsion from a country. See WEBSTER'S NEW WORLD DICTIONARY 370 (3d ed. 1994). "Deportation" may also be used as it is used in the Immigration and Nationality Act; for example, in § 240A, cancellation of "removal" refers to "an alien who is inadmissible or *deportable*." INA § 240A(a), 8 U.S.C. § 1229b(a) (emphasis added). Some of the literature cited in this Note uses deportation to describe removal and vice versa.

³⁸ See generally Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893 (2007).

³⁹ See HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 16-18 (2007), available at <http://www.hrw.org/reports/2007/us0707/us0707web.pdf>.

⁴⁰ See U.S. DEPT OF HOMELAND SEC., 2006 YEARBOOK OF IMMIGRATION STATISTICS 92 tbl.35 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf; U.S. DEPT OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 92 tbl.35 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf; U.S. DEPT OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 154 tbl.36 (2006), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf>.

B. Application of AEDPA and IIRIRA to Lawful Permanent Residents

The removal provisions most often applied to lawful permanent residents who have committed crimes are those found in the general crimes section of section 237 of the Immigration and Nationality Act (INA).⁴¹

(A) General crimes

(i) Crimes of Moral Turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer *may be imposed*, is deportable.⁴²

(ii) Multiple Criminal Convictions

Any alien who *at any time after admission* is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.⁴³

(iii) Aggravated Felony

Any alien who is convicted of an aggravated felony *at any time after admission* is deportable.⁴⁴

....

(B) Controlled substances

(i) Conviction

Any alien who *at any time after admission* has been convicted of a violation of (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 (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.⁴⁵

The "moral turpitude" category potentially includes crimes such as jumping a turnstile in the subway to avoid paying the fare.⁴⁶ The convictions

⁴¹ INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

⁴² INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (emphasis added).

⁴³ INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (emphasis added).

⁴⁴ INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added).

⁴⁵ INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added).

⁴⁶ *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) ("[Moral turpitude] includes certain crimes that fail to live up to this hyperbolic appellation. Under this provision, for example, a legal permanent resident convicted of one minor drug possession charge, or two misdemeanor petty theft or public transportation fare evasion charges—turnstile jumping in

that qualify as aggravated felonies are set forth in twenty-one subcategories in INA section 101(a)(43) and range from murder, rape, sexual abuse of a minor, and drug trafficking to the smuggling of a brother or sister into the United States and theft offenses for which the term of imprisonment is at least one year.⁴⁷ Misdemeanors may fit the categories of aggravated felonies.⁴⁸ Shoplifting and petit larceny qualify as aggravated felonies.⁴⁹ Moreover, the aggravated felony definitions can be applied retroactively to convictions that were entered before the date of enactment of the provision—September 30, 1996.⁵⁰ The effect of the expansion of the aggravated felony definitions is that many lawful permanent residents have become removable for minor crimes even though they have lived in the United States for decades without committing “aggravated” crimes or “felonies,”⁵¹ or serving any time in jail.⁵²

II. THE CASE OF NICARAGUAN DEPORTEES

U.S. immigration law touches the lives of migrants in a dramatic, direct, and unavoidable manner. It is easy to neglect the human component when we focus on the statutory provisions in the abstract. This Part is included to illustrate the story behind the migration of one group of immigrants—Nicaraguans who fled to the United States as a result of conditions fostered by U.S. foreign policy. Some of these Nicaraguans now face removal for criminal convictions. Their stories and experiences may be similar to those of other migrant groups in one way or another.

Nicaragua is the largest country in Central America.⁵³ As early as 1652, the virtues of this beautiful land were exalted: “[Nicaragua] is stored with plenty of cotton wool and abundance of sugar canes, and is so pleasing

the New York City subway system leading to a “theft of services” misdemeanor conviction is considered a crime of “moral turpitude”—is now subject to automatic deportation without any opportunity to present to an Immigration Judge any mitigating equities.”)

⁴⁷ INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

⁴⁸ See *Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815 (2007); *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001); *Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000); *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999).

⁴⁹ See Chacón, *supra* note 7, at 1881 (citing *Erewele v. Reno*, No. 98 C 5454, 2000 WL 1141430 (N.D. Ill. Aug. 11, 2000); *Jaafar v. INS*, 77 F. Supp. 2d 360, 365 (W.D.N.Y. 1999)).

⁵⁰ INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

⁵¹ Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 394 (2007).

⁵² See Chacón, *supra* note 7, at 1844-48; see also Sara A. Rodriguez, Note, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 491 (2006) (explaining that “for immigration purposes a ‘conviction’ includes a sentence of deferred adjudication and that a ‘sentence of imprisonment’ is deemed to include a term of probation.” (citing INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B); *Moosa v. INS*, 171 F.3d 994, 1005 (5th Cir. 1999)).

⁵³ MILLETT ET AL., *NICARAGUA: A COUNTRY STUDY* xiii (James D. Rudolph ed., 1982).

to the eye that the Spaniards call it by the name of Mahomet's Paradise."⁵⁴ But this paradise has been marred by U.S. intervention, civil wars, natural disasters, dictatorships, and more civil wars. The history of American intervention in Nicaragua is long, complex, and beyond the scope of this Note.^{55,56} Nevertheless, this Part highlights some historical facts to place in the proper context the reasons for the migration of Nicaraguans to the United States and the role that the United States played in causing this migration.

A. *The Somozas*

Due to its geographic location as a possible site for an inter-oceanic canal, Nicaragua endured the interest and intervention of the United States beginning in the mid-1830s.^{57,58} In May 1927 the United States established the *Guardia Nacional* (National Guard), which was initially led by U.S. Marines.⁵⁹ When the United States pulled out of Nicaragua in 1933, U.S. Marines handpicked General Anastasio Somoza García (Somoza García) to become the first Nicaraguan commander in chief of the National Guard.⁶⁰ In

⁵⁴ BUREAU OF THE AM. REPUBLICS, NICARAGUA, BULLETIN No. 51, at 28 (Rev. ed. 1893) (quoting a reference to Nicaragua that was published in Peter Heylyn's *Cosmography* in London in 1652).

⁵⁵ See MICHEL GOBAT, *CONFRONTING THE AMERICAN DREAM, NICARAGUA UNDER U.S. IMPERIAL RULE* 1 (2005) ("U.S. intervention has marked few nations as profoundly as Nicaragua.").

⁵⁶ Aside from military interventions, the United States has always felt a right or duty to play a role in the development of American-like democracy in Nicaragua. See MAURICIO SOLAÚN, *U.S. INTERVENTION AND REGIME CHANGE IN NICARAGUA* 26 (2005). The first regime change orchestrated by the United States in twentieth-century Latin America was the resignation and exile of Nicaraguan President José Santos Zelaya after diplomatic and military coercion by the United States. See GOBAT, *supra* note 55, at 70. Zelaya had defended Nicaragua's sovereignty over a proposed canal to be built by the United States in Nicaragua. *Id.* at 67. "U.S. efforts to overthrow Zelaya culminated in the 1909 revolution instigated by General Juan José Estrada." *Id.* at 69. The revolution would have been quashed but for the intervention of U.S. warships on behalf of the rebels in Bluefields, on Nicaragua's Atlantic Coast. *Id.* at 69-70.

⁵⁷ See Peter S. Michaels, Note, *Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua*, 7 B.C. THIRD WORLD L.J. 223, 238 (1987) (citing T. BERRY & D. PREUSCH, *THE CENTRAL AMERICAN FACT BOOK* 271 (1986)); LATIN AMERICAN AND CARIBBEAN FOREIGN POLICY 47 (Frank O. Mora & Jeanne A. K. Hey eds., 2003) [hereinafter *FOREIGN POLICY*].

⁵⁸ See Sergio Ramírez Mercado, *Sandino a Cincuenta Años [Sandino Fifty Years Later]*, in DANIEL ORTEGA SAAVEDRA, BAYARDO ARCE & SERGIO RAMÍREZ MERCADO, *HABLAN LOS COMANDANTES SANDINISTAS [THE SANDINISTA COMMANDERS SPEAK]* 26-30 (1984). Official U.S. records acknowledge military interventions in Nicaragua (not including covert actions and routine alliance stationing and training exercises) during the following time periods: 1853, 1854, 1857, 1867, 1894, 1896, 1898, 1899, 1910, and 1912 to 1933. See CONG. RESEARCH SERV., *REPORT FOR CONGRESS: INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2007*, at CRS-5 to -14 (rev. Jan. 14, 2008), available at <http://www.fas.org/spp/crs/natsec/RL32170.pdf>. These military interventions included the bombing and burning of San Juan del Norte (Greytown) "to avenge an insult to the American Minister [a political appointee] to Nicaragua." *Id.* at CRS-6.

⁵⁹ See GOBAT, *supra* note 55, at 205, 216.

⁶⁰ *Id.* at 264; see also Michaels, *supra* note 57, at 239 (citing E. CRAWLEY, *OLD DICTATORS NEVER DIE: A PORTRAIT OF NICARAGUA AND THE SOMOZA DYNASTY* (1979); R. MIL-

1936 Somoza García became the first Somoza to appoint himself as president of Nicaragua.⁶¹ He ruled from 1936 to 1956.⁶² His presidency began the four decade Somoza dynasty.⁶³ After the assassination of Somoza García, his son Luis Somoza Debayle (Somoza Debayle) assumed the presidency.⁶⁴ He was followed by his brother, Anastasio Somoza Debayle (Somoza), who was president from 1967 to 1979.⁶⁵ The Somoza dictators were able to remain in power for so many years because they exercised total control over the National Guard and received the support of the United States.⁶⁶ "President Franklin D. Roosevelt once said about [the first] Somoza: 'He's a sonofabitch, but he's ours.'"⁶⁷ The last Somoza was a graduate of the U.S. Military Academy at West Point and enjoyed special ties to the U.S. military.⁶⁸

Somoza, in his account of the events that led to the demise of his dictatorship, blamed the Carter administration for having betrayed him and Nicaragua—"the little U.S.A.' of Central America."⁶⁹ According to Somoza, the United States pressured neighboring countries to deny aid to his government during the last days of the civil war against the Sandinistas.⁷⁰ Somoza also accused the United States of interfering with Nicaragua's ability to obtain standby credit from the International Monetary Fund, credit that was desperately needed to buy ammunition.⁷¹ President Carter also convinced other countries not to sell ammunition to the Nicaraguan government, in the

LETT, *THE GUARDIANS OF THE DYNASTY: A HISTORY OF THE U.S.-CREATED GUARDIA NACIONAL DE NICARAGUA AND THE SOMOZA FAMILY* (1977)); OCTAVIO SANABRIA & ELYVRA PABON, *NICARAGUA: DIAGNOSTICO DE UNA TRAICIÓN—EL FRENTE SANDINISTA DE LIBERACION NACIONAL EN EL PODER [NICARAGUA: DIAGNOSIS OF BETRAYAL—THE SANDANISTA NATIONAL LIBERATION FRONT IN POWER]* 25 (1986).

⁶¹ See Michaels, *supra* note 57, at 239.

⁶² See ANDREW CRAWLEY, *SOMOZA AND ROOSEVELT, 1933–1945*, at 7 (2007); GOBAT, *supra* note 55, at 267.

⁶³ See HUMBERTO ORTEGA SAAVEDRA, *LA EPOPEYA DE LA INSURRECCIÓN [THE EPIC OF THE INSURRECTION]* 49 (2004).

⁶⁴ GOBAT, *supra* note 55, at 267.

⁶⁵ *Id.*

⁶⁶ FOREIGN POLICY, *supra* note 57, at 47–48; see also Evelyn Figueroa, *Disarming Nicaraguan Women: The Other Counterrevolution*, 6 COLUM. J. GENDER & L. 273, 277 (1996) ("[The Somozas] enjoyed the full economic and military support of the United States.").

⁶⁷ See Michaels, *supra* note 57, at 239 n.138.

⁶⁸ See FOREIGN POLICY, *supra* note 57, at 48. Somoza's wife was a U.S. citizen. ANASTASIO SOMOZA, *NICARAGUA BETRAYED* 263 (1980).

⁶⁹ See SOMOZA, *supra* note 68, at 230–44, 262. The reference to Nicaragua as "a little United States" dates back to the U.S. occupation of Nicaragua from 1912 to 1933. GOBAT, *supra* note 55, at 3.

In trying to remake Nicaragua into a "little United States," the [U.S.] occupiers not only cut short the country's first major democratic opening and helped produce three devastating wars, they also undermined the rule of law by politicizing state institutions; stymied economic development by blocking much-needed public improvements; and fatally militarized state-society relations by seeking to impose democracy via force.

Id. at 279.

⁷⁰ SOMOZA, *supra* note 68, at 234, 261–62.

⁷¹ *Id.* at 235.

process derailing the delivery of a much needed pre-paid shipment from Israel.⁷² Out of desperation, Somoza authorized air bombings, which caused an uproar throughout the hemisphere.⁷³ Somoza's doom was sealed when President Carter "spearheaded a drive in the Organization of American States (OAS) to pass a resolution condemning the government of Nicaragua."⁷⁴ The resolution was issued on June 23, 1979.⁷⁵ On June 29, 1979, Somoza handwrote his resignation and presented it seventeen days later after he received assurances from the United States that he, his family, and his closest supporters would be granted a safe exit out of Nicaragua.⁷⁶

B. *The Sandinistas*

The *Frente Sandinista de Liberación Nacional* (Sandinista National Liberation Front or FSLN or Sandinistas) chose its designation in honor of General Augusto César Sandino (Sandino).⁷⁷ Sandino, a Nicaraguan guerilla leader, fought against the U.S. Marines occupying Nicaragua in the 1920s and 1930s.⁷⁸ The National Guard aided the U.S. Marines in the war against Sandino's guerrilla force.⁷⁹ Sandino supported an anti-imperialist movement that opposed alliance with any imperial force.⁸⁰ He "believed in democracy and ideological pluralism."⁸¹ On January 2, 1933, after successful guerrilla attacks on U.S. marines in Nicaragua, Sandino finally agreed to lay down his arms, but only after U.S. troops left Nicaragua.⁸² Sandino accepted a peace treaty on February 2, 1933.⁸³ However, he continued to criticize the U.S.-trained National Guard led by Somoza García; as a result, Sandino was assassinated by the National Guard on the night of February 21, 1934.⁸⁴

⁷² *Id.* at 239-42.

⁷³ *Id.* at 239.

⁷⁴ *Id.* at 240.

⁷⁵ *Id.* at 264.

⁷⁶ *Id.* at 263-67, 278-79. In exile in Paraguay (before he was assassinated), Somoza wrote, "Had Nicaragua been able to purchase arms and ammunition, we would have continued our fight against the aggressor forces alone. I am confident we could have defeated the enemy. Also, I knew that many member nations of the OAS were sympathetic to Nicaragua and yet, due to U.S. pressure, voted for the resolution." *Id.* at 266.

⁷⁷ See MILLETT ET AL., *supra* note 53, at xxii.

⁷⁸ See Mercado, *supra* note 58, at 26-30.

⁷⁹ See Gobat, *supra* note 55, at 216.

⁸⁰ BRUCE P. CAMERON, MY LIFE IN THE TIME OF THE CONTRAS 24 (2007).

⁸¹ *Id.*

⁸² See Gobat, *supra* note 55, at 246.

⁸³ *Id.* at 247.

⁸⁴ *Id.* at 264. Rumors spread throughout Nicaragua that the U.S. Minister (a political appointee) in Nicaragua, Arthur Bliss Lane, had conspired with Somoza García to have Sandino murdered. See CRAWLEY, *supra* note 62, at 43-46. The rumors were further fueled by a statement made by Somoza García in 1934, asserting: "I have come from the United States Embassy where I have had a conference with Ambassador Arturo Bliss, who has assured me that the government in Washington supports and recommends the elimination of Augusto Cesar Sandino for considering him a disturber of the peace of the country." Michaels, *supra* note 57, at 239 n.138 (citing BETTY & PREUSCH, *supra* note 57, at 269).

The FSLN began its fight against the Somoza dictators and “yankee imperialism” in 1961.⁸⁵ The Sandinistas finally defeated Somoza’s dictatorship (held by Somoza García’s son) on July 19, 1979, after a bloody civil war.⁸⁶ The chronology of events offered by the Sandinistas describes a period from September to December 1978 during which they engaged in mediations with U.S. representatives and other Central American leaders for the peaceful resignation of Somoza.⁸⁷ The result of these mediations was an offer to Somoza to allow a plebiscite to be supervised by international observers.⁸⁸ The plebiscite would have allowed the citizens of Nicaragua to decide whether a constitutional assembly should be instituted to elect a constitutional president of Nicaragua.⁸⁹ Somoza refused.⁹⁰ Thereafter, the United States stopped military aid to the regime, and the civil war culminated in a final, bloody insurrection.⁹¹ On July 18, 1979, the Sandinistas defeated the National Guard.⁹²

After the overthrow of Somoza, the Sandinistas initially ruled through a *Junta de Gobierno de la Reconstrucción Nacional* (Governing Junta of the National Reconstruction) of which Sandinista commander Daniel Ortega (Ortega) was a member.⁹³ Thereafter, the Sandinistas became the totalitarian, political, and ruling party in Nicaragua with a clear Marxist-Leninist agenda.⁹⁴ In 1984 Ortega was elected President in elections that failed to guarantee the political participation of opposition groups.⁹⁵ Edén Pastora, a former Sandinista commander, resigned from the Sandinista government and led an armed resistance against the Sandinistas because he argued that the Sandinistas betrayed the revolution by failing to guarantee political and ideological pluralism, a mixed economy, and foreign investment.⁹⁶ Instead, the Sandinistas had “turned the government into a terror regime, a police regime. And they allied themselves with the Soviet Union.”⁹⁷

C. *The Contras*

The Somoza-Sandinista civil war was followed by a counterrevolution led by the Contras. “Contras” was the shortened name that the Sandinistas

⁸⁵ See Michaels, *supra* note 57, at 240.

⁸⁶ See IOSU PERALES, *LOS BUENOS AÑOS, NICARAGUA EN LA MEMORIA* [THE GOOD YEARS: NICARAGUA IN THE MEMORY] 48 (2005); GOBAT, *supra* note 55, at 267.

⁸⁷ See SAAVEDRA, *supra* note 63, at 359-63.

⁸⁸ *Id.* at 361.

⁸⁹ *Id.*

⁹⁰ *Id.* at 361-63.

⁹¹ *Id.* at 363, 428-38.

⁹² *Id.* at 436. Accounts place the defeat of the National Guard on either July 18 or 19.

⁹³ See FOREIGN POLICY, *supra* note 57, at 48; D.L. RABY, *DEMOCRACY AND REVOLUTION: LATIN AMERICA AND SOCIALISM TODAY* 208 (2006).

⁹⁴ See SANABRIA & PABON, *supra* note 60, at 65-67.

⁹⁵ *Id.* at 94-95; ROBERT A. PASTOR, *NOT CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA* 204-06 (2002).

⁹⁶ See CAMERON, *supra* note 80, at 22-24.

⁹⁷ *Id.* at 24.

assigned to the "*contrarevolucionarios*" (counterrevolutionaries).⁹⁸ The Contras were formally known as the *Fuerza Democrática Nicaragüense* (Nicaraguan Democratic Force).⁹⁹ Some Contras were former members of Somoza's National Guard, some were former Sandinistas, some were peasants, and others were members of the indigenous-Miskita organization Misura led by Esteban Fagoht.¹⁰⁰ As a group, the Contras were portrayed either as "noble freedom fighters" or "terrorist thugs" depending on the ideological or political position being advanced.¹⁰¹

The Contras received the covert and overt¹⁰² support of the United States.¹⁰³ The assistance was granted under the guise of the "Reagan Doctrine," which espoused support for "any group of 'freedom fighters' battling totalitarian communist regimes."¹⁰⁴ During the height of the implementation of the "Reagan Doctrine," U.S. Secretary of State George Shultz proclaimed that democracies like the United States should not "be inhibited from defending *their own interests* and the cause of democracy itself" by aiding and abetting insurgencies that fight the spread of socialism.¹⁰⁵ U.S. funding of the Contras continued despite a decision by the International Court of Justice (ICJ) ordering the United States to cease and desist its support of the Con-

⁹⁸ *Id.* at 20.

⁹⁹ See SANABRIA & PABON, *supra* note 60, at 125.

¹⁰⁰ *Id.* at 125-28.

¹⁰¹ TED GALEN CARPENTER, CATO INSTITUTE, U.S. AID TO ANTI-COMMUNIST REBELS: THE "REAGAN DOCTRINE" AND ITS PITFALLS 74 (1986), available at <http://www.cato.org/pubs/pas/pa074.html>.

¹⁰² See Editorial, *Prisoner Free, America Still Bound*, N.Y. TIMES, Dec. 18, 1986, at A30; Eric S. O'Malley, *Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations*, 43 VA. J. INT'L L. 319, 323 (2003) ("[U.S. President] Reagan employed a cocktail of non-forcible, covert, and overt destabilization strategies as an essential part of the so-called 'Reagan Doctrine.'"). In Nicaragua, these strategies included providing training and ammunition to the Contras, imposing a trade embargo, and authorizing the United States Armed Forces and the CIA to mine Nicaragua's three main ports in 1984. See Michaels, *supra* note 57, at 223, 240-42; Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 603-04 (1987).

¹⁰³ See Charles L. Capito III, Note, *Inadequate Checks and Balances: Critiquing the Imbalance of Power in Arms Export Regulation*, 64 WASH. & LEE L. REV. 297, 299 (2007) (citing Rep. of the Cong. Comms. Investig. the Iran-Contra Affair, H.R. REP. NO. 100-433, at 5-8 (1987)).

¹⁰⁴ Lance Gay, *Chronology Gives Hazy Furor Picture*, HOUSTON CHRON., Dec. 21, 1986, at § 1.

¹⁰⁵ CARPENTER, *supra* note 101 (emphasis added).

tras.¹⁰⁶ By the time the Contra War ended, some time between 1989 and 1990, 50,000 Nicaraguans had died and the country was in ruins.¹⁰⁷

D. Nicaraguans in the United States

As a direct result of the violent civil war between the Sandinistas and Somoza and the war that followed between the Sandinistas and the Contras, Nicaraguans began a mass migration to neighboring countries in Central America and the United States.¹⁰⁸ The first group to arrive in the United States in 1979 consisted of Somoza's closest supporters.¹⁰⁹ This group was followed (in the early 1980s) by Nicaraguans fleeing communist persecution.¹¹⁰ But the larger wave of migration began after the acceleration of the U.S.-backed Contra War in 1983.¹¹¹ Sandinista supporters labeled the Nicaraguans who fled Nicaragua during the Sandinista era as *contrarevolucionarios* (counterrevolutionaries)¹¹² or *somocistas* (Somoza followers)¹¹³ because the exiles did not support the pro-communist regime and instead escaped to the United States,¹¹⁴ the very country that was supporting the Contras in their effort to oust the Sandinistas.¹¹⁵

It is difficult to quantify the migration of Nicaraguans to the United States prior to the triumph of the Sandinista revolution in 1979.¹¹⁶ However, "the annual number of Central Americans entering the United States was

¹⁰⁶ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see also* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 932 (D.C. Cir. 1988) (describing the ICJ case in detail). The United States, with the approval of Congress, continued the specific funding of the Contras that the ICJ decision had deemed illegal. "In addition, the U.S. used its veto power in the United Nations (U.N.) Security Council to block consideration of a resolution enforcing the ICJ decision." *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 932.

¹⁰⁷ David Adams, *Lost in America: Families Fear Deportations*, ST. PETERSBURG TIMES, Mar. 23, 1997, at 1A.

¹⁰⁸ *See generally* Jennifer H. Lundquist & Douglas S. Massey, *Politics or Economics? International Migration During the Nicaraguan Contra War*, 37 J. LAT. AMER. STUD. 29, 29-53 (2005) (examining reasons for Nicaraguan migration after the triumph of the Sandinista Revolution in 1979 and during the Contra War).

¹⁰⁹ Prior to his departure, Somoza arranged for several flights from Managua to Miami to transport the members of the "Cabinet, General Staff, department commanders, the Congress, and the Board of Directors for the Liberal Party. . . ." SOMOZA, *supra* note 68, at 267-68.

¹¹⁰ *See* Lundquist & Massey, *supra* note 108, at 52.

¹¹¹ *Id.*

¹¹² Being labeled a counterrevolutionary meant, at the least, being jailed and losing your property. *See* Sandra Dibble, *Nicaraguans Look to Canada for Refuge*, MIAMI HERALD, Oct. 13, 1985, at 4B. Even former Somoza opposition leaders were murdered by the FSLN after the revolution when they accused them of being counterrevolutionaries. *See* SANABRIA & PABON, *supra* note 60, at 126.

¹¹³ *See* Sam Dillon, *Nicaraguans in Miami: Living in Limbo, Sandinista Reporter Draws a Grim Picture*, MIAMI HERALD, Dec. 23, 1985, at 1A.

¹¹⁴ The FSLN's anthem states that Sandino's children (the Sandinistas) "fight against the Yanqui, enemy of humanity." *See* Ivan Briscoe, *The Comandante Who Promises Divine Light*, NEW STATESMAN, Dec. 4, 2006, at 34, available at <http://www.newstatesman.com/200612040035>.

¹¹⁵ *See* CAMERON, *supra* note 80, at 16-17.

¹¹⁶ *See* Lundquist & Massey, *supra* note 108, at 31.

rather small through the late 1970s, never exceeding 10,000 persons in any given year.”¹¹⁷ Until March 1980, asylum seekers could obtain asylum, at the discretion of the Attorney General, if they proved that they were escaping a communist regime.¹¹⁸ But the majority of Nicaraguan exiles entered the United States in the 1980s after a change in the asylum law.¹¹⁹ Congress, during the presidency of Jimmy Carter, had enacted the Refugee Act of 1980,¹²⁰ which embodied a new legislative and regulatory framework to review asylum claims: all¹²¹ asylum seekers were now required to prove that they were unwilling or unable to return to their country of origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹²² Congress’ primary purpose in enacting the 1980 Act “was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.”¹²³

The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States. The primary substantive change Congress intended to make under the Refugee Act . . . was to eliminate the piecemeal approach to admission of refugees previously existing under [prior statutory provisions and regulations], and to establish a systematic scheme for admission and resettlement of refugees.¹²⁴

¹¹⁷ *Id.* Before 1976, there was minimal emigration from Central America. *Id.* at 32.

¹¹⁸ See Carolyn Waller & Linda M. Hoffman, *United States Immigration Law as a Foreign Policy Tool: The Beijing Crisis and the United States Response*, 3 GEO. IMMIGR. L.J. 313, 324-26 (1989); *U.S. Denies Political Asylum to About 90% of Nicaraguans*, ORLANDO SENTINEL, Sept. 3, 1985, at C7; see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433-34 (1987) (describing more lenient asylum standard applied to “refugees fleeing from Communist-dominated areas”).

¹¹⁹ The Sandinistas gained power in Nicaragua in July 1979, but they did not immediately declare their pro-communist agenda. See SANABRIA & PABON, *supra* note 60, at 65-67.

¹²⁰ Pub. L. No. 96-212, 94 Stat. 102 (1980).

¹²¹ The long-standing treatment of Cubans is an exception to the 1980 Refugee Act. “Cubans who reach the United States: whether they can prove a well-founded fear of persecution or not, . . . are allowed to enter and, ultimately, transform their temporary status into lawful permanent residence.” Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. MIAMI INTER-AM. L. REV. 527, 530, 553-54 (2004) (citations omitted).

¹²² *Cardoza-Fonseca*, 480 U.S. at 423 (differentiating standards for withholding of deportation and asylum, and discussing Refugee Act of 1980 in asylum case of Nicaraguan citizen who entered the United States in 1979) (internal quotation marks omitted).

¹²³ *Id.* at 436-37 (citing H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.); H.R. REP. NO. 96-608, at 9 (1979); S. REP. NO. 96-256, at 4 (1979)).

¹²⁴ *INS v. Stevic*, 467 U.S. 407, 425 (1984) (citing S. REP. NO. 96-256, at 1 (1979)). The Refugee Act of 1980 sought to “eliminate[] the geographical and ideological preferences that ha[d] dominated [the] system for the past three decades.” Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981).

Many Nicaraguans, after surviving the horrors of the civil war,¹²⁵ left Nicaragua with only one piece of luggage and lost all their possessions.¹²⁶ When they arrived in the United States, they were willing to take menial jobs rather than return to a communist Nicaragua.¹²⁷ Indeed, if they were deported to Nicaragua, many feared losing their lives at the hands of the Sandinistas and their mobs.¹²⁸ Some of the earlier arrivals were granted parole status and permission to work pending the adjudication of their asylum claims.¹²⁹ But their temporary status did not entitle parolees to receive social benefits such as refugee assistance, resettlement aid, food stamps, or welfare.¹³⁰ Even the Nicaraguans who arrived before the 1980 Cuban Mariel boatlift and Haitian exodus were not included in the entrant program providing "financial and social benefits similar to those of Vietnamese and other

¹²⁵ Nicaraguans in the United States who left Nicaragua as children in 1980, still recall, as adults, the stress of living through a civil war and the panic of having to get on a plane to the United States without their parents and siblings. Other refugees remember, as an unforgettable part of their childhood memories, the gunfire and Sandinista takeover of their hometowns. See Andreas Tzortzis, *Political Exiles from Nicaragua Prefer to Remember Their Homeland As It Was Before the Sandinista Revolution*, S. FLA. SUN-SENTINEL, Sept. 5, 1999, at 1.

¹²⁶ See *id.*; Dibble, *supra* note 112, at 4B (quoting the Canadian Consul's discussion of Canada's grant of asylum to middle-class Nicaraguans who fled the Sandinistas and had their property confiscated).

The loss of social status and economic security after leaving the country of origin can become a considerable stressor. As time passes, the difficulty in accepting the unlikely return to one's country becomes clearer and one then has to redefine the purpose of one's life and aspirations. Next, comes the feeling of despair, with the realization that a change must come from the stage of refugee to exile so the integration into the new society can begin. Before the integration and acculturation into the new society, the refugee many times has to experience multiple personal failures that make him feel subject to misfortunes and distress.

Rafael E. Sacasa, *The Sandinista Revolution as a Stressor and Refugee Migration as a Coping Strategy: A Social Psychological Process Model* 75 (June 25, 1992) (unpublished Ph.D. dissertation, Universität Hamburg) (on file with Olin Library, Cornell University).

¹²⁷ See Ana Veciana-Suarez & Sandra Dibble, *Miami's Nicaraguans*, MIAMI HERALD, Sept. 13, 1987, at 1G (reporting that doctors were working as dishwashers and retired generals as security guards). The newspaper story also told of a former well-to-do lawyer who committed suicide because he could not get over losing everything after the Sandinista takeover. *Id.* For older adults, exile and its realities, including difficult economic hardship in the United States, caused an early death. See Tzortzis, *supra* note 125, at 1.

¹²⁸ See *Gomez-Vigil v. INS*, 990 F.2d 1111, 1112-13 (9th Cir. 1993) (petitioners, former Sandinistas who deserted the Sandinista government in 1983, argued that, despite change in government, they feared persecution because the Sandinistas could still subject them to persecution in Nicaragua); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994) (recognizing that it was possible for Sandinistas, even after a new government had been elected, to still retain sufficient "control" to persecute the petitioners).

¹²⁹ See Barbara Gutierrez, *Nicaraguans Picket INS Office in Demand for Political Asylum*, MIAMI HERALD, Feb. 24, 1984, at 1D. Some Nicaraguans were granted "extended voluntary departure" status. T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 255 (1983). The benefit of this status was a declaration by the INS that Nicaraguans would not be deported while conditions in Nicaragua remained uncertain. After the passage of the Refugee Act of 1980 and the withdrawal of extended voluntary departure, the INS encouraged Nicaraguans to apply for political asylum. *Id.*

¹³⁰ See Fabiola Santiago & Barbara Gutierrez, *Nicaraguans in U.S. Battling Hard Times and Uncertain Future*, PHILADELPHIA INQUIRER, Aug. 15, 1984, at A22.

refugees" that the Carter administration implemented for Cubans and Haitians in 1980.¹³¹ College-bound Nicaraguans without permanent immigrant status did not qualify for student financial aid programs (loans, scholarships, or grants) upon graduation from high schools in the United States.¹³² Nicaraguans lived "in constant fear of deportation."¹³³

After the passage of the Refugee Act of 1980, "the Attorney General and his delegates retain[ed] the authority to grant or deny asylum in the exercise of administrative discretion."¹³⁴ The United States, now under President Ronald Reagan, engaged in a two-sided, contradictory approach to the Nicaraguan situation.¹³⁵ On the one hand, President Reagan adamantly labeled the Sandinistas communists and terrorists,¹³⁶ but, on the other hand, his Administration refused to grant political asylum to the majority of Nicaraguan asylum seekers.¹³⁷ Most of the asylum claims filed by Nicaraguans remained pending for years.¹³⁸ Others were summarily denied without formal review.¹³⁹ As one former Nicaraguan judge explained, few Nicaraguans could meet the evidentiary standard required by the Administration.^{140,141} In

¹³¹ Editorial, *A Legal Limbo*, MIAMI HERALD, Dec. 20, 1983, at 28A; see also Editorial, *The Ignored Ones*, MIAMI HERALD, Feb. 27, 1984, at 16A ("For too long, Nicaraguans have been South Florida's ignored refugees. When the Carter Administration created the status of Cuban-Haitian entrant in 1980, it ignored the thousands of Nicaraguans who had come earlier and had no status. Nicaraguans have no legal right to any social benefits in this country."). The status and benefits were granted by executive orders beginning with President Carter and followed by President Reagan. Exec. Order No. 12,246, 45 Fed. Reg. 68,367 (Oct. 10, 1980); Exec. Order No. 12,251, 45 Fed. Reg. 76,085 (Nov. 15, 1980); Exec. Order No. 12,341, 47 Fed. Reg. 3,341 (Jan. 21, 1982).

¹³² See Santiago & Gutierrez, *supra* note 130, at A22. "In 1981, they were even kicked out of free English classes for refugees." *Id.*

¹³³ *Id.*

¹³⁴ Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 4 (1987) (citing INA § 208(a), 8 U.S.C. § 1158(a) (1982)).

¹³⁵ See Associated Press, *Nicaraguans Fail to Win Asylum Despite U.S. Support for Rebels*, S. FLA. SUN-SENTINEL, Sept. 3, 1985, at 6B. By 1985, there were 45,000 Nicaraguan exiles in Miami. *Id.*

¹³⁶ Editorial, *Stay . . . And Work*, MIAMI HERALD, Dec. 31, 1985, at 12A; Alfonso Chardy & Sam Dillon, *Arms Scandal Hasn't Doomed Aid to Contras*, MIAMI HERALD, Dec. 28, 1986, at 1A.

¹³⁷ See Editorial, *supra* note 136, at 12A (advocating that Congress "agree on a policy that deals consistently with the Sandinista government and with the thousands of Nicaraguan exiles who live in South Florida"); Adams, *supra* note 107, at 1A.

¹³⁸ See Adams, *supra* note 107, at 1A.

¹³⁹ See Fabiola Santiago, *Nicaraguan Suit Seeks Changes on Political Asylum*, MIAMI HERALD, Apr. 25, 1985, at 9D (describing a lawsuit filed by Nicaraguan exiles seeking meaningful review of their cases rather than an automatic issuance of a form letter denying their asylum claims); Associated Press, *Suit Challenges Nicaragua Deportations*, S. FLA. SUN-SENTINEL, Apr. 25, 1985, at 7B.

¹⁴⁰ See R.A. Zaldivar, *Exile Communities Each See Alien Bill Differently*, MIAMI HERALD, June 17, 1984, at 22A (interviewing a judge who was one of the lucky few that managed to provide "hard evidence that he would be persecuted in Nicaragua" because American newspapers had documented the threats against his life).

¹⁴¹ "One of the most prevalent misunderstandings in asylum cases, especially [prior to the adoption of the 1990 regulations], . . . [was] that an applicant [was] required to corroborate specific facts of her claim with external evidence." DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 92-93 (3d ed. 1999) (internal citations omitted). External evidence is

the mid-1980s, during the most intense period of the Contra War, nearly all asylum claims were deemed "frivolous."¹⁴² According to some Nicaraguan exiles, President Reagan was concerned that granting asylum would mean a flood of refugees and fewer fighters willing to join the Contras.¹⁴³ The Reagan administration denied these allegations.¹⁴⁴ The Administration's position toward Nicaraguan asylum seekers fluctuated depending on the shifting political priorities in Washington.¹⁴⁵ As a result of the Reagan administration's policies, Nicaraguan asylum applicants remained in "legal limbo" for years.¹⁴⁶

Eventually, Nicaraguans began to obtain lawful permanent status in the United States. Some were granted asylum after the Supreme Court ruled in 1987 in *INS v. Cardoza-Fonseca*¹⁴⁷ "that the well-founded fear of persecution standard under the 1980 Refugee Act is different from and more generous than that of 'clear probability', or balance of probability, which had been imposed by administrative authorities."¹⁴⁸ Luz Marina Cardoza-Fonseca, a thirty-eight year old Nicaraguan citizen, entered the United States in 1979 and, during deportation proceedings, requested withholding of deportation and asylum under the 1980 Refugee Act.¹⁴⁹ The Court held that the Board of Immigration Appeals (BIA) and the immigration judge had incorrectly ap-

often difficult to obtain because "[i]n most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." *Id.* at 93 n.36 (citation omitted).

¹⁴² Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 162 (1990). A 1987 General Accounting Office study found that:

Of the four countries involved in [a General Accounting Office] study—El Salvador, Nicaragua, Poland and Iran (these four made up 78% of cases processed by the INS in fiscal 1984)—those who stated they were arrested, imprisoned, had their lives threatened or were tortured had much lower approval rates if they were from El Salvador and Nicaragua. . . . And comparing the applications from Nicaragua and Poland—90% of which were based on political persecution—Polish aliens were approved at a 51% rate compared with Nicaraguans at a 7% rate (the study examined 1450 asylum applications and INS files). The worldwide approval rate was 24%.

Kerry Elizabeth Knobelsdorff, Note, *INS v. Canas-Segovia: Keeping Politics In and Refugees Out*, 8 CONN. J. INT'L L. 657, 683 n.165 (1993) (citations omitted).

¹⁴³ Adams, *supra* note 107, at 1A.

¹⁴⁴ *Id.*

¹⁴⁵ Olivas, *supra* note 142, at 162.

¹⁴⁶ Editorial, *supra* note 131, at 28A.

¹⁴⁷ 480 U.S. 421 (1987).

¹⁴⁸ Deborah Anker & Carolyn Patty Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 67, 68 (1989). After *Cardoza-Fonseca*, the rate of approval of asylum applications of Nicaraguans increased slightly from a 5% grant rate to a 16% grant rate (for years 1988 to 1994). Lundquist & Massey, *supra* note 108, at 32 (citing U.S. INS, TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION 42 (1995), available at <http://www.uscis.gov/files/article/2ndfullTriReport.pdf>).

¹⁴⁹ *Cardoza-Fonseca*, 480 U.S. at 424.

plied a stricter standard to Cardoza-Fonseca's asylum claim.¹⁵⁰ *Cardoza-Fonseca* was the Court's "first asylum decision under the Refugee Act."¹⁵¹

In addition, some Nicaraguans qualified for legalization under the Immigration Reform and Control Act of 1986 (IRCA).¹⁵² IRCA permitted 277,642 Central Americans to legalize their status (but only six percent of those Central Americans were Nicaraguans).¹⁵³ Eleven years later, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA).¹⁵⁴ NACARA allowed those Nicaraguans and Cubans who had been physically present in the United States for a continuous period beginning on or before December 1, 1995 to adjust their status "to that of an alien lawfully admitted for permanent residence."¹⁵⁵ NACARA also provided some relief from deportation to nationals from Guatemala, El Salvador, the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.¹⁵⁶ Some of the Nicaraguans who benefited from NACARA were former Contras—a "'by-product' of a war in which the United States was directly involved. . . ."¹⁵⁷ The passage of NACARA was hailed by some as "recognition of the anti-communist role [that] many [Nicaraguan exiles] played by opposing Nicaraguan leader Daniel Ortega's Sandinista regime in the 1980s."¹⁵⁸

E. *The Return of the Sandinistas*

With the decline of the Soviet Union and the Cold War, the Sandinistas were forced to enter into a peace agreement and agree to hold supervised elections.¹⁵⁹ The Sandinistas agreed to provide amnesty to the Contras and

¹⁵⁰ *Id.* at 448.

¹⁵¹ Anker, *supra* note 134, at 4.

¹⁵² Pub. L. No. 99-603, 100 Stat. 3359 (1986)). IRCA allowed migrants to initially obtain temporary resident status if they could prove that they had entered before January 1, 1982, and resided continuously in the United States since that date. *Id.* Lawful permanent resident status would follow, at the earliest, eighteen months after temporary status had been granted, provided that an application was filed within the one-year application period. Pamela D. Nichols, Note, *The United States Immigration Reform and Control Act of 1986: A Critical Perspective*, 8 NW. J. INT'L L. & BUS. 503, 508 (1987). Even after being granted lawful permanent status, IRCA specifically precluded eligibility "for all benefits usually available to permanent residents," including "certain public welfare benefits for five years after the grant of the new status." *Cardoza-Fonseca*, 480 U.S. at 426 n.3.

¹⁵³ MARÍA CRISTINA GARCÍA, SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA 91 (2006). Most Central Americans arrived in the United States after the January 1, 1982, cut-off date in IRCA. *Id.*

¹⁵⁴ Pub. L. No. 105-100, §§ 201-04, 111 Stat. 2160 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997).

¹⁵⁵ *Id.* § 202(a)(1), (b)(1).

¹⁵⁶ *Id.* § 203.

¹⁵⁷ Adams, *supra* note 107, at 1A.

¹⁵⁸ Carol Rosenberg, *House Votes to Give Nicaraguans Green Cards*, MIAMI HERALD, Nov. 13, 1997, at 1A.

¹⁵⁹ FOREIGN POLICY, *supra* note 57, at 51.

to hold elections and, in return, the Contras agreed to demobilize.¹⁶⁰ On February 25, 1990, Violeta Barrios de Chamorro, in a surprising victory, defeated Ortega and was elected president of Nicaragua.¹⁶¹ The next elections were held in 1996, and Arnoldo Alemán Lacayo defeated Ortega.¹⁶² In 2001, Ortega was defeated again, this time by Enrique Bolaños Geyer.¹⁶³ However, thanks to a divided opposition, on November 7, 2006, Ortega was once again declared president of Nicaragua after winning the national election with thirty-eight percent of the popular vote.¹⁶⁴

After his return to the presidency, Ortega aligned himself with Venezuela's Hugo Chavez and Bolivia's Evo Morales, two Latin American socialist presidents who continually attack American imperialism in their speeches.¹⁶⁵ Iran's president, Mahmud Ahmadinejad, arrived in Nicaragua on January 13, 2007, after visiting Venezuela, to sign several cooperation agreements between Iran and Nicaragua.¹⁶⁶ Ortega has established the *Consejos del Poder Ciudadano* (Citizen Power Counsels).¹⁶⁷ These grassroots community and neighborhood organizations resemble the *Comités de Defensa Sandinista* (Sandinista Defense Committees), which organized the mobs that would attack with impunity Nicaraguans who did not support the Sandinista regime.¹⁶⁸ Official U.S. Department of State advisories warn that violent crime in Nicaragua is on the increase and that, in 2007, "the [U.S.]

¹⁶⁰ PASTOR, *supra* note 95, at 223-57.

¹⁶¹ LA NICARAGUA POSIBLE [THE POSSIBLE NICARAGUA] 84 (Alejandro Serrano Caldera & Armando del Romero Guerrero eds., 2007).

¹⁶² *Id.* at 86; FOREIGN POLICY, *supra* note 57, at 57.

¹⁶³ Daniel Ortega Saavedra, *candidato presidencial del FSLN* [Daniel Ortega Saavedra, FSLN Presidential Candidate], LA PRENSA (Nicar.), Sept. 29, 2006, available at <http://www.laprensa.com.ni/archivo/2006/septiembre/29/elecciones/candidatos/143891.shtml>.

¹⁶⁴ Letta Tayler, *Ortega Declared Nicaragua's President*, NEWSDAY, Nov. 8, 2006, at A25.

¹⁶⁵ See John D. Negroponte, Dir. of Nat'l Intelligence, Annual Threat Assessment and U.S. National Security Challenges, Statement for the Record of the Senate Select Committee on Intelligence (Jan. 11, 2007), available at <http://www.state.gov/s/inr/rls/79065.htm>. Nicaragua has now joined Cuba, Venezuela, and Bolivia in the Alternativa Bolivariana para las Américas (the Bolivarian Alternative for the Americas), known by its Spanish acronym ALBA. ALBA is Chavez' plan to defeat the United States' economic policies in Latin America, including the Central American Free Trade Agreement (CAFTA). See EFE News Services, *Cuba y Venezuela acuerdan aumentar la capacidad de la refinería de Santiago* [Cuba and Venezuela Agree to Increase the Capacity of the Santiago Refinery], EFE ECONOMIA (U.S.), Dec. 22, 2007.

¹⁶⁶ Luis Sánchez Corea & Wilder Pérez, *Irán: otro socio de Ortega* [Irán: Another of Ortega's Partners], LA PRENSA (Nicar.), Jan. 14, 2007, available at <http://www.laprensa.com.ni/archivo/2007/enero/14/noticias/nacionales/167285.shtml>.

¹⁶⁷ Oguer Reyes Guido, *Consejos del Poder Ciudadano: una crisis innecesaria* [Citizen Power Counsels: An Unnecessary Crisis], EL NUEVO DIARIO (Nicar.), Dec. 25, 2007, available at <http://www.elnuevodiario.com.ni/opinion/4502>.

¹⁶⁸ See *id.* The *Comités de Defensa Sandinista* (CDSs) (Sandinista Defense Committees) or "divine mobs" were organizations used by the FSLN as sources of vigilance and coercion (the "eyes and ears of the revolution"). SANABRIA & PABON, *supra* note 60, at 63, 80. The CDSs were modeled after the Cuban Committees for the Defense of the Revolution. MILLETT ET AL., *supra* note 53, at 151. These committees existed in every department in Nicaragua, including "thousands of block committees in Managua alone." *Id.*

Embassy has noted a gradual increase in the use of armed violence against resident and visiting U.S. citizens."¹⁶⁹

F. *The Potential Nicaraguan Deportees*

The development of less forgiving removal laws aimed at non-citizens, including lawful permanent residents, who have committed crimes (even minor ones) and the virtual elimination of discretionary forms of relief for certain criminal convictions pose a dilemma. Does the United States uphold its removal laws (harsh as they are) and return Nicaraguans to their former persecutors—the Sandinistas and Ortega—or does it make an exception and allow them to remain here? Most of the Nicaraguans who fled during the first Sandinista government and now face removal from the United States on the ground of criminal conviction(s) are lawful permanent residents.¹⁷⁰ If these lawful permanent residents were convicted for “aggravated felonies,” they are not eligible for discretionary waiver of deportability,¹⁷¹ asylum,¹⁷² cancellation of removal,¹⁷³ or voluntary departure.¹⁷⁴

Some lawful permanent residents may be able to meet the evidentiary standard for withholding of removal:¹⁷⁵ “clear probability of persecution”—“more likely than not that the alien would be subject to persecution on one of the specified grounds.”¹⁷⁶ This is a higher standard than is required for asylum, for in the asylum context, “it is enough that persecution is a reason-

¹⁶⁹ U.S. Dep’t of State, Country Specific Information: Nicaragua (Sept. 20, 2007), http://travel.state.gov/travel/cis_pa_tw/cis/cis_985.html.

¹⁷⁰ See generally *supra* discussion in Part II.D (explaining how Nicaraguans eventually obtained lawful permanent resident status).

¹⁷¹ INA § 212(h)(2), 8 U.S.C. § 1182(h)(2) (2000). “No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony” *Id.*

¹⁷² INA § 208(b)(2)(A)(ii), (B)(i), 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). Asylum shall not be granted if “the alien, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of the United States.” *Id.* § (b)(2)(A)(ii). “For purposes of [this section], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.” *Id.* § (b)(2)(B)(i).

¹⁷³ INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3). “The Attorney General may cancel removal . . . if the alien . . . has not been convicted of any aggravated felony.” *Id.*

¹⁷⁴ INA § 240B(a)(1); 8 U.S.C. § 1229c(a)(1). “The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense . . . if the alien is not deportable under [the aggravated felony section].” *Id.*

¹⁷⁵ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The “withholding of removal” provision was enacted to meet the United States’ duty of non-refoulement under Article 33 of the 1951 U.N. Convention on the Status of Refugees. See Victor P. White, Comment, *U.S. Asylum Law Out of Sync with International Obligations: Real ID Act*, 8 SAN DIEGO INT’L L.J. 209, 214 (2006). The “withholding of removal” section provides that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” INA § 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A).

¹⁷⁶ *INS v. Stevic*, 467 U.S. 407, 429 (1984) (reviewing § 243(h), the predecessor to the current withholding of removal statute, § 241(b)(3)).

able possibility.”¹⁷⁷ But withholding of removal is not available for those who have been convicted of a “particularly serious crime” and are deemed a danger to the community of the United States.¹⁷⁸ “The effect of the mandatory deportation provisions for criminal foreign nationals and the Attorney General’s interpretation of ‘particularly serious crimes’ has drastically reduced the [protection for refugees] who would face a serious threat upon their life or liberty upon return to their home countries.”¹⁷⁹ Ultimately, lawful permanent residents who are removed for “aggravated felonies” are permanently barred from the United States.¹⁸⁰ For these individuals, the only avenue for relief may be the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁸¹ “To receive the protection of the CAT, an alien must prove that it is more likely than not that the alien would be tortured if removed.”¹⁸² CAT protection has been granted at a rate of approximately four percent.¹⁸³ Lawful permanent residents who meet the high evidentiary standard under CAT may still be detained indefinitely until removal can be accomplished without violating CAT (i.e., until conditions in the country of origin change).¹⁸⁴

This Note proposes that the United States has special obligations towards Nicaraguans who fled to escape the Sandinista regime.¹⁸⁵ They should not be subject to automatic banishment. Instead the law should provide a

¹⁷⁷ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citation omitted).

¹⁷⁸ INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). Withholding of removal is not available if:

[t]he alien having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

....

... [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

Id.

¹⁷⁹ Valerie Neal, Note, *Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons”*, 36 VAND. J. TRANSNAT’L L. 1619, 1640-41 (2003) (citing Terry Coonan, *Dolphins Caught in Congressional Fishnet—Immigration Law’s New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 606-07 (1998)). “[T]he United States runs a high risk of violating its duty of non-refoulement in the context of foreign nationals who have committed crimes the INA deems ‘aggravated felonies.’” *Id.* at 1641.

¹⁸⁰ INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). This section provides an exception from the permanent bar if the Attorney General consents to the alien reapplying for admission. *Id.* § (a)(9)(A)(iii).

¹⁸¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁸² *Almaghar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006) (citing 8 C.F.R. § 208.16(c)(2); *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001)).

¹⁸³ ALENIKOFF ET AL., *supra* note 18, at 996.

¹⁸⁴ See Andrew I. Schoenholtz & Thomas F. Muther, Jr., *Immigration and Nationality*, 33 INT’L LAW. 517, 530 (1999).

¹⁸⁵ See generally Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891 (2005).

"waiver." This "waiver" would be an equitable type of relief from removal—a humanitarian concession based on the moral obligation of the United States to these immigrants and the prior persecution that they faced at the hands of the Sandinistas.¹⁸⁶ This humanitarian argument against removal is even stronger for Nicaraguans who arrived in the United States as children. These lawful permanent residents have grown up in the United States and have become de facto Americans.¹⁸⁷ They only know the American "way of life." This is the very "way of life" that has been rejected by the Sandinistas and their supporters.¹⁸⁸

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 [his country of origin] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants [convicted of crimes] should in execution be attended by such a cruel and barbarous result would be a national reproach.¹⁸⁹

The history of the Nicaragua-U.S. migratory experience demonstrates the effects of U.S. foreign policy and the ramifications for immigration law.¹⁹⁰ Immigration laws should not be enacted or applied in a vacuum. Removals to countries like Nicaragua, where deportees will find the same regime that originally motivated their flight to the United States, are different from removals to countries where the possibility of persecution is not

¹⁸⁶ Cf. ALENIKOFF ET AL., *supra* note 18, at 1002-03 (setting forth a "safe haven" type of protection for those who present strong humanitarian claims, such as having escaped war or civil strife, especially "whenever some risk of persecution also underlies their resistance to return, even if the proof is insufficient to win protection under § 208, § 241(b)(3), the UN Convention and Protocol, or the Torture Convention.").

¹⁸⁷ Some of these individuals do not even speak Spanish and may suffer retaliation and abuse when they return to their countries of origin—countries that consider them Americans (with all that this allegiance entails). See Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1559 (2007).

¹⁸⁸ In Nicaragua, "anti-Americanism is not always directed against the United States. At times, it can also be an attack against fellow citizens who have embraced U.S. ways." GOBAT, *supra* note 55, at 7.

¹⁸⁹ United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630-31 (2d Cir. 1926).

¹⁹⁰ See Lupe S. Salinas, *Linguaphobia, Language Rights, and the Right of Privacy*, 3 STAN. J. C.R. & C.L. 53, 61 (2007) (explaining that U.S. foreign policy caused Latinos from Central America to migrate to the United States to escape abuse at the hands of groups that were supported by U.S. government agencies).

present.¹⁹¹ At a minimum, the role that the United States played in causing these immigrants to leave Nicaragua ought to weigh in their favor in any determination of the application of removal laws to their particular cases.¹⁹² At an optimum, there should be a mandatory rule against removing Nicaraguans who fled to escape the Sandinistas and have not been convicted of serious crimes such as kidnapping, rape, murder, or drug trafficking.¹⁹³ In sum, the United States must own responsibility for the migration trends that its foreign policy promotes. The following parts of this Note employ some of the issues, policies, and consequences discussed in this Part to support the arguments and recommendations advanced therein.

III. IN THE NAME OF NATIONAL SECURITY

Terrorism and national security have been used as reasons for the implementation of tougher criminal and anti-immigrant laws (especially after September 11, 2001).¹⁹⁴ However, removal is being used as a tool against lawful permanent residents who, in reality, do not pose serious national security risks.¹⁹⁵ Furthermore, by antagonizing our neighbors in Latin America and removing longtime lawful permanent residents who may not be able to assimilate into their countries of origin, the United States could be creating security threats to its citizens and facilities outside the United States.¹⁹⁶

By its actions and lack of understanding as to the implications of mass deportations, the United States is jeopardizing the assistance that pro-U.S.,

¹⁹¹ During the civil wars in Central America, any identification (perceived or real) of individuals with either the right or left subjected him or her to retaliation by the other side. See Palma Torrisi, *Salvadorans' Remittances as Unique Consequences: The Place for Salvadorans' Remittances in the Determination of the Extreme Hardship Requirement of the Nicaraguan Adjustment and Central American Relief Act*, 9 *TOURO INT'L L. REV.* 87, 89 (2001) (discussing the civil war in El Salvador).

¹⁹² Cf. Hing, *supra* note 185, at 952-56 (advocating against deportations of Cambodian refugees due to moral implications created by the role that the United States played "in creating the circumstances that led to Cambodians fleeing to the United States.").

¹⁹³ See Andrew David Kennedy, Note, *Expediting Justice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 *VAND. L. REV.* 1847, 1868 (2007) (advocating that felonies like kidnapping, rape, and murder are felonies that are "the most serious criminal offenses" warranting immigration punishment).

¹⁹⁴ See Chacón, *supra* note 7, at 1850-56. Let us not forget that the Supreme Court in the *Chinese Exclusion Case* "disguised its rationale, upholding the law on the grounds of national security." *Id.* at 1833 (citations omitted).

¹⁹⁵ *Id.* at 1861; see also TracImmigration, *Immigration Enforcement: The Rhetoric, The Reality*, <http://www.trac.syr.edu/immigration/reports/178/> (last visited Feb. 16, 2008) (analyzing data obtained through Freedom of Information Act requests to conclude that the statistics do not support the terrorism and national security rhetoric used in support of the current enforcement of immigration laws). "[I]n the last three years [2004 to 2007] a claim of terrorism was made against only 12 (0.0015%) out of 814,073 individuals against whom the DHS has filed charges in the immigration courts. A separate, but somewhat broader, grouping of immigration court cases concern what are called 'national security' charges. Here, an examination of the data in the FY 2004 to 2006 period revealed that such charges were made against only 114, or 0.014% of the 800,000-plus individuals." *Id.*

¹⁹⁶ See Chacón, *supra* note 7, at 1873-74.

Latin American populations and governments could provide in the prevention of real national security threats against the United States and its citizens. Anti-American sentiment is growing in Latin America due to the manner in which the United States is choosing to enforce its immigration policy. At the XVI Iberoamerican Summit, several Latin American presidents expressed their discontent with U.S. immigration policies.¹⁹⁷ Bolivia's Evo Morales specifically stated, "[n]ow the migration from South to North is criminalized"; but when the emigration was from North to South 'there were no walls, there were no deportations; now there are walls, there are deportations.'"¹⁹⁸ Guatemala's vice-president, Eduardo Stein, referred to the U.S. border wall initiative as "an insult to Latin America by a government that calls itself a partner, but appears to only want our money, and our goods, (and) that views our people as an epidemic."¹⁹⁹

In 2000, then-U.S. Senator Jesse Helms protested the U.S. State Department's grant of a visa to then-former Nicaraguan president Daniel Ortega because his name appeared on a U.S. State Department terrorist watch list.²⁰⁰ On March 14, 2007, U.S. Senator Kay Bailey Hutchison commented on the Senate floor about the meetings between Nicaragua's Ortega and Iran's Ahmadinejad, and asserted that the alliance between Iran, Venezuela, and Nicaragua could mean that the "next terrorist training camp could shift from the Middle East to America's doorstep."²⁰¹ Then-U.S. Senator Rick Santorum also raised the pro-socialist ties between Nicaragua's Sandinista revolution and Venezuela's Bolivarian revolution, and further stated: "A recent congressional report found that Hezbollah may right now have established bases in Venezuela which have [sic] issued thousands of visas to people from places such as Cuba and the Middle East, possibly giving them passports to a vague United States border security."²⁰² If possible terrorist threats in Latin America exist, Congress needs to carefully review the ramifications of mass deportations on our national security at a time when terrorist groups may be looking for ways to germinate the seed of anti-

¹⁹⁷ Elías García, EFE News Services, *Aunque hubo compromiso, migración sigue tocando fibra sensible* [Even Though There Was Agreement, Migration Continues to Touch Sensitive Fiber], EFE MUNDO (U.S.), Nov. 5, 2006.

¹⁹⁸ *Id.*

¹⁹⁹ Diego Cevallos, *Migraciones-EEUU: Vecinos Levantan una muralla de objeciones* [Migrations-USA: Neighbors Raise a Wall of Objections], INTER PRESS SERVICE, Jan. 10, 2006.

²⁰⁰ See Glenn Garvin, *Cancel U.S. Visas for Sandinistas, Senator Demands*, MIAMI HERALD, May 18, 2000, at 12A.

²⁰¹ 153 CONG. REC. S3087 (daily ed. March 14, 2007) (statement of Sen. Hutchison), 2007 WL 763536. This type of "terrorist" rhetoric about Iran and Nicaragua also existed during the Reagan administration. See Gay, *supra* note 104, at § 1 ("Reagan lists Iran as being first among a 'confederation of terrorist states.'"); Chardy & Dillon, *supra* note 136, at 1A (quoting President Reagan as stating, in reference to Nicaragua under Sandinistas, "'The establishment of a Soviet beachhead in the heart of the Americas, a base camp for terrorism and the subversion of democracy remains unacceptable.'").

²⁰² 152 CONG. REC. S11295, S11298 (daily ed. Dec. 6, 2006) (statement of Sen. Santorum), 2006 WL 3517669.

Americanism and further discredit the United States, by portraying it as a violator of human rights,²⁰³ in order to recruit supporters.²⁰⁴

IV. IN THE INTERESTS OF THE UNITED STATES AND ITS NEIGHBORS

An often noted problem with the current congressional process for enacting immigration laws is that it fails to contemplate the long-term effects of the laws on the United States and other countries.²⁰⁵ When deportees are removed, they lose material possessions and their way of life in the United States, but most important, many lose their entire families.²⁰⁶ Human Rights Watch estimates that 1.6 million spouses and children, many of them U.S. citizens or lawful permanent residents, remain in the United States after their spouses or parents are deported.²⁰⁷ In the case of mass migrations from countries like Nicaragua, all members of a deportee's family, including extended family, may reside in the United States as lawful permanent residents or U.S. citizens. These family members include children who will have to grow up without the guidance of a parent, spouses who will become single-parents, and parents who will not have the assistance of their sons and daughters in their old age. These families will face economic hardship after losing the support that the deportee had provided and having to now support the deportee in Nicaragua.²⁰⁸ Consequently, these deportations will contribute to socioeconomic problems in the United States.²⁰⁹

²⁰³ In a speech before the U.N. General Assembly, Iranian President Ahmadinejad argued that the United States violates human rights despite labeling itself as an advocate for human rights. See Warren Hoge & David Sanger, *Iran President Vows to Ignore U.N. Measures*, N.Y. TIMES, Sept. 26, 2007, at A1. Nicaraguan President Ortega also attacked the United States for its actions against Iran and called on "the countries of Asia, Africa and Latin America [to] join him in a march against the forces of 'global capitalist imperialism.'" *Id.* Will lawful permanent residents who do not receive due process and fair treatment in their removal cases have a reason to agree that the United States does not respect human rights?

²⁰⁴ There have already been allegations, supported by some American security experts, that the fundamentalist Islamic group Al Qaeda has established contacts with Central American "maras" (Central American gangs). José Carreño, *Al Qaeda habría financiado "cumbre de pandillas" en Honduras* [Al Qaeda May Have Financed a "Gang Summit" in Honduras], LA PRENSA (Nicar.), Aug. 29, 2004, available at <http://www.laprensa.com.ni/archivo/2004/agosto/29/nacionales/nacionales-20040829-12.html>.

²⁰⁵ See Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 406 (2007) (cautioning that Congress must stop enacting immigration laws without carefully analyzing the consequences of applying those laws and that Congress must first understand the entire immigration process).

²⁰⁶ See, e.g., Torrisi, *supra* note 191 (discussing the civil war in El Salvador and the hardships suffered by deportees and their families).

²⁰⁷ See HUMAN RIGHTS WATCH, *supra* note 39, at 6, 44.

²⁰⁸ Nicaragua is the second poorest nation in the Western Hemisphere, suffers from high unemployment, and "depends heavily on remittances from Nicaraguans living abroad. . . ." U.S. Dep't of State, Background Note: Nicaragua (Jan. 2008), www.state.gov/r/pa/ei/bgn/1850.htm.

²⁰⁹ Latinos are living in constant anguish over possible deportations. See PEW HISPANIC CTR., 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL 1 (2007), available at <http://pewhispanic.org/files/reports/84.pdf> (finding

The United States is currently deporting, for minor crimes, lawful permanent residents who have established themselves and their families in American communities for many years. These immigrants return to their countries frustrated and demoralized.²¹⁰ Some of them leave their hard-earned possessions in the United States.²¹¹ Upon their return to their countries of origin, out of desperation, some of the deportees turn to criminal gangs and international criminal enterprises.²¹² Deportees are often rejected by communities who fear "Americanized young men."²¹³ They are subjected to vigilante violence.²¹⁴ The deportations also serve to export the American gang problem²¹⁵ and ultimately harm the countries receiving the deportees and the United States.²¹⁶ One must ask: should the United States be damaging its close and ill-prepared²¹⁷ neighbor states by sending to them crime problems that were created here?²¹⁸ The answer is probably not.²¹⁹ Accordingly, the United States must carefully weigh the positive and nega-

that "over half of all Hispanic adults in the U.S. worry that they, a family member or a close friend could be deported"). In addition, there are many stories detailing the life-altering experiences suffered by U.S. citizen children who are left behind after a parent is deported. See Kanstroom, *supra* note 7, at 216 (recounting the story of a four-year-old boy who was beaten to death when he was placed in foster care after his father was deported); Donald Kerwin, *Immigrant Families Under Siege*, MIGRATION WORLD MAG., Dec. 31, 2000, at 36 (detailing (1) the suicide committed by a U.S. citizen teenager after his father, a lawful permanent resident, was deported to Colombia after the father was convicted for selling a ten dollar bag of marijuana ten years prior for which he had received a ninety-day sentence; (2) a mother, a lawful permanent resident who had lived in the United States for thirty-seven years, since the age of three, ordered deported after conviction for selling twenty-one pills seventeen years earlier to an undercover officer—she had a seven-year-old U.S. citizen daughter; (3) a father of four U.S. citizen children, a legal permanent resident who had lived in the United States for twenty-nine years, facing deportation for conviction of possession of less than a kilogram of marijuana).

²¹⁰ José Eduardo Mora, *Migraciones-América central: la tragedia del sueño norteamericano* [*Migrations-Central America: The Tragedy of the American Dream*], INTER PRESS SERVICE, Sept. 27, 2004.

²¹¹ See *id.*

²¹² See Norberto Santana, Jr., *Criminal Deportations Fuel Border Crime Wave*, ORANGE COUNTY REG., Dec. 18, 2007.

²¹³ Kanstroom, *supra* note 7, at 219.

²¹⁴ *Id.*

²¹⁵ The "maras" originated in Los Angeles in the refugee communities of Salvadorans who fled the civil war in El Salvador between 1979 and 1992. These gangs were organized to protect Salvadorans in neighborhoods with established Mexican-American (Chicano) and African-American gangs. See Guthrie Gray, *Seguridad-EEUU: Maras, víctimas del sensacionalismo* [*Security-USA: Maras, Victims of Sensationalism*], INTER PRESS SERVICE, Feb. 12, 2007.

²¹⁶ See Kanstroom, *supra* note 7, at 215-21. The increase in gang violence as a result of deportations from the United States has created a secondary phenomenon, "a new stream of illegal entrants into the United States: asylum-seekers who fear persecution by the U.S. deportees." *Id.* at 219 (citing N.C. Aizenman, *More Immigrants Seeking Asylum Cite Gang Violence*, WASH. POST, Nov. 15, 2006, at A8).

²¹⁷ See *id.* at 218-19 (quoting a U.S. prosecutor who acknowledged that deportations are overwhelming local authorities in the receiving countries).

²¹⁸ See Gray, *supra* note 215.

²¹⁹ See Kanstroom, *supra* note 7, at 204 (deportations as a result of crimes committed in this country raise a "question of societal responsibility").

tive consequences of removal of longtime lawful permanent residents because the adverse effects of mass deportations, in the long run, may outweigh any perceived benefit.

V. IN FURTHERANCE OF JUSTICE: PROPOSED CHANGES

A complete overhaul of the current immigration system appears elusive, especially during an election year. Nevertheless, the dialogue must continue. Basic changes should be included in any proposed immigration reform to provide for the enforcement of U.S. immigration policies in a fair manner while considering the obligations of the United States to the deportees and the countries that will have to receive them. In structuring the removal process for lawful permanent residents, lawmakers and their constituents should recognize that these residents have become members of our communities, gained a lawful status, served in the U.S. armed forces, and contributed as taxpayers; accordingly, these residents deserve to receive a level of due process that is appropriate to their status.²²⁰

A. *Judicial Discretion and Consideration of Human Rights Factors*

Deportation inflicts harm on the deportees and their families, including those family members who are U.S. citizens and lawful permanent residents. Prior to 1996, a lawful permanent resident who had resided in the United States for seven years could receive a waiver under section 212(c) of the Immigration and Nationality Act if he or she “persuade[d] an immigration judge to exercise favorable discretion.”²²¹ If the waiver was granted, the person was allowed “to remain in the United States as a lawful permanent resident.”²²² Section 212(c)’s discretionary relief—allowing immigration judges to weigh positive and negative factors in making their decisions²²³—was available to longtime lawful permanent residents, even those convicted of “aggravated felonies.”²²⁴

With the passage of the 1996 laws, Congress eliminated the availability of 212(c)-type relief for lawful permanent residents who have been convicted of “aggravated felonies.”²²⁵ In essence, Congress transformed the removal decision from a human paradigm into an inflexible, mechanical

²²⁰ Lawful permanent residents are immigrants who have been lawfully admitted, have contributed as participants in this society, and are on the road to full citizenship. *In re Griffiths*, 413 U.S. 717, 722 (1973).

²²¹ Hing, *supra* note 185, at 904.

²²² *Id.*

²²³ *Id.* at 903-05. “Thus, section 212(c) cases permitted immigration judges to examine the respondent’s crime, prison experience, current living situation, demeanor, attitude, job skills, employment status, family support, friends, social network, and efforts at rehabilitation in deciding whether to exercise favorable discretion. Judges were even able to postpone the case to monitor the respondent’s behavior before rendering a decision.” *Id.* at 908.

²²⁴ See generally *id.* at 903-05.

²²⁵ *Id.* at 908.

structure.²²⁶ This framework deprives lawful permanent residents of the human consideration that such a life-altering decision—removal from the United States—merits.²²⁷ Legislation must return human judgment to the removal decision by granting immigration judges discretion to consider a totality of humanitarian factors in deciding on removal.²²⁸ Immigration judges must be allowed to exercise their independent wisdom in deciding, evaluating, and weighing factors in each lawful permanent resident's case, such as:²²⁹

- ties to U.S. citizen and lawful permanent resident family members;
- age on date of entry to the United States;
- family relationships in the receiving country (including existence or lack of actual relationship with those family members);
- economic and emotional well-being of U.S. citizen and lawfully admitted family members (including the best interest of minors);
- length of continuous residence in the United States;
- length of continuous residence in the country of origin;
- ability to earn a lawful living in the country of origin (considering age, education, language proficiency, and emotional, psychological, and health factors);
- medical condition and ability to obtain medical care in receiving country;
- U.S. military service;

²²⁶ If the conviction falls into one of the broad crime categories, the judge has no discretion to hear the circumstances of the underlying crime or any other humanitarian or mitigating factors. Banishment must be ordered. This type of regime echoes sentencing under the Sentencing Reform Act of 1984 (Sentencing Reform Act) and the mandatory Federal Sentencing Guidelines. The Guidelines terminated the discretion of judges to dictate sentences after considering the seriousness of the crimes and any aggravating or mitigating facts. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 702 (2005). Twenty-three years after the enactment of the Sentencing Reform Act, the Supreme Court of the United States finally rendered the Guidelines advisory rather than mandatory and ordered appellate review of all sentences for "reasonableness." See *United States v. Booker*, 543 U.S. 220 (2005). In the area of immigration law, the Supreme Court has been greatly deferential to "the 'plenary power' of Congress over the regulation of immigration." Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 618, 620 (2006) ("The bottom line of the plenary power doctrine may be that Congress could expel all or any class of resident aliens whenever it wants without judicial opposition.").

²²⁷ Cf. Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1252 (1997) (arguing for a return to judicial discretion in federal sentencing because "[t]he judge's power to weigh all of the circumstances of the particular case and all of the purposes of criminal punishment represented an important acknowledgement of the moral personhood of the defendant and of the moral dimension of crime and punishment.").

²²⁸ One House bill that calls for the restoration of the pre-IIRIRA aggravated felony definition also calls for the restoration of section 212(c). Keeping Families Together Act of 2007, H.R. 4022, 110th Cong. (2007) (bill introduced by U.S. Representative Bob Filner, D-CA); see also Hing, *supra* note 38, at 1902 (advocating for "reinstatement of section 212(c)-type relief").

²²⁹ For a comparison of factors advocated by Human Rights Watch, see HUMAN RIGHTS WATCH, *supra* note 39, at 8. Some of these factors were previously considered in the balancing analysis under section 212(c), which was eliminated with the passage of the 1996 immigration laws. *Id.* at 25-26.

- rehabilitation;
- punitive proportion of deportation in comparison to the crime(s) that forms the ground(s) for removal;
- degree of U.S. involvement (foreign policy effects), if any, in causing the migration;
- reason(s) for migration in comparison to present conditions in the country of origin (persecution, national disasters, wars, etc.).

B. Transparency and Accountability

Despite the grave consequences of removal, there is no reporting of the number of lawful permanent residents who are deported for crimes.²³⁰ The data on total removals is provided in an aggregate fashion so that it is impossible to determine how many deportees are lawful permanent residents and how many are undocumented immigrants.²³¹ Moreover, it is not possible to ascertain how many U.S. citizens and lawful permanent residents are directly affected by the deportations (as family members of the deportees, including children).²³²

To begin, the information regarding removal of lawful permanent residents must be reported separate from data related to removal of undocumented migrants.²³³ At a minimum, the following information about

²³⁰ See *id.* at 6.

²³¹ The immigration data released in the annual *Statistical Year Book of the Executive Office for Immigration Review* does not include this very relevant information. See Benson, *supra* note 205, at 440 (explaining that the aggregate data in these yearbooks “is not correlated” and does not permit the examiner to “draw clear conclusions”); see also HUMAN RIGHTS WATCH, *supra* note 39, at 6 (stating that there is no hard data to ascertain how many lawful permanent residents are deported).

²³² See HUMAN RIGHTS WATCH, *supra* note 39, at 6.

²³³ The U.S. Department of Homeland Security (DHS) has access to the information required to report how many lawful permanent residents are removed on a yearly basis. DHS's Office of Immigration Statistics already prepares reports specifically estimating the number of lawful permanent residents in the United States during a specific time period. The reports about population estimates of lawful permanent residents currently account for “emigration” but do not specify the number of lawful permanent residents who have been removed from the United States on a yearly basis or cumulatively. See NANCY RYTINA, U.S. DEPT OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_PE_2006.pdf; NANCY F. RYTINA, U.S. DEPT OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2004 (2006), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/LPRest2004.pdf>; NANCY F. RYTINA, U.S. DEPT OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2003 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/EstimateLPR2003.pdf>; NANCY F. RYTINA, U.S. DEPT. OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2002 (2004), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/lprest2002.pdf>; NANCY RYTINA, U.S. IMMIGRATION & NATURALIZATION SERV., IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>.

removals of lawful permanent residents should be compiled and made publicly available (without individual, personal identification):²³⁴

- date of admission or adjustment of status to that of lawful permanent resident;
- date of entry;
- age at time of entry;
- age at time of initiation of removal process;
- gender;
- state of residence immediately prior to detention or service of Notice to Appear;
- state where removal process was initiated;
- state(s) of detention;
- length of detention;
- state where final removal order was entered;
- number of adult family members who are U.S. citizens or lawful permanent residents (in categories: husband, wife, son, daughter, mother, father, extended family members);
- number of children who are U.S. citizens or lawful permanent residents;
- grounds for removal, specifically stating the crime(s) and sentence(s), including how much jail time was served and differentiating federal from state conviction(s);
- legal representation: attorney versus pro se;
- appeal, if any;
- voluntary departure, if any;
- date of removal;
- date of termination of removal proceeding, if not removed, and reason for termination, including prosecutorial discretion;
- country of nationality;
- country receiving the deportee.

Presumably, most of this information is already reviewed and considered in making the decision to initiate removal proceedings. The recording and reporting of this information is not onerous when viewed as part of the entire removal process from pre-charging stage to final execution of a removal order.²³⁵ It is certainly not unduly burdensome when viewed in terms of the consequences that the lawful permanent residents and their families suffer during and after detention and removal. The reporting of this information would also aid Congress to understand the impact of the immigration laws.

²³⁴ For a comparison of other proposed data compilations, see Benson, *supra* note 205, at 442; HUMAN RIGHTS WATCH, *supra* note 39, at 9.

²³⁵ DHS has the technology and ability to issue periodic press releases announcing deportations of lawful permanent residents similar to the manner in which news about deportations of "illegal aliens" are now reported. See DHS, Enforcement News, <http://www.dhs.gov/ximgmt/enforcement/> (last visited Jan. 23, 2008).

C. *Actual Term of Imprisonment for "Single Crime of Moral Turpitude"*

Currently, a lawful permanent resident is deportable if he or she is convicted of a single crime of moral turpitude (within five years after admission for some or ten years for others) and the conviction is for a crime "for which a sentence of one year or longer *may be* imposed."²³⁶ This means that, if the underlying criminal statute allows for a sentence of one year or more, the lawful permanent resident can be deported even if no jail time is actually ordered.²³⁷ It is counter-productive and arbitrary to ignore the decision rendered by the federal or state judge presiding over the criminal proceeding and deciding that the circumstances of the individual and the crime did not warrant the imposition of a one-year sentence or longer even though one could have been imposed. The requirement, *for the purpose of detention* for a single crime of moral turpitude, is that the alien must have been "sentence[d] to a term of imprisonment of at least 1 year."²³⁸ Therefore, the single moral turpitude crime deportability ground should be consistent with the language in the detention provision and must be amended to include only crimes for which a sentence of imprisonment for one year or longer is *actually* imposed.

D. *Narrower Definition of "Aggravated Felony"*

The "aggravated felony" definition is overly broad because it includes minor crimes. Lawful permanent residents who are convicted of "aggravated felonies" do not qualify for cancellation of removal²³⁹ and are barred from entering the United States.²⁴⁰ The definition must be narrowed to include only serious, violent crimes. One method of reform could be to pass a bill similar to the one that was introduced in the House of Representatives on October 31, 2007, calling for restoration of the definition of aggravated felony as it existed prior to the enactment of IIRIRA.²⁴¹ Another alternative would be to allow a conviction for an "aggravated felony" (as currently defined) to be considered as only one of the factors in deciding on removal.²⁴² Some Members of Congress now regret the drastic changes that were enacted in 1996 and that have been used to deport longtime lawful permanent residents for crimes as petty as shoplifting.²⁴³ It is time for Con-

²³⁶ INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2000) (emphasis added).

²³⁷ Jacqueline P. Ulin, Note, *A Common Sense Reconstruction of the INA's Crime-Related Removal System: Eliminating the Caveats from the Statute of Liberty's Welcoming Words*, 78 WASH. U. L.Q. 1549, 1557 n.50 (2000) ("Prior to the enactment of AEDPA, an alien had to have an actual sentence of at least one year to qualify for removal." (citing INA § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1251 (a)(2)(A)(i)(II) (1994))).

²³⁸ INA § 236(c)(1)(C), 8 U.S.C. § 1226(c)(1)(C) (2000).

²³⁹ INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).

²⁴⁰ INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii).

²⁴¹ Keeping Families Together Act of 2007, H.R. 4022, 110th Cong. (2007).

²⁴² See Benson, *supra* note 205, at 433.

²⁴³ See HUMAN RIGHTS WATCH, *supra* note 39, at 34.

gress to move beyond regret and pass legislation to halt the deportation of lawful permanent residents for minor crimes that should not be categorized as "aggravated felonies."

E. Respect for Human Dignity During Detention

Lawful permanent residents who are taken into custody under the "mandatory detention statute," section 236(c),²⁴⁴ as deportable for having been convicted of certain crimes, are detained without a bail hearing (i.e., without a determination of flight risk or danger to the community).²⁴⁵ The government detains lawful permanent residents under the mere presumption that it "may be able to prove [they are] subject to removal."²⁴⁶

In *Demore v. Kim* the United States Supreme Court interpreted the United States Constitution to allow detention of non-citizens [including lawful permanent residents] while they are in removal proceedings, even if those individuals are not a flight risk and pose no danger to society. The Court upheld mandatory detention of permanent resident aliens without the possibility of bail for "the brief period necessary for their removal proceedings" as consistent with the Fifth Amendment Due Process Clause. The statute [INA § 236(c)] impose[s] mandatory detention on non-citizens convicted of certain criminal offenses; thus, *Demore* stands for the proposition that Congress may mandate that aliens convicted of criminal offenses be imprisoned while the Government decides whether to deport them.²⁴⁷

After the ruling in *Demore*,²⁴⁸ lawful permanent residents continue to be detained during removal proceedings for extensive periods of time without the benefit of a mandatory bond hearing prior to detention or even during detention.²⁴⁹ In the concurring opinion in *Ly v. Hansen*,²⁵⁰ U.S. District Judge Haynes advocated:

²⁴⁴ INA § 236(c), 8 U.S.C. § 1226(c) (2000). The crimes that require mandatory detention are (1) a crime of moral turpitude (within the applicable time period) if sentenced to a term of imprisonment of at least one year; (2) two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct; (3) an "aggravated felony"; (4) a violation of a controlled substances law or regulation; (5) certain firearm offenses; and (6) miscellaneous crimes. *Id.* § 236(c)(1), 8 U.S.C. § 1226(c)(1).

²⁴⁵ "Aliens who fall under section 236(c) are completely deprived of all liberty without any hearing." *Fuller v. Gonzales*, No. Civ.A.3:04CV2039SRU, 2005 WL 818614, at *5 (D. Conn. Apr. 8, 2005).

²⁴⁶ *Tijani v. Willis*, 430 F.3d 1241, 1243 (9th Cir. 2005) (Tashima, J., concurring).

²⁴⁷ M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 697 (2004) (citing and quoting *Demore v. Kim*, 538 U.S. 510, 513, 528 (2003)) (emphasis added).

²⁴⁸ *Demore*, 538 U.S. 510.

²⁴⁹ Several courts have reviewed the government's interpretation of "the brief period necessary" language in *Demore* and granted petitions for habeas relief in cases where they found that lawfully admitted aliens (refugees and lawful permanent residents) were being detained for excessive periods of time and without the benefit of a bond hearing before it had been

In my view, to set the constitutional standard for the length of detention for those lawful resident aliens who contest their deportation, we should borrow the time limits in *Kim* that the Supreme Court cited in upholding Section 236(c) for detention of lawful permanent resident aliens. These limitations would be presumptive time limits for detention of lawful resident aliens who object to their deportation. . . . [A]ny time periods that exceed the time limits cited in *Kim* would be presumptively unconstitutional.

Implicit in *Kim* is that a detention of a lawful permanent resident subject to removal under Section 236(c) for up to 47 days is permissible. Borrowing *Kim*'s time limits, we should hold that any contested detention of a lawful permanent resident under Section 236(c) for more than forty seven (47) days is presumptively unreasonable and therefore, unconstitutional, absent an individualized assessment of flight and dangerousness. If the lawful permanent alien appeals an adverse decision, the presumptive time limit would be 120 days. These time limitations that are cited in *Kim*, reflect actual administrative experiences for conducting these removal hearings. If there were justifiable cause for detentions beyond these limits, then the agency must provide the alien with a statement of reasons for the delay and the opportunity for a due process hearing. The alien could then assess whether he can successfully challenge the agency's stated reasons for continued detention at the due process hearing before the agency or later in court.²⁵¹

Congress should provide for a pre-detention hearing and the mandatory release, on the posting of bond and the meeting of other reasonable conditions, for those lawful permanent residents who do not pose a security or flight risk, who have strong ties to the community, and who have been convicted of minor crimes.²⁵² A bright-line limitation of the length of detention

finally determined that they were removable. *Tijani*, 430 F.3d 1241 (detained for over two years and eight months); *Madrane v. Hogan*, 520 F. Supp. 2d 654 (M.D. Pa. 2007) (detained for more than three years); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (detained for one and one-half years); *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006) (detained for thirteen months); *Ali v. Crawford*, No. CV 06-01149-PHX-EHC, 2007 WL 1670165 (D. Ariz. June 8, 2007) (detained for four years); *Zhang v. Gonzales*, No. CV06-0892-PHX-ROS, 2007 WL 2925192 (D. Ariz. May 21, 2007) (detained for over three years); *Castro v. Crawford*, No. CV 06-1522-PHX-ROS, 2007 WL 2973494 (D. Ariz. Oct. 9, 2007) (detained for two years and seven months); *Fuller v. Gonzales*, No. Civ.A.3:04CV2039SRU, 2005 WL 818614 (D. Conn. Apr. 8, 2005) (detained for two years); *Diomande v. Wrona*, No. 05-73290, 2005 WL 3369498 (E.D. Mich. Dec. 12, 2005) (detained for nearly two years).

²⁵⁰ 351 F.3d 263 (6th Cir. 2003).

²⁵¹ *Id.* at 275 (Haynes, J., concurring in part and dissenting in part).

²⁵² See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 520-21 (2007) (enumerating the costs of detention, including "deprivation of liberty; the inability to work, attend school, or socialize with family and friends; and the obstacles to assistance of counsel and to preparation of one's legal case").

(similar to the one advocated by Judge Haynes) ought to be included in the statutory provisions.

Review of the detention provisions must also consider that lawful permanent residents are often detained in facilities that are geographically located far away from their family and other sources of support.²⁵³ Therefore, it should be a priority, *when detention is necessary*, to house lawful permanent residents near family, who would be able to assist them during their removal proceedings. Whenever possible, family visitation should be granted generously. This would serve two purposes: (1) protecting lawful permanent residents from punitive detention in the event they are ultimately not found to be deportable,²⁵⁴ and (2) giving lawful permanent residents who are eventually found to be deportable the opportunity to spend time with their family members in the United States and the ability to settle their affairs in preparation for removal or voluntary departure.

F. Appointment of Counsel at the Expense of the Government for Indigents

Imagine a legal system in which—without having the benefit of legal representation—a person is stripped of his or her lawfully earned, permanent permission to remain in the United States. This is the reality of lawful permanent residents in removal proceedings. In 1893 the Supreme Court held in *Fong Yue Ting v. United States*²⁵⁵ that deportation is not punishment; therefore, the constitutional protections normally available in criminal trials, such as the right to counsel at government expense, are not available in deportation proceedings, not even for lawful permanent residents.²⁵⁶ Despite the current overlap of criminal laws and immigration laws in the removal process, courts have not held that due process requires the appointment of counsel for indigent lawful permanent residents.²⁵⁷ Congress has not provided for the right to counsel at government expense in removal proceedings.²⁵⁸ Most migrants represent themselves in their removal cases because

²⁵³ See Kerwin, *supra* note 209.

²⁵⁴ DHS does not report data on the number of lawful permanent residents who are placed in removal proceedings and later found not deportable. See Benson, *supra* note 205, at 445 (citing DHS Statistical Table). Even if we assume that some removal proceedings are terminated due to prosecutorial discretion, there is no way to account for those removal proceedings that are initiated and terminated because the charging agency sought to remove lawful permanent residents who were not deportable.

²⁵⁵ 149 U.S. 698 (1893).

²⁵⁶ *Id.* at 730; accord Bugajewitz v. Adams, 228 U.S. 585, 592 (1913).

²⁵⁷ The courts generally defer to Congress' "plenary power" in the area of immigration. See Neuman, *supra* note 226, at 618-20.

²⁵⁸ 8 U.S.C. § 1362 (2000) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose." (emphasis added)).

they cannot afford to retain counsel or there are no lawyers available to take their cases.²⁵⁹

Many law review articles²⁶⁰ and several federal judges²⁶¹ argue that removal (deportation) of lawful permanent residents for criminal convictions is punishment.²⁶² The United States Court of Appeals for the Sixth Circuit has gone as far as to set forth a test for determining whether counsel should be appointed: "The test for whether due process requires the appointment of

²⁵⁹ "[I]n 2005, 65 percent of immigrants represented themselves in their deportation hearings before the immigration court." HUMAN RIGHTS WATCH, *supra* note 39, at 39; *United States v. Loaisiga*, 104 F.3d 484, 485-86 (1st Cir. 1997) (describing a Nicaraguan asylum recipient and lawful permanent resident who had to represent himself—unsuccessfully—in removal proceedings because he was unable to find an attorney willing to take his case or procure free legal assistance). Detention facilities are located in remote areas with few or no local attorneys available. *Olivas*, *supra* note 142, at 160-61. Aliens have been transferred to rural detention facilities before they can retain attorneys in order to deprive them of legal representation. *Id.* (citing *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988)).

²⁶⁰ See, e.g., Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 305-06 (2000); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 788 (2000); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 64 (2003); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 246 (2004); Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 446 (2007); Legomsky, *supra* note 252, at 513; Kanstroom, *supra* note 7, at 208.

²⁶¹ See *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) ("The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality, especially in the context of [longtime lawful permanent residents.]); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting) ("When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less."); *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) ("Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation."); *United States v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926) ("However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of civilized peoples."); *United States v. JuToy*, 198 U.S. 253, 273 (1905) (Brewer, J., dissenting) ("Summing this up, banishment is a punishment, and of the severest sort."); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Deportation is punishment.").

²⁶² The Court's *Fong Yue Ting* premise that deportation is not punishment is fundamentally unbelievable. How can deportation of an alien legally residing in the United States be considered anything but punishment? In this case petitioner stands to lose his residence, livelihood, and most importantly, his family. Certainly if the same thing occurred to a United States citizen a Court would not hesitate [sic] to call it punishment[—]moreover, cruel and unusual punishment.

Lieggi v. INS, 389 F. Supp. 12, 17 (N.D. Ill. 1975) (holding that deportation of lawful immigrant for single drug conviction despite rehabilitation for a number of years constituted cruel and unusual punishment), *rev'd*, 529 F.2d 530 (7th Cir. 1976) (unpublished table opinion), *cert. denied*, 429 U.S. 839 (1976).

counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness—the touchstone of due process.'"²⁶³ In deciding whether the "fundamental fairness" test requires the appointment of counsel in a particular case, the court stated that an attorney must be provided (at the government's expense) if the alien "would require counsel to present his position adequately to an immigration judge."²⁶⁴ Experts recognize that current removal cases involve the intersection of criminal law and immigration law.²⁶⁵ Even without factoring in the required criminal law analysis, current "immigration law is one of the most complicated areas of U.S. law."²⁶⁶ Yet, lawful permanent residents who cannot afford legal representation are left at their own peril to present their cases in a proceeding where the opponent (the government who wants to remove them) has the benefit of legal representation at taxpayers' expense.

To promote "fundamental fairness" in the immigration process, Congress must explicitly recognize that removal of lawful permanent residents based on their criminal convictions is punishment meriting the right to counsel at government expense for those individuals who cannot afford to pay for the services of an attorney. This concession would demonstrate that the United States protects the rights of those who are lawfully admitted to this country. From a practical perspective, the appointment of counsel at government expense would benefit the immigration process in general by "eliminat[ing] very weak appeals or [facilitating] the analysis of the administrative agency."²⁶⁷

G. *Statutory Bar to Removal of Longtime Lawful Permanent Residents Who Entered as Children*

Past U.S. immigration laws included a statute of limitation for deportation because it "seemed unconscionable to expel immigrants after they had settled in the country and had begun to assimilate."²⁶⁸ In today's immigration laws there is no generally applicable statute of limitation for removal. Nonetheless, the United States must accept responsibility for the children who have become adults in its jurisdiction, have been admitted as lawful permanent residents, and have engaged in crime as a result of the conditions that they found in this society.²⁶⁹ It is inequitable for the United States to

²⁶³ *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

²⁶⁴ *Id.* at 568 n.3 (citations omitted).

²⁶⁵ See Legomsky, *supra* note 252, at 471 ("The underlying theories of deportation increasingly resemble those of criminal punishment.").

²⁶⁶ Stephen W. Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law*, in *BASIC IMMIGRATION LAW 2007*, at 9, 33 (PLI N.Y. Practice Skills Course Handbook Series No. F-167, 2007), available at 1593 PLI/Corp 9 (Westlaw).

²⁶⁷ Benson, *supra* note 205, at 444.

²⁶⁸ Ngai, *supra* note 12, at 74.

²⁶⁹ See, e.g., Kanstroom, *supra* note 7, at 204. For a proposal of a "Youth Bar" to removal of Cambodian refugees, see Hing, *supra* note 38, at 1902 n.49.

deny its responsibility towards children who have embraced the American "way of life," including at times its gang culture, and deport them to countries that do not have the institutions or resources to deal with individuals who suffer from these types of U.S.-produced socioeconomic problems.²⁷⁰ Therefore, Congress must enact an absolute bar to removal of lawful permanent residents who entered the United States at the age of thirteen years old or younger and have resided continuously in the United States for ten years after entry.²⁷¹ The United States, in reality, legally adopted these immigrants when they were children. Therefore, it should not be allowed to send them back to their countries of birth after they learned their criminal behavior in their adoptive country.

H. Social Security and Disability Payments and/or Contributions

Aside from removal and the trauma associated with returning to countries that are foreign to some lawful permanent residents, the deportees and their families are further penalized by the automatic taking of the contributions that the deportees have made to the Social Security system.²⁷² The United States must not deprive lawful permanent residents of hard-earned contributions that were made with the expectation that the money would be available upon disability or retirement.²⁷³ Deportees should be given the option of keeping their contributions in the Social Security system until retirement age or obtaining a cash pay-out of their contributions plus interest at the prevailing market interest rates during the years that their contributions remained in the system. For individuals who had already retired or had become disabled and were receiving social security or disability payments at

²⁷⁰ See Kanstroom, *supra* note 7, at 218-19 (discussing crime problems faced by countries in Central America and the Caribbean as a result of deportations from the United States).

²⁷¹ The age and years in residence suggestions are not arbitrary but find support in two pre-IIRIRA cases that analyzed the extreme hardship that Nicaraguans would suffer if they were deported after living in the United States for most of their lives. See *In re L-O-G*, 21 I. & N. Dec. 413, 420-23 (BIA June 14, 1996) (Nicaraguan teenager who had entered the United States at age of six and had lived in the United States for about ten years); *In re O-J-O*, 21 I. & N. Dec. 381, 381, 386-87 (BIA June 14, 1996) (Nicaraguan adult who had entered the United States at age of thirteen and had lived in the United States for about eleven years).

²⁷² See DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION CRS-3 (July 20, 2006), available at <http://trac.syr.edu/immigration/library/P1077.pdf>; Legomsky, *supra* note 252, at 513 (citing 42 U.S.C. § 402(n) (2000); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

²⁷³ See *Flemming*, 363 U.S. at 623 (Black, J., dissenting) ("Social Security is not a hand-out; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." (quoting 102 CONG. REC. 15110)); *id.* at 631-32 (Douglas, J., dissenting) ("Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. . . . Social Security benefits have rightly come to be regarded as basic financial protection against the hazards of old age and disability." (citation omitted)); *id.* at 635 (Brennan, J., dissenting) ("[Deportee's] predicament is very real—an aging man deprived of the means with which to live after being separated from his family and exiled . . .").

the time of detention or removal, the payments must continue in accordance with the regulations as they would have applied if the deportees had been permitted to remain in the United States. Allowing deportees to retain the benefit of their contributions would lessen the detriment to the deportees, their families in the United States, and the countries to which they are removed.

CONCLUSION

The U.S. Congress and President must stop implementing policies that harm this country and its neighbors. Before passing legislation and implementing foreign and domestic policies, Congress and the President ought to carefully consider the potential immigration, domestic, and international repercussions. In the process of enacting immigration laws, Congress must not lose sight of the laws' potential harmful human consequences and the human rights of immigrants and their families. Congress must also recognize its higher duty towards lawful permanent residents who have been "accepted" as members of our society. This Note is a call to action for Congress to lead our nation to reach for its highest ideals by enacting fair, informed, and humane immigration reform.

The best way to export democracy is to lead by example and build goodwill and trust among the citizenry of other states (nations). This will only be accomplished by treating fellow countries and their citizens as we would like, and in fact demand, our country and our citizens to be treated.²⁷⁴ This dignified treatment would benefit not only immigrants but all Americans.

It is a mistake to think that we can remedy discrimination against Americans while allowing our government to treat people who live in other countries or carry different passports as not deserving of full, or even basic, human rights. Taking such a position allows the basis of the discrimination to be constantly recreated at the same time that we deplore its consequences. It is like cutting off the head of a weed while fertilizing its roots. This cycle is especially problematic in the United States because our population has cultural and historic ties with so many parts of the world.²⁷⁵

How a nation treats the immigrant speaks volumes about the nation. This is especially true for the United States, which regards itself as a nation of immigrants. How the United States treats the

²⁷⁴ The United States went so far as to bombard and burn an entire town in Nicaragua because citizens of the United States who had passed through the town in transit from the Atlantic to the Pacific had been despoiled and reparations and apologies were not forthcoming. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 768-70 (Fed. Cl. 2003) (citing President Pierce's Message to Congress from December 4, 1854, appended to case).

²⁷⁵ Saito, *supra* note 15, at 54.

immigrant is part of the "project of national self-definition [which] includes not only deciding whom to admit and expel, but also providing for each alien's transition from outsider to citizen."²⁷⁶

We must not forget that lawful permanent residents have fought and are currently fighting on behalf of the United States.²⁷⁷ Some of these U.S. veterans will also face removal under current immigration laws.²⁷⁸ For all these reasons, the United States has a duty to honor its own immigrant past and treat lawful permanent residents in a humane, compassionate, and just manner, even if they have committed crimes in our country. This is the "American way."

Showing compassion, and fairness in our immigration policies is not a sign of weakness. Rather, those traits demonstrate a confidence in a rule of law and system of government that metes out punishment when necessary, but understands that regulating the lives of those who seek to live within our borders must be done with the utmost compassion, dignity, and understanding. . . . As they become part of our neighborhoods and communities, some may make mistakes, but we do well to remember that supporting rehabilitation, giving a second chance, and providing ways for individuals to mature are essential elements of a civil society.²⁷⁹

²⁷⁶ Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1396 (1997) (alteration in original) (citing ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 339-45 (1996); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1944-45 (1996)).

²⁷⁷ See Major Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Service Members Who Are Not United States Citizens*, 51 NAVAL L. REV. 53, 54 (2005) (stating that a lawful permanent resident "who has lived almost all of his or her life in the United States and who elects to risk his or her life in defense of our nation should be considered as much of an American as hot dogs, baseball, and Grandma's apple pie.").

²⁷⁸ *Id.*

²⁷⁹ Hing, *supra* note 38, at 1894.

