

Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools

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I. INTRODUCTION

For the first time in many years, Congress and the White House are engaged in bipartisan efforts to enact comprehensive immigration reform. The give-and-take that dominates the debate is mostly over the terms of legalization for the estimated eleven million undocumented immigrants and the extent to which more funds should be dedicated to enforcement.¹ Along the way, conversations about the DREAM Act, a guestworker program, high-tech visas, and backlogs in family immigration categories take place as well.² However, if one raises the issue of relief for so-called “criminal aliens,” the sound of doors closing in the halls of Congress and the White House is deafening. Deporting immigrants who have committed crimes attracts few critics on Capitol Hill.³ And as President Obama proudly announced to the country during the presidential campaign, he is committed to

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¹ See *Key Senators Agree on Sweeping Immigration Reform*, CBS NEWS (Jan. 28, 2013), http://www.cbsnews.com/8301-250_162-57566097/key-senators-agree-on-sweeping-immigration-reform/.

² See, e.g., *id.*; Jens Manuel Krogstad, *Visa Cap Cuts off Immigrants With Advanced Degrees*, USA TODAY (Jan. 9, 2013), <http://www.usatoday.com/story/money/business/2013/01/09/immigration-science-technology-engineering-math-jobs/1566164/>; Miranda Campbell, *Candidates Debate the DREAM Act*, THE ARKANSAS TRAVELER (Oct. 22, 2012), http://www.uatrav.com/news/article_901098f6-6cc3-53d8-a884-78c250663704.html; Congressman Mike Honda, *Reuniting Families Act* (May 9, 2011), <http://honda.house.gov/news/blog/reuniting-families-act>.

³ A few weeks before the Senate’s Gang of Eight introduced reform legislation on April 18, 2013, U.S. Senator Dianne Feinstein met with constituents to talk about immigration reform. One immigrant rights advocate who was in attendance wrote:

On broad path to citizenship and discretionary waiver for criminal exclusions, [Feinstein] just started shaking her head and said she has been fighting her own staff on criminal exclusions in Ag Jobs. She said right off the bat, “You are not going to get me on this.” She basically thinks if someone has committed a crime, they should be deported, end of story. [Another advocate] raised the story of a Cambodian refugee who came as an infant, had a criminal conviction as a teenager, then shaped up and was working and married a U.S. [citizen] and had three young kids when he was deported. She was unmoved. I told her we are working with veterans’ groups to gather the stories of LPRs who have served in the U.S. military and develop substance abuse issues because of PTSD. Her response: These people with heroin ad-

deporting immigrants “who are criminals, gang bangers, people who are hurting the community.”⁴ Who would dare challenge that enforcement priority?

In this essay, I argue that immigration judges should regain discretion over deportation cases involving lawful permanent resident immigrants who have committed aggravated felonies—discretion that was eliminated in 1996. Congress’s failure to address the issue of reinstating immigration court discretion is a missed opportunity to act consistently with changing political attitudes toward law enforcement and notions of proportionality. Addressing these issues would invite a conversation about the effect of criminal deportations on the prospective deportee, who may in fact be well on the road to rehabilitation. The effect on the community also would become relevant, as we focus on the role that the person has played in the family, in the neighborhood, and at work. By reinstating discretion to give such individuals a second chance, the positive benefits that such individuals bring to the community would be as salient to the conversation as would whatever perceived gain there might be from their removal. Providing discretionary relief to a long-term, lawful permanent resident who has committed an aggravated felony may actually make sense for the individual as well as for the community.

In making this argument, I urge several considerations. I compare the current approach to what existed in the past as well as what other countries do in similar situations. I consider recent philosophical trends in the criminal justice arena that are relevant, as well as the views of prosecutors and immigration judges. What becomes evident is that deporting long-time, lawful permanent residents raises serious issues of whether the punishment fits the crime. I argue that without providing these lawful residents with an opportunity to plead for a second chance, this approach punishes them in a manner that is disproportional to their wrongdoing. In fact, triple punishment is imposed: criminal punishment (often in the form of incarceration), removal (sometimes to a country where the deportee has few ties), and banishment from return because the person is barred from readmission permanently.

dictions or morphine addictions will keep having problems and they should be deported.

E-mail from [advocate] (Mar. 22, 2013, 1:25 PM) (on file with author) (identities kept confidential for fear of retaliation). In responding to the issue of judicial discretion for lawful permanent residents convicted of aggravated felonies when raised by immigrant rights advocates, Democratic Congressman Xavier Becerra “gave some lip service to judicial discretion, but said that his priority is to get as many folks over the finish line as possible without jeopardizing the whole thing, and that probably means folks with clean records.” E-mail from [advocate] (Nov. 5, 2013, 10:09 AM) (on file with author).

⁴ See Julianne Hing, *Who Are Those ‘Gangbangers’ Obama’s So Proud of Deporting?*, COLORLINES.COM (Oct. 17, 2012), http://colorlines.com/archives/2012/10/who_are_those_gangbangers_obamas_so_proud_of_deporting.html.

I begin by providing the necessary background in Part II of this article. The background includes the comparison of the legal framework for immigration judge discretion before and after 1996, as well as an interim period when the aggravated felony ground for deportation was introduced. I include discussion of illustrative cases falling into the three time periods. For example, I contrast the situation of one of my former clients, John Wong, who benefited from an immigration judge's exercise of discretion in the late 1970s, with that of Nhia Bee Vue, an aggravated felon who also benefited under pre-1996 circumstances, and that of Lundy Khoy, whom I am currently assisting and who has no available relief. John suffered gang- and heroin-related convictions. Vue has two opium convictions, including a distribution charge. Lundy has one conviction related to seven ecstasy tablets and has been ordered to be deported without a chance to even ask for a second chance in immigration court. The current deportation law for aggravated felons is in essence a strict zero-tolerance policy.

Part III provides a review of recent political trends related to criminal justice. These trends provide a look at crime and punishment through a more progressive lens that invites similar re-evaluation in the deportation arena. Most notably, Attorney General Eric Holder has invited us to "take bold steps to reform" because the "vicious cycle of poverty, criminality, and incarceration" accomplishes little.⁵ In Part III, I also argue we should view the deportation of aggravated felons through a proportionality approach because these individuals are punished three times—first by being sent to jail, then by being deported, and finally by being barred from readmission. Lessons from advocates for due process proportionality in the immigration regime as well as criminal justice goals announced by Attorney General Holder provide important guidance for rethinking our current approach to the deportation of aggravated felons.

Finally, I argue in Part IV that restoring discretionary relief makes sense as an approach to aggravated felons. The discretion need not be identical to the pre-1996 approach. In fact, adopting more creative approaches to discretion, such as diversion or probation-like programs, could be appropriate outcomes. I argue that the benefits to be gained from these enlightened approaches far outweigh the added costs that might be imposed on the Department of Homeland Security (DHS) through added personnel, or on state and local governments that may provide employment training or counseling services. I conclude that failing to address the zero-tolerance approach to the deportation of aggravated felons represents a failure to engage in innovation, which has grave societal costs. Deporting someone like Lundy Khoy accomplishes little. More than a dozen years have passed since her conviction. She is now rehabilitated. She works full-time. Deportation to a coun-

⁵ Eric Holder, U.S. Att'y Gen., Address at the American Bar Association's House of Delegates Annual Meeting (Aug. 12, 2013), in JUSTICE NEWS, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

try (Cambodia) where Lundy never lived would destroy her life and visit tremendous, unnecessary hardship on her parents and her sister.

II. BACKGROUND

A. *Lundy Khoy*⁶

Lundy Khoy is facing deportation because of the U.S. zero-tolerance policy toward aggravated felons. Lundy was born in a Thai refugee camp after her parents fled the genocide in Cambodia. When she was one-year-old, she and her family came to the United States as refugees. Lundy and her parents were granted lawful permanent residence status when Lundy was in kindergarten, but they never filed for citizenship through naturalization because of the expense. In 2000, when Lundy was a nineteen-year-old freshman at George Mason University, she was stopped by a bicycle cop who asked if she had any drugs. She answered honestly and told the officer that she had seven tabs of ecstasy, but that they were not all for her. She was arrested for possession with intent to distribute. On the advice of her lawyer, she pled guilty,⁷ to spare her family the expense and embarrassment of a trial. She was sentenced to five years in prison.

Although Lundy was released and placed on probation after serving only a few months in prison, her conviction is an aggravated felony for deportation purposes. In the spring of 2004, Lundy arrived at a regularly scheduled probation appointment to show off her college report card. When she stepped inside the office, she was greeted by her probation officer and Immigrations and Customs Enforcement (ICE) agents who were targeting removable aliens on active probation. She was instructed to hand over her possessions and stand spread-eagled against the wall; then the ICE agents handcuffed and transported her to Hampton Roads Regional Jail in Portsmouth, Virginia. Given her aggravated felony conviction, an immigration judge ordered Lundy deported without hearing evidence of her childhood in the United States, her current family situation, her educational pursuits, or her perfect cooperation during her probation. Lundy remained in ICE cus-

⁶ Interview with Lundy Khoy, in Washington, D.C. (Oct. 6, 2013); Mike Riggs, *Lundy Khoy Barely Escaped Pol Pot's Purge; Now the U.S. is Threatening to Deport Her for a Decade-Old Drug Charge*, REASON.COM (Aug. 28, 2012), <http://reason.com/blog/2012/08/28/lundy-khoy-barely-escaped-pol-pots-purge>; Jenny Doren, *Lundy Khoy, D.C. Woman Faces Deportation to Cambodia*, WJLA (Oct. 4, 2012), <http://www.wjla.com/articles/2012/10/lundy-khoy-d-c-woman-faces-deportation-to-cambodia-80597.html>; Tara Bahrapour, *After Run-in With Law, Cambodian Immigrant's Permanent Residency Is at Risk*, WASH. POST (Oct. 3, 2012), http://articles.washingtonpost.com/2012-10-03/local/35502391_1_green-card-holders-green-card-jay-stansell/2.

⁷ Guilty pleas on advice of counsel are, of course, common. See *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010) (ruling that criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea). When the law is unambiguous, attorneys must advise their criminal clients that deportation “will” result from a conviction. *Id.* at 380. When immigration consequences are unclear or uncertain, defense attorneys must advise that deportation “may” result. *Id.*

tody for nine months, while the United States attempted to deport her to Cambodia. However, only because Cambodia is taking its time in issuing travel documents for Lundy, ICE has released her pending the documents.

Now in her early thirties, Lundy is trying to lead a normal life as she awaits her fate. Having been born in a Thai refugee camp and lived in the United States since the age of one, she finds it hard to imagine being removed to Cambodia, a country with which she has no familiarity or family ties; all her relatives live here. She is now trying to complete her bachelor's degree, works full-time as a college enrollment counselor, and volunteers for local charities, including Habitat for Humanity and the Boys & Girls Club. If Lundy had been born in the United States (like her two siblings) or if her parents had become naturalized citizens before Lundy turned eighteen, she would not be on the deportation list.

Lundy lives in Washington, D.C., a few blocks from her younger sister, Linda, who is only eighteen months younger. The two are inseparable. They grew up sharing a bed and a bedroom, until Lundy started college. Linda is Lundy's most ardent supporter. They cook together, go out together, laugh together, and cry together; they think of each other as soul mates. They share intimate details about each other's lives. Linda joins Lundy in speaking out about current deportation policies, and the two are working with community-based organizations in Washington, D.C. and Philadelphia to seek a legislative solution for those who are in the same shoes as Lundy. When Lundy is feeling depressed or worried, Linda provides emotional support to bring Lundy back from those lows. Linda cannot imagine what her life would be like if Lundy was deported to Cambodia.

B. Pre-1988 Deportation Provisions: Crimes Involving Moral Turpitude and Narcotics

Prior to 1988, lawful permanent residents and refugees could be deported for engaging in criminal activities that included crimes involving moral turpitude, drug offenses, prostitution, or certain firearms offenses. The Immigration and Nationality Act § 241(a)(4)⁸ provided two categories of deportable aliens convicted of moral turpitude crimes. An alien was deportable for one conviction if the crime was committed within five years after entry and the alien was sentenced to confinement for one year or more. An alien was deportable for two crimes involving moral turpitude at any time after entry, irrespective of how much time had passed. Thus, an alien could be deported for two crimes involving moral turpitude even if the crimes occurred many years apart. Ironically, if the immigrant had only a single conviction for something serious like murder committed more than five years after admission, deportation was not triggered prior to 1988.⁹ Be-

⁸ Immigration and Nationality Act of 1952, Pub. L. No. 414, § 241(a)(4), 66 Stat. 163, 204 (1952).

⁹ BILL ONG HING, *HANDLING IMMIGRATION CASES* 255 (1st ed. 1985).

sides obvious crimes like murder, rape, and aggravated assault, moral turpitude crimes included theft, robbery, burglary, passing bad checks, credit card scamming, perjury, and acts involving recklessness or malice.¹⁰

A separate ground for deportation related to drugs or marijuana existed. Under INA § 241(a)(11),¹¹ an alien was deportable if convicted of a crime related to the sale, possession, manufacturing, trafficking, or transportation of a narcotic drug or marijuana, or conspiracy to do so. Only one conviction was necessary, including simple possession of marijuana.¹²

Separate deportation provisions were provided for possession of weapons and prostitution as well. An alien convicted of possession of a sawed-off shotgun or certain automatic weapons any time after entry was subject to deportation.¹³ One conviction at any time was sufficient. On the other hand, under INA § 241(a)(12),¹⁴ no conviction was necessary to deport an alien who had engaged in prostitution, as a prostitute, procurer, or recipient of funds from prostitution.

John Wong was one of my clients in this pre-1988 period. I first encountered John when I was a legal services attorney.¹⁵ Because of gang-related crimes and a conviction for the sale of heroin, he was deportable for two crimes involving moral turpitude and separately for his drug conviction.

John's path to criminality is not unique. He was born in Hong Kong on March 27, 1956, the fifth of six children. His parents, originally from mainland China, immigrated to Hong Kong after World War II when the Communist Party took over. As tailors, they owned a small business making suits. As such, they were able to acquire property and had the time and money to provide for their children. John's aunt, however, lived in the United States and soon convinced John's parents that the United States offered a better future full of opportunity for their children. Thus, they sold their possessions and decided to leave Hong Kong. Through the sponsorship of John's aunt in the United States, John's family arrived in San Francisco in 1963, when John was only seven years old. They settled down in San Francisco's Chinatown, where John's aunt owned a restaurant. John's parents worked twelve- to sixteen-hour days in the restaurant, mostly washing dishes. They were grateful for the opportunity to work and earn money but found them-

¹⁰ See *id.* at 256 (citing *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(19) and 241(a)(4) of the Immigration and Nationality Act*, 23 A.L.R. FED. 480 (1984)).

¹¹ Immigration and Nationality Act of 1952, Pub. L. No. 414, § 241(a)(11), 66 Stat. 163, 206 (1952).

¹² Cf. Moeller, 16 I. & N. Dec. 65 (B.I.A. 1976). However, if the lawful permanent resident was convicted of marijuana possession of less than 100 grams, then administrators generally did not proceed with deportation if this was the first offense and no remuneration was involved. See HING, *supra* note 9, at 258.

¹³ Immigration and Nationality Act of 1952, Pub. L. No. 414, § 241(a)(14), 66 Stat. 163, 207 (1952).

¹⁴ *Id.*

¹⁵ Interview with John Wong in S.F., Cal. (Dec. 2, 2009). In an earlier call for reinstating 212(c) relief, I referenced Mr. Wong. See Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1895 (2007).

selves too tired to spend much time with their children. Their search for other work was severely limited by their almost nonexistent English (they could not invest any time in learning the language with their scarce resources). Eventually, both of John's parents were able to use their tailoring skills to obtain employment at a sewing factory and move the family into a two-bedroom apartment. After some time, John's mother remained in the factory, but John's father returned to working in the restaurant.

Life was drastically different in the United States for the Wong family. Because of language barriers resulting in limited job opportunities, the family's socioeconomic status fell from middle class to lower class. Compared to their experience in Hong Kong, supporting the family in the United States was much more difficult for John's parents. The long working hours kept them from providing regular supervision as John and his siblings faced complicated cultural and economic adjustments. Soon, John's siblings, who were in high school, started working part time to help with the family's finances. John felt a little spoiled as the youngest boy in the family. He enjoyed much unsupervised time to do whatever he wanted. In grade school, he found companionship and understanding with neighborhood children who shared a similar background. Like John, the other immigrant children faced cultural and identity conflicts. John thought it would be easy to adjust to his new surroundings, but it turned out to be much more difficult than he had imagined. He had trouble learning English and did not have much support for his academics. His parents had no time to help him in school and did not know about tutoring. At school, the American-born Chinese (ABC) children would pick on the foreign-born kids. As early as kindergarten, John assumed a tough-guy persona in response to bad treatment from the ABC kids. This created further incentive for John to hang out with children more like him. He performed satisfactorily in school but would get into frequent fights with the ABCs. These fights were not very serious, but they affected the formation of future relationships between two groups that did not get along. John did not view the rivalries as a function of class or race, but simply the way things were in the neighborhood in which he grew up.

With little supervision and a group of friends who were struggling to fit in, John gradually lost interest in school. On a typical day, he would go to school only to meet friends and cut classes. They started stealing from local stores for fun. John did not have a sense that what he was doing was wrong or illegal; he just saw that he could obtain free things simply by putting them in his pocket. Because his parents could hardly afford to give him any spending money, this became an easy and exciting way to get the small things he wanted. In time, stealing allowed him to maintain a lifestyle he could not afford otherwise. By selling what he stole, John made enough money to party, go out for dinner, and drink with his friends. Smoking, drinking, and fighting became a regular occurrence in the neighborhood and John was caught participating in these activities several times. He started hanging out with his friends more often; cutting classes in high school became the norm. When John first started getting in trouble, his parents would

hit him. It soon became clear that they could not control him, however, and they decided to allow the authorities to place John in a boys' home in Palm Springs after he was sent to juvenile hall. This facility housed more than one hundred boys and was structured like a hotel. During his year there, John was driven to school and taken on field trips. However, he missed his parents and thought he would do better from then on. Unfortunately, this commitment at that time was short-lived, and John ended up in juvenile hall a total of seven times by the time he reached the age of eighteen.

Although John's juvenile hall sanctions mostly were for stealing, he also got in trouble for fighting. He and his friends often brawled with groups of older kids. One day, when John witnessed a fight in which he did not participate, a policeman chased him into an alley, where John tripped on his baggy pants. The policeman proceeded to beat him before taking him to juvenile hall. John served six months for this "offense." During this time, he felt angry that he had been beaten and could not do anything about it. His hatred grew because he felt he had been apprehended for no reason. There was no remorse. John grew determined to be tougher once he got out.

The other kids in juvenile hall were of different races and bigger than John. John was forced to stand up for himself because he was constantly picked on by these larger kids. Juvenile hall was similar to a dormitory with many levels. Assignments were made on the basis of a detainee's behavior. John spent time on every level. The counselors used methods John did not expect: they tacitly condoned fighting to resolve differences and passed out contraband cigarettes as a reward for good behavior. By the time he was released, John was tougher and less adjusted to life on the outside. Though John never joined one of the neighborhood's gangs, he continued low-level criminal behavior. He was convicted of armed robbery at the age of nineteen and incarcerated for three years.

According to John, "if you're not a criminal and you're sent to state prison, you become a criminal." As a young person, an Asian, and a relatively minor offender, John found himself isolated in a maximum security prison. Hardened by his experiences, though, John held his own as a "tough guy." No matter how tough he tried to be, John still knew he needed to ally himself with a group. With the Asians, he made friends who would watch his back as he did the same for them. At the same time, these friends exposed John to drugs. Each racial or ethnic group had a representative who would organize the group and negotiate to provide whatever the group needed. By way of this organization, many drugs and much money flowed through the prison. Though the Asians did not have as much of a problem with other groups, where there were drugs, there was violence. John was involved in several fights and spent much of his time in lockdowns and solitary confinement. Eventually, he learned to avoid the fighting and after serving three years in state prison, he was paroled for good behavior to San Jose, California.

John spent six months at a halfway house, which he considered a rehabilitation period, and was required to report back periodically. If he violated

any regulation, he would be sent back to jail. He remained drug-free and crime-free at this time. He received training in electronics and landed a job at General Electric. Soon he was able to move out of the halfway house and rent an apartment in San Jose. He enjoyed the taste of freedom. Because his family and friends remained fifty miles away in San Francisco, John started commuting frequently and visiting his girlfriend. John grew bored of working and tired of commuting. He knew that moving back to his old neighborhood would tempt him to return to his old habits, but he missed the support of his family and friends. After his parole ended, John quit his job with General Electric and returned to San Francisco. Back in his old neighborhood, he reverted to hanging out with old friends, using drugs, and getting into fights. John left prison with a drug addiction and more proneness to criminal behavior. Accustomed to someone supervising his every action in prison, he was unable to handle his freedom. As he slipped and could not afford drugs with his salary, he quit his construction job and started distributing drugs for a dealer to earn money. As a middleman, he often did not even look to see what was in the bags. On one such occasion, he was to deliver a brown paper bag to a hotel and pick up a piece of luggage in exchange. Instead, he was caught and arrested.

In 1979, just two years after being released from state prison, John was sentenced to two years in federal prison for possession with intent to distribute heroin. Unlike in state prison, in federal prison, John was in the company of many non-violent white-collar criminals whose influence led him to reconsider his life trajectory. He completed his GED while serving time and also attended a drug rehabilitation program. This program tested him for drugs regularly. An important byproduct of this program was that it acted as a minimum security area, where John was able to meet “a lot of good people.” One was a seventy-three-year-old man who became a friend and mentor. This man, an Asian minister, taught John to value his life and the lives of others. This great influence on how John viewed himself and the world helped him see the importance of self-discipline. Unfortunately, John learned of his mother’s death while he was still in federal prison. This caused him to feel great remorse for what he had done and how he had missed being with those he loved. “It hurt me a lot. I [would always] return [from jail] badder and badder.” Upon release in 1981, John, now age twenty-five, decided to do things right.

John’s resolve to stay out of trouble was strengthened further by his new role as a husband (he had married his girlfriend right before going to federal prison). John struggled to find a job due to his criminal record. Finally, he applied to a job in City Hall, where an old friend helped him secure a job as a clerk for minimum wage. Because the job was only temporary, John continued to apply to all the jobs he could. After a year of working as a clerk, he applied and was accepted to a mechanic’s assistant program because of his electronics training. This two-year training program prepared him to work for the municipal railway service of San Francisco. Though John found it difficult to maintain a “clean” life, he persevered for himself and

his family. He had come to see that he had a lot to lose, and he did not want to take that chance anymore.

Although John's life appeared to be on track, he still faced a final obstacle. Because of his past criminal activity, the Immigration and Naturalization Service (INS) instituted deportation proceedings. John never thought he would have problems with immigration. He had been in the United States for more than twenty-five years, and thought he had paid for his crimes through serving time in prison. "I did my time, I don't deserve getting deported."

From 1976 to 1996, discretionary relief from deportation was available for long-time lawful permanent residents like John who had been convicted of serious crimes. An immigration judge could consider issues of rehabilitation, remorse, family support in the United States, atonement, and employment opportunities for even serious felons who had entered as refugees or as immigrants.¹⁶ These individuals must have been lawful resident aliens and have resided in the country for at least seven years.¹⁷

In 1976, the Immigration and Nationality Act did not contain a provision that explicitly provided relief to a typical lawful permanent resident convicted of a crime of moral turpitude, drug offense, or a crime that might be regarded as an aggravated felony after 1988. The language and application of INA § 212(c), however, provided the framework for an interpretation that benefited many aliens:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) [which included grounds of exclusion that barred the entry of aliens convicted of serious crimes involving moral turpitude and narcotics offenses].¹⁸

In essence, INA § 212(c) provided a waiver of exclusion for a lawful permanent resident who traveled abroad voluntarily and was attempting to return. The person could be readmitted at the discretion of the Attorney General, even if he or she had been convicted of a serious crime that rendered him or her excludable.¹⁹

The fact that similar lawful permanent residents convicted of identical crimes would be treated differently, only because one had never left the United States after immigrating and the other happened to leave and return after committing the same deportable offense, made little sense to the Sec-

¹⁶ See *Marin*, 16 I. & N. Dec. 581, 584-85 (B.I.A. 1978).

¹⁷ *Id.* at 582.

¹⁸ 8 U.S.C. § 1182(c) (1976).

¹⁹ See *L*, 1 I. & N. Dec. 1, 5 (B.I.A. 1940) (applying provision of 1917 law substantially similar to INA § 212(c)).

ond Circuit Court of Appeals in *Francis v. INS*.²⁰ The latter person would be eligible for the 212(c) waiver, while the former would not under the interpretation of the statute by the Board of Immigration Appeals (Board). The Second Circuit ruled that the Board's interpretation violated equal protection and, therefore, held the waiver applicable to any lawful permanent resident who had resided in the country for at least seven years.²¹ Soon thereafter, the Board adopted the *Francis* decision, dropping the departure requirement for eligibility.²² The result was that a lawful permanent resident who simply had resided in the United States for seven years could apply for and be granted a waiver under INA § 212(c) in deportation proceedings, thereby allowing the person to remain in the United States as a lawful permanent resident. To be granted the waiver, the person had to persuade an immigration judge to exercise favorable discretion.

In *Marin*, the Board summarized the major factors for immigration judges to consider in Section 212(c) cases, although each case was to be judged "on its own merits."²³ In general, the immigration judge was required to balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his or her behalf to determine whether a grant of relief appeared to be "in the best interests of this country."²⁴ In essence, the alien had the burden to show that the positive factors outweighed the negative ones. Favorable factors considered include:

[F]amily ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).²⁵

Adverse factors considered include:

²⁰ See *Francis v. INS*, 532 F.2d 268, 269 (2d Cir. 1976).

²¹ *Id.* at 273 (holding that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time"). In fact, this ruling was consistent with the Board's own interpretation of a similar provision that was part of the statute decades earlier: A, 2 I. & N. Dec. 459 (B.I.A. 1946), approved by Att'y Gen. (1947) (holding that an alien's non-reentry into country following his conviction was not bar to exercise of discretionary relief in deportation proceeding).

²² *Silva*, 16 I. & N. Dec. 26, 29–30 (B.I.A. 1976).

²³ See *Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978).

²⁴ *Id.* at 584.

²⁵ *Id.* at 584–85.

[T]he nature and underlying circumstances of the exclusion [or deportation] ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.²⁶

Section 212(c) relief was not automatic. What evolved after 1976 was a system of discretion that functioned well, allowing for relief as well as stern justice. For instance, in *Ashby v. INS*, the applicant was convicted of three crimes, which involved the use of force and weapons, and was incarcerated for nine years.²⁷ Those facts were critical to the Board's denial, despite twenty-seven years of lawful permanent residence.²⁸ Also, in *Arango-Aradondo v. INS*, the Second Circuit upheld the denial of INA § 212(c) relief when the immigration judge found the evidence in the alien's favor ("his drug and alcohol rehabilitation efforts, his longtime residency in the United States, his close family ties, and the hardship he would endure in Colombia given his HIV status and his lack of ties there") did not outweigh the detrimental evidence ("his sporadic employment record, his failure to file taxes, and, most importantly, his 'very lengthy and very severe' criminal record, and long involvement in the drug culture").²⁹

As the number of negative factors grew in a Section 212(c) case, the respondent had to introduce offsetting favorable evidence, often labeled "unusual or outstanding equities."³⁰ Courts required this heightened showing when an alien was convicted of a serious offense, particularly one relating to the trafficking or sale of drugs.³¹ There were cases in which the adverse considerations were so serious that a favorable exercise of discretion was not warranted even in the face of unusual or outstanding equities.³² For example, in *Varela-Blanco v. INS*, a conviction of lascivious acts with a child (sexual abuse of an eight-year-old niece) was a serious crime requiring a demonstration of "unusual or outstanding equities" for Section 212(c) relief.³³ Although the applicant had resided in the United States for eighteen years, the first ten were in an unlawful status. Therefore, employment dur-

²⁶ *Id.* at 584.

²⁷ 961 F.2d 555, 556 (5th Cir. 1992).

²⁸ *See id.* at 557.

²⁹ 13 F.3d 610, 613 (2d Cir. 1994).

³⁰ *See* Marin, 16 I. & N. Dec. at 583.

³¹ *See* Diaz-Resendez v. INS, 960 F.2d 493, 498 (5th Cir. 1992) (finding that possession of twenty-one pounds of marijuana with the intent to distribute constituted a "serious" drug offense); *see also* Roberts, 20 I. & N. Dec. 294, 303 (B.I.A. 1991) (concluding that cocaine sale constituted drug trafficking and thus a "serious" drug offense). However, convictions that might seem minor might also be considered "serious" drug offenses. For example, the sale of \$10 worth of marijuana can be classified as a deportable aggravated felony. *See supra* notes 11–13 and accompanying text.

³² *See* Buscemi, 19 I. & N. Dec. 628, 635–36 (B.I.A. 1988).

³³ 18 F.3d 584 (8th Cir. 1994).

ing his undocumented status was not considered.³⁴ Furthermore, the mere presence of family and considerable evidence of rehabilitation was relevant but insufficient.³⁵

In *Diaz-Resendez v. INS*, however, the Fifth Circuit found that an applicant who had been convicted of possession of twenty-one pounds of marijuana with intent to distribute met the rigorous standards for Section 212(c) relief.³⁶ The applicant was fifty-four years old and had been a continuous lawful resident for thirty-seven years. He had been married to a U.S. citizen for twenty-nine years, had three children who were fully dependent on him, faced imminent breakup of his marriage if deported, and otherwise had a clean criminal record except for a drunk driving charge that ended his drinking.³⁷ Similarly, in *Nhia Bee Vue v. INS*, a refugee from Laos was granted 212(c) relief in spite of convictions for importing opium and possession of opium with intent to distribute.³⁸ Vue was a shaman, a medicine man, who was called upon in times of illness in the Hmong community in the San Diego area.³⁹ Opium was used in spiritual ceremonies to treat stomach disorders and “bad spirits,” and during the ceremonies, the shaman drinks the opium and blows toward the sick person, chanting and healing the sickness.⁴⁰ The opium was not used for recreational purposes.⁴¹

The necessity of demonstrating unusual or outstanding equities was not triggered exclusively by serious crimes involving controlled substances. A particularly grave offense also demanded such a showing.⁴² Additionally, such a showing could be mandated because of a single serious crime, or because of a succession of criminal acts that, together, established a pattern of serious criminal misconduct. A respondent who demonstrated unusual or outstanding equities, as required, did not automatically obtain a favorable exercise of discretion; but absent such equities, relief would not be granted in the exercise of discretion.⁴³ On the other hand, Section 212(c) relief was not to be categorically denied to drug offenders who served fewer than five years of incarceration.⁴⁴

Rehabilitation of the respondent was a critical issue in Section 212(c) cases. The Board noted that an applicant with a criminal record “ordinarily” would be required to make a showing of rehabilitation before relief would be granted as a matter of discretion.⁴⁵ Cases “involving convicted aliens [had

³⁴ *Id.* at 587.

³⁵ *Id.*

³⁶ *See* 960 F.2d at 498.

³⁷ *Id.* at 497.

³⁸ No. 93-70783, 1995 WL 314701, at *1, *4 (9th Cir. May 23, 1995).

³⁹ *See id.* at *1.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* Cordoba-Chavez v. INS, 946 F.2d 1244, 1249 (9th Cir. 1991); Buscemi, 19 I. & N. Dec. 628, 633–34 (B.I.A. 1988).

⁴³ *See* Akrap v. INS, 966 F.2d 267, 272–73 (7th Cir. 1992); Roberts, 20 I. & N. Dec. 294, 302–03 (B.I.A. 1991).

⁴⁴ *See* Yepes-Prado v. INS, 10 F.3d 1363, 1371 (9th Cir. 1993).

⁴⁵ Edwards, 20 I. & N. Dec. 191, 196 (B.I.A. 1990).

to] be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion.”⁴⁶ In practice, the immigration judge would pay close attention to the testimony or statements from family members, friends, employers, parole or probation officers, counselors in or outside prison, and psychiatrists. The judge wanted to discern whether the applicant would engage in criminal activity again and look for evidence that the person’s life had changed to the point that such activity was a thing of the past.⁴⁷

Thus, Section 212(c) cases permitted immigration judges to examine the respondent’s crime, prison experience, current living situation, demeanor, attitude, expression of remorse, 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.⁴⁸

This was the context in which John Wong’s deportation hearing was held. John was clearly deportable because his drug conviction was a matter of record. However, given John’s eligibility for Section 212(c) relief, the immigration judge was tasked with weighing the equities against the serious drug offense as well as the armed robbery conviction incurred when John was an adult. Since his initial immigration to the United States at the age of seven, John had never returned to Hong Kong. He knew no relatives or friends in Asia, and would have an extremely difficult time adjusting to life in Hong Kong. His life, his home, his work, and family were in the United States. John had become the sole provider and caretaker of his elderly father. He was married with children. Dozens of letters supporting John came into evidence from friends, family, supervisors, coworkers, his parole officer, and a court-appointed psychologist. In the end, John Wong was granted 212(c) relief by an immigration judge who weighed evidence of John’s rehabilitation and the likely hardship to himself and his family that would result from his deportation. He was given a second chance to establish a law-abiding life in the United States.

That was in 1985. John stayed out of trouble. Years later, he also applied and became a naturalized citizen. He continues to live in San Francisco and has worked with the local transit authority for forty years. He is married and has three daughters. His children are his inspiration—he is clean from all drugs and works daily to keep his life on track. Both he and his wife decided she would stay at home to raise the children, because John

⁴⁶ *Id.*

⁴⁷ BILL ONG HING, *HANDLING IMMIGRATION CASES* 388 (2d ed. 1995).

⁴⁸ When I handled Section 212(c) cases, both as a legal services attorney and in conjunction with law school clinical programs, occasionally judges who were not happy with the two extreme options of deporting the person or granting the waiver would create an in-between option. They would do so by taking some evidence at an initial hearing, and then continuing the matter for several months (sometimes for more than a year) until eventually holding a final hearing. That way, the judge created an informal probationary period, during which time he or she could get a sense of whether the respondent had actually turned his or her life around.

understood the importance of proper parental supervision. John is eternally grateful for the help he received and the second chance he was given.

C. Introducing the “Aggravated Felony” in 1988

In 1988, the Anti-Drug Abuse Act (Drug Kingpin Act) created a new deportation category for a conviction of a single “aggravated felony” that included murder, drug trafficking, and firearms trafficking.⁴⁹ Now, aliens—including long-time, lawful permanent residents—convicted of a single aggravated felony any time after admission are deportable.⁵⁰ The new aggravated felony ground for deportation overlapped with other grounds of deportation. For example, drug convictions that were now aggravated felonies remained independent grounds for deportation under the provision pertaining to drug crimes.⁵¹ Similarly, any person who was convicted of two crimes involving moral turpitude was still deportable, irrespective of whether one or both crimes were aggravated felonies.⁵²

The major effect of the introduction of the aggravated felony ground for deportation was that now a person with a single, non-drug conviction was deportable, irrespective of time of entry—just as had been true of single drug convictions prior to 1988. For example, a person convicted of murder committed more than five years after entering the country was now deportable as an aggravated felon. That was not possible prior to 1988. The problem is that the list of aggravated felonies for deportation purposes includes much more than murder.

The list of aggravated felonies, expanded several times since 1988,⁵³ is so broad that the current president of the National Association of Immigration Judges considers the category a “misnomer that includes many offenses that are neither aggravated nor felonies.”⁵⁴ Today, the term includes murder, rape, and illicit trafficking of a controlled substance.⁵⁵ But theft offenses,

⁴⁹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181 (1988).

⁵⁰ 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2008).

⁵¹ *See id.*

⁵² *See id.*

⁵³ In fact, a significant expansion of the aggravated felony provision took place in 1996, when Section 212(c) relief was eliminated as well. *See infra* note 76 and accompanying text.

⁵⁴ *See Marks, infra* note 115.

⁵⁵ 8 U.S.C.A. § 1101(a)(43) (2013). Aggravated felonies include sexual abuse of a minor; illicit trafficking in any controlled substance (including possession for sale of marijuana, firearms, or destructive devices); money laundering; or any crime of violence (except for purely political offenses) for which the term of imprisonment imposed is at least one year. *Id.* The definition also includes treason; child pornography; operation of a prostitution business; fraud or deceit in which the loss to the victim or victims exceeds \$10,000; tax evasion in which the loss to the U.S. government exceeds \$10,000; crimes relating to the Racketeer Influenced and Corrupt Organizations (RICO) Act, if the term of imprisonment imposed is at least one year; alien smuggling, except in the case of a first offense involving the assisting, abetting, or aiding of the alien’s spouse, child, or parent and no other individual; document trafficking, if the term of imprisonment imposed is at least one year; failure to appear to serve a sentence, if the underlying offense is punishable by imprisonment for a term of five years; and bribery, counterfeiting, or forgery for which the term of imprisonment is at least one year. *Id.* An attempt or conspiracy to commit any of these crimes also is included. *Id.*

when the term of imprisonment is at least one year, also are included.⁵⁶ So what one might regard as minor crimes—for example, selling \$10 worth of marijuana or “smuggling” a baby sister across the border illegally—are aggravated felonies for deportation purposes.⁵⁷

A crime classified as a misdemeanor under state law might be regarded as an aggravated felony under the Immigration and Nationality Act. For example, several offenses are classified as aggravated felonies once a one-year sentence is imposed. These include theft, burglary, perjury, and obstruction of justice, even though the state criminal court may classify the crime as a misdemeanor.⁵⁸ A misdemeanor statutory rape (consensual sex where one person is under the age of eighteen) will also be treated as an aggravated felony. Similarly, a misdemeanor conviction can be an aggravated felony for deportation under the “rape” or “sexual abuse of a minor” categories.⁵⁹

In spite of the creation of the aggravated felony ground for deportation in 1988 and the subsequent expansion of the term, until 1996, a long-term, lawful permanent resident convicted of an aggravated felony remained eligible to apply for discretionary Section 212(c) relief. The deportation respondent’s ability to introduce evidence of remorse, rehabilitation, hardship to family, work ethic, and community engagement before the immigration court remained constant.⁶⁰ *Nhia Bee Vue v. INS*,⁶¹ summarized below, is an example.

In 1980, at the age of 35, Nhia Bee Vue entered the United States as a Laotian refugee and became a permanent resident on July 9, 1982. During the Vietnam War, Vue had been a guerilla fighter working for the United States. He is a Hmong medicine man, or shaman, and at the time of his criminal problems, the Hmong community in his San Diego neighborhood did not use Western medicine. Instead, community members would call Vue to perform spiritual ceremonies to cure their conditions. For example, opium was commonly used to treat stomach problems and “bad spirits.” As part of the ceremony, a shaman such as Vue would drink opium and blow it on the patient while performing “religious chants to work magic” and “heal sickness.”⁶² Opium is not used by the Hmong for recreational purposes. Vue did not distribute opium and only used it during these spiritual ceremonies.

In 1986, Vue was convicted of opium importation and intent to distribute. He was sentenced to three years in prison but ultimately released after eighteen months. In 1988, Vue again pled guilty to opium possession

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See, e.g., United States v. Campbell*, 167 F.3d 94, 97–98 (2nd Cir. 1999) (concluding that federal rather than state law governs when interpreting status of vacated conviction for purposes of immigration statute).

⁵⁹ *See Small*, 23 I. & N. Dec. 448, 449 (B.I.A. 2002).

⁶⁰ *See supra* notes 23–48 and accompanying text (reviewing the weighing of equitable factors for Section 212(c) relief by immigration court).

⁶¹ No. 93-70783, 1995 WL 314701 (9th Cir. May 23, 1995).

⁶² *Id.* at *1.

and was sentenced to 120 days in county jail and probation. In deportation proceedings in 1989, the immigration judge (IJ) denied Section 212(c) relief, finding that Vue's criminal conviction, including an aggravated felony, offset any favorable equities.

The Ninth Circuit reversed and granted 212(c) relief on the grounds that the IJ's consideration of hardship was inadequate. Communist authorities in Laos had "a clear memory for former enemies," thus a Hmong returning to Laos would face danger.⁶³ Vue's family in the United States included his mother, three siblings, his wife, and seven children, two of whom are U.S. citizens. The court held that Vue's family would suffer severe emotional and psychological hardship due to the "uncontested fact" that Vue would be persecuted and likely executed in Laos. Vue was not a "garden variety" opium user or dealer. At his hearing, Vue promised to stop using opium in the future, acknowledging its illegality in the United States.⁶⁴

The creation of the aggravated felony provision in 1988 expanded the bases for deporting long-term, lawful permanent residents who committed crimes. Yet, deportation was not automatic. Until 1996, an immigration judge continued to have the discretion to give such individuals a second chance if deportation respondents presented sufficient social and humane considerations.

D. The Elimination of 212(c) Relief in 1996

The introduction of the aggravated felony concept in 1988 signaled a major shift in focusing on criminal immigrants. The Immigration Act of 1990 foreclosed criminal sentencing judges from making a Judicial Recommendation Against Deportation.⁶⁵ The Violent Crime and Law Enforcement Act of 1994 and Immigration and Nationality Technical Corrections Act of 1994 expanded the list of aggravated felonies and created "administrative" deportation with no hearing before an immigration judge, while the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 required mandatory detention of certain criminal aliens and barred relief for aggravated felons, drug offenders, and double moral-turpitude defendants.⁶⁶

While deporting criminals might be viewed simply as an effort to rid the country of immigrants who pose public safety concerns, in fact, an important purpose of the strengthened penalties was to address prisons' resource allocation.⁶⁷ One-fourth of federal detainees in 1995 were aliens who

⁶³ *Id.* at *3.

⁶⁴ *Id.* at *4.

⁶⁵ See Lisa R. Fine, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491, 494 (1998); Carl Shusterman, *Padilla—Bring Back the JRAD?*, NATION OF IMMIGRANTS (Apr. 18, 2010), <http://shusterman.typepad.com/nation-of-immigrants/2010/04/padilla-bring-back-the-jrad.html>.

⁶⁶ Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Brady, *infra* note 76, at 129.

⁶⁷ Fine, *supra* note 65, at 492.

were taking up precious and costly prison space.⁶⁸ But without a doubt, clamping down on criminal aliens was about removing aliens who were perceived as undeserving of residence.⁶⁹

Within months of the passage of AEDPA, Congress considered further enforcement-focused immigration legislation. Proponents of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) continued to voice concern over resource allocations. Fresh on the heels of the 1996 welfare reform act—the Personal Responsibility and Work Opportunity Reconciliation Act—that placed limitations on public assistance for immigrants,⁷⁰ IIRIRA contained further limits on such benefits.⁷¹ “As a consequence of these laws, with limited exceptions, undocumented migrants became ineligible for all federal public benefits, including loans, licenses, food and housing assistance, and post-secondary education.”⁷²

However, the debates focused heavily on immigrant criminality by increasing categories of deportation and “streamlining the removal process.”⁷³ Prominent Senator Orrin Hatch (R-UT) argued, “We can no longer afford to allow our borders to be just overrun by illegal aliens. . . . Frankly, a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people.”⁷⁴ This conflation of “illegal alien” with pervasive crime was sufficient to affect the treatment of all criminal aliens—even those who were in fact long-term, lawful permanent residents, leading to restrictions on deportation relief for aggravated felons regardless of immigration status.⁷⁵

As a result, IIRIRA eliminated Section 212(c)’s second-chance relief as it had been applied for twenty years. In its place, a cancellation of removal provision was added that precluded the possibility of relief for many who had been able to seek discretionary relief from an immigration judge under the prior provision.⁷⁶ The new provision, INA § 240A(a), permits the Attorney General to “cancel removal” only for certain aliens who commit crimes if the alien (1) has been a lawful permanent resident for at least five years, (2) has resided in the United States continuously for seven years after having been admitted under any status, and, most significantly, (3) has *not* been

⁶⁸ *Id.* at 492–93 (indicating that the one quarter figure is approximate and represents “defendants,” not necessarily “detainees”).

⁶⁹ *Id.* at 493.

⁷⁰ See generally, Bill Ong Hing, *Don’t Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 162 (1998).

⁷¹ See Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1842 (2007).

⁷² *Id.*

⁷³ *Id.* at 1843.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1843–46.

⁷⁶ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187, repealed by IIRIRA § 304(b), Pub. L. No. 104-208, 1996 U.S.C.A.A.N. (110 Stat. 3009) 546, 597 (2000). See Katherine Brady, *Recent Developments in the Immigration Consequences of Crimes*, in OUR STATE OUR ISSUES: AN OVERVIEW OF IMMIGRATION LAW ISSUES 129–30 (Bill Ong Hing ed., 1996).

convicted of any aggravated felony.⁷⁷ The aggravated felony bar, thus, eliminated relief for many lawful resident aliens who would have been eligible for Section 212(c) relief.⁷⁸ The aggravated felony category, which began as additional grounds for crime-based deportation, became a convenient marker for who should not be eligible for discretionary relief.

The effect of eliminating Section 212(c) relief for a long-time, lawful permanent resident who has been convicted of an aggravated felony is evident. The weighing and balancing of equities against the seriousness of the crime does not take place in the removal proceeding, because the immigration judge does not have discretion to grant relief. Hardship to the respondent and to his or her family is rendered irrelevant, as is any evidence of rehabilitation, remorse, or atonement on the part of the respondent. In essence, a single bad act that may have taken “fifteen minutes” to commit can control the outcome, while the rest of the person’s life that could be exemplary and crime free is ignored.⁷⁹

Without the balancing and serious contemplation over factors in deciding whether to exercise favorable discretion, the outcome is preordained once the aggravated felony conviction is final. John Wong, who has led a productive family life after getting a second chance, would have been deported.⁸⁰ Lundy Khoy, who was carrying seven ecstasy tablets as a teenager more than a dozen years ago, awaits removal.⁸¹ And individuals like Jonathan Peinado and José Luis Magaña actually have been deported.

⁷⁷ 8 U.S.C. § 1229b(a) (2004).

⁷⁸ The 1996 amendments also expanded the list of crimes included as aggravated felonies. See IIRIRA § 321(a), Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat. 3009) 546, 627–28, and AEDPA § 440(e), 110 Stat. at 1277–78 (codified at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. II 1996)). For example, a crime of theft for which the person received a one-year sentence was now an aggravated felony. See IIRIRA § 321(a)(3), Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat. 3009) (codified at INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (Supp. II 1996)). Previously, a theft crime was only classified as an “aggravated felony” if the individual received a sentence of five or more years. See INA § 101(a)(43)(G); 8 U.S.C. § 1101(a)(43)(G) (1994) (amended 1996). Although such a crime would have been considered a “crime involving moral turpitude,” it would not have been grounds for instituting deportation unless it was committed within the first five years of entry or was accompanied by a second crime of moral turpitude. Once the immigrant is classified as an aggravated felon, other harsh immigration consequences follow. An aggravated felon is ineligible for release on bond and asylum (although the person might be eligible for “restriction of removal” or the protections of the Convention Against Torture). An aggravated felon who is not a lawful permanent resident can be deported without a hearing before an immigration judge and is not eligible for a waiver for moral turpitude offenses upon application for re-admission. To make matters worse, a deported aggravated felon who returns to the United States illegally can be sentenced up to twenty years in federal prison. 8 U.S.C. § 1326(b)(2).

⁷⁹ Anoop Prasad, Staff Attorney, Asian Law Caucus, Testimony Before the San Francisco Immigrant Rights Commission (Feb. 11, 2013).

⁸⁰ Hing, *supra* note 15 and accompanying text.

⁸¹ See Interview with Lundy Khoy, *supra* note 6 and accompanying text.

*E. Jonathan Peinado*⁸²

Elia Peinado still has fond memories of life in Mexico. Her husband, a photographer and business owner, owned several properties in the province of Durango as well as the home in which the family lived. Along with Elia, they raised their five children with a great deal of care and attention. As a Christian household, they would entertain missionaries as guests, some of whom would tell the family about the United States. These and other friends would often suggest that the family immigrate to the land of which they spoke so highly. Elia's husband decided to visit and see for himself what life in the United States was like and indeed liked what he saw. After some time, the family started making plans to move, selling their properties and those things they didn't need. They obtained the necessary legal papers to immigrate and moved as a family to the United States. Jonathan, Elia's middle child, was only four years old.

Jonathan was the product of a happy home. He and his siblings received daily Bible lessons. And following high school graduation, Jonathan enrolled at Riverside Baptist College. After two years in the university, Jonathan decided to return home and start working. He enjoyed construction work and became a skilled finish carpenter employed by The Living Center, an organization that specializes in building and remodeling homes and hospitals. At age twenty-one, he married and quickly built up an excellent work record.

Unfortunately, Jonathan's life took a bad turn. After eight years of marriage, Jonathan discovered that his wife had been unfaithful, and the couple divorced. He suffered from the separation and eventually started hanging out with the "wrong crowd." During this difficult time in his life, Jonathan was convicted of second-degree burglary. Elia describes this event as "the incident with the check." "He took a check to see if he could deposit it for a man. The check was bad and he was charged for being involved," she says with sadness. Another man, a friend of Jonathan's also charged with the crime, was concerned about supporting his six children if he went to prison. Jonathan felt sorry for his friend, so he took the blame for the entire ordeal, and the other man was set free. Jonathan received a two-year stayed sentence.

"He is such a good person, that sometimes he is dumb," says Elia, recalling a second conviction her son received. Jonathan became involved with drugs and the people who made them. He allowed some of his friends to use his apartment, not knowing what they needed it for. These friends ended up using the space as a lab for making drugs. Jonathan was caught having the drugs in his home and was advised to admit his guilt to receive a lighter sentence. He did so and was convicted of manufacturing methamphetamine, a drug trafficking conviction.

⁸² Interviews with Elia Peinado, mother of Jonathan Peinado, in Oakland, Cal. (Mar. 1, 2007); Kip Steinberg, attorney for Jonathan Peinado, in S.F., Cal. (Feb. 25, 2007).

After his release from jail, Jonathan strengthened his ties with the community and became president of the Baptist Men's Brotherhood. He occasionally led the service and Bible study at the Baptist Church where his father had been pastor for more than forty years. Elia sadly remembers, "When Jonathan's father died of cancer . . . Jonathan took care of everything." Not only did Jonathan see to the burial arrangements for his father, but he also served as the sole provider for Elia, who suffered from diabetes. Despite the vital role he played in the family, he was placed in removal proceedings a year after he was released from jail. This came as a complete surprise, because no one had ever warned him about the possible repercussions his criminal convictions could have on his immigration status.

Unlike his entire immediate family who had naturalized and become U.S. citizens, Jonathan never saw the need to do so. He knew only one home, and he thought that because he had been in the United States as a lawful permanent resident for more than forty years, he was afforded the rights of any other American. He soon found out this was a tragically false assumption. With his two convictions, Jonathan was ordered to be removed to Mexico with no consideration of mitigating circumstances. He knew this would be devastating not only to himself, but also to his whole family. He had recently discovered that his oldest sister was diagnosed with lymphoma, and had begun taking her on regular trips to the hospital to receive chemotherapy. He had taken tests to see if he could be a bone marrow donor for his sister. He was deported to Mexico before the test results arrived. Before that, he had returned to Mexico only one brief time after moving to the United States.

Elia wistfully contemplates her family's situation. "I have a son who was in the air forces [sic] and worked as an engineer. He graduated from UC Berkeley. My husband went to school here [in the United States], learned English, and became a pastor. He went to Golden Gate Seminary. My children went to school. None of them has asked for welfare or been a burden for this country. Jonathan just messed up at one point in his life, and this [deportation] happened." With the rest of her children either out of the country or with their own families to sustain, Elia no longer has the strong support Jonathan provided. In fact, she lost most of her savings trying to help her son adapt to life in a strange country. She traveled with Jonathan to Tijuana when he was deported to try and help him find a place to live. At first, Jonathan was very homesick as he faced culture shock. He had no idea how things worked in Mexico, and he barely spoke Spanish. He would call home every week and ask how the family was doing, worried his mother would get sick.

Jonathan has lived in Mexico for a few years now. When he first arrived, he barely had enough money to eat. Through a connection with friends, he was able to obtain employment as an English teacher in Puerto Vallarta. Still, he makes only enough money to pay for a small place to live. He struggles daily to survive, worrying about his mother as she worries about him. "He should've had another chance," is all Elia can say.

*F. José Luis Magaña*⁸³

José Luis Magaña was only two when his father was able to arrange for the entire family to immigrate to the United States from Mexico. Unable to find work in Mexico, José's father first came to the United States to find a way to support the family. After years of living apart, José, his mother, and four older brothers were reunited with Mr. Magaña. Over the years, José's parents and four brothers all naturalized to become U.S. citizens. José also attempted to naturalize but missed his scheduled interview appointment. He never tried again. After all, he had been in the United States since he was two, he barely spoke any Spanish, and he had never been back to Mexico. He knew no world outside of the United States, so he never expected having to live elsewhere.

When José was eighteen years old, he heard the tragic news that his little nephew, who was not even two years old, had been accidentally run over and killed. After that, José started losing sleep and feeling depressed. Eventually, he would have "episodes" where he would talk loudly and sometimes angrily with no apparent provocation, but he never physically attacked another person. José was suffering from severe bipolar disorder with manic psychotic features. He was often hospitalized and heavily medicated for weeks following emotionally-charged events.

A few years later, José was convicted of interference with a flight crew by assault or intimidation, in violation of 49 U.S.C. § 46504, for which he received a two-year prison sentence. He had no criminal record prior to this event. Various doctors studied and tested José, submitting their reports to the federal court dealing with what was essentially a hijacking case. These reports showed that the incident occurred while José was in the midst of an emotional crisis, and he was probably insane at the time of the offense. He was acutely psychotic and in an extreme state of mania in which his attitude, thinking, and behavior were all substantially abnormal. One doctor described José as suffering from manic grandiosity and irrational thinking that deprived him of the capacity to appreciate the wrongfulness of his actions under the insanity test. Another doctor observed that José would clearly be considered legally insane under the American Law Institute criteria, which includes the inability to adhere to right behavior, even if the individual knew his actions were wrong. Two psychiatrists indicated that José's medication helped but did not necessarily prevent him from experiencing his delusions and other symptoms of his mental disorder. He had great difficulty remembering what happened on the day of the incident as well as what he was thinking and feeling at that time. Despite these reports, José was sentenced to two years imprisonment.

José's life came crashing down further soon after his release from jail. His family eagerly awaited his return home, and they were notified that José

⁸³ Interview with Michael Mullery, immigration attorney of José Luis Magaña, in S.F., Cal. (Jan 25, 2007).

would have to reside at a rehabilitation home for six months initially. Instead, when the time came for José to come home, his family was told that he had been transported to Arizona for removal proceedings; his two-year sentence made his crime an aggravated felony, and he would be automatically deported in spite of his legal permanent resident status.

Today, José lives in an apartment by himself in the Mexican province of Michoacan—a place he has not called home for thirty years, focusing all of his energy on survival. His family sends him the money they can spare. Although he has access to medicine and seems to be doing well emotionally, they worry about the next time his depression triggers uncontrollable episodes. They can no longer be by his side.

Obviously, John Wong should be proud of his accomplishments and how he turned his life around. John got a second chance, and as a society, we should be proud that we gave him that second chance to turn his life around. The number of criminal alien deportation cases—like all deportations—has risen since 1996. DHS does not specify the number of deportees who were aggravated felons, but of almost 400,000 aliens removed in 2011, close to 190,000 were criminals.⁸⁴ In contrast in 1995, only 31,631 of the 50,873 aliens removed were criminals.⁸⁵ After Congress eliminated the second chance opportunities in 1996 for others like John, we can only wonder what those—like Jonathan Peinado and José Luis Magaña—who have been foreclosed of the opportunity would have been able to accomplish with a second chance of their own. We have a glimpse of what Lundy Khoy would accomplish with a second chance, as she continues working as a college counselor, pursuing her degree, and engaging in volunteer work. Instead, she awaits a deportation notice, foreclosed of an opportunity to plead for a second chance.⁸⁶

III. RECENT POLITICAL TRENDS

Immigrants with criminal convictions have become a primary concern for the Department of Justice (DOJ) and the Department of Homeland Security (DHS).⁸⁷ With great fanfare, DHS officials have announced that DHS will focus its resources on detaining and removing the highest-priority individuals—those who present a threat to public safety or national security.⁸⁸ In order to “prioritize the use of its enforcement personnel, detention space,

⁸⁴ OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 114 tbl. 41 (2011), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf. In 2002, 73,429 of the 165,168 deported immigrants were criminals. *Id.* at 106.

⁸⁵ IMMIGRATION & NATURALIZATION SERV., DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF IMMIGRATION & NATURALIZATION SERVICE 218 tbl. 66 (1998), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>.

⁸⁶ See Interview with Lundy Khoy, *supra* note 6 and accompanying text.

⁸⁷ See generally Chacón, *supra* note 71.

⁸⁸ See *US Makes Criminals Priority for Deportation*, ASSOCIATED PRESS (Aug. 19, 2011), <http://www.foxnews.com/us/2011/08/19/us-makes-criminals-priority-for-deportation/>.

and removal assets,” ICE officials are concentrating on gang members, serious felons, and repeat offenders.⁸⁹ This sets the stage for deporting aggravated felons.

The inability of the aggravated felon to raise issues of hardship in removal proceedings is harsh but constitutional, under the doctrine that Congress has plenary power to regulate immigration.⁹⁰ Deportation could be more detrimental to the life of a noncitizen than the imposition of a criminal sentence.⁹¹ Yet courts continue to treat immigration proceedings as civil proceedings, refusing to view deportation as a separate and additional punishment.⁹²

A deported noncitizen faces the possibility of losing family, friends, and livelihood forever. As the Ninth Circuit Court of Appeals notes, “[f]ew punishments are more drastic than expelling persons from this country when their family members are residents.”⁹³ Many deported noncitizens like Lundy are removed to countries where they have virtually no ties. However, the federal courts are not in a position to intervene, because any noncitizen convicted of an aggravated felony is subject to deportation from the United States without statutory relief.⁹⁴

On the surface, the idea of deporting aggravated felons likely has wide appeal. The public expects our government to protect us from dangerous foreign nationals, particularly in the wake of 9/11. Noncitizens convicted of serious crimes are likely to be perceived as “an intolerable threat to both U.S. citizens and resident noncitizens.”⁹⁵ Thus, mandating the deportation of even long-time, lawful residents convicted of aggravated felonies may sound like an exercise in good policy.

However, as we have seen, a closer look at the sweeping, mandatory deportation scheme governing criminal grounds for deportation reveals that as the aggravated felony deportation category expanded, many included crimes are misdemeanors or involve short prison sentences.⁹⁶ The category “includes many crimes that bear little . . . relation to an actual threat to

⁸⁹ See Memorandum from John Morton, Director, ICE, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. But see Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437 (2013).

⁹⁰ See David Cheng, *Emigres of the Killing Fields: The Deportation of Cambodian Refugees as a Violation of International Human Rights*, 25 B.C. THIRD WORLD L.J. 221, 223–24 (2005).

⁹¹ *Id.* at 224.

⁹² See *id.* at 224; Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1651 (2009).

⁹³ *Yepes-Prado v. I.N.S.*, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993).

⁹⁴ See Valerie Neal, *Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons,”* 36 VAND. J. TRANSNAT’L L. 1619, 1646 (2003).

⁹⁵ See *id.* at 1621.

⁹⁶ See *supra* text accompanying notes 49–59.

public safety.”⁹⁷ The law results in automatic deportation for convictions as minor as petty theft, urinating in public, or forgery of a check for less than \$20.⁹⁸ Similarly, a long-term permanent resident who came to this country legally as a small child may, as an adolescent, be convicted of a non-violent offense, such as shoplifting or simple battery that is classified as an aggravated felony.⁹⁹

A. Proportionality

Beyond the breadth of the aggravated felony category, the inability of the aggravated felon to raise hardship or rehabilitation considerations in removal proceedings raises serious concerns about whether the punishment fits the crime. In other words, is the punishment proportional? The 1996 elimination of discretionary 212(c) relief embodies a zero-tolerance policy for aggravated felons. This means they are punished three times for their crime. First they serve their sentence in the criminal justice system and, second, they are deported from their homes. Furthermore, the deported aggravated felon, in what aptly could be labeled a third punishment, is permanently barred from returning to the United States—exiled from home and family.¹⁰⁰ Recent trends in academic circles, among immigration law practitioners in the United States, and in European courts, point toward the possibility of a new, more humane, approach.

Without the opportunity to seek relief, the convicted aggravated felon’s rehabilitation, remorse, atonement, hardship to self and family, and employment potential are irrelevant to the legal outcome. These factors carry no weight because the judge does not have the discretion to balance competing interests.¹⁰¹ This is troubling from a humanitarian perspective because the punishment does not accurately reflect the individual’s culpability.

Anoop Prasad, a legal services attorney who has advocated for proportionality, provided some of this humanitarian perspective in his testimony before the San Francisco Immigrant Rights Commission:

⁹⁷ Neal, *supra* note 94, at 1621.

⁹⁸ See Elena Shore, *Don’t Pee in Public: Petty Crimes Can Get Immigrants Deported*, PAC. NEWS SERVICE (Jan. 28, 2005), http://news.newamericamedia.org/news/view_article.html?article_id=2c2dc92abd5d9dd37a92d273a06f1f00; see also Celia Dugger, *After Crime, She Made a New Life, but Now Faces Deportation*, N.Y. TIMES, Aug. 11, 1997, at A8, available at <http://www.nytimes.com/1997/08/11/world/after-crime-she-made-a-new-life-but-now-faces-deportation.html>; IMMIGRANT LEGAL RESOURCE CTR., § N.11 BURGLARY, THEFT AND FRAUD 234 (2011), available at http://www.ilrc.org/files/documents/n.11-burglary_theft_fraud.pdf.

⁹⁹ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1940 (2000).

¹⁰⁰ Michael J. Wishnie, *Proportionality: The Struggle for Balance*, 72 U. PITT. L. REV. 431, 451–52 (2011); Juan Rocha, *Exile is Punishment — A Right to Counsel for Immigrant Detainees*, NEW AMERICAN MEDIA, (Nov. 6, 2013), <http://newamericamedia.org/2013/11/deportation-is-banishment-banishment-is-punishment.php> (“Deportation is banishment or exile – it is a punishment that endures in perpetuity.”).

¹⁰¹ See *infra* notes 102, 114–124 and accompanying text.

We must restore proportionality to our immigration system. Often I go into court and I watch hearings take place and the hearings only last a few minutes. The judges deport permanent residents after looking just at their conviction records. The person I talk to and the person the judge sees are two completely different people. The people I talk to have family members here, they've been rehabilitated, they've given back to their communities. But the judge doesn't get to look at any of that. All the judge looks at is the conviction records. And this is the fundamental problem with our criminal deportation system. *It judges people based on their worst acts alone, their worst fifteen minutes of their lives. It is a standard by which none of us would want to be judged.* [Consider the case of one of my clients.] The summer before he was going to start college, he got involved with a group of kids who took [] part in a robbery. He was tried as an adult and sentenced to nine years in prison even though he had no prior criminal records. While he's been incarcerated he finished college, he took part in the California Department of Corrections' Fire Camp Program. He trained as a firefighter, he's trained as an EMT. For the last two years he's been a first responder Later this year, he's going to be turned over [to ICE] and go in front of an immigration judge. But the judge will never know any of that. He'll never know he lived here since he was a child. He'll never hear from his heart-broken mother. He'll never hear from the people whose lives he saved as an EMT. All he'll see is that one criminal conviction when [my client] was sixteen.¹⁰²

The notion that the punishment does not fit the crime often is stated in legal terms as lacking in "proportionality," thereby violating due process or the prohibition against cruel and unusual punishment when the punishment is too severe.¹⁰³ In the deportation context, a strong case has been made that the sanction of removal may very well be impermissibly disproportional to the criminal behavior that makes a person deportable. For example, Angela Banks has reasoned that since deportation can be punitive:

The [Supreme] Court's conclusion that the Due Process Clause prohibits punishment that is "greater than reasonably necessary to punish and deter" is an important development for deportation. It opens the door for new conversations about the scope of the state's power to deport noncitizens. This jurisprudence suggests that deportation decisions, like punitive damage awards, must be proportional and that excessive or disproportionate deportation orders exceed the authority of the state to regulate immigration.¹⁰⁴

¹⁰² Prasad, *supra* note 79.

¹⁰³ See Banks, *supra* note 92, at 1667–68; Wishnie, *supra* note 100, at 445–47.

¹⁰⁴ Banks, *supra* note 92, at 1669 (internal citation omitted); see also Wishnie, *supra* note 100, at 457 (arguing that the additional punishments of deportation and exile for lawful perma-

The use of a proportionality lens in assessing the propriety of deportation is common in European tribunals. For example, in *Nasri v. France*,¹⁰⁵ the European Court of Human Rights blocked the deportation of a thirty-five-year-old Algerian national who had several convictions—including theft, assault, and participation in a gang rape:

[R]emoving the applicant from his family and sending him to a country with which he has no ties would expose him to suffering of such gravity that to do so might be regarded as inhuman treatment. In a democratic society which adheres to the principle of respect for the dignity of the human person, a measure of such severity *cannot be proportionate* to the legitimate aim of maintaining public order.¹⁰⁶

The European Commission of Human Rights agreed to review Nasri's case on proportionality grounds and considered several psychological evaluations, the possibility that he would be tortured back in Algeria, and the fact that his "family relationships would be made impossible" if he were deported. After considering these factors, the commission concluded that Nasri's deportation was disproportionate and could not be justified.¹⁰⁷

In *AR (Pakistan) v. Secretary of State for the Home Department*,¹⁰⁸ the deportation of an asylum applicant who had been granted indefinite permission to remain in the United Kingdom was upheld, but not until the applicant had been given two warnings following several criminal convictions and unsuccessful participation in drug rehabilitation programs. The question in the words of the Court of Appeal in the United Kingdom in these cases is "*whether deportation is proportionate*, given due weight to the public interest and to the right to family life."¹⁰⁹ And the "task of deciding whether deportation is or is not proportionate typically involves weighing up conflicting factors."¹¹⁰

In deciding that the deportation was not disproportionate, the Court of Appeal considered the criminal record and the warnings that had been issued. But the court also paid close attention to the fact that the applicant had children. The applicant and his wife had divorced, and their three children lived with their maternal grandparents.¹¹¹ As in the *Nasri* case, the court was well aware of the fundamental right to family life protected by Article 8 of the European Convention on Human Rights.¹¹² However, the court was influenced by the fact that the applicant's earlier close contact with his children

nent residents convicted of aggravated felonies "may contravene the due process requirement of proportionality").

¹⁰⁵ *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458 (1996).

¹⁰⁶ *Id.* at 470 (emphasis added).

¹⁰⁷ *Id.* at 466–70.

¹⁰⁸ *AR (Pakistan) v. Secretary of State for the Home Department*, [2010] EWCA (Civ) 816 (appeal taken from Asylum & Immigration Tribunal).

¹⁰⁹ *Id.* at [19] (emphasis added).

¹¹⁰ *Id.* at [24].

¹¹¹ *Id.* at [2].

¹¹² *Id.* at [7].

was no longer the pattern—in part because of his intermittent time in prison—and therefore was insufficient “to outweigh the public interest in his deportation.”¹¹³

Some immigration judges and criminal justice officials support a call for proportionality when it comes to the deportation of immigrants convicted of crimes.¹¹⁴ Judge Dana Leigh Marks, president of the National Association of Immigration Judges, criticizes the current system as a “blunt instrument” that does not “serve the public and private interests.”¹¹⁵ Because many crimes classified as aggravated felonies are in fact “neither aggravated or felonies” in the literal sense, Judge Marks argues that immigration judges should have the discretion to consider the “individual circumstances unique to each case.”¹¹⁶ Paul Grussendorf, a former immigration judge in San Francisco and Philadelphia is also troubled by the aggravated felony bar to discretionary relief no “matter how old or minor the offense.”¹¹⁷ He agrees that immigration judges need the discretion to weigh “the age of the conviction, the severity of the offense, evidence of rehabilitation, [and] family ties in the United States.”¹¹⁸

Robert Johnson, a past president of the National District Attorneys Association, had assumed that mandatory detention and deportation would result from “only the most heinous crimes,” but learned that aggravated felonies include offenses like “possessing marijuana, shoplifting or getting in a fight at a sports game.”¹¹⁹ While U.S. citizens often get their cases dismissed after completing a treatment program, immigrants do not get that chance. Johnson argues that the criminal justice system would be more efficient and just if prosecutors knew that immigration judges would consider the individual factors, including “U.S. military service, rehabilitation and family ties, to determine if it is in the best interests of the United States to let someone remain in the country.”¹²⁰ Similarly, Steven Jansen, a former prosecutor from Detroit, uses the language of proportionality writing that our system strives for “case outcomes that reflect a balance of punishment, compassion and concern for victims and community” including for offend-

¹¹³ *Id.* at [23].

¹¹⁴ The Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), underscores the legitimate concern over what is at stake in criminal prosecutions involving noncitizens. Criminal defense counsel must adequately advise noncitizens about the possible collateral deportation consequences of guilty pleas.

¹¹⁵ Dana Leigh Marks, *Let Immigration Judges be Judges*, THE HILL (May 9, 2013, 8:03 PM), <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>.

¹¹⁶ *Id.*

¹¹⁷ Paul Grussendorf, *Immigration Judges Need Discretion*, SAN FRANCISCO CHRON. ONLINE (Apr. 12, 2013), <http://www.sfchronicle.com/opinion/openforum/article/Immigration-judges-need-discretion-4428406.php>.

¹¹⁸ *Id.*

¹¹⁹ Robert Johnson, *Justice System Should Determine Which Immigrants Are Public Safety Risk*, ROLL CALL (May 16, 2013, 1:22 PM), http://www.rollcall.com/news/justice_system_should_determine_which_immigrants_are_public_safety_risk-224879-1.html.

¹²⁰ *Id.*

ers who are not citizens of the United States.¹²¹ Yet, the outcomes in deportation cases do not meet those goals. Jansen argues that as “problem solvers,” prosecutors understand that “crime prevention and community safety demand a more nuanced [and holistic] approach.”¹²² Even Jeff Rosen, the District Attorney of Santa Clara County, California, who believes that “[i]mmigrants who are here unlawfully and commit serious felonies should be prosecuted, punished and deported,” submits that immigrants who commit minor offenses “should be prosecuted, held accountable and then allowed to earn the right to continue on a legal path to citizenship.”¹²³ He argues that deportation in some cases is “a grossly disproportionate punishment” that would “tear a family apart.”¹²⁴ This is a damaging and costly aspect of this automatic deportation policy.¹²⁵

These critiques of “automatic deportation” are voiced by prosecutors and immigration judges. Their call for a more “holistic” approach to deportation is based on witnessing first hand the disproportionate outcomes of the zero tolerance policy imposed on aggravated felons. Their interest in advocating for the possibility of waivers and more judicial discretion is about seeking proportional justice from their unique perspective as prosecutors and judges.

Commentators have offered ideas on how to remedy deportation disproportionality in the United States. Michael Wishnie suggests that “respondents in removal proceedings might argue that their removal would violate the principles of proportionality inherent in the Due Process Clause . . . and the Eighth Amendment [and] in appropriate cases, courts should find that removal is so grossly disproportionate to the gravity of the offense as to be forbidden by the Constitution.”¹²⁶ The key to remedying disproportionality, in Angela Banks’s view, is creating “a category of relief from removal that is rights-based rather than discretionary and ensuring that the Attorney General

¹²¹ Steven Jansen, *A Prosecutor’s Call: Justice for All*, THE HILL (May 21, 2013, 12:30 PM), <http://thehill.com/blogs/congress-blog/judicial/300903-a-prosecutors-call-justice-for-all>.

¹²² *Id.*

¹²³ Jeff Rosen, *Immigration Reform Should End Injustice to Minor Offenders*, SAN JOSE MERCURY NEWS ONLINE (Aug. 9, 2013), http://www.mercurynews.com/opinion/ci_23814309/jeff-rosen-immigration-reform-should-end-injustice-minor.

¹²⁴ *Id.* District Attorney Rosen provides this as an example of “youthful transgressions” being grossly disproportionate to the punishment of deportation:

Take the case of a San Jose truck driver who came to this country as a child. I’ll call him Robert Smith. He was convicted of two minor drug crimes more than 15 years ago, served his time, paid his fines, completed probation and had his convictions lawfully expunged. Since then, he has had no run-ins with the law. He is gainfully employed, pays taxes and has been granted legal status. His wife and their two children are citizens.

But this hardworking immigrant is on the cusp of deportation because of those two minor drug convictions from his early 20s, which came to light when he sought legal status. These are convictions that today would result in treatment, fines and probation rather than jail.

Id.

¹²⁵ *Id.*

¹²⁶ Wishnie, *supra* note 100, at 465.

can consider all factors necessary to ensure that a deportation order is not disproportionate. This could be achieved through the creation of a new form of relief from deportation available only in cases of crime-related deportation.”¹²⁷

Elsewhere, I have advanced suggestions that would address the disproportionality problem that attaches to the deportation of long-time, lawful permanent residents who have been convicted of an aggravated felony.¹²⁸ One solution is to reinstate discretionary Section 212(c) relief to provide the immigration judges with the opportunity to consider the facts related to the respondent’s rehabilitation, atonement, remorse, family support, and employability on a case-by-case basis.¹²⁹ The balancing of factors that the immigration judge would conduct means that the relief would not be automatic—just as it was not automatic prior to 1996.¹³⁰ The application of Section 212(c) prior to 1996 essentially was a proportionality analysis.¹³¹ The balancing of equities and evidence of rehabilitation against the criminal record was an assessment of whether the respondent deserved a second chance.

I believe that proportionality and fairness would be promoted if immigration judges had more assessment tools or alternatives to immediate deportation available to them. Even during the 212(c) relief era, the immigration court only had two options: deport or grant relief—nothing in between. The suggestions that I have made, premised on a belief that individuals are capable of changing their lives, would address that gap while striving to meet the goals of proportionality.

Thus, when punishment is put on hold pending a reasonable chance at rehabilitation, then at least there is an opportunity to avoid disproportionate punishment. For example, my advocacy for a “relational or restorative approach” to the deportation process is based on an understanding that “although socioeconomic factors such as poverty may lead to crime, families, schools, and ‘informal social bonds’ could play important roles in changing individual paths” and that “[f]ocusing on restoring relationships . . . is time well spent in terms of reducing recidivism.”¹³² Similarly, instituting probation as a conditional alternative to deportation, complete with probation officers and regular reporting requirements, would enable monitoring of the rehabilitation.¹³³ In the same vein, offering a diversion program for treatment or community service in lieu of deportation are criminal justice practices that may be appropriate in the deportation context as well.¹³⁴ The idea is that even if the process is not terminated prior to getting to the immigra-

¹²⁷ Banks, *supra* note 92, at 1676.

¹²⁸ See Hing, *supra* note 15.

¹²⁹ *Id.* at 1906.

¹³⁰ See *supra* text accompanying notes 27-48.

¹³¹ *Id.*

¹³² Hing, *supra* note 15, at 1904.

¹³³ *Id.* at 1906.

¹³⁴ *Id.* at 1907.

tion court, provide the immigration judge with assistance from professionals or give the judge the ability to call a time out in the process. This could alleviate the necessity to order deportation when the judge is not confident whether the respondent is adequately rehabilitated on the day of the hearing.

I also have argued that a practice in the “world of corporate fraud prosecutions” is particularly worthy of emulation in the deportation context. To discourage further criminal behavior and foster rehabilitation of responsible officials in a time of corporate scandals, federal prosecutors have entered into deferred prosecution agreements (DPAs) with corporate wrongdoers.¹³⁵ Analogous to “pretrial diversion” or probation, prosecutors suspend charges against the company. Charges are dismissed after a period of time if the conditions of the agreement are fulfilled. The corporation institutes reforms, pays penalties, and makes victim restitution.¹³⁶ Instituting something akin to DPAs in the deportation context also would incentivize rehabilitation and good behavior. The case would be held in abeyance for a period of time under certain conditions. For example, the deportation respondent might be required to obtain employment, seek counseling, receive drug treatment (if appropriate), check in regularly with ICE, and, of course, refrain from any criminal behavior. If the person comes through this period successfully, then deportation charges would be dismissed. Disproportionate punishment is averted, and the community is better off because family separation is prevented and the issue of public safety has been addressed.

B. Changing Political Attitudes

Attorney General Eric Holder made headlines when he addressed the annual meeting of the American Bar Association on August 12, 2013.¹³⁷ His speech outlined important proposals that represent a major philosophical

¹³⁵ *Id.* at 1908 (citing Lisa K. Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 52 N.Y.U. L. REV. 311 (2007)).

¹³⁶ *Id.* at 1908–09 (citing Lisa K. Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 52 N.Y.U. L. REV. 311 (2007)). For example, a deferred prosecution agreement was approved in the prosecution against British banking giant HSBC that was alleged to have allowed drug cartels to launder hundreds of millions of dollars. Under the DPA, HSBC will pay \$1.9 billion to regulators and file quarterly reports. The case remains on the docket of the federal district court in order to ensure the compliance with the DPA. The deal requires HSBC to bolster its anti-money laundering program under the eye of an independent compliance monitor. If HSBC meets its terms, the charges will be dismissed in five years. See Brett Wolf, *Federal Judge Approves HSBC Deferred Prosecution Agreement*, REUTERS (Jul. 3, 2013), <http://blogs.reuters.com/financial-regulatory-forum/2013/07/03/federal-judge-approves-hsbc-deferred-prosecution-agreement/>.

¹³⁷ See, e.g., Robin Wilkey & Ryan J. Reilly, *Eric Holder: ‘Broken’ Justice System Needs ‘Sweeping’ Changes, Reforms to Mandatory Minimum*, HUFFINGTON POST (Aug. 12, 2013), http://www.huffingtonpost.com/2013/08/12/eric-holder-mandatory-minimum_n_3744575.html; Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, at A1; Daniel Klaidman, *How Eric Holder Got His Chance to Overhaul Broken Sentencing System*, THE DAILY BEAST (Aug. 16, 2013), <http://www.thedailybeast.com/articles/2013/08/16/how-eric-holder-got-his-chance-to-overhaul-broken-sentencing-system.html>.

shift in how we should view crime and punishment in the United States.¹³⁸ Public safety is not simply a matter of prosecution and incarceration; to be effective, we also must focus on prevention and reentry. Importantly, a driving force behind this call to rethink our approach is his concern that “many aspects of our criminal justice system may actually exacerbate . . . problems, rather than alleviate them.”¹³⁹ He concludes:

The bottom line is that, while the aggressive enforcement of federal criminal statutes remains necessary, we cannot simply prosecute or incarcerate our way to becoming a safer nation. To be effective, federal efforts must also focus on prevention and reentry. We must never stop being tough on crime. But we must also be smart and efficient when battling crime and the conditions and the individual choices that breed it.

Ultimately, this is about much more than fairness for those who are released from prison. It’s a matter of public safety and public good. It makes plain economic sense. It’s about who we are as a people. And it has the potential to positively impact the lives of every man, woman, and child – in every neighborhood and city – in the United States. After all, whenever a recidivist crime is committed, innocent people are victimized. Communities are less safe. Burdens on law enforcement are increased. And already-strained resources are depleted even further.

Today – together – we must declare that we will no longer settle for such an unjust and unsustainable status quo. To do so would be to betray our history, our shared commitment to justice, and the founding principles of our nation. Instead, we must recommit ourselves – as a country – to tackling the most difficult questions, and the most costly problems, no matter how complex or intractable they may appear. We must pledge – as legal professionals – to lend our talents, our training, and our diverse perspectives to advancing this critical work. And we must resolve – as a people – to take a firm stand against violence; against victimization; against inequality – and *for* justice.

Holder’s call for criminal justice reforms, especially coming from the nation’s chief law enforcement official, may signal a fundamental shift from the law-and-order mentality that brought about the 1996 “reforms” to a more nuanced approach to keeping communities safe. A return to judicial discretion in the criminal deportation regime is consistent with this new philosophy.

The idea of providing alternatives to deportation, developing more tools for the immigration courts, and injecting norms of proportionality in deliber-

¹³⁸ See Eric Holder, *supra* note 5.

¹³⁹ *Id.*

ation draws great support from the philosophy and specifics contained in Attorney General Holder's remarks. If we agree that the results in many of the current criminal immigration cases are "unjust," then we should be willing to "break free of a tired status quo [and] to take bold steps to reform."¹⁴⁰ In fact, we have a "duty to identify those areas we can improve in order to better advance the cause of justice for all Americans."¹⁴¹ Just as incarceration should not be used "merely to warehouse and forget," we should not deport to merely remove and forget about the deportee and his or her family.¹⁴² Acknowledging the "vicious cycle of poverty, criminality, and incarceration [that] traps too many Americans" challenges us to acknowledge that many immigrants are caught up in that vicious cycle and also deserve to benefit from efforts to break that cycle.¹⁴³

Just as the Attorney General challenges us to do "something about the lives being harmed, not helped, by a criminal justice system," we should do something to reform a deportation system that helps those caught up in the system to better themselves, thereby helping their families and the community.¹⁴⁴ A recognition that "zero-tolerance school discipline policies . . . do not promote safety [and are] gateways to the criminal justice system" challenges us to recognize that zero-tolerance, automatic deportation policies are short-sighted.¹⁴⁵ The Attorney General recognizes that "young black and Latino men are disproportionately likely to become involved in our criminal justice system."¹⁴⁶ We should recognize the fact that many criminal deportees are Latino men, which means that deportation is one of the manifestations of that failed criminal justice system.¹⁴⁷

The innovative programs aimed at preventing "at-risk young people from getting involved in the federal prison system" inspires creative thinking about how to handle deportation cases involving respondents who committed their indiscretions as teenagers. The commitment to "evidence-based programs and services, like treatment and supervision," directly connects to my calls to make diversion and treatment tools available to the immigration courts. Understanding that "we cannot simply prosecute or incarcerate our way to becoming a safer nation," forces us to question the wisdom of simply deporting criminal immigrants and thinking that that makes our communities safer. Finally, the Attorney General's challenge to us to "pledge—as legal

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Racial disparity in immigration enforcement is readily seen in another ICE enforcement program—the Secure Communities Program. An analysis of that program revealed that "Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States." AARTI KOHLI, ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW AND SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

professionals (and all stakeholders)—to lend our talents, our training, and our diverse perspectives to advancing this critical work” should inspire us to use our experience and knowledge to be creative about how to make the deportation system more about justice than simply about removal.¹⁴⁸

IV. CONCLUSION

John Wong’s triumph over a history of criminal activities as a young man to become a hard-working, law-abiding, stable family man is a tribute to his diligence, maturity, and strong values. His triumph also is a tribute to the good judgment of an immigration judge who had the discretion to grant John a second chance. That good judgment was possible prior to 1996. Unfortunately, because their cases occurred after 1996, neither Jonathan Peinado nor José Luis Magaña got a chance to prove themselves. Although Lundy Khoy and Anoop Prasad’s client already have demonstrated their rehabilitation, they await deportation.¹⁴⁹

Of course, no one can perfectly predict what an individual will do with a second chance; there are too many variables that affect behavior. However, in this essay, I have attempted to make the case that a blanket rule against second chances is too harsh and that immigration judges should at least be able to exercise discretion. The zero-tolerance approach to aggravated felons results in an outcome—deportation—that is disproportionate to the crime in too many cases. We should implement alternatives to deportation, including probation or diversion. As we know from John Wong, Jonathan Peinado, José Luis Magaña, and Lundy Khoy, the cases often include individuals who have entered the United States at very young ages, involve families, and involve other very sympathetic facts. That includes the environment in which the market forces of migration placed their families.

We should be creative in developing alternative approaches to immediate deportation, because the no-option approach hurts the affected family

¹⁴⁸ While not directly addressing the issue of deporting aggravated felons, a shift to recognizing the need for more reasonable approaches to immigration enforcement—even when noncitizens are arrested—is represented by state and local efforts to resist cooperation with ICE. Several jurisdictions have adopted non-cooperation policies when ICE places a hold on an immigrant who has been arrested by state or local authorities. See, e.g., Elise Foley & Roque Planas, *Trust Act Signed in California to Limit Deportation Program*, HUFFINGTON POST (Oct. 5, 2013), http://www.huffingtonpost.com/2013/10/05/trust-act-signed_n_4050168.html; Michele Waslin, *ICE, Local Governments Make Important Changes to Immigration Detainer Policies*, IMMIGRATION IMPACT (Jan. 10, 2012), <http://immigrationimpact.com/2012/01/10/ice-local-governments-make-important-changes-to-immigration-detainer-policies/>. San Francisco and Santa Clara County in California recently adopted strong local policies resisting cooperation with ICE detainers. See Christopher Strunk & Helga Leitner, *Resisting Federal–Local Immigration Enforcement Partnerships: Redefining ‘Secure Communities’ and Public Safety*, 1 TERRITORY, POLITICS, GOVERNANCE 62, 75 (2013), available at <http://www.sscnet.ucla.edu/geog/downloads/7235/489.pdf>.

¹⁴⁹ Anoop Prasad’s client, who participated in a robbery as a teenager, has completed college and is now a trained firefighter and EMT. See Prasad, *supra* notes 79, 102 and accompanying text.

and does nothing to promote rehabilitation. By deporting noncitizens who have grown up here, we essentially “throw away” their lives.¹⁵⁰ Probation, deferred prosecution agreements, diversion, or the possibility of a second chance should be put on the table by ICE officials as well as policymakers. We should take responsibility for the environment that has resulted in high crime rates in certain immigrant and refugee communities. That responsibility requires that we roll up our sleeves and move forward, rather than remain paralyzed by the law and the difficulty of the task.

Providing alternatives to the zero-tolerance approach to criminal immigrants is not synonymous with being soft on crime. This is about developing smarter approaches to the challenge. Attorney General Holder reminds us that zero tolerance is short-sighted and fails to address the underlying problems.

Critics may complain that providing alternatives to deportation, such as probation or diversion programs, would be financially costly. DHS staffing costs to monitor eligible individuals would likely rise, and state and local governments could face increased demands for such things as job training, substance abuse programs, counseling services, and community college courses. But the potential benefits from these investments in human capital are enormous economically and incalculable emotionally for affected family members and friends. John Wong is a productive employee of the San Francisco municipal railway system and is supporting his family. Jonathan Peinado was supporting his mother. Lundy Khoy is counseling others and supporting herself. As in the DPA situation, a deportation respondent provided with an opportunity to establish rehabilitation bears the primary responsibility personally and may not need to access state or local services. Community-based organizations could establish programs for rehabilitation services. Given the potential benefits to the individual, the affected family, and the community, we may not want to be overly concerned about the price tag of these options. They may be worth it, whatever the cost. In my experience and the experience of other immigration practitioners from the pre-1996 era, recidivism among Section 212(c) clients was extremely low.¹⁵¹

¹⁵⁰ In a review of the highly acclaimed film *The Boys of Baraka*, a documentary about a group of at-risk, inner-city boys from Baltimore who are transported to a rural two-year boarding school in Kenya, *L.A. Times* movie critic Kenneth Turan wrote several years ago:

[The film’s] greatest service is in shining a light on a problem many people don’t want to talk about: *our willingness to throw away the lives of kids* who grow up in dangerous neighborhoods far from quality schools. The enormous potential of these children, how eagerly they respond to the kinds of educational opportunities more fortunate young people take for granted, should make us wonder how society let things get this bad.

Kenneth Turan, *The Light Beyond the City’s Dead End: “The Boys of Baraka” Examines How a Kenya School Is Used to Help African American Boys in Baltimore*, *L.A. TIMES*, Jan. 20, 2006, at E4 (emphasis added).

¹⁵¹ In fact, in the dozens of 212(c) cases I handled, none of my clients ever recidivated. See also Interviews with Kip Steinberg, attorney for Jonathan Peinado, in S.F., Cal. (Feb. 25, 2007); Donald Ungar, Immigration Attorney, in S.F., Cal. (Mar. 20, 2013); Marc Van der

Why push ourselves to come up with alternatives to deportation and reinstitute immigration judge discretion? Because, as Justice Brandeis reminded us more than ninety years ago, deportation may deprive a person of “all that makes life worth living.”¹⁵² Because immigration judges and prosecutors see the need for nimble approaches and more discretion, rather than being unnecessarily harsh on individuals and their families.¹⁵³ Because we can help position these individuals to become better and, in the process, help their families and ourselves as well.

Hout, Immigration Attorney, in S.F., Cal. (Apr. 30, 2012), Martin Lawler, Immigration Attorney, in S.F., Cal. (June 25, 2010).

¹⁵² *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

¹⁵³ In a different context involving the sentencing of undocumented immigrants who have reentered illegally—usually to find work and to be with family, U.S. District Judge Robert Brack expressed frustration that is similar to that of immigration judges who want more discretion in cases involving the deportation of criminal immigrants: “For 10 years now, I’ve been presiding over a process that destroys families every day and several times each day.” *Prosecuting Migrants is Hurting Families: Immigration Reform Should End Costly, Misguided Criminal Cases*, HUMAN RIGHTS WATCH (May 22, 2013), <http://www.hrw.org/news/2013/05/22/us-prosecuting-migrants-hurting-families>.