

THE IMPACT OF NEW POLICIES ADOPTED AFTER SEPTEMBER 11 ON  
LAWFUL PERMANENT RESIDENTS FACING DEPORTATION UNDER THE  
AEDPA AND IIRIRA AND THE HOPE OF RELIEF UNDER THE FAMILY  
REUNIFICATION ACT

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## I. INTRODUCTION

Loeun Lun was an infant when his family fled the killing fields of Cambodia.<sup>1</sup> Like many other Cambodians, Lun and his parents risked their lives to escape the horrific reign of the Khmer Rouge.<sup>2</sup> Under the Khmer Rouge, roughly one-fifth of the population died from “disease, starvation, and execution” as a consequence of the Khmer Rouge’s “deranged ultra-Communist social engineering scheme.”<sup>3</sup> After several years of living in refugee camps, Lun and his family eventually settled as lawful permanent residents (LPRs)<sup>4</sup> in a “crime-ridden housing project” in Tacoma, Washington.<sup>5</sup>

On August 20, 1994, during a fight with a group of teenagers, Lun pulled out a gun and fired shots.<sup>6</sup> He was later arrested and, after pleading guilty to assault charges, sentenced to eleven months in prison.<sup>7</sup> After being released, he found employment, married, had two children, and continued his life as a law-abiding individual.<sup>8</sup> At the request of his wife, Lun applied for naturalization, but failed the test.<sup>9</sup> However, during his naturalization interview, he honestly acknowledged his past criminal conviction.<sup>10</sup> Some years later, his wife successfully obtained a “make-up exam” for him at which the immigration official suggested that Lun appear in person.<sup>11</sup> On March 12, 2002, Lun and his family arrived at the Seattle immigration office.<sup>12</sup> An immigration officer met them and, instead of receiving an interview, Lun was detained and placed in deportation proceedings.<sup>13</sup> The reason Lun was subject to this

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<sup>1</sup> Deborah Sontag, *In a Homeland Far From Home*, N.Y. TIMES, Nov. 16, 2003, § 6 (Magazine), at 48.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 123-24 (3d ed. 2002). LPRs are aliens who were lawfully admitted into the United States for permanent residency and given a green card. They are permitted to work and are eligible for certain government-subsidized benefits. LPRs include refugees who fled their countries for various reasons, mainly persecution, and were granted asylum by the United States. *Id.*

<sup>5</sup> Sontag, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

treatment was because the Immigration and Naturalization Service<sup>14</sup> considered Lun a criminal alien<sup>15</sup> under the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>16</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>17</sup>

Currently, many LPRs are in a similar situation. Perhaps the most devastating feature of the AEDPA and IIRIRA is that they apply retroactively to punish LPRs for past crimes.<sup>18</sup> Since the implementation of the AEDPA and IIRIRA, many LPRs with criminal records find themselves facing deportation regardless of the severity of their crimes or how well they have rehabilitated. For instance, under the AEDPA, an LPR is classified as a criminal alien if he has committed a certain criminal offense satisfying the AEDPA's definition of an "aggravated felony" after the date of admission into the United States, even if this offense took place prior to the enactment of the AEDPA.<sup>19</sup> Furthermore, a criminal alien is deportable if he has committed a crime of moral turpitude within five years of entry into the United States and received, though not necessarily served, a sentence of more than one year in jail.<sup>20</sup>

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<sup>14</sup> On March 1, 2003, the Immigration and Naturalization Service (INS) was abolished and replaced by three organizations: the Bureau of Citizenship and Immigration Services (BCIS), the Bureau of Customs and Border Protection (BCBP), and the Bureau of Immigration and Customs Enforcement (BICE). These three bureaus are under the Department of Homeland Security and they each serve separate functions. BCIS is responsible for processing all immigration applications and adjudicating petitions. BCBP is in charge of border patrol and inspections of goods and individuals at all ports of entry, among other Customs services. BICE is responsible for investigation of immigration violations as well as detention and removal proceedings. See INS Press Release, INS Assures Immigrants of Smooth Transition to Department of Homeland Security (Feb. 26, 2003), <http://uscis.gov/graphics/publicaffairs/newsrels/insassure.htm>.

<sup>15</sup> Paige Krasker, Note, *Crimes of the Past Revisited: Legal Aliens Deported for Past Crimes Under the Retroactive Application of the Antiterrorism and Effective Death Penalty Act*, 22 SUFFOLK TRANSNAT'L L. REV. 109, 116 (1998).

<sup>16</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA] (codified as amended in scattered sections of the *United States Code*).

<sup>17</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA] (codified as amended in scattered sections of Title 8 of the *United States Code*).

<sup>18</sup> Presbyterian Church (USA), Fix '96 and Other Immigration Issues, <http://www.pcusa.org/washington/issuenet/crrl-000800.htm> (last visited Apr. 15, 2005).

<sup>19</sup> Lourdes M. Guiribitey, Comment, *Criminal Aliens Facing Indefinite Detention Under INS: An Analysis of the Review Process*, 55 U. MIAMI L. REV. 275, 276-77 (2001).

<sup>20</sup> Immigration and Nationality Act § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2004) [hereinafter INA].

Now, with the introduction of new border protection enforcement and stricter immigration policies after the September 11 terrorist attacks, more immigrants are at risk for deportation.<sup>21</sup> Even worse for these individuals is the reality of being returned to a country with which they have not maintained contacts or from which they risked their lives to escape. Once deported, LPRs are permanently banned from returning to the United States.<sup>22</sup> In most cases, deportation forces LPRs to leave behind everything, including their families and friends, for life in a country that is unfamiliar to them.<sup>23</sup>

Normally, individuals awaiting deportation are placed in immigration detention facilities until their native countries agree to accept their return.<sup>24</sup> The Attorney General has interpreted the Immigration and Nationality Act (INA) as allowing for indefinite detention of deportees.<sup>25</sup> This is true even when the United States does not have a repatriation agreement with a deportee's native country; thus such deportees will not likely be able to return to their native countries.<sup>26</sup> Often, countries are reluctant to admit criminal aliens because they resent the burden of sheltering America's criminals.<sup>27</sup> Until recently, lack of a repatriation agreement meant that LPRs who were ordered deported could face an endless prison term inside an immigration facility.<sup>28</sup>

If the United States has a repatriation agreement with a country, criminal aliens are returned there regardless of the deportee's personal circumstances or the receiving country's political and social conditions.<sup>29</sup> In Lun's case, the recent repatriation agreement between the United States and Cambodia had

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<sup>21</sup> See Part III.A.

<sup>22</sup> Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 294 (2003).

<sup>23</sup> While it is possible for family members to join their deported relatives in the other country, many choose to remain in the United States for numerous reasons. For instance, when there are children involved, one parent may stay in the United States so that their children can get an education and other opportunities unavailable in the other country. In Lun's case, his wife chose to stay in the United States with their children. See Sontag, *supra* note 1.

<sup>24</sup> Guiribitey, *supra* note 19, at 275.

<sup>25</sup> *Id.* at 277; see also INA, *supra* note 20, 8 U.S.C. § 1231(a)(6).

<sup>26</sup> Guiribitey, *supra* note 19, at 277; see also INA, *supra* note 20, 8 U.S.C. § 1231(a)(6).

<sup>27</sup> Sontag, *supra* note 1.

<sup>28</sup> Guiribitey, *supra* note 19, at 275.

<sup>29</sup> Megan Peitzke, *The Fate of "Unremovable" Aliens Before and After September 11, 2001: The Supreme Court's Presumptive Six-Month Limit to Post-Removal-Period Detention*, 30 PEPP. L. REV. 769, 771 (2003).

devastating consequences for him.<sup>30</sup> Shortly after his arrest, he was placed in an INS detention center. He was released nine months later when the Supreme Court ruled that indefinite detention was a violation of the LPRs' due process rights.<sup>31</sup> A few months later, Lun was deported to Phnom Penh with "a few changes of clothes, \$50, a roll of toilet paper, a bottle of Tylenol and pictures of his wife and children."<sup>32</sup>

This Note will argue that immediate changes need to be made to current immigration law to remedy the unjust consequences of the AEDPA and IIRIRA on LPRs with past criminal convictions. Part II.A will discuss the circumstances leading to the creation and adoption of the AEDPA and IIRIRA. In addition, Part II.B will explain how the application of these two acts retroactively punishes LPRs for past crimes by using a drastic sanction—deportation. Part III will discuss the consequences of these two acts, which are especially important now since numerous immigration policies and procedures adopted after the events of September 11 will most likely increase the number of LPRs in deportation proceedings. More specifically, Part III will focus on how, in the aftermath of September 11, the number of LPRs ordered deported has increased. Part IV will examine the various arguments against deportation that immigration attorneys and advocacy groups have attempted on behalf of LPRs in deportation proceedings. Part V will analyze the potential benefits of the Family Reunification Act of 2002 (FRA) for LPRs facing deportation and the obstacles it may face before being ratified by Congress. Finally, this Note concludes in Part VI that, given the severity of how the AEDPA and IIRIRA affect LPRs and the gradual acknowledgment of this by both Congress and the courts, Congress should reexamine the harsh consequences of these two acts and amend them so that LPRs are not unjustly punished for past crimes. However, in the meantime, Congress should pass the FRA so that, at least, the Attorney General may balance the interest of maintaining family unity against the severity of an LPR's criminal conviction and ensure that deportation is ordered only for LPRs convicted of serious crimes.

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<sup>30</sup> Sontag, *supra* note 1.

<sup>31</sup> *Id.*; see *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>32</sup> Sontag, *supra* note 1.

## II. BACKGROUND

A. *Circumstances Leading to the AEDPA and IIRIRA*

There has long been a negative sentiment toward immigrants based on the belief that they are responsible for social problems such as crime, excessive abuse of the welfare system, and unemployment.<sup>33</sup> Often, these beliefs are shown to be unfounded,<sup>34</sup> but the animosity towards immigrants remains. The resentment escalated when it was revealed that illegal aliens were responsible for the bombing of the World Trade Center on February 26, 1993, which killed six people and injured more than 1000 others.<sup>35</sup> After the bombing of Oklahoma City on April 19, 1995, anti-immigration sentiment reached a new peak though it was later revealed that two U.S. citizens were responsible for the attack.<sup>36</sup> The public immediately demanded that Congress take action against terrorism as well as place tighter restrictions on immigration, which they viewed as facilitating terrorism.<sup>37</sup> Consequently, on April 24, 1996,<sup>38</sup> Congress hastily passed the AEDPA with the purposes of “simplify[ing] the prosecution of people charged with committing or planning terrorist attacks” and “deport[ing] more non-citizen criminals.”<sup>39</sup> The Anti-Drug Abuse Act (ADAA) was the first of two amendments made to the INA in 1996.<sup>40</sup> Supporters of this legislation argue that “[i]n the past, many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those

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<sup>33</sup> Cook, *supra* note 22, at 306.

<sup>34</sup> *Id.* (citing Stephan Chapman, *Old Arguments on Immigration*, ST. LOUIS POST-DISPATCH, June 12, 1995, at 7B and William F. Woo, *A Nation No Longer Quite So Indivisible*, ST. LOUIS POST-DISPATCH, May 7, 1995, at 1B). Studies show that unemployment rates and crime rates are lower in many cities with high immigrant population as opposed to those with low immigrant population. *Id.*; see also Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51 INDUS. & LAB. REL. REV. 654 (July 1998). A comprehensive study conducted on men between the ages of eighteen and forty revealed that immigrants were “much less likely to be institutionalized than native-born men with similar demographic characteristics.” *Id.*

<sup>35</sup> Ella Dlin, Note, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 54 (1998).

<sup>36</sup> *Id.* at 52-53.

<sup>37</sup> *Id.* at 55.

<sup>38</sup> AEDPA, *supra* note 16.

<sup>39</sup> See Cook, *supra* note 22, at 304.

<sup>40</sup> See Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 480 (2001).

around them. The government's attempts to deport those aliens committing the most serious crimes has proved to be ineffective."<sup>41</sup> Shortly after the AEDPA was passed, Congress launched an effort to address problems with enforcement and efficiency in deportation proceedings.<sup>42</sup> Consequently, the IIRIRA was enacted on September 30, 1996.<sup>43</sup>

### *B. Repercussions of the AEDPA and IIRIRA on Criminal LPRs*

Congress enacted the AEDPA with two main purposes: "assuaging public outrage and showing a commitment to battling domestic and international terrorism."<sup>44</sup> On the surface, the AEDPA appears to be an antiterrorism mechanism in that it includes provisions expanding the federal government's jurisdiction over someone who has been charged with a terrorist crime,<sup>45</sup> allowing restitution for victims of terrorism,<sup>46</sup> and creating tougher penalties for various terrorist acts.<sup>47</sup> Critics, however, argue that the AEDPA "ultimately emerged as a weak manifestation . . . [that] failed to include all possible measures to prevent terrorism and was diluted by immigration provisions which do nothing to prevent terrorist acts."<sup>48</sup> In addition, critics charge that the AEDPA does not actually contain anything that would have prevented the Oklahoma City bombing.<sup>49</sup> The AEDPA was created under the pretense of combating terrorism but has the effect of targeting and punishing many LPRs who pose no threat to the United States. Many who were involved in its implementation have acknowledged that the central focus of the AEDPA was to generate more ways to deport criminal aliens rather than to deal with terrorism.<sup>50</sup> For instance, after signing the AEDPA into law in 1996, former

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<sup>41</sup> HOUSE COMM. ON THE JUDICIARY, CRIMINAL ALIEN DEPORTATION IMPROVEMENTS ACT OF 1995, H.P. REP. NO. 104-22, at 6 (1995).

<sup>42</sup> Myrna Pages, Note, *Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom After Zadvydas v. Davis*, 66 ALB. L. REV. 1213, 1217 (2003).

<sup>43</sup> IIRIRA, *supra* note 17.

<sup>44</sup> Dlin, *supra* note 35, at 51.

<sup>45</sup> AEDPA, *supra* note 16, § 721.

<sup>46</sup> *Id.* § 704.

<sup>47</sup> *Id.* § 705.

<sup>48</sup> Dlin, *supra* note 35, at 51.

<sup>49</sup> *Id.* at 61.

<sup>50</sup> Cook, *supra* note 22, at 303; *see also* AEDPA, *supra* note 16, at pmb1. (stating that the AEDPA's purpose was to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes"). It is implied that the AEDPA addresses criminal aliens as one of its "other purposes."

President Bill Clinton admitted that the act made “major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”<sup>51</sup>

Prior to the AEDPA and IIRIRA, LPRs were always at risk for deportation when convicted of a serious crime.<sup>52</sup> In 1952, when Congress passed the INA, it included certain provisions that outlined grounds for deportation, procedures for deportation, and various forms of discretionary relief available to potential deportees.<sup>53</sup> During this time, felony offenses and crimes of moral turpitude committed within five years of entry into the United States were grounds for deportation.<sup>54</sup> Additionally, the Attorney General had discretion to release an LPR “pending a final determination of deportability.”<sup>55</sup>

In 1988, the concept of aggravated felony was first introduced when the ADAA was passed.<sup>56</sup> One of the primary reasons for this act was Congress’ concern about criminal activity by LPRs.<sup>57</sup> Generally, under the ADAA, only serious crimes such as “murder, drug trafficking, and illicit trafficking in firearms” constituted aggravated felonies.<sup>58</sup> Any LPR convicted of an aggravated felony during the term of his residency was deportable under the ADAA regardless of when the crime was committed.<sup>59</sup> Once ordered deported,

<sup>51</sup> Statement by President William J. Clinton upon Signing S. 735, 32 WEEKLY COMP. PRES. DOC. 718, Apr. 29, 1996, *reprinted in* 1996 U.S.C.C.A.N. 961-1, 961-3.

<sup>52</sup> Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000).

<sup>53</sup> Cook, *supra* note 22, at 298.

<sup>54</sup> *Id.* at 297.

<sup>55</sup> Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 459 (2001); *see* 8 U.S.C. § 1252a (1970).

Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole.

*Id.*

<sup>56</sup> Cook, *supra* note 22, at 299; *see also* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 NO. 33 INTERPRETER RELEASES 1317, 1324 (1997) (stating that the concept of aggravated felony is actually an invention of immigration law that has no relevance in criminal law).

<sup>57</sup> Bassett, *supra* note 55, at 459; *see also* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 224 (D. Conn. 2000). The ADAA was passed “in response to concerns about increased criminal activity by aliens. . . .”

<sup>58</sup> Johnson, *supra* note 40, at 480 (quoting AMERICAN IMMIGRATION LAWYER’S ASS’N, INTRODUCING THE 1996 IMMIGRATION REFORM ACT 57 (1996)).

<sup>59</sup> Cook, *supra* note 22, at 299.



the LPR could not reenter the United States for at least ten years.<sup>60</sup> Additionally, the ADAA added a “broadly-worded mandatory detention provision for noncitizens who had committed certain crimes.”<sup>61</sup>

However, this provision was overruled by a number of lower courts as being an unconstitutional violation of LPRs’ rights under the Due Process Clause.<sup>62</sup> Consequently, in 1990 and 1991, Congress amended the provision to allow the release of LPRs convicted of aggravated felonies provided that the LPRs could demonstrate that they did not pose a threat to the community and were not a flight risk.<sup>63</sup> Moreover, this was not the only change that Congress made. In 1990, Congress amended the INA to broaden the coverage of the aggravated felony provision. Under the amendment, drug crimes and crimes of violence carrying a prison term of more than five years were also considered aggravated felonies.<sup>64</sup> Furthermore, deportees were barred from reentering the United States for twenty years and discretionary relief was precluded for LPRs convicted of aggravated felonies.<sup>65</sup>

In 1996, when Congress passed the AEDPA, additional crimes were incorporated in the list of aggravated felonies including gambling-related offenses and perjury where the punishment carried a sentence of at least five years in prison.<sup>66</sup> The AEDPA also reduced the minimum sentence require-

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<sup>60</sup> *Id.*

<sup>61</sup> Bassett, *supra* note 55, at 459; *see* Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2) (1989) (stating that “[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction. . . . [T]he Attorney General shall not release such felon from custody.”).

<sup>62</sup> Bassett, *supra* note 55, at 459.

<sup>63</sup> *Id.*

<sup>64</sup> Cook, *supra* note 22, at 300.

<sup>65</sup> *Id.* at 301.

<sup>66</sup> Morris, *supra* note 56, at 1324-25; AEDPA, *supra* note 16. Other crimes that are also considered aggravated felonies under the AEDPA include

transportation for the purposes of prostitution; alien smuggling where the term of imprisonment imposed is at least five years; document fraud where the term of imprisonment imposed is at least 18 months; failure to appear for service of a sentence (jumping bail) where the underlying offense is punishable by a term of five years or more; failure to appear for trial where the underlying offense is punishable by a term of two or more years; reentry by a deported alien; bribery, counterfeiting, forgery, or trafficking in stolen vehicles if a sentence of five or more years may be imposed; and obstruction of justice, perjury or subornation of perjury if a sentence of five or more years may be imposed.

Morris, *supra* note 56, at 1324-25.

ment for deportation from five years to eighteen months for crimes relating to document fraud.<sup>67</sup>

The IIRIRA further expanded the definition of aggravated felony by adding more crimes to the list and lowering the imposed sentence threshold for crimes already on the list.<sup>68</sup> It restricted judicial review of final orders of removal for almost all crimes categorized as aggravated felonies.<sup>69</sup> The IIRIRA also amended the definition of imprisonment to state “a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>70</sup> For instance, an LPR convicted of shoplifting is deportable if he was sentenced to one year in prison even if the sentence was probated and he never spent a single day in prison.<sup>71</sup> Together, the AEDPA and IIRIRA added more than fifty different crimes to the list of deportable offenses<sup>72</sup> and expanded the provision defining aggravated felony from a single paragraph in 1988 to twenty-one paragraphs with numerous subsections.<sup>73</sup>

The inclusion of crimes of moral turpitude in the list of deportable crimes is problematic because the definition for such crimes is vague and ambiguous.<sup>74</sup> Basically, Congress left it up to the courts to determine whether a crime committed by an LPR satisfied the criteria for deportation.<sup>75</sup> Currently, an LPR can be deported for crimes of moral turpitude only if the crime was committed within five years of entry and the LPR was sentenced to greater than one year.<sup>76</sup> The law also provides for the deportation of aliens convicted of two or more crimes of moral turpitude so long as the conviction did not arise out of a “single scheme of misconduct.”<sup>77</sup> For example, public

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<sup>67</sup> LEGOMSKY, *supra* note 4, at 541.

<sup>68</sup> Socheat Chea, *The Evolving Definition of an Aggravated Felony*, FINDLAW, at <http://library.findlaw.com/1999/Jun/1/126967.html>.

<sup>69</sup> *Id.*

<sup>70</sup> INA, *supra* note 20, 8 U.S.C. § 1101(a)(48)(B).

<sup>71</sup> *See id.* § 1101(a)(43).

<sup>72</sup> *See* David Kinney, *Deportation Looming For Immigrant With Tough New Law*, BUFFALO NEWS, July 8, 1997, at 5A.

<sup>73</sup> Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489, 497 (2003).

<sup>74</sup> AEDPA, *supra* note 16, § 440(a).

<sup>75</sup> Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 263 (2001).

<sup>76</sup> *Id.*

<sup>77</sup> INA, *supra* note 20, 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).

transportation fare evasion is now a crime of moral turpitude, and an LPR convicted of two violations of turnstile jumping is now automatically deported.

In addition to expanding the scope of who is deportable, the AEDPA and IIRIRA also limited judicial review of final orders of deportation and eliminated judicial discretion to grant relief from removal.<sup>78</sup> For instance, prior to 1996, LPRs could seek relief under section 212(c) of the INA, which allowed the Attorney General to consider mitigating factors, such as the duration of the LPR's residency in the United States, his familial ties, "evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to [the LPR's] good character."<sup>79</sup> The section 212(c) discretionary relief from removal (section 212(c) waiver) was available to LPRs who have resided in the United States for at least seven consecutive years.<sup>80</sup> However, to be eligible for the section 212(c) waiver, the LPR must not have committed a crime fitting the pre-1996 definition of an aggravated felony, nor have served more than five years in prison.<sup>81</sup>

The AEDPA severely restricted the use of the section 212(c) waiver.<sup>82</sup> Under section 440(d) of the AEDPA, it was impossible for LPRs convicted of any crimes classified as "aggravated felonies" to petition for a section 212(c) waiver regardless of the sentence imposed or time served.<sup>83</sup> In addition, an LPR who had committed more than two crimes of moral turpitude was barred from seeking a section 212(c) waiver.<sup>84</sup> A major issue with section 440(d) is its ambiguity regarding whether it applies retroactively.<sup>85</sup> Almost immediately after it was implemented, the U.S. Attorney General asserted that section 440(d) applied to all LPRs in "deportation proceedings on or after the date of enactment of the AEDPA, regardless of when they committed or were convicted of an offense covered by that section."<sup>86</sup> However, many courts have rejected this position. For instance, in *Mojica v. Reno*, the district court

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<sup>78</sup> Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Act*, 107 YALE L.J. 2509, 2510 (1998).

<sup>79</sup> *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

<sup>80</sup> HOUSE COMM. ON THE JUDICIARY, FAMILY REUNIFICATION ACT OF 2002, H.R. REP. NO. 107-785, at 7 (2002).

<sup>81</sup> *Id.*; Johnson, *supra* note 40, at 481.

<sup>82</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 8.

<sup>83</sup> AEDPA, *supra* note 16, § 440(d).

<sup>84</sup> *Id.*

<sup>85</sup> Anjali Parekh Prakash, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1432 (1997).

<sup>86</sup> *Mojica v. Reno*, 970 F. Supp. 130, 138 (E.D.N.Y. 1997).

ruled that section 440(d) could not be applied retroactively to bar an LPR's claim for a section 212(c) waiver.<sup>87</sup> Additionally, in *Pottinger v. Reno*, the district court stated that retroactive application of section 440(d) was contrary to congressional intent and there was a strong presumption that section 440(d) was intended to apply prospectively.<sup>88</sup>

The IIRIRA eliminated the application problem altogether with section 304(b), which repealed section 212(c) and replaced it with section 240A(a).<sup>89</sup> Relief under section 240A(a) is called cancellation of removal. It allows for the Attorney General to exercise discretion in granting waivers to LPRs in deportation proceedings.<sup>90</sup> For the most part, the factors considered are the same as those in a section 212(c) waiver petition.<sup>91</sup> However, cancellation of removal is available only to LPRs who have been admitted to the United States for at least five years, have maintained residency for at least seven consecutive years, and have not been convicted of any crimes classified as aggravated felonies under the AEDPA and IIRIRA.<sup>92</sup> These conditions are actually more restrictive than they appear. For instance, continuous residence terminates when an LPR is served notice to appear at a deportation proceeding or when the LPR has committed a deportable offense.<sup>93</sup> Congress created this restriction to prevent LPRs and their attorneys from delaying deportation proceedings in order to accrue the period of residency needed to qualify for the relief. Another major restriction is that cancellation of removal may not be granted for LPRs with aggravated felony convictions occurring prior to April 1, 1997.<sup>94</sup> Therefore, unlike section 212(c) waivers, cancellation of removal is only available to certain LPRs.

The sudden unavailability of the section 212(c) waiver had devastating effects on LPRs who relied on it during their criminal and deportation proceedings.<sup>95</sup> For instance, an LPR may have pled guilty to a particular charge in exchange for a suspended sentence of one year in jail because they

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<sup>87</sup> *Id.* at 168-82.

<sup>88</sup> 51 F. Supp. 2d 349, 357-64 (E.D.N.Y. 1999).

<sup>89</sup> IIRIRA, *supra* note 17, § 304(b).

<sup>90</sup> *See* INA, *supra* note 20, § 240A.

<sup>91</sup> Michael Boyle, *Immigration Consequences of Criminal Convictions* (2002), <http://www.immigrantcenter.com/crimes.htm> (providing the factors used by the Immigration Judge during a cancellation of removal action under section 240A(a)).

<sup>92</sup> IIRIRA, *supra* note 17, § 304(a); *see* INA, *supra* note 20, § 240A(a).

<sup>93</sup> IIRIRA, *supra* note 17, § 304(a); *see* INA, *supra* note 20, § 240A(d).

<sup>94</sup> *Mojica*, 970 F. Supp. at 138.

<sup>95</sup> *See* Prakash, *supra* note 85, at 1430.

relied on being granted a section 212(c) waiver. Removing this form of relief after the fact is harsh because it leaves the LPR with no alternative but to face possible deportation.

While granting relief under section 212(c) was at the discretion of an immigration judge or the Board of Immigration Appeals (BIA), in most instances LPRs could appeal denial of relief to the federal courts.<sup>96</sup> However, after the passage of the AEDPA, LPRs were prevented from seeking judicial review for final removal orders.<sup>97</sup> Surprisingly, individuals suspected of terrorist activity are allowed privileges such as the right to have appointed counsel and the right to seek judicial review for deportation orders.<sup>98</sup> Thus, laws created with the express purpose of preventing terrorism and punishing individuals convicted of terrorist acts actually provide suspected terrorists with legal protection while LPRs are deprived of these rights when they have not engaged in terrorist activities.

After the enactment of the IIRIRA, many LPRs were placed in indefinite detention since their native countries refused to take them back, which has since been found unconstitutional.<sup>99</sup> Prior to 1996, an LPR ordered deported "generally could not be detained pending deportation for more than six months," and, once the six-month period expired, the Attorney General was required to release the deportee "subject to the Attorney General's supervision."<sup>100</sup> For LPRs who had committed an aggravated felony, the Attorney General was required to take the LPR into custody initially, but it could release him upon a determination that he was not a threat to the community and not a flight risk.<sup>101</sup>

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<sup>96</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 7.

<sup>97</sup> Dlin, *supra* note 35, at 63.

<sup>98</sup> AEDPA, *supra* note 16, § 504(c)(1).

<sup>99</sup> See Pages, *supra* note 42, at 1214.

<sup>100</sup> Bassett, *supra* note 55, at 460.

<sup>101</sup> *Id.*

Under the AEDPA,<sup>102</sup> Congress eliminated the power of the Attorney General to grant discretionary release of LPRs who were convicted of an “[a]ggravated felony,”<sup>103</sup> an offense “relating to a controlled substance”<sup>104</sup> “[c]ertain firearm offenses,”<sup>105</sup> or “[m]iscellaneous crimes.”<sup>106</sup> Nevertheless, the maximum six-month detention rule for LPRs was unaffected by the AEDPA.<sup>107</sup> However, when Congress enacted the IIRIRA, it included a mandatory detention provision requiring the Attorney General to “take into custody, upon their release from prison, [LPRs] deportable for having committed an aggravated felony, a controlled substance violation, a firearms offense, two crimes of moral turpitude, or certain other offenses with no discretionary release from the time of their release from prison until their actual deportation.”<sup>108</sup> Consequently, LPRs in this situation are ineligible for a bail hearing and “must remain in custody throughout the duration of their removal proceedings until they are actually deported.”<sup>109</sup>

Recently, the Supreme Court made an important ruling regarding indefinite detention. In *Zadvydas v. Davis*, the Court ruled on the consolidated cases of Kestutis Zadvydas and Kim Ho Ma.<sup>110</sup> Zadvydas was a resident alien who was ordered deported due to a lengthy criminal record including “drug crimes, attempted robbery, attempted burglary, and theft.”<sup>111</sup> However, deportation

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<sup>102</sup> See AEDPA, *supra* note 16, 8 U.S.C. § 1228(a)(1) (referencing 8 U.S.C. § 1227(a)(2) as cited in *infra* notes 103-06):

The Attorney General shall take any alien convicted of any criminal offense covered in § 1251(a)(2)(A)(iii) [aggravated felony], (B) [possession of controlled substances], (C) [certain firearm offenses], (D) [miscellaneous crimes, e.g., espionage, sabotage, sedition, selective service violations] of this title, or any offense covered by § 1252(a)(2)(A)(ii) of this title [conviction of two or more crimes involving moral turpitude] for which both predicate offenses are covered by § 1251(a)(2)(A)(i) of this title [classifying crimes of moral turpitude committed within certain time periods after the date of entry as deportable offenses], upon release of the alien from incarceration, [and] shall deport the alien as expeditiously as possible. Notwithstanding [other provisions of § 1252], the Attorney General shall not release such felon from custody.

<sup>103</sup> 8 U.S.C. § 1227(a)(2)(A)(iii).

<sup>104</sup> 8 U.S.C. § 1227(a)(2)(B).

<sup>105</sup> 8 U.S.C. § 1227(a)(2)(C).

<sup>106</sup> 8 U.S.C. § 1227(a)(2)(D).

<sup>107</sup> Bassett, *supra* note 55, at 460.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 461.

<sup>110</sup> 533 U.S. 678, 678 (2001).

<sup>111</sup> *Id.* at 684.

proved problematic because the United States could not determine whether to send Zadvydas back to Lithuania, the country of his birth, or Germany, the country where he was raised.<sup>112</sup> Ultimately both Lithuania and Germany refused to accept his return, making it unlikely that the United States would be able to successfully deport him. Kim Ho Ma was ordered deported due to a manslaughter conviction, which is considered an aggravated felony under the AEDPA.<sup>113</sup> Since the United States did not have a repatriation agreement with Ma's native country at the time, Ma could not be deported. In both instances, the INS continued to detain the LPR even after the expiration of the removal period.<sup>114</sup> The Attorney General argued that since the AEDPA and IIRIRA "eliminated the distinction in the law between 'excludable' and 'deportable' non-citizens for purposes of removal, 'an alien under final order of removal [stood] on an equal footing with an inadmissible alien at the threshold of entry.'" <sup>115</sup> The Court found that deportable aliens have greater rights than inadmissible aliens outside U.S. borders.<sup>116</sup> In particular, the Court stated that indefinite detention would pose a serious constitutional problem since the Fifth Amendment's Due Process Clause prohibits the government from denying any "person . . . of . . . liberty . . . without due process of law."<sup>117</sup> The Court emphasized that the central feature of the Due Process Clause is protection against imprisonment, which includes government detention, custody, or other types of physical restraint.<sup>118</sup> Furthermore, the Court held that there was nothing in the INA indicating "congressional intent to authorize indefinite, perhaps permanent, detention."<sup>119</sup> More specifically, the Court held that § 1231(a)(6) of the INA expressly restricts an alien's post-removal period of detention to "a period reasonably necessary to bring about that alien's removal from the United States," and it did not contain language permitting indefinite

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 685.

<sup>114</sup> *Id.* at 684-85.

<sup>115</sup> Catalina Joos Vergara, *Trading Liberty for Security in the Wake of September Eleventh: Congress' Expansion of Preventive Detention of Non-Citizens*, 17 GEO. IMMIGR. L.J. 115, 128 (2002) (quoting *Zadvydas*, 533 U.S. at 703). Excludable aliens are non-citizens who were not lawfully admitted to the United States. *Id.* at 128 n.82. The term "includes individuals who are physically present in the United States [though they] lack legal status." *Id.* Deportable aliens are non-citizens who were lawfully admitted to the United States but subsequently ordered removed for violating the law. *Id.* at 128 n.83.

<sup>116</sup> *Zadvydas*, 533 U.S. at 693.

<sup>117</sup> *Id.* at 690 (quoting U.S. CONST. amend. V).

<sup>118</sup> *Id.* at 690.

<sup>119</sup> *Id.* at 699.

detention.<sup>120</sup> Thus, in cases where deportation seems reasonably unforeseeable, the Court ruled that the INS could not detain deportees for more than the statutory removal period of six months unless they can show that these individuals are either a threat to the community or a flight risk.<sup>121</sup>

Many supporters viewed *Zadvydas* as a victory for deportable LPRs. Many of them hoped that Congress would recognize that they "went too far in 1996" and would "repeal the remainder of the 1996 laws that compel the detention and deportation of immigrants who have committed minor crimes."<sup>122</sup> However, others comment that the Court in *Zadvydas* provided the "possibility for more narrowly tailored regulations" that would permit indefinite detention when the LPR's "dangerousness" corresponds with a "special circumstance."<sup>123</sup> In response to *Zadvydas*, Congress is currently considering legislation to specify what would be considered "special circumstances."<sup>124</sup> The current law permits the DHS to indefinitely detain LPRs if they have "a highly contagious disease that is a threat to public safety,"<sup>125</sup> have been "detained on account of serious adverse foreign policy consequences of release,"<sup>126</sup> have been "detained on account of security or terrorism concerns,"<sup>127</sup> or are "determined to be specially dangerous."<sup>128</sup> Presently, the Attorney General is permitted to indefinitely detain an LPR in renewable six-month increments if there are "reasonable grounds to believe" that he is "engaged in any . . . activity that endangers the national security of the United States."<sup>129</sup>

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<sup>120</sup> Peitzke, *supra* note 29, at 783 (quoting *Zadvydas*, 533 U.S. at 689).

<sup>121</sup> *Zadvydas*, 533 U.S. at 699.

<sup>122</sup> Peitzke, *supra* note 29, at 783 (quoting Press Release, ACLU, In Second Victory for Immigrants' Rights, High Court Says INS Cannot Indefinitely Jail Immigrants (June 28, 2001), available at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=7339&c=95&Type=s>).

<sup>123</sup> Edward Bates Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say*, 28 N.C. J. INT'L L. & COM. REG. 567, 592 (2003).

<sup>124</sup> *Id.*

<sup>125</sup> Continued Detention of Removable Aliens on Account of Special Circumstances, 8 C.F.R. § 241.14(b) (2003).

<sup>126</sup> *Id.* § 241.14(c).

<sup>127</sup> *Id.* § 241.14(d).

<sup>128</sup> *Id.* § 241.14(f).

<sup>129</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (2001) [hereinafter Patriot Act] (adding section 236A to the Immigration and Nationality Act, 8 U.S.C. § 1226(a) (2004)).



After 1996, the broader scope of crimes that constitute grounds for deportation and the reduction of available relief resulted in a sudden significant increase in deportable LPRs.<sup>130</sup> For instance, in 1996, 36,909 aliens were deported on crime-related grounds.<sup>131</sup> In 1997, the number rose to 53,214 and has since then leveled out to just above 70,000.<sup>132</sup> After 1996, three specific categories of deportees rose sharply reflecting the changes made by the AEDPA and IIRIRA.<sup>133</sup> The first type involves cases of hardship in which the LPRs entered the United States as children and “now face deportation to countries that they no longer even remember, let alone to which they have any ties or speak the language.”<sup>134</sup> The second type includes LPRs who are now considered aggravated felons for crimes they committed prior to 1996.<sup>135</sup> In some instances, these individuals “have fully reformed, raised families and become productive members of their communities in the ensuing years.”<sup>136</sup> The third category involves cases in which the LPRs committed relatively minor offenses either before or after 1996 but are now deportable under the AEDPA and IIRIRA.<sup>137</sup>

Perhaps the most devastating feature of the AEDPA and IIRIRA is that they apply retroactively. In other words, LPRs who had committed crimes years, or even decades ago, can now be deported under the new categorization of crimes under aggravated felonies and crimes of moral turpitude. Retroactive application of laws has long been deemed unfair because it “upset[s] expectations by changing the rules after the game has been played.”<sup>138</sup> For instance, suppose that prior to 1996 an LPR was charged with felony shoplifting<sup>139</sup> and, following her attorney’s advice, she plead guilty in

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<sup>130</sup> Johnson, *supra* note 40, at 483.

<sup>131</sup> IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 171, available at <http://uscis.gov/shared/aboutus/statistics/statybook96/Chapter6.pdf>.

<sup>132</sup> See OFFICE OF IMMIGRATION STATISTICS, U.S. DEPARTMENT OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 190-97 (2003), available at <http://uscis.gov/graphics/shared/statistics/yearbook/2002/Yearbook2002.pdf>.

<sup>133</sup> HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ACTIVITIES OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 107-807, at 262 (2003).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Bassett, *supra* note 55, at 465.

<sup>139</sup> See, e.g., GA. CODE ANN. § 16-8-14(b)(2) (2004). Each state has different minimum standards for determining whether shoplifting of goods constitutes a misdemeanor or felony. For instance, in Georgia, theft of goods exceeding \$300 in value is considered a felony. *Id.*

exchange for no prison time under the condition that she pay restitution and perform a certain amount of community service.<sup>140</sup> At the time, both she and her attorney decided that accepting such an agreement was in her best interest and doing so would not significantly affect her immigration status. However, if the AEDPA and IIRIRA were effective at that time, their decision would probably be different since a suspended one-year sentence is grounds for deportation.<sup>141</sup> Thus, while it is valid to state that immigrants must face the repercussions of their actions when they violate the law even if it means deportation, it is unjust to create laws that reach back to punish them again after they have already paid for their crimes and moved on to lead productive lives.

### III. THE IMPACT OF THE PATRIOT ACT ON DEPORTABLE LPRS

Months before September 11, 2001, Congress considered legislation that would potentially ease some of the restrictions imposed by the IIRIRA, including those that required expedited removal and imposed strong limits on judicial review.<sup>142</sup> Unfortunately, after the September 11 terrorist attacks, all of this was quickly set aside. Instead, President George W. Bush and members of Congress took immediate action to ensure that such horrific acts of terrorism would never happen again.<sup>143</sup>

#### A. *Availability of the NCIC-III for Immigration Purposes*

On September 25, 2001, Attorney General John Ashcroft presented the Senate Committee on the Judiciary with a proposal outlining the Bush administration's recommendations for "correct[ing] perceived flaws in U.S. intelligence, criminal justice, and immigration systems."<sup>144</sup> On October 26, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot

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<sup>140</sup> See Bill Ong Hing, *Deported for Shoplifting?*, WASH. POST, Dec. 29, 2002, at B07.

<sup>141</sup> INA, *supra* note 20, 8 U.S.C. § 1227(a)(2)(A)(i).

<sup>142</sup> Stanley Mailman & Stephen Yale-Loehr, *As the World Turns: Immigration Law Before and After Sept. 11*, 226 N.Y.L.J. 3 (2001).

<sup>143</sup> Jacob R. Lilly, *National Security at What Price?: A Look Into Civil Liberty Concerns in the Information Age Under the USA Patriot Act of 2001 and a Proposed Constitutional Test for Future Legislation*, 12 CORNELL J.L. & PUB. POL'Y 447, 458 (2003).

<sup>144</sup> Vergara, *supra* note 115, at 115.

Act).<sup>145</sup> The main purpose of the Patriot Act was to enable federal law enforcement agencies to engage in certain activities, such as surveillance and secretive detention, for the purpose of investigating terrorist groups.<sup>146</sup>

Included in the Patriot Act is a provision that requires the Federal Bureau of Investigation to grant the Department of State and the INS access to the National Crime Information Center's Interstate Identification Index (NCIC-III) and Wanted Persons File maintained by the National Crime Information Center (NCIC) for the purpose of detecting visa applicants and non-citizens who have criminal records entering the United States.<sup>147</sup> On the surface, this provision furthers Congress's goal by having federal agents monitor individuals entering the United States.<sup>148</sup> However, in addition to checking for potential terrorists among visa applicants, the INS has also extracted arrest records and criminal warrants from the NCIC-III to supplement the data in its Interagency Border Inspection System (IBIS)<sup>149</sup> in order to detect deportable LPRs returning from trips abroad.<sup>150</sup> Therefore, an unsuspecting LPR who had committed a criminal offense satisfying the definition for an aggravated felony or crime of moral turpitude under the AEDPA and IIRIRA could be apprehended at the airport and placed in immediate deportation proceedings.<sup>151</sup> Additionally, the availability of such records allows the INS to screen naturalization and green card renewal applications for deportable LPRs and detain unsuspecting ones who come for interviews.<sup>152</sup>

### *B. Aggressive Negotiation for Repatriation Agreements*

Prior to *Zadvydas*, many LPRs ordered deported to countries such as Laos, Vietnam, Croatia, Bosnia, Somalia, and Cuba, faced indefinite detention because the United States does not have repatriation agreements with these

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<sup>145</sup> Patriot Act, *supra* note 129.

<sup>146</sup> Jennifer C. Evans, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933, 966-67 (2002).

<sup>147</sup> Patriot Act, *supra* note 129, § 403(a)(4).

<sup>148</sup> *See id.* § 403(c)(3).

<sup>149</sup> *See* Immigration Service Implements Anti-Terrorism Practices, U.S. Embassy Malaysia, Oct. 9, 2002, [http://usembassymalaysia.org.my/wf/wf1009\\_cronin.htm](http://usembassymalaysia.org.my/wf/wf1009_cronin.htm).

<sup>150</sup> *Effective Immigration Controls to Deter Terrorism: Hearing Before the Subcomm. on Immigration of the Sen. Comm. on the Judiciary*, 107th Cong. 3-4 (2001) (statement of James W. Ziglar, Commissioner, Immigration and Naturalization Service), available at [http://uscis.gov/graphics/aboutus/congress/testimonies/2001/10\\_17\\_01S.pdf](http://uscis.gov/graphics/aboutus/congress/testimonies/2001/10_17_01S.pdf).

<sup>151</sup> Boyle, *supra* note 91.

<sup>152</sup> *See* Sontag, *supra* note 1.

countries.<sup>153</sup> In exchange for supervised release, many deportees accept the removal orders with little resistance due to the belief that their home countries will never accept their return.<sup>154</sup> A significant number of these individuals risk of being returned to countries where they will likely be tortured.<sup>155</sup> For instance, countries such as Cambodia, Laos, and Vietnam are recognized by the State Department for "gross and widespread human rights violations."<sup>156</sup>

With the recent repatriation agreement reached between the United States and Cambodia in which Cambodia agrees to accept the return of U.S. deportees,<sup>157</sup> the future of many LPRs facing deportation to Cambodia is frighteningly uncertain. The agreement came as a surprise since countries, such as Cambodia, were often reluctant to accept such deportees before. Cambodia was forced to accept the agreement after the U.S. State Department threatened to stop the issuance of visas to Cambodians planning to enter the United States if Cambodia continued to deny issuing travel documents for the U.S. deportees.<sup>158</sup> In addition, as part of the agreement, Cambodia will receive monetary incentives to assist with the "reintegration of deportees back into Cambodian society" and make "it easier for the Cambodian government to cooperate" with the United States.<sup>159</sup> For instance, the U.S. Embassy has agreed to compensate the Cambodian government for processing expenses by paying \$300 for each accepted deportee.<sup>160</sup> This agreement is only one part of the Bush administration's aggressive post-September 11 efforts to negotiate repatriation agreements with countries that had been reluctant to take back

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<sup>153</sup> Guiribitey, *supra* note 19, at 277.

<sup>154</sup> Southeast Asian Resource Center, Action Alert: Deportation of Cambodians from the United States, May 8, 2002, [http://www.searac.org/cambdeptactalt6\\_02.html](http://www.searac.org/cambdeptactalt6_02.html).

<sup>155</sup> *E.g.*, Sontag, *supra* note 1. When Lun arrived in Phnom Penh, he was immediately placed in a "dirty, mosquito-infested detention center" where the "guard proceeded to shake [him] down." *Id.* Shortly after, his wife received a phone call from a guard promising his release upon payment of \$200. *Id.*

<sup>156</sup> Chris McGann, *Refugees with a Record Face Shock—Deportation*, SEATTLE POST-INTELLIGENCER (June 14, 2002), available at [http://www.seattlepi.nwsourc.com/local/74648\\_cambodia14.shtml](http://www.seattlepi.nwsourc.com/local/74648_cambodia14.shtml).

<sup>157</sup> Memorandum Between the Government and the United States and the Royal Government of Cambodia for the Establishment and Operation of a United States—Cambodia Joint Commission on Repatriation, Mar. 22, 2002, U.S.-Cambodia, Cambodia American National Council, available at <http://www.cmcweb.org/canc/deportation.html>.

<sup>158</sup> Matt McKinney, *Cambodians Deported by U.S. Face Harsh Welcome: Convicts Return to Forgotten Land*, BOSTON GLOBE, July 28, 2002, at A10, available at [http://www.searac.org/bostglbart7\\_28\\_02.pdf](http://www.searac.org/bostglbart7_28_02.pdf).

<sup>159</sup> Sontag, *supra* note 1.

<sup>160</sup> *Id.*

criminal deportees.<sup>161</sup> Currently, the United States is also negotiating with Vietnam and Laos for similar agreements.<sup>162</sup> The United States will likely employ similar financial incentives to persuade these countries to sign the agreements. The consequences of these agreements are clear; families will be torn apart and many individuals will be forced to start a new life in a place with which they may have had little or no contact.

#### IV. POSSIBLE REMEDIES

Since the enactment of the AEDPA and IIRIRA, immigration attorneys and advocacy groups have explored potential forms of relief for deportable LPRs, including relief under section 212(c) and relief under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3). However, these two forms of relief are highly restrictive.

##### A. Availability of Section 212(c) Relief Waiver

After years of arguing against the AEDPA and IIRIRA, opponents of these two acts may have succeeded in convincing the Supreme Court on certain key points. In *INS v. St. Cyr*, the Supreme Court ruled that section 304(b) of the IIRIRA, which repealed section 212(c) relief, could not be applied retroactively to LPRs.<sup>163</sup> The Court held that LPRs, who were ordered deported for certain crimes for which they pled guilty prior to enactment of the AEDPA and IIRIRA, continue to be eligible for section 212(c) relief, notwithstanding the AEDPA and IIRIRA amendments that restrict such relief.<sup>164</sup> Furthermore, the Court found that the IIRIRA did not contain express language indicating that the repeal applied retroactively.<sup>165</sup> More importantly, the Court recognized that “[g]iven the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> 533 U.S. 289, 315 (2001).

<sup>164</sup> *Id.* at 325-26.

<sup>165</sup> *See id.* at 318-20. The Court pointed out that Congress expressed unambiguously in specific sections of the IIRIRA its intention to have particular provisions apply retroactively. *Id.* at 318-19. Thus, since there was no indication that § 304(b) be applied retroactively, it was not Congress' intention to make it applicable to prior convictions. *Id.* at 319-20.

whether to accept a plea offer or instead to proceed to trial.”<sup>166</sup> Additionally, the Court stated that retroactive application “would surely be contrary to ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.’”<sup>167</sup> Thus, LPRs may seek section 212(c) relief if their criminal conviction occurred prior to April 24, 1996.<sup>168</sup> Furthermore, LPRs who have resided in the United States for more than seven years are now eligible for section 212(c) relief even if they plead guilty to an aggravated felony.<sup>169</sup> The Court reasoned that criminally charged LPRs may have relied on the availability of section 212(c) relief when they plead guilty to the deportable crime.<sup>170</sup>

However, the Court also hinted that crimes committed prior to the enactment of the AEDPA and IIRIRA could still be considered “aggravated felonies” under the definitions of the two acts.<sup>171</sup> Thus, while it appears that the Court held that the repeal of section 212(c) relief could not be applied retroactively, it also suggested that perhaps the retroactive application of the post-1996 definition of aggravated felony to convictions is acceptable.<sup>172</sup> Furthermore, since section 212(c) relief is only available for convictions occurring prior to April 24, 1996, LPRs convicted after this date must rely on cancellation of removal with its relatively restrictive requirements.

### *B. Relief Under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Many scholars have suggested that Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>173</sup>

<sup>166</sup> *Id.* at 323.

<sup>167</sup> *Id.* at 323-24 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

<sup>168</sup> Rex B. Wingerter, *Challenges to Removal Based on Criminal Convictions: Post-Conviction Relief and Immigration Proceedings*, 02-02 IMMIGR. BRIEFINGS at 1, 1 (2002); see also *INS v. St. Cyr*, 533 U.S. at 323.

<sup>169</sup> Gerald Seipp, *The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable*, 02-01 IMMIGR. BRIEFINGS at 1, 15 (2002).

<sup>170</sup> *Id.* at 16.

<sup>171</sup> Wingerter, *supra* note 168, at 1. See also *St. Cyr*, 533 U.S. at 319 (stating that the amended definition of aggravated felony clearly applies to “‘conviction[s] . . . entered before, on, or after’ the statute’s enactment date” (citations omitted)).

<sup>172</sup> Wingerter, *supra* note 168, at 1.

<sup>173</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 3, 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987) [hereinafter Article 3]. The United States signed the treaty on April 18,

may offer relief for LPRs facing deportation to countries where they fear persecution. Article 3 prohibits the deportation of an individual to a country if there are “substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>174</sup> Article 3 provides unique options for certain individuals. It is a potentially powerful tool for criminal aliens facing deportation because it does not have exceptions to granting relief.<sup>175</sup> Thus, even LPRs with aggravated felony convictions may qualify for this relief.

However, the burden of proof is extremely high on the petitioner to demonstrate that he will be persecuted or tortured if he returns to his home country.<sup>176</sup> In most cases, the courts will not accept this claim if the petitioner cannot show that there are “substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>177</sup> However, what constitutes “substantial grounds” and “torture” is ambiguous. The Senate has interpreted the “substantial grounds” test to require the petitioner to show that it is “more likely than not that he would be tortured.”<sup>178</sup>

Along with the high burden of proof, another major restriction is that the infliction of torture must be done “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>179</sup> Courts have held that “acquiescence” does not require actual knowledge of the torturous activity but that mere awareness of it and failure to intervene is sufficient.<sup>180</sup> However, the BIA has denied relief when the torture was inflicted by private groups or individuals even though government

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1988, but it did not become a full member until November 1994. Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT’L L. & POL’Y 533, 536 (1998). On October 21, 1998, Congress ratified and President Clinton signed the Foreign Affairs Reform and Restructuring Act of 1998 into law, incorporating Article III into the U.S. immigration laws. Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, 112 Stat. 2681-761, 2681-822 (1998).

<sup>174</sup> Article 3, *supra* note 173.

<sup>175</sup> Kristen B. Rosati, *International Human Rights Treaties Can Make a Difference: U.S. Implementation of Article 3 of the United Nations Convention Against Torture*, 28-WTR HUM. RTS. 14, 14 (2001).

<sup>176</sup> Zachary Margulis-Ohnuma, Note, *Saying What the Law Is: Judicial Review of Criminal Aliens’ Claims Under the Convention Against Torture*, 33 N.Y.U. J. INT’L L. & POL. 861, 881 (2001).

<sup>177</sup> *Id.* (citing Article 3, *supra* note 173, para. 1).

<sup>178</sup> Rosati, *supra* note 173, at 537 (quoting 136 Cong. Rec. S17492 (daily ed. Oct. 27, 1990)).

<sup>179</sup> *Id.* at 538 (citing Matter of S-V-Interim Decision 3430 (BIA 2000)).

<sup>180</sup> *E.g.*, *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

officials were aware of such activity and refused to intervene.<sup>181</sup> For instance, in *Matter of S-V-Interim Decision*, the court denied relief for an LPR who feared being kidnapped and tortured by guerrillas if he is deported to Colombia since such occurrences have happened to U.S. citizens visiting there.<sup>182</sup> The court held that relief was appropriate only if the LPR was capable of proving that the Colombian government's failure to intervene was a "deliberate acceptance of the guerrillas' activities."<sup>183</sup> Thus, it would be nearly impossible for an LPR to seek relief under Article 3 even if he is ordered deported to a country where political instability and violence is rampant as long as the government is neither directly nor indirectly involved in the infliction of torture.

While Article 3 relief may be incredibly beneficial to LPRs who can prove their claims, it does not serve as permanent relief from deportation. Instead, Article 3 simply defers deportation orders. Therefore, even if an LPR is eligible for relief under Article 3, deportation orders will only be suspended, and the INS may, at any time, send the LPR to another country or revoke the suspension once an immigration judge determines that the LPR is no longer in danger of being tortured.<sup>184</sup>

#### V. POTENTIAL RELIEF: THE FAMILY REUNIFICATION ACT

By 1999, even supporters of the AEDPA and IIRIRA recognized that "there has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship."<sup>185</sup> In a letter to Attorney General Janet Reno, twenty-eight members of the House Judiciary Committee stated that

Some cases may involve removal proceedings against [LPRs] who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever

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<sup>181</sup> Rosati, *supra* note 175, at 15 (citing *Matter of S-V-Interim Decision* 3430 (BIA 2000)).

<sup>182</sup> *Matter of S-V-Interim Decision* 3430, 22 I. & N. Dec. 1306 (BIA 2000).

<sup>183</sup> *Id.* at 1313.

<sup>184</sup> Rex B. Wingerter, *Defenses to Removal Based on Criminal Convictions: INA Waivers*, 01-06 IMMIGR. BRIEFINGS at 1,1 (2001).

<sup>185</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 9; see also Sacks and Kolken Immigration Lawyers, Restore Fairness and Due Process: 1996 Immigration Laws Go Too Far (June 11, 2001), <http://www.sackskolken.com/court/Dueprocess.html>.



since, obtained and held jobs and remained self-sufficient, and started families in the United States.<sup>186</sup>

They requested that the Attorney General “issue guidelines on prosecutorial discretion so that INS prosecutors would be encouraged to utilize their inherent power to not pursue removal in appropriate cases.”<sup>187</sup> Even though guidelines were issued, reports indicated that harsh deportation proceedings such as ones referenced in the letter continued.<sup>188</sup>

Various bills have been introduced in Congress to alleviate the harshness of the AEDPA, IIRIRA, and accompanying restrictions of remedies.<sup>189</sup> One bill that had successfully been signed into law is the Child Citizenship Act of 2000 (CCA),<sup>190</sup> which went into effect on February 27, 2001.<sup>191</sup> The CCA essentially grants automatic citizenship to foreign-born biological and adopted children of U.S. citizens who are under the age of eighteen, entered the United States as LPRs, and are in the legal and physical custody of at least one parent with U.S. citizenship.<sup>192</sup> The CCA was passed in response to situations where U.S. citizens failed to obtain citizenship for their foreign-born children and these children later committed crimes that made them deportable under the AEDPA and IIRIRA.<sup>193</sup> The CCA served to equalize the citizenship status of adopted and biological children and to maintain family unity by removing the risk of deportation.<sup>194</sup> The provision conferring automatic citizenship was praised by numerous members of the House because it simplified the application process and reduced the waiting period for adoptive parents to obtain citizenship for their foreign-born children, provided equal treatment in terms of citizenship status for biological and adoptive children, and shielded foreign-born adopted children from the harsh effects of the AEDPA and IIRIRA.<sup>195</sup> While the CCA provides protection for foreign-born and adopted

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<sup>186</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 9.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Gerald P. Seipp, *Waivers of Inadmissibility: From Basic Principles to Advanced Practice Considerations Part II*, 03-09 IMMIGR. BRIEFINGS at 1, 1 (2003).

<sup>190</sup> Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

<sup>191</sup> *Id.* § 104; see also *INS Issues Guidance For Adoptive Parents on Effective Date of Child Citizenship Provision*, 78 INTERPRETER RELEASES 495 (2001).

<sup>192</sup> Child Citizenship Act of 2000, § 101 (amending section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431(a) (2004)).

<sup>193</sup> Romero, *supra* note 73, at 495.

<sup>194</sup> *Id.* at 492.

<sup>195</sup> *Id.* at 494-96.

children who would otherwise be deportable LPRs, no similar protection is provided for adult LPRs, including foreign-born and adopted children over the age of eighteen who are ineligible for automatic citizenship under the CCA.<sup>196</sup> A possible solution to this problem comes in the form of the FRA.

The FRA would amend section 240A(a) of the INA, which currently precludes LPRs with aggravated felony convictions from receiving cancellation of removal.<sup>197</sup> This bill is designed to “address crimes committed by reformed individuals before IIRIRA was enacted, and relatively minor crimes now encompassed in the aggravated felony definition, like battery resulting from a bar fight with no jail time.”<sup>198</sup> Under this bill, “certain ‘non-aggravated’ aggravated felons and . . . long term permanent residents who immigrated during their childhood” may seek special cancellation relief from removal.<sup>199</sup>

The proposed FRA features two central components. The first component provides the Attorney General or Deputy Attorney General with discretion to grant relief.<sup>200</sup> Under the FRA, the Attorney General would have four avenues for granting relief from removal to LPRs:

- (1) An LPR who had committed a non-violent aggravated felony would be eligible for relief if she “has been a permanent resident for at least five years . . . resided in the United States continuously for at least seven to ten years; was convicted in connection with a single scheme of misconduct for which the alien received a sentence of [less than four years], or two schemes of misconduct for which the alien received a sentence of [less than four years], but was never actually imprisoned; and was not an organizer or leader of the aggravated felony or felonies.”<sup>201</sup>

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<sup>196</sup> *See id.* at 498.

<sup>197</sup> Austin T. Fragomen, Jr. & Steven C. Bell, *House Judiciary Committee Approves Bill to Fix Harsh Provisions of IIRAIRA*, IMMIGRATION BUS. NEWS AND COMMENT, Sept. 1, 2002, available at 2002 WL 1949655.

<sup>198</sup> *House Judiciary Committee Approves Family Reunification Act and NICS Measure*, 79 INTERPRETER RELEASES 1120, 1121 (2002) (quoting Judiciary Committee Chairman James Sensenbrenner, Jr.).

<sup>199</sup> *Id.*

<sup>200</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 10-11.

<sup>201</sup> *Id.* at 11.

- (2) An LPR who had committed a violent aggravated felony may seek relief provided that he had not been sentenced to more than two years in prison and the felony did not involve any infliction of "serious bodily injury or death."<sup>202</sup>
- (3) An LPR who lawfully entered the United States before the age of ten is eligible for relief if he has been an LPR for at least five years, has continuously resided in the United States for seven or more years, and "has not been imprisoned for aggravated felonies arising out of more than two patterns of criminal misconduct."<sup>203</sup>
- (4) An alien who was lawfully admitted into the United States before the age of sixteen is eligible for relief in the same manner as ones who arrived before the age of ten with the exception that he was not convicted of any aggravated felony within the first seven years of entering the United States.<sup>204</sup>

The second component of the FRA would allow an immigration judge to release an LPR from detention if the LPR can show that he is eligible for one of the forms of relief available in the FRA; "would not pose a danger to persons, property, or national security"; and is not a flight risk.<sup>205</sup>

The FRA could be valuable to LPRs who were ordered deported because it serves as a replacement to the repealed section 212(c) relief waiver and an alternative for individuals who are ineligible for the waiver under *St. Cyr*.<sup>206</sup>

Supporters of the FRA state that the bill will ensure that deportation will be reserved for the more serious criminals.<sup>207</sup> Furthermore, it will ensure that families remain intact, which was also the central focus of the CCA.<sup>208</sup>

The CCA and FRA essentially share a common goal in that they both serve to maintain family unity. In fact, Professor Victor Romero pointed out that the FRA would more effectively maintain family unity because many of the "citizen children adversely affected by a parent's deportation are likely to be younger . . . [and] the deportation of . . . [their] noncitizen parents would have

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 66.

<sup>206</sup> Seipp, *supra* note 189 (outlining the impact of *St. Cyr*, 533 U.S. 289).

<sup>207</sup> Romero, *supra* note 73, at 496.

<sup>208</sup> *Id.* at 497.

a greater emotional and socioeconomic impact on them.”<sup>209</sup> Additionally, the FRA is arguably more restrictive than the CCA since LPRs must meet specific eligibility requirements before qualifying for relief under the FRA whereas the CCA simply bestows automatic citizenship to foreign-born LPRs who are children of U.S. citizens. Thus, the CCA eliminates the threat of deportation for even convicted murderers as long as they satisfy the three requirements while the FRA only allows relief for LPRs with convictions not exceeding its minimum sentencing threshold. Furthermore, relief would be precluded under the FRA for LPRs convicted of rape, murder, or sexual abuse of a minor.<sup>210</sup>

Opponents of the FRA state that it is “unconscionable and irresponsible” for the INS to reexamine felony deportation cases which would be permitted under the FRA when INS resources are already drained.<sup>211</sup> Their argument implies that LPRs should be deported even for minor offenses because it is too burdensome to give the cases or LPR’s further consideration. This argument fails to consider that the INS currently spends large amounts of resources to detain and deport LPRs.<sup>212</sup> The INS should utilize these resources to exercise discretion on upcoming deportation cases and to reevaluate cases where the LPRs have already been deported.

Furthermore, the FRA is not without restrictions. It requires that LPRs, who have already been deported, apply to reopen their cases within one year of the bill’s implementation.<sup>213</sup> In addition, the FRA will not change who is deportable, but it will allow the Attorney General to exercise discretion on individual cases and reverse deportation orders when the interest in keeping families intact far exceeds the severity of the criminal conviction. Thus, the FRA will primarily help LPRs who have committed a crime, served their sentence, and have since turned their lives around.<sup>214</sup>

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<sup>209</sup> *Id.* at 505 (citing U.S. Census Bureau, *The Foreign-Born Population in the United States* (Mar. 2000), available at <http://www.census.gov/prod/2000pubs/p20-534.pdf>).

<sup>210</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 2-3.

<sup>211</sup> *Id.*

<sup>212</sup> Tracy L. Barnett, *Family Reunification Act*, NATIONAL CATHOLIC REPORTER, Oct. 11, 2002, available at [http://natcath.org/NCR\\_Online/archives2/2002d/101102/101102h.htm](http://natcath.org/NCR_Online/archives2/2002d/101102/101102h.htm).

<sup>213</sup> HOUSE COMM. ON THE JUDICIARY, *supra* note 80, at 6.

<sup>214</sup> Kelley Beaucar Vlahos, *Panel to Ease Convicted Immigrant Deportation Rules* (July 17, 2002), available at <http://www.foxnews.com/story/0,2933,57868,00.html>.

## VI. CONCLUSION

In an effort to address legitimate national concerns about terrorism, Congress has created laws that have resulted in injustices and inequities for LPRs. In 1996, Congress made drastic changes to the INA when it passed the AEDPA and IIRIRA. These changes included: altering the definition of aggravated felony by expanding it to include even relatively minor criminal convictions, including crimes of moral turpitude as deportable offenses even though Congress never properly defined “moral turpitude,” and eliminating judicial discretion to review final orders of removal or grant relief from deportation. However, perhaps the most devastating aspect of the AEDPA and IIRIRA is that they apply retroactively. Thus, LPRs who were convicted of crimes years or even decades ago are now deportable under these two acts. With highly restricted means for relief, these individuals are often forced to leave their friends and families behind for an unfamiliar country.

In fact, even members of Congress have recognized that the AEDPA and IIRIRA have caused unjustifiable hardship on LPRs and their families—especially in cases where the LPRs have proven to be fully reformed. Unfortunately, just as Congress was prepared to ease some of the harsh consequences of the AEDPA and IIRIRA, the events of September 11th resulted in an indefinite delay for relief. Though many LPRs were detained and ordered deported after the implementation of the AEDPA and IIRIRA, those who were fortunate enough to remain in the United States escaped the severe effects of these two acts. However, after September 11, the INS now has powerful tools to track down deportable LPRs either returning from abroad or submitting immigration applications.

Over the years, immigration attorneys have successfully convinced the courts to allow limited forms of relief for their clients. Perhaps their most significant achievement thus far occurred in *St. Cyr*. In this case, the Supreme Court ruled that LPRs with criminal convictions occurring prior to April 24, 1996 are still eligible for the repealed section 212(c) relief.<sup>215</sup> Many scholars have also suggested that LPRs facing deportation to countries where they fear persecution could seek relief under Article 3 of the Torture Convention; however, the burden of proof is extremely high and most courts have been reluctant to grant such relief.<sup>216</sup>

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<sup>215</sup> *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

<sup>216</sup> See Margulis-Ohnuma, *supra* note 176.

Currently, the proposed FRA may be extremely valuable for LPRs who are deportable for relatively minor crimes because it allows the Attorney General to review the LPR's circumstances and grant discretionary relief when it is appropriate. The FRA should not be especially controversial since it does not alter the AEDPA and IIRIRA in any significant way. In fact, LPRs would still be deportable for the same crimes; however, the FRA allows discretionary relief for deserving LPRs while excluding it for serious criminals. It is difficult to comprehend why the CCA passed so quickly and easily while the FRA is still being debated by Congress since both acts share a common goal of maintaining family unity.<sup>217</sup>

Fairness requires that individuals be afforded the opportunity to know what the law is and the consequences of its violation so that they can conform their conduct accordingly. However, the retroactive applications of the AEDPA and IIRIRA violate this notion. It appears that many people recognize the injustice caused by these two acts, but few are willing to do anything about it. In the meantime, the deportation of undeserving LPRs continues. As a result, many families are torn apart. While Congress is reluctant to repeal or even amend the AEDPA and IIRIRA, they should implement the FRA so that LPRs will have a chance to plead their cases before the Attorney General.

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<sup>217</sup> Unfortunately, the FRA currently has not been presented to the full House and its passage is not likely to happen as easily and swiftly as was the passage of the CCA. See Romero, *supra* note 73, at 498. Professor Victor Romero argues that racial and class preference may be the reasons why those who had supported the CCA would be reluctant to offer the same level of support for the FRA. *Id.* at 503-04.