United States

Tough, Fair, and Practical

A Human Rights Framework for Immigration Reform in the United States

HUMAN RIGHTS WATCH

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"Tough, Fair, and Practical"

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I. Introduction

> *From Jamestown to the Pilgrims to the Irish to today's workers, people have come to this country in search of opportunity. They have sought nothing more than the chance to work hard and bring a better life to themselves and their families. And they come to our country with their hearts and minds full of hope. We will endure today's loss, and begin anew to build the kind of tough, fair, and practical reform that is worthy of our shared history as immigrants and as Americans. Immigration reforms are always controversial. But Congress was created to muster political will to answer such challenges. Today we didn't, but tomorrow we will.*
>
> —Senator Edward Kennedy, Statement before the US Senate after failed cloture vote on immigration reform legislation, June 28, 2007

Americans from all political perspectives agree that US immigration laws need to be fixed. While some emphasize the need to be tough in enforcing immigration law, others emphasize the importance of fairness. Human rights law offers a practical framework embracing both of these policy goals that is in the interests of citizens and non-citizens alike.

Human rights law recognizes every government's sovereign right to enforce its laws and protect its borders. However, the pressure to achieve immigration reform cannot come at the cost of violating fundamental human rights. Immigration law, like other aspects of US law, must adhere to the international legal obligations of the United States. This is crucial for protecting the rights of all persons in the United States.

In this report, Human Rights Watch addresses the human rights standards that should underpin any immigration reform legislation and makes recommendations to improve US immigration law.

II. Human Rights and Legalization for Undocumented Migrants

While there is no recognized human right to migrate to another country and obtain legal status, the United States has human rights obligations that provide a strong basis for establishing an earned legalization process for the 12 million undocumented immigrants currently residing in the United States. Three of these obligations, discussed below, are the need to ensure victims of abuse have remedies, to respect an individual's private life, and to ensure fair treatment in all governmental actions.

Provide Remedies for Victims

Human Rights Watch has investigated numerous instances in which the undocumented status of individuals has exacerbated the impact of human rights abuses, including serious violent crime.[1] The fact that they are undocumented too often prevents them from obtaining the redress to which they are entitled under both US and international human rights law. And because undocumented persons are less likely to report abuses, perpetrators are more likely to commit crimes against them and to escape being brought to justice.

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, ensures that victims of human rights abuse have access to a remedy, and that no group or category of victims should be unable to access the criminal justice system.[2] According to the United Nations Human Rights Committee, the international expert body that provides authoritative interpretations of the ICCPR, the government's failure to ensure that

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[1] See, for example, Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture*, May 2010, http://www.hrw.org/en/reports/2010/05/05/fields-peril-0, (undocumented farmworker girls are especially vulnerable to rape and sexual violence); Letter from Human Rights Watch to Mark Taylor, senior coordinator, Office to Monitor and Combat Trafficking in Persons, United States Department of State, "US: Victims of Trafficking Held in ICE Detention," April 19, 2010, http://www.hrw.org/en/news/2010/04/19/us-victims-trafficking-held-ice-detention (women trafficked for prostitution fearful of reporting abuse due to immigration status); Letter from Human Rights Watch to Immigration and Customs Enforcement (ICE), "Letter to ICE Urging Investigation on Death in Immigration Detention," August 27, 2007, http://www.hrw.org/english/docs/2007/08/28/usdom16755.htm (undocumented transgender detainee dies in detention after being denied adequate medical care).

[2] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, http://www2.ohchr.org/english/law/ccpr.htm (accessed June 30, 2010). The ICCPR provides the rights to a remedy and to access to justice, including a fair and public hearing on non-criminal claims (Articles 2 and 14). The ICCPR also imposes an obligation on governments to protect individuals' right to life (Article 6), to protect persons from inhuman treatment, including domestic violence (Article 7); to treat all individuals equally before the law; and to ensure non-discrimination (Articles 2, 3, 16, and 26).

individuals have redress for abuses by private persons may itself violate the covenant.[3] State laws, such as Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, that give broad discretion to state sheriffs and police to arrest persons suspected of unlawful presence discourage immigrants' cooperation with law enforcement efforts.[4]

An individual without a regularized immigration status is inherently at increased risk of exploitation and violent crime. A program of earned legalization for undocumented immigrants in the United States would offer tangible governmental protection to especially vulnerable individuals, an important human rights responsibility of the US government. And society broadly benefits when at-risk populations are less vulnerable and more willing and able to cooperate with law enforcement.

Protect the Right to a Private Life

Undocumented immigrants with long and deeply rooted ties in the United States currently face the same constant threat of deportation as other undocumented immigrants. Without a legalization process, they face possibly unlawful interference with established family and community relationships, which some jurisdictions have recognized as essential components of the basic right to a private life.[5] Providing such a process to undocumented immigrants who have established ties to the United States—because of long residence in the country, years or decades of employment, and deep investments in American society—would both protect this right and maintain immigrants' important relationships and contributions to society.

An undocumented individual over time develops stronger ties to the country of immigration, separate and apart from family relationships (discussed below), that must be taken into account in the deportation context. Children brought to the United States often have no ties at all to their country of origin, other than birth. Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy ... home or correspondence.... Everyone has the right to the protection of the law against such interference or attacks." The Human Rights Committee has stated that the term "home" is

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[3] Human Rights Committee, General Comment No. 31, "Nature of the General Legal Obligation on States Parties to the Covenant," U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), http://www1.umn.edu/humanrts/gencomm/hrcom31.html (accessed June 30, 2010), para. 8.

[4] "US: Arizona Violating Human Rights Treaty," Human Rights Watch news release, April 30, 2010, http://www.hrw.org/en/news/2010/04/30/us-arizona-violating-human-rights-treaty.

[5] See European Court of Human Rights, *Berrehab v. Netherlands*, (App. 10730/84), Judgment of 21 June 1988, http://www.unhcr.org/refworld/docid/3ae6b6f424.html (accessed June 30, 2010). Although European Court of Human Rights cases have no binding authority on the United States, they can help clarify international human rights standards.

"to be understood to indicate the place where a person resides or carries out his usual occupation."[6]

The rights arising out of such ties require protection even when a person is an undocumented immigrant. For instance, the European Court of Human Rights found that a non-citizen's private life included his "real social ties in Belgium":

> He lived there from the age of 11, went to school there, underwent vocational training there and worked there for a number of years. He accordingly also established a private life there ... which encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature.[7]

Undocumented immigrants are often entrepreneurs, longstanding taxpayers, property-owners, productive employees, and employers of US citizens. Many are deeply involved in their churches, schools, and broader communities. Some seek to contribute in other ways, by joining the US military, for example, but are prevented from doing so because of their immigration status.[8] Halting these important contributions and these community ties can cause a great deal of harm to American society and families.

Ensure Fair Legalization Procedures

If a program for legalization is put in place it must be accessible to most undocumented people, and eligibility criteria must be fair. Human rights law provides that government actions be guided by principles of fairness and non-discrimination, and include procedural safeguards. For example, persons entitled to a judicial determination of their legal rights must receive a "fair and public hearing by a competent, independent and impartial tribunal"; however, proceedings may be kept confidential "when the interest of the private lives" of

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[6] UN Human Rights Committee, General Comment No. 16, "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation," U.N. Doc. HRI/GEN/1/Rev.6 at 142 (2003), http://www1.umn.edu/humanrts/gencomm/hrcom16.htm (accessed July 1, 2010), para. 5.

[7] European Court of Human Rights, *C v. Belgium*, (App. 21794/93), Judgment of 7 August 1996, http://www.humanrights.is/the-human-rights-rpoject/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/466 (accessed June 30, 2010), para. 25.

[8] An example is the case of Gaby, an undocumented youth brought to the United States at the age of seven by her parents from Ecuador. In her high school, Gaby was the highest ranked Junior ROTC student and scored highest on the military's vocational aptitude test. The US Air Force tried to recruit her, but her undocumented status prevented her from serving. Cheryl Little and Susana Barciela, "Unleash the Dream: Ending the Colossal Waste of Young Immigrant Talent," Florida Immigrant Advocacy Center, April 2010, http://www.fiacfla.org/FIAC%20042210_Revised%202%282%29.pdf (accessed June 30, 2010).

persons requires.[9] All people are also entitled to "equality before the law."[10] Therefore, any process by which undocumented people come forward to enter the path towards legalization must respect these principles.

Finally, human rights law embraces the notion that when a penalty for illegal conduct is lessened, persons should benefit from the lessened penalty.[11] This is important for undocumented persons who may be subject to penalties relating to their undocumented status (for example, those who might be subject to punishment for illegal entry), who should nevertheless benefit from a legalization program.

Recommendations Regarding a Legalization Plan

Congress and the Obama administration should include new provisions in US immigration law that:

- Provide a path to earned legalization for undocumented migrants that will allow the United States to protect the right to a private life, and to provide a remedy for victims of rights abuse;
- Broadly define who may qualify for earned legalization benefits. Wide coverage encourages individuals to come forward, and permits Congress to require registration and entry into earned legalization as a prerequisite to lawful status without risking discrimination;
- Include procedural safeguards such as guarantees of confidentiality, rigorous evidentiary standards, and the ability to appeal decisions to a higher authority;
- Allow waivers and other modifications to current immigration law that will ensure that those eligible for legalization are not paradoxically disqualified from legalization due to bars to entry to the United States in existing law; and
- Pass the Agricultural Job Opportunities, Benefits, and Security Act (AgJOBS Act)[12] and the Development, Relief, and Education for Alien Minors Act (DREAM Act),[13] legislative proposals that recognize the significant connections to the United States established by agricultural workers with long residence and deep community roots and by young people who have worked hard and excelled while gaining an education in the United States.

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[9] ICCPR, art. 14.

[10] Ibid., art. 26.

[11] Ibid., art. 15.

[12] Agricultural Job Opportunities, Benefits, and Security Act of 2009, 111th United States Congress, 1st session, May 2009, S. 1038/H.R.2414, http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2414: (accessed June 30, 2010).

[13] Development, Relief, and Education for Alien Minors Act of 2009, 111th United States Congress, 1st session, March 2009, S. 729, http://thomas.loc.gov/cgi-bin/query/z?c111:S.729: (accessed June 30, 2010);: American Dream Act, 111th Congress, 1st session, March 2009, H.R. 1751, http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1751: (accessed June 30, 2010).

III. Ensuring Workers' Rights

Whenever they occur, labor and workplace conditions violations—from wage exploitation and pressure to do dangerous work to sexual abuse—are grave problems for both citizen and non-citizen workers in the United States. However, the threat of deportation by US Immigration and Customs Enforcement (ICE) makes non-citizens particularly vulnerable to such abuses, including immigrants with short-term visas or other forms of legal permission to work in the United States. While a path to legalization will improve workers' protections, lawmakers should take proactive steps in any immigration reform legislation to ensure this result.

In our reports, "Fields of Peril: Child Labor in US Agriculture"[14] and "Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants,"[15] Human Rights Watch documented how the threat of deportation, which immigrant workers fear even when they have permission to work in the US, can lead to unscrupulous employers paying unfair wages, refusing to respect hour limitations, employing child laborers, and subjecting workers to dangerous conditions. Some workers who are injured on the job or who are subjected to sexual abuse are afraid to report the harm they have suffered. Others who want to exercise their rights as workers, such as the right to organize, are too fearful to do so.

Human rights law binding on the United States is clear that all workers (irrespective of immigration status) must enjoy the rights to organize and bargain collectively, to workers' compensation, to non-discrimination, and to safe and healthy conditions of work.[16]

Ensure Portability, Grace Periods, and Deferred Action for Temporary Visas

Employers can more easily coerce non-citizen workers when their continued presence in the United States is dependent upon ongoing employment. In order to minimize the impact of such coercion, any legislative proposal to allocate temporary visas should ensure that such

[14] Human Rights Watch, *Fields of Peril*, http://www.hrw.org/en/reports/2010/05/05/fields-peril-0.

[15] Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, January 2005, http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear-0.

[16] See the International Labour Organization (ILO), "Declaration of Fundamental Principles and Rights at Work," Geneva, June 1998, http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (accessed June 30, 2010) (binding on the United States as a member of the ILO); North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (NAALC), *Commission for Labor Cooperation, North Atlantic Free Trade Organization*, 1993, http://www.naalc.org/naalc/naalc-full-text.htm (accessed June 30, 2010); ICCPR, art. 22 ("Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.").

visas are transferable to new employers (portability), even in different industries, and grant workers a grace period to search for a new job after leaving their initial employment. Otherwise, workplace rights will exist only in theory for many workers, who are likely to fear being fired and deported should they report violations.

For example, the current H-2 visa program provides immigrant farmworkers with permission to work in agriculture on a short-term basis: less than a year, with time-limited options for renewal.[17] Persons holding H-2 visas have little incentive to raise concerns about unfair wages or workplace conditions because their permission to work in the United States is tied to their employer.[18] Although employers of H-2 visa holders must uphold basic labor rights protections, and may only fire workers for "just cause," workers are not always aware of this and are often unwilling to step forward to vindicate their rights after termination.[19]

Even if they are not fired for exercising their rights as workers, temporary workers are particularly vulnerable when their visas expire. Human Rights Watch recommends that individual workers who pursue their labor rights through legal processes (such as filing a worker's compensation claim) should be provided with "deferred action," an extension of their temporary permission to remain in the United States until their legal claims for workplace violations have been resolved.[20]

Finally, the US Department of Homeland Security (DHS) should publicly affirm and explain portability, deferred action, and grace periods to non-citizen temporary workers and their employers. Human Rights Watch has documented cases in which employers stopped short of firing workers, but they blacklisted individuals who exercised their rights, making it difficult for workers to obtain new employment even when the law entitles them to a grace period and visa portability.[21] Informing workers of their rights is an essential step toward reducing these coercive practices.

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[17] Immigration and Nationality Act, secs. 101(a)(15)(H)(ii)(a), 214, and 218; 8 U.S.C. secs. 1101, 1184, and 1188.

[18] 8 C.F.R. sec. 214(h); 20 C.F.R. sec. 655.102.

[19] Patricia Medige, "Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues," *Denver Journal of International Law and Policy*, vol. 32, 2004, p. 739.

[20] See 8 C.F.R. sec. 274a.12(c)(14) (There is no statutory basis for deferred action, but the regulations cited reference this form of relief and provide a brief description: "[D]eferred action, an act of administrative convenience to the government which gives some cases lower priority…" Where a request for deferred action is granted, the foreign national is provided employment authorization.).

[21] See Human Rights Watch, *Blood, Sweat, and Fear*, http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear-0, p. 79.

Protect the Right to Equal Pay for Equal Work and to Equal Benefits

The United States is obligated under Article 26 of the ICCPR to "guarantee to all persons equal and effective protection against discrimination on any ground." While work-related benefits are not explicitly addressed in the ICCPR, any program affording fewer benefits to non-citizen than to citizen workers would violate Article 26, since "the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided in the Covenant." Article 26 "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[22]

Thus, any proposed temporary visa programs for workers must guarantee that they are afforded the same wages as other workers performing the same task, not simply the minimum wage. Likewise, temporary worker programs instituted by the United States should guarantee the same work-related benefits (such as unemployment and compensation for work-related injuries) to non-citizen workers as to citizen workers.

Reduce the Coercive Impact of Immigration Enforcement

As noted above, even when workers rights are clearly protected under US law, the reality of immigration law enforcement in the United States means that the fear of deportation often trumps workers' ability or willingness to exercise their rights, and this includes their labor rights.

ICE (and its predecessor agency, the Immigration and Naturalization Service (INS)) and the US Department of Labor entered into a Memorandum of Understanding (MOU) to try to de-link immigration and labor law enforcement.[23] First established in 1998, this MOU states that the two agencies must avoid situations where their co-involvement in a particular labor setting will have the purpose or effect of placing immigration raids on workplaces above labor law enforcement, because the Department of Labor has recognized that immigrant workers will be reluctant to bring complaints if employers are able to call in ICE.[24]

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[22] UN Human Rights Committee, General Comment No. 18, Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003), http://www1.umn.edu/humanrts/gencomm/hrcom18.htm (accessed June 30, 2010).

[23] Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, November 23, 1998, http://www.dol.gov/esa/whd/whatsnew/mou/nov98mou.htm (accessed July 1, 2010).

[24] "Better Use of Available Resources and Consistent Reporting Could Improve Compliance," statement of Anne-Marie Lasowski, acting director, Education, Workforce, and Income Security, Government Accountability Office before the Committee on Education and Labor, House of Representatives, GAO-08-962T, July 15, 2008, http://www.gao.gov/new.items/d08962t.pdf (accessed July 1, 2010).

In addition, since 1996, the INS (now ICE) has had in place internal guidance to its staff on how to avoid immigration enforcement involvement in labor disputes. This guidance, which appears as an ICE "Operating Instruction 287.3a" on labor disputes, provides that ICE agents should consider whether tips about alleged employment of undocumented workers are being provided to the agency in order to interfere with labor rights.[25] Despite the existence of these tools, perhaps partly because they are not consistently followed, some workers remain fearful of exercising their rights as workers. For example, employers in the United States continue to threaten to call immigration enforcement to report immigrant workers in order to prevent union organizing.[26]

Undocumented workers live in fear not only of ICE, but increasingly of local police officers as well. This is due to so-called 287(g) agreements under which local or state police enter into an agreement with ICE to enforce federal immigration law.[27] As of April 2010, ICE reported having enrolled 71 agencies in 26 states and trained 1,120 officers under the program.[28] The involvement of local police in enforcing federal immigration laws, which often is accompanied by racial profiling, has a chilling effect on workers' willingness to report workplace abuses.[29]

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[25] United States Immigration and Customs Enforcement (ICE), "Operating Instruction 287.3(a), Questioning persons during labor disputes," revised December 1996, added to INSERTS April 1999, http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53663/0-0-0-61045/0-0-0-61070.html#0-0-0-31745 (accessed July 1, 2010).

[26] In incidents documented by Human Rights Watch at Smithfield Foods, Inc. meatpacking plant, the company threatened to call immigration enforcement to report immigrant workers if workers chose union representation. See Human Rights Watch, *Blood, Sweat, and Fear*, http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear-0, p. 90 (citing decision of ALJ John H. West, JD-158-00, Smithfield Foods, Inc. and UFCW, Case Nos. 11-CA-15522 et. al. (December 15, 2000) (ALJ Decision)); and at Nebraska Beef, workers told Human Rights Watch that their employer told them they would be deported if they voted for the union. Ibid., p. 86.

[27] Section 287(g) of the Immigration and Nationality Act "authorizes the secretary of the U.S. Department of Homeland Security (DHS) to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Agreement (MOA), provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) officers." ICE, "Delegation of Immigration Authority Section 287(g): Immigration and Nationality Act," August 2008, http://www.ice.gov/partners/287g/Section287_g.htm (accessed July 1, 2010).

[28] ICE, "Updated Facts on ICE's 287(g) Program," April 2010, http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm (accessed July 1, 2010).

[29] Southern Poverty Law Center, "Racial Profiling by Law Enforcement is Constant Threat," April 2009, http://www.splcenter.org/publications/under-siege-life-low-income-latinos-south/2-racial-profiling (accessed April 7, 2010); see also Southern Poverty Law Center, "Close to Slavery: Guestworker Programs in the United States," March 2007, http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf (accessed April 7, 2010), pp. 1-2.

Recommendations to Protect Workers' Rights

Congress and the Obama administration should include new provisions in US immigration law that:

Ensure that any temporary worker visas are portable between employers, including employers in different industries;

- Provide workers with a grace period to search for a new job after leaving their initial employment;
- Ensure that workers who pursue labor rights through legal processes are given an extension of their temporary permission to remain in the US (deferred action) until their legal claims are resolved;
- Require ICE and the Department of Labor to recommit to Operating Instruction 287.3a, and the November 23, 2003 Labor Department MOU, and issue instructions to all field staff to abide by their terms, and provide training on how to do so; and
- Until such time as 287(g) Agreements are reformed or terminated, require that ICE train all signatories on the revived 287.3a Operating Instruction and the Labor Department MOU.

IV. Fair Treatment before the Courts

Some proposals for immigration reform seek to combine increased enforcement of immigration laws (resulting in increased deportations) with an earned legalization program. Any such package should ensure fair treatment and due process of law to non-citizens in deportation proceedings.

As noted above, the international human rights treaties ratified by the United States require that US authorities respect immigrants' rights when enforcing immigration laws. Legislation should reform aspects of the current immigration law that give judges too little discretion to correct injustices.

When the US Congress passed sweeping deportation laws in 1996,[30] it created a system in which ICE frequently acts as police, prosecutor, and jury in deportation proceedings and in which immigration judges presiding over those hearings have little authority to intervene and stop unjust deportations. While not every deportation proceeding raises concerns, human rights law guarantees that all persons appearing before a judicial proceeding receive "a fair and public hearing by a competent, independent, and impartial tribunal" in a determination of rights.[31] It also guarantees non-citizens' rights to present the reasons against their deportation in a fair hearing.[32]

Restore Reasonable Discretion to Immigration Judges

Under existing immigration law, a non-citizen is given the opportunity to appear before an immigration judge, but the judge can do very little other than rubber stamp deportation. This contravenes the US commitment under the ICCPR to allow persons lawfully in the country, as

[30] See the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-628; Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

[31] According to the UN Human Rights Committee, the requirement of a competent, independent, and impartial tribunal "is an absolute right that is not subject to any exception." UN Human Rights Committee, General Comment No. 32, "Right to equality before courts and tribunals and to a fair trial," U.N. Doc. CCPR/C/GC/32 (2007), http://www1.umn.edu/humanrts/gencomm/hrcom32.html (accessed July 1, 2010), para. 19.

[32] ICCPR, art. 14(1). According to the UN Human Rights Committee, "[i]nsofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in [the ICCPR], and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable." UN Human Rights Committee, General Comment No. 32, para. 62.

well as those whose legal status is in dispute,[33] the opportunity to present any reasons why they should not be deported to immigration courts.[34]

Every year, thousands of lawful permanent residents, or "green card" holders, are expelled from the United States as a result of committing minor crimes. Since most people become lawful permanent residents through family or employment sponsorships, many of these people are the immediate relatives of US citizens, or have established careers with US businesses.

Even with their extensive ties to the United States, lawful permanent residents may be deported for a myriad of minor crimes, including those classified for purposes of immigration law as "aggravated felonies." Despite its name, an "aggravated felony" does not have to be a felony under state law nor does it have to be violent. Document fraud, crimes involving the use of force against property, illegal reentry offenses, and other theft and fraud offenses can be aggravated felonies under immigration law. In our 2009 report, "Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses," Human Rights Watch documented that 68 percent of lawful permanent residents deported between 1997 and 2007 were removed for nonviolent offenses.[35] We estimated that 1 million spouses and children—many of them US citizens—have been forced apart because of these deportations. Yet in many cases where non-citizens have committed these offenses, no matter what the circumstances of the crime or how extensive the non-citizen's ties to the United States, Congress has mandated that the immigration judge order that person deported from the country. For example, one legal permanent resident originally from Haiti was ordered deported and the judge could not consider the fact that he had lived in the United States for 40 years, had four US citizen sons, and was a military veteran whose crimes stemmed from a drug habit that began during his military service.[36]

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[33] The UN Human Rights Committee has interpreted the phrase "lawfully in the territory" to include non-citizens who wish to challenge the validity of the deportation order against them. In addition, the Human Rights Committee has made this clarifying statement: "if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13…. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one." UN Human Rights Committee, General Comment No. 15, "The position of aliens under the Covenant," U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003), http://www1.umn.edu/humanrts/gencomm/hrcom15.htm (accessed July 1, 2010), paras. 9 and 10.

[34] ICCPR, art. 13. An "alien lawfully in the territory of a State … may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall … be allowed to submit the reasons against his expulsion … and be represented … before … the competent authority." Ibid.

[35] Human Rights Watch, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, April 2009, http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0.

[36] Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, http://www.hrw.org/en/node/10856/section/1, p. 76.

Prior to 1996, lawful permanent residents facing deportation for aggravated felonies could appear before an immigration judge and request relief under section 212(c) of the immigration law.[37] Under 212(c), an immigrant could ask the immigration judge to weigh the equities in their case, including negative factors such as the severity of the crime and positive factors such as the immigrant's ties to the community and rehabilitation. The immigration judge, after having a full view of the case, would decide whether 212(c) relief was warranted, and whether the non-citizen should retain their lawful permanent resident status. The elimination of 212(c) relief has resulted in removal hearings that fall far below the ICCPR requirement that lawfully residing non-citizens be provided with the opportunity to present the reasons against their deportations.

Reform Expedited Removal

Under current immigration law, certain immigrants arrested within 100 miles of any US border are put into "expedited removal" (a system of quick deportation hearings), in which they are not provided a hearing before an immigration judge, but instead must make their case before an ICE officer.[38] Once ICE has begun expedited removal, the non-citizen is not allowed to make most arguments against deportation, such as requesting relief under the Violence against Women Act or as a victim of trafficking, that would be available in a typical immigration court hearing.[39] Although asylum seekers in expedited proceedings may explain the reasons they fear persecution if forced to return to their country of origin, the rushed atmosphere of these proceedings, and the fact that they are not held before an immigration judge, prevents some vulnerable persons from being able to make their fears known. All of these deficiencies are of concern because, under existing law, a decision to deport someone through expedited removal cannot be appealed.

Ensure Access to Counsel

Immigration reform legislation should ensure that non-citizens have access to counsel. ICE's transfer practices seriously interfere with the attorney-client relationship. In our 2009 report,

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[37] Section 212(c) provided, "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…. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." INA 212(c), 8 U.S.C. sec. 1182(c), 1994 (repealed in 1996 by AEDPA Section 440(d)).

[38] Outside of the expedited removal process, non-citizens are provided hearings in immigration court to determine whether they should be deported from the US or have a valid claim for legal immigrant status. The decision of an immigration judge can usually be appealed to the Board of Immigration Appeals (BIA), and the BIA decision, in turn, appealed to federal court.

[39] Alison Siskin and Ruth Ellen Wasem, "Immigration Policy on Expedited Removal of Aliens," *Congressional Research Service*, September 2005, http://trac.syr.edu/immigration/library/P13.pdf (accessed July 1, 2010), p. 14.

"Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States," Human Rights Watch documented how ICE routinely transfers non-citizens arrested for immigration violations to detention facilities thousands of miles away.[40] And, because there is no deadline for ICE to file a charging document (known as a Notice to Appear, "NTA") against a detainee, the agency can transfer the person multiple times and across long distances before starting deportation proceedings, often to a place far away from their attorney, witnesses, and evidence: 1.4 million of these transfers have taken place since 2006.

More often than not, a non-citizen will be unable to pay for his or her attorney to travel to immigration court in the new location. And although some immigration judges may allow the non-citizen's attorney to appear at a hearing by telephone, this privilege is not guaranteed and is often denied by immigration judges. As a result, the transfer of detainees can, as a practical matter, result in the deprivation of counsel. Non-citizens also will have to appear in immigration court in the new remote location, far from potential witnesses and evidence in their case. Depriving immigrants of counsel violates their right to access to an attorney under human rights and US law.[41]

Counsel is also essential for certain particularly vulnerable immigrants. In early 2010, Human Rights Watch conducted 43 interviews of non-citizens with mental disabilities in 12 immigration detention facilities in the United States.[42] We found that mentally disabled immigration detainees often could not provide basic identifying information, did not know their birthdays, their legal status in the US, or whether they had permission to work. Given the complexity of immigration law, without legal representation these people are unable to present their legal claims or defend against deportation. In some cases, the lack of counsel has led to unlawful deportations. In order to meet the ICCPR standard of a "fair" hearing, indigent people who are not mentally competent to represent themselves should be appointed counsel in immigration hearings.

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[40] Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December 2009, http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0.

[41] Article 13 of the ICCPR states that aliens shall "be represented … before … the competent authority." Article 13 applies both to non-citizens lawfully in the United States and those who are facing deportation. In addition, the UN Basic Principles on the Role of Lawyers provides that "Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on … national or social origin." Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principle 2. Under US law, see 8 C.F.R. sec. 292.5, 5 U.S.C. sec. 555(b).

[42] We use the term "mental disability" to include developmental or cognitive disabilities as well as mental illness.

Recommendations to Ensure Fair Trials

Congress and the Obama administration should include new provisions in US immigration law that:

- Restore the availability of 212(c) relief;
- Restrict the definition of aggravated felonies to serious violent crimes classified as felonies under state law;
- Restrict the use of expedited removal to extraordinary situations and ensure immigration judge review of all deportation orders in order to reduce the risk of wrongful deportations;
- Prohibit ICE from transferring non-citizens represented by counsel and require that the Notice to Appear be filed within 48 hours of arrest at the immigration court nearest to the place of arrest; and
- Provide for the appointment of counsel for mentally disabled indigent non-citizens.

V. Protect against Arbitrary Detention

As discussed more fully in our report, "Costly and Unfair: Flaws in US Immigration Detention Policy,"[43] while the United States has a legitimate interest in detaining some non-citizens to guarantee their appearance at hearings and to ensure the deportation of those judged to be removable, the power of immigration authorities to detain people under current US immigration law is too broad, leading to unwieldy, unnecessary, and costly detention.

The United Nations Working Group on Arbitrary Detention recognizes "the sovereign right of states to regulate migration" and yet cautions: "immigration detention should gradually be abolished.... If there has to be administrative detention, the principle of proportionality requires it to be a last resort."[44] This means that immigration detention should only be used in those cases in which legitimate government interests cannot be fulfilled through any other means.

Exempt Nonviolent Offenders from Mandatory Detention

Too many non-citizens are ending up in crowded and costly immigration detention facilities in the United States. In order to uphold human rights standards, the US government should subject persons to detention only if they are dangerous or at risk of absconding from legal proceedings.

Under current US law, many nonviolent offenses trigger a "mandatory detention" provision.[45] This provision requires ICE to detain non-citizens who have finished serving sentences for certain crimes without even the possibility of a bond hearing to determine whether it is appropriate to release them pending the outcome of deportation proceedings. By contrast, in the US criminal justice system, no one is held in comparable circumstances (in pre-trial detention, for example) without a hearing to determine if they are a flight risk or dangerous. In an October 2009 report, the US Department of Homeland Security determined that 66 percent of all immigration detainees were confined due to this mandatory detention provision.[46]

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[43] Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 2010, http://www.hrw.org/en/reports/2010/05/06/costly-and-unfair-0.

[44] UN Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_en.pdf (accessed July 1, 2010).

[45] 8 U.S.C. sec. 1226(c).

[46] Dr. Dora Schriro, special advisor on ICE Detention and Removal, "Immigration Detention Overview and Recommendations,"

The nonviolent crimes that can result in mandatory detention include controlled substances offenses (including minor possession), two or more crimes of "moral turpitude" (including so-called "fraud" crimes such as shoplifting), and any crime of moral turpitude carrying a sentence of imprisonment of one year or more (even if the sentence was suspended by the criminal court judge). The mandatory detention of non-citizens who have nonviolent criminal records is out of step with international human rights standards. Non-citizens with these types of nonviolent criminal histories should be exempt from mandatory detention and afforded a bond hearing to assess each individual's circumstances, such as community ties, and the likelihood they would appear at hearings.

Exempt Lawful Permanent Residents from Mandatory Detention

Lawful permanent residents who are convicted of certain crimes are subject to immigration detention and removal after serving their criminal sentences. In most such cases, they are subject to the mandatory immigration detention provision described above. While citizens convicted of the same crimes are able to return to the community as soon as they complete their sentences, ICE holds lawful permanent residents indefinitely pending removal proceedings without even a bond hearing.

Consistent with the principle of proportionality, administrative detention of lawful permanent residents should be used only to protect the community from danger or to prevent someone who is likely to abscond from fleeing. Human Rights Watch believes that all lawful permanent residents should be exempt from mandatory detention and entitled to a bond hearing before being detained indefinitely by immigration authorities. We also believe that, when considered for bond, there should be a presumption that such individuals are neither flight risks nor dangerous, which could be rebutted by the government during the bond hearing.

Lawful permanent residents are unlikely to be flight risks because they have a vested interest in maintaining their legal status by appearing in court, and usually have employment and residential ties to the community. They also often have strong family ties to the United States. In fact, many are the parents and spouses of US citizens. In addition, many lawful permanent residents are not dangerous. As noted above, more than two-thirds of lawful permanent residents deported on criminal grounds between 1997 and 2007 were deported for nonviolent offenses.

Department of Homeland Security, Immigration and Customs Enforcement, October 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed July 1, 2010).

Limit Detention of Vulnerable Groups

Certain categories of non-citizens are in a vulnerable state when they come into contact with US immigration enforcement authorities. These include asylum seekers, unaccompanied minors, and persons with mental or physical illness or disability. For members of these groups who have endured trauma and hardship, or who require specialized programs, professional care, and higher standards of treatment than is provided in detention facilities, there should be a categorical exemption from detention or, at minimum, priority access to alternative-to-detention programs.

Although ICE currently operates three alternative-to-detention programs that monitor non-citizens through global positioning software, telephone monitoring, radio monitoring, and home visits, these programs are only available to limited numbers of non-citizens who live close to the 24 field offices that run them. Human Rights Watch believes that ICE should expand these programs so that vulnerable persons can, at minimum, be placed in an alternative-to-detention program.

Ensure Safe and Dignified Conditions of Detention

When the United States detains individuals pending the outcome of their civil immigration proceedings, protections must be in place to ensure the safety and dignity of detainees. The International Covenant on Civil and Political Rights obliges governments to ensure that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[47] This, the UN Human Rights Committee has explained, entails a positive obligation to see that those individuals suffer no "hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons."[48]

More than 100 detainees have died since ICE was created in 2003. Reports have documented gross failures in the medical care provided to detainees and raised numerous concerns about the lack of sufficient federal oversight of detention facilities. A March 2009 Human Rights Watch report documented instances of shackling of pregnant detainees and detailed dozens of cases in which women detainees struggled to obtain pap smears, mammograms, pre-natal care, counseling (for survivors of violence), and even basic

[47] ICCPR, art. 10(1).

[48] UN Human Rights Committee, General Comment No. 21, "Replaces general comment 9 concerning humane treatment of persons deprived of liberty," U.N. Doc. HRI/GEN/1/Rev.6 at 153 (2003), http://www1.umn.edu/humanrts/gencomm/hrcom21.htm (accessed July 1, 2010), para. 3.

supplies such as sanitary pads or breast pumps for nursing mothers.[49] A December 2007 Human Rights Watch report found that ICE does not collect the basic information necessary to provide proper treatment for immigrant detainees with HIV/AIDS, has sub-standard policies and procedures for ensuring appropriate care and services, and inadequately supervises the care provided.[50] This report also documented discrimination against both immigrants living with HIV/AIDS and lesbian, gay, bisexual, transgender, and gender non-conforming immigrants and recommended that ICE develop an anti-discrimination policy to address this problem.

While ICE has begun a process of detention reform to address these and other failings, no legally enforceable standards currently govern immigration detention conditions. Congress should legislate standards to ensure that detained immigrants have effective protection against mistreatment.

Recommendations to Protect against Arbitrary Detention

Congress and the Obama administration should include new provisions in US immigration law that:

- Provide that only violent offenders are subject to mandatory detention;
- State that lawful permanent residents shall not be subject to mandatory detention, and that they will be presumed to be neither a flight risk nor dangerous during bond hearings, with the burden on the government to prove otherwise;
- Ensure that ICE has full discretion to release detained non-citizens who do not pose a flight risk or danger to the community and prioritize undocumented persons convicted of the most serious, violent, criminal offenses for detention and deportation;
- Expand the alternatives-to-detention program throughout the United States; and
- Provide legally enforceable standards to guarantee proper treatment of individuals in immigration detention, including adequate medical care to detained immigrants.

[49] Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, March 2009, http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed.

[50] Human Rights Watch, *Chronic Indifference: HIV/AIDS Services for Immigrants Detained by the United States*, vol. 15, no. 5(G), December 2007, http://www.hrw.org/en/reports/2007/12/05/chronic-indifference.

VI. Preserve Family Unity

Family unification has been a longstanding goal of US immigration policy. The concept is incorporated into the domestic law of the United States. For example, in the context of custody rights for grandparents, the US Supreme Court has held that the "right to live together as a family" is an important right deserving constitutional protection, and that "the institution of the family is deeply rooted in this Nation's history and tradition."[51]

Human rights treaties binding on the United States also protect the right to family unity. Article 17 of the ICCPR states that no one shall be "subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." Article 23 provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state," and that all men and women have the right "to marry and to found a family." The right to found a family includes the right "to live together."[52] The UN Human Rights Committee has explicitly stated that family unity imposes limits on states' power to regulate immigration.[53]

Prioritize Family Unity: Visa Discrimination and Backlogs

Current immigration law threatens American families' right to live together, including those who are in the United States lawfully and are waiting to be able to reunite with their family members. Low numerical limits for family visas and processing inefficiencies have led to a backlog of more than 4 million family visa applicants. In addition, congressionally allocated visas sometimes go unused due to inefficiencies in visa processing and those unused visas do not get combined with new allocations in subsequent years. Spouses and children of lawful permanent residents make up the largest group of family members waiting abroad for visas. This backlog creates tremendous pressure throughout the immigration system—leading to increased illegal immigration and visa overstays. Additionally, as documented in our report, "Family Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law," the Defense of Marriage Act, passed in 1996, excludes lesbian and

[51] *Moore v. City of East Cleveland*, 431 U.S. 494, 500; 503 (1977).

[52] UN Human Rights Committee, General Comment No. 19, "Protection of the Family, the right to marriage and equality of the spouses," U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003), http://www1.umn.edu/humanrts/gencomm/hrcom19.htm (accessed July 1, 2010), para. 5.

[53] UN Human Rights Committee, General Comment No. 15, paras. 5 and 7.

gay couples from the definition of "spouse," thereby preventing thousands of US citizens from receiving legal recognition of their same-sex partners for purposes of immigration.[54]

Restore Judges' Ability to Protect Family Unity

Congress should also address the harsh effects on family unity brought about by the 1996 amendments to the immigration laws. Persons facing deportation after serving their sentences for criminal convictions must have access to a fair hearing (such as a 212(c) hearing) in which a judge can balance their human right to family unity against the seriousness of their crime. In light of the strong international standards protecting family unity, the United States has fallen far behind the practice of governments around the world in terms of providing protection for family unity in deportation proceedings.

Recommendations to Preserve Family Unity

Congress and the Obama administration should include new provisions in US immigration law that:

- Restore the 212(c) waiver from deportation;
- Combine visas that go unused due to processing inefficiencies with new congressional allocations of visas in subsequent years;
- Include the spouses and children of legal permanent residents in the immediate relative visa category (the category is currently limited to immediate relatives of US citizens), and exempt them from numerical caps on family immigration visas; and
- Pass the Uniting American Families Act to offer binational same-sex couples' relationships the same recognition and treatment afforded to binational married couples.

[54] Human Rights Watch, *Family Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law*, May 2006, http://www.hrw.org/en/reports/2006/05/01/family-unvalued-0.

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HUMAN RIGHTS WATCH

Tough, Fair, and Practical

A Human Rights Framework for Immigration Reform in the United States

Americans from all political perspectives agree that United States immigration laws need to be fixed. While some emphasize the need to be tough in enforcing immigration law, others emphasize the importance of fairness. International human rights law offers a practical framework embracing both of these policy goals that is in the interests of citizens and non-citizens alike.

Tough, Fair, and Practical describes the human rights standards that should underpin any immigration reform legislation and makes practical recommendations to improve US law. The basic right to family unity, fair hearings, protection against arbitrary detention, workplace rights, and remedies for victims are enhanced for all persons in the United States if these rights are protected in immigration policy. While international human rights law recognizes every government's sovereign right to protect its borders, the pressure to achieve immigration reform cannot come at the cost of violating fundamental human rights.

(front cover) Immigrant laborers from Mexico and Honduras work to rebuild a home damaged by Hurricane Katrina on April 27, 2006, in New Orleans.

(above) A migrant farm worker from Mexico picks spinach on September 16, 2009, near Wellington, Colorado.