



**Forced Apart**  
**Families Separated and Immigrants Harmed by United States**  
**Deportation Policy**

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## I. Summary

Antonio Cerami came to the United States with his family when he was 12 years old. He entered the country as a lawful permanent resident. In 1984, Antonio met Cristina, who is a US citizen, and they were married in 1992. Antonio became stepfather to her four children, and the couple had a son of their own. A unionized dockworker in Chicago, Antonio also worked part-time in the evenings and weekends to provide financial support to his family. The couple purchased a home in the Chicago suburbs and sent their children to local public schools. Cristina told a Human Rights Watch researcher,



“I stayed home until our son was about three years old. Antonio worked two jobs to take care of us. Then, I also got a job in an office and everything was good .... We were fine, we were just a normal—not a rich—family, but very comfortable, right? I went to work, he went to work, we hardly ever saw each other because we worked for 10 hours. But we had a plain old normal life. We moved to a [new suburb] after a few years because ... there were better schools and we wanted a home where [each of our] kids could have his own room.”<sup>1</sup>



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Then, in 2003, Antonio decided to take his young son and wife on a three-week trip to Italy for a niece’s wedding. Upon their return to O’Hare airport, Antonio was taken into custody in connection with a conviction he had received 19 years earlier, for attempting with an accomplice to rob a pizza parlor. Antonio had been sentenced to six years in prison, and released after three years for good behavior. He had complied with all conditions of his parole by reporting once a month to a parole officer.

Antonio was ordered deported back to Italy. Cristina explained what happened when she was called to testify at the immigration court:

When I begged the judge not to take Tony away, the judge said, “You have a job, you can work.” Well what happened to America and family unity? What happened to that? Does that not mean anything? No child left behind? Mr. Bush? We pay taxes. My husband paid taxes. He was here for 30 years

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<sup>1</sup> Human Rights Watch interview with Cerami family, Chicago, Illinois, February 5, 2006.

[before his deportation] .... My daughter, you should have seen the way she was crying ... when I saw her face in court, that was a nightmare. He was her dad. He raised her since she was five years old .... My whole family was there. We're decent people. It was a very traumatic experience for my whole family, but mostly for my kids.<sup>2</sup>

Cristina's youngest son had to undergo counseling after his father was deported. She explained, "He's a good boy, but he started using drugs." The loss of Antonio's income and expensive legal fees took their toll on the family. Cristina lost the house in the suburbs. Her oldest daughter moved in with her boyfriend's family and, Cristina explained,

My daughter had problems. I had problems. I cried every day. Right now we don't really have a home. We're living with friends and family. John lives with a friend, Jessica lives with another friend, Danny's with his uncle and Angela lives with another friend. They have really split us up.<sup>3</sup>

Unfortunately, the Ceramis are not alone. Hundreds of thousands of families throughout the United States are being forced apart by punitive and inflexible US deportation policies. Regularly, legal immigrants who have lived in the country for decades with family members who are citizens or lawful permanent residents are being deported from the United States.

Contrary to popular belief, US deportation policy did not become more severe after the terrorist attacks on September 11; instead, drastic changes made in 1996 have been at work for more than a decade, devastating communities across the nation. Also, contrary to popular belief, these policies do not target only undocumented immigrants—they apply to long-term lawful permanent residents (or green card holders) as well. When these members of the community of the United States are deported, their absence is felt because shops close, entrepreneurs lose their business partners, tax revenues are lost, and, most tragically, US citizen and lawful permanent resident children and spouses are forced to confront life without their fathers, mothers, children, husbands, or wives.

Deportation is a necessary part of every country's enforcement of its immigration laws. To be sure, the non-citizens featured in this report are being deported for a reason—they have violated the criminal laws of the United States, making them subject to deportation after

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

they have finished serving their criminal sentences. However, many immigrants being deported from the United States are a far cry from the worst and most violent offenders. Non-citizens have been forced into permanent exile for non-violent misdemeanor offenses, even if they served a short sentence with a perfect record of good conduct. As shown in the case of Mr. Cerami, the 1996 laws have also had sweeping retroactive effects: a criminal offense committed in the 1980s that did not trigger deportation at that time can now render a non-citizen deportable, even if the non-citizen served a prison sentence, successfully completed all terms of probation, and has since lived, worked, and raised a family in the community without ever running into trouble with the law again.

Not only have deportation laws become more punitive—increasing the types of crimes that can permanently sever an immigrant’s ties to the United States—but there are fewer ways for immigrants to appeal for leniency. Hearings that used to happen in which a judge would consider immigrants’ ties to the United States, most especially their family relationships, were stopped in 1996 for those convicted of a long list of crimes. There are no exceptions available, no matter how long an individual has lived in the United States and no matter how much his spouse and children depend on him for their livelihood and emotional support.

A retired immigration judge shared the frustration he felt when he was unable to prevent deportation because of the strict requirements of the changed laws:

My 30-year career with the Department of Justice has been exciting and stimulating. Each case I hear is a life story. I have been able to grant refuge to persons who have a genuine fear of persecution. I have been able to unite or re-unite families. On the other hand, in many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit.<sup>4</sup>

In the United States between 1997 and 2005 (the most recent year for which data are publicly available), 672,593 non-citizens have been deported for criminal offenses.<sup>5</sup> The Department of Homeland Security (DHS) has only recently disclosed general statistics on the criminal convictions that formed the basis for removal orders. In 2005, 64.6 percent of the

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<sup>4</sup> James P. Vandello, “Perspective of an Immigration Judge,” *Denver University Law Review*, vol. 80 (2003), p. 775.

<sup>5</sup> Immigration and Naturalization Service, “Enforcement Operations, Aliens Removed by Criminal Status and Region and Selected Country of Nationality,” *Statistical Yearbook 1997*, Table 65 (FY 1997), p. 185; Department of Homeland Security, *Yearbook of Immigration Statistics 2005*, Table 41 and Table 42 (FY 1998-2005), <http://www.dhs.gov/ximgtn/statistics/publications/YrBko5En.shtm> (accessed May 31, 2007).

immigrants deported were removed for non-violent offenses like drug convictions, illegal entry, and larceny; 20.9 percent were removed for violent offenses; and 14.7 percent were removed for “other” crimes.

Unfortunately, we have no idea whether and how many of those 672,593 non-citizens were lawful permanent residents or otherwise in the country with legal permission, and how many were undocumented. There are also no hard data on their family relationships. However, based on the 2000 US Census, we estimate that approximately 1.6 million spouses and children living in the United States were separated from their parent, husband, or wife because of these deportations.

Human rights law recognizes that the privilege of living in any country as a non-citizen may be conditional upon obeying that country’s laws. However, a country like the United States cannot withdraw that privilege without protecting the human rights of the immigrants it previously allowed to enter. Unfortunately, that is precisely what US immigration law fails to do—it gives no opportunity to immigration judges to balance the individual’s crime against his or her family relationships, length of time in the US, military service, economic ties to the US, likelihood of persecution, or lack of connections to the country of origin.

Without being able to raise these issues in their immigration hearings, people’s rights to have these factors taken into account are violated. In this respect, the United States is far out of step with international human rights standards and the practices of other nations, particularly nations that it considers to be its peers. For example, of all the governments in western Europe, the United States joins only Luxembourg in not weighing family ties or providing for some proportionality analysis in all of its deportation proceedings.

In this report, Human Rights Watch charts the various devastating ways in which changes to immigration laws passed 10 years ago have impacted America’s families. We reiterate a theme that US President George W. Bush has repeatedly recognized, including in an April 9, 2007 statement about proposed comprehensive immigration reform legislation: “[F]amily values d[o] not stop at the Rio Grande River.”<sup>6</sup>

Human Rights Watch calls on the President and Congress, as a part of comprehensive immigration reform or other legislation, to hold true to those words. The United States

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<sup>6</sup> The White House, “President Bush Discusses Comprehensive Immigration Reform in Yuma, Arizona,” US Border Patrol, Yuma Station Headquarters, Yuma, Arizona, April 9, 2007, <http://www.whitehouse.gov/news/releases/2007/04/20070409-12.html> (accessed May 30, 2007).



should reinstate hearings that would allow immigrants facing deportation the chance to ask a judge to allow them to remain in the United States when their crimes are relatively minor and their connections (including their family ties) to the United States are strong. We ask Congress to take a second look at the kinds of crimes that render people deportable, in order to prevent permanent and mandatory banishment from the United States for relatively minor non-violent crimes like theft or drug possession. Providing for proportionality in deportation and protecting family unity are essential to a just and fair immigration policy, and this cannot be accomplished without amending US immigration law to allow for relatively simple balancing hearings.

## II. Recommendations

### To the President of the United States

- Encourage Congress to amend immigration laws to ensure that all non-citizens have access to a hearing before an impartial adjudicator, weighing the non-citizen's interest in remaining in the United States against the US interest in deporting the individual.

### To the United States Congress

- Amend immigration laws to provide access to a balancing hearing before an impartial adjudicator in which an individual non-citizen's interest in remaining in the United States is weighed against the US interest in deporting the individual.
  - In the reinstated balancing hearings, ensure that the following are weighed in favor of the non-citizen remaining in the United States:
    - Family relationships in the United States,
    - Hardship family members will experience as a result of deportation,
    - The best interests of any children in the family,
    - Legal presence in the United States,
    - Length of time in the United States,
    - Period of time after the conviction during which the non-citizen has remained conviction-free (evidence of rehabilitation),
    - Investment in the community of the United States through business enterprises, military service, property ownership, and/or tax payments,
    - Lack of connection to the country of origin.
- Amend immigration laws so that only non-citizens who have committed serious, violent crimes (not misdemeanor crimes), for which the non-citizen has served an actual prison term (not probation or drug treatment sentences) are subject to deportation.
- Amend immigration laws to ensure that individuals whose lives or freedom would be threatened if returned are provided protection from return to persecution unless they have been convicted of a particularly serious crime and are dangerous to the community of the United States within the meaning of the 1951 Refugee Convention.
- Amend immigration laws to ensure that offenses that did not trigger deportation at the time they were committed are not used to deport immigrants now.

- Amend immigration laws to allow state and federal criminal judges to sentence non-citizens convicted of crimes with a judicial recommendation against deportation (“JRAD”).

### **To the Department of Homeland Security**

- Publish statistics annually that reveal what criminal convictions form the basis for all removals from the United States on criminal grounds, the immigration status (lawful permanent resident, asylee, etc.) of all persons removed on criminal grounds, and whether non-citizens removed have family relationships with US citizens or lawful permanent residents.

### **To the Bureau of Population, Refugees and Migration**

- Ensure that individuals who enter the United States through refugee resettlement programs (“refugees”) receive information in a language they understand about the naturalization process for themselves and their children.
- After the five-year waiting period, conduct follow up through social service agencies with refugees and their children to ensure that they receive support and advice in a language they understand so that they may naturalize.

### **To the United States Citizenship and Immigration Services**

- Ensure that individuals who are granted asylum (“asylees”) receive information in a language they understand about the naturalization process for themselves and their children.
- After the five-year waiting period, conduct follow up through social service agencies with asylees and their children to ensure that they receive support and advice in a language they understand so that they may naturalize.

### **To Criminal Defense Attorneys**

- Advise clients on the immigration consequences of criminal convictions or other criminal dispositions such as guilty pleas, court-mandated drug treatment, or probation.

### III. Deportation Law Based on Criminal Convictions Before 1996

#### Early History of the Deportation Power

In 1996, Congress adopted the most sweeping immigration law changes in the history of the United States, focusing in particular on deporting non-citizens with criminal convictions. In the 50 years leading up to these historic amendments, Congress had already made incremental changes to US immigration law. This chapter traces the most significant of these earlier changes, setting the stage for Congress's broad overhaul in 1996.

All governments enact immigration laws to control the flow of people across their borders. The United States is no exception, and has a long history of regulating which non-citizens can enter and live in the country, for how long, and for what reasons. Early laws mostly controlled entry to the country, and were less concerned with deportation.<sup>7</sup> For example, a general immigration law passed in 1875 excluded prostitutes and alien convicts from entering the United States, and the 1882 Immigration Act denied entry to "convicts (except those convicted of political offences), lunatics, idiots, and persons likely to become public charges."<sup>8</sup> An 1891 law refused entry to prospective immigrants who had a "dangerous contagious disease" or were polygamists, and a 1917 law established a literacy requirement for admission to the country.

However, deportation also has a long history in the United States. As early as 1798, the newly established US Congress passed the Alien Enemies Act and the Alien Friends Act, which empowered the president to expel any non-citizen he deemed dangerous.<sup>9</sup> Other changes passed in 1882 made it illegal for Chinese laborers to enter or to *remain* in the United States.<sup>10</sup> In 1952 the McCarran-Walter Act established the basic structure of US immigration law today, setting up deportation procedures, creating an admissions system with quotas based on nationality, as well as detailed exclusions based on political grounds. Other major changes to US immigration laws have occurred in 1965, 1980, 1986, 1988, 1990, and 1996.

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<sup>7</sup> Throughout this report, we use the term "deportation" and "removal" interchangeably to refer to a government's policy to remove a non-citizen from its territory. We note that the terms had different meanings under earlier versions of US immigration law, and that now all such governmental actions are referred to in US law as "removals." Nevertheless, for ease of reading and simplicity we use the more commonly understood term "deportation" wherever possible.

<sup>8</sup> Immigration Act, 1882.

<sup>9</sup> 50 U.S.C. Sections 21-23, 1798.

<sup>10</sup> An Act to Execute Certain Treaty Stipulations Relating to Chinese, Section 1 and Section 2, 1882.

Throughout the history of the United States, many different kinds of non-citizens have been made subject to deportation after criminal convictions. People with lawful permanent resident status (or green card holders), including those who have lived lawfully in the US for decades, are subject to deportation. So are other legal immigrants—refugees, students, businesspeople, and those who have permission to remain because their country of nationality is in the midst of war or a humanitarian disaster. Of course, undocumented non-citizens are also subject to deportation regardless of whether they have committed a crime.

A primary principle of US immigration law is that US citizens can never be denied entry into the US; neither can they ever be forcibly deported from the US. By contrast, non-citizens, even those who have lived in the country legally for decades, are always vulnerable to deportation, especially if they have been convicted of a crime.

## Crimes of Moral Turpitude and Aggravated Felonies

Created as a category in 1891, “crimes of moral turpitude” have long been a type of criminal conviction that could render non-citizens subject to deportation. The term “moral turpitude” is undefined in immigration law, and this lack of clarity has left courts to draw their own conclusions as to what crimes fit the definition over time. Courts have generally found that a “moral turpitude” offense must involve immoral or fraudulent intent<sup>11</sup> as an element of the offense.<sup>12</sup> Weapons offenses involve moral turpitude when committed with a malicious intent, but not when committed “passively.”<sup>13</sup> Attempts and conspiracies to commit crimes and being an accessory to a crime involve moral turpitude if the primary or substantive offense does.<sup>14</sup>

Broadly speaking, from 1952 until 1996, non-citizens were subject to deportation for crimes of moral turpitude committed within five years after the date of entry and with a sentence of

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<sup>11</sup> Charles Gordon et al., *Immigration Law and Procedure* (New York: Matthew Bender, revised edition, 1999), Sections 71.05[1][d][i] and 71.05[1][d][iii].

<sup>12</sup> Commentators divide “crimes involving moral turpitude” into four major categories: (1) crimes against the person; (2) crimes against property; (3) sex crimes and crimes involving family relationships; and (4) crimes of fraud against the government or its authority. Brian C. Harms, “Redefining ‘Crimes of Moral Turpitude’: A Proposal to Congress,” *Georgetown Immigration Law Journal*, vol. 15 (Winter 2001), p. 259.

<sup>13</sup> See, for example, *Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); *Ex parte Saraceno*, 182 F. 955 (S.D.N.Y. 1910); *In re S*, Immigration & Nationality Laws Administrative Decisions, vol. 8, decision 344 (B.I.A. 1959) (carrying a concealed weapon is a crime of moral turpitude when local statute specifies that carrying a concealed deadly weapon allows presumption that person carrying weapon had intent to use it against another person).

<sup>14</sup> Annotation, “What Constitutes ‘Crime Involving Moral Turpitude’ Within Meaning of Sections 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 USCS Sections 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime,” *American Law Reports Federal*, vol. 23 (1975), p. 487 (citing *Jordan v. DeGeorge*, 341 U.S. 223 (1951)).

at least one year.<sup>15</sup> Non-citizens were also subject to deportation for violating a controlled substance law<sup>16</sup> or for unlawful possession of an automatic weapon.<sup>17</sup>

With the passage of the Anti-Drug Abuse Act (ADA) in 1988, Congress added to the types of crimes that could render someone deportable and began limiting the procedures available to non-citizens who wished to challenge their deportation. The ADA added a new category of crimes for which non-citizens were subject to deportation, called “aggravated felonies.” This category included murder as well as many of the crimes previously categorized as crimes of moral turpitude, including drug and firearms offenses.<sup>18</sup>

Virtually every subsequent change to US immigration law has included an expansion of the aggravated felony definition. The Immigration Act of 1990 expanded the category to include crimes of violence for which the term of imprisonment that the court may impose is at least five years, as well as money laundering and trafficking in any controlled substance.<sup>19</sup> The Immigration and Technical Corrections Act of 1994 added additional weapons offenses, some theft and burglary offenses, prostitution, tax evasion, and certain categories of fraud as aggravated felonies.<sup>20</sup>

Throughout the history of immigration law in the United States until the present day, deportation ensues only after the non-citizen involved has served his or her criminal sentence. Upon release from criminal incarceration or upon payment of the necessary fines, the non-citizen is put into deportation procedures. Up until 1988, non-citizens could be deported from the United States only after a hearing before an immigration judge in which the non-citizen could raise one of several bases (see discussion below) for canceling<sup>21</sup> their deportation orders. If the immigration judge found that the non-citizen failed to meet any of these bases for cancellation, the order of deportation became final. Thereafter, the non-citizen was deported unless he or she chose to appeal the immigration judge’s decision to

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<sup>15</sup> 8 U.S.C. Section 1251(a)(4)(1952).

<sup>16</sup> 8 U.S.C. Section 1251(a)(11)(1952).

<sup>17</sup> 8 U.S.C. Section 1251(a)(14)(1952).

<sup>18</sup> Anti-Drug Abuse Act, 1988, Section 7344(a).

<sup>19</sup> Public Law No. 101-649, 104 Stat. 4978, 1990.

<sup>20</sup> Public Law No. 103-416, 108 Stat. 4305, 1994.

<sup>21</sup> Although the various defenses to deportation have a variety of technical names in immigration law (cancellation, withholding, waiver, suspension), we use the term “cancellation” simply to mean any decision by an immigration authority or judge to prevent the deportation of a non-citizen from the United States.

the Board of Immigration Appeals (BIA), an administrative court. Once the BIA reached its decision, the non-citizen could appeal to an independent federal court within six months.

From the 1950s until the 1990s, non-citizens could raise one of several possible bases for canceling their deportation from the United States. These were:

- **A Judicial Recommendation against Deportation.** US immigration law used to allow non-citizens to ask their criminal court judge to issue a binding recommendation that, despite conviction of a crime of moral turpitude, the conviction must not trigger deportation.<sup>22</sup> This basis for stopping deportation was eliminated by Congress in 1990.
- **Suspension of Deportation.** A non-legal permanent resident of good moral character who had lived in the US for a minimum of seven years could ask an immigration judge to suspend his or her deportation after demonstrating that deportation would cause him or her extreme hardship.<sup>23</sup>
- **Waiver of Deportation (212(h)).**<sup>24</sup> Non-citizens who were the spouses, parents, or children of a US citizen or legal permanent resident, upon evidencing that they would suffer extreme hardship, could ask the immigration judge to waive deportation based on a crime of moral turpitude or possession of 30 grams or less of marijuana.<sup>25</sup>
- **Waiver of Deportation (212(c)).** Non-citizens who were legal permanent residents and had lived in the United States lawfully for at least seven years could ask the immigration judge to waive deportation based on a series of factors such as family ties within the United States, duration of residence in the United States (particularly when residence began at a young age), hardship to family if deportation occurred, service in US armed forces, history of stable employment, and other evidence attesting to the non-citizen's good character. Adverse factors included the seriousness of the crime, and whether the individual had a record of immigration or additional criminal offenses.<sup>26</sup>

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<sup>22</sup> 8 U.S.C. Section 1251(b), 1986.

<sup>23</sup> 8 U.S.C. Section 1254(a)(1), (2), 1986.

<sup>24</sup> Throughout this report, in the text we use the more commonly understood citations to the Immigration and Nationality Act ("Section 212(h)"), and in the footnotes we cite to the codification of these sections in the United States Code ("8 U.S.C. Section 1182(h)").

<sup>25</sup> 8 U.S.C. Section 1182(h), 1990.

<sup>26</sup> 8 U.S.C. Section 1182(c), 1990.

- **Withholding.** Non-citizens could ask the immigration judge to withhold their deportation if their life or freedom would be threatened in the country of proposed return on the basis of their race, religion, nationality, membership in a particular social group, or political opinion. Non-citizens with a criminal record could not request withholding if they had been convicted of a “particularly serious crime,” a term that was interpreted by courts until 1990, at which time Congress decided that aggravated felonies constituted “particularly serious crimes,” and therefore prevented non-citizens with aggravated felony convictions from applying for withholding.<sup>27</sup>

With the passage of the Immigration Act of 1990 and the Immigration and Nationality Technical Corrections Act of 1994, immigration law remained in this configuration until the major changes passed by Congress in 1996.

### Case Study: Why Not Become a Citizen?<sup>28</sup>

Given the very harsh effects of deportation, it is natural to wonder why immigrants do not become citizens; which is the only surefire way to effectively avoid deportation. Human Rights Watch posed this question to many of the individuals and families we interviewed, and we received many credible answers.

For example, Pierre B., originally from the Philippines, lived in the United States from his early childhood as a lawful permanent resident. He was deported from the United States for a criminal conviction. In a telephone interview with a Human Rights Watch researcher, Pierre B’s mother, Beth B., explained that she purposefully kept her son from becoming a US citizen since dual citizenship was not an option at the time, and she did not want him to lose his rights to inherit his father’s property in the Philippines.

Other immigrants claimed it was ignorance (including the ignorance inherent in youth) that kept them from taking the necessary legal steps to become citizens. Juan F., originally from Guatemala, came to the United States with his mother when he was four years old. He lived in the United States for 19 years, during which time, he said, “my mistake was to not listen to my mom. She told me, ‘go become a citizen. . .’ In reality, it’s my fault.”

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<sup>27</sup> 8 U.S.C. Section 1253(h), 1990.

<sup>28</sup> This text box is based on a Human Rights Watch telephone interview with Beth B., mother of Pierre B. (both pseudonyms), Scottsdale, Arizona, May 2006; a Human Rights Watch interview with Maria F. and Juan F. (both pseudonyms), Los Angeles, California, April 7, 2006; and *Chan v. Gantner*, 464 F.3d 289 (2d Cir. 2006).



Many other immigrants never understood that their status as “lawful permanent residents” was, contrary to the ordinary meaning of the phrase, *not* permanent (see case study “I am Legally Here,” below).

Immigrants also fail to apply for citizenship because there is no point in doing so. Individuals who try to naturalize *after* a criminal conviction often fail to meet the “good moral character” requirement in naturalization law. For example, Kai Tung Chan, originally from China, entered the United States on December 20, 1975, with a visitor's visa issued by the United States Consulate in Hong Kong. In June 1985 Chan married a United States citizen, and in October of that year Chan was granted lawful permanent resident status.

In 1993, Chan pled guilty to one count of conspiracy to smuggle aliens, and was sentenced to five years of probation and fined \$5,000. Soon thereafter, immigration authorities charged Chan with deportability, but because Chan had accepted responsibility for his offense and because his deportation would cause his family hardship, the immigration judge granted him a waiver of deportation under the previous immigration laws (Section 212(c)). Thereafter, Chan completed his probation and paid the fine without incident.

By 2002, Chan had lived in the US for a decade without committing another offense. On March 20 of that year, he decided to submit an application to become a US citizen through naturalization. On his application, Chan acknowledged his past conviction for conspiracy to smuggle aliens. Chan took and passed the naturalization exam. However, his application for naturalization was denied due to his inability to establish good moral character. The decision to deny his application was affirmed by the court of appeals.

## IV. Deportation Law Based on Criminal Convictions After 1996

Three events—the 1993 World Trade Center bombing,<sup>29</sup> the initial popularity of anti-immigrant legislation in California in 1994 (Proposition 187),<sup>30</sup> and the 1995 Oklahoma City bombing<sup>31</sup>—prompted Congress to restructure United States immigration law in 1996.

The legislative changes were adopted in a rushed atmosphere. During its consideration of the first of the two bills passed, the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress was pressed for time because it sought to adopt legislation prior to April 1996, which was the first anniversary of the Oklahoma City bombing;<sup>32</sup> and in the case of the second bill, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (hereinafter both laws are referred to generally as the “1996 laws”), Congress wanted to pass immigration legislation that emphasized enforcement prior to the run-up to the 1998 national elections.<sup>33</sup>

Although commentators since have focused on the fact that the two bills were adopted very quickly,<sup>34</sup> official debate contains few expressions of concern about Congress’s haste. One notable exception is Senator Robert Graham of Florida, who said that Congress was “not in

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<sup>29</sup> John Dillon, “Surge in Immigration to US Raises Public Anxiety, Spurs A Showdown in Congress,” *Christian Science Monitor*, December 17, 1993; Anthony Lewis, “Abroad at Home: Warning, Hysteria Ahead,” *The New York Times*, October 25, 1993; Robert McFadden, “Immigration Hurts City, New Yorkers Say in Poll,” *The New York Times*, October 18, 1993; William Schneider, “Americans Turn against Immigration,” *The National Journal*, July 24, 1993; Michael Tackett and Nicholas Horrock, “Terrorism Prompting Immigration Review,” *Chicago Tribune*, July 13, 1993.

<sup>30</sup> Human Rights Watch telephone interview with University of Virginia Professor David Martin, former general counsel of US Immigration and Naturalization Service from 1995-98, Charlottesville, Virginia, December 1, 2006.

<sup>31</sup> Gerald F. Seib & John Harwood, “Oklahoma City Terror Bombing May Intensify Hard-Line Views on Crime and Immigration,” *Wall Street Journal*, April 21, 1995; Howie Carr, “Bomb begs the question: Do we need immigrants?” *The Boston Herald*, April 21, 1995; Fred LeBrun, “A Time to Turn Down the Radio,” *The Times Union* (Albany), April 23, 1995; Tamara Kerrill, “Arab Americans Here Suffer Slings of Suspicion,” *Chicago Sun-Times*, April 23, 1995; Editorial, “Don’t Bash Immigrants,” *The Boston Herald*, April 22, 1995; Mary Abowd, “Arab-Americans Suffer Hatred After Bombing,” *Chicago Sun-Times*, May 13, 1995; Peter Brimelow, “Immigration Pendulum has Swung too Far, Now Threatens America’s Future,” *The Augusta Chronicle* (Georgia), June 1, 1995; Joe Fitzgerald, “Those of Us who Cherish Sanctity of Life Deplore Actions of Madmen like Salvi,” *The Boston Herald*, December 28, 1995 (noting that “Nine months ago, local airwaves were used to whip up hatred of ‘towelheads’ and ‘immigrant scum’ in the hours following the Oklahoma City bombing, then the accused bombers turned out to be as All-American as the cast from ‘Happy Days.’”).

<sup>32</sup> Human Rights Watch telephone interview with University of Virginia Professor David Martin, December 1, 2006. Of course, a US-born United States citizen was convicted for committing the Oklahoma City bombing.

<sup>33</sup> *Ibid.* Martin emphasized that the “theme of enforcement” was very strong among politicians at the time.

<sup>34</sup> John H. Blume, “AEDPA: The ‘Hype’ and the ‘Bite,’” *Cornell Law Review*, vol. 91 (1996), p. 259 (noting that “the use of new statutory language combined with the speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance regarding Congress’s intent.”).

as advanced a position as we should be” when considering the legislative changes contained in IIRIRA. He cautioned,

[I]t was also essentially a closed process. Not only were many of the members of the conference committee not given the opportunity to participate, at the conclusion of the conference they were not even allowed to offer amendments to try to modify provisions which were found to be objectionable. So we have a product today which has not had the kind of thoughtful dialog and debate which we associate with a conference report which is presented to the US Senate for final consideration.<sup>35</sup>

Senator Graham also questioned Congress’s narrow focus on an eventually defeated provision that would have granted states the ability to deny public education to undocumented children. Graham said the provision was “so inflammatory that it tended to focus total attention on this legislation on that single provision .... Therefore, we are now focusing for the first time on the totality of this legislation.”<sup>36</sup>

The rushed consideration of legislative changes in 1996 was also fueled by a perceived connection between terrorists and non-citizens convicted of crimes. In their statements, members of Congress continually made such connections explicitly or implicitly to non-citizens involved in crime, no matter how petty the offense or how distinguishable from terrorism.<sup>37</sup>

Representative Bill McCollum said that the

[C]riminal alien provisions in this bill [AEDPA] ... are also important to the terrorist issue, because oftentimes we find that terrorists or would-be terrorists are criminal aliens and we are not deporting them in a proper fashion .... The sooner we get them out of the country, the better procedures we have for that, the less likely we are to have that element in this country

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<sup>35</sup> “Conference Report to Accompany Illegal Immigration Reform and Immigrant Responsibility Act of 1996,” Congressional Record, vol. 142, Section 11514, 104th Congress, 2nd Session, September 27, 1996 (Mr. Graham).

<sup>36</sup> *Ibid.*

<sup>37</sup> In the post-September 11 United States, conflation between non-citizens convicted of crimes and terrorists abound. For example, President George W. Bush said on April 9, 2007, “that way our Border Patrol can chase the criminals and the drug runners, potential terrorists, and not have to try to chase people who are coming here to do work Americans are not doing.” The White House, “President Bush Discusses Comprehensive Immigration Reform in Yuma, Arizona,” US Border Patrol, Yuma Station Headquarters, Yuma, Arizona, April 9, 2007, <http://www.whitehouse.gov/news/releases/2007/04/20070409-12.html> (accessed May 30, 2007).

either create the actual acts of terrorism or directing them in some manner. We need to kick these people out of the country....<sup>38</sup>

Similarly, Representative Lamar Smith said that the 1996 laws

Ensure[] that the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—will be protected from the criminals and terrorists who want to prey on them.<sup>39</sup>

However, Representative Patsy Mink of Hawaii questioned her colleagues' conflation of terrorists and non-citizens with criminal convictions:

This bill increases the number of criminal activities that legal aliens can be deported for. Most of the additional offenses are not required to be linked to terrorism .... I am deeply concerned that these provisions expand authorization for deportation of aliens without any association with crimes of violence or terrorism.<sup>40</sup>

President Bill Clinton made a similar comment when signing AEDPA into law. He said, “This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents....”<sup>41</sup>

## Specific Crimes Rendering Non-Citizens Deportable

### *Aggravated Felonies*

The 1996 laws added new crimes to the aggravated felony ground of deportation. First, Congress added 17 additional types of crimes to the category when it passed AEDPA in April 1996.<sup>42</sup> In September 1996, shortly before Congress adjourned to campaign, it passed IIRIRA, which added four more types of crimes to the aggravated felony definition and lowered

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<sup>38</sup> Congressional Record, vol. 142, H 2247, H2259-H2260, 104th Congress, 2nd Session, March 14, 1996 (Mr. McCollum).

<sup>39</sup> Congressional Record, vol. 142, H 3605, 3617, 104th Congress, 2nd Session, April 18, 1996 (Mr. Smith).

<sup>40</sup> “Conference Report on S. 735, Antiterrorism and Effective Death Penalty Act of 1996,” Congressional Record, vol. 142, no. 55, 104th Congress, 2nd Session, page E645, April 18, 1996 (Ms. Mink).

<sup>41</sup> William J. Clinton, “Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996,” *Weekly Compilation of Presidential Documents*, vol. 32 (April 24, 1996), p. 720.

<sup>42</sup> Antiterrorism and Effective Death Penalty Act (AEDPA) Section 440(e), amending INA Section 101(a)(43), 1996.

certain threshold requirements. For example, before IIRIRA, theft offenses and crimes of violence were aggravated felonies only if the term of imprisonment was five years or more; IIRIRA reduced the term of imprisonment provision to a one-year threshold.<sup>43</sup>

Therefore, since 1996, aggravated felonies include the following broad categories of crime:

- any crime of violence (including crimes involving a substantial risk of the use of physical force) for which the term of imprisonment is at least one year;
- any crime of theft (including the receipt of stolen property) or burglary for which the term of imprisonment is at least one year; and
- illegal trafficking in drugs, firearms, or destructive devices.

The following specific crimes are also listed as aggravated felonies:

- murder;
- rape;
- sexual abuse of a minor;
- illicit trafficking in a controlled substance, including a federal drug trafficking offense;
- illicit trafficking in a firearm, explosive, or destructive device;
- federal money laundering or engaging in monetary transactions in property derived from specific unlawful activity, if the amount of the funds exceeded \$10,000;
- any of various federal firearms or explosives offenses;
- any of various federal offenses relating to a demand for, or receipt of, ransom;
- any of various federal offenses relating to child pornography;
- a federal racketeering offense;
- a federal gambling offense (including the transmission of wagering information in commerce, if the offense is a second or subsequent offense) that is punishable by imprisonment of at least one year;
- a federal offense relating to the prostitution business;
- a federal offense relating to peonage, slavery, involuntary servitude, or trafficking in persons;
- any of various offenses relating to espionage, protecting undercover agents, classified information, sabotage, or treason;
- fraud, deceit, or federal tax evasion, if the offense involves more than \$10,000;

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<sup>43</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Section 321(a)(3), 1996.

- alien smuggling, other than a first offense involving the alien’s spouse, child, or parent;
- illegal entry or re-entry of an alien previously deported on account of committing an aggravated felony;
- an offense relating to falsely making, forging, counterfeiting, mutilating, or altering a passport or immigration document if (1) the term of imprisonment is at least one year and (2) the offense is not a first offense relating to the alien’s spouse, parent, or child;
- failure to appear for service of a sentence, if the underlying offense is punishable by imprisonment of at least five years;
- an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, for which the term of imprisonment is at least one year;
- an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
- an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years’ imprisonment or more may be imposed; and
- an attempt or conspiracy to commit one of the foregoing offenses.

While some of the above examples of aggravated felonies would seem to be severe offenses for which deportation is an appropriate punishment, in practice it is not always clear cut. For example, Ramon H. (a pseudonym) is originally from Mexico. He married a United States citizen, Pamela H., (a pseudonym) in 1990. In February 1993, Ramon pled guilty to lewd or lascivious acts with a minor. After his plea, he completed his probation, according to his probation officer, “in an exemplary fashion.”<sup>44</sup> He applied to adjust his status to that of a lawful permanent resident through his US citizen wife in 1996, but in 2001 DHS informed him that he was deportable for his criminal conviction, and he was placed in removal proceedings in August 2004.

The circumstances of Ramon’s crime were later described by his niece Kelda in a sworn affidavit that she submitted during his deportation hearing. Kelda explained that during a family gathering, Ramon patted her “lightly on the butt ... for no apparent reason.”<sup>45</sup> Kelda

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<sup>44</sup> Letter from Dick Tschinkel, Los Angeles County Probation Department, October 15, 2004 (on file with Human Rights Watch).

<sup>45</sup> Affidavit of Kelda O. (pseudonym), submitted in opposition to Ramon’s deportation, October 15, 2004 (on file with Human Rights Watch).

mentioned the incident to a friend at school, who in turn told a teacher, and the school called the police, resulting in Ramon's conviction and order of deportation.

Some minor drug crimes are considered aggravated felonies. For example, 24-year-old Mario Pacheco entered the United States with his mother in 1981 when he was two months old. He lived in Chicago with his parents as a lawful permanent resident for 20 years, where he attended public schools. Mario obtained his general equivalency diploma (GED) and went to work right away.

At the age of 19, in 2001, Mario was convicted for possession of 2.5 grams of marijuana with intent to distribute, which is a misdemeanor offense under Illinois law, but is also considered an aggravated felony under immigration law. The drugs were discovered in Mario's car after he was stopped for a broken taillight. Mario explained that he was hanging out with the wrong crowd at the time, that he often drove friends in his car, and that the drugs belonged to one of his friends. He was sentenced to one year of "supervision"—a sentence that is less severe than probation.

At this writing, Mario was still trying to appeal his deportation, but his prospects did not look good. Mario works about 60 hours a week in the shipping department at a large warehouse and is the father of three US citizen children, ages two to six.<sup>46</sup> Mario's parents also spoke with a Human Rights Watch researcher.<sup>47</sup> They both are lawful permanent residents: his mother has worked at the same company for more than 20 years and has a graduate degree in business, which she obtained by attending courses at night while working full time. His mother spoke about how stressful her son's impending deportation was for her and the family: "If you do something very bad, then I'm not saying anything about that. But he's being punished for something he did when he was a teenager. He didn't even go to jail."<sup>48</sup>

Ricardo S. was also facing separation from his US citizen wife and two children because of an aggravated felony drug conviction. He was ordered deported because of a conviction for possession with intent to distribute a small amount of heroin, for which he was advised by a defense attorney to plead guilty. In return for his guilty plea, he received no jail time but was ordered to pay a fine of \$500 and serve two years probation, which he completed without incident. Ricardo S. had no other criminal convictions and worked in construction in the Chicago area. His conviction was brought to the attention of the immigration authorities

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<sup>46</sup> Human Rights Watch interview with Mario Pacheco, Chicago, Illinois, February 2, 2006.

<sup>47</sup> Human Rights Watch interview with Pacheco family, Chicago, Illinois, February 2, 2006.

<sup>48</sup> Stacie Williams, "One Strike, You're Out," *The Chicago Reporter*, July/August 2005.

because he and his US citizen wife, who were married in 2001, applied to adjust Ricardo S.'s status to that of a lawful permanent resident. Looking back on his one conviction, Ricardo S. said,

I feel bad about it because of my family. If I was by myself, without my wife or any children, it would have been a lot different. But I feel real bad for them .... Maybe if they would have caught me with a ton of drugs [I could understand them wanting to deport me], or if I ever murdered somebody. But it was the only one .... I wish that [when I applied for my green card] they would have just told me I didn't qualify. I have kids who are citizens and a wife who is a citizen but I wish they would have just let me continue working to support my family....<sup>49</sup>

Deportation under almost any circumstances limits a non-citizen's ability to return, even temporarily, to the United States. Non-citizens previously removed are barred from re-entry for five or 10 years, depending on the circumstances of their removal. For non-citizens with aggravated felony convictions, this bar to re-entry is permanent, unless they can obtain permission to enter from the Attorney General, which is rarely granted.<sup>50</sup> Thus, for families separated due to offenses classified as aggravated felonies, deportation permanently splits the family in two. Spouses and children are often either US citizens or lawful permanent residents, and cannot relocate to the deportee's country of origin. In addition to the strong connections to the United States that these family members often have, parents of school-age children emphasize that the United States is the only home their children have ever known, that their children often do not speak any language other than English, and that their children are being educated in US schools as reasons for not being able to join their deported spouse permanently.

### *Crimes of Moral Turpitude*

Immigrants are deportable if they are convicted of a "crime involving moral turpitude" within five or in some cases 10 years after they enter the United States and their crime carries a sentence of one year or longer.<sup>51</sup> A non-citizen is also deportable if he or she is convicted of two or more crimes of moral turpitude at any time after admission.<sup>52</sup> In 1996 Congress did

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<sup>49</sup> Human Rights Watch interview with Ricardo S. (pseudonym), Chicago, Illinois, February 3, 2006.

<sup>50</sup> 8 U.S.C. Section 1182(a)(9)(A), 1996.

<sup>51</sup> 8 U.S.C. Section 1227(a)(2)(A)(i)(I) and (II), 1996.

<sup>52</sup> 8 U.S.C. Section 1227(a)(2)(A)(ii), 1996.



not change the crimes considered to meet the definition of “moral turpitude.” However, it did make it more difficult for non-citizens with convictions for crimes of moral turpitude to defend against deportation, primarily because Congress made the standards more rigorous and the determination of who merited cancellation of removal entirely up to the discretion of the immigration judge.

Under the Immigration and Nationality Act (INA) Section 240A(a), non-citizens convicted of moral turpitude crimes can apply for “cancellation of removal”:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable for the United States if the alien:

- (1) has been an alien lawfully admitted for permanent residence for not less than 5 years;
- (2) has resided in the United States continuously for 7 years after having been admitted in any status;
- (3) has not been convicted of an aggravated felony.<sup>53</sup>

For example, Mark Ferguson, a native of the United Kingdom who had lived in the United States lawfully as a green card holder since the age of three, was convicted of two or more crimes of moral turpitude for “mooning” (showing his nude buttocks to) women. Ferguson testified that in the past he had mooned a woman about once every six months, but was under psychiatric treatment for the practice, and under treatment had not re-offended for two years. He submitted expert testimony that he was not sexually aroused by the practice, had an “unusually low” chance of re-offending, and that he had strong family connections to the United States, including because he was a primary caregiver for his deceased sister’s children. The Board of Immigration Appeals found that although he was statutorily eligible for cancellation of removal under INA Section 240A, cancellation of Ferguson’s removal would not be in the best interests of the United States. On appeal, the court found that it had no power to review that discretionary decision.<sup>54</sup>

### *Definitions Include Relatively Minor Crimes*

In 1996, listeners to Congressional debate were left with the impression that only the most violent non-citizen offenders would be subject to deportation once the 1996 laws were

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<sup>53</sup> 8 U.S.C. Section 240A(a), 1996.

<sup>54</sup> *Ferguson v. Attorney General of the United States*, 2007 U.S. App. LEXIS 3100 (3d Circuit, February 9, 2007).

passed. Senator Alan Simpson of Wyoming chose two from the long list of more minor crimes that would require deportation in the new legislation, noting that “domestic violence and stalking are made deportable offenses.”<sup>55</sup>

Similarly, focusing on felonies (and ignoring the many misdemeanor crimes that would also trigger deportation under the proposed legislation), Senator Spencer Abraham of Michigan said, “By conservative estimates, almost half a million felons are living in this country illegally. These aliens have been convicted of murder, rape, drug trafficking, potentially such crimes as espionage, sabotage, treason and/or a number of other serious crimes....”<sup>56</sup>

Even after the new laws were in place for a year, there remained some confusion among legislators responsible for the bills’ passage as to what kinds of crimes actually triggered deportation. In an article published in the *Washington Post* in 1998, Congressman Lamar Smith of Texas denied that shoplifting could render someone deportable and characterized this assertion as “a view peddled in the media by immigration lawyers.”<sup>57</sup> But, in fact, shoplifting is a deportable offense.

Congresswoman Patsy Mink of Hawaii and Senator Edward Kennedy of Massachusetts were among the few legislators who raised concerns about the minor crimes that would result in deportation under the new laws. Summing up her views on this issue, Representative Mink said,

[I]t is wrong to place upon legal immigrants a higher penalty for crimes which in themselves are not related to terroristic actions. Deportation should be reserved for only the most heinous of crimes rendering the person unfit to remain in the country.<sup>58</sup>

Similarly, Senator Kennedy said,

It applies to all criminal aliens, regardless of the gravity of their offense .... whether they are murderers or petty shoplifters. An immigrant with an

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<sup>55</sup> Congressional Record, vol. 142, no. 137, 104th Congress, 2nd Session, September 28, 1996 (Mr. Simpson).

<sup>56</sup> “Conference Report on S. 735, Antiterrorism and Effective Death Penalty Act of 1996,” Congressional Record, vol. 142, no. 55, 104th Congress, 2nd Session, page E645, April 18, 1996 (Mr. Abraham).

<sup>57</sup> Lamar Smith, “Immigration Facts,” *Washington Post*, February 16, 1998.

<sup>58</sup> “Conference Report on S. 735, Antiterrorism and Effective Death Penalty Act of 1996,” Congressional Record, vol. 142, no. 55, 104th Congress, 2nd Session, page E645, April 18, 1996 (Ms. Mink).

American citizen wife and children sentenced to 1-year probation for minor tax evasion and fraud would be subject to this procedure. And under this provision, he would be treated the same as ax murderers and drug lords.<sup>59</sup>

## **Elimination of Defenses to Deportation**

As noted above, prior to 1996, there were several grounds that non-citizens could raise in order to cancel their deportation from the United States: a judicial recommendation against deportation (JRAD); suspension of deportation; 212(h) waiver of deportation; 212(c) waiver of deportation; and withholding. The JRAD was eliminated in 1990. In 1996 Congress eliminated 212(c) waivers and replaced suspension of deportation with cancellation of removal, instituting instead a much narrower waiver under 240A(a) for legal permanent residents (described above). Congress further decided to limit immigrants with criminal convictions' ability to apply for 212(h) waivers and withholding.

### *Elimination of 212(c) Waiver of Deportation*

The continuing expansion of the aggravated felony definition, culminating in the 1996 laws, has meant that increasing numbers of non-citizens find themselves barred from raising defenses to deportation in their immigration hearings. The very limited relief that does remain in immigration law at this writing, in the Immigration and Nationality Act (INA) Sections 240A and 212(h), is not available to those convicted of aggravated felonies.<sup>60</sup>

Congress chose to eliminate hearings under former INA Section 212(c) with the passage of the 1996 laws. The hearings had allowed seven-year lawful permanent residents who committed crimes to seek discretionary relief from deportation from an immigration judge by showing negative factors were outweighed by positive factors.<sup>61</sup> Negative factors in a 212(c) application included: the nature and underlying circumstances of the reason for deportation; the presence of additional significant violations of the immigration laws; the existence of a criminal record and, if so, its nature, recency, and seriousness; and the presence of other

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<sup>59</sup> Congressional Record, vol. 141, S 7803, 104th Congress, 2nd Session, (Mr. Kennedy).

<sup>60</sup> IIRIRA, Pub. L. No. 104-208, Section 348, 110 Stat. 3009-628 (2005).

<sup>61</sup> 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. 1182(c), 1994 (repealed 1996 by AEDPA Section 440(d)).

evidence indicative of a respondent's bad character or undesirability as a permanent resident of the United States.<sup>62</sup>

Favorable 212(c) factors included: family ties within the United States; residence of long duration in the country (particularly when the inception of residence occurred while the respondent was of young age); evidence of hardship to the respondent and family if deportation occurs; service in the US Armed Forces; a history of employment; the existence of property or business ties; evidence of value and service to the community; proof of a genuine rehabilitation if a criminal record exists; and other evidence attesting to a respondent's good character (for example, affidavits from family, friends, and responsible community representatives).<sup>63</sup>

Throughout the 1996 legislative debate, Congress never considered these factors in detail, and never analyzed the utility or importance of retaining a hearing in which some or all of them were weighed. Instead, Congress took a wholesale approach and eradicated the hearings altogether.

Legislative discussion on this issue lacked nuance, especially because legislators tended to lump all non-citizens convicted of crimes into one category—neglecting the fact that the legislation under consideration would include legal residents with minor offenses and affect US citizen family members. As a result, Congress chose to eliminate 212(c) across the board.

Congress was motivated by its belief that 212(c) relief was abused, leading to unnecessary delays in deportation. A colloquy between Senator Orrin Hatch of Utah and Senator Abraham revealed a concern on the part of both senators that immigration judges were granting

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<sup>62</sup> *Matter of Marin*, Board of Immigration Appeals, Immigration & Nationality Laws Administrative Decisions, vol. 16, decision 581, August 4, 1978. *Matter of Marin* cites to the following cases in support of the use of these factors: *Matter of Carrasco*, Interim Decision 2579 (BIA 1977), aff'd on other grounds; *Carrasco-Favela v. INS*, 563 F.2d 1220 (5 Cir. 1977); *Matter of Edwards*, Immigration & Nationality Laws Administrative Decisions, vol. 10, decision 506 (BIA 1963, 1964); *Matter of M--*, Immigration & Nationality Laws Administrative Decisions, vol. 3, decision 1804 (BIA 1949) (involving the seventh proviso to section 3 of the Immigration Act of 1917); *Matter of V--*, Immigration & Nationality Laws Administrative Decisions, vol. 1, decision 293 (BIA 1942) (seventh proviso); *Matter of G--*, Immigration & Nationality Laws Administrative Decisions, vol. 1, decision 8 (BIA 1940; A.G. 1940) (seventh proviso).

<sup>63</sup> *Matter of Marin*, Immigration & Nationality Laws Administrative Decisions, vol. 16, decision 581, (BIA 1978). *Matter of Marin* cites to the following cases in support of the use of these factors: *Matter of Edwards* (see above); *Matter of G--- A--*, Immigration & Nationality Laws Administrative Decisions, vol. 7, decision 274 (BIA 1956); *Matter of F--*, Immigration & Nationality Laws Administrative Decisions, vol. 6, decision 537 (BIA 1955); *Matter of S--*, Immigration & Nationality Laws Administrative Decisions, vol. 6, decision 392 (BIA 1954; A.G. 1955); *Matter of M--*, Immigration & Nationality Laws Administrative Decisions, vol. 5, decision 598 (BIA 1954); *Matter of G--- Y-- G--*, Immigration & Nationality Laws Administrative Decisions, vol. 4, decision 211 (BIA 1950; Act'g A.G. 1951) (seventh proviso); *Matter of M--*, Immigration & Nationality Laws Administrative Decisions, vol. 3, decision 1804 (BIA 1949) (seventh proviso); *Matter of V---I---*, Immigration & Nationality Laws Administrative Decisions, vol. 3, decision 571 (BIA 1949) (seventh proviso); *Matter of V--*, (see above); *Matter of G--*, (see above).

discretionary relief under 212(c) too frequently. Senator Abraham highlighted his concern by stating, “for the past 8 years, however, 212(c) relief has been granted to more than half of all who apply, the vast majority of whom are criminal aliens, amounting to thousands of criminal aliens per year.”<sup>64</sup>

By contrast, Immigration and Naturalization Service (INS) officials, who on a daily basis saw the important role that the hearings played, were distressed to see the elimination of the 212(c) provision:

Key officials in the Department of Justice were keenly aware ... that the “criminal alien” slogan, for all its power on the campaign trail, embraces a vast spectrum of human character and behavior. Some such criminals are truly dangerous, but a large fraction of this class made single mistakes or had shown genuine rehabilitation and remorse. In the view of those officials, most such deportable aliens should at least be eligible for consideration of release during proceedings and for a discretionary waiver of deportation altogether, as had earlier been possible under INA § 212(c).<sup>65</sup>

An immigration judge interviewed by a Human Rights Watch researcher for this report said,

It is true that judges often granted 212(c) relief, but that was because immigration judges often saw deserving cases. Congress did not accept that fact, and so took judicial discretion away. Instead, what they created was a statute with so many legal interpretation questions that litigation did not decrease at all after 1996.<sup>66</sup>

Drawing a connection between slow deportation rates and the judicial review that non-citizens used to request once they received an order of deportation, Representative Henry Hyde of Illinois spoke in favor of what he called AEDPA’s “criminal alien deportation improvements .... they can get deported with expedition rather than go through another and another and another hearing.”<sup>67</sup>

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<sup>64</sup> Congressional Record, vol. 142, S 12294, 104th Congress, 2nd Session (Mr. Abraham).

<sup>65</sup> David A. Martin, “Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v. Davis*,” *The Supreme Court Review*, vol. 47 (2001), p. 92.

<sup>66</sup> Human Rights Watch interview with an immigration judge who requested anonymity, October 26, 2006.

<sup>67</sup> “Conference Report on S. 735, Antiterrorism and Effective Death Penalty Act of 1996,” Congressional Record, vol. 142, no. 55, 104th Congress, 2nd Session, page E645, April 18, 1996 (Mr. Hyde).

In fact, according to the Department of Justice, on average, 12,043 cases were appealed by immigrants from the administrative level to the Board of Immigration Appeals in the seven years prior to April 1, 1997 (the date the 1996 laws took effect).<sup>68</sup> In the seven years after the laws took effect (up through April 1, 2004), on average, 22,629 cases were appealed each year.<sup>69</sup>

Although many members of Congress clearly thought the elimination of 212(c) was a good thing, Senator Kennedy did not. He argued against the bill's "one size fits all approach" that eliminated hearings balancing non-citizens' interests in remaining in the country against the government's interest in deportation:

[T]his amendment virtually eliminates the Attorney General's flexibility to grant discretionary relief from deportation for long-time permanent residents convicted of lesser crimes .... [T]his discretionary relief would be denied to permanent residents for carrying a concealed firearm, drug abuse or addiction, in which no conviction would even be required, any drug offense involving more than 30 grams of marijuana, and other such crimes. They could live here productively for 30 years and have an American citizen wife and children. But for them, it is one strike and you are out.<sup>70</sup>

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<sup>68</sup> Statistics provided by US Department of Justice, Executive Office for Immigration Review, October 31, 2006 (on file with Human Rights Watch).

<sup>69</sup> *Ibid.*

<sup>70</sup> Congressional Record, vol. 141, S 7803, 104th Congress, 1st Session, June 7, 1995 (Mr. Kennedy).

## Case Study: Deportation in Europe: the Boultif Test<sup>71</sup>

The 47 member countries in the Council of Europe (COE) have adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention” or ECHR), which places them under the jurisdiction of the European Court of Human Rights (ECtHR). Any person alleging a rights violation under the European Convention within a Council nation can take their case to the ECtHR, whose decisions are legally binding upon Council member nations. Article 8 of the European Convention covers an individual's right to family life and provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to be free from government interference with family life has been successfully asserted by non-citizens facing deportation because of criminal convictions. In several COE nations, non-citizens have challenged deportation by proving that it would unjustifiably interfere with their right to family life or because the deportation procedures they were subject to gave inadequate attention to their Article 8 rights.

The ECtHR's approach to these questions was established in 2001 by the *Boultif v. Switzerland* case. The case involved an Algerian citizen who moved to Switzerland in 1992 and married a Swiss woman a few months later. He was soon convicted of weapons possession and then, in 1994, of physically assaulting and robbing a man in Zurich, for which he received a two-year sentence. Shortly after he started his sentence, Swiss authorities refused to renew his residence permit and the Swiss Federal Court held that his deportation did not violate Article 8 of the European Convention, since it was a valid exercise of state power in the interests of public order and security.

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<sup>71</sup> This text box is based on analysis of the European Court of Human Rights case, *Boultif v. Switzerland*, (App. 54273/00) Judgment of 2 August 2001; EHR 497. The case was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was adopted under the auspices of the Council of Europe on November 4, 1950 for the purpose of protecting human rights and fundamental freedoms in Europe. The ECHR binds the 47 present members of the Council, which are as follows: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.

The ECtHR rejected Switzerland's judgment. In so doing, the court determined "guiding principles" for this type of case, establishing a four-step framework. In the first three steps, the court determines whether there has been interference with family life, and if so, if it fits with the factors allowing for such interference in Article 8(2) (such as national security or public safety). The fourth and final step asks whether the interference is "necessary in a democratic society," and weighs eight factors:

- (1) The nature and seriousness of the offense,
- (2) The length of the applicant's stay in the expelling country,
- (3) The length of time elapsed since the offense and the applicant's behavior during that time,
- (4) The nationalities of the parties concerned,
- (5) The applicant's family situation (length and "effectiveness" of the marriage),
- (6) Whether the spouse knew about the offense at the time of entering into the marriage,
- (7) Whether there are children, and their ages, and
- (8) The potential difficulties family members would face in relocating to the applicant's home country.

In Mr. Boultif's case, the court found in his favor mostly by focusing on the potential hardship to his wife in relocating to Algeria and by considering whether he continued to pose a danger to the public. The court noted not only Mr. Boultif's good behavior since committing his crime, but the fact that he had originally received a relatively light criminal sentence. This, in the court's view, undercut the idea that he posed a danger. Based largely on these two factors, the court found that the harm Mr. Boultif would suffer from deportation would be disproportionate to Switzerland's stated goals in expelling him.

### *Limits on Withholding: Returns to Persecution*

During its adoption of the 1996 laws, Congress appears to have paid very little attention to the fact that the expansion of the aggravated felony definition would allow immigration authorities to deport refugees to persecution (*refoulement*), even if their crimes did not fit the "particularly serious crime" definition as required under the UN Convention relating to the Status of Refugees, which the United States is bound by through its ratification of the UN Protocol relating to the Status of Refugees in 1967.

The 1996 changes to US immigration law mean that the United States no longer meets its treaty obligations to protect from *refoulement* refugees who meet the Refugee Convention's criteria for protection. IIRIRA made it impossible for any immigrant convicted of an aggravated felony with a five-year sentence to obtain protection from return to persecution. This means, for example, that drug offenders with sentences of five years or more can be sent to persecution by US immigration authorities. By contrast, under international



standards, only refugees who have been convicted of a “particularly serious crime” *and* who “constitute a danger to the community” of the United States can be returned to places where they would be persecuted.<sup>72</sup>

There are only two scant references to this in the legislative history for the 1996 immigration laws. Senator Kennedy said, “[r]efugees could also be deported to the hands of their persecutors for relatively small offenses”;<sup>73</sup> and the UN agency responsible for refugee protection, the United Nations High Commissioner for Refugees (UNHCR), wrote to the Senate Judiciary Committee to raise its concerns that “the particularly serious crime” exclusion ground should only be invoked in “extreme cases” and only after a balancing test has been applied, weighing the degree of persecution feared against the seriousness of the offense committed.<sup>74</sup>

## Retroactive Effects

Congress also decided to make the 1996 laws retroactive. The laws render someone deportable for crimes committed at any point prior to the change in law, including crimes that were not deportable offenses at the time of their commission.

Despite this sweeping change, there is little in the legislative history to show that Congress considered the likely outcomes. Former INS General Counsel David Martin recalled that Senator Kennedy and his staff tried to draw attention to sympathetic cases of immigrant families that would suffer drastic effects under the retroactive application of the laws. Kennedy had meetings with Senator Jon Kyl of Arizona and Senator Abrahams to try to “walk through some of the retroactivity scenarios,” but “there wasn’t much response. I really don’t think there was anyone in Congress who anticipated what would happen and even when

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<sup>72</sup> Although there is some debate as to whether the treaty requires both the “particularly serious crime” and the “danger to the community” prongs to be established, the weight of international authority suggests that both must be satisfied before the bar can be applied. Kathleen Keller, “A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement,” *Yale Human Rights and Development Law Journal*, vol. 2 (1999), p. 183.

<sup>73</sup> Congressional Record, vol. 141 S 7803, 104th Congress, 1st Session, June 7, 1995 (Mr. Kennedy).

<sup>74</sup> Letter to Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, from United Nations High Commissioner for Refugees, Branch Office for the United States of America, September 20, 1996. Another authority on this issue wrote, “The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded, although a less serious offence and a lesser threat might justify the return of an individual likely to face only some harassment or discrimination.” Guy Goodwin-Gill, *The Refugee in International Law* (Oxford, UK: Oxford University Press, 1996), p. 140.

they were presented with sympathetic facts, they just didn't want to appear soft on immigration, so they left the retroactivity in."<sup>75</sup>

Martin said that the idea originally came from his office, although he ultimately came to oppose the way that Congress dealt with retroactivity:

We proposed the retroactivity because we saw it as a way to clean up the previous aggravated felony provisions from the 1988, 1991, and 1994 laws. These different definitions and effective dates were a nightmare for INS to administer, so we wanted the new definition to clean all that up, and be fully retroactive.<sup>76</sup>

Even though INS wanted the new definition to be retroactive, it expected to be able to continue to exercise discretion to allow compelling cases to remain in the country, particularly those cases in which the immigrant had lived in the United States for a long time and had family ties. In other words, the INS expected 212(c) hearings to remain available. According to Martin,

The key point is that this was at a time when 212(c) was available .... If we had known that [Congress] would ultimately exclude all those people from 212(c) relief, I'm sure we wouldn't have taken that stance [in support of retroactivity].<sup>77</sup>

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<sup>75</sup> Human Rights Watch interview with University of Virginia Professor David Martin, former general counsel of US Immigration and Naturalization Service from 1995-98, Charlottesville, Virginia, December 1, 2006.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

### Case Study: 212(c) Hearings: The St. Cyr Precedent

Due to the Supreme Court case, *U.S. v. St. Cyr*, 533 U.S. 289 (2001), a small sub-group of non-citizens who entered guilty pleas prior to 1996 on the understanding that they would have had access to 212(c) waivers are now allowed to apply for those waivers.

One such case is that of Ricardo Etienne, who moved to the United States at the age of 11 in 1986, and attended middle and high school in Stamford, Connecticut. His mother, brother, and sister all live in the United States. He is engaged to Marjorie Roc and the couple has three children. Prior to his incarceration and deportation, Etienne supported his family by earning \$8 an hour at a series of full-time jobs. During his incarceration prior to deportation, he completed a series of drug rehabilitation programs. Etienne was not allowed a 212(c) hearing and was therefore deported to Haiti. With their main breadwinner deported, Ms. Roc and Etienne's children could no longer afford the apartment in which they had been living and moved to public housing, which was located in an unsafe neighborhood, according to Ms. Roc. They also could not afford to travel to Haiti to see Etienne.

Etienne's case was reconsidered under *St. Cyr v. INS*, and the reviewing court found that the favorable factors—family ties, substantial rehabilitation, and work history—outweighed Etienne's criminal history and that "there is a reasonable probability that ... [Etienne] would have been granted Section 212(c) relief." *United States of America v. Ricardo Etienne*, 2005 U.S. Dist. LEXIS 976, p. 25 (D. Conn, January 14, 2005).

Other cases decided under the St. Cyr precedent have stopped the deportation of non-citizens with strong ties to the United States. In *Matter of Dominos Dias Goncalves*, No. A34 744 205, Immigration Reporter, vol. 26 (MB) B1-117 (BIA November 25, 2002), the court prevented deportation, noting "While it is indeed lengthy, the respondent's criminal record includes several arrests for minor offenses which were committed when the respondent was a minor from an abusive and troubled background. Given the strength of the positive factors in this case, including the evidence of the respondent's strong ties in the United States and of his significant rehabilitation, we conclude that the positive factors surpass the cumulative weight of the respondent's criminal record and his substance-abuse history."

These immigrants are "lucky" to fit within the St. Cyr precedent, and therefore had the ability to access the 212(c) waiver. Hundreds of thousands of other immigrants who did not plead guilty in their cases, and whose convictions came after 1996, have not had this same chance.

## Congressional Regrets

After watching the effects over the years, several members of Congress have expressed regrets about having changed US immigration law so drastically in 1996. Representative Bob Filner of California characterized what Congress did in 1996 in the following way:

[In] the Immigration Law of 1996 .... people were defined as felons in a new way. They were picked up off the streets in the middle of the night, deported without any due process—and these were legal people, here legally, but may have committed some crime, even shoplifting 20 or 30 years ago.<sup>78</sup>

Some US legislators have sought ways to lessen the blow dealt by the 1996 laws to non-citizens with close family and other ties to the United States. Although several bills have been introduced over the ensuing decade, only one, H.R. 5062, made it out of congressional committee in the US House of Representatives and was introduced in the US Senate—only to die there without being referred to a Senate committee. All of the other reform bills have failed to receive the full attention or consideration of Congress, since they never made it out of the committee process.<sup>79</sup> Therefore, despite some clear signals that Congress regrets its actions in 1996, it has never had the opportunity to carefully consider what was done 10 years ago, including whether some aspects of the laws should be amended to bring them better into line with notions of justice and fair play.

On October 1, 1999, Representative Bill McCollum of Florida, once a proponent of the 1996 laws, introduced the Fairness for Permanent Residents Act, which would have allowed the Attorney General to prevent the deportation of lawful permanent residents who were convicted of certain aggravated felonies, in particular those whose crimes were not serious violent felonies. The bill focused primarily on giving some permanent residents relief from the harsh application of the new definition of aggravated felon. Family ties were not considered. When introducing this bill, McCollum stated,

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<sup>78</sup> “House Democrats Hold News Conference on Justice Department Policies,” Press Statement from Congressman Bob Filner, Washington, D.C., June 5, 2003.

<sup>79</sup> This is true for each of the bills described in this report: H.R. 5035 was referred to the House Committee on the Judiciary on March 28, 2006, and no further action was taken; H.R. 213 was referred to the House Subcommittee on Immigration on February 2, 2007, and no further action was taken; H.R. 4966 was referred to the House Subcommittee on Immigration on August 15, 2000, and no further action was taken; S. 3120 was referred to the Senate Committee on the Judiciary on September 27, 2000, and no further action was taken; S. 173 was referred to the Senate Subcommittee on Immigration on March 24, 1999, and no further action was taken; and S. 871 was referred to the Committee on the Judiciary on April 22, 1999, and no further action was taken.

[I]n 1996, Congress made several modifications to our country's immigration code that have had a harsh and unintended impact on many people living in the United States. These individuals, permanent resident aliens, have the legal right to reside in the country and apply for US citizenship. They serve in the military, own businesses and made valuable contributions to society.... Our bill returns balance to our existing laws by allowing people with compelling or unusual circumstances to argue their cases for reconsideration. The legislation does not automatically waive the deportation order, it simply grants a permanent resident alien the right to have the Attorney General review the merits of his case.<sup>80</sup>

In July 2000, Representative Henry Hyde, who was then chair of the House Judiciary Committee, brought together Representatives McCollum, Barney Frank of Massachusetts, and other interested legislators. Their discussions resulted in H.R. 5062, sponsored by McCollum and co-sponsored by 10 additional Representatives.<sup>81</sup> H.R. 5062 was subsequently passed by the House on September 19, 2000. The bill offered amendments limiting the retroactive application of the new aggravated felony definition to pre-1996 crimes, and gave non-citizens with pre-1996 convictions access to cancellation of removal.

Upon unanimous passage of the bill, Representative Filner addressed the House to "honor [his] colleagues for taking a step forward and unanimously passing H.R. 5062, an important step toward restoring fairness to families split apart by 1996 legislation that was billed in this House as immigration reform."<sup>82</sup> Senate passage of the bill seemed certain, and White House Chief of Staff John Podesta wrote to Senator Hatch of the Senate Judiciary Committee to voice the Clinton administration's support for reforms. However, the Senate became embroiled in a battle over visas allocated to skilled professional workers and no subsequent action was taken on the bill, inaction that was attributed to the 2000 elections.<sup>83</sup>

Representative John Conyers of Michigan sponsored a very comprehensive reform bill, entitled the "Restoration of Fairness in Immigration Law Act of 2000," but known more

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<sup>80</sup> Statement by Hon. Bill McCollum to the House of Representatives, October 4, 1999.

<sup>81</sup> H.R. 5062 was co-sponsored by Representatives Andrews (New Jersey); Diaz-Balart (Florida); Frank (Massachusetts); Kennedy (Rhode Island); Rogan (California); Bilbray (California); Filner (California); Frost (Texas); Ose (California); Ros-Lehtinen (Florida).

<sup>82</sup> "Stop Splintering Families, Start Applying American Fairness and Justice," Press Statement from Congressman Bob Filner, September 28, 2000.

<sup>83</sup> Carol Leslie Wolchock, "Legislative Efforts to Restore Immigrant Rights," *Human Rights Magazine*, American Bar Association, Winter 2001.

colloquially as the “Fix ‘96” bill, which was introduced on July 26, 2000, and was co-sponsored by 47 additional representatives.<sup>84</sup> Conyers reintroduced the bill in March 2002, together with members from the Congressional Hispanic, Black, and Asian Pacific Caucuses. The bill would have, among many other provisions, improved access to judicial review for non-citizens facing deportation; redefined crimes of moral turpitude, aggravated felonies, and the definition of conviction to limit deportation to the most serious crimes; and it would have allowed judges to exercise discretion in favor of certain non-citizens facing removal whose deportation would result in extreme hardship to their US citizen or legally present family members. The bill was referred to the House Subcommittee on Immigration and Claims, but made no further progress in Congress. When he reintroduced the bill in March 2002, Conyers said that the bill “restores fairness to the immigration process by making sure that each person has a chance to have their case heard by a fair and impartial decision maker. No one here is looking to give immigrants a free ride, just a fair chance.”<sup>85</sup>

In the Senate, Senator Kennedy sponsored a bill, S. 3120, introduced on September 27, 2000, and co-sponsored by seven additional Senators,<sup>86</sup> which made the statement that current immigration laws “punish legal residents out of proportion to their crimes,” and revised several punitive aspects of the laws, including by eliminating the retroactive effects, eliminating several minor crimes (including aggravated felonies punishable by a sentence of more than five years) from eligibility as deportable offenses, and affording more deportable non-citizens access to cancellation of removal.<sup>87</sup>

Other attempts at reform included a bill sponsored by Senator Daniel Patrick Moynihan of New York, S. 173, introduced to the Senate on January 19, 1999, which would have made non-citizens convicted of an aggravated felony with a sentence of less than five years eligible for cancellation of removal.<sup>88</sup> Senator Patrick Leahy of Vermont introduced a bill on April 22, 1999, which would have lessened the impact of deportation policy on US military veterans, including by making them eligible for cancellation of removal, irrespective of any criminal convictions.<sup>89</sup> Even as recently as January 2007, a bill sponsored by Representative

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<sup>84</sup> Restoration of Fairness in Immigration Law Act of 2000, H.R. 4966, July 26, 2000.

<sup>85</sup> “Conyers re-Introduces the Omnibus ‘Fix ‘96’ Immigration Bill,” Press Statement from Congressman John Conyers, Jr., March 7, 2002.

<sup>86</sup> The bill was co-sponsored by Senators Dodd (Connecticut); Feingold (Wisconsin); Kerry (Massachusetts); Wellstone (Minnesota); Durbin (Illinois); Graham (Florida); and Leahy (Vermont).

<sup>87</sup> Immigrant Fairness Restoration Act of 2000, S. 3120.

<sup>88</sup> To amend the Immigration and Nationality Act to revise amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act, S. 173, Section 1(a), January 19, 1999.

<sup>89</sup> Fairness to Immigrant Veterans Act of 1999, S. 871, April 22, 1999, Section 3.

José Serrano of New York was introduced that would provide discretionary authority to immigration judges to allow non-citizen parents of US citizen children to remain in the United States and avoid deportation when such deportation is determined to be against the best interests of the child.<sup>90</sup> Despite these many efforts, at this writing not one of these proposed reforms has received the full and detailed attention of Congress, and none has passed.

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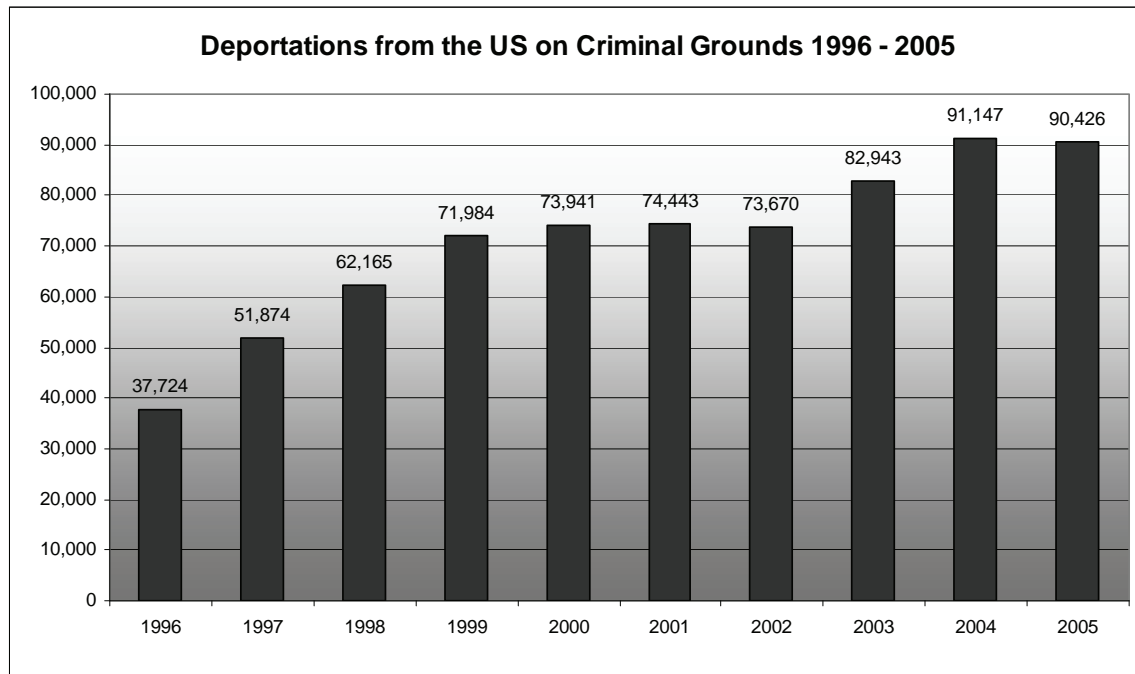
<sup>90</sup> Discretionary Authority with Respect to Removal of Parents of Citizen Children, H.R. 213, January 4, 2007 (previously introduced as H.R. 5035 on March 28, 2006).

## V. National Statistics on Deportation for Crimes

The history of the 1996 immigration laws tells a story of unintended consequences—Congress seems to have passed laws that treated some immigrants more harshly than lawmakers anticipated. Regardless of what Congress intended, the effects of the 1996 laws—particularly on families in the United States—have been widespread and devastating.

Aggregate statistics released annually by immigration authorities reveal that since 1997 (when the 1996 laws went into effect), a total of 672,593 immigrants have been deported for criminal convictions. Figure 1 shows that the annual number of deportees has risen most years and predictably jumped the most (61 percent) between 1996, before the new laws took effect, and 1998, when they had been in place for a full calendar year. Each year subsequently, with the exception of 2002 and 2005, the numbers have risen steadily.

Figure 1

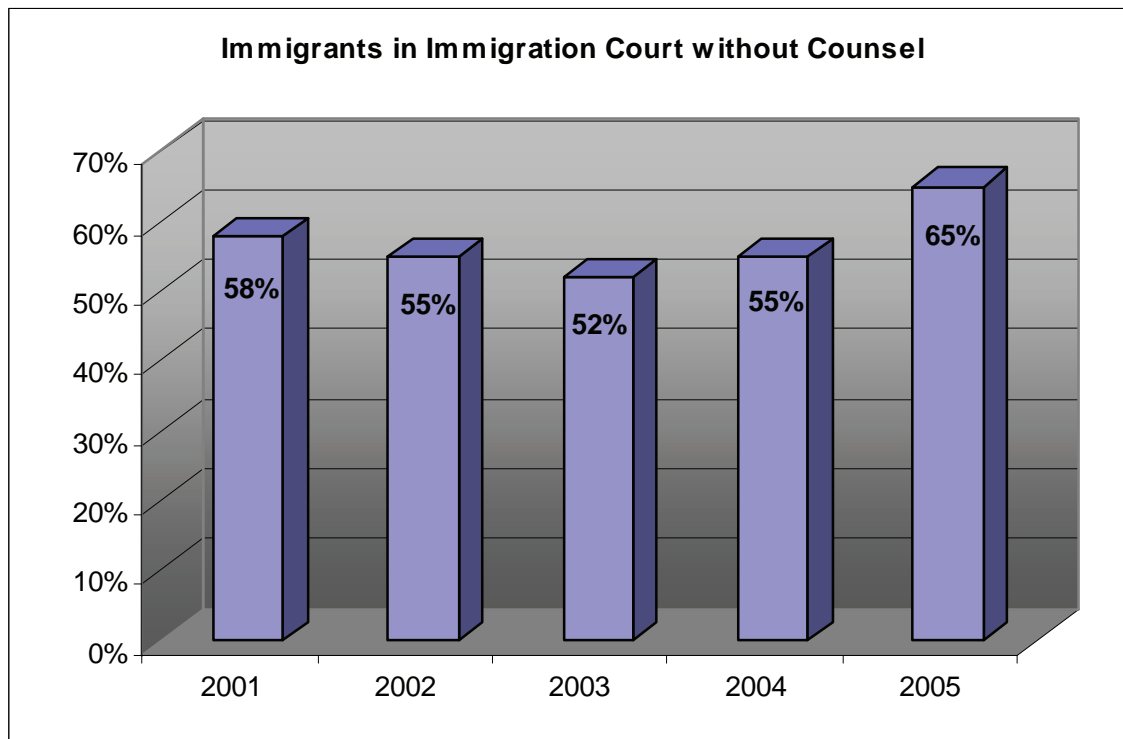


Source: For FY 1996 and FY 1997, Immigration and Naturalization Service, “Enforcement Operations, Aliens Removed by Criminal Status and Region and Selected Country of Nationality,” *Statistical Yearbook 1997*, Table 65, p. 185. For all subsequent years, Department of Homeland Security, *Yearbook of Immigration Statistics 2005*, Table 41 and Table 42 <http://www.dhs.gov/ximgtn/statistics/publications/YrBko5En.shtm> (accessed July 2, 2007). According to ICE, Tables 41 and 42 should be added to calculate the total number of non-citizens removed on criminal grounds. Human Rights Watch telephone interview with Elizabeth M. Grieco, Ph.D., Office of Immigration Statistics, Department of Homeland Security, Washington, D.C., March 1, 2007.



Large numbers of these non-citizens deported for crimes receive their deportation orders after appearing in immigration proceedings without an attorney, often speaking with the help of whatever interpretation services the court normally uses. Figure 2 shows that in 2005, 65 percent of immigrants represented themselves in their deportation hearings before the immigration court.

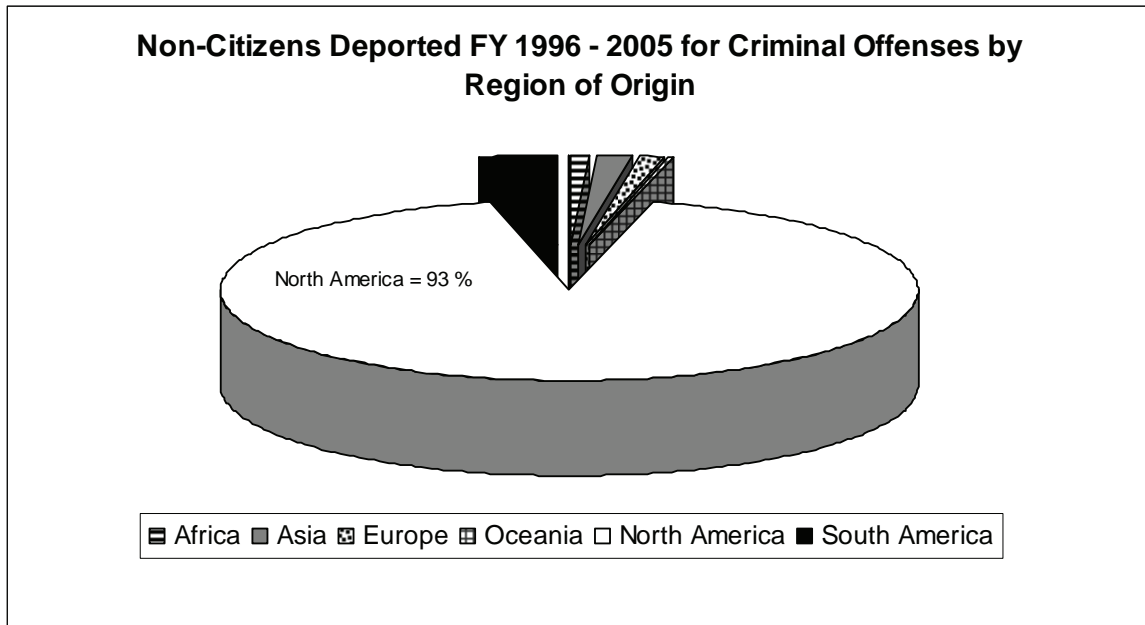
**Figure 2**



Source: Karin Brulliard, "Battling Deportation Often a Solitary Journey," *The Washington Post*, January 8, 2007 (citing Department of Justice, Executive Office for Immigration Review).

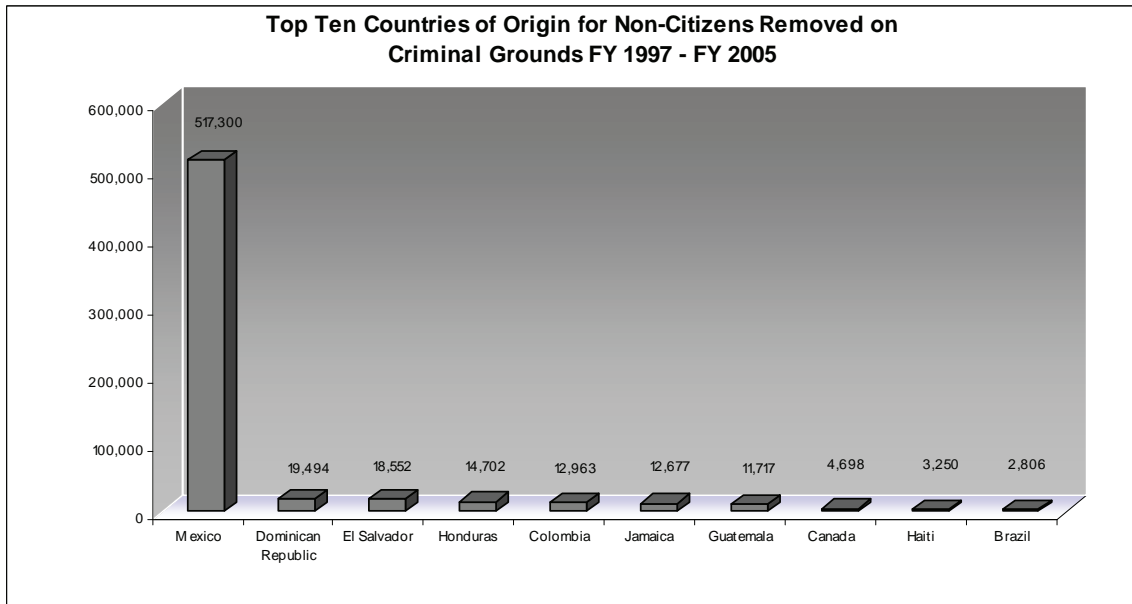
Non-citizens deported for criminal offenses come from the same countries and regions of the world as all immigrants living in the United States. Therefore, the bulk of those deported—or 93 percent—are sent to countries in North and Central America and the Caribbean, as shown in figure 3. Mexico receives by far the largest number of immigrants deported for criminal convictions, shown in figure 4.

Figure 3



Source: For FY 1996 and FY 1997, Immigration and Naturalization Service, "Enforcement Operations, Aliens Removed by Criminal Status and Region and Selected Country of Nationality," *Statistical Yearbook 1997*, Table 65, p. 185. For all subsequent years, Department of Homeland Security, *Yearbook of Immigration Statistics 2005*, Table 41 and Table 42 <http://www.dhs.gov/ximgtn/statistics/publications/YrBko5En.shtm> (accessed July 2, 2007).

Figure 4



Source: For FY 1996 and FY 1997, Immigration and Naturalization Service, "Enforcement Operations, Aliens Removed by Criminal Status and Region and Selected Country of Nationality," *Statistical Yearbook 1997*, Table 65, p. 185. For all subsequent years, Department of Homeland Security, *Yearbook of Immigration Statistics 2005*, Table 41 and Table 42 <http://www.dhs.gov/ximgtn/statistics/publications/YrBko5En.shtm> (accessed July 2, 2007).

The Immigration and Customs Enforcement (ICE) agency within the Department of Homeland Security only recently has made data available about the criminal convictions that form the basis for deportations from the United States. For reasons that are unclear, in its regular press updates the agency always touts its deportations of violent criminals, but keeps vague the other categories of immigrants deported. The secrecy surrounding the criminal convictions forming the basis for deportations has been remarked upon by many attorneys, academics, and statistical researchers. In fact, Syracuse University, which maintains a special immigration data analysis unit, recently observed,

Despite the interest in aggravated felonies, very little is currently known about how often aggravated felony provisions are in fact used. The government publishes no statistics on the number of individuals it has sought to deport, or actually deported, on aggravated felony grounds. A literature search has not turned up any other sources with relevant statistics.<sup>91</sup>

In its regular press releases, instead of simply disclosing all of the offenses that form the basis for deportations, ICE prefers to highlight the worst, most violent offenses. In one press statement, announcing the deportation of 562 “criminal aliens,” ICE chose to highlight presumably three deportees who were removed for “aggravated assault,” “drug trafficking,” and “lewd and lascivious acts on a child.” Details on criminal convictions for the 559 additional immigrants deported were not provided. The same release quotes Marc Moore, San Antonio ICE field office director for detention and removal operations:

Our citizens may sleep better knowing that these dangerous criminals no longer pose a threat to our communities. ICE will continue to work to aggressively remove those who have no legal right to remain in the United States, especially those who terrorize our communities.<sup>92</sup>

In another press advisory, ICE announced its deportation of “144 criminals,” highlighting three non-citizens who were deported for sex offenses or stalking, and referring to “other individuals” who were deported for “crimes such as homicide, heroin and cocaine

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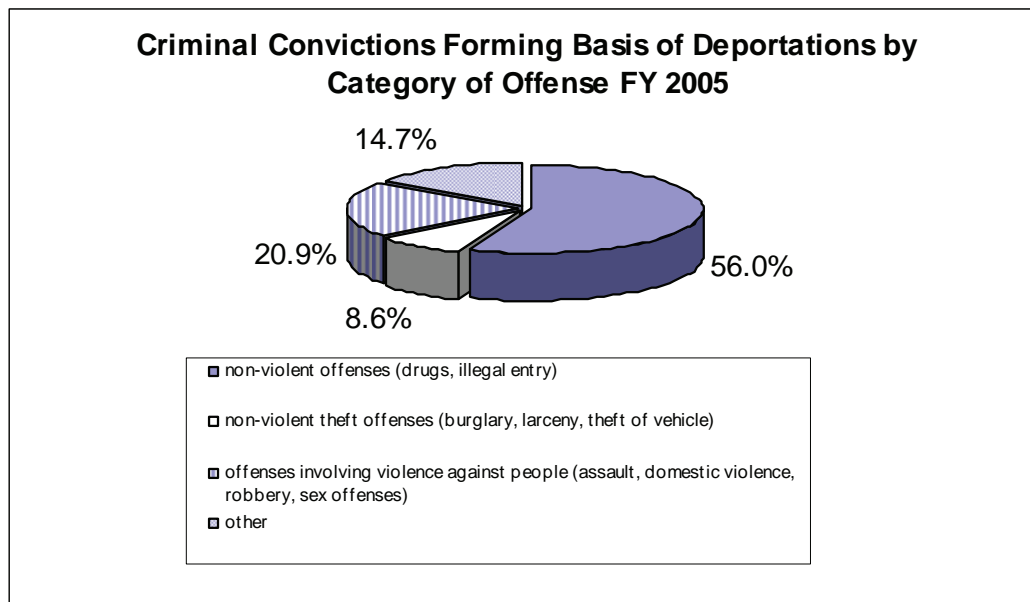
<sup>91</sup> Transactional Records Access Clearinghouse, Immigration Report, “How Often Is The Aggravated Felony Statute Used?” Syracuse University, 2006, <http://trac.syr.edu/immigration/reports/158/> (accessed March 1, 2007).

<sup>92</sup> “ICE Removed More Than 3,000 Criminal Aliens, Status Violators from South Texas During June,” Office of the Press Secretary, Immigration and Customs Enforcement Public Affairs, July 11, 2005, [www.ice.gov/pi/news/newsreleases/articles/050711santonia.htm](http://www.ice.gov/pi/news/newsreleases/articles/050711santonia.htm) (accessed May 30, 2007).

smuggling, fraud, weapons offenses, sexual assault, prostitution, and extortion.”<sup>93</sup> In yet another release, ICE chose to highlight the deportations of two men: a Brazilian who was convicted for assault with a deadly weapon, domestic assault and unlawful possession of a firearm; and a Jamaican who was deported for “unnatural acts upon a child; providing obscene materials to minors; assault and battery; breaking and entering; larceny; and possession of a controlled substance.” But the agency failed to describe the crimes of the 756 other immigrants deported during the same ICE operation.<sup>94</sup>

As figure 5 reveals, newly public data on the underlying convictions for deportations in fiscal year 2005, which were released by ICE at the end of 2006, show that 64.6 percent of immigrants were deported for non-violent offenses, including non-violent theft offenses; 20.9 percent were deported for offenses involving violence against people; and 14.7 percent were deported for “other” crimes, unreported by ICE. Figure 6 breaks down these numbers into more specific offenses for 2005, showing that drug crimes, immigration offenses, assault (non-sexual), and “other” crimes are the top four most common criminal convictions, totaling 81 percent of all deportations on criminal grounds in that year.

Figure 5

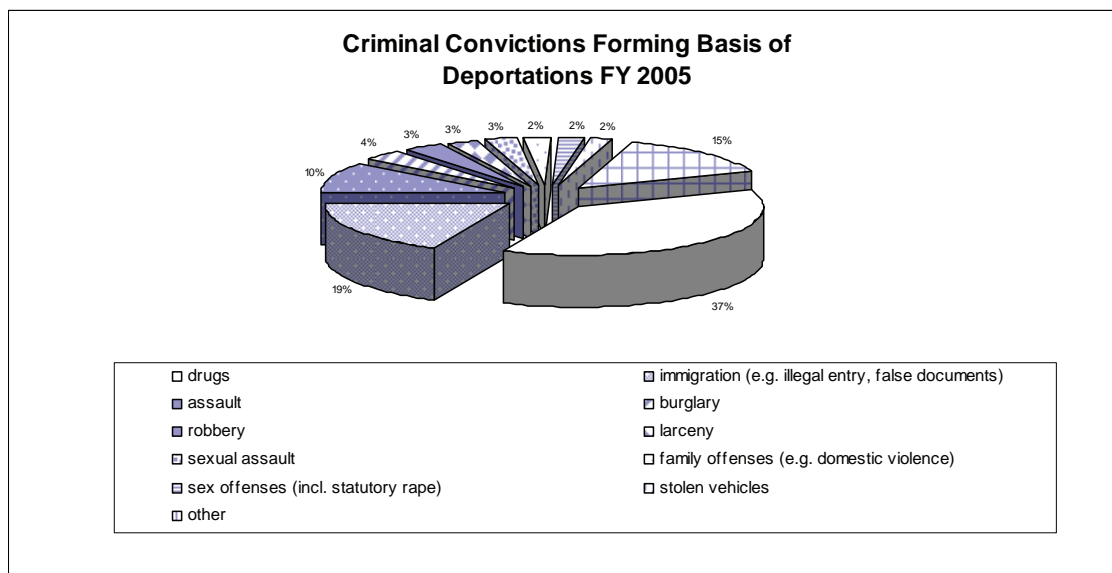


Source: Mary Dougherty, Denise Wilson, and Amy Wu, Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005*, Table 4, November 2006, p. 5.

<sup>93</sup> “Philadelphia ICE Deports 144 Criminals, Office of the Press Secretary, Immigration and Customs Enforcement Public Affairs”, June 22, 2005, [www.ice.gov/pi/news/newsreleases/articles/050622philadelphia.htm](http://www.ice.gov/pi/news/newsreleases/articles/050622philadelphia.htm) (accessed May 30, 2007).

<sup>94</sup> “ICE Removes 758 Criminal Aliens from 5-State Area During July,” Office of the Press Secretary, Immigration and Customs Enforcement Public Affairs, August 15, 2006, [www.ice.gov/pi/news/newsreleases/articles/060815neworleans.htm](http://www.ice.gov/pi/news/newsreleases/articles/060815neworleans.htm) (accessed May 30, 2007).

Figure 6



Source: Mary Dougherty, Denise Wilson, and Amy Wu, Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005*, Table 4, November 2006, p. 5.

Applying these percentages from 2005 to the aggregate number of persons deported since 1997 allows us to estimate that 434,495, or nearly half a million people, were non-violent offenders deported from the United States in the 10 years since the 1996 laws went into effect. In addition, we can estimate that 140,572 people were deported during that same decade for violent offenses.

These broad estimates fail to answer important additional questions. When Human Rights Watch commenced research for this report, we filed a Freedom of Information Act (FOIA) request with ICE to answer basic questions about the legal status of those deported for crimes (how many were green card holders and how many were undocumented), the nature and seriousness of the criminal convictions forming the basis for deportations (e.g. how many convicted of shoplifting, how many of homicide) and the family relationships of those deported (how many had US citizen or lawfully present spouses and children). Human Rights Watch delayed publication of this report for one year while we waited to receive a response to our FOIA request.<sup>95</sup> Unfortunately, as detailed in the Appendix, we have not received the

<sup>95</sup> On the eve of publication of this report, on June 19, 2007, Human Rights Watch received correspondence in response to our administrative appeal in which ICE claimed it could provide records responsive to three of the five types of information we had requested: the country of origin of each non-citizen deported on criminal grounds from 1997 to the present, their immigration status, and the crime forming the basis for the deportation. Contrary to the provisions of FOIA regarding payments for information, ICE has assessed fees without responding to our application for a fee waiver as an organization that publicizes information “in the public interest” about the “operation or activities of the [US] government.” We have appealed this finding of the agency.

information requested. Worse, the history of ICE's response to our repeated requests suggests at best a lack of commitment to transparency and the goals behind the FOIA legislation; at worst it suggests deliberate stonewalling.

If ICE had responded to our FOIA request, we would have been able to fill in at least some of the blanks left by the publicly available data. That data, for example, do not reveal how many of the 672,593 non-citizens deported for crimes were lawfully present in the country and how many were undocumented. The data also provides the public with little basis for judging the fairness of the deportations in light of the crimes for which the deported immigrants were convicted because criminal categories used by ICE are so broad as to be almost meaningless. The broad category of "sex offenses" may include acts like consensual underage sex (prosecuted as statutory rape), as well as violent rape. The category of "drugs" no doubt includes high-level drug traffickers as well as immigrants deported for simple possession of small amounts of narcotics.

Although Human Rights Watch cannot make reliable estimates of the legal status of the deported immigrants nor the offenses triggering their deportations, we can make reasonable estimates of how many spouses and children were left behind as a result of these deportations. The 2000 US Census found that the 6.3 million households with a foreign-born non-citizen householder<sup>96</sup> in the United States had an average household size of 3.44 persons.<sup>97</sup> If that average household size holds true for the foreign-born non-citizens being deported from the United States for criminal offenses (that is, deportee plus 2.44 relatives in each household), then we can estimate that at least 1.6 million family members, including husbands, wives, sons and daughters, have been separated from loved ones by deportations since 1997.

We can also estimate that many of these relatives are US citizens and lawful permanent residents. The 2000 US Census found that US citizens represented 33 percent of all members of foreign-born households. This means that since the harsh immigration laws were passed in 1996, an estimated 1.6 million spouses and children, of whom approximately 540,000 were US citizens by birth or naturalization, lost a loved one to deportation. (We have found no way of reliably estimating the numbers of lawful permanent residents within the families of deported immigrants.)

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<sup>96</sup> A "householder" is "usually the household member or one of the household members in whose name the housing unit is owned or rented." US Census Bureau, *Profile of the Foreign Born Population in the United States: 2000*, December 2001, p. 430.

<sup>97</sup> *Ibid.*, p. 4; US Census Bureau, "Table FB1-Profile of Selected Demographic and Social Characteristics for the Non-U.S. Citizen Population," *Census 2000 Special Tabulations (STP-159)*, 2000. See also US Census Bureau, Immigration Statistics Staff, Population Division, "American Community Survey," 2003 (revealing that 50 percent of the non-US citizen population was married with their spouse present, and 8 percent were married with their spouse absent).

## VI. US Deportation Policy Violates Human Rights

Since the beginning of the nation state, control over immigration has been understood as an essential power of government. In recent history, governments have allowed limits on their immigration power, recognizing that it may only be exercised in ways that do not violate fundamental human rights.<sup>98</sup> Therefore, while international law does support every state's right to set deportation criteria and procedures, it does not allow unfettered discretion to deport all non-citizens in all circumstances.

When Congress changed deportation law in 1996 it broke with international human rights standards in ways never before attempted in the United States. Four important human rights are violated by US deportation policies as applied to immigrants with criminal convictions: the right to raise defenses to deportation, the principle of proportionality, the right to family unity, and the right to protection from return to persecution. In this chapter, we describe these human rights standards and highlight examples of people who were ordered deported in contravention of these norms.

### The Right to Raise Defenses to Deportation

A primary purpose of human rights law is to define rights protecting the individual against the coercive powers of the state. Deportation, which removes an immigrant from the community with which he or she has built close and enduring ties, is an example of a coercive state power. However, the recognized legitimate interests of states in deporting certain non-citizens, combined with the relative ease by which deportation can be accomplished, have caused government officials and the public at large to lose sight of just how serious and coercive the state's decision to deport really can be.

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<sup>98</sup> UN Human Rights Committee, General Comment 15 ("It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise"); Inter-American Commission on Human Rights – Report No. 49/99 Case 11.610, *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, April 13, 1999, Section 30 (recognizing state authority to control immigration but stressing that this power is limited by the American Convention on Human Rights' guarantees); Gerald P. Heckman, "Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?" *International Journal of Refugee Law*, vol. 15 no. 2 (2003), p. 214 ("[o]nce widely accepted as a nearly unfettered discretion derived from state sovereignty, the power of states to control the entry and residence of aliens on their territories is increasingly understood to be circumscribed by domestic law and customary and conventional international law."); *Boughanemi v. France* (App. 22070/93), Judgment of 24 April 1996 (recognizing that a state's right to control immigration is "well-established international law," but that it must be tempered by Article 8's protection of family life).

Deported individuals lose their ability to live with close family members in a country that they may reasonably view as “home.” They are deprived of raising their children or living in the same country as their parents, they lose friends and communities, and their ability to work may be restricted as well. In their countries of nationality, people deported from the United States for criminal convictions are often stigmatized and have difficulty finding jobs and establishing or reestablishing family and community connections. Most are barred, either permanently or for decades, from ever re-entering the United States, even for a short visit.

A governmental decision to deprive a person of connection to the place he or she considers home raises serious human rights concerns, requiring at a minimum that the decision to deport be carefully considered, with all relevant impacts and potential rights violations weighed by an independent decision maker. Unfortunately, the US fails to do this on a daily basis.

Instead, the United States takes a “one size fits all” approach to deportation. When non-citizens are facing deportation for criminal convictions, immigration judges can do little more than run conveyor belt deportation hearings in which they rubber stamp the removal orders issued by Immigration and Customs Enforcement. Many non-citizens are legally blocked from raising the closeness of their family relationships or other ties to the United States as well as the likelihood that they may be returned to persecution. Without an ability to raise these equities, deportation hearings provided for immigrants with criminal convictions are devoid of justice, and they violate international standards.

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992,<sup>99</sup> states in Article 13 (to which the United States has entered no reservations, understandings or declarations),

An Alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion* and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>100</sup>

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<sup>99</sup> 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://www.ohchr.org/english/countries/ratification/4.htm> (accessed May 30, 2007).

<sup>100</sup> ICCPR, art. 13 (emphasis added).



The UN Human Rights Committee, which monitors state compliance with the ICCPR, 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.”<sup>101</sup>

Similarly, Article 8(1) of the American Convention on Human Rights, which the United States signed in 1977,<sup>102</sup> states,

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.<sup>103</sup>

Applying this standard, the Inter-American Commission on Human Rights has stated that deportation proceedings require “as broad as possible” an interpretation of due process requirements and include the right to a meaningful defense and to be represented by an attorney.<sup>104</sup>

While the ability to raise defenses to deportation is provided for in these human rights treaties, not every possible argument against deportation is important enough to call into question the legitimacy of a hearing that denies such arguments’ consideration. For example, a non-citizen who for reasons of personal predilection prefers the economic opportunities and climate in one country to another could not legitimately challenge his hearing under human rights law if he was prevented from making this argument as a defense to deportation.

However, some defenses implicate very important and fundamental rights that non-citizens should be able to raise in their deportation hearings in the United States, including the

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<sup>101</sup> UN Human Rights Committee, General Comment 15, paras 9 and 10.

<sup>102</sup> American Convention on Human Rights “Pact of San Jose, Costa Rica,” General Information on the Treaty, <http://www.oas.org/juridico/english/Sigs/b-32.html> (accessed May 30, 2007).

<sup>103</sup> American Convention, art. 8(1).

<sup>104</sup> Inter American Commission on Human Rights, Report No. 49/99 Case 11.610, *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, April 13, 1999, Section 70-1.

rights to family unity, ties to a country, proportionality, and the likelihood of return to persecution upon return. Without a hearing that allows for the weighing of these concerns, the right to raise defenses to deportation is undermined.

Several categories of immigrants facing deportation for crimes in the United States are barred from having hearings in which their human rights can be weighed.<sup>105</sup> First, there is no mechanism by which immigration courts weigh whether deportation itself is a proportionate penalty imposed for the crimes a non-citizen has committed. Second, immigrants convicted of offenses categorized as aggravated felonies are barred from raising their family relationships or longstanding ties to the United States in a deportation hearing. Third, other non-citizens convicted of crimes cannot raise these issues if they do not fit the very narrow categories contained in the two remaining waivers of deportation (Sections 212(h) and 240A(a)). Fourth, many refugees convicted of aggravated felonies are barred from having their risk of persecution weighed by the courts.

The US policy of blocking certain categories of immigrants convicted of crimes from raising defenses to deportation during their deportation hearings violates international human rights standards. Europe has consistently allowed immigrants to raise these issues during deportation. If deportation infringes on a right protected in the European Convention of Human Rights, such as the right to family life under Article 8, a non-citizen is entitled to “an effective remedy before a national authority” under Article 13.<sup>106</sup> This remedy must provide some basic procedural protections as well as be conducted by an authority with sufficient power to rule on the question of whether the infringement of the right is so severe as to render the deportation unlawful.<sup>107</sup> In addition, in *Stewart v. Canada*<sup>108</sup> and *Canepa v.*

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<sup>105</sup> Non-citizens convicted of aggravated felonies who are not lawful permanent residents, or who have lawful permanent resident status conditionally, are subject to accelerated removal procedures without a hearing before an immigration judge. Under such procedures, the law explicitly states that “an alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.” 8 U.S.C. Section 1228. Where cases are reviewed by immigration judges or the Board of Immigration Appeals, serious concerns exist that the quality of such review has “fallen below the minimum standards of legal justice.” *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Review of detention and removal decisions is now possible only through a writ of habeas corpus in the Court of Appeals, and it is unclear as yet whether such review will be construed to include the right to challenge the underlying removal decision itself. Hiroshi Motomura, “Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus,” *Bender’s Immigration Bulletin*, vol. 11-10, p. 2 (2006). In addition, all categories of aggravated felons (including lawful permanent residents) facing deportation have no right to raise the fact that they will be separated from family members if the deportation is carried out. This lack of a hearing violates basic standards in international human rights law.

<sup>106</sup> European Court of Human Rights, *Al-Nashif and Others v. Bulgaria* (App. 50963/99), Judgment of June 6, 2002.

<sup>107</sup> *Ibid.*, Section 137.

<sup>108</sup> *Stewart v. Canada*, Communication No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996).

Canada,<sup>109</sup> the Human Rights Committee has determined that hearings weighing family ties should take place prior to deportation.

Given the strength of these standards, many other constitutional democracies require deportation hearings to weigh such defenses to deportation in their domestic practices. In fact, in contrast to the United States, the laws and practices of 61 governments around the world researched by Human Rights Watch offer non-citizens an opportunity to raise family unity concerns, proportionality, ties to a particular country, and/or other human rights standards prior to deportation.

**Figure 7: Human Rights Protections in the Deportation Laws of 61 Countries and Territories**

	Must weigh family ties as Party to ECHR	As a matter of domestic law (DL): must weigh family ties prior to deportation	DL: Must weigh proportionality prior to deportation	DL: Must weigh ties to a country prior to deportation	DL: Must give due process prior to deportation	DL: Must consider human rights prior to deportation
Albania	X	X				
Andorra	X					
Argentina		X		X	X	
Armenia	X				X	
Australia			X	X		
Austria	X	X				
Azerbaijan	X					
Belgium	X				X	
Bosnia & Herzegovina	X		X			
Brazil		X				
Bulgaria	X					
Canada		X				
Croatia	X					
Cyprus	X					
Czech Republic	X					
Denmark	X	X		X		
Estonia	X					
Finland	X	X				
France	X	X	X	X		
Georgia	X					
Germany	X	X		X		
Greece	X	X				
Guatemala					X	
Hong Kong		X				
Hungary	X	X	X	X		
Iceland	X	X		X		

<sup>109</sup> *Canepa v. Canada*, Communication No. 558/1993, U.N. Doc CCPR/C/59/D/558/1993 (1997).

	Must weigh family ties as Party to ECHR	As a matter of domestic law (DL): must weigh family ties prior to deportation	DL: Must weigh proportionality prior to deportation	DL: Must weigh ties to a country prior to deportation	DL: Must give due process prior to deportation	DL: Must consider human rights prior to deportation
Ireland	X	X		X		
Israel		X				
Italy	X				X	X
Japan					X	
Latvia	X					
Liechtenstein	X					
Lithuania	X				X	X
Luxembourg	X					
Macedonia	X	X		X		
Malta	X					
Moldova	X					
Monaco	X					
Netherlands	X	X				
New Zealand					X	
Norway	X	X	X	X		
Poland	X					
Portugal	X	X				
Romania	X					
Russia	X					
San Marino	X					
Serbia	X					
Singapore			X			
Slovakia	X			X		
Slovenia	X	X		X		
South Africa		X				X
South Korea					X	
Spain	X	X				
Sweden	X	X		X		
Switzerland	X	X	X	X		
Tajikistan			X			
Turkey	X					
United Kingdom	X				X	X
Ukraine	X					
Venezuela			X		X	

Source: This chart is based on international comparative law research and analysis performed for Human Rights Watch by the international law firm of Sidley Austin, LLP, February 2007 (legal memo on file with Human Rights Watch).

### Case Study: Deportation and Post-Traumatic Stress: Kannareth C.<sup>110</sup>

Kannareth C., a young man facing deportation to Cambodia, came to the United States with his mother from a refugee camp in Thailand when he was 10 years old. The family entered the United States legally as refugees and became lawful permanent residents. At the age of 15, Kannareth was placed on probation for driving without a license. While he was on probation he was charged with pick pocketing. He also violated his probation by failing to report.

Kannareth has a fiancée and a daughter who was three years old when he went to renew his green card for employment purposes and his criminal record was checked. He was placed in immigration detention and in deportation proceedings. Kannareth wrote,

“I came to the United States of America legally for the opportunities offered of a good life. I was making the best of those opportunities by attending college to learn a trade for the chance at a good employment career. I held a job at the same time to provide for my family. My fiancée and I plan to marry and raise our daughter together. I value my family and have come to realize how much my family need me to be there for them. The thought of having my daughter ask how come I’m not home, saddens me. I regret putting my family through the strain of not having me home, and I regret this matter is before the court. Please understand that I am not a bad person, nor am I a violent person. I just got caught up and lost sight of direction. I have since gotten back on course .... I can once again provide for my family. I ask that you not destroy my dreams and plans to be a devoted father and husband, and my ambition to provide a good life to my family.”

Punthea C., Kannareth’s mother, spoke (with the help of an interpreter) with a Human Rights Watch researcher. She was under the care of a psychologist because the problems with her son were triggering old memories associated with her flight from Cambodia. She said,

“I feel very lost without my son. It happened again like during the communist years and the civil war. Basically, that is all coming back. Now, we are being separated again. It makes my chest feel very tight. I can’t talk. And breathing is ... in other words it’s like something that lumps in your throat and you can’t talk ... I feel very bad inside for my child. He went all through his life not having a father, not having a father figure. With my situation in the camp ... I couldn’t give him a normal upbringing, that’s one of the reasons why things happened the way they did. After escaping what I went through and escaping from death, now to come to this point. It’s a lot to lose.”

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<sup>110</sup> This text box is based on a Human Rights Watch interview with Punthea C. (pseudonym) regarding her son Kannareth C. (pseudonym) and Punthea’s social worker, Long Beach, California, April 7, 2006.

A clinical social worker who is a therapist at the Program for Torture Victims in California gave a professional evaluation of Punthea, reporting that she is suffering from severe post-traumatic stress disorder and major depressive disorder, and that it is her “professional opinion that the deportation of [Punthea’s] son to Cambodia would be severely damaging to [Punthea’s] psychological well-being. She is extremely fearful for her son’s well-being and safety if he is sent to Cambodia, and the thought of him in Cambodia triggers painful and frightening memories of her own torture and the other traumas she experienced in Cambodia.”

## Proportionality

Since deportation is such an inherently severe sanction, governmental decisions to impose it are subject to human rights constraints. A person’s status as a non-citizen, his or her conviction of a crime, or the combination of the two, does not extinguish his or her claim to just treatment at the hands of the government, nor does it free a government to ignore fundamental rights in its actions. Even in an area in which governmental powers are known to be robust, such as in immigration, governments must uphold basic notions of fairness and proportionality. The gravely serious burdens that are imposed as a result of deportation require government to act within bounds of reasonableness.

The idea that infringements upon rights must be proportional is explicitly included in the domestic law of many countries around the world,<sup>111</sup> including the United States.<sup>112</sup> International law uses proportionality to ensure that rights are not denied arbitrarily. Bodies enforcing those laws, such as the European Union, the Human Rights Committee and the

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<sup>111</sup> In Austria, limitations on fundamental rights have been held to be permissible only where the limitation is in the public interest and the limitation is in proper proportion to the weight of the public interest and the gravity of the limitation. Albrecht Weber, ed., *Fundamental Rights in Europe and North America* (Leiden, Netherlands: Brill Academic Publishers, 2001), p. 78. In the Czech Republic, the principle of proportionality where fundamental rights are intruded upon is “one of the unwritten rules” that has been recognized by the constitutional court. Weber, ed., *Fundamental Rights*, p. 48. In Finland, the law requires that fundamental rights be limited only where a legitimate aim cannot be reached by other, less intrusive means. Weber, ed., *Fundamental Rights*, p. 37. Germany also applies the doctrine of proportionality to cases involving violations of fundamental rights. Weber, ed., *Fundamental Rights*, p. 57. France has developed a doctrine of proportionality for fundamental rights cases, influenced by the German practice. Weber, ed., *Fundamental Rights*, p. 58. In Ireland, the High Court has adopted a test for constitutional rights violations that requires a proportionality interest which was influenced in its development by the case law of the European Court of Human Rights as well as Canada. Weber, ed., *Fundamental Rights*, p. 65. In Canada, the Supreme Court applies the “Oakes test” in analyzing infringements of rights guaranteed by the Canadian Charter of Rights and Freedoms, which includes an inquiry into whether the infringement is proportionate to the valid governmental purpose. Vicki C. Jackson, “Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on ‘Proportionality,’ Rights and Federalism,” *University of Pennsylvania Journal of Constitutional Law*, vol. 1 (1999), pp. 606-607.

<sup>112</sup> For example, the United States Supreme Court uses “strict scrutiny” to examine state policies based on race, by balancing the right to be free from discrimination against any compelling governmental interest in the policy under consideration. See, for example, *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Korematsu v. United States*, 323 U.S. 214 (1944).

International Court of Justice have all applied proportionality when analyzing states' decisions to infringe on important rights, including in the context of deportation.<sup>113</sup>

However, US courts do not consider deportation a form of punishment,<sup>114</sup> and therefore they do not weigh the seriousness of the consequence of deportation against the seriousness of a particular non-citizen's criminal offense. Striking the right balance in the United States is therefore left to the legislative branch. Whether the proportionality analysis is done in a court, or whether it is done by the legislature, and irrespective of whether deportation is considered a punishment under US law, it is a very severe penalty that seems to outweigh some of the crimes that currently trigger it. This is especially so when mitigating and aggravating factors are not weighed in an individualized hearing.

For example, despite the plain meanings of the words "aggravated" and "felony," this category includes misdemeanor crimes, even though misdemeanors are generally less serious and involve less violence than felonies. Figure 8 outlines some of the offenses that trigger deportation from the United States. For some of these offenses, deportation seems a very harsh additional penalty to add to a criminal sentence that is comparatively inconsequential, reflecting the minor nature of the crimes involved.

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<sup>113</sup>The European Union has decided that before deporting a long-term resident alien, states must consider factors such as duration of residence, age, consequences for the deportee and his or her family, and links with the expelling and receiving country. Council of the EU – Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Article 12. The Human Rights Committee has explained, in the context of the prohibition of arbitrary interference with family rights, that "[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances." UN Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17): 08/04/88. The International Court of Justice has found that where limitations on freedom of movement are concerned, they must be limited by proportionality to the least intrusive means possible for achieving a legitimate state purpose. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 136. In addition, the Inter-American Court of Human Rights has held that measures that discriminate against one group in favor of another must be bound by proportionality. Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants, 100. The Special Rapporteur for the Prevention of Discrimination and the Rights of Non-citizens has called for distinctions between citizens and non-citizens to be proportional. The use of proportionality is also widespread in the European Court of Justice, where the doctrine was invoked either by litigants or the court in over 500 cases between 1955 and 1994. Vicki C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on 'Proportionality,' Rights and Federalism," *University of Pennsylvania Journal of Constitutional Law*, vol. 1 (1999), p. 604 n.81. The European Court of Human Rights has "consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests of society." Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Belgium: Intersentia, 2002), p. 14; Ian Brownlie, *Principles of Public International Law* (Oxford, UK: Oxford University Press 2003), p. 551.

<sup>114</sup>Two 19th century United States Supreme Court decisions established that deportation is not "punishment" under the US Constitution and thus rendered inapplicable constitutional protections afforded in criminal proceedings, as well as prohibitions on cruel and unusual punishment, ex post facto laws and bills of attainder. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); and *Yue Ting v. United States*, 149 U.S. 698 (1893).

**Figure 8 – Criminal Sentences Contrasted with Penalty of Deportation**

Criminal Offense	Immigration Consequence	Examples of Likely Federal or State (NY law used) Sentence
2 Shoplifting offenses	Mandatory detention and deportation <sup>115</sup>	For first conviction individual could receive sentence to several days of community service. <sup>116</sup> For second conviction, individual could receive a sentence of up to six months.
Tax evasion, causing loss of more than \$10,000	Mandatory detention and deportation <sup>117</sup>	Fine equaling tax loss plus zero to six months' imprisonment <sup>118</sup>
Possessing stolen property within five years of entry to the US	Mandatory detention and deportation <sup>119</sup>	Restitution of property, plus one year's imprisonment <sup>120</sup>
Possession with intent to sell of 35 grams of marijuana	Mandatory detention and deportation <sup>121</sup>	Between 15 days and up to one year of imprisonment <sup>122</sup>

The case of Suwan provides an example of a relatively minor offense for which deportation seems a disproportionate penalty. He was deported to Cambodia at the age of 34, after living in the United States as a refugee with his wife and two young children. Suwan was a supervisor on a construction crew in Houston, Texas. The crime for which he was deported involved two counts of indecent exposure. Suwan committed these offenses because, according to him, there was no toilet at the construction site that he was supervising, and he was forced to urinate outdoors. After his deportation to Cambodia, Suwan told a CNN reporter, "I think that the crime that I commit ... [was not] bad enough to deport me here ... [I had] made it in the States [with my] wife, two kids, a home. Drive to work and back home ... I could live the rest of my life [in the United States]." <sup>123</sup>

<sup>115</sup> Two shoplifting offenses constitute two crimes of moral turpitude, which render a non-citizen deportable even if he or she received no prison sentence for the offenses. 8 U.S.C. Section 1227(a)(2)(A)(ii).

<sup>116</sup> New York Penal Law Section 155.25 (definition of petit larceny); Section 70.15 (sentence for Class A misdemeanors); Section 400.14 (relating to second crime offenders).

<sup>117</sup> Tax evasion causing loss of more than \$10,000 is considered an aggravated felony under 8 U.S.C. Section 1227(a)(2)(A)(iii).

<sup>118</sup> United States Sentencing Guideline Section 2T1.1.

<sup>119</sup> Possessing stolen property constitutes a crime of moral turpitude, which is a deportable offense under 8 U.S.C. Section 1227(a)(2)(A)(i). See also *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000) (a conviction for possessing stolen property involves moral turpitude without regard to the triviality of the offense).

<sup>120</sup> New York Penal Law Section 70.00.

<sup>121</sup> Conviction of a crime relating to a controlled substance, other than simple possession of 30 grams or less of marijuana, is a deportable offense under 8 U.S.C. Section 1227(a)(2)(B)(i).

<sup>122</sup> New York Penal Law Section 221.35.

<sup>123</sup> "One Way Ticket for Convicted Cambodians," CNN, November 19, 2002; Human Rights Watch interview with Nil Samorn, Cambodian Association of Illinois, Chicago, Illinois, February 3, 2006; Bruce Stokes, "Between Two Nations," *National Journal*, January 13, 2007.



In another example, Jose A., originally from El Salvador, entered the United States in 1980 and became a lawful permanent resident in 1990. Jose has three US citizen children and is facing deportation for breaking into a car, a misdemeanor conviction; and for shoplifting a \$10 bottle of eye drops from a drug store.<sup>124</sup> Jose A. paid a fine for his first offense, and was sentenced to two months' imprisonment for the shoplifting offense, which he served. His two crimes are considered "crimes of moral turpitude," making him subject to deportation.

Jose has paid federal income taxes in the United States, and has worked as a technician for a sink and water fountain company. Jose's wife is a US citizen, with whom he has a young daughter.<sup>125</sup> Jose spoke about his wife and reflected on his past crimes and his pending separation from his wife and children:

[My wife] works, has started a credit line. She has a good job, a little house. It's her time to chase her dreams. I acted foolishly and should pay for those decisions. But I do think the penalty is too harsh. I have been here for 26 years and I would thank the US and say I'm sorry for what I did. I would even accept the deportation if I killed someone or robbed a bank. But now what they are doing to me is robbing my children of their future and their ability to make their own choices ... It is a severe punishment to put you in exile away from your whole world. That is the same as taking away your identity.<sup>126</sup>

Another example is the case of Hamok Yun,<sup>127</sup> originally from Korea, who lived in the United States as a lawful permanent resident since the age of two. Yun is married to a US citizen, served in the US Coast Guard, attended Michigan public schools, and worked for seven years at Idra Prince (an industrial machine builder), but lost his job due to his problems with his immigration status.

Yun is facing deportation because he pled guilty to two counts of attempted third degree criminal conduct. After his discharge from the Coast Guard, at the age of 22, Yun began a

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<sup>124</sup> Human Rights Watch interview with Jose A. (pseudonym), Eloy Detention Facility, Eloy, Arizona, May 2006.

<sup>125</sup> Jose A. is separated from the mother of his two oldest children, but he pays child support and was suing for custody at this writing because the mother of his children had a drug problem. Jose's son Isaac was having severe problems in school ever since his father was put into immigration detention pending deportation. Isaac's first grade teacher wrote a letter of concern about her young student: "Academically Isaac is functioning in the lowest 10 percent of my class. Behaviorally, Isaac is struggling as well .... I am VERY concerned about this student and his success here at school. I have referred him to our school counselor to get some help." Letter from Valerie Dixon, Ogden City Schools, Ogden, Utah, February 3, 2006.

<sup>126</sup> Human Rights Watch interview with Jose A., May 2006.

<sup>127</sup> Olivia Cobiskey, "Man Pledged Allegiance to the Flag Daily, but Still Could be Deported," Associated Press, December 13, 2004.

relationship with a 15-year-old girl. It was this relationship that caused the girl's parents to bring charges against Yun for statutory rape, resulting in his third degree criminal conduct conviction. A newspaper account of his case explained that "the parents of the girl say they have no ill will toward Yun. In fact, her mother wrote a letter to the immigration judge saying she did not think Yun should be deported. 'I am stepping forward to say that I feel he has been punished appropriately and to a higher extent than I thought he would be. I feel it is not needed that he be returned to his former country.... I feel that no further punishment is needed.'"<sup>128</sup>

The principle of proportionality in international law may counsel against imposing the penalty of deportation for these types of offenses, which are less serious than intentional violent crimes such as homicide or (non-statutory) rape.

### Case Study: Deportation after Questionable Legal Advice<sup>129</sup>

Every non-citizen deported for a crime had a separate criminal case prior to his or her deportation hearing. Defense attorneys across the country work hard to stay informed about immigration law, but nevertheless there are some who may give their clients bad advice, which then triggers deportation. It is nearly impossible for these immigrants to convince courts to reopen their criminal cases and resentence them, and thereby nullify the order of deportation.

In one such criminal case, Oscar Hernandez, originally from Mexico, arrived in the United States in 1979 at the age of four and became a lawful permanent resident at the age of 12. As a child, Oscar attended elementary, junior high, and high school in Phoenix. In 1993 Oscar was arrested and placed on probation. He became a father in 1994 and now has two US citizen daughters who live with their mother. Also in 1994, like many other lawful permanent residents, Oscar was recruited by the US Army, though he did not end up joining.

In 1995, while on probation, Oscar was arrested for carjacking. Although Oscar claimed then and now that he was innocent of the carjacking, his attorney advised Oscar to sign a plea agreement in 1998, claiming that he would be sentenced to time served (he had been in jail for three years)

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<sup>128</sup> Ibid.

<sup>129</sup> The information contained in this text box comes from: Human Rights Watch interview with Oscar Hernandez, Eloy Detention Facility, Eloy, Arizona, May 2006; Human Rights Watch interview with Juanita Chacon, Phoenix, Arizona, May 2006; Letter from Mr. Frank Ballesteros, June 17, 1992 (on file with Human Rights Watch); Letter from Col. John C. Meyers, US Army to Oscar Hernandez, October 11, 1994 (on file with Human Rights Watch); Affidavit of Oscar Hernandez, Criminal Court of the State of Arizona, County of Maricopa, March 2006 (on file with Human Rights Watch). Federal courts throughout the US have held that deportation is not a direct consequence of a conviction, and therefore unforeseen results from a criminal case relating to immigration, such as deportation, can rarely serve as a basis for overturning a guilty plea or conviction. John J. Francis, "Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?" *University of Michigan Journal of Law Reform*, vol. 36 (2003), p. 701.

and there would be no immigration consequences. Instead, Oscar was sentenced to one year and two months, which he appealed, but which would have made him deportable if his appeal failed. In a shocking turn of events, while Oscar was waiting for his appeal, he was deported by US immigration authorities under his codefendant's name. Oscar explained his attempts to correct the mistaken identity problem before he was deported:

"I requested to see a supervisor ... I told her she was mistaken but she did not listen to me. I was deported as my codefendant, Oscar Barerra Sanchez. I continuously attempted to inform the guards that they had the wrong man and I was repeatedly ignored .... In June 1999 I was deported to Mexico and the following day I returned to the United States with my school identification my brother delivered to me. One-and-a-half years later, in November 2000, I was pulled over for driving without a license."

Eventually, Oscar was prosecuted for illegal re-entry and sentenced to 57 months in prison. He was once again awaiting deportation when Human Rights Watch interviewed him in 2006. He wrote to the court,

"I ... should not have been deported in 1999 as my codefendant. I want to stay in the United States and live here legally. I have been apart from my family for close to 10 years and would like to live with my mother in Phoenix and assist her as she grows older."

When asked what would happen to Oscar, to his daughters, and to herself if he was deported back to Mexico, Oscar's mother (who is confined to a wheelchair since she had an accident at her factory job) said,

"He doesn't know anywhere outside of the US .... All of his brothers are here. Where is he going to go and with who? Right now, he's the only one that accompanies me. He takes care of me because I can't do anything. He cooks for me, he cleans the house, he picks up my medicine, and he takes me to the doctor. And if my son weren't here, what would become of me? ... Like I told the judge once, if I would have seen that my son was bad, I myself would have turned him in to the police because I don't want any of my children to be delinquents. I hope in God that he listens to me, that they take him out of jail and not out of the country."

## Family Unity

The international human right to family unity finds articulation in numerous human rights treaties. The concept is also 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 an “enduring American tradition.”<sup>130</sup>

The Universal Declaration of Human Rights states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>131</sup> The International Covenant on Civil and Political Rights states in Article 17(1) that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article 23 states 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.”<sup>132</sup>

As the international body entrusted with the power to interpret the ICCPR and decide cases brought under its Protocol, the Human Rights Committee has explicitly stated that family unity imposes limits on states’ power to deport.<sup>133</sup> In *Winata v. Australia*,<sup>134</sup> the committee found a violation where Australia sought to deport two Indonesian nationals whose 13-year-old son, Barry, had been born in, and had become a citizen of, Australia. The committee was unimpressed by Australia’s arguments that the petitioners were asserting a “claim[] to residence by unlawfully present aliens,” noting that instead the petitioners merely asserted that “forcing them to leave would be arbitrarily interfering with their family life.”<sup>135</sup>

The committee also rejected Australia’s argument that the family had the power to decide whether or not to separate, since they could choose to return to Indonesia as a group. The

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<sup>130</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 500, 503, n.12 (1977) (plurality); Linda Kelly, “Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights,” *Villanova Law Review*, vol. 41 (1996), pp. 729-730 (Discussing various non-immigration areas of law in which the Supreme Court has stressed the importance of legal protections for family unity and family life), Nancy Morawetz, “Symposium: Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,” *Harvard Law Review*, vol. 113, pp. 1950-1951 (2000) (Discussing instances of members of Congress and the INS expressing the importance of family in the immigration context).

<sup>131</sup> Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 78 (1948), art. 16(3). The Declaration also states, “Motherhood and childhood are entitled to special care and assistance.” UDHR, art. 25(2).

<sup>132</sup> UN Human Rights Committee, “General Comment 19: Protection of the Family, the right to marriage and equality of the spouses,” art. 23, July 27, 1990.

<sup>133</sup> UN Human Rights Committee, “General Comment 15: The Position of aliens under the Covenant,” November 4, 1986.

<sup>134</sup> *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

<sup>135</sup> *Ibid.*

committee looked at the strong family ties to Australia and also the impact on Barry<sup>136</sup> to decide that deportation would constitute not only arbitrary interference with the family under Article 17 in conjunction with Article 23, but also a failure to provide necessary measures for the protection of a minor under Article 24.<sup>137</sup>

Even in a case in which the governmental interest in deportation was strong because a non-citizen was found deportable due to prior criminal convictions, the committee found a violation of the same rights in *Madafferri v. Australia*, involving an Italian national who had married an Australian national and had four Australian children, and who had been ruled deportable based on prior crimes in his native Italy.<sup>138</sup>

The Council of the European Union, without challenging in general states' power to deport non-citizens, imposes limitations in order to protect family relationships. When making deportation decisions, the council has found that the state must consider "the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from that person."<sup>139</sup> According to the council, states must also "take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin."<sup>140</sup>

Case law from the European Court on Human Rights (see case study: Boultif Test, above) has provided additional guidance to member countries on respecting family unity during deportation on criminal grounds, finding that they should weigh several factors including: the nature and seriousness of the offense; the length of stay in the host country; rehabilitation; spousal relationships; the existence of children; and the potential difficulties family members would face in relocating to the country of origin.<sup>141</sup>

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<sup>136</sup> Barry was described in a psychologist's report as "an Inner Western Sydney multicultural Chinese Australian boy ... [who] would be completely at sea if he was to be left there while [his parents] returned to Indonesia."

<sup>137</sup> *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

<sup>138</sup> *Madafferri v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

<sup>139</sup> Council of the EU, "Council Directive 2003/86/EC of 22 September 2003 on the right to family unification," art. 6(2).

<sup>140</sup> *Ibid.*, art. 17.

<sup>141</sup> *Boultif v. Switzerland*, ECHR 5427/00 (2001).

The American Declaration of the Rights and Duties of Man<sup>142</sup> features several provisions relevant to the question of deportation of non-citizens with criminal convictions and strong family ties. Article V protects every person against “abusive attacks upon ... his private and family life.”<sup>143</sup> Under Article VI, “[e]very person has the right to establish a family, the basic element of society, and to receive protection therefor.”<sup>144</sup> The American Convention on Human Rights, to which the United States is a signatory,<sup>145</sup> contains analogous provisions.<sup>146</sup> The Inter-American Commission on Human Rights case, *Wayne Smith and Hugo Armendáriz v. United States of America*, relies on several of these provisions to challenge the US policy of deporting non-citizens with criminal convictions without regard to family unity.<sup>147</sup> The *Smith and Armendáriz* case was ruled admissible by the Inter-American Commission on Human Rights,<sup>148</sup> and Human Rights Watch has submitted an amicus curiae brief to the Commission in support of Petitioners Smith and Armendáriz. As of this writing, hearings in the case are expected in July 2007.

In light of these strong international standards, 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. As shown above (Figure 7), 52 governments are required by domestic and/or international law to weigh family relationships when deporting non-citizens.

One immigrant, Hector J., who was deported from the United States away from his family in 2004, spoke about his loss of family in a way that summed up the sentiments of many others interviewed for this report. Hector spoke with a Human Rights Watch researcher by telephone, after he had been deported to Santo Domingo. Hector entered the United States

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<sup>142</sup> The American Declaration of the Rights and Duties of Man is not a binding treaty, but is enforceable on member states of the American system. Laurence R. Helfer, “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes,” *Columbia Law Review*, vol. 102 (2002), p. 1885.

<sup>143</sup> American Declaration of the Rights and Duties of Man, art. V., <http://cidh.oas.org/Basicos/basic2.htm>.

<sup>144</sup> *Ibid.*, art. VI, <http://cidh.oas.org/Basicos/basic2.htm>.

<sup>145</sup> American Convention on Human Rights “Pact of San Jose, Costa Rica,” General Information on the Treaty, <http://www.oas.org/juridico/english/Sigs/b-32.html> (accessed May 30, 2007).

<sup>146</sup> Article 17 states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection from society and the state.” American Convention on Human Rights, Article 17. Article 11 protects the family against “arbitrary or abusive interference.” American Convention on Human Rights, Article 11. Under Article 19, “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.”

<sup>147</sup> *Wayne Smith and Hugo Armendáriz v. United States of America*, Case No. 12.561, Inter-American Commission on Human Rights.

<sup>148</sup> Admissibility Petition 8-03, Wayne Smith, Report Number 56/06, Inter-American Commission on Human Rights, July 20, 2006, <http://www.cidh.oas.org/annualrep/2006eng/USA8.03eng.htm> (accessed May 30, 2007); Admissibility Petition 526-03, Hugo Armendáriz, Report Number 57/06, Inter-American Commission on Human Rights, July 20, 2006, <http://www.cidh.oas.org/annualrep/2006eng/USA526.03eng.htm> (accessed May 30, 2007).

at age 17 and lived with his mother in Brooklyn, New York. He attended public school in New York and completed an associate degree in human resources. After graduating, Hector worked as a community organizer and monitor for two non-profit organizations in Brooklyn that assisted homeless and low income families.<sup>149</sup> Hector's deportation separated him from his oldest daughter, Serena, and from his mother. He told Human Rights Watch,

[Y]ou know, being with your family, there is nothing that you can compare to anything in life. It's just that warmth of the home, time with your loved ones ... its something that you really can't describe. What do I do without it now? Also something I can't describe.<sup>150</sup>

Ramon H. (introduced in Chapter IV), who was facing deportation for conviction of an aggravated felony, had such strong family ties to the United States that his attorney submitted a great deal of additional information to the court, even though the judge had no discretion to waive the deportation. Ramon's wife told the court that her husband "is a wonderful and great husband and father to his two daughters. We both work to support our family ... Our lives will not be the same if my husband is not with us. It will be very difficult for my daughters and myself."<sup>151</sup>

Ramon's daughter, Pamela Alicia, told the court, "My dad is the one who mainly supports the family. My father helps us when we need help on things like school and at home. My dad has given us everything we need to make us happy."<sup>152</sup> Pamela Alicia's math teacher wrote a letter to the court, stating,

I am writing to respectfully request that [Ramon] ... be allow[ed] to remain in the United States as a husband to his wife and as a father to [Pamela Alicia] and her younger sibling. In my experience with [Pamela Alicia], she has always been an excellent student ... I must confess that a significant part of her growth as a thinker and student is due to the stability of her home .... It is

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<sup>149</sup> Human Rights Watch telephone interview with Hector J. (pseudonym), Santo Domingo, Dominican Republic, July 7, 2006. Hector spoke with pride about his work: "when you are helping out people ... its not only the pay it's more than that ... it's the spiritual pay that you get when you feel that you are doing something well for people. And due to the fact that I speak two languages, I was also helping out people that couldn't communicate [in English]. I had that ability to become a bridge."

<sup>150</sup> Ibid.

<sup>151</sup> Affidavit of Pamela H. (pseudonym), October 2, 2004 (on file with Human Rights Watch).

<sup>152</sup> Affidavit of Pamela Alicia (pseudonym), October 1, 2004 (on file with Human Rights Watch).

rare to find a home environment that supports the student in the way that [Pamela Alicia] is supported.<sup>153</sup>

In another example, Jeremiah E., originally from Jamaica, came to the United States when he was eight years old as a lawful permanent resident and lived in California for 17 years. Jeremiah's stepmother and father, both of whom are lawful permanent residents, petitioned to have him and his brother join the family. Jeremiah's biological mother has not been involved in his life. Jeremiah's other brother, his sister, two of his aunts, and two of his uncles are all US citizens.

Jeremiah was in detention in late 2006 facing deportation back to Jamaica for two offenses: possession of a controlled substance, for which he received 36 months of probation; and possession of a firearm, for which he also received 36 months of probation. Jeremiah's stepmother wrote to the court,

[Jeremiah] and I always have [had] a great relationship, [when he was] a little boy we would go to Church together, and on our way we would sing songs from the tapes and at times we would just talk. As an only child for nine years we would do a lot of things together. When his sister was born he was excited and would help in many ways, the same with his brother. He is a loving son and brother and also helps around the home .... He also has a son of his own that he loves and adore[s]. We all love [Jeremiah], and I will continue to do so until God takes me home. I know he has made some wrong decisions, but I do hope that he has learned from them and ... that he will be given another chance to be a positive leader both in the community and for his son.<sup>154</sup>

After Jeremiah's son was born, he and his son's mother lived in their own home together. During this time, Jeremiah worked as a carpenter, was a member of a union, and paid taxes for several years prior to his incarceration pending deportation. He was the sole financial support for his son and girlfriend. His father wrote, "I remember he would get up at four in the morning to fit in work and school into his day."<sup>155</sup> Jeremiah's stepmother wrote,

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<sup>153</sup> Affidavit of Clarence Terry, Mathematics Department, Madrid Middle School, September 27, 2004 (on file with Human Rights Watch).

<sup>154</sup> Letter from Jeremiah's stepmother regarding her stepson's deportation, July 26, 2005 (on file with Human Rights Watch).

<sup>155</sup> *Ibid.*



All [Jeremiah] talks about is his son. Whenever he calls home, he asks about his son. It bothers him tremendously that he cannot take care of his son while he is detained. [Jeremiah] Jr. needs his father here—no one else can take a father’s place. If Jeremiah is deported, [Jeremiah] Jr. would be another child growing up without a dad.<sup>156</sup>

Seventeen-year-old Michael Hinds, Jr. may lose his father, 58-year-old Michael Hinds, Sr., to deportation. At the age of 10, Hinds Jr. was reunited with his father because his dad returned to the United States after his mother, who was a lawful permanent resident, died of AIDS and he had no parent to raise him. Hinds Sr. returned to the United States from Jamaica after having already been deported in 1994 for attempted sale of a controlled substance in the third degree.<sup>157</sup> He was facing deportation again for re-entering the country after deportation.

Speaking with obvious pride about his son’s academic and musical achievements (he is a pianist), Hinds Sr. told a Human Rights Watch researcher that he worked in construction, which he did in order to rent an apartment in the same neighborhood his wife had lived in, and to ensure his son’s attendance in school, and provide for him between 2000 and 2006.<sup>158</sup> Hinds Sr.’s partner told a Human Rights Watch researcher that his son “is very obedient of his father. He never talks back to him. [Michael] tells his son to ‘try to keep his head up’ even though he’s been through so much and now his Dad is in detention. But it’s not easy. It’s not easy at all.”<sup>159</sup>

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<sup>156</sup> Letter from Jeremiah’s stepmother regarding her stepson’s deportation, May 16, 2005 (on file with Human Rights Watch).

<sup>157</sup> *US v. Michael Hinds*, Complaint, Southern District of New York, Affidavit of Christopher Quinn, Senior Special Agent with DHS/ICE.

<sup>158</sup> Human Rights Watch interview with Michael Hinds, Metropolitan Detention Center, Brooklyn, New York, August 2006.

<sup>159</sup> Human Rights Watch telephone interview with Kaima [last name withheld], New York, New York, August 2006.



Drawing by a child facing separation from her father due to deportation © 2005 private

Cases like those described above, and in fact all such cases of family separation are particularly poignant because they are examples of families whose rights would have received greater protection when 212(c) hearings were still available.

Courts in the United States have been extremely reluctant to rely on international human rights law to overturn deportation decisions, even when family relationships are very strong and compelling. Few cases have looked at the human rights standards in detail, preferring to give these international treaties short shrift. However, the only US court to conduct a careful and thorough analysis of US human rights treaty obligations found that it would be inconsistent with those obligations to allow a deportation to go forward when it would interfere with the right to family unity. In *Beharry v. Reno*,<sup>160</sup> Mr. Beharry, who entered the US from Trinidad as a lawful permanent resident when he was seven years old, had been ordered deported because of an aggravated felony conviction and denied a section 212(c) hearing as a result. He appealed that decision, raising the right to family unity under international law as a defense. The appellate court in the Southern District of New York highlighted Beharry's impending separation from several close family members, including his lawful permanent resident mother and his six-year-old US citizen daughter.

<sup>160</sup> *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

After considering several human rights instruments, including the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights as aids in interpreting US immigration law, the District Court found that “[s]ummary deportation of this long-term alien without allowing him to present the reasons he should not be deported violates the ICCPR’s guarantee against arbitrary interference with one’s family, and the provision that the alien shall ‘be allowed to submit the reasons against his expulsion.’”<sup>161</sup> The Court further found that denial of a hearing balancing Beharry’s family ties “would violate the principles of customary international law that the best interests of the child must be considered where possible.”<sup>162</sup>

The US government appealed this decision. The Second Circuit Court of Appeals reversed the lower district court’s decision by finding that Beharry had not followed the correct procedures to raise the issues the district court considered. Therefore, the Court of Appeals did not address any of the international law issues; it declined to discuss “the merits of the district court’s analysis of the interaction between international law, the Supremacy Clause, and § 212(h).”<sup>163</sup>

However, in later cases the Second Circuit rejected the reliance on international human rights law outright, holding that Congress’s unambiguous intent controlled the availability of a waiver of deportation notwithstanding any perceived conflict with international law, customary or otherwise, of the sort discussed in Beharry.<sup>164</sup> To date, no other US court has followed the District Court’s reasoning in Beharry.<sup>165</sup>

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<sup>161</sup> *Ibid.*, p. 604.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Beharry v. Ashcroft*, 329 F.3d 51, 54-55 (2d Cir. 2003).

<sup>164</sup> *Guaylupo-Moya v. Gonzales*, 432 F.3d 121, 136 (2d Cir. 2005); *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 235 (2d Cir. 2005) (rejecting immigrant’s argument that international law, as discussed in *Beharry*, warranted relief from deportation based on family unity).

<sup>165</sup> The following cases all criticize or distinguish the District Court’s decision in *Beharry*: *Verissimo v. INS*, 71 F. App’x 859, 861-62 (1st Cir. 2003), cert. denied, 540 U.S. 1080 (2003); *Bankole v. INS*, 126 F. App’x 503 (2d Cir. 2005); *Gordon v. Mule*, 153 Fed. Appx. 39 (2d Cir. 2005); *Gonzalez Polanco v. United States INS*, 148 Fed. Appx. 60 (2d Cir. N.Y. 2005); *Pichardo v. Ashcroft*, 374 F.3d 46 (2d Cir. N.Y. 2004); *Chen v. Ashcroft*, 85 F. App’x 700, 704-05 (10th Cir. 2004); *Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. Tex. 2005); *Ferris v. INS*, 303 F. Supp. 2d 103 (D. Conn. 2004); *Campbell v. Ganter*, 353 F. Supp. 2d 332 (E.D.N.Y. 2004); *Jimenez v. United States Immigration Serv.*, 2004 U.S. Dist. LEXIS 22524 (S.D.N.Y. Oct. 27, 2004); *Guaylupo-Moya v. Ashcroft*, 2004 U.S. Dist. LEXIS 17871 (S.D.N.Y. Sept. 7, 2004); *Holmes v. McCoy*, 2004 U.S. Dist. LEXIS 16764 (S.D.N.Y. Aug. 22, 2004); *Adebayo v. Ashcroft*, 2003 U.S. Dist. LEXIS 27048 (E.D.N.Y. Mar. 6, 2003); *Marino Cabreja v. U.S. Immigr. Serv.*, No. 02CIV5441(GEL), 2003 WL 22697957 (S.D.N.Y. Nov. 3, 2003); *Guerra v. Ashcroft*, No. Civ. A. 301CV1562H, 2002 WL 1359706 (N.D. Tex. June 19, 2002); *Ayala-Caballero v. Coleman*, 58 Fed. Appx. 669 (9th Cir. Wash. 2002); *Alvarez-Garcia v. United States INS*, 234 F. Supp. 2d 283 (S.D.N.Y. 2002); *Gonzalez-Polanco v. United States INS*, 2002 U.S. Dist. LEXIS 14303 (S.D.N.Y. Aug. 5, 2002); *Tavaeras-Lopez v. Reno*, 127 F. Supp. 2d 598 (M.D. Penn. 2000).

## Case Study: Loss of a Caretaker: Jimmy X.'s Story<sup>166</sup>

Jimmy X., originally from Laos, came to the United States with his parents as a refugee when he was four years old. His parents “made a little raft to cross the Mekong River [with] inner tubes and stuff like that.” Jimmy’s parents had difficulties adjusting to life in the United States. His father was “an abusive alcoholic. He used to beat my mom, me, and my sister up all the time.” Jimmy’s parents were divorced in 1989. His mother “would do that sweatshop stuff, you know making like five cents per item .... That’s why I really stick by her now, because I’m more mature now and I see all the struggle she did.”

As a teen growing up in Los Angeles, Jimmy joined a gang. He was 18 years old when he was convicted for robbery and home invasion, an aggravated felony. He was sentenced to seven years. In prison, Jimmy earned his GED. He told a Human Rights Watch researcher, “I used to get straight A’s when I was in school, so the GED wasn’t anything difficult .... Believe it or not, I was spelling bee champion in elementary school. Those were fun days, better days, best days.”

Jimmy told Human Rights Watch that after serving his criminal sentence (he was released after four years for good behavior) he had no idea that he would face deportation. He said, “I had my green card and everything, so I didn’t worry about it. This was the first time I ever heard anything about they’re deporting people. But that happens to everybody. You just don’t know until it happens to you.”

At the time of his interview with Human Rights Watch, Jimmy was a community outreach organizer for a non-profit group serving troubled youth involved in gangs. He explained,

“I really changed my life around. I don’t do anything bad anymore. I’ve been out five years, and I haven’t done anything illegal. I’ve made it a point to actually help others and prevent others from doing anything illegal. In the gang lifestyle you get used to doing things in certain ways ... I’m working on my language right now, speaking in the best intellectual way. If only the government would actually see that some of us try so hard to change and do right.”

Although Jimmy has a final order of deportation, he has not yet been sent to Laos because the United States has not obtained the necessary travel documents. Jimmy has a lot of responsibility at work and at home. He cares for his mother and supports her. He told a Human Rights Watch researcher,

“[My mother] has suffered from depression and post-traumatic war, you know, stress. She is a little bit lost. I hate to say it, but she’s crazy. To the point where she always thinks someone’s

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<sup>166</sup> Human Rights Watch interview with Jimmy X. (pseudonym), Los Angeles, California, April 5, 2006.

after me. She really does think so. She thinks the phones are tapped and all that stuff. She got worse once I was put in deportation. She couldn't understand. Because we're here legally, she's got all the paperwork and everything ... She doesn't leave the house at all, she doesn't open the curtains, the lights are always off, she goes to the bathroom in the darkness ... I use all my connections [from his work] to community agencies. That's what pisses me off: I can help the whole damn world, but I can't help my mom. I can't get her like any government aid, anything like that."

Jimmy barely speaks Laotian. When asked what would happen if he were sent to Laos, he said,

"My mom would go crazy. There would be no one here to take care of her. My sister can't handle my mom. I mean, even I can't handle her, but I still do my best with her. My mom can't imagine me back there in Laos. She knows I'm an American boy. I mean, they didn't give me a Lao name, they gave me an American name. Like any parents, they had all those hopes for me, for their kids."

### *Children's Rights*

Beyond family unity in general, the rights of children to be raised by their parents is one of the strongest human rights counseling against the separation of families through deportation. Article 24 of the International Covenant on Civil and Political Rights, to which the United States is a party, entitles children "to such measures of protection as are required by [their] status as a minor, on the part of the family, society and the state."

Article 9 of the Convention on the Rights of the Child (CRC), which the United States has signed but not ratified,<sup>167</sup> requires that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child."<sup>168</sup> Thus, the CRC weighs *in favor* of non-citizens' rights not to be deported if it is contrary to the best interests of the child. Accordingly, the Committee on the Rights of the Child often notes concerns over states' failure to put the best interest of children first and foremost in immigration proceedings.<sup>169</sup>

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<sup>167</sup> Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, signed by the United States on February 16, 1995, <http://www.ohchr.org/english/countries/ratification/11.htm> (accessed on May 31, 2007).

<sup>168</sup> CRC, art. 9(1).

<sup>169</sup> See, for example, "Concluding Observations of the Committee on the Rights of the Child," Canada, U.N. Doc. CRC/C/15/Add.215 (2003) ("the Committee remains concerned that the principle that primary consideration should be given to the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal

Almost every case study featured in this report presents an example of a family that was denied their right to remain together by US deportation policy. However, the following cases include particularly strong testimonies about the kinds of parent-child relationships that are harmed by deportation.

For example, eight-year-old Angelito Martinez is facing separation from his father, Eduardo. Eduardo explained his relationship to Angelito and his wife, Jennifer:

We used to do so many things together. I was his soccer coach at school. We would go fishing a lot. I took him to soccer, Jennifer took him to swimming lessons. I would help him with his homework. He is great at spelling. The school said maybe he should be in a higher grade, but I don't want to do that right now. I think that's too much pressure on him right now. As a family, we also ask him his opinion on decisions like that. The three of us talk about those decisions together. That's why I don't want to leave this country. My family. That's it.<sup>170</sup>

Eduardo came to the United States at the age of 19. After several years in the United States, Eduardo said, "The most beautiful thing happened to me. I met my wife, Jennifer." They were together for three years before getting married, and have been married for seven years. Eduardo and his wife applied to have his immigration status adjusted, but the paperwork was not final when he was arrested for possession of a marijuana joint and two grams of marijuana and for illegal possession of a weapon, which Eduardo said he "bought to protect my family. I kept it in the house, out of reach of my son. It is true that I smoked marijuana. I should not have done that. It's shameful."<sup>171</sup>

Four-year-old Rosita and 10-year-old Carlos are facing separation from their father and stepfather, Miguel Y., who is currently in immigration detention waiting for deportation. His wife, Carmela Y., told a Human Rights Watch researcher, "[m]y son cries because he doesn't understand why daddy disappeared."<sup>172</sup>

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children"); and "Concluding Observations of the Committee on the Rights of the Child," United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/15/Add.188 (2002) ("the Committee is concerned that the principle of primary consideration for the best interests of the child is not consistently reflected in legislation and policies affecting children throughout the State party, notably in the juvenile justice system and immigration practices").

<sup>170</sup> Human Rights Watch interview with Eduardo Martinez-Herrera, Eloy Detention Facility, Eloy, Arizona, May 2006.

<sup>171</sup> Ibid.

<sup>172</sup> Human Rights Watch interview with Carmela Y. (pseudonym), Los Angeles, California, April 7, 2006.

Carmela was struggling to get by on her salary, to pay for rent, feed her two young children, and cover lawyers' fees now that Miguel was in deportation proceedings. She explained that she couldn't make ends meet on her salary alone:

I'm waiting for the tenth of the month. How can I help my kids? What will we eat for the next three days? Look—[she opens the refrigerator to show a Human Rights Watch researcher that it is empty apart from some milk and a half-eaten carton of fast food]—there's nothing there! This is all I have to last us until I get paid again.<sup>173</sup>

Miguel had been convicted of possession of marijuana with the intent to sell,<sup>174</sup> and later in 1996 with receiving stolen property, an aggravated felony. His defense attorney advised Miguel to plead guilty in exchange for a 16-month sentence, without advising his client of the immigration consequences. Prior to his convictions, Miguel had lived in the country as a lawful permanent resident since the age of 13.

Deported to El Salvador, Miguel returned to the US in 1998, where he lived without getting in trouble with the law again (although his re-entry is a new deportable offense under immigration law). Miguel worked and supported Carmela, who was going to college to get her Bachelor's degree when Miguel was arrested for illegal re-entry and detained. She explained what happened:

He got dragged out of the house in front of my two-year-old [Rosita]. He was handcuffed. [Rosita] put up a fight because she was ... she didn't want her daddy to leave.<sup>175</sup>

Losing a parent to deportation can be devastating for children, bringing about tragic results. Gerardo Anthony Mosquera, Jr., a US citizen, was the son of a 29-year-long legal permanent resident who was deported after committing the aggravated felony of selling a \$10 bag of marijuana to an undercover police officer.<sup>176</sup> Unable to be consoled after the loss of his father, Gerardo, a strong student interested in sports and taking care of his younger siblings, committed suicide by shooting himself in the head.

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<sup>173</sup> *Ibid.*

<sup>174</sup> Possession of cocaine with intent to distribute has been found to be a particularly serious crime by immigration courts. See *Matter of Buscemi*, Immigration & Nationality Laws Administrative Decisions, vol. 19, decision 628 (BIA 1998).

<sup>175</sup> Human Rights Watch interview with Carmela Y. (pseudonym), Los Angeles, April 7, 2006.

<sup>176</sup> Patrick J. McDonnell, "Deportation Shatters Family," *Los Angeles Times*, March 14, 1998.

## Ties to a Country

The US Supreme Court stated in *Landon v. Plasencia* that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”<sup>177</sup> Despite this accepted constitutional maxim, a non-citizen’s ties to the United States, including length of residence, military service, and business, educational, and community ties that are separate from family relationships, are often not considered when he or she faces deportation because of a criminal conviction.

Under human rights law, the state power of deportation should be limited if it infringes upon an individual’s right to a private life, which includes his or her ties to the country of immigration not including any family ties. 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.”<sup>178</sup>

The Human Rights Committee has explained that this “guarantee[s] that even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”<sup>179</sup> Further, the committee has stated that the term “home” “is to be understood to indicate the place where a person resides or carries out his usual occupation.”<sup>180</sup>

Therefore, the right to protection against arbitrary interference with privacy and home encompasses those relationships and ties that an immigrant develops with the community outside of his or her family. For example, the Inter-American Commission has found that the right encompasses “the ability to pursue *the development of one’s personality* and aspirations, determine one’s identity, and define one’s personal relationships.”<sup>181</sup>

The European Court of Human Rights has weighed an individual’s ties to a country as a part of his private life (and separate from family life) in deportation cases. In *C v. Belgium*, the

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<sup>177</sup> *Landon v. Plasencia*, 459 U.S. 21, 33 (1982).

<sup>178</sup> ICCPR, art. 17.

<sup>179</sup> UN Human Rights Committee, General Comment 16, para. 4, 1988.

<sup>180</sup> *Ibid.*, para. 5.

<sup>181</sup> *Maria Eugenia Morales De Sierra v. Guatemala*, Session N<sup>o</sup> 4/01, Case 11.625, Jan. 19, 2001, <http://www.cidh.org/women/guatemala11.625.htm> (accessed July 3, 2007). English translation found at: [www.cidh.org/women/guatemala11.625aeng.htm](http://www.cidh.org/women/guatemala11.625aeng.htm) (accessed July 3, 2007) (emphasis added).



ECHR found that the petitioner’s private life included the petitioner’s “real social ties in Belgium”:<sup>182</sup>

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 within the meaning of Article 8 (art. 8), which encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature.<sup>183</sup>

The court ultimately found that the petitioner’s very serious crime outweighed countervailing factors, allowing him to be deported from Belgium, but only after a hearing that weighed his right to a private life against his crime. In another case, *Beljoudi v. France*, deportation was not allowed because of the rights violations faced by Mr. Beljoudi, including his right to privacy as well as his right to family unity. In the decision, one judge emphasized the right to privacy, finding that the applicant’s “links with France, and the absence of them with Algeria, are such that there must be much stronger arguments to justify an interference with his right to respect of his private life.”<sup>184</sup> He continued,

[I]f there is a country responsible for the education and behavior of the applicant, there is room to consider that it is France, rather than Algeria. If it is not illegal, it is in any case morally rejectable to send to Algeria those of the numerous immigrants who become criminals, while those who contribute to the prosperity of the country can remain in France.<sup>185</sup>

Two additional cases, *Moustaquim v. Belgium* and *Lamguindaz v. United Kingdom*, involved non-citizens who the court found should not be deported because they had spent the vast majority of their lives in the host state, even though they had been convicted of various crimes as well.<sup>186</sup> In each case, the individual had grown up and completed his education in

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<sup>182</sup> European Court of Human Rights, *C v. Belgium*, (App. 21794/93), Judgment of 7 August 1996, (paragraphs 32 and 33).

<sup>183</sup> *Ibid.*

<sup>184</sup> European Court of Human Rights, *Beldjoudi/Teychene v. France*, 1990, (App. 12083/86) (Rapport de la Commission) (Opinion Concordante de M. H.G. Schermers à laquelle Mme G.H. Thune Declare se rallier).

<sup>185</sup> *Ibid.* The *Beldjoudi* case and additional European precedent is also discussed in the report, Human Rights Watch, *France - In the Name of Prevention: Insufficient Safeguards in National Security Removals*, Volume 19, No. 3(D), June 2007, <http://hrw.org/reports/2007/france0607/>.

<sup>186</sup> European Court of Human Rights, *Moustaquim v Belgium*, Judgment of February 18, 1991, Series A No. 193; European Court of Human Rights, *Lamguindaz v. The United Kingdom*, Judgment of June 28, 1993, Series A No. 258-C.

the host state, which the ECtHR found constituted elements of his private life that required careful weighing prior to deportation.<sup>187</sup>

The European Union has taken steps to further codify the practice of weighing ties to a country before deportation by issuing a Council Directive on the issue in 2003. The Directive states that countries expelling long-term residents must take account of the length of their stay in the country when making a decision to expel<sup>188</sup> and that long-term residents are entitled to “reinforced protection against expulsion.”<sup>189</sup>

Therefore, these international standards recognize that the right to private life is put at risk by deportation that fails to weigh the various ties and relationships that non-citizens develop with their host countries. In the United States, these ties and relationships can be subdivided into several parts, including: the length of legal residence in a country; military service in a country’s armed forces; legal residence in a country since childhood; and economic and business ties.

### *Length of Legal Residence*

Many immigrants facing deportation from the US have stronger ties to the US than to their countries of origin, but unlike in Europe these ties receive no consideration in deportation proceedings. For example, 35-year lawful US resident and Cuban national, Sergio C., came to the United States at the age of six. His entire family<sup>190</sup> was admitted into the United States, which gave Sergio legal permission to remain in the country. He attended school through the 10<sup>th</sup> grade in Miami, Florida. After leaving high school, he went to work for the Continental Marketing Group, where he was employed for 20 years, and paid income tax. Sergio pled guilty to two acts of fraud, for which he received a sentence of 20 months imprisonment and was required to pay restitution. He wrote to Human Rights Watch,

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<sup>187</sup> Kees Groenendijk, Elspeth Guild and Halil Dogan, *Security of Residence of Long-Term Migrants: A Comparative Study of Law and Practice in European Countries* (Strasbourg: Council of Europe, 1998), p. 6.

<sup>188</sup> Council of the EU, “Council Directive 2003/109/EC of 25 November 2003 Concerning The Status Of Third-Country Nationals Who Are Long-Term Residents,” art. 12.

<sup>189</sup> *Ibid.*, para.16.

<sup>190</sup> Sergio C. (pseudonym) entered the US with his mother, father, three brothers, and four sisters, all of whom were sponsored by Sergio’s lawful permanent resident grandparents. Sergio married a lawful permanent resident, Alexa (pseudonym), with whom he had two children, Giuseppe (pseudonym), who was age 21 in 2007, and Erica (pseudonym), who was age 18 in 2007. Sergio and Alexa were married for 20 years before divorcing.

I have entered my plea and served my punishment. I only wish to return to the community from which I was raised to be the man and father I am known to be.<sup>191</sup>

Jared L., originally from Jamaica, entered the United States as a lawful permanent resident in 1972, which was 34 years prior to his arrest in 2006. He worked for a construction company for most of his adult life, and is facing deportation for unlawful transport or sale of a controlled substance, and aiding and abetting that transport or sale. Jared L. wrote to Human Rights Watch from immigration detention, “I have no one in Jamaica, all my family are here in the states.” Prior to his arrest and detention, Jared L. was injured on the job and was receiving treatment for five degenerated discs in his lower back. Now in immigration detention in Los Angeles, Jared is confined to a wheelchair. His treatments are paid for by the insurance of his employer, which “does not cover [him] outside of California, much less outside of the U.S.A.”<sup>192</sup>

### *Legal Residence in the United States Since Childhood*

The international definitions of private life embrace the ties and relationships that a person builds with his or her country of immigration. Non-citizens who have lived in the United States from a very young age have developed a particularly strong connection to the country; nevertheless, these ties are given no weight in deportation hearings.

For example, Chris L. was born in a Cambodian refugee camp in Thailand and entered the United States legally as a refugee with his entire family when he was just three months old. However, Chris was charged and tried as an adult with attempted murder at the age of 15, convicted at age 16, served 10 years in prison, and now faces deportation to Cambodia.<sup>193</sup>

He told a Human Rights Watch researcher about his early childhood in the United States. Chris and his mom, dad, grandmother, and two sisters first lived in Dallas, Texas, and soon moved to Napa, California. His life in Napa was “good, normal. I was a regular American boy.” Then when Chris turned 12, his family moved to Riverside, California, where he “started hanging out with the wrong people.”<sup>194</sup>

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<sup>191</sup> Letter from Sergio C. (pseudonym) to Human Rights Watch, July 17, 2005.

<sup>192</sup> Letter from Jared L. (pseudonym) to Human Rights Watch, August 19, 2006.

<sup>193</sup> Human Rights Watch interview with Chris L. (pseudonym), Eloy Detention Facility, Eloy, Arizona, May 2006.

<sup>194</sup> Ibid.

Once in Riverside, Chris had friends who were gang members. On the night of his crime, he told a Human Rights Watch researcher, he had “tried to scare someone by shooting in the air. But no one was even hurt in my crime. I never should have taken the deal for attempted murder. I was only age 15. I did 10 years. My mistake was not thinking right at age 15, but I’m 25 now.”<sup>195</sup> Chris said, “I didn’t know anything about being deported. Then, after serving my 10 years, immigration came to get me. My family is devastated. My grandma had a mild heart attack. Everyone in my family is afraid for me if I go back to Cambodia.”<sup>196</sup>

When asked what he would do if he wasn’t deported, Chris said, “I want to start a fresh life. I would like to study biology and psychology. I got my GED in prison. I have a certificate in computer repair. My sister would let me move in with her in Riverside. I know I could do it.”<sup>197</sup> During his incarceration in California, Chris’s entire family—his mother, father, sister, and brother—all became US citizens.

#### Case Study: “I am Legally Here”<sup>198</sup>

Lan X. was brought to the United States when he was four years old. He was convicted of second degree murder at the age of 16 and sent to prison in California. Lan’s crime was gang-related, in which he shot a rival gang member who had shot at his house and assaulted his cousin. After serving his sentence in prison, Lan was facing deportation. Ironically, Lan’s parents are actually Laotian, but he was born in Cambodia, and so Lan faces deportation there even though he does not speak Khmer. He explained to a Human Rights Watch researcher about his family circumstances at the time of his offense:

“Before I joined the gang, I used to look at my mother and I just didn’t want to be at home because it would be a burden to my family. I said, ‘Okay [the gang will] take care of me, they feed me, they bathe me, they watch me. . .’ [It was] the worst mistake I ever did in my life. I thought, ‘My family—I’ll just leave them alone where you don’t have to worry about having to spend the extra money just to help me out.’ I felt like I was a burden to my family and plus, my mom was just a single mom. She came here with no education. She couldn’t do anything.”

After serving eight years in prison for his crime, Lan was shocked to learn he would be deported to Cambodia. He explained,

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<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> This text box is based on information from a Human Rights Watch interview with Lan X. (pseudonym), Long Beach, California, April 6, 2006.

“I understood about illegal immigration, but I thought ‘your honor, that is not pertaining to me.’ I am not an illegal immigrant. I am legally here and a permanent resident here. Also, I didn’t think I was considered an adult. I was 16. But none of that mattered. I was convicted as an adult and now I’m being deported even though I thought I was a lawful permanent resident. Do you think as a 16-year-old I could have said to my mom, ‘Hey, Mom, you need to go to an INS place to get your citizenship?’ Do you think a 16-year-old would think of that? If you think a 16-year-old would think of that and should be tried as an adult, then you might as well think that an 11-year-old should drink beer.”

Lan said he knew his crime was horrible, and one that he deserved punishment for, but he emphasized the fact that he pled guilty to his crime, served his eight-year sentence, and that “it didn’t take me two or three times [to learn my lesson], it took me once in my life. When I was incarcerated, I went and got my education, my high school diploma, and then I got my college degree. I always worked two or three jobs. But that doesn’t matter. That’s how society is right now, all they judge you for is what happened in the past. They won’t judge you for who you are now.”

Lan was under a final order of deportation when he was interviewed by Human Rights Watch, but he had been released on parole while the immigration authorities tried to make travel arrangements to send him to Cambodia. When he is deported to Cambodia (or Laos), Lan will leave behind two brothers and two sisters. Lan was using his time on parole pending deportation to work to help his siblings and nieces and nephews out financially.

“I work as much as I can ’cause I’m the oldest one in the family. I try to take care of them as much as I can. I want to be married too one of these days, but the only thing that scares me is what happens if they take me away? If I have to tell my girl, how are you going to survive? Can you fend for yourself? And what happens if I have kids? Who’s going to take care of my daughter or my son when I’m in Cambodia? And what am I gonna do in Cambodia? They might as well send me to the gas chamber or to shark infested waters. I’m more Americanized. I don’t even speak their language!”

Reflecting on his crime and on his pending deportation, Lan concluded, “I did the crime, I knew I had to do the time, but with immigration law and everything around it, it’s like a chain reaction. I didn’t know. But it’s all too late now to rewind back time.”

### *Military Service*

Military service is another example of an individual's ties to the community. Like schooling, work experience, and friends, it is one of the elements of an individual's private life which ought to be weighed prior to deportation.

Forty-two-year-old Andre R. has lived in the United States as a lawful permanent resident for 36 years. He entered the country when he was five years old. Andre attended public school throughout his childhood and entered the US military upon graduation from high school. He served in the US army in Panama in 1982 and 1985. Upon leaving the army in 1986, he applied for US citizenship but says that he never received the notice of his citizenship hearing. As a result, he was recorded as failing to appear for the hearing, although he remained a lawful permanent resident. Then, in 1995 he pled guilty to an aggravated felony that rendered him deportable once the immigration laws were changed in 1996. He explained that he pled guilty "thinking that it was the best for me so I could go to work and not miss any time ... I should be able to be home with my family<sup>199</sup> working and doing what a man is to do to take care of his children."<sup>200</sup>

Andre owned his own company in the United States. As he wrote to Human Rights Watch, "I have paid tax all my life to this country until DHS detained me." He concludes, "All I ask for is a fair chance to fight for what is right and that is my family and my right to be in a country that I fought for in the military. When I joined the army they never asked me if I was an alien."<sup>201</sup>

A second example is that of Joe Desiré, originally from Haiti, who has lived in the United States as a lawful permanent resident for 40 years, since he was 11 years old. Desiré was married in 1971, and has four United States citizen sons, two of whom are in the military. Desiré himself was in the US military from 1970 to 1974. He was based in North Carolina, Oklahoma, Fort Dix, Okinawa, Panama, Korea, and did a one-month tour of duty in Vietnam. Desiré told a Human Rights Watch researcher that during his years in the military he developed the habit of using "marijuana, acid, and sometimes cocaine."<sup>202</sup>

Desiré admits that it was his drug habit that caused him to get in trouble with the law. He has two drug possession convictions and one drug sale conviction—all from the mid-1990s—for which he served his criminal sentence, and now was facing deportation back to Haiti, a

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<sup>199</sup> Andre R.'s legally present grandmother, mother, and five US citizen children (ranging in age from eight to 20) all live in the United States.

<sup>200</sup> Letter from Andre R. (pseudonym) to Human Rights Watch, 2006.

<sup>201</sup> Ibid.

<sup>202</sup> Human Rights Watch interview with Joe Desiré, Eloy Detention Facility, Eloy, Arizona, May 2006.

country in which he has no family or contacts. He told a Human Rights Watch researcher, “What I know of Haiti, I’ve read. I know nothing of the place. Nothing.”<sup>203</sup>

Despite his drug habit and three convictions, Desiré worked his entire life. He was a welfare fraud investigator and went to college at night after leaving the military. He explained, “my intention was to go into law enforcement, but then I got into my own business. I became a certified cable technician and worked for HBO, and NACOM, and as a sales manager for American Cable Systems. I also worked on the side as a limo driver.”<sup>204</sup>

As of this writing, Desiré has spent eight years in immigration detention awaiting deportation to Haiti. He told a Human Rights Watch researcher, “I have lived here most of my life. I want to be in touch with my sons. I have been clean and sober now for ten years. I cannot see myself going back to that style of life.”<sup>205</sup>

### *Training and Employment*

International human rights law emphasizes the importance of education, vocational training, and employment in a host country “for a number of years” as elements of an individual’s private life placed at risk by deportation.<sup>206</sup> These factors receive no consideration in US deportation law.

For example, Lingyan Zhuang, originally from China, owned his own store in Highland Park, New Jersey, and had lived in the United States as a lawful permanent resident since the 1980s. He pled guilty in 2003 to illegally smuggling family members into the United States, for which he served 15 months in prison. Zhuang’s crime made him deportable. Zhuang’s wife is a naturalized US citizen and the couple has two US citizen children. The cost of fighting her husband’s deportation has caused her to work seven days a week at the couple’s store. Zhuang’s attorney said, “[a]ny American who sees the case, sees his children here and his family here, would decide that he’s someone who should not be deported. As the whole town of Highland Park has decided by their strong support ... he’s someone who benefits the community, and we need people like him here.”<sup>207</sup>

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> European Court of Human Rights, *C v. Belgium*, (App. 21794/93), Judgment of 7 August 1996, (paragraphs 32 and 33).

<sup>207</sup> Ken Tarbous, “Deportation Fight Weighs Heavily on Family,” *HomeNews Tribune* (New Jersey), June 30, 2005.

Non-citizens who reside in the United States for a significant amount of time have deep ties to the country that extend beyond their immediate families. Once a non-citizen establishes a lengthy residence in the United States, the impact of deportation without a balancing hearing can produce a devastating violation of the right to private life.

## Protection from Return to Persecution for Refugees

The principle of non-refoulement places well recognized limits on states' powers to deport refugees. The 1967 Protocol Relating to the Status of Refugees, to which the United States is a party, binds parties to abide by the provisions of the Refugee Convention, including that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>208</sup>

Given the imperative of protecting refugees from return to a place where they would likely be persecuted, refugee law permits a very narrow exception to non-refoulement, which only applies in extremely serious cases. Article 33(2) of the Refugee Convention states that protection against refoulement may not be claimed by a refugee, "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."<sup>209</sup>

Procedures must be in place to ensure careful application of this narrow exception. The Refugee Convention and Protocol require that a refugee should be "allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."<sup>210</sup> UNHCR's Executive Committee has explained that deporting a refugee under Article 33(2) "may have very serious consequences for a refugee and his immediate family members ... [and therefore should only happen] in exceptional cases and after due consideration of all the circumstances."<sup>211</sup> The exceptions to non-refoulement in Article 33(2) were intended to be used only as a "last resort" where "there is no alternative mechanism to protect the community in the country of asylum from an unacceptably high risk of harm."<sup>212</sup>

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<sup>208</sup> Convention relating to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, art. 33.

<sup>209</sup> *Ibid.*, art. 33(2).

<sup>210</sup> *Ibid.*, art. 32(2).

<sup>211</sup> UN High Commissioner for Refugees (UNHCR) Executive Committee, Conclusion No. 7 (1977).

<sup>212</sup> James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge, UK: Cambridge University Press, 2005), p. 352.



Therefore, an individualized determination must occur before deportation in compliance with Article 33(2),<sup>213</sup> during which states must weigh two elements: that a refugee has been convicted of a particularly serious crime *and* that he or she constitutes a danger to the community.<sup>214</sup>

With regard to the first prong of the inquiry, the determination of a particularly serious crime cannot be merely rhetorical: It requires that the crime in question be distinguished from other crimes.<sup>215</sup> The UNHCR has defined such a crime as a “capital crime or a very grave punishable act.”<sup>216</sup>

With regard to the second prong, a government must separately assess the danger the individual poses to the community: “A judgment on the potential danger to the community necessarily requires an examination of the circumstances of the refugee as well as the particulars of the specific offence.”<sup>217</sup>

Thus, under the Refugee Convention, even individuals convicted of serious crimes are guaranteed the right of a hearing to show that they do not in fact pose a danger to the community. Indeed, the “danger to the community” exception “hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past.”<sup>218</sup> Past criminality is not per se evidence of future danger.<sup>219</sup>

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<sup>213</sup> Hathaway, *The Rights of Refugees*, p. 351; Kathleen M. Keller, “A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement,” *Yale Human Rights and Development Law Journal*, vol. 7, p. 189.

<sup>214</sup> Rene Bruin and Kees Wouters, “Terrorism and the Non-derogability of Non-refoulement,” *International Journal of Refugee Law*, vol. 15, no. 1 (2003), p. 18; Keller, “Comparative Perspective,” p. 188; Hathaway, *The Rights of Refugees*, p. 344.

<sup>215</sup> Hathaway, *The Rights of Refugees*, p. 344.

<sup>216</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, January 1992), para. 155. Note that the requirement that the crime must be a “capital crime or a very grave punishable act” was a description of what constitutes a “serious’ non-political crime” for the purposes of Article 1F. The “particularly serious crime” exception in Article 33(2) is presumed to require that the individual refugee be even more dangerous in order to fall under this exception. See Sir Elihu Lauterpacht & Daniel Bethlehem, UNHCR, “Opinion: The Scope and Content of the Principle of Non-Refoulement,” June 20, 2001, paragraph 147 (“Article 33(2) indicates a higher threshold than Article 1F . . .”).

<sup>217</sup> UNHCR, “Nationality Immigration and Asylum Bill 2002: UNHCR comments relating to serious criminals and statutory review,” 2002, paragraph 3; UNHCR, *Handbook*, p. 157 (“The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from amnesty is also relevant.”).

<sup>218</sup> UNHCR, “The Scope and Content,” paragraphs 147 and 164 (“While past conduct may be relevant to an assessment of whether there are reasonable grounds for regarding the refugee to be a danger to the country in the future, the material consideration is whether there is a prospective danger to the security of the country.”); Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses,” Background Paper for UNHCR Global Consultations (2001), p. 27, <http://www.unhcr.org/publ/PUBL/419dba514.pdf> (accessed May 31, 2007) (“[M]ere conviction of a particularly serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to the community in the future, should not satisfy Article 33.2,” criticizing the US court decision in *In re Q-T-M-T-* to deny withholding without consideration of mitigating circumstances and future danger to the community.).

Unfortunately, US law falls short of these standards, which are binding on the United States because of its ratification of the Refugee Protocol. The less protective standard used by the United States is known as “withholding.” Withholding states that protection may not be claimed by a refugee, who “having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States,”<sup>220</sup> and a subsequent section states that for purposes of interpreting this clause,

[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have been convicted of a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.<sup>221</sup>

As this section states, in addition to all refugees convicted of aggravated felonies with five year sentences, the Attorney General has statutory authority to send refugees to persecution with sentences of *less* than five years. In a decision under this statutory authority, the Attorney General has issued the blanket statement that aggravated felonies with sentences of less than five years “presumptively constitute particularly serious crimes,” meaning that the non-citizen would have the difficult burden of overcoming the Attorney General’s presumption that his or her crime was “particularly serious” in deportation procedures.<sup>222</sup>

The automatic nature of this bar to refugee protection without judicial scrutiny of the details of the particular crime committed or the nature and likelihood of persecution feared violates the standards provided in international law for two reasons. First, it fails to weigh individually the seriousness of the crime. Second, it fails to assess whether the potential deportee poses a risk of dangerousness to the community of the United States. In sum, it fails to protect refugees from return to persecution and to carefully and narrowly apply the

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<sup>219</sup> For example, the Australian High Court has ruled that in addition to weighing whether a conviction constitutes a particularly serious crime *and* whether that conviction renders a refugee a danger to the community, mental disabilities of the refugee must be taken into account. Hathaway, *The Rights of Refugees*, p. 350. German law requires an additional inquiry into the personal characteristics of the refugee and whether he or she is likely to relapse into crime. Keller, “Comparative Perspective,” p. 188.

<sup>220</sup> 8 U.S.C. Section 1231 (b)(3)(B)(ii).

<sup>221</sup> 8 U.S.C. Section 1231 (b)(3)(B).

<sup>222</sup> *In re Y-L*, Immigration & Nationality Laws Administrative Decisions, vol. 23, decision 270, (B.I.A. 2002).

exception to this standard. The US is therefore regularly violating its obligations under international refugee law.

Juan Ramirez,<sup>223</sup> a gay man originally from Guatemala, was tortured, detained arbitrarily, and raped prior to fleeing his country in 1992. Since 1998 he had been working in the United States under a valid work visa until he was placed in removal proceedings after being convicted of possession for sale of a small quantity of methamphetamine. The immigration judge in his case found that his conviction constituted a particularly serious crime, and therefore barred him from applying for withholding of removal. Ramirez claimed he feared persecution because of his status as a gay man, and because of his previous experience of persecution in Guatemala. His case is currently under appeal to the Board of Immigration Appeals.<sup>224</sup>

In another example, Mark McAllister, originally from Northern Ireland, was barred from protection against return to persecution because of his conviction for three counts of possession with intent to distribute the drug known as ecstasy. McAllister's fear of persecution was based on his family's political opinion in Ireland. His father was repeatedly arrested, beaten and jailed by the Royal Ulster Constabulary (RUC) for his activities with the Irish National Liberation Army (INLA). His mother was also repeatedly arrested. Soon after the RUC's security files on the McAllisters ended up in the hands of paramilitaries, the family's house was repeatedly shot at while the family was at home. The pattern matched other cases of murders of INLA members and their families in Ireland. McAllister's parents feared for their lives and were warned to leave the country, which they did: while McAllister was still a juvenile in 1996, they legally entered the United States. After his conviction, McAllister asked the immigration judge, the BIA, and the district court to grant him withholding of removal, but all three levels of review determined that his conviction was an aggravated felony and a particularly serious crime, which barred him from protection against return to persecution.<sup>225</sup>

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<sup>223</sup> Juan Ramirez is a pseudonym.

<sup>224</sup> Email communication from Sital Kalantry, assistant clinical professor of law, Cornell Law School, to Human Rights Watch, April 18, 2007 (Kalantry is Juan Ramirez's current attorney).

<sup>225</sup> *McAllister v. Ashcroft*, 2004 U.S. Dist. LEXIS 29598, (D. N.J. July 21, 2004).

## VII. Conclusion: The Need for a Legislative Solution

An estimated 1.6 million spouses and children of immigrants have suffered terribly because of US deportation policies. Families have had to sell their homes, children have had to undergo psychological treatment, and relatives have had to try to keep their families unified in spirit, even when US law keeps them physically apart. Refugees have been sent to places where they would likely be persecuted, even though the crimes they have committed are not sufficiently serious to warrant stripping them of protection. Immigrants also have been deported for relatively minor and non-violent crimes, raising the question of whether deportation is a proportionate penalty to impose on top of the criminal sentences they have already served.

When Congress set out to change immigration laws in 1996, it wanted to ensure that the worst non-citizen offenders were deported from the United States and to reduce the number of court cases brought by immigrants. But the changes were so overbroad as to impose permanent exile from the United States for non-violent, misdemeanor crimes—even in cases where the court determined that the crime was so minor that it did not warrant a prison sentence. Moreover, given the complexity and drastic consequences of the laws, the average number of appeals of deportation orders in each of the seven years after the 1996 laws took effect was nearly twice the average number of appeals in the prior seven years. And while Congress appeared to be focused on ensuring that *illegal* immigrants were swiftly deported from the United States, each year the mix of deportees includes tens of thousands of lawful permanent residents who have been in the country for years.

Ten years later, it is time for Congress to amend these laws, restore proportionality to the law, and eliminate their unintended consequences. A relatively simple set of amendments to the Immigration and Nationality Act would do just that, by accomplishing the following three things: (1) restore hearings to weigh an immigrant's connections to the US, especially their family relationships, in deciding whether someone should be deported; (2) ensure that refugees who would likely face persecution upon return are allowed to remain in the US as long as they have not committed a particularly serious crime and do not pose a danger to the community of the United States; and (3) amend definitions in the current law to ensure that immigrants are not deported for minor (especially non-violent) offenses or for offenses that were not grounds for deportation at the time they were committed.

These limited and logical fixes to US immigration laws appeal to three core values traditionally embraced by the United States and reflected in international law: a fundamental respect for the protection of family unity, a justifiably proud history of protecting refugees from return to persecution, and a belief in fundamental fairness and proportionality in all governmental actions.

The United States has a proud tradition of welcoming immigrants. It is a country founded on notions of human rights and equal treatment. Like all nations, it offers important protections to families and to children, as members of society requiring special protections. Congress should reform immigration law to conform to these proud traditions and values instead of dismissing and undermining them on a regular basis in US deportation procedures.

## Appendix: A History of Human Rights Watch’s FOIA Request for Deportation Data

	Date	Description
1	March 15, 2006	Human Rights Watch and the Center for Human Rights and International Justice at Boston College submit FOIA request to DHS.
2	March 27, 2006	FOIA request is acknowledged by DHS, it is referred to Marshall Fields “for processing and direct response.”
3	April 2006	Human Rights Watch contacts Marshall Field’s offices to follow up on our request; we are directed to Mr. Sal Vakalahee who indicates that he cannot locate our request and asks that it be re-faxed to DHS. HRW re-faxes our request to DHS.
4	May 3, 2006	Mr. Vakalahee assigns us case number FOIA #06-22074, and asks that we transmit the original response sent by his own agency to HRW so that he may follow up. We fax DHS’s response letter back to DHS as requested.
5	May 18, 2006	Mr. Vakalahee indicates to an HRW staff member that the necessary information is located in the Office of Detention and Removal (ODRO) and that they may be able to combine our request with others they have recently received. Nevertheless, he claims that he has misplaced our original request and again asks that we fax it to his office, which we do on this date.
6	June 2006	Through multiple phone contacts with Mr. Vakalahee we learn that our request is pending with the ODRO.
7	July 2006	Mr. Vakalahee moves to the Office of Detention and Removal and informs HRW that he will no longer handle our file. Instead, we are directed to contact Ms. Margaret Elizalde, the director of that office.
8	July 20–24, 2006	HRW leaves voice messages with Ms. Elizalde.
9	July 25, 2006	Ms. Elizalde asks for more information about the reference number we were provided by Mr. Vakalahee. We were then told to contact Mr. Vakalahee, which we did and he explained that our request was “in a box” and we would be updated once the request was located.
10	August 10, 2006	Ms. Elizalde and Mr. Vakalahee explained that Mr. Vakalahee would be leaving the ODRO office and that we should continue to follow up with Ms. Elizalde.
11	August 11, 2006	Human Rights Watch faxed a modification of our original request to Ms. Elizalde, limiting our original request to one single year of records, August 11, 2005–August 11, 2006, in a good faith effort on the part of HRW to help expedite agency response to our request.
12	August 14, 2006	HRW spoke with Ms. Elizalde who indicated that we should have by Wednesday, August 16, 2006, some sense of the time it will take to produce the records. Ms. Elizalde also indicated that it might be possible that there would be no charge for the narrowed set of records.
13	August 18, 2006	HRW spoke with Linda Thomas, in Ms. Elizalde’s office, who informed us that all the data we required was available on line at <a href="https://www.uscis.gov/graphics/shared/statistics/publications">https://www.uscis.gov/graphics/shared/statistics/publications</a>
14	August 18, 2006	HRW left voicemail for Ms. Thomas explaining that HRW had already conducted thorough searches of all available data sources through USCIS, DRO, BJS, DOJ,

	Date	Description
		and BOP, and stated unequivocally that the original purpose of our FOIA was to obtain data that was not publicly available at any location, having thoroughly researched this issue prior to our March 2006 request.
15	August 18, 2006	HRW receives a cost estimate of \$7,946 for producing the records requested in FOIA #06-22074. This estimate makes no mention of our request for a fee waiver, filed with our original request six months previously in March 2006. We are informed by Ms. Thomas that the cost estimate would remain the same irrespective of whether DHS produced records for a single year as per our amended request—see above item 11—or 10 years as we originally requested.
16	September 11, 2006	Again in an effort to amicably resolve the matter, HRW emails Ms. Thomas and Ms. Elizalde to make two alternative requests: First, that DHS make a decision to grant HRW and Boston College a fee waiver, or that DHS supply HRW and Boston College with CD-Roms containing all data for aliens removed on criminal grounds (as defined in the original request).
17	September 21, 2006	HRW contacts DHS to find out their response to our queries of September 11, 2006. We are told to contact Margaret Elizalde. Ms. Elizalde informs us that “a preliminary response was received but more detail is expected.”
18	October 3, 2006	HRW emails DHS to ask for an update on status of our request.
19	October 4, 2006	Ms. Thomas writes to say that they will be “in touch in the near future.”
20	October 5, 2006	HRW contacts DHS to offer that we will travel to Washington DC to meet with the relevant officials to seek a response to our request.
21	October 12, 2006	Ms. Thomas writes to say that they are “diligently working on a resolution.” HRW writes back to inform DHS that DOJ recently sent us data in response to a FOIA request without charging any fees.
22	October 18, 2006	Ms. Thomas tells HRW that our request is being reviewed by the legal advisor’s office.
23	October 31, 2006	HRW is told again that our request is pending with the legal advisor’s office. HRW writes to request additional family-related data to our pending request (based on new information provided to HRW). We also reiterate our offer to receive all records regarding “criminal removals” and conduct the data analysis ourselves and to stipulate to preserve the confidentiality of non-responsive or confidential records.
24	November 2, 2006	HRW is informed by DHS that the legal advisor’s office is expected to make its decision by early the following week.
25	November 13, 2006	HRW is told that the legal advisor’s office still has not rendered its decision.
26	November 20, 2006	HRW receives a letter response to our request modifying FOIA #06-22074 (see item 23, above) indicating once again that the data we seek is available online, a claim which we know to be false and have explained as such (see item 13, above).
27	November 21, 2006	HRW responds to DHS letter in correspondence sent from Executive Director Kenneth Roth pointing out the need for a timely response and the unresponsive treatment our request has thus far received.
28	November 30, 2006	DHS General Counsel letter announcing treatment of case as appeal.
29	December 6,	DHS letter setting forth additional items in response to November 21, 2006

	Date	Description
	2006	letter.
30	December 15, 2006	HRW responds to DHS letter, pointed out several factual inaccuracies, as well as legal inaccuracies, and reiterating our request for a timely response.
31	January 4, 2007	HRW places calls to follow up on December 15 letter.
32	January 12, 2007	DHS calls HRW to explain it will take immediate action to determine whether a fee waiver can be granted.
33	January 22, 2007	HRW receives three-page letter denying our FOIA request in full from DHS and ODRO.
34	January 23, 2007	HRW meets with pro bono counsel to discuss litigation in response to denial letter.
35	January 25, 2007	As decided during meeting with counsel on January 23, 2007, HRW makes final telephone approach to contacts in DRO and DHS to propose a narrowed request that would be less onerous on the agency.
36	January 29, 2007	ODRO and DHS inform HRW that no further discussions can be had on the original request since that FOIA file is closed and that a separate and new FOIA request must be submitted.
37	January 29, 2007	DHS contacts HRW to explain that they are willing to discuss FOIA with HRW; a call is scheduled for the following day.
38	January 30, 2007	ODRO contacts HRW to explain that they have changed their position and are now willing to discuss an amicable resolution with HRW.
39	January 30, 2007	Margaret Elizalde (ODRO) and Alison Parker (HRW) have telephone conversation in which HRW proposes narrowed request from 17 items to 5 as an amicable means by which HRW can obtain the requested information.
40	January 30, 2007	HRW sends to ODRO the revised five-item request in writing as per telephone conversation.
41	February 6, 2007	HRW sends a follow-up email seeking a response to our January 30, 2007 email.
42	February 7, 2007	ODRO replies indicating that our "request continues to be reviewed."
43	February 22, 2007	HRW sends another follow-up email seeking a response to our January 30, 2007 email.
44	February 26, 2007	HRW files administrative appeal.
45	April 16, 2007	HRW contacts FOIA appeals officer to enquire about the status of our appeal. We receive no response.
46	May 30, 2007	HRW contacts FOIA appeals officer to again enquire about the status of our appeal. We receive no response.
47	June 19, 2007	On the eve of publication of this report, Human Rights Watch receives correspondence from Catrina Pavlik-Keenan, Director of ICE's FOIA office, in response to our administrative appeal in which ICE claims it could provide records responsive to three of the five types of information we had requested, and assesses fees without responding to our application for a fee waiver as an organization that publicizes information "in the public interest" about the "operation or activities of the [US] government."
48	June 27, 2007	Human Rights Watch, through our pro bono counsel, Carter Ledyard & Milburn, LLP, appeals ICE's finding that we are not entitled to a fee waiver.