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AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, The;Legislative Reform

Dawn Marie Johnson

The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes

I. INTRODUCTION

In 1996, Congress amended the Immigration and Nationality Act of 1952 (INA) by passing the Antiterrorism and Effective Death Penalty Act (AEDPA)[1] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[2] The AEDPA and the IIRIRA greatly increased the list of crimes that constitute "aggravated felonies" for immigration purposes. Prior to 1996, an alien had to actually receive a sentence of five years or more in order for his or her crime to be considered an aggravated felony.[3] Now, crimes with sentences as short as one year can be considered aggravated felonies and aliens do not need to receive the full sentence to be in danger of removal.[4] As long as the crime carries a possible sentence of one-year, an alien may be designated as an aggravated felon.[5] Because many crimes carrying a possible sentence of one year are misdemeanors or non-aggravated felonies, for all practical purposes, the AEDPA and the IIRIRA force judges to recharacterize misdemeanors and non-aggravated felonies as aggravated felonies solely for immigration purposes.

Although some judges do not agree with this recharacterization of misdemeanors as felonies with short potential sentences, courts hesitantly continue to uphold the literal language of the AEDPA and the IIRIRA. For example, in *U.S. v. Pacheco*,[6] Circuit Judge Miner stated, "in the case before us, we deal with the question of whether Congress can make the word 'misdemeanor' mean 'felony.' As will be seen, we hold that it can, because . . . we consider Congress 'to be the master – that's all.'"[7] In making this ruling, the circuit court affirmed the prior decision of the trial court. However, the trial judge had hesitated to expand the definition of felonies in this manner. In the opinion, the trial judge stated: "I don't – I can't imagine that the sentencing reformers really meant [sic] this situation exists."[8]

According to Assistant Attorney General Robert Raben, even the Immigration and Naturalization Service (INS) recognizes that "the law has had disastrous consequences for certain non-citizens."[9] In an effort to alleviate these admittedly disastrous conse-

1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18 U.S.C.).
2. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).
3. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 n.17 (2000).
4. *See id* at 1940.
5. *See id.*
6. 225 F.3d 148 (2d Cir. 2000).
7. *Id.* at 149.
8. *Id.* at 152.
9. *INS Use of Prosecutorial Discretion: Reality or Myth?*, ELLIS ISLANDER, (ABA Immigration Pro

quences, the INS allows its prosecutors to use discretion when deciding "whether to place an individual in immigration proceedings and to determine what charge to file against him or her."[10] However, this discretion may not significantly reduce the harshness of the IIRIRA and the AEDPA.

In this article, I will suggest some more effective methods to ameliorate this harshness. I will begin by examining the contrast between misdemeanors and felonies in Part II. In Part III, I will describe legal permanent residents (LPRs), a group which is detrimentally affected by the 1996 reform of immigration law. Part IV will contrast immigration law prior to 1996 with immigration law after the enactment of 1996 statutes. Next, in Part V, I will demonstrate the effect of these changes by providing statistics and examples of how the laws were applied to specific individuals. Part VI will discuss prosecutorial discretion and propose that depending solely on such discretion is not sufficient to lessen the severity of the 1996 reform. Finally, in Part VII, I will establish that legislative reform is the best way to bring equity back to the removal process and to ameliorate the harshness of the AEDPA and the IIRIRA.

II. CONTRAST BETWEEN MISDEMEANORS AND FELONIES

The distinction between a misdemeanor and a felony is rooted deeply in our common law tradition. At common law, present day misdemeanors were known as transgressions or trespasses and were defined simply as lesser crimes than felonies.[11] Today, a misdemeanor is defined as a "crime that is less serious than a felony and is usually punishable by fine, penalty, forfeiture, or confinement (usually for a brief term) in a place other than prison (such as a county jail)."[12] A person cannot be punished by death or imprisonment for more than one year for a misdemeanor.[13]

As can be inferred from the definition of misdemeanor, felonies are more serious crimes than misdemeanors. Initially, felonies, or *felonia*, were defined as serious crimes for which a vassal could forfeit his fee.[14] At common law, the punishment for felonies evolved to include forfeiture of goods to the crown, in addition to the traditional forfeiture of land.[15] Today, the definition of "felony" is "a serious crime, usually punishable by imprisonment for more than one year or by death."[16]

For a felony to be labeled "aggravated," the seriousness of the crime must be increased beyond that of the crimes on the borderline between a misdemeanor and a felony. For example, a felony could be considered aggravated if violence is involved, a

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Bono Development and Bar Activation Project, Wash., D.C.), June 2000, at 6 [hereinafter ELLIS ISLANDER].

10. *Id.*

11. BLACK'S LAW DICTIONARY 633 (7th ed. 1999).

12. *Id.* at 1014.

13. *See* 22 C.J.S. *Criminal Law* § 12 (1989).

14. *See* BLACK'S LAW DICTIONARY 633 (7th ed. 1999).

15. *See id.*

16. *Id.*

deadly weapon is used, or the perpetrator intends to commit another crime.[17] In our criminal code, only very serious felonies are deemed to be "aggravated felonies" and misdemeanors are by definition not as serious as felonies. Therefore, misdemeanors should not be recharacterized as aggravated felonies solely for immigration purposes because doing so conflicts with our criminal code and common law tradition.

III. THE EFFECT OF THIS RECHARACTERIZATION ON LEGAL PERMANENT RESIDENTS

LPRs in the United States comprise one of the groups that is the most affected by the recharacterization of misdemeanors and felonies in immigration law. To acquire LPR status, an alien must possess employment skills needed by the United States' labor market, or a close family member who already has status in the United States must apply for the alien. Therefore, LPRs either have skills that are assets to the United States, or they already have family ties to the United States.

To maintain LPR status, aliens must reside in the United States continuously with only "innocent, casual, and brief excursion[s] . . . outside this country's borders."[18] Such excursions will not deprive aliens of their LPR status as long as their stay outside of the United States is not for an extended period, and they do not have extensive property or business ties in a foreign country.[19]

In exchange for sacrificing ties to their home countries, such as land, family, and culture, and residing continuously in the United States, LPRs receive many of the same rights and privileges that are extended to United States Citizens (USCs). For example, LPRs have the right to enlist in the United States Army, Air Force, and Reserves of the Armed Forces.[20] LPRs also receive equal protection and due process rights from the United States Constitution[21] with the exception of voting rights and presidential candidacy.[22] Therefore, the distinction between USCs and LPRs is minimal.[23]

Although the status of an LPR is similar to that of a USC, public prejudice against illegal aliens may have led to the inequity in the treatment of LPRs who commit minor felonies and misdemeanors. Several events occurred prior to the enactment of the AEDPA and the IIRIRA that fueled an "anti-immigrant" (especially "anti-illegal immi-

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17. *See id.* at 64.

18. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). *See also* 3A AM. JUR. 2D *Aliens and Citizens* § 458 (1998).

19. *See* 3A AM. JUR. 2D *Aliens and Citizens* § 458 (1998) (citing Chavez-Ramirez v. I.N.S., 792 F.2d 932 (9th Cir. 1986)).

20. *See* 3C AM. JUR. 2D *Aliens and Citizens* § 2664 (1998) (citing 10 U.S.C.A § 3253 (West 1998)); 10 U.S.C.A § 8253 (West 1998); and 10 U.S.C.A. § 510 (b) (West 1998),(renumbered in §§ 12102 to 12104).

21. *See* Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 36 (1997).

22. *See* U.S. CONST. art. II, § 1, cl. 5 (stating that only United States citizens are eligible to be President). *See also* U.S. CONST. amend. XV, § 1 (stating that only the voting rights of United States citizens cannot be abridged).

23. *See* Demleitner, *supra* note 21, at 36.

grant") sentiment amongst the general population. One of these events was the proposal of California's Proposition 187.[24] Proposition 187, which was supposed to take effect in January of 1995, required California schools to verify the legal status of each child enrolled and prohibit children whose parents were not citizens, permanent residents, or persons otherwise authorized under federal law to be present in the United States, from attending public elementary and secondary schools.[25] Because this drew attention to the number of illegal immigrants in the California school system, the issue of immigration came to the forefront of the public's view during an election year. The North American Free Trade Agreement (NAFTA), which was passed in 1994, also focused the public's attention on immigration and its ramifications on the United States economy. In addition, the February 1993 bombing of the World Trade Center in New York City focused the public's attention on immigration issues because an immigrant was accused of planting the bomb. The effect this incident had on legislation is evidenced by both the title of the *Anti-Terrorist* and Effective Death Penalty Act and its provision that bars "alien terrorists from relief previously available to them at the [INS's] discretion."[26] As this demonstrates, in Congress' effort to respond to the political pressure created by the bombing of the World Trade Center, the proposal of Proposition 187, and the debate over NAFTA, the legislature may not have considered all the ramifications the AEDPA and the IIRIRA would have on legal immigrants, especially LPRs. Public prejudice and rash legislative decisions caused by the events listed above should not be allowed to govern how the United States applies its criminal and immigration laws to LPRs. If crimes are classified as misdemeanors when they are committed by a USC, then they should also be misdemeanors when they are committed by an LPR.

IV. CHANGES MADE BY THE IMMIGRATION REFORM OF 1996

A. Immigration Law Prior to 1996

Prior to 1996, deportation proceedings consisted of a two-step process for LPRs who had been convicted of crimes.[27] In the first step, the immigration judge (IJ) determined whether an alien *could* be deported. Aliens who committed aggravated felonies became one of the groups that was no longer eligible for cancellation of removal when Congress passed the Anti-Drug Abuse Act of 1988 (ADAA).[28] When the ADAA amended the INA in 1988, only "murder, drug trafficking, and illicit trafficking in fire-

24. *See* CAL. EDUC. CODE § 48215 (West Supp. 2001).

25. *See id.*

26. Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1149 (10th Cir. 1999).

27. *See* Morawetz, *supra* note 3, at 1938.

28. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, INTRODUCING THE 1996 IMMIGRATION REFORM ACT 57 (1996).

arms" were considered to be aggravated felonies for immigration purposes.[29] However, Congress continued to expand the definition of "aggravated felony." For example, the Immigration Act of 1990, (IMMACT90), added money laundering, crimes of violence for which an alien received a sentence of at least five years in prison, and any conspiracy to commit these acts to the definition of "aggravated felony."[30]

After the IJ determined that an alien *could* be deported, the IJ moved to the second step of the proceeding: determining whether the LPR *should* be deported.[31] The IJ's discretion to decide whether an LPR *should* be deported arose from § 212(c) of the Immigration and Nationality Act (INA). Section 212(c) granted relief from deportation to two groups of LPRs: 1) those who had not been convicted of aggravated felonies, and 2) those who had been convicted of aggravated felonies, but who had already served at least five years of the sentence received for the crime.[32] The factors which IJs considered when determining whether to waive deportation included: the circumstances of the case, whether the LPR had been rehabilitated, the effect that deportation would have on the LPR's family members, and the strength of the LPR's ties to his or her home country.[33] If balancing these factors showed that the LPR should be allowed to remain in the United States, the IJ could use discretion to grant an LPR relief from deportation.

Although the text of § 212(c) stated relief from deportation only applied to "aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily . . . and [were] returning to a lawful unrelinquished domicile [in the United States] of seven consecutive years,"[34] *Rosenberg v. Fleuti*[35] held that § 212(c) also applied in criminal deportation hearings.[36] As a result, prior to 1996, an LPR could obtain relief from deportation even if convicted of an aggravated felony, as long as he or she had served at least five years in prison to atone for the criminal activity and had other favorable extenuating circumstances.

B. 1996 Changes

Both the AEDPA and the IIRIRA greatly changed deportation/removal. Both § 440(e) of the AEDPA37 and § 321 of the Immigration Reform Act of 1996 (IRA)[38] expanded the definition of "aggravated felony." As a result, when these acts became effective in April of 1997,[39] crimes such as rape and sexual abuse of a minor were newly

29. *Id.*
30. *See id.*
31. *See* Morawetz, *supra* note 3, at 1938.
32. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 52.
33. *See* Morawetz, *supra* note 3, at 1938-39.
34. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 52.
35. 374 U.S. 449 (1963).
36. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 52.
37. *See* AEDPA § 440(e) (codified at 8 U.S.C. § 1101(43) (1994).
38. *See* IRA § 321 (codified at 8 U.S.C. § 1101(43) (1994)).
39. *See* DEPARTMENT OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND

classified as aggravated felonies for immigration purposes.[40] In addition, the sentence and monetary value thresholds necessary to qualify an alien for deportation were decreased for offenses already listed as aggravated felonies.[41] For example:

1. The threshold amount for money laundering was reduced from $100,000 to $10,000;

2. Crimes of violence, theft offenses, racketeering or gambling offenses and bribery, counterfeiting, forgery or trafficking in vehicles offenses used to require a five-year term of imprisonment. They now only require a term of imprisonment of one year;

3. The threshold amount for offenses in fraud and deceit was reduced from $200,000 to $10,000; and

4. The threshold for tax evasion was reduced from an amount in excess of $200,000 to an amount in excess of $10,000.[42]

Due to these changes, many crimes with potential sentences of as low as one year are now "aggravated felonies" for immigration purposes. LPRs who commit misdemeanors with one-year potential sentences are also deportable as aggravated felons even if they have received a sentence of less than one year. For example, petty theft is a misdemeanor under New York law, but because it carries a potential one-year sentence, it constitutes an aggravated felony for immigration purposes.[43] As this demonstrates, to deport an LPR, the literal wording of INA § 237(a)(2)(A)(ii) and INA § 238(c) requires a conviction for an "aggravated felony." However, being convicted in United States criminal courts for felonies that are not "aggravated," and even for misdemeanors, still can lead to the deportation of an LPR. The reason for this is that another body of law characterizes LPRs as aggravated felons without the benefit of a hearing or consideration of the circumstances.

In addition to expanding the definition of "aggravated felony," the IRA also expanded the definition of "conviction."[44] "Conviction" is now defined as:

> A formal judgment of guilt; or if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendre* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the

NATURALIZATION SERVICE 163 (1999).

40. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 58.

41. *See id.*

42. *Id.* at 58-59.

43. Morawetz, *supra* note 3, at 1939, (citing United States v. Graham, 169 F.3d 787, 793 (3d Cir. 1999)).

44. *See* AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 59.

> judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[45]

Although the definition specifies that a sentence must be imposed in order to make an alien eligible for deportation, courts have held that suspended sentences also qualify an alien for deportation.[46] Therefore, an LPR is deportable if he or she receives a sentence of one year, even if that sentence was suspended and the LPR was never imprisoned.[47] Since the INA's definitions of "aggravated felony" and "conviction" were expanded by the AEDPA and the IIRIRA, more LPRs are subject to removal today than before the acts became effective in 1997.

The number of LPRs who can be removed has also increased because the AEDPA applies its expanded definition of "aggravated felony" retroactively. When Congress defined "aggravated felony" for immigration purposes in the Anti-Drug Abuse Act of 1988, only convictions for murder, drug trafficking, and illicit trafficking in firearms had a retroactive effect.[48] However, as a result of the expanded definitions included in the immigration law reform of 1996, more crimes are retroactively considered to be aggravated felonies. Section 321(b) of the IRA that applies to all the crimes the AEDPA and the IIRIRA classifies as aggravated felonies states "notwithstanding any other provision of law (including any effective date) the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph."[49] Therefore, even crimes committed before 1996, which qualified as misdemeanors at that time, are now considered to be aggravated felonies for immigration purposes. As a result of this retroactive application of the law, the number of deportable LPRs in the United States has increased.

As the number of deportable LPRs increased, the number of aliens eligible for relief from deportation decreased. Today, after the immigration court determines that an LPR has committed an aggravated felony, AEDPA § 440(d) and IIRIRA § 304 "significantly limit the cases where discretionary relief from removal can be sought."[50] A reason for this limitation is that the second step of the deportation process, "the individualized assessment of the appropriateness of deportation," was eliminated by the IRA.[51] The IRA eliminated the second step of the deportation process by repealing INA § 212(c), which gave IJs discretion to waive deportation. Prior to the 1996 immigration law reforms, IJs had the power to determine both whether an alien was removable and whether such removal would be fair under the circumstances.[52] Both of these determinations

45. INA § 101(a)(48)(A) (codified in 8 U.S.C. 1101 (1994 & Supp. V 1999)).
46. *See* Morawetz, *supra* note 3, 1939.
47. *See id.*
48. AMERICAN IMMIGRATION LAWYER'S ASS'N, *supra* note 28, at 57.
49. *Id.* at 59.
50. St. Cyr v. INS, 229 F.3d 406, 409 (2d Cir. 2000).
51. *See* Morawetz, *supra* note 3, at 1939.
52. *See id.*; *see also supra* text accompanying notes 27-36.

were made at deportation hearings and at exclusion hearings. Today, deportation and exclusion hearings are both referred to as removal proceedings.[53] Now, during a removal proceeding, an IJ is only able to determine whether removal is warranted under AEDPA § 440 (d) and IIRIRA § 304. As a result, a conviction of an "aggravate felony" effectively precludes an alien from asking for discretionary relief.[54]

In addition to effectively eliminating the possibility for discretionary relief, the IIRIRA increased the INS's authority to expedite removals of "aggravated felons" under INA § 238, 8 U.S.C. 1228 (a)[55] and eliminates the "innocent, casual, and brief excursion" exception from *Rosenberg v. Fleuti*.[56] IIRIRA § 308(b)(4) increases expedited removals by giving the Attorney General authority under INA § 238 to begin removal proceedings and to attempt to complete all appeals thereof before the alien has been released from custody.[57] The court cannot intervene in these cases unless the LPR has a credible fear of persecution upon return to his or her country of origin.[58] Since this increases the number of expedited removals, an IJ's ability to grant discretionary relief has decreased. Also, since the IIRIRA makes persons who admit to or are convicted of certain crimes inadmissible, LPRs with what the IIRIRA designates as "aggravated felony convictions" are no longer covered by *Fleuti*.[59] Therefore, even if the LPR's excursion outside of the United States is "innocent, brief, and casual," he or she will be barred from reentering. Further, because the definition of both "conviction" and "aggravated felony" has expanded for immigration purposes, fewer LPRs are eligible for relief from removal and more LPRs deported from the United States.

V. EFFECT OF THE 1996 IMMIGRATION REFORM

A. Statistics

As a result of the changes the 1996 Immigration Reform made to immigration law, many more aliens are deported for criminal activities than in the years before 1996. For example, in fiscal year 1996, 37,243 aliens were deported for criminal or narcotics violations,[60] and an additional 156 aliens were deported for behavior related to criminal or narcotics violations.[61] Therefore, over one half of the total 69,317 deportations in 1996[62]

53. *See* DEPARTMENT OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 163 (1999).

54. *See* St. Cyr v. INS, 229 F.3d 406, 408 (2d Cir. 2000).

55. *See* INA § 238(a) (codified in 8 U.S.C. § 1228 (1994)).

56. 374 U.S. 449 (1963).

57. *See* INA § 238(a)(3)(A) (codified in 8 U.S.C. § 1228 (1994)).

58. *See* INA § 235(b)(1)(B)(iii)(I) (codified in 8 U.S.C. § 1225 (1994 & Supp. V 1999)).

59. United States v. Youboty, 2000 WL 962832, at *5-*6 (E.D.Pa. 2000).

60. *See* Department of Justice, *supra* note 53, at 183.

61. DEPARTMENT OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 188 (1997).

62. *See* Department of Justice, *supra* note 53, at 183.

were for behavior in some way related to criminal or narcotics violations. However, after the IIRIRA and the AEDPA took effect in 1997 the number of people deported for criminal activity greatly increased. In fiscal year 1997, 51,141 aliens were removed from the United States for behavior related to criminal or narcotics violations,[63] which is an increase of 13,898 from 1996.

The effect of the IIRIRA and the AEDPA can also be seen in the number of aliens who were under docket control and required to depart. In 1995, only 429 aliens were under docket control and required to depart[64] because the INS possessed evidence that the alien had a criminal conviction in his or her past.[65] In 1996, the number remained relatively low, with only 436 under docket control. However, in 1997, the aliens under docket control and required to depart increased to 664.[66]

The number of criminal removals from the United States continues to be high compared to the pre-1996 figures. In 1999, 14,239 aliens were removed from the United States in the month of September alone.[67] Of these, 5,594 were considered to be criminal removals.[68] Although the number of criminal removals dropped to 5,348 out of a total of 13,402 removals in October of 1999,[69] the number of criminal removals remained high. More recently, in September of 2000, there were 5,003 criminal removals out of a total of 13,293 removals;[70] and, in October of 2000, the number of criminal removals increased slightly to 5,075 out of 12,468 total removals.[71]

B. Effect on Individuals

In *United States v. Pacheco*,[72] the United States Court of Appeals for the Second Circuit affirmed the conviction of Pacheco for one count of aggravated reentry following deportation in violation of 8 U.S.C. § 1326(a)(1).[73] Pacheco pled guilty at the District Court level and was sentenced to a 46-month prison term followed by three years of supervised release.[74] In addition, he was ordered to pay a special assessment of one hun-

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63. *Id.*
64. *See id.* at 188.
65. *See id.* at 193.
66. *See id.* at 191.
67. *See* http//www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep00/REMOVAL.HTM. (last visited Mar. 27, 2001).
68. *See id.*
69. *See* http://www.ins.usdoj.gov/graphics/aboutines/statistics/msroct00/REMOVAL.HTM. (last visited Mar. 27, 2001).
70. *See.* http://www.ins.usdoj.gov/graphics/aboutines/statistics/msroct00/REMOVAL.HTM. (last visited Mar. 27, 2001).
71. *See.* http://www.ins.usdoj.gov/graphics/aboutines/statistics/msroct00/REMOVAL.HTM. (last visited Mar. 27, 2001).
72. 225 F.3d. 148 (2d Cir. 2000).
73. *See id.* at 149.
74. *See id.*

dred dollars.[75] Pacheco received this harsh sentence because he had been convicted for committing several misdemeanors in the years between 1990 and 1997.[76] Three of these misdemeanors included: a 1992 conviction of larceny under $500 for the theft of a $10 video game, a 1992 shoplifting conviction for the theft of four packs of cigarettes and two packs of Tylenol Cold Medicine, and a 1995 conviction for simple domestic assault.[77] On each of these three occasions, Pacheco received a suspended one-year sentence along with a one-year probation.[78] In November of 1997, the INS informed Pacheco that he was eligible for deportation based on the one-year suspended sentences he had received for two of the three misdemeanor convictions.[79] Although these sentences were imposed for misdemeanors, Pacheco was treated as though he had committed aggravated felonies for immigration purposes because he had received one-year sentences.[80]

The district court made this decision because the judge felt obligated to follow the precedent set by the Third Circuit in *United States v. Graham*.[81] In *Graham*, the court held that: "Congress' definition of the term 'aggravated felony' for the purposes of the INA was a 'term of art' that 'includes certain misdemeanants who receive a sentence of one year.'"[82] In order to follow this precedent, the United States District Court for the Northern District of New York found that Pacheco's crime constituted an aggravated felony even though he had only been convicted of misdemeanors.[83] The district court's reluctance to make this holding is evident from the statements of Judge Norman A. Mordue at Pacheco's sentencing hearing. At the hearing, Judge Mordue stated: "I just want the record to reflect I think it's an incredibly harsh sentence . . . . And I don't - I can't imagine that the sentencing reformers really meant this situation [to exist], but that's not according to the Third Circuit."[84]

Another case that demonstrates the effect of the 1996 immigration reforms is *Jurado-Gutierrez v. Greene*.[85] In *Jurado-Gutierrez*, the Tenth Circuit consolidated several cases that questioned AEDPA § 440(d)'s retroactive application, its elimination of INA § 212(c)'s discretionary waiver of deportation, and its equal protection implications since it applies to deportable, but not to excludable, aliens. One of the cases in *Jurado-Gutierrez* concerned Benigno Palaganas-Suarez, a twenty-eight year old citizen of the Philippines who had been an LPR in the United States since he was fourteen years old.[86]

75. *See id.*
76. *See id.* at 149-50.
77. *See id.* at 150.
78. *See id.*
79. *See id.*
80. *See generally* United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000).
81. *See Pacheco*, 225 F.3d at 152 (citing United States v. Graham, 169 F.3d 787 (3d Cir. 1999)).
82. *Pacheco*, 225 F.3d at 152 (citing *Graham*, 169 F.3d at 792).
83. *See Pacheco*, 225 F.3d at 152.
84. *Id.* (quoting Mordue, J.).
85. 190 F.3d 1135 (10th Cir. 1999).
86. *See id.* at 1141.

At the time of the trial, he was married to a USC and had four children.[87] In 1988, Mr. Palaganas-Suarez pled guilty to assault in the second degree and, in August of 1996, he pled guilty to theft.[88] Because these are both crimes of moral turpitude, the INS began deportation proceedings for Palaganas-Suarez in October of 1996.[89] The deportation proceedings lasted until after the effective date of the IIRIRA in November of 1997.[90] At that time, even though Palaganas-Suarez's crimes had occurred before the effective date, the INS amended its charge against Palganas-Suarez to make him deportable under INA § 241(a)(2)(iii) because the statute now considered Palganas-Suarez's crimes to be aggravated felonies.[91] On January 8, 1997, an IJ found that Palganas-Suarez could not apply for a 212(c) waiver under the statute as it was worded after the AEDPA and the IIRIRA were enacted.[92]

Palganas-Suarez appealed this decision to the Board of Immigration Appeals (BIA).[93] The BIA affirmed the IJ's decision, and Palaganas-Suarez appealed to a federal district court on the grounds that AEDPA, which applies to deportable but not to excludable aliens, violates equal protection.[94] The district court held that construing § 440(d) to treat aliens in exclusion and deportation proceedings differently does violate equal protection.[95] However, the court did not grant Palganas-Suarez relief because it found that both deportable and excludable aliens should be precluded from discretionary relief.[96] Therefore, Palganas-Suarez's rights had not been violated.[97] Palganas-Suarez next appealed the equal protection question to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit consolidated Palganas-Suarez's case with the cases of three other LPRs who had final orders of deportation entered against them because of past criminal convictions.[98] In all four cases, the court held that equal protection is not violated by application of AEDPA § 440(d).

To determine the outcome of the other three cases, the Tenth Circuit also analyzed whether AEDPA § 440(d) applied retroactively by using the *Lindh-Landgraf* test.[99] The first step of the test is to determine Congress' intent.[100] However, the Tenth Circuit was unable to determine whether Congress intended to apply § 440(d) retroactively or pro-

87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See* Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1141 (10th Cir. 1999).
92. *See id.*
93. *See id.*
94. *See id.* at 1148.
95. *Id.*
96. *See id.*
97. *See id.*
98. *See id.* at 1139.
99. *See id.* at 1149-50.
100. *See id.* at 1148.

spectively because it found that the AEDPA was ambiguous.[101] The final step of the *Lindh-Landgraf* test asked the court to determine whether the statute had a retroactive effect.[102] The Tenth Circuit found that AEDPA § 440(d) did not have a retroactive effect because LPRs were on notice that they could be eligible for deportation and criminal penalties when they committed the crimes.[103] Because an LPR could have no "settled expectation" of discretionary relief, his or her situation was really not changed by the removal of discretionary waiver of removal in INA § 212(c).[104] Therefore, the court determined that AEDPA § 440(d) had only prospective effect.[105] Because the court found that the Congress' intent was ambiguous and that the AEDPA did not have a retroactive effect, according to the *Lindh-Landgraf* test, AEDPA § 440(d) does not apply retroactively.[106] Because the Tenth Circuit found that AEDPA § 440(d) does not apply retroactively and that it does not violate equal protection, Palganas-Suarez, a twenty-eight year old LPR who has four children, is married to a United States Citizen, and has lived in the United States since he was fourteen, and three other LPRs were found to be deportable.

VI. PROSECUTORIAL DISCRETION: A REMEDY FOR THIS HARSHNESS?

Despite these harsh consequences, the AEDPA and the IIRIRA continue to be supported by members of Congress who argue that prosecutorial discretion reduces the severity of the immigration reforms of 1996.[107] They argue this because prosecutorial discretion allows prosecutors to determine whether to file charges against an alien and whether to commence immigration proceedings against an alien. Factors that can be considered when deciding whether to exercise prosecutorial discretion include: length of residence in the United States, humanitarian concerns, honorable service in the United States military, immigration history, and criminal history.[108] Although prosecutorial discretion may reduce the harshness of the 1996 immigration legislation slightly, relying on only prosecutorial discretion is not effective because "prosecutorial discretion by INS leaves a person in limbo, at risk of future immigration enforcement action and unable to travel outside the United States without the fear of being denied readmission."[109] As a result, "[p]rosecutorial discretion is not a full or adequate substitute for the forms of relief previously available from an [IJ] prior to the changes in the law in 1996."[110]

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101. *See* Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1150 (10th Cir. 1999).

102. *See id.*

103. *See id.*

104. *See id.* at 1151.

105. *See id.*

106. *See id.* at 1150.

107. *See* ELLIS ISLANDER, *supra* note 9, at 6.

108. *See* INS PROSECUTORIAL DISCRETION GUIDELINES (November 28, 2000), *available at* INS Fact Sheet, http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/Prosecut.htm (last visited Mar. 27, 2001).

109. *Id.*

110. *Id.*

Relying solely on prosecutorial discretion is also insufficient because some INS offices encourage criminal attorneys to seek sentences that will result in deportation of aliens. For example, a memo written by the INS office in Atlanta encouraged "prosecutors to seek plea bargains and sentences that will result in deportation, and to not agree to sentences or pleas which may allow immigrants to avoid deportation."[111] The memo states: "'[y]ou may encounter alien defendants that return to court to have their sentences amended to avoid removal/deportation i.e. reduced from twelve months to eleven months. Try to avoid this, by reducing the sentence, the alien may avoid removal.'"[112] Because the INS is taking steps such as these to encourage deportation, the Agency is hardly leaving decisions concerning prosecution to an attorney's discretion. Therefore, providing prosecutorial discretion will not, by itself, ameliorate the harshness of the AEDPA and the IIRIRA.

VII. LEGISLATIVE REFORM: NECESSARY TO AMELIORATE THE HARSHNESS OF THE 1996 REFORMS

To truly ameliorate the harshness of the AEDPA and the IIRIRA, Congress must amend § 440(d) of the AEDPA, which bars deportation waivers for aliens convicted of aggravated felonies.[113] It must also amend § 348 of the IIRIRA, which provides that the Attorney General may not grant a waiver to any LPR who has been convicted of an aggravated felony since his or her admission for permanent residence.[114] Both of these provisions amended § 212 of the INA in 1996[115] and effectively eliminated the second step of the removal process – the individualized assessment of whether an LPR should be removed. In order to make the removal process more equitable, this second step of the process must be reestablished by reenacting § 212(c). Reenacting § 212(c) would give IJs the discretion to grant relief from deportation after making individual assessments. Individual assessments would be made by considering the totality of the circumstances including factors such as: whether the LPR has been rehabilitated, whether the LPR's family would suffer extreme and unusual hardship if the LPR was removed from the United States, the number of years the LPR has resided in the United States, etc.

Factors such as these should be considered in order to bring fairness to the United States' system of removal. As the AEDPA and the IIRIRA are currently interpreted, an LPR who committed a felony years ago, served his or her sentence, and has been completely rehabilitated can be removed from the United States. Also, as a result of the 1996 reform, this removal cannot be waived even if it would bring severe hardship on the

111. ELLIS ISLANDER, *supra* note 9, at 6.

112. *Id.*

113. *See* Akorede v. Perryman, 1999 WL 262129, at *1 (N.D. Ill. Apr. 21, 1999) (citing AEDPA § 440(d), 110 Stat. 1277 (1996) (codified at 8 U.S.C. § 1182 (1994 & Supp. V 1999)).

114. *See Akorede*, 1999 WL 262129, at *1(citing IIRIRA § 348, 110 Stat. 3009-639 (1996) (codified at 8 U.S.C. § 1182 (1994 & Supp. V 1999))).

115. *See Akorede*, 1999 WL 262129, at *1 (citing 8 U.S.C. § 1182 (1994 & Supp. V 1999)).

LPR's family. In some instances, such as those demonstrated by *United States v. Pacheco,*[116] IJs are forced by precedent to reach these decisions despite the fact that they would prefer to make the opposite holding. Hence, Congress must reenact INA § 212(c) to give IJs the discretion to consider the totality of the circumstances.

Another way to restore equity to this legislation would be to use the same distinction between felonies and misdemeanors as is used in criminal law. If immigration law used the same distinction between felonies and misdemeanors as that in the criminal code, misdemeanors and felonies that are not aggravated would not be treated as aggravated felonies. A way to accomplish this would be to use the federal guidelines' definitions of misdemeanors, felonies, and aggravated felonies rather than maintaining separate definitions for immigration law. Other reforms which would bring immigration law's interpretation more in line with that of criminal law include: 1) returning the sentencing requirement to five years or more, as was required before 1996 when the AEDPA reduced the sentencing requirement to only one year or more, and 2) establishing that the length of the sentence for removal purposes is the length of the sentence *actually* received, not the length of the sentence which *could possibly* be received for the crime. If changes such as these were made, there would no longer be an inconsistency between the definition of an aggravated felony as it applies to citizens of the United States (who are not sanctioned for committing an aggravated felony if they have committed a misdemeanor) and as it applies to LPRs (who are treated as though they have committed a felony when they have only committed a misdemeanor). Therefore, amending the INA to define "aggravated felony" as it is defined in criminal law and allowing for discretionary waivers of removal would decrease the discrimination based on national origin that the immigration reforms of 1996 brought to immigration law.[117]

VIII. CONCLUSION

Congress made many changes to immigration law when it passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Some of these changes include: altering the definition of "aggravated felony," expanding the definition of "conviction," and eliminating IJs' discretion to provide relief from deportation. As a result of these changes, the amount of removals have increased and judges, such as those who decided *United States v. Pacheco,*[118] feel that they are forced into making unfair decisions in order to follow precedent and uphold the strict interpretation of the legislation. To stop situations such as this from arising in the future, the 1996 immigration legislation must be amended so IJs have discretion to consider the totality of the circumstances and determine whether an LPR *should* be removed. Also, the definition of "conviction" and the

116. 225 F.3d 148 (2d Cir. 2000).

117. *See supra* part IV(B); *supra* notes 43-69 and accompanying text.

118. 225 F.3d 148 (2d Cir. 2000).

definition of "aggravated felony" must be retracted. For example, an "aggravated felony" should no longer include crimes that the United States criminal code defines as misdemeanors or as non-aggravated felonies. Making these changes would bring equity back to immigration law by reducing the discriminatory effect that the AEDPA and the IIRIRA have on LPRs. Therefore, LPRs would not suffer as much discrimination based on their national origin, and the prejudicial sentiment that was prevalent in society prior to the enactment of the AEDPA and the IIRIRA would no longer have as much control over the treatment of LPRs facing removal.

Dawn Marie Johnson[*]

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[*] Candidate for Juris Doctor, Notre Dame Law School, 2002; B.A., Anthropology and History, University of Notre Dame, 1999. I would like to thank Professor Barbara Szweda for all of her advice and her enthusiasm for Immigration Law. Thanks also go to my parents and my friends Robin and Sheila for their continued support and encouragement.