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American Immigration Laws: A Legal and Moral Analysis

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AMERICAN IMMIGRATION LAWS: A LEGAL AND MORAL ANALYSIS

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AMERICAN IMMIGRATION LAWS

"When a foreigner resides among you in your land, do not mistreat them. The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt. I am the LORD your God.

-- Leviticus 19:33-34

I. INTRODUCTION

If laws are but a reflection of a nation’s sentiments, then the instant article will show the consequences of a nation’s radical perspective change on immigration. From a complete lack of immigration regulations to our current legal labyrinth, this article will outline the direct and collateral effects of immigrants law changes for immigrants as well as for their non-immigrant families. Thus, the focus will be on the most controversial amendments to the law established by the Illegal Immigration and Immigrant Responsibility Act of 1996.

II. HISTORY OF IMMIGRATION LAWS IN GENERAL

No legal limits on immigration were fathomed by newcomers between 1776 and 1875 when the U.S. was still a young nation seeking to attract newcomers.¹ As immigration population augmented between 1875 and 1917, Congress began to enact regulations “to improving the quality of immigrants” such as imposing a 50-cent tax for “idiots, lunatics, convicts and persons likely to become a public charge.”² As immigrant influx continued on the rise during the first decade of the 20th century, hostility between previously settled immigrants and newcomers transpired and Congress continued to pick and choose which immigrants should have an easier

time entering. Some of those new laws established rules restricting the immigration of anarchists or illiterate immigrants.

The Emergency Quota Act of 1924 is likely the first most restricting law enacted by Government in U.S. Immigration Law history because it concerned the quantity rather than the quality of immigrants. This drastic change of treatment for immigrants had the effect of severely curtailing the number of immigrants seeking to enter from South America and Southern and Eastern Europe. For the first time, immigrants were required to obtain immigrant visas at the U.S. Embassies in each foreign country which were to be issued in accordance to the quota of each country. Also, immigrants who chose to ignore the new procedures were made deportable and the U.S. government could begin proceedings at any time after entry since there was no statute of limitation.

In 1948, Congress enacted the Displaced Persons Act in reaction to the widespread displacement of people resulting from the aftermath of World War II. That Act allowed for immigration of over 400,000 refugees into the United States. Allowing immigration of individuals under said act had the effect of mortgaging the numerical quotas of the nationalities admitted into the future. Similarly, there was a brief relaxation of immigration laws to allow alien spouses, children and fiancées of World War II American Servicemen pursuant to the War Brides Act of 1946 which allowed for immigration of approximately 5000 persons.

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4 The Emergency Quota Act established a fixed number of visas to be issued to the immigrants of each country depending on the number of immigrants from that country that were already settled in the U.S. in 1920.
Although the changes to that date were already profound, the most restrictive and complicated legislations with regards to immigration law were passed 1990s as concerned with the country’s ability to absorb the increasing immigration rate and high levels of immigrants in the jail system rose. Specifically, the Immigration Act of 1990, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA) were enacted during the 1990s and completely transformed the entire system of immigration laws and regulations as to that date. The Illegal Immigration and Immigrant Responsibility Act of 1996 has been called one of “the most sweeping immigration reform packages ever enacted.” The Act changed nearly all immigration law procedures though this paper will address only the ones that had the most shock-wave like effects on the entire immigrant legal system even until the present.

The following sections will provide some background on speculations for the reasons leading to Congress’ enactment the Act in 1996 focusing on only 5 out of the numerous amendments to Immigration and Nationality Act (INA) and the consequences for alien Respondents and legal practitioners. Additionally, the article will describe the changes to IIRIRA amendments development by Congress and the Supreme Court following IIRIRA enactment.

III. BACKGROUND ISSUES LEADING TO ENACTMENT OF IIRIRA

In the 1990s, when the broadest immigration policies were enacted by Congress, one of the nation’s ongoing concerns was to crack down on aliens who committed crimes in the United States. In fact, the drafters of IIRIRA expressly cited concerns about the increase of the numbers of criminal aliens in recent years as the main reason for the increased enforcement provisions.

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According to Congressional reports, there were about 100,000 criminal aliens in federal and state prisons by the early 1990s.\textsuperscript{9} As a result of this ongoing concern, IIRIRA established various changes in law to block ways in which immigrants with a criminal record could obtain or retain legal status in the United States but it also imposed regulations criminalizing behavior which had never before been deemed criminal. For instance, more restrictive measures were adopted for approval of waivers of inadmissibility\textsuperscript{10}, variations in the meaning of "conviction" which only applies to criminal aliens, and expansion in the scope of crimes (aggravated felonies) which are deserving of harsh immigration penalties.\textsuperscript{11}

In addition to the concerns related to the increase of criminal activity amongst immigrants, Congress also became concern with the country’s ability to spread resources evenly and without affecting U.S. citizens. The amendment which had the most sweeping effect because it took care of the Congress’ two more urgent concerns related to immigration was IIRIRA’s replacement of “entry” definition with the concept of “admission” throughout most of the Immigration and Naturalization Act. The legal and procedural consequences of said replacement of legal terms created legal mayhem for practitioners and severe issues related to Due Process protection which were heavily litigated for decades before and after the enactment of IIRIRA. The legal outrage rising from the consequence of this amendment forced the involvement of the Supreme Court which settled the score in a decision which was issued in 2012.\textsuperscript{12}

\textsuperscript{9} Id.
\textsuperscript{10} Grounds for inadmissibility include use of fraudulent information to obtain immigration benefits, criminal convictions, re-entry after removal, etc.
\textsuperscript{11} IIRIRA §§§ 321, 322, 330, 331, 348.
\textsuperscript{12} Varterlas v. Holder, 566 U.S. ___ (2012).
Immigrants seeking admission into the United States are subjected to different treatment of the law based on classifications which would otherwise be arbitrary if due process of law was applicable to them as it is applied to non-immigrants. Due Process is guaranteed in the fifth and the fourteenth amendments of the U.S. Constitution to U.S. citizens. These guarantees have been extended to aliens in civil, criminal and administrative proceedings but not to those seeking admission even though they may be physically present in the U.S. Examples of this different treatment could be observed in how the burden of proof in immigration cases is assigned in the present as in the past prior to IIRIRA. Specifically, upon the enactment of IIRIRA the burden to prove admissibility was always placed on the immigrant rather than placing it on the government sometimes. Additionally, for some aliens who have met certain criteria which we will examine further, expedited removal proceedings in which they were only given several minutes to prove their case before removal were instated. This had the effect of lessening the immigrant’s opportunities to hire counsel or have any type of competent defense. The placement of burden of proof was at least less burdensome to some aliens under pre IRIRA laws but this will be discussed in more detail later.

Nevertheless, despite the seemingly unfairness of the new the change in placement of burdens and expedited removal grounds imposed by the Act are justified under Section 292 of the INA which provides:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have he

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13 INSERT CITE FOR THE STATEMENT THAT ALIENS SEEKING ADMISSION DON'T HAVE DUE PROCESS
privilege of being represented *at no expense to the Government*

by such counsel...as he shall choose.\textsuperscript{14}

Unfortunately, despite the seemingly unfair treatment of the law for certain classifications of alien, "Congress and the executive branch have broad and exclusive authority over immigration decisions" according to the plenary doctrine. Accordingly, courts have only been rarely involved and when it does so it limits itself to entertain constitutional challenges to decisions about which aliens should be admitted or expelled.\textsuperscript{15} The sole exception to this rule pertains to naturalization proceedings, power over which is divested on congress in accordance to the U.S constitution.

Given the applicability of the plenary doctrine to immigration laws, Congress was also able to make unfavorable changes for immigrants including placing the burden of proof on them at all proceedings, heightening the standards of proof by changing the entire administrative judicial system through IIRIRA’s replacement of "entry" throughout most of the INA. This issues raised much opposition from legal practitioners and have been litigated numerous times even through recently.

**IV. CHANGES IMPLEMENTED BY IIRIRIA ENACTMENT**

Prior to the enactment of IIRIRA, the term "entry," which was scattered throughout most of the Immigration and Naturalization Act (INA), was defined as either "crossing into territorial limits of the United States (i.e. physical presence) with inspection and admission by an immigration officer or actual and intentional evasion of inspection at the nearest inspection point

\textsuperscript{14} 8 U.S.C. § 1362
couple with freedom of restrain." The key word in immigration law after the enactment and implementation of IIRIRA was "admission," therefore after the implementation of IIRIRA, the basis under which an alien could have been deemed to have entered, "or actual and intentional evasion of inspection at the nearest inspection point couple with freedom of restrain," was eliminated. After IIRIRA, immigrants who evaded inspection by immigration officials and were caught at a small distance from the border were not longer processed as if they had entered and if they did, they were classified as "aliens who had entered without inspection" (EWI), a status which has carried much restriction on manners to adjust status to legal status or admissibility later.

This amendment alone sent out shock waves that changed the entire legal immigration framework as practitioners knew it. Consequently, the criteria which made several aliens admissible through certain procedures for seeking legal status while present in the United States through waivers of inadmissibility processes were no longer applicable since the aliens needed to have a lawful entry to qualify for admission under the new law. A cable which the Department of State sent to consular posts worldwide shortly after the IIRIRA enactment provides a thorough explanation as to Congress’ reason for implementing the amendment:

Former INA § 101(a)(13), a convoluted definition of “entry,” had generated much litigation and intellectual heartburn for many years. The issue: “Was the alien’s ‘entering’ and thus subject to

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16 INA § 101(a)(13).
17 Section 301(a) of the act provides that the terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
exclusion procedures, or had the person ‘entered’ and therefore became entitled to protections in deportation proceedings?” (As an example, in a 1994 case, aliens who had been denied admission, but escaped from carrier custody and were later found, were held to have “entered” and [were] thus subject only to deportation) To resolve such problems, INA § 101(a)(13) has been changed to a definition of “admission,” not “entry.”

The most immediate consequence of the shock-waives that the implementation of the “admission” concept sent out to immigration legal system was the change in judicial proceedings to expel immigrants out of the United States. Prior to the enactment of IIRIRA, when an immigrant has an “entry,” he will be placed in exclusion proceedings and carry the burden to show that they were admissible to the U.S. Conversely, if the alien had “entered” the U.S. in accordance with the above-referenced 3-prong test, then the alien will be placed in deportation proceedings and the ICE attorneys will bear the burden of proving deportability. Effective in September of 1997, the Illegal Immigration Reform Act replaced the prior bifurcated system of exclusion and deportation proceedings into removal proceedings. Joining the old two-track system into single proceedings which would be known as “Removal Proceedings” was done so as to create a more comprehensive system of removal which is, at the same time, compatible with the newly introduced “admission” definition. The effects of the creation of removal proceedings was a change on placement of the burden of proof (between alien and Immigration

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18 The State Department’s cable is reproduced in 73 Interpreter Releases 964 (July 25, 1994).
20 The INS implemented the new removal system in interim regulations published on March 6, 1997, most of which is a mere repetition of the statutory language. See 62 Fed. Reg. 10312-95 (Mar. 6, 1997), reported and reproduced in 74 Interpreter Releases 353 (Mar. 10, 1997).
and Customs Enforcement (ICE)). Additionally, the new removal structure proved itself more restrictive than it was under the prior system for aliens who could not prove “admission” into the United States.21

V. LEGAL CONSEQUENCES OF THE IIRIRA CHANGES

Since the basic IIRIRA amendments are now fully described and basically explained, we will move on to scrutinize further amendments made by IIRIRA by assessing the consequences for aliens unlawfully present in the United States and aliens who have already been admitted to the United States.22 For example, prior to the implementation of IIRIRA, aliens who could be classified as having “entered” the U.S. were subjected to “deportation proceedings,” where Immigration and Customs Enforcement attorneys would have the burden of proving that the aliens were “deportable.” On the other hand, aliens who were deemed as to not have entered the U.S. were subjected to “exclusion procedures,” where the immigrant had to burden of proving that he was “admissible.” In real life, this meant that there was greater protection for immigrants who started families and had interests in their stay despite their initial entry without inspection. IIRIRA’s entry/admission change made the two track immigration legal system merge into “Removal Proceedings” where ICE attorneys only had to place the ball on the ballpark by establishing doubts about the immigrant’s legal status and they would at all times have the burden of defending their cases. Specifically, once ICE establishes alienage of the person, then the alien is charged with being inadmissible, then he or she has the burden to prove clearly and beyond a doubt that he or she is in the United States lawfully pursuant to a prior admission. Alternatively, the alien has to prove that he or she is admissible into the US. If the alien meets

21 INA § 212(a)
22 “Unlawfully Present” aliens includes those who entered without inspection and remain without status and aliens whom entered legally and overstay the period they were allowed to remain in the United States.
his or her burden of proof, then and only then does the burden shift back to government to prove by clear and convincing evidence that the person is deportable.\textsuperscript{23}

Admitted immigrants (LPRs) faced the most serious is issues related to removal proceedings in connection with entry and the issues related to this category of immigrants created the most complicated legal issues and have continued to haunt lawmakers for many years to come. Prior to the implementation of IIRIRA, there was already a lengthy history regarding whether admitted aliens should be considered as seeking admission upon returning from a trip abroad and whether they should be placed in removal proceedings if upon inspection at re-entry if there were found to be inadmissible. Legal Permanent Residents and their legal representatives constantly held the position that they should not be categorized as seeking admission upon return and that they should not be placed in removal as a result of said status because their Legal Permanent Resident status should be regarded as continuous. In 1963, the Supreme Court became involved in this ongoing issue in the case of Mr. Fleuti.\textsuperscript{24} In Fleuti, the Supreme Court created what would be known as the "Fleuti Doctrine," which stated that the criteria which should be included to decide whether there is an entry are a) the length of the absence, b) purpose of absence and c) evidence of interruption of status. For many years, the Fleuti doctrine gave legal practitioners and admitted immigrants reliance on legal principles and stability as what to expect if grounds for inadmissibility arose. Nevertheless, IIRIRA abolished the set of criteria created by the Supreme Court in Fleuti by replacing exclusion and deportation proceedings with removal proceedings through the change of entry for admission notions.

\textsuperscript{23} In Defense of the Aliens, Lydio F. Tomasi (v. XX)
\textsuperscript{24} Rosenberg v. Fleuti, 374 U.S. 449 (1963)
In the Act of 1996, Congress mandated an “expedited removal” process through which certain aliens will be “pre-screened” shortly after arriving in the U.S. The categories of aliens who were required to undergo expedited proceedings included those who were deemed inadmissible at the border. 25 Additionally, the Attorney General had the power of imposing expedited removal on any alien who would be unable to prove that he or she had been living in the U.S. continuously for 2 or more years. 26 And if it were not enough to subject certain aliens who are inherently unfamiliar with the U.S. judicial system and the language as well as jet-lagged, hungry and emotionally unstabled to lengthy and uncomfortable immediately upon crossing the border into the U.S., the Department of Homeland Security extended the applicability of expedited removal to a much broader scheme. Specifically, DHS extended the application of expedited removal to any person present in the U.S. who was no admitted or paroled and who is encountered 100 miles of the border, and who cannot establish that they had not been in the United States for the preceding 14 days.27 Eventually this problematic procedure under Due Process standards was even extended by the Attorney General to include “persons who arrive in the U.S. by sea (except Cubans) will be subject to expedited removal unless they were in the U.S. for two years prior to the determination of inadmissibility.28

The only exception to such harsh and surreptitious manner of giving an alien his or her day in court before being deported applies to aliens who communicate fear of returning to their native country. If the alien communicated his or her concern to the immigration officers, then they would temporarily evade the expedited removal until he was referred to an asylum officer.

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25 INA § 212(a)(6)(C) (material misrepresentation) and INA § 212(a)(7) (lack of IV or NIV documents).
for a “credible fear” interview. The Credible Fear interview is another device which was enacted by the Act of 1996 which purpose was to find out in an expedited manner whether there was a “significant possibility … that the alien could establish eligibility for as the potential asylum applicant’s claim for asylum” in the alien’s reason for his fear to return. If the alien was found credible under the rules, then he would be granted an opportunity to pursue his or her asylum claim in removal proceedings. However, if he or she was denied, then the case was referred to an Immigration Judge (IJ) but his intervention was limited solely to review the basis for negative findings at credible fear interview. During the entire time when the alien attempts to make his or her case, the alien shall be detained pending removal, except where DHS paroles the applicant because “parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”

The replacement of “entry” for “admission” pursuant to the 1996 Act meant that many immigrants who were previously eligible to adjust their status to legal permanent residents were no longer able to do so by virtue of their lack of “admission” into the United States. Said immigrants along with immigrants who actually were “admitted” but had overstayed their permitted time are categorized as “aliens unlawfully present” under the Act. For the purposes of illustrating the changes made by amendment of INA § 101(a)(13) (modification of “entry”), we will only examine the changes that the Act of 1996 had in 3 out of the numerous waivers available which were changed by other parts of the act. Specifically, we will concentrate on

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29 8 C.F.R. §§ 235.3(b)(4), 1235.3(b)(4).
30 8 C.F.R. § 1208.30 (g).
31 8 C.F.R. §§ 235.3(b)(2)(iii), 1235(b)(2)(iii).
32 The term “unlawfully present” for the purpose of the new waiver provisions means that the alien is present after overstaying an authorized period of admission, or without being admitted or paroled.
waivers for a) aliens previously removed, b) aliens “unlawfully present” who voluntarily departed and c) aliens unlawfully present who reenter the United States.

Aliens who were previously ordered removed, either through expedited or normal proceedings (another controversial change to be defined and further explained later) initiated upon the alien’s arrival in the U.S., are inadmissible for a period of five years after the date of their removal according to amendments made to the INA by the Act of 1996.\(^33\) Similarly, aliens who were unlawfully present in the United States and depart voluntarily and without a judge’s removal order and seek admission afterwards are also inadmissible for a period of 10 years. The harshest inadmissibility penalties are probably for aliens who re-enter the U.S. without inspection after having been unlawfully in the country of a year or more or after a removal order was entered against them.

The above-referenced grounds of inadmissibility may be waived through the filing and approval of a waiver of inadmissibility. However, eligibility for waivers of inadmissibility was vastly limited to a small percentage of immigrants. Under the Act, only aliens who have approved alien relative petitions and could prove that his or her U.S. citizen (U.S.C.) or Legal Permanent Resident (LPR) spouse or parent would suffer extreme hardship if the alien’s admission is refused. By default, the Act fails to consider the hardship to the alien’s USC or LPR children of any age. This meant that a large amount of immigrants who have been living in the United States for lengthy amounts of time and have over the age USC children are still out of

\(^{33}\) Section 301(b) of the act provides IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who- "(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien’s departure or removal, or "(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s departure or removal from the United States, is inadmissible.
luck to obtain legal status in the United States. Additionally, the Act established denials of applications for waivers of inadmissibility could not be reviewed by a judge.\textsuperscript{34} As such, the only other option an alien has following denial of a waiver of inadmissibility is to re-file when there have been a changed of circumstances which merit approval of the waiver.

At the time when IIRIRA was enacted, Congress became concerned due to the large amount of alien criminals inhabiting the prison system in the United States. About 100,000 criminal aliens were in federal and state prisons in the year 1996 and Congress came up with different legislations designed to identify them, foreclose avenues of relief for such aliens, and make their removal from the U.S as expeditious as possible.\textsuperscript{35} The term “aggravated felony” was originally defined on the Anti-Drug Abuse Act of 1999 as murder and certain drug and firearm trafficking crimes.\textsuperscript{36} Since the ADAA enactment, Immigration legislation has expanded the definition of aggravated felony to great lengths in accordance with Congress’ efforts to continue to make it harder for alien immigrants to remain in the country. Unfortunately, the exaggerated expansion of the definition of a legal term which causes as severe consequences as “aggravated felony” has caused much direct hardship to aliens who committed misdemeanors in certain states and also collateral hardship to their American relatives.

The consequences of being convicted of an aggravated felony are very severe. One major consequence is that lack of time limitations to the application of the statute. If the alien convicted is already admitted, removal proceedings could be initiated against him at any time (there is no applicable statute of limitation).\textsuperscript{37} On the other hand, if the alien was seeking admission, the

\textsuperscript{34} Grounds of Inadmissibility and Deportability and Available Waivers, Linton Joaquin, 1997.
\textsuperscript{36} Pub. L. No. 100-690 (ADAA).
aggravated felony conviction would not be a ground for inadmissibility. However, the conviction may be grounds for denial of admission based on categorization of the aggravated felony under a category which would make the alien inadmissible such as a "crime involving moral turpitude or a controlled substance or a discretionary denial." During removal proceedings, an alien convicted of an aggravated felony is subjected to mandatory detention during the pendency of the removal proceedings case. Furthermore, a person who has been convicted of an aggravated felony is permanently barred from establishing good moral character and, therefore, he or she would be permanent ineligible to obtain several types of relief including naturalization, asylum and voluntary departure.

Additionally, being convicted of an aggravated felony also meant severe obstacles to the immigrant's defense in removal proceedings. For instance, immigrant could no longer rely on discretionary factors in order to achieve relief from removal and also the immigrant is subjected to mandatory detention during removal proceedings. Moreover, if the alien lost in Removal Proceedings and was removed, a conviction for an aggravated felony also placed even more severe obstacles in returning to the United States to reunite with his or her family. A removal of the country based on an aggravated felony conviction prevents a person from ever returning into the United States except through a grant of a special waiver. Additionally, it subjects the person to a 20-year prison term if found in the United States without a grant of said pardon. And however harsh the consequences of a conviction of a crime may be, they would still be deemed as reasonable if the extent of the criminal charges were left as narrow as they were at its inception. However, the utter exaggeration of grounds for aggravated felony make the penalties

38 INA § 212(a)
39 INA § 236 (c)(1)(B). October 8, 1998, was the last day Transition Period Custody Rules were in effect. See 8 CFR § 236.1(c)(1)(i); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 303(b), 100 Stat. 3009, 3009-585 to 3009-587.
ridiculously exaggerated for certain offenses which are deemed misdemeanors in the criminal realm.

For instance, the Immigration and Nationality Technical Corrections Act of 1994 added several other crimes to the definition of aggravated felony to include firearm and explosive offenses, some theft or burglary offenses, some fraud offenses, prostitution offenses and several others.\textsuperscript{40} Then the Antiterrorism and Effective Death Penalty Act of 1996 added several offenses in addition to categorized them as 4 different types, a) offenses involving obstruction of justice, b) offenses relating to commercial bribery, c) offenses committed by an alien ordered previously deported and d) offenses relating to the failure to appear to answer for a felony offense for which a sentence of two or more years may be imposed.\textsuperscript{41} Only 4 months after the AEDPA further amended the definition of aggravated felony, Congress saw fit to further amend the definition through the enactment of IIRIRA.

The definition of aggravated felony for immigration purposes was found on INA § 101(a)(43)(F) which defined the term as “a crime of violence is deemed an aggravated felony if the term of imprisonment imposed was at least five years.” Under IIRIRA amendment, however, the scope of crimes which would be included under the aggravated felony umbrella was greatly increased because it lowered the imprisonment threshold to crimes where the term of imprisonment was at least 1 year.\textsuperscript{42} This way, even convictions for drug-related misdemeanors would make an alien vulnerable to the harsh consequences of a conviction for an “aggravated felony.” Additionally, IIRIRA added rape and sexual abuse of a minor to the list and expanded

\textsuperscript{40} 71 Interpreter Releases 1381, 1401 (Oct. 17, 1994).
\textsuperscript{41} 73 Interpreter Releases 568 (Apr. 29, 1996); 521 (Apr. 22, 1996).
\textsuperscript{42} New INA § 101 (a)(43)(F)
the definition of aggravated felony to include crimes with lowering sentences and monetary amount thresholds.

VII. FURTHER DEVELOPMENT AFTER IIRIRA ENACTMENT

Although, for the purposes of analysis and description, this paper has described the changes implemented by IIRIRA separately, it is important to provide an example of how they work together in order to understand the system prior to its current state. The case of an a Chinese immigrant by the name of Xing-Chang Zhang provides a good example of how the previously described law and provisions work together and how they function after the implementation of IIRIRA. The case of Mr. Zhang is bifurcated because the issues in his case involved a denial of his asylum application and an in-depth analysis about whether he had “entered” the United States and whether he should have been placed in exclusion or deportation proceedings.

Mr. Zhang and his wife fled from China to the United States because they were being targeted due to their refusal to undergo surgical procedures to prevent having more children. As such, Mr. Zhang traveled for weeks by ship before his transportation vessel was detected by U.S. Patrol agents from helicopters and he threw himself on the water and arrived to U.S. soil swimming. Upon arrival, Mr. Zhang soon collapsed from exhaustion. At that point he was arrested and placed in exclusion proceedings because he was deemed not to have entered the U.S. and would have the burden of proving his asylum claim. Upon losing his asylum claim because he could not meet his burden, he appealed the judge’s decision contending that the government should have been placed in deportation proceedings because he should have been

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44 Id.
deemed to have “entered” the U.S. As such, the government should have had the burden of proving that he was deportable rather than putting the burden on him to prove that he was admissible by the clear and beyond doubt standard.

The case of Mr. Zhang help us illustrate how the reliefs of newcomers were limited or taken away altogether by the amendments imposed by IIRIRA as it also helps us understand the changes that have occurred after the enactment to mitigate the harshness of the changes imposed by the Act of 1996. In the case of people that have entered illegally, like Mr. Zhang, the sweeping effects of modifying the term “entry” for “admission” meant that he would not even had a chance for argument that he had entered and, therefore, was entitled to the classification of immigrants which are deserving of “more” due process protection. Although the Supreme Court already established that immigrants, even when they have entered illegally, have rights under the 5th amendment45, it is obvious that in practice the level of protection is severely lessened when additional penalties such as mandatory detention for second time entries are imposed. 46

Similarly, in the case of immigrants who are deemed admitted, the entry change for admission meant that if they became deportable under INA § 23747 for any reason, such as the commission of an aggravated felony, they will were deemed as if they were seeking admission into the United States or the first time. As such, at the enactment of IIRIRA, if an admitted


46 In certain cases, removal proceedings also implicate a liberty interest in being free from detention because the INA requires that aliens be held pending the issuance of a final order of removal, or pending the execution of such order. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 690 (2001); Ly v. Hansen, 351 F.3d 263, 269 (6th Cir. 2002).

47 § 237 (8 USC 1227) Deportable aliens provides numerous grounds for deportability including aliens inadmissible at the time of entry or adjustment of status or by violation of status, termination of conditional permanent status, marriage fraud, commission of certain crimes amongst numerous other grounds.
immigrant (i.e. LPR) even temporarily went out of the country, he would be placed in removal proceedings upon return automatically. The issue then became even more complex when law enforcement tried to apply the old “entry” definition for returning LPRs under the justification that the grounds for deportability (i.e. commission aggravated felony) had occurred prior to the changes imposed by IIRIRA and therefore pre-IIRIRA law was applicable. Thus, the issue in which courts became involved was deciding whether Congress intended for the legislation to be applied retroactively as it as not specified within IIRIRA legislation.

Until recently, LPRs returning to the United States who were deemed deportable would undergo a preliminary type of admission process conducted by DHS at the airport which would parole them into the United States only so they could undergo removal proceedings. This particular consequence of the admission notion introduced by IIRIRA faced much resistance from the immigrants and their legal representatives given that it was already settled that “LPR aliens have a ‘vested interest’ in their residence” and that “the continued enjoyment of our hospitality once granted, shall not be subject to meaningless and irrational hazards.”48 Due to the recognition of LPRs’ vested interest in their status, there were numerous occasions when these type of problems have been brought to the judicial government branch despite the limitations imposed by the plenary doctrine. Many of the consequential problems which endangered the status of admitted immigrants were related to whether it would be applied retroactively. This was not specified by congress when IIRIRA was enacted but courts began applying them to immigrants retroactively. In the year 2012, the Supreme Court once again became involved to an

48 Dipasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947) (“It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subjected to meaningless and irrational hazards.”)
extent which was to rule on whether IIRIRA should be held retroactive and, if so, which parts and up to when.

The case of Mr. Vartelas involved a Greek immigrant who had become deportable due to the commission of a crime which became an aggravated felony after the expansion enacted by IIRIRA and which occurred prior to IIRIRA enactment. Mr. Varterlas was deemed as “seeking admission” upon returning from Greece and was placed in removal proceedings as inadmissible rather than deportable under the new laws after the IIRIRA amendments. The question before the Supreme Court was whether Vartelas effectuated an entry, which would subject him to a charge of inadmissibility, and if that entry was governed by the Fleuti doctrine since that doctrine was in force at the time of his conviction and not by the definition of admission contained in the IIRIRA. The court decided that the retroactivity of IIRIRA was limited to the date when the Act was enacted and therefore Mr. Vartelas’ entry should not have interrupted his LPR status so long as it satisfied all of the Fleuti prongs since the commission of the crime was what made his status endangered and the conviction occurred prior to the enactment of IIRIRA.⁴⁹

Over the years, numerous immigrants and their families have suffered separation and much hardship due to the inflexibility and harshness of the laws after IIRIRA. Although the government established various ways to alleviate the severity of the penalties, much damage has been already made for many U.S. citizens who have depended on the hard-work of their immigrant head-of-household relatives while they lived in the United States. Additionally, the violence and other circumstances present in neighboring countries continue to ramp up the number of people who seek to escape the cruel environment of their countries into the promising land that once was the United States. And however accustomed legal professionals and even

immigrants are to the sternness of the rules now—it begs the question—how did such radical change on the perception of immigrants came about?

VIII. FINNIS ANALYSIS

As previously demonstrated, the Illegal Immigration and Immigrant Responsibility Act of 1996 was the most restrictive and inhospitable set of amendments enacted by U.S. Congress in American Immigration laws. The Act is particularly controversial given that the U.S. is a nation characterized by its prior welcoming demeanor towards immigrants from all over the world. Although the Act made more restrictive most immigration laws as they stood in 1996, the most contentious changes were the harsh consequences of classifying immigrants in accordance to the manner the arrived to the United States which included drastically stripping immigrants of due process generally. Additionally, the act has for years condemned families to permanent separation and to callous treatment to fleeing immigrants in the name of protecting U.S. society.

This part of the article seeks to flesh out which of the 7 basic goods described by Finnis are affected by the Act and to weigh such consequences under Finnis’ theory of practical reasonableness. Additionally, I will focus on the perspective of a pool of immigrants whose influx is the most predominant currently: Central Americans. As such, we will briefly go over the reasons why it is important to discuss the morality of current laws in accordance to Finnis’ view of natural law and the process by which Finnis believes people in general are more likely to make decisions which will lead to a live fulfilling life. We will continue to examine what are foreigners’ reasons to want to migrate to the United States as well as the U.S. government’s reasons for enacting restrictive laws such as IIRIRA and, finally we will analyze under Finnis’ practical reasonableness requirements whether the decision to enact such restrictive laws is reasonable.
According to Finnis, institutions of human law is required in order to secure the common good and requirements of practical reasonableness. Regardless of whether the law operates as a "social technique,"\textsuperscript{50} "method of social control"\textsuperscript{51} or as a "system of norms which provides methods,"\textsuperscript{52} according to different theorists, it is undeniable that the ends of the means (that is law) is to achieve the common good and practical reasonableness. The difference between each of the theorists' and their critics' viewpoints is during which time or in what context of their reasoning is the final result, which is the common good, is addressed. And what is referred to as the common good depends of numerous variants, all of which are addressed in the following paragraphs:

Natural law seeks to explain and provide a means to arrive at the conclusion of what is the common good. As first impression, it has been the presumption that when one speaks of natural law, one is speaking in pure theological terms which becomes an issue because not every one believes in deity. As such, Finnis proposes an alternative and more systematic view in which the morals which are intrinsically imposed by invoking the power of God in his commandments upon humanity are conveyed in a more reasonable and systematic manner. In essence, Finnis states that what is good or bad (or moral and immoral) depends on what is reasonable. Evaluating what is reasonable and, therefore, a common good will be the main point of the rest of this document.

"Good is to be pursued and evil is to be avoided," states John Finnis is, in a nutshell, the way to make decisions which are moral and good. Understanding the depth of Finnis' seemingly simple statement requires the analysis of the exhaustive list of 7 basic goods which, he states,

\begin{flushright}
\textsuperscript{50} Kelsen view on pg. 5
\textsuperscript{51} Hart
\textsuperscript{52} Raz
\end{flushright}
should be pursued by human race in general in order to live a fulfilling life. According to Finnis, the list of basic goods is exhaustive\textsuperscript{53} and applicable across the board throughout the entire human race though exercised differently. Among the examples of the diversity of expression of the basic goods, he proves that every culture in the world establishes in some way or another that certain extreme behavior such as rape or murder should be criminalized.\textsuperscript{54} Similarly, every culture also provides proper burial to the dead or celebrates the birth of a new child. \textsuperscript{55} Finnis categorized the basic goods applicable to all people in 7 basic goods which include life, knowledge, play, beauty, friendship, practicable reasonableness and religion.

a. **The Goods involved in IIRIRA**

The reason why millions of immigrants have opted to relocate to the United States can be summarizes as “searching for a better life.” The simplicity of this statement exactly compels the purpose for Finnis’ analysis in *Natural Law and Natural Rights*. In the terms of what makes a better life, this Act affects 6 of the 7 basic goods as outlined by Finnis on his book. Specifically, the amendments enacted by Illegal Immigration and Immigrant Responsibility Act of 1996 affects life, knowledge, friendship, play, beauty and practical reasonableness for millions of immigrants around the world. The only basic good which does not seem affected by the Act is religion as the freedom of spiritual believes of each person, or lack thereof, was one of the pillars on which this nation was built.

In my opinion the only good which is promoted by the Act is “life” because the main and foremost purpose to be accomplished by the Act is self-preservation of U.S. citizens and the

\textsuperscript{53} Any goods that are not particularly mentioned in the list should be a combination of pursuit of several goods of an subcategory of one of the goods (i.e. health is a subcategory of life and being involved in a team project involves the goods of knowledge, friendship and play).

\textsuperscript{54} Finnis at p. 83

\textsuperscript{55} Id. 
legal immigrants who already live here. Although the applications of life as I am utilizing it here does not precisely fit within the vitality definition to which Finnis refers in “the other basic values” chapter, it is certainly feasible to see that allocation of resources play is certainly connected with survival. Ensuring a normal growth of population is key for the government to guarantee effectivity in the allocation of financial resources. Some examples of the immediate consequences of closing down borders and making the process of immigrating into the United States more difficult is keeping the ratio of students to children is reasonably allocated so that education is imparted effectively, limiting the public financial resources which would otherwise be assigned to the prison system to ensure provisions for Social Security benefits such as disability or retirement for people who have earned wages in the United States amongst others. Through IIRIRA, it is clear to see that the U.S. government’s made a paternalistic decision to shut down the border in order to protect the people who had already been settled in the country.

Nevertheless, would it be reasonable for the U.S. paternalistic role to end at its borders when it is the most developed country in the continent where it geographically lays? In other words, is its individual pursue of life reasonable when contrasted against a common pursuit of life for the international community where it is located? We will further analyze the answer to these questions in the context of the requirement for practical reasonableness as established by Finnis.

Practical reasonableness refers to a bifurcated concept which entails the “fullness of well-being” of an individual. It is bifurcated because, according to Finnis, it refers to how the process of choosing relays on intelligence and/or freedom. When we translate the principles that lead to

56 That through human reproduction rather than through expedited influx of millions of individuals per year in addition to normal reproduction.
practical reasonableness to the needs of a nation, then we must consider the common good (to be discussed later) as a community. As such, the fullness of well-being to a nation can hardly be promoted by subordinating goods in the international community such as friendship, play, and knowledge. In the case of an advanced society as is the United States, it would be unrealistic to think that an enactment such as IIRIRA could be promoting friendship in the international community where there are third-world countries in need of guidance from more sophisticated societies. Shutting down borders and deporting gang members made in the United States without proper rehabilitation, though beneficial to the U.S., it could hardly be of assistance to already primitive societies in need of assistance.

Additionally, by preventing the influx of immigrants in the United States the Act deprives U.S. residents of the good of knowledge which could otherwise be attained from becoming acquainted with other cultures. The type of knowledge to which I am referring here is self-evident\(^57\) from the culture in which we live where we have melted customs and lifestyles into one that is most convenient to all of us. The comparison and melting of ideas is one of the reasons which have made this country thrive. Yet, through the enactment of IIRIRA, the U.S. government seems to affirm that it has had “all that it needs from the melting of cultures and no more is needed so we shut the borders down.” And although some of it may have some merit, the government fails to acknowledge how future generations may continue to benefit from keeping open borders, at least in this regard. If this view is a reflection of how the population actually thinks, then we are taking for granted the knowledge which we acquired from putting together numerous viewpoints that are influenced by each of the immigrants’ diverse backgrounds and we are not considering what we are doing for the common good of future generations.

\(^{57}\) Reference the knowledge chapter with self-evidence argument.
Other goods, such as play and beauty, are affected only indirectly by the Act since the creativity and beauty of cultures that could have been in the U.S. may be prevented from entering and being shown to the rest of the population by the harshness of immigration laws following the enactment of IIRIRA.

b. Practical Reasonableness

Finnis states that most humans pursue the basic goods the wrong “willy nilly” way, that is simply to satisfy our desires or “going with our gut” or for the utility of the goods rather than for themselves. Nevertheless, he argues that that process of making a decision in such ways would only bring temporary satisfaction and not fulfillment. Finnis theory, in colloquial terms, seeks to establish that “what should be fulfilling for humans should be the journey and not the end” and he provides a systematic process through which we could choose to make the journey as fulfilling as possible through the 9 requirements of practical reasonableness. According to Finnis, 1) we should live a life which follows the coherent direction of a plan with an interest or a preference for something 2) without discounting the rest of goods or 3) other people with dissimilar interests. With the projects and steps we take towards to completion of our life goals, 4) we should have a healthy pace being careful not to over attach ourselves to projects that may leave feelings of emptiness but also 5) not to abandon something and lack diligence to meet our goals. 6) Even if the steps we take towards fulfilling the life plan require of our focus on one or some of the basic goods over the rest, we should never lose sight that all goods are equally important and deserving of our attention. 7) Similarly, one must be mindful that each step will be measured by its effectiveness through the entire process and not only the final consequence. 8) Also, in deciding the path of our steps, we should never forget that our individual interest should
be compatible with the common interest of our community and that 9) we should follow our conscience.

In enactment IIRIRA, the U.S. government definitely seemed to have a coherent plan of life for the American population in mind: the fair allocation of financial resources as well and control over criminal activity in the United States. In the instant section of this article, we will seek to analyze through Finnis’ 9 requirements for practical reasonableness whether “the journey” it chose to achieve this life plan was a reasonable and fulfilling. Now that we have established what may have been the governor’s cohere plan of life, we will move to analyze whether the U.S. government made arbitrary preferences among the goods in enacting IIRIRA. As we have previously discussed in the section which focused on which goods were promoted or subordinated by IIRIRA, the U.S. government seemed to have placed more focus on the self-preservation of the nation’s population than on the rest of the goods which seemed to be mostly subordinated by the Act..

Further, whether the U.S. government made arbitrary preferences amongst people depends on what Finnis was referring to when he mentioned people in the third requirement for practical reasonableness. In this context, if Finnis was referring only to the pool of people that are directly affected by the amendment of a particular law, then IIRIRA enactment did not make an arbitrary preference for any immigrants as the Act affected all classifications of immigrants. Although some of the immigrants (i.e. the ones that entered without inspection) were affected more severely than the rest, the consequences were generally felt amongst the entire immigrant community. However, if the focus of arbitrary preference for people referred to the population in general, then we can certainly say that the IIRIRA amendments were severely arbitrary not only among the immigrants who were directly affected but also towards the U.S. citizen family.
members of immigrants. The preference for citizens who were not related to newcomer immigrants was blatant because they did not have to suffer from family separation resulting from deportation, or restriction for medical treatment for ill persons (including children) who had to be relocated in a foreign nations where the health services were not as nearly as adequate, or permanent detentions for their immigrants parents, children and siblings for having sought to reunite with them even through illegal manners.

Nevertheless, the fact that the U.S. Congress has taken measures to lighten the harsh effects of IIRIRA is evidence that it is sufficiently detached in its projects to carry out the life plan: to allocate resources and control criminality. The most progressive laws towards mitigating the harshness of IIRIRA have been promulgated during President Obama’s double term. For instance, in the year 2011, President Obama issued the “Morton Memorandum,” a document which instructed Department of Homeland Security counsel to stop removal proceedings for immigrants who, despite their unlawful status, had strong ties to the United States like U.S. relatives and were able to show evidence of their good moral character such as lack of criminal history, continuous employment in the United States and tax payment. For millions of illegal immigrants as the ones just described, removal proceedings have been administratively closed and they are able to continue their living in the United States with permission to continue to work and their families have been spared from unjust separation.\(^\text{58}\)

Also during President Obama’s term, numerous illegal immigrant under age 31 who initially entered the United States before their 16\(^{th}\) birthday and June of 2007, were able to obtain

temporary legal status known as Deferred Action for Childhood Arrivals. Additionally, a new type of waiver known as the “provisional waiver” was instated in 2012 for immigrants that have been illegally present in the United States but did not have any other grounds for inadmissibility and were the immediate relatives of U.S. citizens. The innovative and redeeming quality of this waiver stems from its innovative process which allows for illegal immigrants to await a result together with their families in the United States and does not bound the immigrant to a process of removal proceedings in the case of an unfavorable decision.

Although the commitment of the U.S. government to responsibly allocate financial resources among the population has remained important for the entire population; no matter their legal status. However, the government has failed to remain committed to the goals by the enactment of other measures which will advance the goal outside of the immigrants context. If the allocation of financial resources is one of main goals or life plan of the U.S. government driving the enactment of IIRIRA, then it is my opinion that more should be done towards this goal in the context of other problematic minorities such as people with recurring criminal records or recurring need for public assistance. For example, the U.S. government can do more to implement more exigent rehabilitative programs inside the jail system rather than being so focused on the punitive aspect of detention. Creating more rehabilitative programs is likely to make more effective the allocation of resources because the recidivism rate is likely to drop and

61 i.e. Prior removal or unexecuted removal order, fraud findings or convictions for crimes of moral turpitude or aggravated felonies.
the money can be better used elsewhere.62 This same fact is evidence of the U.S. lack of commitment towards the goal of more effectively controlling criminal levels in the U.S.

It is obvious by now that the act, as it was originally enacted, severely favors the good of life over the rest of the goods and it lacks respect for them in many of the steps that are consequence of IIRIRA’S enactment. Evidence of its harshness and its arbitrariness was obvious from the enactment of other counteractive laws which lessened the severity of the penalties for simply searching for a better living in the United States.

The analysis of whether the Act affected the common good is similar to the analysis of whether the Act made an arbitrary preference for certain people. According to Finnis, there are three possible perceptions of the common good. The first has to do with the self, “a common good is any good (i.e. any of the 7 basic goods) which we would all seek after individually.” Also, a common good is one which a number of people can participate in a variety of manners and occasions, and an ensemble of conditions which allow each person individually to pursue his or her best interest is also a common good. Additionally, the analysis of the common good is also closely related to the analysis of authority because it is the mechanism through which a community can decide which is the common good and how to pursue it.

Hence, first we must consider the government’s big picture life plan by the enactment of IIRIRA which was, as we already established, “to protect the interest of the population by ensuring allocation of resources and controlling criminal activity.” Further, we shall weigh

62 About two-thirds (67.8%) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6%) were arrested within 5 years. Recidivism of Prisoners Released in 30 States in 2005: Pattern from 2005 to 2010, by Alexia D. Cooper, Ph.D., Matthew R. Durose, Howard N. Snyder, Ph.D., U.S. Bureau of Justice Statistics, April 22, 2014. Available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986
whether the enactment of IIRIRA pursued to common good. In the context of LPRs who have
been stripped of their status due to a criminal conviction, we shall pose the question of whether
“allocating government resources and controlling criminal activity by foreigners” is a common
good that even they will perceive as good which they would also seek to pursue as any other
individual. Provided that there is remorse in the convicted alien for the crime for which he or she
was convicted, it is likely that he or she would deem the purpose of IIRIRA good and worth
pursuing. The basic good from which the principles leading to IIRIRA emanated is self-
preservation which is a subcategory of the good of life as we have previously established. Given
that such good is self-evident, it is likely that even a convicted immigrant being stripped of his
status would also be willing to “participate in a variety of manners and occasions.” Thus,
government efforts certainly satisfy the first two perspectives of the common good.

Nevertheless, the third of Finnis’ perspective of what is the common good, an “ensemble
of conditions which allow each person individually to pursue his or her best interest is also a
common good,” is rather a hard fit in this context. It would be ludicrous to believe that making
someone lose his legal status in the U.S. and all that is familiar and dear to him due to a bad
decision is consistent with the notion of creating an ensemble that allows the pursuit of self-
interest. Although the requirement of removal for these immigrants is likely to be seen as the
common good because it is an an opportunity to pursue our individual self-interest in ensuring
allocation of resources and control of criminal activity, it would be hardly a pursue of self-
interest for the convicted immigrant or his relatives. For them, the criminal conviction should
have been enough to control their prior commission of the crime and the allocation of resources
on them should be deemed as fair since they also contributed to the existence of the resources
(i.e. by paying taxes). Thus, even if the reasons for enacting IIRIRA seem like a common good at
the surface, the process used to achieve IIRIRA’s end goal is not necessarily one that promotes the common good which it seeks to obtain.

IIRIRA’s process to reach the goal of ensuring a fair allocation of resources and controlling criminal activity amongst immigrants involves deporting convicted immigrants regardless of whether they have achieved legal status in the U.S.63 Nevertheless, there are numerous options that could lead to the same outcome without causing such negative collateral effects64. Thus, how did Congress arrive to the decision that pursuing the good through the harsh penalties imposed by IIRIRA was the best way to achieve he goal? Here, it is unlikely that there was unanimity in enacting such harsh immigration laws since there is a vast immigrant population (and their non-immigrant relatives) who would certainly oppose them. Therefore, it is more likely that the enactment and consequences of IIRIRA was made by Congress’ exercise of authority.

According to Finnis, even a community’s choice for authoritative figures such as the members of congress are decisions which are coordinated either through unanimity or at least substantial convergence on the prospective ruler’s idea of a solution for the achievement of the common good. When voters elect members of Congress, they base their choice on which candidate’s idea of a solution to coordination problems more closely resembles their individual idea on how to achieve a solution for the common good. At the same time, each person’s determination of what is the common good should be made through a practical reasonableness analysis. However, in the world we live in, where most determinations of what is the common

63 Immigrants who have reached naturalization are no longer included in the classification of aliens who can face removal due to criminal convictions.
64 Examples of other approaches to achieve the good set forth by IIRIRA in the discussion of attachment and detachment.
good is made “from people’s guts,” policies like the ones imposed by IIRIRA are indirectly made by a community who believed that the harsh change in law was what was needed to achieve the ends of IIRIRA which is the common good.

Many of the immigrants who have been removed from the United States following the enactment of IIRIRA include thousands who have lived in the United States for their entire lives and no longer have any ties to their native countries. Many of them have families here, speak only English and have flourishing businesses which provide employment for Americans and other LPRs. Removal of such individuals certainly does not provide good conditions for the achievement of all individuals involved. Specifically, removal of immigrants like the ones described negatively affects their U.S. citizen relatives, employees and even the community within which they live. Moreover, the harsh penalties imposed broadly to most criminal convictions certainly does not provide an ensemble of conditions which allow the directly affected immigration to pursue his or her best interest individually. As such, even though the end goal of IIRIRA is compatible with the idea of the common good, the process involved to get there certainly does not promote the common good as viewed by Finnis’ third notion of it.

Additionally, the common good of our international community is not promoted when immigrants who commit crimes in the United States are condemned to serve time in U.S. jails before deportation but they do not receive any type of rehabilitative programs that could help them integrate to society again. All the opposite is true: immigrants that end up serving jail time in the U.S. prior to removal return with an even worse criminal mind from having survived the U.S. prison system. The result of the punitive and non-rehabilitative jail system is placing the countries where the criminal immigrants return in a worse position than before because the deportees return to continue to live the life they had in the U.S. prison system. The process just
described is what contributed to the initiation of the current gang-related lawlessness in Central America.

The most widespread and dangerous gangs in Central American countries are the Mara Salvatrucha gang (MS) and the Barrio 18 gang (MS-18). The gangs originated actually within the jail system in the United States but they were later deported to mostly Central American countries. Once back in their countries, gangs managed to vastly increase in number by recurring to excessively violent ways to recruit youths and children. This group is an easy and fruitful target for gangs because the governments of those countries do little to nothing to protect their well-being. As a result of the authorities’ lack of protection, children as young as 5-years-old perform farm-related work or are threatened into joining the gangs. Young men and women who try to escape to the United States only to be subjected to removal without due process by expedited removal or because they were not found credible by an asylum officer. Since their lives are at so much risk, they seek to enter the U.S. multiple times after the first removal and end up with criminal charges with jail time to be served, where they learned the criminal behavior they were trying to escape.

The analysis of the 9th requirement for practical reasonableness is similar to the third requirement as they both may have in common the use of the Golden Rule, “do onto others as

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65 “In 1996, Congress extended the get-tough approach to immigration law… the list of deportable crimes was increased, coming to include minor offenses such as drunk driving and petty theft. As a result, between 2000 and 2004, an estimated 20,000 young Central American criminals, whose families had settled in the slums of Los Angeles in the 1980s after fleeing civil wars at home, were deported to countries they barely knew... The deportees arrived in Central America with few prospects other than their gang connections; many were members of MS-13 and another vicious Los Angeles group, the 18th Street Gang (which took the name Mara 18, or M-18, in Central America).” How the Street Gangs took Central America, Ana Arana, Council on Foreign Relations, June 2005. Available at http://www.foreignaffairs.com/articles/60803/ana-arana/how-the-street-gangs-took-central-america
you wish they do to you.” However, the third requirement is more like an objective standard as it commands for refraining from making any arbitrary preference amongst people while the ninth requirement allows for some subjective flexibility because it has to do with one’s own conscience. Through the lens of our own conscience, one may refrain from doing on to other something because of a certain principle which may not be objective at all but simply implanted within us from our backgrounds. In the case of the United States, its background was for a long time to welcome immigrants from all parts of the world and welcoming the resulting diversity that came from accepting numerous culture in one land. However, as the trend changed for a more restrictive society where the government as well as the inhabitants became more concerned about their individual well-being, could we say that the conscience of the U.S. also changed? If we could say that it did and the change was for a more self-preserving attitude, then the U.S. would be satisfying the ninth requirement despite whether said arbitrary attitude for self-preservation without regard to the common good.

Nevertheless, the conscience of a large part of the U.S. population is likely in conflict with the enactment of IIRIRA because of its indirect yet harsh effect on themselves. For example, numerous U.S. citizen children and married women have lost their parental figures or supporting spouses as a consequence of the Act. In turn, these children and women have ended up in welfare or some other way of public assistance which is continuing to drain the government’s resources. Because there is a conflict between the obvious sentiments from at least a large part of the population who have been negatively affected by the and the actual legislation

66 "We highlight the consequences of the threat of detention and deportation for the physical and mental health of children and families. Additionally, we project that a continued policy of deportation at the level reported in 2012 would mean that hundreds of thousands of families will experience hardship in the coming years. In particular, children will sustain these impacts across multiple measures of mental health and well-being." Health of Children of Undocumented Immigrant Suffers from Failed Immigration Policies, by Human Impact Partners, June 5, 2013. Available at http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth_PressRelease.pdf
of the unfavorable laws, the enactment of IIRIRA may be perceived as an unjust law. According to Finnis, an unjust law fits within one or more of three categories: a) exploitation of governors’ opportunities by making stipulations intended by them not for the common good but for those with who they sympathize, or b) legislation of laws beyond their authority which should really be bound by the their own friend’s or party’s advantages or our of malice against some person or c) through distribution of the common stock to a class not reasonably entitled to it while denying it to other persons’ or by imposing on some a burden from which others.  

Though certainty of the legislators’ motivations are unknown to the public outside of what has been published, the effects that we have seen since the enactment of the law show that the law was at least designed to favor some groups of people over others. Thus, under Finnis’ analysis to identify unjust laws, IIRIRA may fit into at least the first category of unjust laws. However, immigrants’ inability to access public benefits such as unemployment immigration after working (sometimes harder than U.S. citizens and LPRs) and paying for those benefits as other groups are entitled to the benefits sometimes even by fraud could also be construed as unjust application of the law under the third category for unjust laws by Finnis.

IX. CONCLUSION

The bottom line of immigration laws is that most of the violations thereof are malum prohibitium rather than maul in se. Although all violations of the law are always morally wrong even if the laws are deemed unjust, sometimes those violations seemed justifiable when obedience of such laws puts at stake all that has sentimental value to any normal human being as is needing to live next to loved ones in a familiar place. In almost 10-year experience working with immigrants, I have encountered situations of moral people

67 Finnis at 352, 253.
(sometimes even more than the ones living here legally) who are striving to just live a normal life working and providing for their children yet they are criminalized only for having crossed a territorial border. Unfortunately, the circumstances in life, which in many times include developmental or health-related issues or the devastating circumstances in their countries of origin, do not allow for relocation. As such, they settle for living a life of fugitives because they simply do not see another option.

In the enactment of IIRIRA, the U.S. government’s exercised the type of self-preference of which Finnis refers to in the description of third of 9 requirements for practical reasonableness. He stated, “there is...reasonable scope for self-preference. But when all allowance is made for that, this third requirement remains a pungent critique of selfishness, special pleading, double standard, hypocrisy, indifference to the good of others who one could easily help and all other manifold forms of egoistic and group bias.” In the case of the United States, it could easily do more to help under-developed countries fight the “war on drugs” more effectively than expressing sympathy for their alarming death toll and issuing travel warnings for U.S. citizens. Yet the system implanted which simply seeks to close down the border and turn a close eye to problems that are happening in our front lawn is precisely the type of out-of-scope for self-preferential treatment behavior to which Finnis refers.

68 Finnis at 107.
69 "The Department of State continues to warn U.S. citizens that the level of crime and violence in Honduras remains critically high." Honduras Travel Warning. U.S. Department of State, June 24, 2014. Available at http://travel.state.gov/content/passports/english/alertswarnings/honduras-travel-warning.html