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ASSESSING COLLATERAL IMMIGRATION CONSEQUENCES OF CRIMINAL JUSTICE DECISIONMAKING WHEN THE DEFENDANT IS AN ALIEN

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All criminal convictions visit hardship and a variety of disabilities upon the defendant and his or her family. When the defendant is an alien, he or she often will be deemed "deportable" as a result of criminal conviction. For some aliens, deportation may be a temporary and remediable sanction; for others, it may mean lifetime exclusion from the U.S. The specific immigration consequences for each criminal alien turn on a variety of findings and discretionary decisions made during the course of the criminal litigation. Therefore, criminal proceedings conducted without regard to immigration consequences can lead to extraordinarily harsh results.

This essay provides a brief overview of the sometimes life-altering and irremediable immigration consequences that flow from even "routine" decisions by federal defense counsel, prosecutors, and judges. A caveat is in order: the provisions described below are current through the recent enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[1] In recent years, however, the Immigration and Nationality Act ("INA")[2] has been vulnerable to repeated amendments, and its crime-related provisions are frequent targets of legislative reform. At the moment, comprehensive immigration bills are again pending before Congress, and while most of the INA's parameters are likely to remain stable for a while, the specifics are vulnerable and should not be relied upon without first checking the current text.[3]

I. The Nature of the Crime and Attendant Penalties

Unlike the guideline system, where sentences are designed to respond *both* to generic features of the offense of conviction ("charge offense") and to factual features of the offense as it was actually or allegedly committed ("real offense"), the INA represents a nearly exclusively charge offense-driven system. Immigration consequences vary greatly with the INA's classification of the offense of conviction and, in some cases, its actual or potential penalty.

A. "Aggravated Felonies"

The most serious criminal classification in the INA is that of "aggravated felony," defined in 8 U.S.C. § 1101(a)(43). As might be expected, this term encompasses many of the most egregious criminal offenses, such as murder, drug or firearms trafficking, kidnapping and explosive materials offenses. However, the underlying crime need neither be classified as a felony nor generally recognized as "aggravated" so long as it can be fairly characterized as falling within one of the twenty or so broad groups of crimes included in the statutory definition.

Some offenses are described with specific reference to federal criminal statutes, such as money laundering, child pornography and RICO. In addition, any "crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)" is an aggravated felony, as is an attempt or conspiracy to commit a crime of violence. Most other aggravated felonies are described in very general terms, highlighting particular offense elements; they include, for example, "a theft offense (including receipt of stolen property) or burglary offense," "an offense that relates to the owning, controlling, managing, or supervising of a prostitution business," and "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony." Attempts and conspiracies to commit any of the above offenses are also deemed aggravated felonies.

Several of the offense types eligible for aggravated felony status qualify only if the *actual* term of imprisonment *imposed* meets a specified floor. For example, nonpolitical crimes of violence, alien smuggling, and theft or burglary offenses are aggravated felonies only when the imposed term (regardless of any suspension of imprisonment) is at least 5 years; document fraud offenses are aggravated felonies if a term of 18 months or more (regardless of suspension) is imposed. Where the applicability of the definition hinges on the sentence imposed, sentencing decisions can be structured so as to ensure or avoid the aggravated felony classification.

Many other eligible offense types qualify as aggravated felonies only where the total term of imprisonment that *may be* imposed meets a specified floor. RICO, forgery, obstruction of justice, and failure to appear for sentencing offenses, for example, are aggravated felonies only where a sentence of 5 years' imprisonment or more *may* be imposed. Guideline sentencing may present greater opportunities for strategic decisionmaking than are available in non-guideline jurisdictions since sentencing ranges under the guidelines, accounting as they do for a specific offender's criminal history and offense characteristics, are generally much narrower than legislatively prescribed minimum and maximum ranges. At the same time, guideline sentencing may present unique complications. First, it is possible, consistent with the traditional approach of the immigration law, to construe the phrase "for which a sentence of *[X]* year[s] or longer may be imposed"[4] as including the maximum possible sentence under the

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guidelines for *any* offender violating the statute in question, rather than as referring to the maximum available sentence for the *particular* offender based on the sentencing judge's findings of fact. A second, related issue is whether (and how) the authority to depart from a guideline sentence affects the length of sentence that "may be imposed" for any particular offense.

B. Controlled Substance Offenses

Aliens who violate controlled substance laws are, like aggravated felons, also subject to severe and irremediable immigration consequences. Under the INA, an alien who is

> convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.[5]

With respect to federal convictions, this provision is broad enough to encompass virtually any kind of drug-related conduct that Congress has deemed criminal.

Drug offenses qualifying as "drug trafficking crimes," as defined in 18 U.S.C. § 924(c), are also "aggravated felonies" under the INA. These offenses, therefore, give rise to all the immigration-related disabilities associated with both categories of crimes.

C. "Crimes of Moral Turpitude"

Among the most perplexing offense classifications created by the INA are "crimes of moral turpitude." An alien who commits two crimes of moral turpitude "not arising out of a single scheme of criminal misconduct" is deportable[6]; an alien who commits one crime of moral turpitude is deportable if the crime is (a) committed within a specified period of time after entry[7] and (b) punishable by a sentence of one year or longer.[8]

The INA does not define "crime of moral turpitude." The Board of Immigration Appeals has (unhelpfully) opined that moral turpitude "refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[9] Whether a particular offense qualifies is generally determined by examining the "inherent nature of the crime as defined by the statute and as limited and described by the record of conviction (indictment, plea, verdict, and sentence).[10] A voluminous body of administrative and judicial precedent has developed to analyze, offense by offense, which crimes are morally turpitudinous for immigration purposes and which are not.[11]

D. Firearms Offenses

Conviction under any law for purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying any "firearm or destructive device" as defined in 18 U.S.C. § 921(a), or for attempting or conspiring to do so, is ground for deportation[12] and for other serious collateral immigration-related disabilities. Classification of the offense as a misdemeanor or felony is irrelevant, as is the severity of the sentence.

E. Other Offenses

Other criminal offenses which result in additional immigration consequences upon conviction include the commission of, or attempts or conspiracies to commit, espionage, sabotage, treason, sedition, threats against the President, military expeditions against friendly nations, trading with the enemy, violations of the Military Selective Service Act, violations of alien travel restrictions and documentation requirements, and importation of an alien for prostitution or other immoral purpose, various immigration crimes including failure to register and document fraud, and gambling offenses.[13] Still other potentially criminal activities give rise to immigration-related disabilities even *without* a conviction. These include alien smuggling, entry without inspection, terrorist activities and conduct endangering national security, prostitution-related activity or "other unlawful commercialized vice," and polygamy.[14]

II. The Consequences: Limitations and Options

Conviction of a crime within the scope of any of the INA categories described above usually results in a finding of deportability. From an alien's perspective, however, the fact of deportability may be less important than the attendant restrictions on present and future options for remaining in or returning to the U.S. Each of the INA categories of crime creates differing levels of flexibility with respect to actual deportation and/or eventual reentry. Depending on the basis for the finding of deportability, about which the criminal proceedings are usually determinative, the alien may be eligible to have particular grounds of deportation waived, to avoid deportation on equitable grounds, or to minimize the period of time for which he must remain outside the U.S. In addition, the nature of the crime may dramatically narrow or eliminate procedural rights and opportunities for judicial review. Finally, if an alien is ultimately required to leave the U.S., his criminal history directly affects whether and when he'll ever be able to reenter the U.S. lawfully.

A. Eligibility for Waivers of Deportability

After conviction for an aggravated felony or crime(s) of moral turpitude, only a full and uncondi-

tional executive pardon will lead to a finding of non-deportability.[15] However, aliens who are longtime permanent residents of the U.S. (for at least 7 consecutive years) may be eligible for a discretionary waiver of deportation, despite deportability, under INA § 212(c) [8 U.S.C. §1182(c)].[16]

Until the recent enactment of the AEDPA, section 212(c) provided at least the opportunity for discretionary relief from crime-related deportation[17] for compelling personal and humanitarian reasons. Under § 440(d)[18] of the AEDPA, however, aliens convicted of an aggravated felony, a controlled substance offense, a firearms offense, any of the miscellaneous criminal offenses described in INA §241(a)(2)(D), or two crimes of moral turpitude, either of which provides independent ground for deportation, are ineligible for the remedy. As a practical matter, § 440(d) appears to mean § 212(c) waivers will be available only when the longtime resident alien is convicted of (1) only one crime of moral turpitude; or (2) two crimes of moral turpitude, at least one of which does not provide grounds for deportation because it (a) was committed more than 5 years after an "entry," or (b) was subject to a maximum sentence of less than 12 months.[19] From a resident alien's standpoint, therefore, conviction of a crime involving moral turpitude may be vastly preferable to an arguably less serious conviction for, for example, a firearms offense.

B. Eligibility for Affirmative Relief from Deportation

Two additional forms of equitable discretionary relief from deportation may be available at a deportation hearing: suspension of deportation[20] and asylum or withholding of deportation.[21] In crime-related deportations, the suspension remedy may be available to longtime residents who can show that deportation would result in "exceptional and extremely unusual hardship" to the alien or immediate family members who are U.S. citizens or permanent residents. In addition to hardship, the alien must establish ten years of continuous physical presence in the U.S., during which time the alien has been a person of "good moral character." Restrictions on eligibility are subsumed in the INA's statutory definition of "good moral character."[22]

Under the INA's definition, aliens convicted of an aggravated felony are *permanently* barred from eligibility for a finding of good moral character, regardless of motive or lack of personal culpability with respect to the underlying offense. Some other criminal convictions create *temporary* bars: for example, commission of a crime of moral turpitude or a controlled substance offense subject to a maximum term of 1 year's imprisonment or, if convicted, involving an actual term of no longer than 6 months, precludes a finding of good moral character. Similarly, multiple criminal convictions for any crimes temporarily bar a finding of good moral character if the aggregate sentences to confinement imposed total 5 years or more. Any actual confinement to a penal institution for 6 months or longer during the statutory period will bar a finding of good moral character. Finally, "illicit trafficking" in controlled substances, alien smuggling, polygamy, prostitution and related activities, and certain gambling activities will temporarily preclude findings of good moral character, even absent criminal charge or conviction.

For purposes of preserving the viability of the suspension option, then, an aggravated felony is the least favored criminal disposition. Moral turpitude, controlled substance, and other offenses temporarily barring findings of good moral character will have that effect even absent charge or conviction: this may occur, for example, where the criminal proceedings result in findings of "relevant conduct" or specified aggravating sentencing factors establishing the essential elements for such a charge. With respect to these offenses, immediate eligibility for suspension of deportation is preserved only when the actual or possible penalties fall within the parameters described above. Aliens convicted of firearms offenses and many of the miscellaneous criminal deportation grounds may remain immediately eligible for suspension, so long as those offenses (or their "real offense characteristics") do not also establish the elements of a crime of moral turpitude; if they involve imposition of a term of imprisonment, only confinement for less than 180 days will preserve immediate eligibility.

Even where findings of good moral character are not statutorily precluded, suspension is a discretionary remedy. In addition to facing already formidable barriers to eligibility (extraordinary hardship and 10 years good moral character), aliens deportable on any criminal grounds will be substantially disadvantaged in the immigration judge's weighing of the equities.

The second remedy, or pair of remedies, is a grant of asylum or the closely-related withholding of deportation. Asylum is available, in the discretion of the immigration judge, to an alien who can establish she is unable or unwilling to return to the home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[23] Withholding of deportation is mandatory, not discretionary, when the alien can establish her life or freedom would be threatened on account of one of the five aforementioned bases.[24] Aliens convicted of aggravated felonies, however, are ineligible for either asylum or withholding. Also, aliens convicted of any "particularly serious crime," rendering them "a danger to the community," are similarly ineligible for otherwise mandatory withholding of deportation.

C. Scope of Procedural Rights and Judicial Review

The AEDPA amends the INA to provide that aliens who are convicted of aggravated felonies, controlled substance offenses, firearms offenses, miscellaneous criminal offenses described in INA § 241(a)(2)(D), or two crimes of moral turpitude, either of which provides independent ground for deportation, are subject to the expedited deportation proceedings during the alien's term of incarceration formerly held only for aggravated felons.[25] These proceedings, often conducted at prison locations remote from the alien's counsel and family, present formidable barriers to a meaningful adversarial hearing. Furthermore, any final order of deportation on the basis of any such conviction "shall not be subject to review by any court."[26]

Aliens who are not lawful permanent residents and are convicted of aggravated felonies are subject to even more abbreviated deportation procedures, known as "administrative deportation." Under this mechanism, procedural rights are severely curtailed, judicial review is similarly barred, and all discretionary relief from deportation is deemed unavailable.[27]

D. Bars to Lawful Reentry

A deported alien faces multiple bars to lawful reentry. Nearly every crime-related ground for deportation presents an analogous ground for exclusion. The most notable exceptions are single firearms offenses and, oddly enough, aggravated felonies, except insofar as they also qualify as controlled substance offenses or crimes of moral turpitude.[28] That is not to say aggravated felons face no barriers to reentry; to the contrary, once deported, an aggravated felon is prohibited from reentry without advance consent for a period of 20 years; any other previously deported alien may reapply for admission after 5 years, provided he can overcome applicable grounds for exclusion.[29] Decisions regarding excludability are made in the first instance by consular officers abroad, and an applicant for admission has no right to a hearing or to administrative or judicial review. A second excludability determination, made by an immigration inspector at the border, results in mandatory detention and entitles the alien to a hearing and administrative review upon request; judicial review, however, is limited to petitions for writs of habeas corpus.[30]

Discretionary waivers are available for some crime-related grounds of excludability (most notably moral turpitude offenses other than murder or torture; multiple criminal offenses; and single convictions for possession of 30 grams or less of marijuana). Eligible aliens are those who are otherwise qualified for lawful permanent residence and can establish either (1) that 15 years have passed, the alien has been rehabilitated, and admission would not be contrary to the national welfare, safety, or security; or (2) that exclusion would otherwise create extreme hardship for the alien's U.S. citizen or permanent resident spouse, parent, or child.[31]

E. Enhanced Penalties for Unlawful Reentry

Congress has provided for enhanced sentencing in criminal prosecution for unlawful reentry following a prior deportation.[32] The Sentencing Commission has accommodated these policies by providing a 4-level enhancement (from an original base offense level of 8) where the prior deportation followed conviction for a felony, other than a felony involving violation of the immigration laws, and a 16-level enhancement where the prior deportation followed conviction for an aggravated felony. To qualify for the sentence enhancement, the felony or aggravated felony need not have served as the ground for the prior deportation.[33] As additional deterrence, the criminal penalty for aiding or assisting the entry of a previously deported aggravated felon is also enhanced from base offense level 9 to base offense level 20.[34]

III. Focusing on Critical Decisions

A. Charge and Plea Discussions

When the defendant is an alien, the nature of the criminal charge, terms of any plea bargain, and stipulations of fact can all affect the collateral immigration consequences. There may well be opportunities to account for such consequences during plea negotiations or other discussions among counsel. Armed with a sense of how these decisions may affect the alien's future opportunities to reunite with family or avoid persecution, for example, counsel may seek to achieve criminal law objectives while preserving one or more immigration-related options. An alien may indeed prefer pleading guilty to a more serious offense (e.g., felony transporting an alien) where the less serious option (e.g., misdemeanor aiding and abetting illegal entry) would involve admissions of elements of deportability or be conclusive on the issue of future excludability.[35] Similarly, avoidance of an aggravated felony charge will often be of paramount concern, even at the cost of pleading guilty to an arguably more serious crime of moral turpitude, insofar as options for relief from deportation or waivers of future excludability may remain available for the latter. In some cases, of course, it may be possible to identify charges appropriate to the facts that avoid immigration consequences altogether, e.g., a crime not involving moral turpitude.

B. "Voluntariness"

An alien's lack of awareness of the full range of immigration consequences attendant to a guilty plea does not vitiate its voluntariness for purposes of

Federal Rule of Criminal Procedure 11, generally on the ground that immigration consequences are "collateral" rather than "direct."[36] Many federal judges advise alien defendants that a plea of guilty "may result in deportation" as a routine part of the Rule 11 colloquy; at least fourteen states require such advice by statute or court rule.[37] In light of the diverse consequences of particular charges, however, awareness of the possibility of deportation, without more, may not enable the defendant to make a fully informed choice when options may be available. Although failure to do so would not likely rise to the level of constitutionally ineffective assistance of counsel, both defense counsel and the prosecutor may be viewed as ethically obligated to evaluate "the whole picture" in advising the alien and selecting the charge.

C. Findings of Fact

During the sentencing phase, findings of fact may also directly affect immigration consequences. First, numerous grounds for deportation or exclusion, as well as types of affirmative relief, are triggered by actual or potential sentence lengths. Plea discussions that include consideration of government sentencing recommendations may properly be affected by these immigration provisions. Second, to the extent possible, offense elements, such as use of a weapon, might be incorporated into the sentence as aggravating factors rather than as elements of the offense of conviction, thus avoiding the severe deportation and exclusion consequences associated with firearms convictions. Where such arrangements lead to longer sentencing ranges, the long-term results may nevertheless be preferred.

Third, nothing prevents counsel from requesting judicial findings on the record with respect to considerations such as good moral character and strong family or community ties which may favorably affect the exercise of administrative discretion in future immigration proceedings. Similarly, although binding judicial recommendations against deportation are no longer authorized by law, neither are judges expressly prohibited from opining on the undesirability of deportation in an appropriate case. Participants should also be aware that factual findings on the record may serve to ensure deportation, even where the offense of conviction does not. For example, drug abuse or addiction provides an independent ground for deportation, regardless of conviction.[38] Avoiding such findings where they are unnecessary to the criminal disposition will avert immigration complications.

D. Departures

Finally, it is not clear that departures to account for severe collateral immigration consequences will never be warranted, even though there is some authority to the contrary.[39] Some federal courts have recognized circumstances under which downward departure might be appropriate. The Eighth Circuit noted in dicta there might arise an "unusual case" of unlawful reentry where compelling humanitarian concerns justify downward departure from the 20-level aggravated felony enhancement.[40] The D.C. Circuit found departure permissible where the defendant, because of his status as a deportable alien, would face objectively more severe prison conditions than he would otherwise.[41] While some courts have suggested downward departures would not alleviate the harshness of deportation, but would merely expedite it,[42] where immigration consequences turn in part on the length of sentence, departure may significantly relax (or even eliminate) the deportation sanction. Courts have also rejected upward departures premised on the notion that deportation following release would frustrate the imposition of a fine or supervised release, reasoning that the Commission must have been aware when drafting the relevant guidelines, that convicted defendants would face immediate expulsion.[43] These cases usually involve illegal reentry offenses, where deportation is undoubtedly a consequence of every case. Given the breadth and the vagaries of immigration law, the same assumption may not be reliably made with respect to general criminal offenses, where the defendant's status as an alien is merely coincidental to the crime.

In conclusion, noncitizen defendants often face the equivalent of permanent and irremediable banishment—lifetime separation from home and family—as a result of even relatively minor involvement with the criminal justice system. Compared with other types of collateral consequences suffered by citizen defendants, immigration consequences are fundamentally different in kind. To permit the criminal justice system to act without careful consideration of immigration consequences, where it is possible to do so without sacrificing the ends of justice, is to display an extraordinary lack of compassion.

NOTES

[1] Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[2] 8 U.S.C. §§ 1101 et seq.

[3] Changes in the immigration law regarding criteria for deportation and exclusion are frequently deemed retroactive. Retroactive deportability is not subject to challenge under the Constitution's ex post facto clause, on the ground that deportation is not "punishment." *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 593-95 (1952). Although this conclusion is unlikely to change with respect to immigration law, ongoing litigation over expansion of the concept of "punishment" for various

constitutional purposes warrants careful attention. *E.g., United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *amended by* 56 F.3d 41 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996); *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996); *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994); *Austin v. United States*, 113 S. Ct. 2801 (1993).

[4] This specific language appears, in relevant part, in INA §§ 101(a)(43)(J), (R), (S), (T) (defining "aggravated felony") and § 241(a)(2)(A)(i)(II) (defining deportability for crimes of moral turpitude). Language strikingly similar in import and effect appears in INA § 212(a)(2)(A)(ii)(II) ("the maximum penalty possible for the crime") and § 101(a)(43)(P) ("if the underlying offense is punishable by imprisonment for a term of 5 years or more").

[5] INA § 241(a)(2)(B) [8 U.S.C. § 1251(a)(2)(B)].

[6] INA § 241(a)(2)(A)(ii) [8 U.S.C. § 1251(a)(2)(A)(ii)]. While the Board of Immigration Appeals ("BIA") interpreted "single scheme of criminal misconduct" restrictively in *Matter of Adetiba*, Int. Dec. 3177 (BIA 1992), the federal circuit courts are in conflict. *See id.; see also* 72 Interp. Releases 1238, 1239 (Sept. 11, 1995).

[7] "Entry" is defined by INA § 101(a)(13) [8 U.S.C. § 1101(a)(13)]. *See also Matter of Pierre*, 14 I & N Dec. 467 (BIA 1973); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

[8] INA § 241(a)(2)(A)(i) [8 U.S.C. § 1251(a)(2)(A)(i)], *as amended by* AEDPA § 435.

[9] *Matter of Danesh*, 19 I & N Dec. 669, 670 (BIA 1988).

[10] *Matter of Short*, Int. Dec. 3125 (BIA 1989); *see also Marciano v. INS*, 450 F.2d 1022 (8th Cir. 1971) (Eisele, J., dissenting) (describing traditional and minority views on proper scope of court's inquiry).

[11] For helpful summaries, *see, e.g.*, Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes § 6.2 & Appendix E (rev. ed. 6/95); *see also* Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425, 433-36 (1986).

[12] INA § 241(a)(2)(C) [8 U.S.C. § 1251(a)(2)(C)].

[13] INA §§ 241(a)(2)(D), (a)(3), 101(f) [8 U.S.C. §§ 1251(a)(2)(D), (a)(3), 1101(f)].

[14] INA §§ 241(a)(1)(A), (a)(1)(B), (a)(1)(E), (a)(4)(B) [8 U.S.C. §§ 1251(a)(1)(A), (a)(1)(B), (a)(1)(E), (a)(4)(B)]; §§ 212(a)(2)(D), (a)(3), (a)(6)(C), (a)(6)(E), (a)(9)(A) [8 U.S.C. §§ 1182(a)(2)(D), (a)(3), (a)(6)(C), (a)(6)(E), (a)(9)(A)].

[15] INA § 241(a)(2)(A)(ii) [8 U.S.C. § 1251(a)(2)(A)(ii)].

[16] In the exercise of this discretion, the immigration judge will consider a variety of adverse factors, including the gravity of the offense; significant violations of the immigration laws; the nature, recency, and seriousness of the alien's criminal record; and other evidence of bad character or undesirability. On the favorable side, the judge may also consider family ties in the U.S.; long duration of residence; hardship to the alien and his or her family; military service; employment record; property or business ties in the U.S.; community service; good moral character; and proof of rehabilitation if a criminal record exists. *Matter of Marin*, 16 I & N Dec. 581, 584 (BIA 1978).

[17] By its express terms, § 212(c) affords relief only from exclusion, not deportation, after a permanent resident alien has departed the country. However, to avoid fatal equal protection defects, the remedy has been judicially and administratively extended to long-time residents facing deportation. *See, e.g., Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I & N Dec. 26, 30 (BJA 1976); *Lozada v. INS*, 857 F.2d 10, 11 n.1; *Katsis v. INS*, 997 F.2d 1067, 1070 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 902 (1994); *Chiravacharadhikul v. INS*, 645 F.2d 248, 248 n.1 (4th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Mantell v. INS*, 798 F.2d 124, 125 & n.2 (5th Cir. 1986); *Gonzalez v. INS*, 996 F.2d, 804, 806 (6th Cir. 1993); *Variamparambil v. INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977); *Marti-Xiques v. INS*, 741 F.2d 350, 355 (11th Cir. 1984); *see also Matter of Hernandez-Casillas*, Int. Dec. 3147 (Att'y Gen. 1991), *aff'd mem.* 983 F.2d 231 (5th Cir. 1993) (declining to reconsider the *Francis/Silva* construction of § 212(c)).

[18] This section, formerly § 441(d), was renumbered pursuant to a technical corrections bill, S. Con. Res. 55, 142 Cong. Rec. S4073-02 (daily ed. April 24, 1996), that deleted a conflicting provision, § 431, from the AEDPA.

[19] For a preliminary assessment of the impact of § 440(d), *see* National Immigration Project of the National Lawyers Guild, 212(c) Practice Advisory, *reprinted in* 73 Interp. Releases 662 (May 13, 1996).

[20] INA § 244(a) [8 U.S.C. § 1254(a)].

[21] INA §§ 208(a), 243(h) [8 U.S.C. §§ 1158(a), 1253(h)].

[22] INA § 101(f) [8 U.S.C. § 1101(f)].

[23] INA § 208(a) [8 U.S.C. § 1158(a)] (incorporating by reference INA § 101(a)(42)).

[24] INA § 243(h) [8 U.S.C. § 1253(h)].

[25] AEDPA § 440(f) (amending INA § 242A(a) [8 U.S.C. § 1252a(a)]).

[26] AEDPA § 440(a) (amending INA § 106(a)(10) [8 U.S.C. § 1105a(a)(10)]).

[27] AEDPA § 442(a)-(d) (amending INA § 242A(b) [8 U.S.C. § 1252a(b)]). For a pre-AEDPA analysis of administrative deportation, *see* Lory Rosenberg, *Administrative Deportation Proceedings: Accomplishment or Abomination?*, 72 Interp. Releases 721 (May 25, 1995).

[28] *See* INA § 212(a)(2) [8 U.S.C. § 1182(a)(2)].

[29] INA § 212(a)(6)(B) [8 U.S.C. § 1182(a)(6)(B)].

[30] INA §§ 235(a) [8 U.S.C. § 1225(a)] (findings of excludability), 236(b) [8 U.S.C. §1226(b)] (administrative review), 106(b) [8 U.S.C. § 1105(a)] (judicial review).

[31] INA § 212(h) [8 U.S.C. § 1882(h)].

[32] INA § 276(b) [8 U.S.C. § 1326(b)].

[33] § 2L1.2(b) & comment. n.4.

[34] § 2L1.1(a), as applied to sentences following conviction under 8 U.S.C. § 1327.

[35] *See* INA §§ 241(a)(1)(E)(i) [8 U.S.C. § 1251(a)(1)(E)(i)], 212(a)(6)(E)(i) [8 U.S.C. §1182(a)(6)(E)(i)].

[36] *See, e.g., United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971); *see also* Kesselbrenner & Rosenberg, *supra* note 13, § 4.2(a)(1), (3) (rev. ed. 11/95) (citing numerous cases).

[37] Cal. Penal Code § 1016.5; Conn. Gen. Stat. Ann. § 54-1j; D.C. Code Ann. § 16-713; Fla. R. Crim. P. 3.172(c)(viii); Haw. Rev. Stat. §§ 802E-1 to -3; Mass. Gen. Laws Ann. ch. 278, § 29D; Mont. Code Ann. § 46-12-210(1)(f); N.Y. Crim. P. Law § 22.50(7); N.C. Gen. Stat. § 15A-1022(a)(7); Ohio Rev. Code Ann. § 46-12-210(1)(f); Or. Rev. Stat. §135.385(2)(d); Tex. Code Crim. P. art. 26.13(a)(4); Wash. Rev. Code Ann. § 10.40.200; Wis. Stat. § 971.08(1)(c)-(3).

[38] INA § 241(a)(2)(B)(ii) [8 U.S.C. § 1251(a)(2)(B)(ii)].

[39] *See, e.g., U.S. v. Restrepo*, 999 F.2d 640 (2d Cir.), *cert. denied*, 114 S. Ct. 405 (1993); *U.S. v. Mendoza-Lopez*, 7 F.3d 1483, 1487 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1552 (1994); *U.S. v. Nnanna*, 7 F.3d 420, 422 (5th Cir. 1993); *U.S. v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990); *U.S. v. Chavez-Botello*, 905 F.2d 279, 281 (9th Cir. 1990); *U.S. v. Polanco*, 47 F.3d 516 (2d Cir. 1995).

[40] *U.S. v. Maul-Valverse*, 10 F.3d 544, 547 (8th Cir. 1993).

[41] *U.S. v. Smith*, 27 F.3d 649 (D.C. Cir. 1994); *but cf. Restrepo*, 999 F.2d at 645-46.

[42] *E.g., Restrepo*, 999 F.2d at 647.

[43] *See, e.g., U.S. v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990).