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Recognizing Constitutional Rights of Excludable Aliens: The Ninth Circuit Goes out on a Limb to Free the Flying Dutchman - Dispensing with a Legal Fiction Creates an Opportunity for Reform

Wendy R. St. Charles
Florida State University College of Law

RECOGNIZING CONSTITUTIONAL RIGHTS OF EXCLUDABLE ALIENS: THE NINTH CIRCUIT GOES OUT ON A LIMB TO FREE THE "FLYING DUTCHMAN"*—DISPENSING WITH A LEGAL FICTION CREATES AN OPPORTUNITY FOR REFORM

WENDY R. ST. CHARLES**

"What the government has lost sight of is the sense of proportion that must inform any governmental intrusion on liberty."[1]

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* In *Mezei v. Shaughnessy*, Judge Learned Hand in his dissenting opinion compared the plight of excluded aliens to that of the "Flying Dutchman" condemned to sail the sea until the Day of Judgment. 195 F.2d 964, 971 (2d Cir. 1952) (dissent), *rev'd*, 345 U.S. 206 (1953).

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1. Barrera-Echavarria v. Rison, 21 F.3d 314, 316 (9th Cir. 1994), *vacated*, 44 F.3d 1441 (9th Cir. 1995), *petition for cert. filed* __ U.S.L.W. ___ (U.S. Jul. 12, 1995) (No. 95-5309).

2. Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), *vacated*, 44 F.3d 1441 (9th Cir. 1995), *petition for cert. filed* __ U.S.L.W. ___ (U.S. Jul. 12, 1995) (No. 95-5309).

3. 988 F.2d 1437 (5th Cir. 1993), *opinion amended*, 997 F.2d 1122 (5th Cir. 1993) (deleting footnotes 4 and 24 only).

I. INTRODUCTION

For some time our Courts have perpetuated a legal fiction, not of corporate entities, but of human liberty. There are persons, within our country and the confines of our prisons, who are fictionally excluded from being recognized as within our borders. They are deemed "excludable aliens," and are, in theory, "stopped" at our borders.[4] Thus, regardless of their physical presence within the United States, our government excludes them from the most fundamental protections demanded by our Constitution, including the right to be free from unlawful confinement.[5] In fact, the United States government has defined these individuals as "non-persons."[6]

Since 1953, the Supreme Court has applied the "entry doctrine" to excludable aliens detained for prolonged periods without trial or conviction.[7] The result has been virtual acquiescence by the court to human rights deprivations despite the remonstration of Justice Marshall, who stated, "[o]nly the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement."[8] This "perverse" reading of the Constitution has prevailed for more than four decades.[9]

On March 31, 1994, the Ninth Circuit came forward with a bold proclamation, defying the Court's past failed acknowledgements, to end an era of jurisprudential perversity and move the American legal system forward into an era of enlightenment in immigration law. The Ninth Circuit announced that excludable aliens within the

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4. *E.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953) [hereinafter *Mezei*].

5. In *Jean v. Nelson* the Eleventh Circuit rejected any judicially-imposed restraint on the indefinite confinement of excludable aliens, notwithstanding the duration of that confinement. 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). *Cf., Barrera*, discussed, *infra*, note 23 (constitutional restraint on confinement recognized in *Barrera* based on *Foucha*).

6. Under *Mezei*, due process protection applied to"persons" and excludable aliens simply do not fall into that category. 345 U.S. at 206; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983) (excludable aliens have the status of non-persons); Christopher R. Yukins, *A Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501 (1987) (the fiction is the functional equivalent of treating excludable aliens as non-persons).

7. The "entry doctrine" fiction authorizes the detention of aliens pending administrative proceedings to determine an alien's status for admission to the U.S. The doctrine can be traced back as early as 1892, where it was applied to a Japanese immigrant permitted to stay in a mission pending a decision of her admissibility into the United States. Nishimura Ekiu v. United States, 142 U.S. 651 (1892). It was more recently applied by the Supreme Court in *Mezei* ,at o an alien held in detention at Ellis Island for two years pending deportation. Mezei, 345 U.S. at 215. Therein the Court reasoned that temporary harborage is solely an act of legislative grace which bestows no additional rights and "shall not be considered a landing." *Id.*

8. Jean v. Nelson, 472 U.S. 875 (1983) (Marshall, J., dissenting).

9. *See infra* note 12.

jurisdiction of the United States are persons to whom constitutional protections apply.[10] After eight years of imprisonment because of his status as an excludable alien, Barrera-Echavarria was ordered released. In doing so, the court in *Barrera-Echavarria v. Rison*[11] drew a striking line in the shifting sands of a judiciary mostly reluctant to recognize any rights of excludable aliens.[12]

This article reviews the *Barrera* decision and the history of the fiction giving rise to the anomalous creature of statute designated the "excludable alien." This article then explores the tension between the judicial deference that has served to perpetuate the fiction, the political policies that seek to preserve it, and the moral commitment to human rights proclaimed by our nation. Consideration is then given to the ramifications of abolishing the fiction, along with a look at proposed reform.

II. RECENT DEVELOPMENTS

A. A Bold Departure: Barrera-Echavarria v. Rison[13]

In May of 1980, Fidel Castro opened the doors of his prisons to release his undesirable constituents into the already swollen flow of Mariel refugees fleeing to the United States; Alex Barrera-Echavarria was among them.[14] As a result of the influx of excludable aliens, Immigration and Naturalization Services ("INS") was confronted with the paradoxal dilemma of the physical presence in the United States of persons statutorily forbidden to enter. Generally, excludable aliens are ordered summarily returned to their homeland.[15] In

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10. Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), *vacated,* 44 F.3d 1441 (9th Cir. 1995), *petition for cert. filed* __ U.S.L.W. ___ (U.S. Jul. 12, 1995) (No. 95-5309); *see infra* note 23.

11. *Id.* [hereinafter *Barrera*]

12. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), is the first in a series of cases over the past forty years refusing to recognize fundamental rights for excludable aliens. *But see,* Alverez-Mendez v. Stock, 746 F. Supp. 1006, 1015 (C.D. Cal. 1990), *aff'd* 941 F.2d 956 (9th Cir. 1991), *cert. denied,* 113 S. Ct. 127 (1992) (pointing out that excludable aliens are entitled to *Miranda* warnings and to raise arguments concerning effectiveness of counsel in a criminal case, yet have no recognized rights with regard to the "immigration process' and, thus, may be arrested without a warrant or deported for illegal behavior for acts occurring before outlawed by Congress because deportation is not considered "punishment" under the *ex post facto* clause of the Constitution).

13. 21 F.3d 314 (9th Cir. 1994).

14. *Id.* at 315. The Mariel Cubans are so termed because the boatlift to the U.S. departed from the Mariel harbor.

15. An alien found to be excludable is to be immediately removed from the United States unless such removal is not practicable or proper. Thus, the statute, as drafted does not contemplate mass migration or asylum situations where inspection and further inquiry are complicated by logistics and by the processing of asylum claims, both of which disrupt the statutory model of progression from inspection to excludability inquiry to exclusion. Martin, *supra* note

the case of the Mariel Refugees released from Castro's prisons, Cuba refused their repatriation and no other country stepped forward to accept them.[16] Thus, their plight became analogous to that of the "Flying Dutchman,"[17] with one grave exception: instead of setting sail on the open sea, the Mariel refugees were sent to federal penitentiaries and detention camps for an undetermined period of confinement.[18] Ironically, the mass immigration which brought many of these "excludable aliens" came be known as the "Freedom Flotilla."[19]

Judge Noonan, writing for the Ninth Circuit, boldly proclaimed in freeing Barrera that his continued confinement in a prison could "no longer be fictionally characterized as exclusion from the country. *It is imprisonment within the country.*"[20] While acknowledging the Attorney General's well-established statutory power to deport, parole and detain excludable aliens,[21] Judge Noonan accurately noted that a great "gap" existed between the power to detain and the power to imprison indefinitely.[22] The latter is unconstitutional.[23] He then analogized the inexhaustible authority to detain excluded aliens, as claimed by the government, to the "lettres de cachet"[24] issued by the King of France:

56, at 304. Nor does the statute contemplate years of detention, which substantially disrupts the statutory model. Section 1226(e) of the Immigration and Nationality Act was added in 1990 by P.L. 101-649, Title V, § 504(b), 104 Stat. 5050, 101st Cong., 2nd Sess., November 29, 1990, and amended by P.L. 102-232, Title III, § 306(a)(5), 105 Stat. 1751, 102nd Cong., 1st Sess., December 12, 1991, to provide for any alien convicted of an aggravated felony to be taken into custody pending determination of excludability, whether or not released on parole at the time, thus contemplating some duration.

16. *Barrera*, 21 F.3d at 315.

17. *Id.* at 316 (referring to Judge Learned Hand's comparison of the excludable alien to the operatic outcast).

18. Woolner, *infra* note 138.

19. Woolner, *infra* note 138. "For six years United States District Judge Marvin Shoob worked to free Mariel Cubans who were trapped in a legal limbo." *Id.* The irony, of course, rests in the number of Cubans coming to the U.S., who instead of finding freedom, found detention.

20. *Barrera*, 21 F.3d at 317 (emphasis added).

21. *Id.* at 317-18.

22. *Id.* at 317.

23. *Id.* at 315 (affirming that Barrera-Echavarria's continued detention constitutes punishment in violation of the Fifth and Sixth Amendments relying on *Foucha*). *Foucha* is discussed at length, *infra* notes 29 through 33 and accompanying text.

24. *Id.* at 318. On June 2, 1789, Jefferson, Lafayette and M. de Saint Etienne attended a dinner during which it was proposed that the King of France seize the initiative and proclaim a constitution for the kingdom. Excited at the prospect, Jefferson wrote a draft which he presented the next day with his apologies for meddling. Based on Jefferson's draft, "there would no longer be any lettres de cachet with which a simple royal whim decided a man's fate: a noble's incarceration in the Bastille would be decided by "order of a court of justice on the prayer of 12 of his nearest relations." Louis XVI opted to hold on to his absolute powers rather than adopt the proposal, leading to his demise. Although Jefferson is not the father of the French Constitution, it was his draft that contained, in essence, the provisions later adopted by

> The infamous lettres de cachet of the King of France, a device for confining persons on the royal say-so, began as an extraordinary political measure and eventually became a routinized method of preserving order, employed in thousands of cases.... Our government does limit this easy administrative method of confining persons to one small segment of the population. *Some evils are too great for any margin to be given them.* The practice of administratively imprisoning persons indefinitely is not a process tolerable in use against any person in any corner of our country.[25]

The circuit court affirmed the district court's finding that Barrera-Echavarria's indeterminate confinement was without statutory authority and that continued imprisonment constituted punishment in violation of the Fifth[26] and Sixth[27] Amendments. Implicit in the Ninth Circuit's holding is a violation of the Eighth Amendment as well,[28] another constitutional protection not previously recognized as applicable to excludable aliens held in detention. Thus, the Ninth Circuit effectively did what no other court had been willing to do—discard the fiction that has deprived excludable aliens of human rights and thereby providing them the fundamental protections demanded by the amendments to our Constitution.

The Ninth Circuit reasoned its conclusion, in large part, on *Foucha v. Louisiana*,[29] where the Supreme Court held that a person found "not guilty by reason of insanity" could not be detained for an indefinite period of time as a preventative measure.[30] A state may only confine an insanity plea acquittee if it can be shown that he is

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the Assembly. Herbert Stein-Schneider, *The French and U.S. Constitutions—Memo: The Constitution: A Celebration*, MIAMI HERALD, July 12, 1987, at 6C; Until the end of the 18th century, French subjects had no protection from arbitrary incarceration upon the issuance of royal orders of arrest by the King. Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 112, n.19, discussing, Ludwikowski, *Two Firsts: A comparative Study of the American and Polish Constitutions*, 8 MICH. Y.B. INT'L LEGAL STUD. 117, 121 (1987).

25. *Barrera*, 21 F.3d 314. As was the case in France, the discretion exercised by immigration authorities in imprisoning without trial is in the name of high authority but actually delegated to much lower employees of the government. *Id.*

26. U.S. CONST. amend. V, which reads in pertinent part that no person shall be "deprived of life, liberty, or property, without due process of law...."

27. U.S. CONST. amend VI. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... and to be informed of the nature and the cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." *Id.*

28. *See Barrera*, 21 F.3d at 319 (Sneed, J., dissenting). U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

29. 112 S. Ct. 1780 (1992). Justice White wrote the judgment for the Court as to parts I and II, as well as the opinion as to part III.

30. *Id.* at 1784.

both mentally ill *and* dangerous.[31] Otherwise, the purpose for which his confinement was authorized has disappeared. The *Barrera* court's analogy is not only proper, but insightful.

As openly declared by Justice White in *Foucha*, "It is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection. We have always been careful not to minimize the importance and fundamental nature of the *individual's* right to liberty."[32] Thus, in order to hold a person not convicted of a crime or a person whose prison term is complete, "the government [is] required, in a 'full blown adversary hearing,' to convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[33] Obviously, the Supreme Court in *Foucha*, like the Ninth Circuit in *Barrera*, by its decision, was not advocating a mass release of all committees or detainees; respectively, each court simply mandated due process and a lawful basis for continued confinement.

In order to follow *Foucha*, the *Barrera* court needed only to preface its reasoning with the acknowledgment that Barerra-Echavarria was a person, thereby entitling him to protection against constitutional prohibitions of the type recognized in *Foucha*. The recognition was summarily made by the court's notation that Barrera's personage was simply an issue not in dispute.[34] The court then in considering whether prolonged detention was punishment, was forced to confront the obstacle of precedent, which it approached effectively.[35]

Previous Supreme Court rulings, permitting detention of excludable aliens for undetermined and prolonged periods of time, were based on the government's regulatory power attendant to the

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31. *Id.* at 1786.

32. 112 S. Ct. at 1785 (quoting first from Jones v. United States, 463 U.S. 354 (1983), then from United States v. Salerno, 481 U.S. 739 (1987) (emphasis added) (citation omitted)(internal quotes omitted)).

33. *Id.* at 1786. The various recommended conditions of the petitioner's release included that he (i) be placed on probation; (ii) remain free from intoxicating and mind-altering substances; (iii) attend a substance abuse clinic; (iv) submit to regular urine drug screening; and (v) be actively employed or seek employment. *Id.* at 1783 n.2. These are examples of the types of restrictions which could reasonably be placed on aliens released from detention pending deportation or other disposition of their status in the United States. Although some may find such conditions oppressive, if properly tailored to concerns of release, they enable release, where release may otherwise warrant concern.

34. The court pointed out that, "[i]t is not disputed that he is a person. He is a person within our jurisdiction." *Barrera*, 21 F.3d 314.

35. The Supreme Court's decision in *Mezei* has been read to hold that "even an indefinitely incarcerated alien 'could not challenge his continued detention . . ." *Alverez-Mendez*, 746 F. Supp. at 1014 (quoting from Jean v. Nelson, 727 F.2d 957, 974-75 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846, 105 S. Ct. 2992 (1985)).

exclusion process. This meant that confinement, instead of being recognized as punishment, became a necessary component of the exclusion process.[36] Upon holding eight years of confinement excessive in relation to the regulatory goal of detaining aliens subject to deportation, based on *United States v. Salerno*,[37] the Ninth Circuit was free to distinguish *Barrera* from precedent and to consider his case in light of the punitive nature of his confinement.[38] "Common sense" would indicate that "prolonged incarceration in federal prisons . . . constitutes punishment."[39] The government's rationale for detaining excludable aliens parallels its rationale for detaining insanity plea acquittees. Both are detained as a preventative measure.[40] Thus, analogizing the violative practices associated with insanity plea confinement to the problematic aspects of the detention of excludable aliens is logical and sound.

B. *The Prevailing View:* Gisbert v. United States Attorney General[41]

Ninth Circuit's reasoning in *Barrera* runs head-on into the prevailing view, summarized by the Fifth Circuit in a recent opinion,[42]

> [E]xcludable aliens are entitled only to those process rights provided by law. 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' As to excludable aliens, the decisions of executive or administrative

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36. *Alverez-Mendez*, 941 F.2d at 963 (confirming that parole decisions are an integral part of the admissions process and excludable aliens cannot challenge such decisions as a matter of constitutional right); *see also*, Fernandez-Roque v. Smith, 734 F.2d 576, 582 (11th Cir. 1984), *stay granted in part*, Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986); Jean v. Nelson, 727 F.2d 957, 966-972 (11th Cir. 1894).

37. 481 U.S. 739 (1987). *Salerno* is discussed in *Barrera*, 21 F.3d at 316, for the proposition that excessive detention is disproportionate, which the court found eight years of incarceration because of alien status to be. *Salerno* was also cited in *Foucha* for the same proposition with regard to prolonged confinement of insanity acquitees who the state sought to confine on the basis of an antisocial behavior. 112 S. Ct. 1785.

38. At what point in time duration of confinement becomes punishment is the issue courts have mostly struggled with. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981); Soroa-Gonzalez v. Civiletti, 515 F. Supp. 1049, 1056 n.6 (N.D. Ga. 1981); Fernandez-Roque v. Smith, 91 F.R.D. 239, 243 (N.D. Ga. 1981), *appeal dismissed*, 671 F.2d 426 (11th Cir. 1982); *cf.*, Jean v. Nelson, 727 F.2d at 974-75 (duration of detention is not an issue for the court).

39. *Barrera*, 21 F.3d at 315.

40. *Id.*; *Foucha*, 112 S. Ct. at 1782.

41. 988 F.2d 1437 (5th Cir. 1993).

42. Few courts have recognized any limitations on the Attorney General's authority to detain excludable aliens, with the exception of the Tenth Circuit in *Rodriguez-Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir. 1981) (holding that a reading of the statute that permit indefinite confinement would violate international law); Diaz v. Haig, 594 F.Supp. 1 (U.S. D. Wyom. 1981) (holding only temporary detention during a reasonable period for negotiating the return of an alien is permitted).

> officers, acting within powers expressly conferred by Congress, are due process of law. . . .[43]
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> . . .
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> [Furthermore], [b]ecause there is no evidence here of any expression of intent to punish on the part of the Government, . . . [and] protecting society from a potentially dangerous alien [is] a rational, non-punitive purpose for detention, . . . [w]e hold that the continued INS detention of the petitioners is not punishment and does not constitute a violation of the aliens' rights to substantive due process.[44]
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> . . .
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> We [further] conclude that the INA authorizes the Attorney General to continue to detain petitioners, whether or not they have been convicted of aggravated felonies, until the United States is able to deport them.[45]

The *Gisbert* court easily concluded that his continued confinement did not violate his constitutional rights because under the prevailing view he had none. The reasoning of the *Barrera* court was obviated by the majority view on the blanket declaration that "*immigration proceedings and detention do not constitute criminal proceedings or punishment.*"[46] There comes a point in prolonged detention, however, where such an argument is purely a matter of semantics.

The petitioners in *Gisbert*[47] argued *Foucha* in support of their contention that detainees have both procedural and substantive rights to their liberty interests. The court responded by finding *Foucha* "inapposite on several grounds," only two of which the court articulated in a footnote: (1) Foucha was a citizen, rather than an excludable alien and (2) at issue in *Foucha* was his confinement in a psychiatric facility *after the basis for holding him had ceased to exist.*[48]

Contrary to the summary assessment of the *Gisbert* court, the issue in *Foucha* is precisely the issue in *Gisbert* and *Barrera*: The primary basis for detaining excludable aliens is for determining their

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43. *Gisbert*, 988 F.2d 1442-43 (alteration in original).

44. *Id.* at 1441-42.

45. *Id.* at 1447.

46. Rodriguez v. Thornburgh, 831 F. Supp. 810, 813 (D. Kan. 1993) (quoting Ramos v. Thornburg, 761 F. Supp. 1258, 1260 (U.S. W.D. La. 1991), *aff'd* Gisbert v. United States Attorney Gen. 988 F.2d 1437 (5th Cir. 1993), *citing* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1989). *See Gisbert*, 988 F.2d 1437 at 1441-42 (relying on *Alverez-Mendez* in stating that the protection of society from a potentially dangerous alien is a non-punitive purpose for detention).

47. The petitioners in *Gisbert* consist of twelve Mariel Cubans, all of whom had been in the custody of INS for over two years following revocation of their parole status for criminal acts ranging from attempted murder to cocaine trafficking to petty theft. 988 F.2d at 1440, 1444.

48. *Gisbert*, 988 F.2d at 1441 n.6.

eligibility for admission into the United States, because they are subject to deportation upon denial. Once that objective has been met, and entry has been denied, the alien is to be deported. In the case of the Cuban detainees, they cannot be deported, for the simple reason that no country will accept them.[49] Thus, the primary basis for their detention has ceased to exist.

The secondary purpose for the detention of excludable aliens is to guard against the potential danger they pose to society,[50] which was offered as the purpose for Foucha's detention.[51] Experts who evaluated Foucha diagnosed an antisocial personality, a disorder for which there is no effective treatment. This was evidenced by his conduct while confined, which, the experts concluded, rendered him a danger to himself and others. On that basis, the State asserted it had an interest in Foucha's continued detention. To that the Supreme Court responded,

> [Such] rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. *It would also be only a step away from substituting confinement[] for dangerousness* [in place of] *our present system* . . . .[52]

Foucha is precisely on point with *Barrera* because the prolonged detention of the Mariel Cubans is in many instances nothing more than confinement for assumed dangerousness. Confinement for periods ranging from two to eight years, not based on a criminal act or proven dangerousness, was not an intended use of our immigration laws and must not be permitted as a result of them.

III. DEVELOPMENT OF THE LAWS GOVERNING EXCLUDABLE ALIENS

A. Aliens Subject to Exclusion

In 1917, Congress enacted legislation that codified the existing categories of excludable aliens, excluding illiterates and banning

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49. Barrera-Echavarria v. Rison , 21 F.3d 314 (9th Cir. 1994) *vacated*, 44 F.3d 1441 (9th Cir. 1995).

50. *Gisbert*, 988 F.2d at 1442; *Barrera*, 21 F.3d at 315.

51. The psychiatrist who evaluated Foucha refused to certify that Foucha would not be dangerous. Foucha v. Louisiana, 112 S.Ct. 1780, 1786 (1992).

52. *Foucha*, 112 S. Ct. at 1787 (emphasis added) (limited exceptions for confining the mentally ill and pretrial detainees omitted).

almost all Asian immigration.[53] An "excludable alien" was an alien who had requested admission but had not yet accomplished entry.[54] Even after being conditionally admitted to the United States, physical presence was not enough to alter the status of the excludable alien. Thus, whether physically within or outside our borders, excludable aliens were constructively stopped at the border.[55]

The distinction between the application of our laws to "excludable aliens" and "deportable aliens" is significant.[56] Foremost, deportable aliens are entitled to due process of our laws and thus are recognized as protected by our Constitution.[57] Excludable aliens are not.[58] The irony of this distinction is that deportable aliens, many of whom enter the country surreptitiously, are given more rights under the law than excludable aliens who present themselves to immigration officials at the border.[59]

Although the *Barerra* case involves the plight of a Mariel refugee with a criminal record,[60] Title 8 U.S.C. § 1182, entitled "Excludable Aliens," presents a litany of persons either seeking entry into the United States, present in the United States, and in some instances returning to the United States, who are theoretically excluded from our borders, despite their presence.[61] The list of those deemed "ineligible" is fairly extensive. Ineligibility extends to such individuals as

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53. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 556 (1990).

54. The term "excludable alien" is used to define those persons whose right to enter or remain in the United States is governed by sections 235 through 237 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1225-1227 (1976 & Supp. 1994).

55. *See Mezei*, 345 U.S. at 215.

56. An alien is "deportable" rather than "excludable" if he has accomplished entry into the United States without being intercepted. Deportable aliens' rights, which are more expansive, are governed by sections 241 through 243 of the INA, 8 U.S.C. 1251-1253 (1976 & Supp. 1994). For instance, those who have perfected entry can be expelled only pursuant to an order of deportation and only after deportation proceedings which involve greater statutory and administrative procedural safeguards than exclusion proceedings. Deportable aliens are also within the scope of constitutional guaranties, such as the prohibition against deprivation of life, liberty or property with due process of law. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 299 (1983).

57. William L. Wheatley, *Immigration Law-Deportation – Second Circuit Refuses Finding of Entry and Denies Deportation Hearing*: Correa v. Thornburgh, 901 F.2d 1166 (2d Cir. 1990), 15 SUFFOLK TRANSNAT'L L.J. 801, 803 (1992). The entry issue is of paramount concern because constitutional safeguards are afforded in deportation proceedings whereas they are not in exclusion hearings. The panoply of distinctions and their respective nuances are beyond the scope of this article. For an in depth analysis of these issues, *see Id.*

58. *Id.*

59. Martin, *supra* note 56. Today there is review of parole procedure for excludable aliens. The review is limited, however, to habeas proceedings considering only whether administrative officials acted outside the scope of their statutory authority.

60. Barrera's criminal record is detailed in the dissenting opinion. *Barrera*, 21 F.3d at 319 (J. Sneed, dissenting). *See infra* note 137 and accompanying text.

61. 8 U.S.C. § 1182 (West 1970 & Supp. 1994).

persons with communicable diseases, including AIDS;[62] persons whose beliefs, statements, or associations would compromise a compelling U.S. foreign policy;[63] persons identified as members of a communist or totalitarian party, unless such membership was involuntary; polygamists; educational visitors;[64] drug abusers or addicts; suspected drug traffickers; aliens who have asserted immunity; stowaways; previously removed aliens; persons convicted of crimes of moral turpitude;[65] and persons engaged in prostitution.[66] In essence, aliens entering or attempting to remain in the U.S. may be denied entry based on discriminatory grounds otherwise impermissible in the context of domestic policies.[67]

The statute has undergone some recent reform in the wake of cases drawing harsh criticism to its application.[68] For instance, the Immigration and Nationalization Act barred communist speakers for almost forty years in direct conflict with the First Amendment.[69] Prior to recent reform, the statute also barred homosexuals.[70] Although, the 1990 reform removed much of the discretion of exclusion from the statute, individuals remain excluded from our society based on classifications otherwise unacceptable to us.[71] As a self-proclaimed progressive and enlightened nation, the United States'

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62. Juan P. Osuna, *The Exclusion From the United States of Aliens Infected With AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUS. J. INT'L. L. 1 (Fall 1993). Although an in depth discussion of each category of exclusion is beyond the scope of this article, it should be noted that AIDS infected aliens have continued to be excluded even after the 1990 reform, as a result of public outcry demanding the exclusion be continued.

63. Ira J. Kurzban, *A More Critical Analysis of Immigration Law*, 99 HARV. L. REV. 1681, 1684-85 (1986) (reviewing ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS (1985)). The statute was revised to narrow it in the wake of the outrage following *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

64. Signh v. Moyer, 674 F. Supp. 20 (N.D. Ill. 1987), *aff'd*, 867 F.2d 1035 (7th Cir. 1989) (lacking jurisdiction to hear challenge to INS deportation).

65. Chiaramonte v. Immigration and Naturalization Service, 626 F.2d 1093 (2d Cir. 1980) (finding supported that father was excludable for larceny conviction and son would not suffer severe hardship from deportation of his father).

66. In theory or in practice, a young girl previously enslaved in a life of prostitution coming to live with long-lost relatives would be denied entry into the United States

67. Fiallo vs. Levi, 430 U.S. 787 (1977).

68. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972) (lecturer denied entry to speak).

69. *Id.* In 1987, 8 U.S.C. § 1182 was revised to exempt from exclusion persons with past, current, or expected beliefs if those beliefs could be held by a U.S. citizen, other than resident aliens.

70. Shannon Winter, *Symposium: Refusing Refugees: Political and Legal Barriers to Asylum Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Gay and Lesbian Identity*, 26 CORNELL INT'L L. J. 771. Previously gays and lesbians were excluded under the "psychopathic personality" exclusion. Now they may only be excluded based on a lack of good moral character or if convicted of a crime of moral turpitude such as sodomy.

71. *See, e.g.*, Major Elena Kusky, *Immigration and the Foreign Spouse: How Spouses Can Get Their Own Green Cards*, 1993-DEC ARMY LAW. 3 & nn.31-42.

domestic policies should be reflected in its immigration laws.[72] Furthermore, the broad scope and ambiguous nature of the classifications for exclusion (i.e. crimes of moral turpitude)[73] continue to permit discriminatory application on a discretionary basis.

B. Authority and Exclusion Policy

Congress and the executive branch exercise plenary power over the entry of aliens into the United States.[74] This power is derived from three fundamental principles: (i) aliens at the border seek the privilege of entry, not the right,[75] (ii) the power of the constitution does not extend beyond our borders,[76] and (iii) the nature and the source of the government's exclusionary authority places that authority beyond constitutional restraints.[77]

Although Supreme Court has endorsed the federal government's plenary power over excluded aliens as an inherent attribute of sovereignty,[78] such reasoning is inconsistent with (i) the natural law theory of the bill of rights,[79] (ii) the constitutional limitations on foreign affairs[80] and (iii) the power of the federal government to exclude, as opposed to expel, aliens, the latter of which is

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72. Congress regularly makes laws that would be unacceptable if applied to citizens. Matthews, 426 U.S. 67, 80 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977).

73. *See* Chiaramonte, 626 F.2d 1093.

74. *See* Kurzban, *supra* note 63. The *Knauff-Mezei Doctrine* stands for the proposition that the federal government has virtually plenary power with respect to whom it will admit or exclude from the United States.

75. This justification first appeared in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). The fact that an alien seeking admission has no right to enter does not entail a governmental power to withhold the privilege and any means and for any reason. Note, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1311, 1318-19 (1983) [hereinafter *Immigration Policy*].

76. This rationale has its origin in the earliest exclusion cases and is tied to the concept of inherent sovereignty based power, thereby supporting plenary exclusion power. The territoriality principle justifies domestic alien protections and exclusion policies for those outside the territory, but it fails to account for extra-territorial constitutional protections extended to citizens and denial of constitutional protections for aliens within the territory. *Id.* at 1320-21.

77. Sovereign power is necessary to preserve orderly international relations and protect the country from encroachment, yet no necessary connection exists between the power to exclude aliens, if an inherent attribute of sovereignty, and the further conclusion that courts are impotent to intervene in the exclusion setting. In fact, the courts have done otherwise. *Id.* at 1314-15.

78. *Id. See also* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984). Parole to an alien is an act of extraordinary sovereign generosity.

79. Is the *Bill of Rights* meant to protect individual rights or to restrain government activities? If the latter, there can be no distinction as to who benefits from the protection. *See* Susan Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865 (1993).

80. United States v. Bowman, 260 U.S. 94 (1992); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 177 (1972).

constitutionally restrained.[81] Furthermore, nothing in the Constitution expressly confers in the federal government the power to exclude aliens.[82] Despite the obvious arguments refuting the government's plenary authority to exclude aliens, the Court, nonetheless, has continued to acquiesce to the legislative power of exclusion thus leaving the plight of the excluded alien to a political fate.

C. Executive Influence

Because the proclaimed plenary power to exclude aliens is grounded in the federal government's sovereignty, the executive, like Congress, retains the power to suspend or restrict the entry of aliens or a group of aliens.[83] The claimed policy for excluding aliens thus varies under each administration, with public fear serving as a barometer. For example, physical detention of aliens became the exception, not the rule, in 1954 when, upon closing Ellis Island, the Attorney General announced a new policy under which only those arriving aliens who were likely to abscond,[84] or whose freedom threatened national security or safety, would be detained. Others would be released on parole or under supervision.[85]

> The parole of aliens seeking admission is simply a device through which needless confinement can be avoided while administrative proceedings are conducted. . . . Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. . . . Certainly this policy reflects the humane qualities of an enlightened civilization.[86]

The policy was short lived, however, retained only through the Carter administration.

The INS and the Department of Justice shifted policies under the Reagan administration due to the massive influx of Cuban and Haitian Refugees.[87] Detention once again became the rule. Detention was officially initiated between May 20 and July 31, 1981.[88] The

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81. *See supra* note 56. Deportation proceedings are constitutionally constrained.

82. *Immigration Policy, supra* note 75, at 1314.

83. Mow Sun Wong v. Campbell, 626 F.2d 789 (9th Cir.), *cert. denied sub nom.*, Lum v. Campbell, 450 U.S. 959 (1980) (President may impose conditions on the entry of aliens that he deems are appropriate).

84. Unlike flight to avoid prosecution, there is little incentive for an alien to abscond because, in doing so, the right to remain in the United States is what is at risk. Thus, logic tells us that if an alien seeks permission to remain in the United States, he will appear for proceedings.

85. Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 304 (1983).

86. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

87. Ellen B. Gwynn, Note, 14 FLA. ST. U.L. REV. 333, 339 (1986).

88. Louis v. Nelson, 544 F. Supp. 973, 978-79 (S.D. Fla. 1982), *enforced*, 544 F. Supp 1004 (S.D. Fla. 1982), *aff'd in part, rev'd in part*, Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *reh'd en*

Refugee Act of 1980, although advanced as an attempt to ensure greater equity in the treatment of refugees and displaced persons, institutionalized a two-tier system: those considered politically favored, such as the Indochinese,[89] Cubans and Soviets, and those considered disfavored, such as the Salvadorans, Haitians and Guatemalans.[90]

Even as preferred refugees, many Cubans, detained initially for a number of legitimate reasons, became subject to prolonged and indeterminate periods of confinement.[91] The two-tiered system, fueled by exclusionary laws, increased discriminatory practices considerably.[92] Nonetheless, courts remained silently constrained by the plenary power doctrine, impotent to intervene to correct dysfunctional political processes.[93] Thus, the United States' immigration policy became patently discriminatory in practice with regard to alien detention and admissions.

In the case of the Mariel refugees released from Castro's prisons, the government's contention was that continued detention was necessary to deter foreign dictators from depositing on American shores the "country's undesirables" and forcing the United States to retain them by refusing to repatriate them.[94] The government further argues that preventative detention is the only way to achieve the object of immigration laws which bar excludable aliens from entering the United States.[95] According to the government, ceasing the practice of detention would make a mockery of U.S. immigration

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banc granted, 714 F. 2d 96 (11th Cir. 1983), *dismissed in part, rev'd in part, remanded with instructions*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) (detention is mandated under section 235.3(b) for arriving aliens that appear to the inspecting officer to be inadmissible or who lack documentation, etc. 253.3(c) makes detention optional for other aliens appearing to be inadmissible to inspecting officers). For an in depth discussion of *Jean v. Nelson*, see Gwynn, *supra*, note 87.

89. Favored immigrants shift with time. For example see Chinese Exclusion Cases, Wong Wing v. United States, 163 U.S. 228 (1896).

90. Jeffrey C. Gilbert & Steven Kass, *Jean v. Nelson: A Stark Pattern of Discrimination*, 36 U. MIAMI L. REV. 1005, 1024 (1982).

91. *Id.*

92. In *Garcia-Mir*, six years after the Mariel boatlift, the class of Cubans before the court consisted of two groups: The first group was comprised of those guilty of crimes committed in Cuba or who were mentally incompetent, all of whom have remained in confinement. The second group was comprised of those who were paroled into the U.S. at some point, but whose parole was revoked. All were held in confinement at Atlanta Penitentiary. Many may still be. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986).

93. Kevin Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizen, and Immigration Law and Enforcement*, 1993 B.Y.U.L. REV. 1139.

94. *Barrera*, 21 F.3d 314.

95. *Id.*

laws and policies,[96]—policies designed to categorically bar aliens the government does not want to admit.[97]

IV. JUDICIAL DEFERENCE TO THE FICTION

Excludable aliens have no constitutional rights, whether within or without our borders.[98] They must be content to accept whatever statutory rights and privileges are granted them by Congress.[99] The contours of those rights are left to the discretion of the political branches.[100] In light of the Court's recognition of the federal government's plenary power over excludable aliens, political policy prevails in determining the plight of aliens as enumerated under 8 U.S.C. § 1182, but, that has not always been the case.

In the latter part of the 19th Century, the Court was willing to assert constitutional prohibitions to strike down improprieties against aliens. In 1896, the Court invalidated on Fifth and Sixth Amendment grounds, the Chinese exclusion laws that provided for imprisonment at hard labor any Chinese person or person of Chinese descent found not entitled to remain in the United States.[101] Some half century later, the Attorney General's determination not to parole was subject to judicial review "under the paramount law of the Constitution."[102] That era of enlightenment, however, came to a swift end.

In *Fong Yue Ting v. United States*, the Court unequivocally sanctioned the federal government's right to expel and the absolute and unqualified right to prohibit and prevent entry of aliens into the U.S.[103] The Court's deference to Congress and the executive branch was reaffirmed in two troubling, landmark cases, *Knauff*[104] and *Mezei*[105]. In *Knauff*, the Court held that admission of an alien who had not made entry is a privilege granted by the sovereign United States government.[106] That privilege is granted to an alien upon

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96. *Id.*

97. *See* 8 U.S.C. § 1182. The general purpose of the section enumerating excludable aliens is to bar undesirable aliens from our shores. Lennon v. Immigration and Naturalization Service, 527 F.2d 187 (2d Cir. 1975). In the this case, it was John Lennon that the INS sought to exclude as undesirable. *Id.*

98. Adras v. Nelson, 917 F.2d 1552, 1554 (11th Cir. 1990).

99. Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984).

100. *Adras*, 917 F.2d at 1555 (denial of parole for excludable alien will be reviewed only to see whether made within statutory discretion and for abuse of discretion based on race or national origin).

101. Wong Wing v. United States, 163 U.S. 228 (1896).

102. Carlson vs. Landon, 342 U.S. 524, 537, *reh'g denied*, 343 U.S. 988 (1952).

103. Kurzban, *supra* note 63, at 314.

104. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

105. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

106. 338 U.S. at 542.

such terms prescribed by the United States government. Thus, "aliens are due only that process that Congress sees fit to authorize for them."[107] Three years later in *Mezei*, the Court rejected due process challenges to the indefinite detention of an East European alien permanently excluded from the United States, despite the fact that no other country was willing to accept him.[108] Thus, the Court confirmed that the final determination of substantive and due process issues regarding admission and expulsion rests exclusively with the legislative and executive branches.[109]

Although there are several narrow exceptions to the general proposition that excludable aliens have only those rights granted by congress,[110] the Knauff-Mezei Doctrine has preserved virtual plenary power in the legislative and executive branches to decide who will be admitted or excluded,[111] and the means by which exclusion will be determined. "[A] plenary power world creates the distinct potential for immigration law and policies to linger at the fringes of lawfulness."[112] A review of our immigration practices evidences these words to be a truism.

V. AN ATTEMPT TO RECOGNIZE LIMITED RIGHTS OF EXCLUDABLE ALIENS WHILE PRESERVING EXCLUSION POLICIES

Over the course of four decades, during which time a practice of human rights violations and discriminatory policies has prevailed in immigration law, occasional relief has been granted; however, prior to *Barrera-Echavarria*, relief was granted without disturbing the status quo of immigration law. Courts have acknowledged that "[t]he legal fiction that an excludable alien is 'waiting at the border' wears quite

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107. *Id.* at 544.

108. *Mezei*, 345 U.S. at 212. Mezei lived in the United States for twenty-five years, married an American citizen and fathered two children prior to departing the country and returning to the U.S., at which time his reentry was challenged based on the security risk he posed. Although recognizing that as a deportable alien, Mezei may be able to raise due process challenge based on his ties to the U.S., the court's decision to deny him any due process challenge rested on the determination that at the time of his apprehension, he had not gained entry to the U.S., and thus was an excludable alien rather than a deportable alien. Thereupon the distinction between excludable and deportable aliens was established.

109. The court deviated from 50 years of jurisprudence in the *Knauff* and *Mezei* decision. *Immigration Policy*, *supra* note 75, at 1322.

110. Kurzban, *supra* note 63, at 1684 n.24. More recently the Court has extended Fifth Amendment protection to excludable aliens, but the Court's holding in that case pertains only to those excludable aliens who previously resided in the U.S. and are excludable based upon a condition attendant to their reentry. Landon v. Plasencia, 459 U.S. 21, 32 (1983).

111. Kurzban, *supra* note 63.

112. Johnson, *supra* note 93, at 1186.

thin after a year at the Atlanta Federal Penitentiary."[113] Nonetheless, decisions granting relief have been few and narrow.

A. Statutory Rights Granted to Excludable Aliens

In an effort to maintain its power against mounting controversy, Congress conceded to granting excludable aliens limited rights of a constitutional nature by statute. For instance, Congress has provided certain statutory rights granting procedural protection to excludable aliens.[114] Congress has also authorized parole review proceedings for detained excludable aliens.[115] Questions remain as to the scope of the constitutional rights which inhere in the statutory protections and the right to petition.[116] According to some courts at least, there are none.[117] Few rights have been recognized, since a Writ of Habeas Corpus remains the only means by which an excludable alien denied parole may seek review, and that review is limited to an abuse of discretion or failure to exercise restraint within the scope of the statutory authority granted.[118] Currently, exclusion proceedings remain exempt from review.

B. Statutory Construction Preserving Exclusion Policies

No court has come forward to recognize that the INA statute explicitly authorizes indefinite detention. Rather, the courts have consistently held that the statute does not explicitly authorize indefinite detention.[119] The statute has, however, been held to authorize

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113. Soroa-Gonzalez v. Civiletti, 515 F. Supp. 1049, 1056 n.3. (N.D. Ga. 1981).

114. Steven Scheinfeld, *Due Process Rights of Asylum Applicants Expanded to Include Stowaways*, 50 BROOK. L. REV. 751, 752; *but see Gisbert*, 988 F.2d at 1443 n.11, 1445 n.16 (detailing criteria for releasing Mariel Cubans on parole).

115. 8 C.F.R. § 212.12 grants Mariel Cubans in immigration detention an annual review for parole determinations by a Cuban Review Panel, including a personal interview if parole is not recommended after a review of the alien's file. 8 C.F.R. § 212.13 grants aliens who have been denied parole under the above procedures a request for single review by a special Department Panel consisting of three individuals from the Justice Department, one of whom must be an attorney and one who must be a representative of the Community Relations Committee.

116. Scheinfeld, *supra* note 114, at 775.

117. "Because petitioners' interests here are contingent upon the Attorney General's discretion, they have no liberty interest in being paroled." Gisbert v. United States Att'y Gen., 988 F.2d 1437, 1443 (10th Cir. 1993). Of course, those rights granted may also be withdrawn.

118. Marczak v. Greene, 971 F.2d 510, 515-16 (10th Cir. 1992)

119. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10 Cir. 1981); 8 U.S.C. § 1226(e)(1) provides that the Attorney General *shall* detain aliens *pending* a determination of excludability. Section 1226(e)(3) further provides that the Attorney General *may* release such aliens only upon concluding that the alien will not pose a danger to the safety of other person or property. Read *in pari materia*, the statute has been interpreted to implicitly authorize indefinite detention. Alvarez-Mendez, 941 F.2d at 962; Gisbert, 988 F.2d at 1446. Note, however, that interpreted in this manner, the statute would be stricken under *Foucha*, discussed *supra* at notes 29 through 33.

prolonged detention provided that detention is related to the process of exclusion and is within authority granted by the statute.[120] The circuitous nature of the argument renders it difficult to defeat.

C. *Applying Customary and International Human Rights Law*

The principles of both customary international law and international human rights law have been drawn upon and rejected by courts struggling with excludable alien issues. International law requires all nations adhere to an international minimum standard of procedural and substantive justice in the treatment of aliens.[121] Thus, in *Rodriguez-Fernandez v. Wilkinson*,[122] the district court held that the United States may not indefinitely detain an excluded alien as ineligible for entry into the United States, even if he is not deportable because no other country will accept him.[123] The court's review of customary international law clearly demonstrated that arbitrary detention is prohibited and that the petitioner's prolonged detention was arbitrary, placing domestic law at odds with international law principles.[124] The district court reasoned that, even if indeterminate detention cannot be said to violate our Constitution, it is judicially remediable as a violation of international law.[125]

The Tenth Circuit Court of Appeals affirmed *Rodriguez-Fernandez* on appeal taking into account principles of both international law and constitutional law, but resting on the conclusion that the statute challenged did not authorize detention under the circumstances before the court, thus avoiding conflict between constitutional and international law.[126] International law, although available to provide a basis for relief, was shunned by the circuit court in exchange for a limiting construction under the statute, which left the holding factually based, thus case specific.[127] The circuit court reasoned that,

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120. *Gisbert*, 988 F.2d at 1443.

121. Richard B. Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 RECUEIL DES COURS (Hague Academy of Intern'l Law) 329, 339-356 (1978-III).

122. 505 F. Supp. 787 (D. Kan. 1980), *appeal decided*, 654 F.2d 1382 (10th Cir. 1981).

123. *Id.* at 791.

124. *Id.* at 798; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702(e) and cmt. f, (1987).

125. *Rodriguez-Fernandez*, 505 F.Supp. at 798. Further a more comprehensive discussion of the application of international law in this context, *see* Mark Kemple, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law and Human Considerations*, 62 S. CAL. L. REV. 1773 (1989) (the United States is bound by international customary law of human right as a party to the United Nations Charter and the Charter of the Organization of American States).

126. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

127. *See, e.g.*, Rodriguez v. Thornburgh, 831 F. Supp 810, 812 (D. Kan. 1993) ("[a] review of the *Rodriguez-Fernandez* decision persuades the court [that] petitioner's circumstances are distinguishable....").

although continued detention constituted arbitrary detention, "due to the unique legal status of illegal aliens in this country it is an evil from which our Constitution and statutory laws afford no protection."[128]

The Eleventh Circuit similarly avoided turning to international human rights law in *Soroa-Gonzales v. Civiletti*,[129] but as dictum stated that, had the court been forced to decide the issue, the court "would conclude that petitioner's further detention was arbitrary" within the meaning of the Universal Declaration, the Covenant on Civil and Political Rights, and the American Convention on Human Rights.[130] The Eleventh Circuit has since discounted the application of international law to the detention of excludable aliens.[131] Thus, international law and constitutional law, as pertaining to excludable aliens, although ignored, remains in conflict.

D. The Constitutional Question Preserved

In a controversial opinion issued by the Eleventh Circuit in *Jean v. Nelson*,[132] denying that excludable aliens are "persons" under our Constitution, the Supreme Court responded by stating the Eleventh Circuit never should have reached the question, instead of clarifying the issue which has perpetuated a means to circumvent human rights for excludable aliens. By not ruling on the constitutional issue and declaring that *all person within the United States' borders are persons under the Constitution*, the Court left excludable aliens adrift in the sea of confusion among the federal courts, subject to further denial of human rights.

VI. SOCIAL POLICY PERPETUATES THE DILEMMA

Without question, many of the petitioners discussed herein are not model immigrants. The petitioners in *Gisbert* are convicted felons. Petitioner Rodriguez, recently denied parole after eight years detention in *Rodriguez v. Thornburgh*,[133] likewise, is not a model immigrant. In 1982, Rodriguez was convicted of rape and sodomy charges on a guilty plea in California. He was sentenced to eight years in prison.[134] After serving four years and seven months in a state prison, he was transferred to the federal penitentiary in Atlanta

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128. *Rodriguez-Fernandez*, 505 F. Supp. at 795.
129. 515 F. Supp. 1049.
130. *Id.* at 1061 n.18.
131. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984).
132. *Id.*
133. 831 F. Supp. 810 (D. Kan. 1893).
134. *Id.* at 811.

in 1986, as an excludable alien. He was notified of the revocation of his immigration parole based on the 1982 criminal conviction.[135] He has since been denied any parole into the community by INS authorities. Apart from his earlier crime for which he served a separate sentence, he has now served an additional eight years because of his "excludable alien" status. He may well serve eight more years, as he has no mandatory or even recommended release date.

It is important to note that Barrera-Echavarria's confinement, like the Gisbert petitioners' confinement, and Rodriguez's confinement, was, without question, authorized at one point. Barrera-Echavarria also committed a crime in the United States, although of a lesser magnitude than Rodriguez, but of equal or greater magnitude than at least some of the petitioners in *Gisbert*.[136] Barrera-Echavarria was convicted of armed robbery in Florida and sentenced to 230 days in jail.[137] He served the 230 day imposed criminal sentence, since which he has served eight years for his excludable alien status. Many of the Mariel refugees confined, however, never committed any crime in the United States.[138] In fact, 300 to 400 Mariel Cuban refugees were incarcerated for extended periods simply for insufficient documentation.[139]

The offensive irony underlying the United States' excludable alien immigration policy is clearly illustrated in the *Rodriguez*[140] and *Barrera*[141] opinions. Rodriguez and Barrera-Echavarria each have spent the past eight years in prison, not because of crimes they committed, but because they are undesirable aliens.[142] They are nonetheless human beings entitled to basic human rights.[143] Nowhere else in our society may an individual be detained simply because he is deemed undesirable.[144] Citizens guilty of more egregious crimes

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135. *Id.* at 811.

136. The twelve petitioners in *Gisbert* were convicted of crime ranging from attempted murder to drug trafficking to petty theft. 988 F.2d at 1439 n.1, 1440.

137. 21 F.3d at 319. According to the dissenting opinion, Barrera-Echavarria was arrested four times for various crimes: grand theft auto, retail theft, armed robbery and strong arm robbery, the dispositions of which were not disclosed on the record. The conviction leading to his initial detention was for armed robbery. He was arrested on July 11, 1982 and sentenced to 230 days in prison on March 1, 1983, at which time his sentence was almost served.

138. For a poignant discussion on the struggle to free many refugees confined without ever having committed a crime in the United States or Cuba, *see* Ann Woolner, *He Tried to Give Cubans Justice in America*, AM. LAW., Jan.-Feb. 1988, at 137.

139. *Id.*

140. 831 F. Supp. 810.

141. 21 F.3d 314.

142. *See Lennon*, 527 F.2d 187; *Barrera*, 21 F.3d at 315.

143. For an exceptional discussion on this issue, *see* RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 42-43 (1984).

144. *See, Barrera*, 21 F.3d at 319.

return to roam our streets much sooner—thus, Barrera-Echavarria and Rodriguez are imprisoned because of who they are, not for what they did. States cannot discriminate between aliens and citizens in the distribution of entitlements; yet the federal government discriminates between aliens and citizens in the application of fundamental human rights.[145] In this sense, it appears hypocritical for the United States government to grossly depart from the beliefs that govern local government simply because the topic turns to immigrants or refugees.

VII. THE BARRERA RATIONALE: TURNING TO OUR CONSTITUTION—THE QUESTION ANSWERED

Fiction serves to mask reality. When that reality reveals human rights deprivations, the Court must intervene. Judicial intervention is foremost required where a fiction masks political schemes at the expense of human rights, as in the case of the unacknowledged rights of excludable aliens. The excludable alien fiction has left persons in the United States with no rights or remedies other than as provided through the political branches. Exercise of judicial restraint in the face of such human rights violations, makes a mockery of our Constitution and shames the United States as a nation.[146] Tolerance under such circumstances flies in the face of the very role federal courts serve to guard against.

Whether an alien is a "person" within the meaning of the Constitution is a question to be dispensed with summarily, as the court did in *Barrera*. "Barrera is a person within our jurisdiction."[147] Other courts argue that the Bill of Rights simply does not apply to excludable aliens—that they are not "persons."[148] Both the document and its drafting history, however, refute the argument that any class of "persons" was intended to be excluded under it.[149]

A comparison of the terminology applied in the First and Fourth Amendments, as opposed to the terms applied in the Fifth and Sixth Amendments, demonstrates the intent to distinguish between them. The First, Second and Fourth Amendments reserve rights to "the people," whereas the Fifth and Sixth Amendments reserve rights to "person[s]" and the "accused," respectively, *not* citizens or "the

145. Graham v. Richardson, 403 U.S. 365 (1971) (state laws restricting eligibility of aliens for welfare benefits conflicts with overriding national policies in area constitutionally entrusted to the federal government); Plyler v. Doe, 457 U.S. 202 (1982).

146. Woolner, *supra* note 138.

147. *Barrera*, 21 F.3d at 315.

148. Martin *supra* note 56, at 176.

149. *But see supra* note 6.

people."[150] On that basis, in *Turner*, the Court concluded that the First Amendment does not apply to excludable aliens because the term "the people" was intended to include the people of the United States.[151] No such rationale may be extended to the Fifth and Sixth Amendments—but it has been.[152] In fact no viable argument has been advanced which would justify the exclusion of any person within the United States from the protection of the Fifth and Sixth Amendments.[153] Notably, each amendment addressed fails to limit rights to "citizens."

Even excludable aliens forcibly returned to the United States are extended procedural due process as a condition of confinement, as well as other constitutional protections.[154] If the United States is constitutionally bound to extend human rights protections to excludable aliens accused of crimes, it should be constitutionally bound to provide human rights and due process protections to excludable aliens not accused of crimes but nevertheless imprisoned. In fact, even excludable aliens, once convicted of crimes, fall within the purview of our Constitution, at least while serving a prison term. There is no sound basis for excluding non-criminal aliens or for subsequently denying excludable aliens convicted of crimes the protections of our Constitution that we extend to excludable aliens accused of crimes.[155]

It has been argued that excludable aliens may have no constitutional rights because such a broad construction of the Constitution would require those same protections to apply in enemy times.[156] Others claim that the government's obligation to protect citizens is correlative with the duty of loyal support and that aliens cannot claim constitutional rights available to citizens without ever having assumed a duty of even temporary allegiance.[157] Such arguments bear strong underlying pretenses.

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150. For a discussion by the Court contrasting the terminology in the Fourth Amendment with the Fifth and Sixth Amendments *see* U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).

151. Turner v. Williams, 194 U.S. 279 (1904).

152. *See supra* note 6 and accompanying text.

153. *But see* Rodriguez v. Thornburgh, 831 F. Supp. 810, 813 (holding no basis for Fifth or Sixth Amendment challenges by Mariel detainees).

154. Franco-De Perez v. Burgos, 876 F.2d 1038 (1st Cir. 1989).

155. Justification for the increased rights for deportable aliens has been based on ties to the U.S. One would presume some ties exist for an excludable alien who has been in the U.S. for eight years, even though those ties evolve from incarceration.

156. Christopher A. Donesa, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement By the Military*, 41 DUKE L. REV. 807 (1992).

157. United States v. Verdugo-Veguidez, 856 F.2d at 1237 (dissenting opinion), *rev'd*, 494 U.S. 259, *reh'g denied*, 494 U.S. 1092 (1990).

This comment suggests that the candor displayed by the Ninth Circuit, in now dispelling the myth of the excludable alien, sets the stage for long overdue and much needed goals of reform of immigration policies as they pertain to excludable aliens.

VIII. DISPENSING WITH A LEGAL FICTION

Dispensing with the legal fiction that human beings do not exist in places where they in fact are is the first step in imposing accountability upon the government for its policies, and accepting responsibility as a society for the policies the government professes to promote, and the reality of our vision as a nation . Legal fictions may be proper where they are necessary to extend rights where there are none, but are inappropriate to eliminate rights where they should be. The legal fiction that excludable aliens remain outside the borders of the United States when they are physically within our borders amounts to nothing more than an attempt to legitimize ignorance of a real problem involving real people. Legal fictions may serve a legitimate purpose to breathe life into a corporation, but should never be employed to eliminate basic rights for human beings.

Acknowledging the presence of excludable aliens who are in our country defies inapplication of constitutional rights to them. Providing constitutional rights to excludable aliens does not expose our society to great evils; it simply requires the government to treat them with human dignity. *Barrera* does not require the release of all excludable aliens in detention. It simply requires due process and equal protection for confinement under our laws.

> It is fanciful to suppose [Barrera] more dangerous than any other ex-felon. It is dangerous to everyone's liberty to suppose that the government has a duty and a right to protect its citizens by the indefinite imprisonment of persons that the government thinks are dangerous. The government owes to those it governs the duty of protection. That duty is betrayed when the government uses illegitimate means to provide protection, when, for example, as here, the government imprisons a person it deems dangerous without charge.[158]

Both excludable aliens and citizens guilty of crimes should be and must be confined. But only upon a charge, a hearing, and a conviction may confinement be sustained for any prolonged term. Thus, only by abolishing the legal fiction that obscures the great evil of

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158. *Barrera*, 21 F.3d at 318.

discrimination lurking beneath our immigration policy, are both our highest moral values and the safety of our society preserved.

IX. RECONCILING DOMESTIC AND INTERNATIONAL LAW

By taking a place among the nations of the earth, the United States has obligations under international law.[159] As early as 1815 Justice Marshall stated that "the Court is bound by the law of nations which is part of the law of the land."[160] It is upon that basis that the United States has since entered into numerous international agreements which notably proscribe arbitrary arrest, detention, or exile,[161] and which mandate recognition that "everyone has the right to life, liberty, and the security of person."[162] If we as a nation profess to subscribe to principles of international laws as adopted, we as a nation must respect and uphold those principles.

Principles of international law condemn arbitrary confinement as violative of basic human rights.[163] The Supreme Court has similarly condemned arbitrary sentencing as violative of our Constitution under the Eighth Amendment.[164] Our domestic policy is thus aligned with our international policies; we need only begin to apply the principles of domestic policies to everyone within the United States' jurisdiction. Indeed, the Civil Rights Act of 1964 contemplated protection of constitutional rights for "any citizen of the United States *or* 'other person' within the jurisdiction."[165] Thus, whether applying international principles or constitutional principles, the ineluctable conclusion is the same—all persons possess a liberty interest in freedom from arbitrary detention.

X. WHERE THERE HAS BEEN NO REMEDY: RECONCILING THE WRONGS

Recognition of constitutional protections for detained excludable aliens is significant, not only for the obvious reason expressed, but because of the added impetus for compliance through civil liability. Without that recognition, excludable aliens cannot challenge the constitutionality of, *inter alia*, intentional discrimination in parole

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159. Kemple, *supra* note 125, at 1761 (quoting from Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793)).

160. *Id.* at 1761 (quoting The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815)).

161. *Id.* at 1766-70.

162. *Id.* at 1766.

163. *See supra* note 160 and accompanying text.

164. Walton v. Arizona, 497 U.S. 639, 654 (1990) (eligibility and selection factors for punishment may not be arbitrary and vague).

165. 42 U.S.C. § 1983 (1976) (emphasis added). Congress designated vindication of civil rights for both citizens and other persons within the jurisdiction of the United States.

decisions, cruel and unusual punishment under the Eighth Amendment,[166] illegal revocation of parole, and due process violations under the Fourth, Fifth and Fourteenth Amendments.[167]

Recognizing that constitutional protections do apply to excludable aliens enables them to, not only to challenge a violation thereupon, but also enables them to seek declaratory or injunctive relief, as well as damages for constitutional torts. Prior to *Barrera*, although conditions under which excludable aliens are confined were recognized by the courts as "onerous and perhaps 'harsh,'" such confinement was, nonetheless, not unlawful.[168] Unlike the constitutional protections under the Eighth Amendment accorded persons imprisoned on criminal charges, the detention of excludable aliens has never been recognized as punishment.[169] Thus, although some limited instance of liability have been upheld,[170] the Eighth Amendment mandates of a "civilized society" have never applied to detained excludable aliens.[171]

Implicit in the reasoning of *Barrera* is the application of the Eighth Amendment to detained excludable aliens. The court refuted the government's contention that indefinite detention is both appropriate and constitutional because its purpose is not to punish, but rather to guard the community against a probable danger for which there is no apparent remedy. "[I]t is sophistry to say incarceration for over eight years . . . is not punitive."[172] Once determined punitive in nature, the protections of both the Eighth and Fifth Amendments must flow to detained excludable aliens.[173]

Based on the acknowledged punitive nature of incarceration, as demonstrated in *Barrera*—in addition to acknowledging the reality of

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166. Lynch v. Cannatella, 810 F.2d 1363, *on remand*, 112 F.R.D. 195, *appeal dismissed*, 860 F.2d 651 (5th Cir. 1987) (noting that harbor police defendants were correct that the eighth amendment prohibitions against cruel and unusual punishment is not applicable in cases where plaintiffs are not in custody as punishment for a criminal act). Detention of excludable aliens, however, once viewed in the context of the *Barrera* opinion that such detention is "punishment" may arguably open the door to eighth amendment type claims.

167. Adras v. Nelson, 917 F.2d 1552, 1556-58 (11th Cir. 1990) (aliens denied any and all claims arising from abuse of discretionary function of duty under FTCA and violations of parole revocation or denial of parole does not rise to constitutional level).

168. *Id.*, at 1558-59.

169. *Id.*, at 1559 (citing Equan v. U.S I.N.S., 844 F.2d 276 (5th Cir. 1988)).

170. *Lynch*, 810 F.2d 1363 (plaintiffs could only recover for "gross physical abuse" at the hands of state and federal official).

171. Estelle v. Gamble, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066, *cert. denied*, 434 U.S. 974 (1977).

172. *Barrera*, 21 F.3d 314.

173. Foucha v. Louisiana, 112 S. Ct. 1780 (1992); Wing Wong v. United States, 163 U.S. 228 (1986). *Cf.* Adras v. Nelson, 917 F.2d 1552, 1556 (11th Cir. 1990) (no constitutional rights, no *Bivens* type claim).

the presence of excludable aliens imprisoned—excludable aliens are able to seek civil redress for intentional abuse of process, substandard conditions of confinement, inadequate medical care, right to effective assistance of counsel, and deprivation of liberty based on discriminatory or other practices under civil rights statutes and Bivens type claims.[174] Thus, the impetus to properly and adequately resolve the detention period and conditions of confinement for excludable aliens will be greatly increased under the threat of civil liability.

XI. THE FATE OF THE FLYING DUTCHMAN: WHERE WE GO FROM HERE

The Mariel Cubans have long ago receded from the front pages of the world's headlines. Those few detainees left in U.S. prisons most can easily ignore. The issues surrounding them, however, are not mooted, nor should they be. "U.S. READIES BLOCKADE TO HALT CUBANS"—dateline, August 11, 1994.[175]

Just prior to the completion of this article, in the wake of rising unrest in Cuba, the media announced that Fidel Castro "threatened to stop putting obstacles in the way of people who want to leave the country."[176] According to reports, Fidel Castro may "launch[] a repeat of the Mariel boatlift, in which he sent thousands of Cuban criminals to our shores."[177] As the hysteria mounts, the Clinton administration is prepared to mount a virtual blockade of the 90 mile-wide strait between Florida and Cuba. "The contingency plan drafted in 1981 following the Mariel affair ha[d] been shelved pending a second Castro-spawned exodus from Cuba."[178] Thus, the timing of *Barrera* is perhaps uncanny and almost prophetic in the opportunity it affords to reform immigration laws and policy so as to align immigration law with principles to which we otherwise adhere in our domestic law and policy in order to avoid a repeat of the human rights violations witnessed in the wake of the Mariel boatlift.

Regardless of political dogma and views surrounding the issues emergent from excludable aliens, reality masked by fiction and ignored in theory cannot be tolerated at the expense of basic human

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174. Adras, 917 F.2d at 1559 (plaintiffs, excludable aliens, alleged severe overcrowding, insufficient nourishment, inadequate medical care and other conditions of ill-treatment; nonetheless because the conditions did not reach the "gross physical abuse" requirement of *Lynch*, the plaintiffs' cause of action was dismissed). Under *Estelle* or *Bivens*, however, the plaintiffs' claim would have been sustainable. Estelle v. Gambell, 429 U.S. 97 (1976); Biven v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

175. The Florida Times-Union, Thursday, August 11, 1994, at 1.

176. *Id.*

177. *Id.*

178. The Florida Times-Union, Thursday, August 11, 1994, at A-7.

rights. The United States cannot maintain a policy of detention for excludable aliens. We must bear the burden of establishing procedures and programs to assimilate aliens into our society or we must accept turning them away from our shores and borders. Foreigners coming to our shores cannot be buried in our prisons. They are entitled to the same fundamental rights we demand for ourselves.

Thus, as the Ninth Circuit boldly stated in *Barrera*, it is time to acknowledge that constitutional protections apply to every person within the United States jurisdiction, including detained aliens. Attendant to those rights, is the need for judicial review for enforcement. The procedural protections and judicial enforcement required to ensure those protections are accomplished through the Ninth Circuit's recognition of the application of constitutional rights to excludable aliens. They are entitled to no more and deserving of no less—excludable aliens are people too.

The decision in *Barrera* simply serves to impose upon our government the declarations we claim as a society. Our laws have progressively moved toward eradicating discriminatory practices in every sector of our society.[179] There is no justification for fostering such practices at our borders.

We should also strip away the litany of categories established to discriminatorily reject certain immigrants; only immigrants who pose a true threat to our nation's security should be categorically excluded from our borders, for obvious reasons. The remaining categories of persons enumerated in the "excludable aliens" statute should be eliminated from the statute because there are arbitrary, unfounded, and are intended to discriminate. Immigrants would thus be admitted into the United States on the merits of their application as a whole.

VII. CONCLUSION

Our immigration laws continue to contain substantive provisions that are difficult to reconcile with generally accepted legal principles, and the Court thus far remains complacent with its asserted lack of power to interfere with Congress' substantive judgment in this area. In the case of unadmitted aliens detained on our soil but deemed legally outside our borders, the machinery of our domestic law has utterly failed to operate to ensure protection.[180] Whether confined at Ellis Island, Krome Detention camp in South Florida, or in federal

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179. Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1993); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (1990); Title VII, 42 U.S.C. § 2000e-2(a)(1)(1993).

180. 654 F.2d 1382.

penitentiaries, the "entry doctrine" fiction allows the INS to characterize excludable aliens as legally "outside" the U.S. border and thus beyond the reach of the *Bill of Rights*.[181] Until *Barerra*, the question remained whether an excludable alien is a "person" under our Constitution.[182] The Ninth Circuit has resoundingly answered that question in the affirmative—articulating to a civilized society what should have been self-evident.

For years, we as a society have for the most part been willing to ignore the plight of immigrants, none moreso than excludable aliens—they are outcasts, and as such, are discriminated against. They are also men, women and children, entitled to the protection of our laws so long as they live among us.

ADDENDUM

This article was completed in September 1994. Since the completion of the article, the Ninth Circuit scheduled a rehearing *en banc*, after which the Ninth Circuit vacated the promising opinion of its enlightened members,[183] and issued an opinion denouncing reliance on *Foucha*. The *en banc* opinion reasoned its reversal of promise on a convenient interpretation of the Immigration and Nationality Act[184] and resort to the legal fiction applied to excludable aliens holding that the attorney general has authority to indefinitely detain excludable aliens without violating the Constitution or international law.[185] Thereupon a bold step for human rights receded to judicial deference to political persuasions.

The Federal government has the authority to close United States borders—indeed many would have us do so.[186] I suggest such a measure in view of the Ninth Circuit's *en banc* opinion, as repugnant

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181. Gwynn, *supra* note 87 at 336.

182. *Id.*

183. *Barrera*, 21 F.3d 314.

184. § 237(a)(1); 18 U.S.C. § 1227 (a)(1).

185. Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995).

186. "[G]rass-roots anger over widespread economic concerns, hostility, toward welfare programs and fears arising from events such as the bombing of the World Trade Center have driven politicians to propose new measures to restrict the entry of immigrants. Marc Sandalow, *Politicians Paying Attention to Uproar Over Immigration: Divided We Stand/The Immigration Backlash*, S.F. CHRON., Mar. 31, 1994, at A1. "[A]s much as a third of the decline in the relative earning of native-born high-school dropouts in the 1980s can be attributed to competition from low skilled immigrants." Paul Glastris, *Immigration Crackdown: Huddled Masses; Anxious Americans want new restrictions and tougher enforcement*, U.S. NEWS & WORLD REP., Vol. 114, No. 24, June 21, 1993, at 34, 38 "[I]mmigrants generate a net $27 billion, rather than the $42 billion deficit asserted . . . ." Michael J. Mandel, *It's Really Two Immigrant Economies: Refugees and illegals cost the U.S. money—but other immigrants more than pay their way*, BUS. WEEK., June 20, 1994, at 74.

as the measure may appear, is, nonetheless, in effect, exceedingly preferable to our current policy of masquerading behind a fiction giving license to discrimination and human rights violations.

All hope for reconciling our domestic policy regarding excludable aliens with constitutional protections and international law is not lost. Certiorari to the Supreme Court has been applied for, giving the Supreme Court the opportunity to recognize excludable aliens as the persons they are thus entitling them to the minimal protections of our constitution and international law. . . so long as they live among us.