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Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?

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CONSEQUENCES TOO HARSH FOR NONCITIZENS CONVICTED OF AGGRAVATED FELONIES?

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I. INTRODUCTION

The Immigration and Nationality Act of 1952 (INA) largely governs the body of law regulating immigration in the United States. Provisions of the INA describe classes of noncitizens who are inadmissible and removable, including any noncitizen who is convicted of an aggravated felony defined by the statute. The definition of "aggravated felony" encompasses a range of offenses from very serious to relatively minor offenses and imposes harsh consequences for a noncitizen convicted of qualifying crimes. Some recent U.S. Supreme Court decisions acknowledge the harshness of these consequences and are encouraging a more narrow reach for this term, setting the stage for Congress to revisit the aggravated felony definition.

This Note will suggest restructuring the INA so that its penal provisions produce just results for noncitizens convicted of aggravated felonies. Part II of this Note will consider the legal history of the INA, including the expansion of the term aggravated felony, and the restriction of judicial and discretionary review by the U.S. Attorney General. Part III will characterize judicial interpretation of immigration laws, consider the recent U.S. Supreme Court decision in *Moncrieffe v. Holder*, and present holdings from the Supreme Court and U.S. Circuit Courts of Appeals that have collectively shaped im-

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migration law. Part IV will consider the problem with the broad aggravated felony definition and the consequences of characterizing crimes as such, including the societal impact that mandatory deportation has on noncitizens and their families. Part IV will also consider whether *Moncrieffe v. Holder* might open the door for restricting the offenses that qualify as aggravated felonies. Part V will consider whether the legislature should revise the definition of aggravated felony, or whether it should provide more discretionary review to determine whether certain offenses warrant removal.

This Note does not advocate for the rights of criminal aliens to stay in the United States when doing so would threaten the interests of justice and the safety of citizens. Rather, it advocates the use of discretion to individually consider immigration offenses before mandating removal and the revision of the current statutory scheme, so that minor offenses are not penalized with disproportionate consequences.

II. IMMIGRATION AND NATIONALITY ACT

A. Legal History

The primary sources of immigration law are the INA, provisions in treaties and other statutes, federal case law, and agency regulations.[1] The goals of this complex body of law include "controlling the entry of aliens[;] . . . establishing the grounds and procedures for their expulsion or, alternatively, relief from expulsion; providing for administrative and judicial review of the proceedings involved; and creating civil and criminal liability as a means of enforcing controls."[2] Imposing criminal liability on aliens is among the most serious concerns of the federal government, which implemented measures for excluding and removing criminal aliens early in the formation of immigration law.[3] Since the nineteenth century, barriers have restricted the entry of criminals into the United States; convicts and prostitutes were among the first classes of aliens deemed excludable.[4] By the early twentieth century, Congress enacted statutes that expanded the classes of excludable aliens and the grounds for removal of aliens who were already in the United States.[5]

The Immigration Act of 1917 included, for the first time, a list of grounds for removal "in response to public outcry against the activi-

1. 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 1.02[3][a] (Matthew Bender rev. ed. 2013).

2. *Id.* § 1.02[1].

3. *See id.*

4. S. REP. NO. 81-1515, at 335 (1950).

5. Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 778 (2012).

ties of noncitizen criminals."[6] This Act specifically listed "aliens sentenced to serve one or more years of imprisonment for commission in this country within 5 years of entry of crimes involving moral turpitude, or sentenced more than once to such a term of imprisonment for the commission of such crimes at any time after entry."[7] Other laws mandated removal for aliens convicted of drug trafficking, an offense of particular concern to Congress.[8] In 1947, the Senate approved a resolution allowing for a comprehensive investigation of the immigration system and subsequently enacted the INA.[9] The INA has developed substantially since 1952 to address changing concerns.[10]

B. Enlargement of the Aggravated Felony Provision

In 1988, Congress enacted the Anti-Drug Abuse Act of 1988 (ADAA) to "prevent the manufacturing, distribution, and use of illegal drugs, and for other purposes."[11] The ADAA amended the INA to include a definition of aggravated felonies to serve as grounds for deportation.[12] The ADAA defined three categories of offenses as aggravated felonies: murder, drug trafficking, and firearm trafficking.[13] After its introduction, the term aggravated felony expanded to include more serious and less serious offenses through amendments in the Immigration Act of 1990 (IMMACT 90),[14] the Immigration and Nationality Technical Corrections Act of 1994,[15] the Antiterrorism and Effective Death Penalty Act of 1966 (AEDPA),[16] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[17]

IMMACT 90 amended the INA to "change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purpos-

6. 6 GORDON ET AL., *supra* note 1, § 71.05[1][a]; s*ee also* S. REP. NO. 81-1515, at 388-89 (discussing the first time an elaborate list of causes for deportation was statutorily enumerated).

7. S. REP. NO. 81-1515, at 389.

8. *See id.* at 408.

9. *See id.* at 1; *see also* 6 GORDON ET AL., *supra* note 1, § 71.05[1][a].

10. 6 GORDON ET AL., *supra* note 1, § 71.05[1][a].

11. Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered titles of the U.S. Code).

12. § 7342, 102 Stat. at 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43)).

13. *Id.*

14. Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)).

15. Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101(a)(43)).

16. Pub. L. No. 104-132, § 440(b), 110 Stat. 1214, 1277-78 (codified as amended at 8 U.S.C. § 1101(a)(43)).

17. Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 3009-627 to -28 (codified as amended at 8 U.S.C. § 1101(a)(43)).

es."[18] The provision of IMMACT 90 relating to aggravated felonies added new categories of crimes to the existing list of qualifying offenses, including illicit trafficking in controlled substances, crimes related to money laundering, crimes of violence, and offenses in violation of federal, state, or foreign law.[19] Several years later, the Immigration and Nationality Technical Corrections Act provided the largest expansion of the classes of offenses characterized as aggravated felonies to include numerous offenses, such as theft and fraud.[20]

AEDPA and IIRAIRA also impacted the definition of aggravated felony. "The four listed purposes of IIRAIRA are to: (1) 'increase control over immigration to the United States,' (2) expedite the removal of aliens, 'especially criminal aliens,' (3) reduce abuse of asylum and parole, and (4) effect a reduction in the use of welfare and government benefits by aliens."[21] The purposes of AEDPA are " 'to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.' "[22] These Acts modified the aggravated felony definition by lowering the sentencing requirement from five years to one year, which allowed the provision to encompass crimes characterized as misdemeanors under state law.[23] The phrase "aggravated felony" is a term of art that includes non-felonies "when the language of a particular subparagraph specifically includes misdemeanors."[24] "The controlling factor is the sentence imposed,"[25] notwithstanding the fact that Congress expanded the term "conviction" to include any reference to imprisonment or sentence, regardless of its execution, deferred adjudication, probation, suspension, or expungement.[26] Even an indeterminate sentence constitutes an aggravated felony "as long as the law defines an indeterminate sentence as one that exceeds one year."[27]

Today, the definition of aggravated felony includes more than fifty classes of crimes imposing numerous penalties and restrictions against convicted noncitizens.[28] The legislature expanded the defini-

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18. Immigration Act of 1990.

19. *Id.* § 501 (amending the definition of "aggravated felony" within 8 U.S.C. § 1101(a)).

20. § 222(a), 108 Stat. at 4320-22.

21. Meneses, *supra* note 5, at 825 (quoting S. REP. NO. 104-249, at 2 (1996)).

22. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

23. *See* Meneses, *supra* note 5, at 782.

24. 6 GORDON ET AL., *supra* note 1, § 71.05[2][b].

25. *Id.*

26. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 322(a)(1), 110 Stat. 3009, 3009-628 to -29 (1996) (codified as amended at 8 U.S.C. § 1101(a)(48)(A)-(B)).

27. 6 GORDON ET AL., *supra* note 1, § 71.05[2][b].

28. *See* 8 U.S.C. § 1101(a)(43) (2012); 6 GORDON, *supra* note 1, § 71.05[2][b].

tion of the term four times in the decade after it was created.[29] Through these amendments, the initial concerns over the serious crimes of murder, drug trafficking and firearm trafficking gave way to less serious crimes that are neither aggravated, nor felonies.[30]

C. Fitting State Offenses into the Federal Scheme

The aggravated felony provision encompasses offenses in violation of federal or state law.[31] "[W]hether a state conviction can be considered an aggravated felony for immigration purposes is best determined according to a uniform rule based on set federal standards."[32] In most cases, courts employ the categorical approach in determining whether a state offense is comparable to an aggravated felony under the federal scheme.[33] This approach restricts courts to "look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[34] Under this approach, courts must determine "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony."[35] This approach has been widely accepted in immigration law, both because the Attorney General established this standard for convictions of noncitizens, and because the Board of Immigration Appeals (BIA) set this as the standard for removal proceedings.[36]

Despite the common usage of the categorical approach, there are some immigration cases in which this approach does not achieve the best compromise between federal and state offenses. In some instances, a departure from the categorical approach is warranted and courts should employ a modified categorical approach. Such cases occur, for example, when a noncitizen is convicted of a crime that is similar to, but broader than the generic crime, making it uncertain whether the offense satisfied the elements of the generic crime.[37] Using the modified categorical approach, courts may go beyond the

29. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101(a)(43)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered titles of the U.S. Code).

30. Meneses, *supra* note 5, at 781.

31. § 1101(a)(43).

32. 6 GORDON ET AL., *supra* note 1, § 71.05[2][b].

33. *Id.*

34. *Id.* (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)).

35. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)).

36. *See id.* at 1685; 6 GORDON ET AL., *supra* note 1, § 71.05[2][b] n.450.1.

37. 6 GORDON ET AL., *supra* note 1, § 71.05[2][b].

statutory language and look into the details of a conviction record to determine whether a state offense constitutes an aggravated felony.[38]

D. Restriction of Discretionary Review

The changing landscape of immigration law and the expansion of the aggravated felony definition have been accompanied by a restriction on judicial review in deportation cases. The Immigration Act of 1917 created Judicial Recommendation Against Deportation (JRAD), giving sentencing judges the ultimate authority to determine that a noncitizen shall not be deported.[39] Judicial discretion was restricted in 1952 and eliminated in the 1990s.[40] IMMACT 90 restricted the ability of immigration judges to grant discretionary relief in removal proceedings, which AEDPA entirely eliminated in 1996.[41] AEDPA added that "any final order of deportation against an alien who is deportable by reason of [certain enumerated criminal grounds] shall not be subject to review by any court."[42] The limitation on judicial review eliminated any ability of an immigration judge to consider a noncitizen's case and determine that they qualify for some form of discretionary relief from removal.

The INA does provide several possibilities for waivers of deportation. For example, a noncitizen may be granted a full and unconditional pardon by the President of the United States or by the governor of any state.[43] In addition, the INA includes a provision granting the Attorney General the discretion to cancel removal of permanent residents or certain nonpermanent residents deemed inadmissible or deportable; but, such discretion is barred altogether in cases where the offender has been convicted of an aggravated felony.[44] The effect of deportability, the limitation on judicial review of removal, and the limited ability of noncitizens to seek cancellation of removal are the obstacles that noncitizens face once their misconducts are categorized as aggravated felonies.[45]

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38. *Id.*
39. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1479 (2010); Meneses, *supra* note 5, at 782-83.
40. Meneses, *supra* note 5, at 783.
41. *Id.*
42. 6 GORDON ET AL., *supra* note 1, § 104.13[3] (quoting Antiterrorism and Effective Death Penalty Act of 1996 § 440(a)).
43. 8 U.S.C. § 1227(a)(2)(A)(vi) (2012).
44. *See* 8 U.S.C. § 1229b(a) (2012).
45. 6 GORDON ET AL., *supra* note 1, § 71.05[2][c].

III. AGGRAVATED FELONY CASES

A. Supreme Court Cases Shaping the Law

Federal court decisions have shaped the law relating to the deportability of criminal aliens as the statutory framework has evolved. Numerous decisions from the Supreme Court and circuit courts of appeals have involved noncitizens convicted of aggravated felonies. In less than a decade, the Supreme Court decided three cases involving drug offenses, each analyzing "whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' "[46] Additionally, the Court decided one case that considered whether a fraud conviction was an aggravated felony.[47] Through these decisions, the Court has established precedent that provides guidance to lower courts.

In 2006, the Court decided *Lopez v. Gonzales* and determined that a noncitizen's conviction of a state felony ultimately was not an aggravated felony.[48] The defendant was a legal permanent resident when he was convicted in South Dakota of a felony charge of aiding and abetting the possession of cocaine.[49] The INA provides that illicit trafficking in a controlled substance, which the CSA makes punishable by more than one year in prison, is an aggravated felony.[50] South Dakota law equated the aiding and abetting charge with possession, so the defendant was convicted of a felony, which was characterized as a misdemeanor under the CSA.[51] The government argued that the felony conviction should be treated as an aggravated felony under the INA, but the Court disagreed.[52] It reasoned that Congress would not have created a statutory scheme of felonies and misdemeanors if it intended courts to ignore the scheme in favor of state punishment.[53] The Court held that a state offense only equates to a federal felony if it proscribes conduct punishable as a felony under federal law.[54] The defendant, therefore, was not disqualified from discretionary cancellation of removal.[55]

Three years later, in *Nijhawan v. Holder*, a noncitizen was convicted of "conspiring to commit mail fraud, wire fraud, bank fraud,

46. Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 (2013).
47. *See* Nijhawan v. Holder, 557 U.S. 29, 32 (2009).
48. *See* Lopez v. Gonzales, 549 U.S. 47, 60 (2006).
49. *Id.* at 51.
50. *Id.* at 50.
51. *Id.* at 53.
52. *Id.*
53. *Id.* at 54-55.
54. *Id.* at 60.
55. *See id.*

and money laundering."[56] The INA makes punishable as an aggravated felony "an offense that . . . involves fraud or deceit in which the loss to the victim . . . exceeds $10,000."[57] The jury made no finding as to the amount involved in the fraud convictions, but the defendant stipulated at sentencing to an amount exceeding $10,000.[58] The Court considered whether the amount required for characterization as an aggravated felony under the INA referred to "an element of a fraud statute or to the factual circumstances surrounding commission of the crime on a specific occasion."[59] This difference would affect whether the Court should adopt the typical categorical approach, or whether it should adopt a circumstance-specific approach when determining whether the offense constitutes an aggravated felony.[60] Despite the Court's emphasis that the categorical approach is necessary when considering generic crimes, the Court adopted the circumstance-specific approach in this case because of the statutory-threshold requirement.[61] The Court upheld the aggravated felony conviction against the defendant, because there was clear and convincing evidence that the conviction involved losses considerably greater than the amount required by the statute.[62]

In 2010, the Court decided *Carachuri-Rosendo v. Holder*, which involved a legal permanent resident who faced deportation after committing two misdemeanor drug offenses in Texas.[63] The federal law provided that "recidivist simple possession"—a repeat conviction for a simple possession offense—is punishable as a felony with a prison sentence of up to two years, making it an aggravated felony.[64] Because of this categorization, the government sought to deport the defendant after his second conviction for possessing a single tablet of anti-anxiety medication without a prescription.[65] The defendant did not contest his removability, but argued he was eligible for cancellation of removal.[66] The Court had to determine whether the mere possibility of a two-year prison sentence was sufficient to constitute an aggravated felony.[67] The Court used a "commonsense conception" of the statutory language and determined that possession of one Xanax tablet did not constitute the offense of trafficking in a controlled sub-

56. 557 U.S. 29, 32 (2009).
57. *Id.* (emphasis omitted).
58. *Id.*
59. *Id.* at 33.
60. *Id.* at 34.
61. *See id.* at 36.
62. *See id.* at 42-43.
63. 560 U.S. 563 (2010).
64. *Id.* at 567-68.
65. *Id.* at 570.
66. *Id.*
67. *Id.*

stance.[68] The Court held that the relevant statutory hook is an actual conviction of a crime punishable as a felony under federal law, not the mere possibility that a felony conviction could have resulted.[69]

B. Moncrieffe v. Holder

Most recently in 2013, the Court issued its decision in *Moncrieffe v. Holder*, considering for a third time in seven years whether the government "properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' "[70] The defendant in *Moncrieffe* was a Jamaican citizen who legally moved to the United States in 1984 when he was three years old.[71] In 2007, the defendant was arrested for possessing 1.3 grams of marijuana and pleaded guilty to possession of marijuana with intent to distribute, a felony under Georgia state law.[72] As a first-time offender, the trial court required the defendant to complete five years of probation for the offense, after which the charge would be expunged.[73] In addition, "the trial court withheld entering a judgment of conviction or imposing any term of imprisonment."[74]

The government later sought to deport the defendant for conviction of an aggravated felony, because the offense was punishable by up to five years imprisonment and considered a felony under the CSA.[75] An immigration judge ordered the defendant's removal, and the Board of Immigration Appeals (BIA) affirmed.[76] The defendant filed a petition for review to the Fifth Circuit Court of Appeals and asserted that § 841(b)(4) of the CSA makes distribution of "a small amount of marijuana for no remuneration" a misdemeanor offense.[77] The Fifth Circuit denied the petition, holding that the defendant's conviction under Georgia law was the equivalent of a federal felony, and that " 'the default sentencing range for a marijuana distribution offense is the CSA's felony provision, § 841(b)(1)(D), rather than the misdemeanor provision.' "[78]

The Supreme Court granted certiorari to resolve the narrow issue of whether a state statute criminalizing conduct that meets both felony and misdemeanor provisions of the CSA is an offense that " 'pro-

68. *Id.* at 573.
69. *See id.*
70. 133 S. Ct. 1678, 1693 (2013).
71. *Id.* at 1683.
72. *Id.*; *see also* Ga. Code Ann., § 16-13-30(h) (making it a felony to possess a controlled substance with intent to distribute).
73. *Id.*
74. *Id.*
75. *See id.*
76. *See id.*
77. *Id.*
78. *Id.* (quoting Moncrieffe v. Holder, 662 F.3d 387, 392 (5th Cir. 2011), *rev'd*, 133 S. Ct. 1678 (2013) (citing Lopez v. Gonzales, 549 U.S. 47, 392 (2006))).

scribes conduct punishable as a felony under' the CSA."[79] Under the Georgia statute, the defendant pleaded guilty to a felony, but the record of conviction did not necessarily establish that the defendant's conduct would constitute a felony under the CSA.[80]

Justice Sotomayor wrote the opinion for the Court and described the severity of the consequences for noncitizens convicted of aggravated felonies under the INA, including deportation and ineligibility for discretionary relief from removal.[81] The Court maintained the standard that "a noncitizen's conviction of an offense that the [CSA] makes punishable by more than one year's imprisonment will be counted as an 'aggravated felony' " for convictions under state or federal law, but state offenses must be punishable as felonies under federal law.[82] The Court employed the categorical approach to determine whether the state offense equated to the generic definition of a federal felony,[83] explaining:

> By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense " 'necessarily' involved . . . facts equating to [the] generic [federal offense]."[84]

This approach required the Court to ignore the facts underlying the case, assume that the conviction was for the least severe acts criminalized under the state statute, and then determine whether the crime fit the definition of the generic federal offense.[85] In cases where a state statute contains several different crimes, each described separately, "a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy," or something similar.[86]

The Court applied the categorical approach in *Moncrieffe*, because " 'illicit trafficking in a controlled substance' is a 'generic crime.' "[87] To satisfy the categorical approach, the state drug offense "must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for that conduct."[88] The primary issue before the Court was whether the defend-

79. *Id.* at 1684 (quoting *Lopez*, 549 U.S. at 60).
80. *See id.* at 1685.
81. *See id.* at 1682.
82. *Id.* at 1683.
83. *See id.* at 1684.
84. *Id.* (quoting Shepard v. United States, 544 U.S. 13, 24 (2005)).
85. *Id.* (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).
86. *See id.* (citing Nijhawan v. Holder, 557 U.S. 29, 35 (2009)).
87. *Id.* at 1685 (quoting *Nijhawan*, 557 U.S. at 37).
88. *Id.*

ant's conviction under Georgia law for possession of marijuana with intent to distribute was "necessarily" a felony under the CSA.[89] Although possession of a controlled substance with intent to distribute is a felony, the Court was required to consider what punishment the CSA imposed for the offense.[90]

Upon examining the punishment provisions within the CSA, the Court cited the statute and highlighted its exception.[91] Section 841(a) describes the offense of unlawful possession under which the defendant was convicted, and subsection (b) describes its respective punishment:

> Subsection (b)(1)(D) provides that if a person commits a violation of subsection (a) involving "less than 50 kilograms of marihuana," then "such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years," *i.e.,* as a felon. But one of the exceptions is important here. Paragraph (4) provides, "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, 21 U.S.C. § 844, which for our purposes means as a misdemeanant.[92]

The distinguishing factor in *Moncrieffe* was that the defendant's conviction fell within the statutory exception that created two categories of punishment for possession with intent to distribute under the CSA, which meant the state conviction could match both felony and misdemeanor punishment.[93] Under the Georgia statute, a conviction for possession with intent to distribute marijuana does not reveal whether the conviction is for a small amount or for no remuneration.[94] Since a conviction for an aggravated felony requires that the state statute describe an offense that is "necessarily" punishable as a felony under the CSA, the defendant's conviction in *Moncrieffe* was not an aggravated felony.[95]

The Fifth Circuit believed the felony provision of the CSA to be the default provision,[96] but the Court felt this would ignore the legislature's intent in creating separate punishments within the statute.[97] The Court held that the conviction under state law was not for an aggravated felony under the INA.[98] The Court made clear its prefer-

89. *See id.*
90. *Id.*
91. *Id.* at 1686.
92. *Id.* at 1685-86.
93. *See id.* at 1686.
94. *See id.*
95. *See id.* at 1687.
96. *Id.* at 1688.
97. *See id.* at 1689.
98. *See id.*

ence to "err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor."[99] In addition, the Court declared that it would be unreasonable to characterize conduct as an aggravated felony when that conduct is characterized as a misdemeanor under federal statutes.[100] Although the defendant was still subject to deportation for his conviction, the Court's holding eliminated the mandatory sanctions that would have been imposed under the INA if the conviction were categorized as an aggravated felony.[101]

C. Moncrieffe *Dissent*

Justice Alito dissented in *Moncrieffe*, claiming that the Court did not use a pure categorical approach in deciding the case and asserting a need to depart from the pure categorical approach under the specific circumstances.[102] Justice Alito presented a hypothetical in which an alien found to possess two marijuana cigarettes with the intent to give one to a friend would be regarded as having committed an aggravated felony under the pure categorical approach.[103] "[T]his classification is plainly out of step with the CSA's assessment of the severity of the alien's crime because under the CSA the alien could obtain treatment as a misdemeanant."[104] Justice Alito agreed with the majority that the alien should not be classified as an aggravated felon, but he declared that it is necessary to depart from a pure categorical approach in order to avoid this result.[105] Ultimately, he took exception with the Court's reasoning rather than with its result.[106]

Justice Alito sided with the government's proposed remedy, which provided that noncitizens should be given the opportunity in immigration proceedings to show that their conviction involved a small amount of marijuana for no remuneration.[107] The majority disagreed with this result, asserting that this sort of *post hoc* investigation would invite re-litigation of past convictions in mini-trials, which is precisely what the categorical approach aims to prevent.[108] As Justice Alito pointed out, the categorical approach would not be best in cases like *Moncrieffe*, because some state crimes are so broadly defined that they encompass very serious and less serious crimes. Although

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99. *Id.* at 1693; *see* Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).
100. *Moncrieffe*, 133 S. Ct. at 1693.
101. *See id.*
102. *See id.* at 1699 (Alito, J., dissenting).
103. *Id.*
104. *Id.* at 1699-1700.
105. *Id.* at 1700.
106. *See id.*
107. *Id.* at 1690 (majority opinion).
108. *See id.*

the INA aims to identify categories of criminal conduct that pose a particularly high danger to society, its goal is not furthered by categorizing defendants, like the one in *Moncrieffe*, as aggravated felons.[109] Justice Alito supported a departure from the categorical approach, much like the Court embraced in prior cases, and supported a kind of modified categorical approach, declaring, "it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court."[110]

D. Circuit Court Cases Applying the Law

In light of decisions by the Supreme Court, various circuit courts have dealt with similar issues involving noncitizens convicted of aggravated felonies. Notable cases show the outer limits reached by the aggravated felony provision and the widely accepted rule that misdemeanor offenses in state law can constitute aggravated felonies. Circuit court decisions show how this definition extends from petit larceny, to pointing a firearm at another person, to aggravated criminal sexual contact.[111]

In *United States v. Pacheco*, the Second Circuit announced: "In the case before us, we deal with the question of whether Congress can make the word 'misdemeanor' mean 'felony.' As will be seen, we hold that it can."[112] *Pacheco* involved a noncitizen who was convicted of several misdemeanors in Rhode Island for which he received suspended one-year sentences.[113] The Second Circuit held that he had been convicted of a single, aggravated felony.[114] Similarly, in *United States v. Christopher*, the Eleventh Circuit upheld a lower court's finding that the defendant's misdemeanor shoplifting offense constituted an aggravated felony, because that court imposed a twelve-month, albeit suspended, sentence.[115] The Eleventh Circuit considered the length of the sentence imposed to be the controlling factor.[116] Additionally, in *United States v. Graham*, the Third Circuit upheld a lower court's finding that a petit larceny conviction constituted an aggravated felony.[117]

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109. *See id.* (Alito, J., dissenting).
110. *Id.* at 1701.
111. *See, e.g.*, Cole v. U.S. Att'y Gen., 712 F.3d 517 (11th Cir. 2013); Restrepo v. Att'y Gen., 617 F.3d 787 (3d Cir. 2010); United States v. Graham, 169 F.3d 787 (3d Cir. 1999).
112. United States v. Pacheco, 225 F.3d 148, 149 (2d Cir. 2000).
113. *Id.*
114. *Id.*
115. United States v. Christopher, 239 F.3d 1191, 1193-94 (11th Cir. 2001).
116. *Id.* at 1193.
117. *Graham*, 169 F.3d at 793.

IV. THE PROBLEM

A. Overbroad Aggravated Felony Provision

The laws expanding the aggravated felony definition have a common goal of protecting U.S. citizens.[118] The initial concern that prompted the creation the aggravated felony provision in the INA was protection from noncitizens convicted of murder, drug trafficking, and firearm trafficking.[119] Subsequent amendments to the INA provided protections from noncitizens engaged in crimes of violence, theft, and fraud.[120] The most recent changes to the statute aimed to expedite the removal of criminal aliens, deter terrorism, and provide justice for victims.[121] These changes serve societal interests by characterizing offenses as aggravated felonies and imposing punishment for serious criminal conduct in furtherance of a worthy goal.

The expansion of the classes of crimes characterized as aggravated felonies, however, begs an inquiry into whether the definition of aggravated felony is overbroad. It may be the case, for example, that amidst the growing fear of terrorism, Congress had a growing concern about getting rid of criminal aliens in the United States and equated all noncitizens to "terrorist aliens."[122] AEDPA and IIRAIRA, which were enacted primarily to deter terrorism, had the largest impact on the aggravated felony definition.[123] The concern driving the bills could have led Congress to draft an over-inclusive statute in response to the perceived problem of having criminal aliens in the country. "The aggravated felony provision now appears to include a number of crimes that may not seem deserving of their menacing label, such as petty theft, perjury, and misdemeanor assault and bat-

118. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101(a)(43)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered titles of the U.S. Code).

119. *See* Anti-Drug Abuse Act of 1988.

120. *See* Immigration and Nationality Technical Corrections Act of 1994; Immigration Act of 1990.

121. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996; Antiterrorism and Effective Death Penalty Act of 1996.

122. *See* Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIR. 1, 6 (2011).

123. *See* Illegal Immigration and Nationality Technical Corrections Act of 1996; Antiterrorism and Effective Death Penalty Act of 1996; *see also* Meneses, *supra* note 5, at 825.

tery."[124] The effects of the expansions seem to extend beyond the purposes motivating the amendments.[125]

B. Harsh Consequences for Conviction

The INA declares that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[126] Deportability makes it possible for the federal government to initiate removal proceedings against a noncitizen, yet in many instances, a noncitizen has various remedies to prevent actual removal. The alien may apply for a waiver, seek cancellation of removal by the Attorney General, or apply for asylum; but an alien convicted of an aggravated felony under the INA is barred from almost all forms of relief.[127] The only available relief is a full pardon by the President or a state governor.[128] This provision removes the Attorney General's discretion and states: "The Attorney General may cancel removal in the case of an alien who is . . . deportable from the United States if the alien . . . has not been convicted of an aggravated felony."[129] Furthermore, "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," meaning the alien is presumed to be a danger to the community of the United States and is ineligible to apply for asylum.[130] Thus, aliens convicted of aggravated felonies are deportable with no reasonable forms of relief, which is the practical equivalent of mandatory removal.

In addition to mandatory removal, the consequences of requiring deportation for an aggravated felony conviction include: (1) mandatory detention during removal proceedings; (2) a permanent bar against re-entry into the United States; (3) a bar against naturalization; and (4) enhanced sentences for illegal re-entry after deportation.[131] Furthermore, the aggravated felony provision applies retroactively and may have consequences on old convictions.[132] These consequences do not solely impact the criminal alien but very often affect the alien's family.[133] Human Rights Watch estimates that over 1 million people in the United States lost a family member to deportation between 1997 and 2007, many of whom are citizen children or spous-

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124. Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1699 (1999).
125. *See* Meneses, *supra* note 5, at 825.
126. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
127. *See* 8 U.S.C. §§ 1227(a)(2)(A)(vi), 1229b(a)(3), 1158(b)(2)(A)-(B) (2012).
128. § 1227(a)(2)(A)(vi).
129. § 1229b(a)(3).
130. 8 U.S.C. § 1158(b)(2)(B)(i) (2012).
131. Bennett, *supra* note 124, at 1701-02.
132. *Id.* at 1702.
133. Meneses, *supra* note 5, at 777.

es of noncitizens.[134] The restriction on re-entry also tremendously impacts aliens with families in the United States by eliminating any opportunity to be reunited in this country.[135]

According to estimates by the Department of Homeland Security, 160,000 convicted criminal aliens were deported in 2010, mostly due to convictions for drug offenses, immigration offenses, and criminal vehicular-traffic offenses.[136] "According to Human Rights Watch, of those persons deported for criminal offenses between 1997 and 2007, seventy-two percent were deported for committing non-violent crimes, and another fourteen percent were deported for offenses that had the potential to cause harm but did not."[137] Deportation carries serious penal consequences for noncitizens[138] and others in the United States community.[139] Thus, competing concerns for safety of the American people and unity among the families of noncitizens call for careful consideration of the impact of expanded laws that may overreach the intent of the legislature and impact important societal values.

C. Effect of Supreme Court Decisions

The fact that the Supreme Court has repeatedly addressed the issue of whether a noncitizen's criminal conduct constitutes an aggravated felony indicates the need for a better understanding of the purposes of the INA in order to appropriately implement its provisions. The CSA and the INA, for example, enforce punishment against the serious crime of illicit trafficking in a controlled substance.[140] "Large-scale marijuana distribution is a major source of income for some of the world's most dangerous drug cartels."[141] The CSA and INA aim to prevent and punish such large-scale drug distribution, but the goals of these statutes are not to impose serious consequences on crimes that are "out of step with the CSA's assessment of the severity of the alien's crime[.]"[142] Mandating removal without judicial review, or without possibility for cancellation of re-

134. *See id.*

135. *See* 8 U.S.C. § 1182(a)(9)(A)(ii); Bennett, *supra* note 124, at 1701-02; Meneses, *supra* note 5, at 822; *see also Deportations Under '96 Law Take Toll on Families*, ASSOCIATED PRESS (July 18, 2007), http://www.nbcnews.com/id/11683008/ns/us_news-life/t/deportations-under-law-take-toll-families/#.U3lTTV7A2d8.

136. Meneses, *supra* note 5, at 773.

137. *Id.*

138. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356 (2010). In *Padilla*, the Supreme Court ruled that defense counsel was required to inform noncitizen defendants of the deportation consequences of entering into a plea agreement. *Id.* at 369. The Court refused to distinguish between direct and collateral consequences in the immigration context, recognizing that deportation is an integral part of the penalty that may be imposed on noncitizens. *Id.* at 366.

139. Meneses, *supra* note 5, at 777.

140. 8 U.S.C. § 1101(a)(43).

141. Moncrieffe v. Holder, 133 S. Ct. 1678, 1696 (2013) (Alito, J., dissenting).

142. *See id.* at 1699.

moval of a noncitizen convicted of possession of a small amount of marijuana with intent to distribute, naturally falls beyond the serious crimes these statutes aim to criminalize.[143] For this reason, the Court in *Moncrieffe* determined that "[s]haring a small amount of marijuana for no remuneration, let alone possession with intent to do so, does not fit easily into the everyday understanding of trafficking, which ordinarily . . . means some sort of commercial dealing;" and decided that the defendant's conduct did not warrant the harsh consequences of an aggravated felony conviction.[144] The Court in *Moncrieffe* held for the third time that conduct the BIA and circuit courts were willing to uphold as aggravated felonies was not, in fact, equivalent to an aggravated felony.[145]

Consistency in applying the law, and clarity about interpreting the law, is necessary, especially when the consequences of conviction are so harsh. To that end, the recurrence of this issue before the Court may be a result of the realization that harsh consequences are not warranted by low-level drug offenses, or by less serious offenses in general. The consideration of whether an offense falls within the scope of an aggravated felony requires a comparison between state and federal law.[146] "Different states, however, define the requisite elements for . . . crimes differently."[147] This creates disparity and inconsistency as to what constitutes aggravated felonies in different states.[148] With many offenses qualifying as aggravated felonies while falling outside the scope of serious conduct criminalized by the INA, the issues before the Court may soon extend to other types of criminal conduct warranting mandatory removal without review. The Court's recent decisions encourage a legislative revision to restrict the types of criminal conduct that can be reached by the INA's aggravated felony definition or allow more discretion for judges deciding the issue.[149]

V. THE SOLUTION

The recurring dispute over the definition of aggravated felony before the Supreme Court suggests a need both to revise this provision

143. *See id.*
144. *Id.* at 1693 (internal quotation marks omitted).
145. *See id.*; Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Lopez v. Gonzales, 549 U.S. 47 (2006).
146. *See* 6 GORDON ET AL., *supra* note 1, § 71.05[2][b].
147. Bennett, *supra* note 124, at 1720.
148. *See id.*
149. Meneses, *supra* note 5, at 785 ("Recent Supreme Court holdings seem to be calling for Congressional re-consideration of immigration laws, especially in areas in which criminal law intersects with immigration regulation."); *see also* Kohli, *supra* note 122, at 14 ("[T]he Court seems to be reacting to Congress' reduction of judicial and administrative discretion with regard to deportations of criminal noncitizens over the last twenty years and the concurrent sharp increase in removals.").

to prevent excessive punishment for less serious offenses, and to cure disparate results in lower courts regarding what crimes constitute aggravated felonies. These needs call for congressional restructuring of the provisions of the INA defining aggravated felony and eliminating discretionary review of removal for noncitizens convicted of qualifying offenses. Narrowing the definition and granting judges discretion in reviewing immigration cases may be the appropriate solution to improve the current, unclear state of immigration law.

The term aggravated felony denotes a serious threat to society and suggests that removal without relief is proper for such offenses, but the Court has agreed that deportation goes beyond being regulatory and imposes severe penalties upon a noncitizen.[150] There is a very real threat to noncitizens, because this provision includes offenses ranging from misdemeanors to murder and imposing a blanket sanction upon anyone convicted of an offense, regardless of its severity.[151] Although U.S. Circuit Courts of Appeals have embraced the fact that this provision can include misdemeanors,[152] the Supreme Court has reversed those courts on three occasions, putting an end to deportation for some less serious crimes. These cases produced rulings that share a view of leniency for criminal aliens.[153]

A major issue in all of these Supreme Court decisions was the reasonableness of equating state convictions to federal convictions. Because state statutes can be very broad, disparity arises when courts are required to characterize state laws within the federal system. The Court has created many guidelines for courts to consider when determining whether offenses qualify as aggravated felonies. In *Lopez*, the circuit court and BIA supported a finding that the state felony should warrant removal as an aggravated felony, even though the crime of aiding and abetting possession of cocaine only amounted to a federal misdemeanor.[154] However, the Court held that the state offense must proscribe conduct punishable as a federal felony, implying that a consideration of conduct is essential. [155] In *Carachuri-Rosendo*, the Court emphasized that conviction of a crime that is punishable as a federal felony is key. [156] These holdings, taken together, seem to instruct courts to determine whether the actual conviction under a state law that prescribes conduct punishable as a felony equates to an aggravated felony. In *Moncrieffe*, the Court decided that a state felony should not be viewed in light of a default

150. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).
151. *See* Meneses, *supra* note 5, at 798.
152. *See, e.g.*, United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000).
153. *See* Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Lopez v. Gonzales, 549 U.S. 47 (2006).
154. *Lopez*, 549 U.S. 47.
155. *See id.*
156. *Carachuri-Rosendo*, 560 U.S. 563.

provision when the federal law includes dovetailing provisions prescribing both felony and misdemeanor punishment for an offense.[157] These cases illustrate the complicated manner in which courts must consider convictions. Although the Supreme Court found a way to reconcile these holdings, this area of the law remains perplexing, and judicial discretion may be the best resolution. In the wake of broad state statutes and complicated instructions, judicial discretion could be a meaningful and effective way of determining which part of a law an alien violated, and whether that offense should constitute an aggravated felony.

Furthermore, Justice Thomas's dissent in *Moncrieffe* suggests that the issue of aggravated felonies will continue to appear before the Court if it keeps ignoring the plain meaning of statutes.[158] If there is concern about the Supreme Court misinterpreting statutory provisions in its application of this law, it follows that U.S. Circuit Courts of Appeals will also have difficulty discerning the law. While it is Congress's prerogative to develop immigration law and policy, it would be desirable to revise ambiguous laws in order to promote more fair and consistent implementation. However, if Congress decides not to take action and narrow the scope of the aggravated felony provision, it should at least allow for judicial discretion to cure ambiguities. According to long-standing canons of construction, ambiguous provisions should be viewed in a light favorable to the noncitizen.[159] Employing this canon would require judges to inquire about the relevant circumstances surrounding the criminal conviction while determining whether removal is warranted.

The categorical approach is the accepted standard by which to fit state offenses in the federal law,[160] but the Supreme Court agreed that sometimes employment of a modified categorical approach is favorable.[161] A modified categorical approach may, in fact, be better suited than the categorical approach to determine whether most criminal convictions are properly characterized as aggravated felonies. While the majority in *Moncrieffe* supported the use of the categorical approach to decide the issue, Justice Alito's dissent asserted that the Court did not actually employ a purely categorical approach.[162] If this is true, then *Monrieffe* might, in effect, support the use of a modified categorical approach. Even if *Moncrieffe* does not

157. *Moncrieffe*, 133 S. Ct. 1678.

158. *See id.* at 1694 (Thomas, J., dissenting) (referring to the "drug trafficking crime" statute at issue in *Moncrieffe*).

159. *Id.* at 1693; *see also* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 516 (2003).

160. *Moncrieffe*, 133 S. Ct. at 1685.

161. *Id.* at 1701 (Alito, J., dissenting) (referencing several cases where the Court departed from the categorical approach).

162. *See id.* at 1697.

provide this support, other decisions support a modified categorical approach as an extension of the doctrine in favor of the alien. *Nijhawan*, for example, shows a necessity to depart from the categorical approach in some cases to consider the facts and circumstances underlying the conviction.[163] In *Nijhawan*, the Court drew a line to determine which offenses require consideration under a different approach:

> The "aggravated felony" statute lists several of its "offenses" in language that must refer to generic crimes [such as] . . . "murder, rape, or sexual abuse of a minor," . . . "illicit trafficking in a controlled substance," . . . and "illicit trafficking in firearms or destructive devices." . . . [H]owever, the "aggravated felony" statute . . . lists certain other "offenses" using language that almost certainly does not refer to generic crimes but refers to specific circumstances.[164]

The INA does not define most of the crimes it labels as aggravated felonies; rather, it refers to other statutes or uses everyday terms.[165] Sometimes, it is not clear which crimes are generic for the purposes of employing one approach over the other, which may support a universal adoption of a modified categorical approach instead.[166] In 2012, the Second Circuit decided *Pennant v. Holder*, in which the court explained that the use of the modified categorical approach involves a two-step inquiry: (1) the agency must consider whether the state statute is divisible, and (2) "[i]f the statute is divisible, the agency must proceed to the second step, 'consult[ing] the record of conviction to ascertain the category of conduct of which the alien was convicted.' "[167] Divisibility refers to some categories of proscribed conduct within the provision that warrants removal.[168] Upon this determination, courts may consider the record of conviction, charging document, and plea agreement to shed light onto the circumstances of conviction that are necessary to determine whether the crime is aggravated, or whether it is even a felony that warrants removal.[169] In other words, if it is unclear on the face of the conviction whether the noncitizen's conduct was for an aggravated felony or for serious criminal misconduct, immigration judges should be able to go beyond the record of conviction at the outset of immigration proceedings and "look to the facts and circumstances underlying an offender's conviction."[170] This would allow inquiry into the offense itself, rather than

163. *See* Nijhawan v. Holder, 557 U.S. 29, 34 (2009).

164. *Id.* at 37.

165. Bennett, *supra* note 124, at 1720.

166. *See, e.g.*, *Nijhawan*, 557 U.S. at 30-31 (supporting the categorical approach for generic crimes but departing from that approach for the defendant's conviction because of certain elements required by the provision).

167. Pennant v. Holder, 494 F. App'x 169, 170 (2012) (quoting Lanferman v. BIA, 576 F.3d 84, 88-89 (2d Cir. 2009)).

168. *See id.*

169. *See* 6 GORDON ET AL., *supra* note 1, § 71.05[2][b] n.450.1.

170. *Nijhawan*, 557 U.S. at 34.

just the language of the violated statute, which may have misleading implications. Although this approach might delay the process, the delay is worthwhile given the severity of the potential consequences for the noncitizen. A modified categorical approach would promote a fair determination of whether removal is an appropriate punishment for the crime.

Although a modified categorical approach may solve the problem of less serious offenses being punished too harshly, support for judicial discretion does not suggest that no misdemeanor can equate to an aggravated felony. Where the nature of the offense does not constitute a felony and is not aggravated, the judge should have discretion to determine whether the noncitizen is eligible for relief. Yet, in certain instances, aggravated felony treatment may be appropriate for misdemeanors. For example, in *Wireko v. Reno*, a misdemeanor sexual battery was characterized as an aggravated felony, because it fell within the INA's provision of a crime of violence for which the term of imprisonment is at least one year.[171] *Wireko* should be distinguished from the shoplifting conviction that was deemed an aggravated felony in *Christopher*.[172] It is more appropriate to categorize misdemeanor sexual battery as an aggravated felony, because the nature of this crime implies a threat to people. In order to prevent serious consequences for all of the crimes included in the expansive range of offenses reached by the aggravated felony statute, judges should be allowed to order removal for violent crimes or sexually deviant crimes as aggravated felonies. However, judges should also have the discretion to grant relief in cases where the offenses are victimless crimes or nonviolent misdemeanors that pose less serious threats to society.

Congress should eliminate mandatory removal without first requiring immigration judges to conduct an "individualized inquiry that examines factors such as the noncitizen's length of residence, family ties, likelihood of rehabilitation, and conditions in the receiving country in order to determine whether removal is warranted."[173] Inquiring into this background information could better protect family unity for noncitizens convicted of crimes while ensuring justice. Individualized inquiry could also effectively protect the U.S. community by requiring removal of noncitizens that pose the most serious threats to society.[174]

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171. *See* Wireko v. Reno, 211 F.3d 833, 835 (4th Cir. 2000).

172. United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001).

173. Kohli, *supra* note 122, at 4.

174. *Id.* at 20 ("ICE attorneys and investigators could focus resources on those noncitizens who present a real threat to community safety, rather than individuals with minor criminal histories.").

VI. CONCLUSION

The INA is a complex body of law governing the generally confusing area of immigration law. The INA has evolved since its inception and continues to face challenges in light of recurring issues. Changes to the INA have expanded the classes of offenses that may be categorized as aggravated felonies and eliminated judicial discretion to grant relief to noncitizens. Moreover, changes to the INA have limited the Attorney General's ability to cancel removal, leaving noncitizens convicted of aggravated felonies in danger of mandatory removal with no opportunity for relief. The issue of which crimes constitute aggravated felonies has been litigated extensively due to the harsh penalties imposed upon those convicted of aggravated felonies. In several cases, the Supreme Court realized the harsh consequences of this classification and spared some offenses from aggravated felony categorization. The Court's decisions seem to encourage a revision of legislative provisions and to improve the current state of immigration law in favor of noncitizens. To avoid over-punishment, Congress should narrow the classes of crimes that can be reached by the aggravated felony definition, or it should grant immigration judges more discretion to consider which offenses appropriately follow the letter of the law. The employment of a modified categorical approach may be an effective way to balance congressional interests and the rights of noncitizens. By allowing judges to inquire about circumstances surrounding the conviction and the noncitizen's background, a fair determination may be achieved as to whether or not a conviction warrants characterization as an aggravated felony.