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# Rethinking Drug Inadmissibility

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## RETHINKING DRUG INADMISSIBILITY

NANCY MORAWETZ\*

### ABSTRACT

*Changes in federal statutory policy, state criminal justice laws, and federal enforcement initiatives have led to an inflexible and zero-tolerance immigration policy with respect to minor drug use. This Article traces the evolution of the statutory scheme and how various provisions in state and federal law interact to create the current policy. It proceeds to investigate the broad reach of these rules if they are fully enforced, in light of the widespread lifetime experience with minor drug use both in the United States and abroad. Drawing on the experience of law enforcement agencies that have abandoned similarly rigid rules, the Article proposes changes to the immigration law that would better reflect societal standards with respect to the appropriate lifetime consequences of past drug use. Finally, the Article argues that more systemic reform depends on developing mechanisms that will better insulate the specific criteria for denying admission from the one-way political ratchet of episodic congressional oversight.*

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	165
I. THE STRUCTURE AND EVOLUTION OF DRUG	
INADMISSIBILITY LAWS . . . . .	170
A. <i>The Anti-Drug Abuse Act of 1986</i> . . . . .	172
B. <i>The Immigration Act of 1990</i> . . . . .	173
C. <i>The Immigration and Nationality Act</i> <i>Amendments of 1981</i> . . . . .	178
II. IMPLICATIONS OF CHANGES IN SUBSTANTIVE LAW AND	
ENFORCEMENT PRACTICES ON THE REACH OF THE DRUG	
INADMISSIBILITY GROUND ON UNITED STATES	
RESIDENTS . . . . .	180
A. <i>The Immigration Law Context</i> . . . . .	181
1. <i>Formal Structure of the Immigration Laws and the</i> <i>Impact of Admissibility Rules on</i> <i>United States Residents</i> . . . . .	181
2. <i>The Enforcement Context</i> . . . . .	184
B. <i>The Criminal Law Context</i> . . . . .	187
1. <i>State Criminal Law Requirements</i> . . . . .	188
2. <i>State Criminal Law Enforcement</i> . . . . .	190
III. THE CASE FOR LEGISLATIVE REFORM . . . . .	192
A. <i>Measuring the Immigration Standards</i> <i>Against Popular Experience</i> . . . . .	193
B. <i>Comparable Zero-Tolerance Policies Have</i> <i>Proven To Be Unworkable and Unjustified</i> . . . . .	196
C. <i>Disproportionality</i> . . . . .	202
D. <i>The Dangers of Arbitrary Enforcement and</i> <i>Profiling</i> . . . . .	203
E. <i>Penalizing Honesty</i> . . . . .	203
IV. PROPOSALS FOR LEGISLATIVE REFORM . . . . .	204
A. <i>Technical Fixes</i> . . . . .	204
1. <i>Basing Inadmissibility on Convictions</i> . . . . .	205
2. <i>Inclusion of a Petty Offense Exception</i> . . . . .	206
3. <i>Eliminating Bars to 212(h) Waivers</i> . . . . .	206
B. <i>Systematic Overhaul</i> . . . . .	207
CONCLUSION . . . . .	209

## INTRODUCTION

In early 2007, the press debated whether candidate Barack Obama's admission of past cocaine use would spell the end of his bid for the presidency.<sup>1</sup> Eleven years earlier, then-candidate George Bush was more cautious in his admissions, stating that he could honestly deny any drug use over the previous twenty-five years.<sup>2</sup> Bush was careful not to provide a lifetime answer to the questions of the press and refused to answer specific questions about whether he had used drugs before he turned twenty-eight.<sup>3</sup> The press around Obama and Bush included active debate about the scope to which public officials should be subjected to scrutiny about any past drug use.<sup>4</sup> But the statements of both Obama and Bush reflect a common assessment that drug use that is far enough in the past or has been followed by a clean record should not serve to disqualify them from public office. This assessment matched the polls, where 84 percent of voters said that they did not think that proof of cocaine use in his twenties should disqualify Bush from the presidency.<sup>5</sup> Indeed, in the domestic sphere, the reality of some past drug use in a large segment of the adult population is so well-recognized that the Federal Bureau of Investigation (FBI), along with police departments around the country, have altered hiring practices so that admission of past drug use no longer automatically disqualifies an applicant for a position as an agent.<sup>6</sup>

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1. See, e.g., Lois Romano, *Effect of Obama's Candor Remains To Be Seen*, WASH. POST, Jan. 3, 2007, at A1.

2. See, e.g., CNN.com, *Bush Faces New Round of Drug Questions*, Aug. 20, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/08/20/president.2000/bush.drug/>.

3. See, e.g., Online NewsHour, *The Drug Question*, Aug. 20, 1999, [http://www.pbs.org/newshour/bb/media/july-dec99/bush\\_8-20.html](http://www.pbs.org/newshour/bb/media/july-dec99/bush_8-20.html).

4. *Id.*

5. See *Bush Faces New Round of Drug Questions*, *supra* note 2.

6. See, e.g., Federal Bureau of Investigations, *Background Investigation, Employment Drug Policy*, <http://www.fbijobs.gov/52.asp> (last visited Sept. 25, 2008) (barring those who answer yes to any of the following questions: "Have you used marijuana at all within the last three years? Have you used any other illegal drug (including anabolic steroids after February 27, 1991) at all in the past 10 years? Have you ever sold any illegal drug for profit? Have you ever used an illegal drug (no matter how many times or how long ago) while in a law enforcement or prosecutorial position, or in a position which carries with it a high level of responsibility or public trust?").

In the immigration realm, the situation is completely different. At the questioning stage, there is no limit to the time span for which immigrants are expected to reveal past drug use. The standard application to adjust status to lawful permanent residence asks applicants: "Have you ever, in or outside the United States: knowingly committed ... a drug related offense for which you have not been arrested?"<sup>7</sup> Once answers are provided, the law is extremely unforgiving. As rewritten in 1990, the Immigration and Nationality Act (INA) provides that an admission of a violation of a controlled substance law bars admission to the United States.<sup>8</sup> There is no provision for excluding old offenses. And unlike the other major criminal ground of inadmissibility, there is no exception for those who were under eighteen at the time of the crime or who were convicted of a petty offense.<sup>9</sup> Furthermore, the general waiver for criminal grounds of inadmissibility is unavailable for anything other than a single instance of possession of marijuana in an amount under thirty grams, an amount which is less than an ounce.<sup>10</sup>

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In addition, the FBI policy bars those who have been convicted of a felony or who are current users. *Id.* at Employment Disqualifiers, <http://www.fbijobs.gov/51.asp> (last visited Sept. 25, 2008). Prior to December 2006, the FBI had a more rigid policy that barred those who admitted using marijuana more than fifteen times in their lifetime. *See* Ted Bridis, *FBI Revisits Policy on Drug Use*, WASH. POST, Oct. 11, 2005, at A15; *see also* BRUCE TAYLOR ET AL., COP CRUNCH: IDENTIFYING STRATEGIES FOR DEALING WITH THE RECRUITING AND HIRING CRISIS IN LAW ENFORCEMENT 12 (2006), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/213800.pdf> (describing a growing tendency among police departments to tolerate some history of drug use).

7. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., I-485, Application to Register Permanent Residence or Adjust Status, at 3, *available at* <http://www.uscis.gov/files/form/i-485.pdf>.

8. Section 212 of the INA makes inadmissible any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of ... a violation of (or a conspiracy ... to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21).

Immigration and Nationality Act § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2000) [hereinafter INA].

9. Section 212(a)(2)(A)(ii)—providing an exception to inadmissibility under section 212(a)(2)(A)(i)(II)—only applies to the inadmissibility ground for crimes involving moral turpitude under § 212(a)(2)(A)(i)(I). *Id.* § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (2000).

10. *Id.* § 212(h), 8 U.S.C. § 1182(h) (2000).

The potential sweep of the drug inadmissibility ground is breathtaking. Various studies of lifetime drug use in the American population show that experimentation with drugs is the norm rather than the exception.<sup>11</sup> Furthermore, these studies rely on self-reporting of conscious use of illicit drugs.<sup>12</sup> The criminal law has evolved so that possession is now typically a strict liability crime in which mere presence in a location where there are drugs is sufficient to prove constructive possession, and there are no meaningful defenses to a charge of possession.<sup>13</sup> If the immigration law were applied to truly screen out every applicant who, at some time in his or her life, could have been prosecuted under the broad strict liability drug possession laws of the United States, it is easy to imagine even larger numbers, if not virtually all, of those selected for immigration based on family ties or business need would be excluded.

It is time for policymakers to review the standards for barring immigrants based on past violations of drug laws. Any inadmissibility rule denies admission to the very people who are identified by law as those we are most interested in having immigrate. Whether that group is made up of family members and those sponsored by business (as reflected in current law)<sup>14</sup> or a point system (as proposed in the “Grand Bargain” debated in 2007),<sup>15</sup> the immigration laws are designed to identify persons who the United States has an interest in bringing or keeping in this country. Because drug inadmissibility sweeps so broadly, it has the potential to exclude arbitrarily many worthy immigrants. On that basis alone, the standards are worthy of examination.

Furthermore, the current law emerged from an inattentive legislative process. As a result of a series of legislative amendments—many of which were accompanied by no explanation from

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11. See *infra* notes 175-84 and accompanying text.

12. See *infra* note 175 and accompanying text.

13. See MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME 32-39 (2002).

14. See *generally* INA § 202, 8 U.S.C. § 1152 (2000).

15. The “Grand Bargain” refers to a proposal that a number of senators introduced in the spring of 2007 to alter the immigration system as part of comprehensive immigration reform. A summary of its features can be found at AILA InforNet, available at <http://www.aila.org/content/default.aspx?docid=22365> (last visited Sept. 25, 2008).

Congress<sup>16</sup> or explanations that indicated that Congress had no intent to expand these grounds<sup>17</sup>—the drug inadmissibility ground has lost the conventional moorings for limiting the breadth of inadmissibility grounds. First, it is based on a pure cross-reference to the laws regulating drugs that are enacted by states or foreign governments.<sup>18</sup> It has no significant separate federal content—as with laws governing crimes involving moral turpitude—which limits the scope of offenses. As a result, it is hostage to state laws that have dispensed with basic safeguards of the criminal law, such as *mens rea*, in delimiting criminal liability.<sup>19</sup> Second, since 1990, the drug ground can be triggered without a conviction, and yet it lacks basic exceptions for petty offenses that are recognized for the other significant inadmissibility ground,<sup>20</sup> which reaches crimes classified as “involving moral turpitude.”<sup>21</sup> Given the prevalence of lifetime drug use, the lack of any exception for petty offenses assures that the drug ground reaches minor conduct in excluding worthy applicants for admission. Third, the drug ground is written in a way that ossifies the exceptions for more innocuous use identified in the past.<sup>22</sup> As applied today, any new drug that the federal government chooses to recognize as worthy of being treated as a controlled substance is automatically treated as a ground of inadmissibility and as not worthy of any exception. Fourth, the drug inadmissibility ground is particularly out of step with public values, as reflected in the polls surrounding inquiry into President Bush’s possible past drug use.<sup>23</sup>

So long as drug inadmissibility can be triggered by a concession, rather than a conviction, reform is also necessary to preserve the integrity of the immigration process. Questions that seek admissions from immigrant applicants for visas and then provide no safety valve for fair consideration of the responses encourage applicants to lie. This is bad for the applicants and bad for the

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16. See *infra* note 43 and accompanying text.

17. See *infra* note 49.

18. See *infra* note 46 and accompanying text.

19. See *infra* Part II.B.1.

20. See *infra* notes 55-59 and accompanying text.

21. INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (2000).

22. See *infra* notes 87-95 and accompanying text.

23. See *supra* note 5 and accompanying text.

immigration system. It breeds contempt for the process, discourages honesty, and rewards dishonesty.

The drafters of the immigration law should learn from the experience of employers who have rejected the kind of zero-tolerance, one-size-fits-all approach that is reflected in the current drug inadmissibility grounds.<sup>24</sup> Although many employers are restricted by law from inquiring into past drug use, certain federal employers are exempted from these restrictions.<sup>25</sup> Among these federal employers, the FBI has experimented with a policy that was almost, although not quite, as severe as the standards in current immigration law.<sup>26</sup> But with experience, the FBI rejected such a zero-tolerance policy because it screened out worthy potential employees.<sup>27</sup> If the FBI can recognize the folly of inflexible rules that screen out our job candidates with past drug use or misdemeanor convictions, then certainly the immigration system, which is not hiring for such sensitive positions, but is instead making decisions about reuniting family and attracting talent for the workplace, should be able to do so as well.

Part I of this Article examines key aspects of current drug inadmissibility grounds, and the legislative origins of these policies. Part II explores how criminal justice policies and general changes in immigration law and enforcement have affected the consequences of the drug inadmissibility criteria. Part III presents the case for legislative reform. Finally, Part IV proposes large and small measures that Congress could undertake to achieve a more rational policy on drug inadmissibility.<sup>28</sup>

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24. See *infra* Part III.B.

25. See *infra* note 192 and accompanying text.

26. See *infra* note 196 and accompanying text.

27. See *infra* notes 194-207 and accompanying text.

28. This Article does not address the proper scope of two additional features of the inadmissibility law as it relates to drugs: (1) the bar on admission for drug addiction that is included in the health-related grounds of inadmissibility, INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv) (2000); and (2) the bar on admission of persons whom the border official has “reason to believe” is or has been a drug trafficker. *Id.* § 212(a)(2)(C). This Article also does not examine drug deportability standards and the grounds for treating a drug offense as an “aggravated felony” that bars most forms of relief. See *generally* *Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that a drug possession conviction is not an aggravated felony by virtue of being a state felony); *In re Jose Angel Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (concluding that a subsequent possession offense that was not prosecuted as a recidivist crime is not an aggravated felony).

## I. THE STRUCTURE AND EVOLUTION OF DRUG INADMISSIBILITY LAWS

Rules excluding those with a criminal past are a longstanding aspect of the immigration law.<sup>29</sup> But even within that context, the rules on drug crimes stick out like a sore thumb. As Professor Steve Legomsky has observed, the drug inadmissibility rules are unusually unforgiving.<sup>30</sup> They reach crimes committed by minors, crimes for which the only penalty was a sentence of probation, crimes that are classified as misdemeanors, and even offenses that are treated as violations and not crimes under state law. Moreover, for a wide array of drug offenses, there is no available waiver, irrespective of the length of time since the offense or the extreme hardship that will be sustained by immediate family members.<sup>31</sup>

Thirty years ago, drug inadmissibility rules hit the popular press when the Immigration and Naturalization Service (INS) sought to deport John Lennon. Lennon had been admitted to the United States on a temporary basis when he and his wife, Yoko Ono, sought to obtain custody of her daughter from a previous marriage.<sup>32</sup> Lennon, who had a past conviction for possession of cannabis resin, was treated as “excludable” because of this conviction.<sup>33</sup> He was permitted into the United States, however, through a waiver that is

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29. Many scholars have commented on the punitive and extreme nature of immigration provisions that are related to a past crime. *See, e.g.*, Jennifer Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 340-43 (2007) (exploring the use of gang association labels to criminalize and deport noncitizens without regard to criminal convictions); Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts on Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (discussing generally the increasing convergence of immigration and criminal law); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613-14 (2003) (placing punitive aspects of immigration law in the context of broader punitive developments in criminal justice policy).

30. *See* Steven Legomsky, *Reforming the Criteria for the Exclusion and Deportation of Alien Criminal Offenders*, 12 IN DEFENSE OF THE ALIEN 64, 65-66 (1990).

31. The only waiver is § 212(h) of the Immigration and Nationality Act. This waiver is limited to a single use of a small quantity of marijuana and requires either that the crime be fifteen years old or that the applicant be able to show extreme hardship to a lawful permanent resident or citizen parent, spouse, or child. INA § 212(h), 8 U.S.C. § 1182(h) (2000).

32. *Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975).

33. *Id.* at 188.

available to temporary visitors.<sup>34</sup> When Lennon sought to obtain permanent status based on his status as an exceptional artist, however, his application was denied on the ground that there was no waiver available for permanent immigrants with past drug convictions.<sup>35</sup> Lennon proceeded to wage a four-year battle to obtain legal status.<sup>36</sup> Ultimately, he prevailed.<sup>37</sup>

Lennon's case serves as a useful backdrop to understanding current immigration law governing persons who have violated drug laws. Lennon prevailed by arguing that the law only applied to convictions for "illicit" possession of a prohibited drug.<sup>38</sup> His lawyers argued that Lennon's conviction was under a statute that did not require the defendant to have any guilty knowledge.<sup>39</sup> In Lennon's case, the drug had been found among his possessions in his apartment.<sup>40</sup> Judge Kaufman, writing for the panel in the Second Circuit, agreed that the British law would permit a conviction even when the defendant was wholly unaware of the presence of the drug, and therefore reversed the order of deportation in Lennon's case.<sup>41</sup> The media closely followed Lennon's case, and Lennon gained widespread support in his bid to remain in the United States.<sup>42</sup> But changes in the law enacted in the decade following his victory would have prevented that victory from happening.

Since Lennon's case, there have been three major changes to the law governing past violations of drug laws. Two of these expanded the grounds of exclusion (now termed "inadmissibility"). One provided a small window for humanitarian waivers. The two changes that expanded grounds of exclusion followed the all-too-familiar pattern of enactment without any explanation or public

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34. *Id.* at 189.

35. *Id.* at 190.

36. *Id.* at 195.

37. *Id.*; Arnold H. Lubasch, *Deportation of Lennon Barred by Court of Appeals*, N.Y. TIMES, Oct. 8, 1975, at 42.

38. *Lennon*, 527 F.2d at 190, 193.

39. *Id.* at 190.

40. *Id.* at 188.

41. *Id.* at 192.

42. See, e.g., David Bird, *Lindsay Deplores Action to Deport Lenons as a 'Grave Injustice'*, N.Y. TIMES, Apr. 29, 1972, at 33; Albin Krebs, *Lennon's Deportation Hearing is Delayed*, N.Y. TIMES, May 2, 1972, at 33.

debate.<sup>43</sup> Altogether, they create a package of laws that sweep far wider than those that the INS sought to use to deport John Lennon.

*A. The Anti-Drug Abuse Act of 1986*

The first significant expansion of the drug excludability category came in the Anti-Drug Abuse Act of 1986.<sup>44</sup> According to press reports, this legislation was rushed through Congress in a matter of weeks following the widely reported drug-related death of Len Bias, a popular basketball star from the Washington, D.C. area.<sup>45</sup> An amendment that overturned the key to the Lennon opinion was a very minor provision in this enormous piece of legislation. Instead of requiring that possession offenses be “illicit,” the new legislation rewrote the drug exclusion ground to cross-reference any law or regulation of a state or foreign country “relating to” a controlled substance, as that term is defined by federal law.<sup>46</sup>

The elimination of any knowledge element in the drug exclusion ground opened the way for drug exclusion to automatically expand

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43. See, e.g., Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 210 (2007) [hereinafter Morawetz, *Invisible Border*] (describing lack of congressional attention to the change in treatment of lawful permanent residents with past criminal offenses who travel); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1955 n.106 (2000) [hereinafter Morawetz, *1996 Deportation Laws*] (describing last-minute unexplained changes to the bars to relief from removal); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 152 (1998) [hereinafter Morawetz, *Retroactive Deportation Laws*] (describing lack of attention to changes in the stop time rule).

44. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207-47 (1986).

45. See, e.g., Peter Kerr, *Anatomy of the Drug Issue: How, After Years, It Erupted*, N.Y. TIMES, Nov. 17, 1986, at A1.

46. Subtitle M of the Anti-Drug Abuse Act was entitled the “Narcotics Traffickers Deportation Act.” Section 1751(a) amended the drug exclusion ground in § 212(a)(23) of the INA:

- (1) by striking out “any law or regulation relating to” and all that follows through “addiction-sustaining opiate” and inserting in lieu thereof “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))”; and
- (2) by striking out “any of the aforementioned drugs” and inserting in lieu thereof “any such controlled substance.”

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207 (1986).

with state laws that made prosecution easy. If a state allowed constructive possession to support a conviction, then the federal law would treat that as a ground of exclusion. Similarly, if the state eliminated a defense, the federal law would follow suit. All that mattered under this new formulation is whether the state offense is properly categorized as “relating to” a controlled substance.

This seemingly technical change had enormous implications for the administration of the immigration law. In general, the key to criminal exclusion or deportation grounds is whether the federal category matches the requirement for a conviction under the relevant state law of the offense for which the individual was convicted.<sup>47</sup> In the case of state laws on passing bad checks, for example, the immigration law question is whether the state conviction can be classified as a “crime involving moral turpitude.” Where state law requires proof that the individual meant to pass a bad check, the crime is classified as a crime involving moral turpitude. But where the state has dispensed with the mens rea element, and instead allows a presumption of bad intent when the individual lacked the funds to pay the check, the conviction cannot be classified as a crime involving moral turpitude.<sup>48</sup> If the state crime need only relate to the same subject as the federal crime, no such correspondence in the scope of criminal liability is necessary. In the case of drug crimes, as will be discussed in Part I.B, this automatic expansion of the federal exclusion category has had enormous implications.

### *B. The Immigration Act of 1990*

The second major expansion in the drug exclusion ground came in 1990. In 1990, Congress overhauled the exclusion provisions in an effort to change “outmoded” grounds of exclusion.<sup>49</sup> The

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47. Morawetz, *1996 Deportation Laws*, *supra* note 43, at 109 n.46.

48. Compare *In re Balao*, 20 I&N Dec. 440, 444 (BIA 1992) (holding that because intent to defraud is not an essential element of the crime of passing bad checks under Pennsylvania law, a conviction under Pennsylvania law is not a conviction for a crime involving moral turpitude), with *In re Khalik*, 17 I&N Dec. 518, 519 (BIA 1980) (holding that because the Michigan offense of issuance of a check without sufficient funds includes the element of intent to defraud, such a conviction constitutes a conviction for a crime involving moral turpitude).

49. The conference report stated:

legislative history of the 1990 Act contains substantial discussion of many of these revisions. For example, the legislative history discusses the elimination of the exclusion ground based on sexual orientation<sup>50</sup> and the revision of grounds based on physical and mental disorders or on political beliefs.<sup>51</sup> There was no explanation, however, of the changes to the criminal grounds for exclusion. It appears that participants understood the conference substitute mainly as a reorganization of existing grounds and not as a set of substantive changes.<sup>52</sup>

The 1990 changes, however, were very significant. Prior to 1990, the drug exclusion ground was a separate subsection of the INA.<sup>53</sup> The 1990 amendments revised the long list of exclusion grounds and collected them into categories governing health, criminal, and other grounds. The criminal grounds were grouped in INA § 212(a)(2), with the first subsection including both the longstanding provision regarding “crimes involving moral turpitude” (CIMT) and the ground for crimes “relating to” a controlled substance.<sup>54</sup> These two grounds, however, had different triggers and exceptions. The ground for CIMTs had historically been applied both to those convicted of a crime and to those who admit having committed such crime, or to those who admit to having committed acts that constituted the essential elements of such crime.<sup>55</sup> It included exceptions, however,

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The House amendment repealed several outmoded grounds for exclusion based on health and replaced them with a general exclusion based on a mental or physical disorder which could endanger the alien or others and a second ground based on drug abuse or addiction.

The Senate bill had no comparable provision.

The conference substitute provides for a comprehensive revision of all the existing grounds for exclusion and deportation, including the repeal of outmoded grounds, the expansion of waivers for certain grounds, the substantial revision of security and foreign policy grounds, and the consolidation of related grounds in order to make the law more rational and easy to understand.

H.R. REP. NO. 101-955, at 128 (1990) (Conf. Rep.).

50. H.R. REP. NO. 101-723, pt. 1, at 56 (1990) (Conf. Rep.).

51. *See supra* note 49.

52. A key player in the 1990 reforms, Bruce Morrison, reports that there was little attention paid to how the redesigned inadmissibility grounds altered the standards for inadmissibility based on drug violations. Conversation with Bruce Morrison, Former Chair, Immigration Subcommittee of the House Judiciary Committee (May 22, 2007).

53. INA § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1988).

54. INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(A)(I) (1990).

55. *See id.*

for those who committed one crime while under the age of eighteen, and five years prior to the application for admission, or who had only one offense that is classified as a petty offense.<sup>56</sup> The ground for drug exclusion had no such exceptions. However, drug exclusion was only triggered by a conviction.<sup>57</sup> As rewritten in 1990, and as in force today, the drug exclusion ground was expanded to include the CIMT trigger of an admission.<sup>58</sup> But there was no similar incorporation of the exceptions for CIMTs that are youthful or petty offenses.

By expanding the drug ground to include admissions, Congress opened up the possibility that a wide range of statements in various contexts could be seen as grounds for exclusion. The danger is that virtually any admission of past drug use made in response to a question on an immigration application will serve as a bar to immigration.

The 1990 change may have seemed innocuous to drafters because of the very limited application of the admission ground in the context of CIMTs. Well before 1990, for instance, agency case law had developed in ways that greatly circumscribed the applicability of the admission ground. First, in a series of decisions, the Board of Immigration Appeals (BIA) ruled that where there has been a criminal arrest, the BIA would defer to the outcome of the proceeding to determine whether the individual is excludable, notwithstanding any admissions that were made in the course of the proceeding.<sup>59</sup> Second, the BIA had ruled that in order for an admission of a crime to trigger the exclusion ground, the admission must be voluntary and must be made following an explanation of the elements of the crime to which the individual was admitting.<sup>60</sup> Due to these two developments in agency case law, the CIMT admission ground swept far more broadly on paper than it did in practice. In a case where the government argued that the record showed that a respondent admitted to making false statements under oath, for example, the BIA ruled that the admission was not

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56. *Id.*

57. *See supra* note 20.

58. INA § 212(a)(2)(A)(II), 8 U.S.C. § 1182(a)(2)(i)(A)(II) (2000).

59. *See, e.g., In re Seda*, 17 I&N Dec. 550 (BIA 1980); *In re Winter*, 12 I&N Dec. 638, 642 (BIA 1968).

60. *See, e.g., In re G*, 1 I&N Dec. 225, 227 (BIA 1940) (admission of false statements under oath insufficient to establish admission of perjury).

of perjury because the individual had not been presented with a definition of the elements of perjury.<sup>61</sup>

The elements of drug crimes and the multiple ways of obtaining admissions of past drug use, however, pose a serious danger that exclusion based on admission of drug violations will sweep far more broadly. That potential sweep is evident in a decision from the U.S. Court of Appeals for the Ninth Circuit. In *Pazcoquin v. Radcliffe*,<sup>62</sup> the petitioner was a Philippine immigrant who obtained a visa from the American embassy in the Philippines to join his mother as a permanent resident of the United States.<sup>63</sup> As part of the application for a visa, Pazcoquin had been examined by a doctor—to whom he had admitted that he had used marijuana over a four-year period ending when he was twenty-one.<sup>64</sup> When Pazcoquin arrived in the United States, he was further questioned about his marijuana use.<sup>65</sup> Ultimately, he was placed in removal proceedings.<sup>66</sup>

On appeal, Pazcoquin made two major arguments. First, he argued that his use of marijuana was not necessarily a crime because Philippine law provides a defense that may have been available had he ever been charged with possession of marijuana.<sup>67</sup> Second, he argued that since he had not been provided with a definition and the essential elements of the crime, his admission did not meet the requirements of agency case law circumscribing which statements qualify as admissions.<sup>68</sup> The Ninth Circuit rejected both arguments. It concluded that the “essential elements” of a drug crime do not include defenses.<sup>69</sup> It further concluded that while the immigration inspector was duty-bound to provide Pazcoquin with a definition and the essential elements of the crime of possession or use of marijuana under Philippine law, no such obligation applied with respect to the doctor who had obtained admissions in the

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61. *Id.*

62. 292 F.3d 1209 (9th Cir. 2002). Judge Berzon’s dissent is reported at 308 F.3d 934 (9th Cir. 2002).

63. *Pazcoquin*, 292 F.3d at 1212.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1214.

68. *Id.* at 1216.

69. *Id.* at 1214.

Philippines.<sup>70</sup> As a result, Pazcoguin's honest answer to a medical professional in connection with an application for admission sealed his fate. Judge Berzon dissented on both grounds. She criticized the majority for placing form over substance in ignoring available defenses under Philippine law.<sup>71</sup> She also argued that the interests in "fair play" applied equally to an admission to both a medical professional and to an immigration inspector.<sup>72</sup>

Although other circuits have yet to weigh in on the issues presented in *Pazcoguin*, the case illustrates the potentially widespread implications of the 1990 changes providing for inadmissibility based on admissions of drug law violations. Medical examinations are a standard part of the permanent visa issuance process, and questions about drug use can easily arise in this context. There is no similar standard examination that would elicit admissions on other criminal grounds where the law does not require a conviction. For example, although an admission of wrongdoing can be sufficient to bar an immigrant who engaged in a crime classified as a CIMT (such as unauthorized use of cable service or other forms of theft of service), this information would not ordinarily be part of an immigrant's file. But because of the medical examination, it is not unusual for the files of immigrants to include answers to questions about former drug use, thereby triggering scrutiny of whether the immigrant passes the criminal grounds for admissibility. Furthermore, the case law requirement that officials present an applicant with a statement of the elements of the offense before an "admission" will be treated as sufficient to prove the violation<sup>73</sup> has far less force with the drug inadmissibility ground than it does with the CIMT ground. Because drug crimes are drafted in expansive ways, there is often little that needs to be proved, and therefore there are few elements that would have to be clear to a person making an admission.

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70. *Id.* at 1218.

71. *Pazcoguin v. Radcliffe*, 308 F.3d 934, 936-38 (9th Cir. 2002) (reporting Judge Berzon's dissent).

72. *Id.* at 938-39.

73. *See, e.g., In re E.N.*, 7 I&N Dec. 153, 155 (BIA 1956) (requiring that the individual admit all of the factual elements of the crime).

*C. The Immigration and Nationality Act Amendments of 1981*

In addition to these two expansive changes to the drug exclusion ground, one amendment ameliorated the reach of this ground: the waiver of the drug exclusion ground that Congress created in 1981.<sup>74</sup> This amendment, however, is very limited. It allows for a waiver of drug inadmissibility only with respect to a single offense for possession of less than thirty grams of marijuana.<sup>75</sup> In addition, this waiver is available only when the individual can show that the waiver is necessary to prevent extreme hardship to a citizen or lawful permanent resident parent, spouse, or child.<sup>76</sup>

Unlike the prior two changes, the 1981 amendment appears to have been the result of more conscious congressional attention. It illustrates, however, the politically charged nature of efforts to reform drug inadmissibility rules. In the years leading up to the 1981 amendments, Congress had passed many private bills seeking waivers of drug inadmissibility rules.<sup>77</sup> Each of these bills was based on the compelling story of a person with strong ties to the United States who was barred from obtaining permanent status due to a past drug offense.<sup>78</sup> At the time, the drug inadmissibility ground had not yet been amended to reach conduct without a conviction.<sup>79</sup> As a result, all of these private bills involved persons with drug convictions.<sup>80</sup> In some cases, there was more than one conviction.<sup>81</sup> In some cases, there was a trafficking offense.<sup>82</sup> And in some, there was a conviction for a drug other than marijuana.<sup>83</sup>

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74. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1616 (1981).

75. *Id.*

76. *See id.*

77. *See generally* BERNADETTE MAGUIRE, IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS 149, 174-179 (1997).

78. *Id.*

79. *Id.*

80. *Id.*

81. *E.g., id.* at 177 (describing case of a private bill for a spouse of a U.S. citizen who had two convictions of possession of cannabis and hemp seed).

82. *E.g., id.* (describing case of a spouse of a U.S. citizen serving in the Air Force, who had been convicted of trafficking in hashish).

83. *E.g., id.* (describing case of a spouse of a U.S. citizen serving in the Army who had been convicted of giving two individuals sixty-nine tablets of valium); *id.* at 176 (describing case of a spouse of a U.S. citizen who had been convicted of possession of cocaine, heroin, and

Prompted by these private bills, Congress entertained general legislation that would provide the INS and the State Department with the authority to waive drug inadmissibility. In 1979, the House considered a proposal that would have provided broad authority to waive drug inadmissibility.<sup>84</sup> Both the State Department and the INS supported the proposal, noting that they had encountered extreme hardship cases for which they lacked the authority to grant waivers.<sup>85</sup> The following year, the House issued a report reaffirming its judgment that there was a need for greater flexibility in cases involving non-trafficking offenses.<sup>86</sup> In both cases, the discussions centered on the need for broad flexibility, without a limitation based on the type of drug or the lack of a second offense.

In 1981, the year that the amendments passed, the administration urged that the waiver be limited to a single possessory offense.<sup>87</sup> The House proceeded to follow this counsel and limited its proposed waiver to simple possession of marijuana.<sup>88</sup> When the bill reached the Senate floor, a floor amendment further narrowed the reach of the waiver. Senator Simpson proposed an amendment that limited waivers to a single offense of simple possession of thirty grams or less of marijuana.<sup>89</sup> The amendment was agreed to without any further discussion.<sup>90</sup>

By the time Congress had completed its work on the 1981 amendment, it had whittled down the scope of relief considerably. Although members expressed confidence that the legislation eliminated the need for many private bills,<sup>91</sup> the legislation did not

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morphine).

84. H.R. 5087, 96th Cong. (1979).

85. *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 96th Cong. 3 (1979) (statement of David Crosland, Acting Comm'r, Immigration and Naturalization Service); *id.* at 30 (statement of Elizabeth Harper, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, Department of State).

86. H.R. REP. NO. 96-1301, at 67 (1980).

87. See *INS Efficiency Legislation: Hearing on H.R. 2043 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 97th Cong. 49, 53, 58 (1981) (statement of Hon. Doris Meissner, Acting Comm'r, Immigration and Naturalization Service).

88. 127 CONG. REC. 23,776 (1981) (statement of Rep. McClory).

89. *Id.* at 32,008 (statement of Sen. Simpson).

90. *Id.* at 32,009.

91. *Id.* at 22,051.

even reach many circumstances that Congress had previously found worthy of a private bill. The person whose controlled substance crime involved valium, or who had more than one past offense, was not covered by the waiver.<sup>92</sup> Moreover, by relying on the one drug offense that seemed worthy of a waiver at that time—a single use of a small amount of marijuana<sup>93</sup>—Congress ossified the law in terms of then-existing norms and the then-existing list of drugs on the federal list of controlled substances. As a result, any new drug added to the schedules of controlled substances automatically becomes a ground of inadmissibility,<sup>94</sup> and there is no safety valve in terms of an exception for minor possession. As is often the case with criminal immigration issues, Congress ultimately relied on the labels of the offenses<sup>95</sup> and not on the range of equities—such as cases involving the spouses of members of the U.S. military—in determining whether relief would not be provided.

## II. IMPLICATIONS OF CHANGES IN SUBSTANTIVE LAW AND ENFORCEMENT PRACTICES ON THE REACH OF THE DRUG INADMISSIBILITY GROUND ON UNITED STATES RESIDENTS

Between 1986 and 1990, changes to the legal structure of the drug inadmissibility ground paved the way for a far harsher and more inflexible approach to admission of immigrants who had used any drugs in the past. The implications of the new legal architecture, however, were not fully realized at the time these provisions were enacted. Instead, their implications have grown over time as Congress has expanded the use of the drug inadmissibility ground to govern an increasing number of rights and remedies under the immigration law, as the list of controlled substances has expanded,<sup>96</sup> and as the criminal law governing drug prosecutions has made it

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92. Immigration and Nationalization Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1612, 1616 (1981).

93. *Id.*

94. 21 U.S.C. § 802(b) (2000) (defining “controlled substance” for the purpose of 8 U.S.C. § 1182(a)(2)(A)(II) as “a drug or other substance” listed in the federal substance schedules).

95. See generally Morawetz, *1996 Deportation Laws*, *supra* note 43.

96. See, e.g., Placement of Pregabalin into Schedule V, 70 Fed. Reg. 43, 633-35 (July 28, 2005) (to be codified at 21 C.F.R. pt. 1308); Placement of Butorphanol into Schedule IV, 62 Fed. Reg. 51,370 (Oct. 1, 1997) (to be codified at 21 C.F.R. pt. 1308); Placement of Zopiclone into Schedule IV, 70 Fed. Reg. 16,935-37 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 1308).

easier to obtain convictions.<sup>97</sup> In addition, enforcement policy with respect to both immigration and drugs has changed in ways that threaten to affect even more immigrants. Altogether, these changes mean that the inadmissibility criteria now reach more people with stronger ties and more minimal offenses.

*A. The Immigration Law Context*

*1. Formal Structure of the Immigration Laws and the Impact of Admissibility Rules on United States Residents*

The most obvious group affected by drug inadmissibility criteria are those who are abroad and seek to immigrate to the United States. But while the drug inadmissibility ground is found in the section of the INA that pertains to admission of new immigrants,<sup>98</sup> it has profound implications for persons who are already in the United States. Through cross-references to the inadmissibility provisions, Congress has imported these criteria into other aspects of the immigration law that affect a wide array of noncitizens present in the United States, including lawful permanent residents.

Admissibility rules and limits to waivers under § 212(h) of the INA affect all immigrants provided with permanent visas.<sup>99</sup> Recent statistics show that more than half of these persons are already in the United States and are therefore more likely to have strong ties within the United States.<sup>100</sup> Many will be adjusting their status from a temporary status, such as a student or a temporary business visa holder.<sup>101</sup> Others are adjusting through spousal petitions or other routes to adjustment that do not require a departure from the United States.<sup>102</sup> In addition, many seeking permanent visas through the consular process will have strong ties in the form of family and employment relationships.<sup>103</sup>

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97. *See infra* Part II.B.

98. INA § 212(a), 8 U.S.C. § 1182(a) (2000).

99. INA § 212(h), 8 U.S.C. § 1182(h) (2000).

100. OFFICE OF IMMIGRATION STATISTICS, 2006 YEARBOOK OF IMMIGRATION STATISTICS 18 (2007).

101. *Id.*

102. *Id.*

103. *See* Enid Trucious-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and*

Inadmissibility rules also serve as a baseline for virtually all proposals to legalize undocumented immigrants in the United States. Proposals for comprehensive immigration reform in 2007 all included, as a minimal requirement, that the individual be “admissible.”<sup>104</sup> Similarly, the much heralded “DREAM Act,” which provides a path to legal status for immigrants who were brought to the United States as children, requires that they establish that they are “admissible” both when they first register for temporary status and when they later adjust to permanent resident status.<sup>105</sup> Even a single violation related to a small amount of marijuana cannot be waived.

In addition to this direct role of inadmissibility in determining who is eligible to immigrate, changes in the immigration law have created cross-references to the “inadmissibility” ground as a basis for limiting important forms of relief from removal for those who are present in the United States. Consider, for example, limits on cancellation of removal for persons who are not lawful permanent residents.<sup>106</sup> Under the 1996 immigration law reforms, cancellation of removal is restricted to situations in which the applicant can show that “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child” who is a citizen or a legal permanent resident (LPR).<sup>107</sup> But cancellation is unavailable to any person who cannot prove “good moral character” for the previous ten years.<sup>108</sup> “Good moral character” is defined as a person who has not committed acts that are a ground of inadmissibility, with an exception for those with a single offense of possessing less than thirty grams of marijuana.<sup>109</sup> In addition, there is a categorical bar on cancellation for those who have ever been convicted of a crime that is the basis of inadmissibility.<sup>110</sup> As a result, cancellation is barred across the board for any conviction

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*Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 643 (2006).

104. See, e.g., Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 209 (2005).

105. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 621 (2006) (labeling a portion of the bill the “DREAM Act”).

106. INA § 240A(b), 8 U.S.C. § 1229b(b) (2007) (2000).

107. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2000).

108. INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B) (2000).

109. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (2000).

110. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2000).

related to drugs, and is barred for any admission of a drug violation within the past ten years other than a one time possession of marijuana, even though removal would cause “exceptional and extremely unusual hardship” to a citizen or LPR family member.

Similar restrictions exist on a wide array of remedies for immigrants present in the United States who present a variety of compelling equities, such as being a battered spouse<sup>111</sup> or a person taking temporary refuge due to flooding or other disaster in their home country.<sup>112</sup> In each of these situations, the inadmissibility ground operates to trump the statutorily recognized category of compelling equities.

Most surprisingly, inadmissibility grounds have crept into the law so as to affect persons who are lawful permanent residents and have therefore already been found to be admissible, and who may have resided in the United States for years with full legal resident status. First, criminal inadmissibility can be triggered by any trip in which a lawful permanent resident crosses a border.<sup>113</sup> Thus, a lawful permanent resident who is not deportable, for example, because the person has never been convicted of a crime, could be “inadmissible” following a trip outside the country due to past drug use. Indeed, at the border, if the person is questioned about drug use that never even led to an arrest, the answers to those questions could be used to find the person to be an “arriving alien” who is “inadmissible.”<sup>114</sup>

The second change in the law that affects lawful permanent residents has to do with the clock stop rule enacted in 1996. This highly technical provision has far-reaching implications. Under both new and old law, a lawful permanent resident who is deportable must show seven years of continuous residence in order to obtain relief from removal.<sup>115</sup> But the 1996 law created a stop clock provision that stops the clock for continuous residence at the time

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111. INA § 240A(b)(2)(A)(iv), 8 U.S.C. § 1229b(b)(2)(A)(iv) (2000).

112. INA § 244, 8 U.S.C. § 1254a(c)(2)(A) (2000).

113. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2000).

114. See Morawetz, *Invisible Border*, *supra* note 43, at 205-10.

115. This requirement is currently found in INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2). The requirement under old law, which remains available to some of those with pre-1996 offenses, was found in INA § 212(c), 8 U.S.C. § 1182(c) (1995). See *generally* *INS v. St. Cyr*, 533 U.S. 289 (2001) (finding that pre-1996 relief is available for a permanent resident who pled guilty prior to the change in the law).

a crime is committed if it is a ground of inadmissibility and triggers removability.<sup>116</sup> For lawful permanent residents who do not travel, the clock stop rule can only be triggered by a ground of deportability that corresponds to an inadmissibility ground. But since those who travel are subjected to inadmissibility criteria,<sup>117</sup> it is sufficient that they meet a ground of inadmissibility. As a result, as the law is applied, a mere admission of occasional drug use within the first seven years of arriving in the country can lead to both removal and ineligibility for relief.<sup>118</sup> And all of these consequences are triggered by a finding that the individual fits within the scope of the drug inadmissibility ground.

## 2. *The Enforcement Context*

The full effect of the inadmissibility ground depends, of course, not on the law on the books, but also on how it is enforced. Unfortunately, there are many signs that the drug inadmissibility ground is being applied expansively and that the government has begun to train officers to actively seek out admissions of past wrongdoing that can then be used to exclude or deport the unwary.

*Pazcoquin v. Radcliffe*,<sup>119</sup> the case in which the Philippine national obtained a visa despite admissions of past drug use to a medical officer,<sup>120</sup> illustrates how every visa seeker faces a risk of being denied entry despite approval by the State Department following a lengthy visa process. Pazcoquin was forthright and the State Department saw no need to bar his entry.<sup>121</sup> But immigration

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116. See INA § 240A(d), 8 U.S.C. § 1229b(d).

117. See *supra* notes 113-14 and accompanying text.

118. There are some issues still under litigation about the scope of this rule. See, e.g., *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1201 (9th Cir. 2006) (limiting the retroactive reach of the clock stop rule); *Tineo v. Ashcroft*, 350 F.3d 382, 397 (3d Cir. 2003) (considering the argument that LPRs retain the ability to invoke the rule of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963)). Nonetheless, the agency position is clear that any lawful permanent resident who travels is subject to review for inadmissibility on criminal grounds, regardless of how long ago the offense occurred or how insignificant the trip outside the country. See *In re Collado-Munoz*, 21 I&N Dec. 1061, 1064 (BIA 1998).

119. 292 F.3d 1209 (9th Cir. 2002).

120. *Id.* at 1212; see *supra* notes 62-72 and accompanying text.

121. *Pazcoquin*, 292 F.3d at 1212.

officials retained the power to seek to exclude him at the border and chose to exercise it.<sup>122</sup>

There is reason to suspect that immigrants face even tougher hurdles as government enforcement personnel at the border seek to obtain admissions that are not in the file, as they were in *Pazcoguin*. The Federal Law Enforcement Training Center, an interagency law enforcement training organization for over eighty federal agencies,<sup>123</sup> has developed specific training materials on obtaining admissions from noncitizens that can be used to lodge removal charges.<sup>124</sup> A training article posted as part of the agency's website walks inspectors through the process of getting an immigrant to confess to past drug use.<sup>125</sup> It urges immigration inspectors to make greater use of their interrogation power to get admissions that will stand up in court.<sup>126</sup> The article confidently describes how inspectors can take advantage of the non-criminal nature of immigration proceedings to extract incriminating statements.<sup>127</sup> The article further notes that the immigrant will be placed in a catch-22 situation: either the immigrant cooperates and provides the damning admission, or refuses to cooperate and can be excluded on that basis.<sup>128</sup> There is nothing in the article that speaks to the circumstances under which officers should adopt these tactics to obtain admissions. Instead, the article unapologetically arms those officers who choose to take such a tough approach with the tools to obtain admissions that will later stand up in court as grounds of inadmissibility.

A recent case out of the Third Circuit illustrates the use of these interrogation techniques. In *Romero-Fereyros v. Attorney General*,<sup>129</sup> an immigrant with a past conviction applied to adjust his status

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122. *Id.*

123. Federal Law Enforcement Training Center, Welcome to the FLETC, <http://www.fletc.gov/> (last visited Sept. 25, 2008).

124. See Keith Hunsucker, Criminal Without Conviction—Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act, <http://www.fletc.gov/training/programs/legal-division/the-informer/research-by-subject/miscellaneous/aliencriminalwithoutconviction.pdf> (last visited Sept. 28, 2008).

125. *Id.*

126. *Id.* at 3.

127. *Id.* at 3-4.

128. *Id.*

129. No. 05-3925, 2997 WL 1031264 (3d Cir. Apr. 5, 2007).

based on his marriage to an American citizen.<sup>130</sup> Because of the past conviction, which did not relate to drugs, he applied for a waiver of inadmissibility.<sup>131</sup> While he was waiting for his lawyer to park her car, he was called for his interview.<sup>132</sup> He explained that he would like to wait for his lawyer, but was encouraged to go ahead without her so as not to lose his appointment.<sup>133</sup> In the interview, he was questioned about his past drug use and admitted to past use of cocaine.<sup>134</sup> The agents immediately found that he was no longer eligible for a waiver.<sup>135</sup> They proceeded to handcuff him and order him summarily removed.<sup>136</sup> On appeal, the Third Circuit concluded that there was no error.<sup>137</sup> The inflexibility of the drug inadmissibility ground served as a shield to the agents' actions.

The potential use of these interrogation methods to obtain admissions of past drug use is especially troubling because immigration enforcement is already infused with problems of racial and ethnic profiling.<sup>138</sup> The drug inadmissibility ground is akin to driving over the speed limit—a violation that is so widespread (especially when the scope of the arrest power extends far back in time to reach lifetime violations) that the person with the arresting power can select who to arrest out of an enormous population of violators. In these situations, police can simply decide who to find in violation of the law and there is a heightened risk of racial and other improper forms of profiling. In the drug inadmissibility context, the ability to interrogate people about conduct that is widespread in the population means that virtually anyone can be found inadmissible if the enforcement officers choose to subject that person to interrogation about past drug use. If there is reason to suspect that people will be targeted based on race, the underlying

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130. *Id.* at \*1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at \*2.

137. *Id.* at \*4.

138. See, e.g., Kevin Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002) [hereinafter Johnson, *U.S. Border Enforcement*]; Kevin Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

broad grounds of inadmissibility serve simply as an excuse for excluding persons based on profiling.

Indeed, unfair profiling in immigration enforcement is a particular danger today because the federal government has deputized increasing numbers of local police officers to engage in immigration enforcement,<sup>139</sup> and the agency's stated goal is to "remove all removable aliens."<sup>140</sup> As others have observed, delegation of immigration enforcement to localities increases the risk of improper profiling in immigrant communities.<sup>141</sup> More immigrants, with or without legal status, face serious consequences for admitting to conduct that is not unusual and to which they might readily admit.

### *B. The Criminal Law Context*

In addition to the effects of immigration law changes and immigration enforcement, the impact of the drug inadmissibility ground is governed by changes in both the legal structure of criminal laws relating to drugs as well as drug enforcement practices. The criminal law context is significant for two reasons. First, when the immigration law cross-references the criminal law, as the drug inadmissibility ground has since 1986,<sup>142</sup> any reduction in the requirements for a criminal violation immediately expands the scope of the inadmissibility grounds. This is true whether or not the individual is arrested and convicted. Second, actual enforcement of the criminal law that leads to a record showing that the criminal drug laws were violated will serve in the immigration system as

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139. There has been a vast increase in agreements between state and local governments and the federal government to engage in immigration enforcement. Editorial, *Immigration Outsourced*, N.Y. TIMES, Apr. 9, 2008, at A26. These agreements, under § 287(g) of the Immigration and Nationality Act, provide local officers with the right to enforce federal immigration law. INA § 287(g), 8 U.S.C. § 1357(g) (2000).

140. U.S. DEP'T OF HOMELAND SEC., BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012, ch. 4-1 (2003), available at <http://www.fas.org/irp/agency/dhs/endgame.pdf> ("Endgame sets in motion a cohesive enforcement program to build the capacity to 'remove all removable aliens.'"). When it was first issued, ENDGAME was available through government websites.

141. See, e.g., Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 634 (2008); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119-21 (2007).

142. See *supra* note 46 and accompanying text.

indisputable proof of the underlying violation of the law. Increased resources for enforcement, or changes in the law or institutional setting that make it easier to obtain a conviction will, therefore, change the de facto scope of the inadmissibility ground.

### 1. *State Criminal Law Requirements*

The inadmissibility provisions apply to both foreign and domestic violations of controlled substance laws.<sup>143</sup> Therefore, the sweep of the ground depends on a wide array of legal systems and how they regulate drugs. Equivalent conduct will be a ground of inadmissibility if committed in some jurisdictions and not if committed in others. But interestingly, the law does not distinguish between how seriously the jurisdiction chooses to treat the offense.<sup>144</sup> As a result, a violation of a rule that the jurisdiction lightly enforces with a minimal penalty will be treated as equivalent to a violation that the jurisdiction treats with a heavy penalty. But if there is no regulation and no penalty, then the conduct is lawful and not a ground of inadmissibility.<sup>145</sup> As a result, there is a sharp discontinuity in how a jurisdiction's treatment of drug use translates into drug inadmissibility.

There is some room, however, for how the definitions of crimes within a jurisdiction (short of legalization) will affect drug inadmissibility. Laws that simplify the elements required to prove a violation will make it easier to establish that an individual has committed acts that "constitute the essential elements"<sup>146</sup> of a violation of drug laws. In the United States, at least, it appears that this is precisely what the criminal law has done.

Markus Dubber's study, *Victims in the War on Crime*,<sup>147</sup> traces the myriad ways in which criminal law has developed to make it

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143. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2000) (stating that inadmissibility will result from "a violation of ... *any* law or regulation of a state, the United States, or a foreign country relating to a controlled substance") (emphasis added).

144. *Id.*

145. The inadmissibility laws provide separate exclusion grounds for drug addiction and trafficking. *See supra* note 28. These grounds do not depend on the criminal law of other countries.

146. *See* INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(A)(I) (2000).

147. MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS' RIGHTS* (2002).

simpler to establish a violation of the drug laws. In particular, states have expanded the crime of possession so that it reaches a wide range of circumstances in which the accused may have had no knowledge of the item purportedly possessed.<sup>148</sup> In New York, for example, “from evidence of your being in a car or a room with a controlled substance, the prosecutor, without additional evidence, gets to jump to the conclusion that you possessed the drugs, and [that you] knew that you did.”<sup>149</sup> As a result, a single drug item found in a car will be treated as “possessed” by every person in the car, and all the occupants are subject to prosecution.<sup>150</sup>

Those accused of drug possession also have few available defenses. They cannot take advantage of distinctions between principals and accomplices.<sup>151</sup> “Whereas the law of complicity has long been careful to remind itself that mere presence does not an accomplice make, the law of possession has had no difficulty imposing liability on that very basis.”<sup>152</sup> Moreover, possession offenses, on their face, are not based on the status of the accused, even if in practice they are applied based on suspect criteria.<sup>153</sup> As a result, they cannot be challenged on the vagueness grounds that curtailed vagrancy statutes.<sup>154</sup>

Controlled substance laws have also been expanded to cover matters that are relatively innocuous. Possession of a controlled substance without a prescription is defined as a crime, even if it involves something as innocuous as having possession of a family member’s prescription pain killers or sleep medication that the individual was not using in an abusive way.<sup>155</sup> As in other areas, laws are changed to make prosecutions easier. But because the inadmissibility law looks solely at the law on the books, it fails to

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148. *Id.* at 37 (describing presumptions on possession as a popular legislative choice); *id.* at 35 (describing state statutes that do not require proof that the individual knew he or she was “possessing anything at all”).

149. *Id.* at 37.

150. *See, e.g.*, N.Y. PENAL LAW § 220.25 (Consol. 2000).

151. DUBBER, *supra* note 147, at 38.

152. *Id.* at 65; *see also id.* at 35 (describing how possessory offenses do not lend themselves to defenses of necessity or self-defense).

153. *Id.* at 80-81.

154. *Id.*

155. *E.g.*, S.D. CODIFIED LAWS § 22-42-5 (2007).

recognize that prosecutors may have no interest or inclination to apply the laws so broadly.

## *2. State Criminal Law Enforcement*

Unlike the laws on the books, which can be equally problematic for an immigrant whether they carry light or heavy penalties, criminal law enforcement is critically important because any conviction will be treated as indisputable proof of a violation of a controlled substance law.<sup>156</sup> The immigration system will not look behind the fact of the conviction, no matter how problematic the procedures that led to the conviction.

There can be no doubt that domestic criminal law enforcement policies have vastly expanded the number of people who have records of drug convictions. As Frank Zimring and Bernard Harcourt have observed, the recent history of drug control in the United States “represents a singular chapter in the history of criminal justice.”<sup>157</sup> Between 1980 and 2000, a time when non-drug prisoners in state facilities tripled, the number of persons imprisoned for drug crimes grew twelve-fold.<sup>158</sup> In federal prisons, the disparity was even greater. As Zimring and Harcourt note, “none of the hydraulic processes that ... make the bark of the criminal law louder than its bite” were at work during this period of the drug war.<sup>159</sup>

In addition to the increased growth in the number of people imprisoned for drug violations,<sup>160</sup> a far greater number have been immersed in the criminal justice system for low-level drug offenses. Between 1990 and 2002, marijuana arrests increased nationally by 113 percent.<sup>161</sup> In some localities, the expansion was even more dramatic. In New York City, for example, marijuana arrests increased

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156. See INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(A)(i) (2000) (stating that “any alien convicted of ... a violation” of drug laws will be inadmissible).

157. FRANKLIN ZIMRING & BERNARD HARCOURT, *CRIMINAL LAW AND THE REGULATION OF VICE* 217 (2007).

158. *Id.* at 219.

159. *Id.* at 219-20.

160. *Id.* at 218-19.

161. Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 1, 3 (2006), available at <http://www.harmreductionjournal.com/content/pdf/1477-7517-3-6.pdf>.

by 882 percent over the same period.<sup>162</sup> In New York City, the most common arrest was for marijuana in the public view.<sup>163</sup> Although the overwhelming majority of these cases were dismissed, 20 percent of cases led to a sentence of time served, a fine, or jail.<sup>164</sup> Given the sheer volume of marijuana arrests, this remains a high number of criminal court dispositions finding violations of controlled substance laws.

For those who are arrested, changes in criminal procedure law have made it more difficult to defend against charges that prosecutors choose to press. As Dubber describes, criminal procedure law has evolved in ways that make it easy for police to justify an arrest for drug possession.<sup>165</sup> Any bulge on a person can trigger a stop by the police that triggers a frisk and then allows for an arrest when drugs are found.<sup>166</sup> Similarly, a minor traffic violation can trigger a stop that triggers a search that can lead to a drug possession arrest.<sup>167</sup> As Dubber argues, drug possession laws provide police with enormous power to arrest whomever they choose to arrest—they are the modern day equivalent of discredited vagrancy laws.<sup>168</sup>

In addition to increased enforcement, there is evidence that this enforcement has had a disproportionate impact on Black and Latino communities. Blacks and Latinos were both more likely to be arrested for marijuana in public view and more likely to be detained prior to arraignment.<sup>169</sup> Those detained, of course, have more of an

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162. *Id.* at 8.

163. See Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 132-33 (2007).

164. *Id.* at 150 tbl.3 (reporting that 9.1 percent of defendants were sentenced to time served, 8.0 percent to a fine, and 3.2 percent to jail).

165. See *supra* text accompanying notes 147-49.

166. See, e.g., *United States v. Proctor*, 148 F.3d 39, 42-43 (1st Cir. 1998) (holding that seizure of marijuana and arrest of suspect was reasonable after officer observed bulge in suspect's jacket and performed pat-down search).

167. See, e.g., *Whren v. United States*, 517 U.S. 806, 808-09, 818 (1996) (holding constitutional a pretextual traffic stop for failure to signal that led to a subsequent search for drugs and suspect arrests).

168. DUBBER, *supra* note 147, at 47-70 (describing how possession laws have furthered the rapid expansion of arbitrary police power).

169. See Golub et al., *supra* note 163, at 155 (finding that focus on marijuana arrests has had a "substantial and disproportionate impact on Black and Hispanic communities").

incentive to take a sentence of time served, since they have already served the time. The time-served sentence, however, has vastly different immigration consequences than a dismissal because it involves an adverse criminal disposition.

Even though available data suggests that immigrants are less likely to be incarcerated than are native-born Americans,<sup>170</sup> it is probably fair to assume that arrest and conviction patterns for noncitizens will rise and fall with overall criminal enforcement policies. Thus changes in domestic criminal law, policies, and enforcement will be reflected in the numbers of noncitizens who will be inadmissible due to the drug inadmissibility grounds. Altogether, the changes in this criminal justice context over the past twenty years mean that the drug inadmissibility grounds will be easier to prove in a greater number of cases for noncitizens who have lived in the United States in some capacity prior to applying for lawful permanent resident status.

Ironically, more lenient policies used in some jurisdictions may also contribute to making noncitizens inadmissible. In a jurisdiction that treats a possession offense as something very minor, warranting treatment equivalent to a traffic ticket,<sup>171</sup> a person may not take the violation very seriously or bother to contest an erroneous citation. Nonetheless, a criminal disposition could serve to preclude admission because it will establish a violation of a law or regulation of a state or another country. For those who face lax enforcement policies in another country, it may be more likely that there will be no criminal disposition. For this group, the most problematic aspect of the current immigration law may be the use of admissions of violations. The more unenforced a provision of law, the more likely that the individual will not worry about revealing a past violation.

### III. THE CASE FOR LEGISLATIVE REFORM

The law on drug inadmissibility is ripe for review. It has largely evolved without thought to its contours and, if fully enforced, would

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170. See RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CENTER, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION (2007).

171. See, e.g., King & Mauer, *supra* note 161, at 9-10 (describing policies of the Toronto Police Chief and the Ontario provincial police organization).

lead to such sweeping consequences that it would trump many other policies embedded in immigration law. As we enter an era of greater enforcement of the fine print of immigration law, it is important to ensure that the fine print makes sense. In the case of drug inadmissibility, the law cannot meet that basic test.

Drug inadmissibility rules should be changed because they are counterproductive, allow for arbitrary enforcement of the law, and are totally out of proportion to legitimate interests. The rules are inconsistent with domestic values and standards as reflected in employment practices, military recruitment policies, and other areas of domestic law that permit judgments based on past drug use or convictions. These policies have evolved to reflect the reality of domestic use and attitudes, particularly with respect to remote offenses. Furthermore, drug inadmissibility rules should be changed because they undermine the more fundamental interest of the immigration system in encouraging truthful responses to questions. A system that seeks information and then offers no flexibility for dealing with likely answers encourages a lack of candor that undermines the integrity of the immigration system.

#### *A. Measuring the Immigration Standards Against Popular Experience*

Drug inadmissibility policy sets out three basic rules: (1) admission of any form of violation of drug laws serves as a ground of inadmissibility, regardless of how minor or how remote in time;<sup>172</sup> (2) the only waiver is for a single offense involving simple possession of a small quantity of marijuana and that waiver requires that the offense be fifteen years in the past or that denial of admission would work an extreme hardship on a citizen or LPR parent, spouse, or child;<sup>173</sup> and (3) that regardless of the circumstances or the reasons for a plea, any conviction record for violation of a drug law is irrebuttable proof of that violation.<sup>174</sup> With these standards, most adult Americans would be ineligible to immigrate.

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172. INA § 212(a)(2)(A)(I), 8 U.S.C. § 1182(a)(2)(A)(I) (2000).

173. INA § 212(h), 8 U.S.C. § 1182(h) (2000).

174. INA § 212(a)(2)(A)(i), 8 U.S.C. § 82(a)(2)(A)(I) (2000).

The federal government and various academic institutions have tracked drug use for decades. These studies, although sometimes criticized for relying too much on self-reporting and therefore potentially underestimating drug use,<sup>175</sup> paint a portrait of a country in which some experience with illegal drugs is the norm rather than the exception. For adults with a high school education who have reached age forty-five, the statistics show that 79 percent had tried marijuana by the time they turned forty-five and 72 percent had tried an illicit drug other than marijuana.<sup>176</sup> Almost nine out of ten had tried either marijuana or another drug.<sup>177</sup> Thus, even assuming that all of those who reported marijuana use could squeeze into the narrow waiver in the immigration law for one time possession of a small amount of marijuana, it would still be the case that more than seven out of ten forty-five-year-olds would be inadmissible and would not even meet the test of a hardship waiver (which is limited to a single possession of a small quantity of marijuana)<sup>178</sup> under existing law.

The statistics also show that lifetime use among forty-five-year-olds, who by definition have had a longer life in which to accrue a transgression of the drug laws, is not an aberration. Almost half of all twelfth grade high school students admit to some illicit drug use during their lifetime.<sup>179</sup> Over one quarter admit to use of a drug other than marijuana.<sup>180</sup> In addition, the majority of high school seniors report having friends who use illicit drugs.<sup>181</sup> Even if they have not themselves used drugs, simply being in a car or room with these friends would be sufficient under many jurisdictions to

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175. See Thomas M. Mieczkowski, *The Prevalence of Drug Use in the United States*, 20 CRIME & JUST. 349, 361, 388-89 (1996) (noting that the MONITORING THE FUTURE study of high school graduates, see *infra* note 176, omits drop-outs who are expected to have higher use and that it relies on self-reporting).

176. NAT'L INST. OF HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., 2 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2004: COLLEGE STUDENTS AND ADULTS AGES 19-45, at 30, 77-83 (2005), available at [http://www.monitoringthefuture.org/pubs/monographs/vol2\\_2004.pdf](http://www.monitoringthefuture.org/pubs/monographs/vol2_2004.pdf).

177. *Id.*

178. See *supra* note 31 and accompanying text.

179. NAT'L INST. OF HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS, 2006, at 47 (2006), available at [www.monitoringthefuture.org/pubs/monographs/overview2005.pdf](http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf).

180. *Id.*

181. *Id.* at 208.

establish a criminal offense.<sup>182</sup> For those who are twenty-nine to thirty years old, lifetime use reaches 60 percent for marijuana and 46 percent for any illicit drug other than marijuana.<sup>183</sup> Annual rates of drug use (namely use within the previous year) run at 34-40 percent for those who are one to four years out of high school.<sup>184</sup> Thus, as compared to domestic statistics, the drug inadmissibility rules are extraordinarily harsh. If applied fully, they would serve to screen out the majority of the native-born population, overshadowing all other policies underlying the immigration system.

Of course, domestic statistics do not speak directly to the population immigrating from abroad. It is difficult to get comparable lifetime data for many other countries.<sup>185</sup> Where these statistics are available, the numbers also show widespread lifetime use. In Canada, 45 percent of adults report lifetime use of marijuana, with the lifetime figures being higher for younger cohorts than for older cohorts.<sup>186</sup> The percentage of those who report an experience with drugs other than marijuana is lower than in the United States, but still reaches 30 percent for some cohorts.<sup>187</sup> Similarly, studies in the United Kingdom show an overall rate of 34 percent lifetime usage for the adults surveyed, with rates for younger cohorts reaching as high as 58 percent.<sup>188</sup> Data from Australia indicates an overall

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182. *See supra* notes 149-50 and accompanying text.

183. NAT'L INST. OF HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., 2 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2006: COLLEGE STUDENTS AND ADULTS AGES 19-45, at 76 (2007), available at [www.monitoringthefuture.org/pubs/monographs/vol2\\_2006.pdf](http://www.monitoringthefuture.org/pubs/monographs/vol2_2006.pdf)

184. *Id.* at 235.

185. For those countries where statistics are available, it is not clear that they are comparable to the U.S. statistics. Lifetime use in the MONITORING THE FUTURE study is evaluated based on both current survey statements and statements in past surveys. *Id.* at 74-75. For many countries, there are no available lifetime statistics, apparently because the data is not seen as very helpful. For example, a United Nations-sponsored global study of drug issues provides information on annual use, but not lifetime use. The study states that lifetime data "are not very illustrative." U.N. OFFICE ON DRUGS & CRIME, GLOBAL ILLICIT DRUG TRENDS 2003, at 347 (2003), available at [http://www.unodc.org/pdf/trends2003\\_www\\_E.pdf](http://www.unodc.org/pdf/trends2003_www_E.pdf). It explains that "[t]he fact that a 50-year-old person smoked marijuana at the age of 20 does not provide much insight into the current drug abuse problem." *Id.*

186. CANADIAN CTR. ON SUBSTANCE ABUSE, CANADIAN ADDICTION SURVEY 48 (2005), available at <http://www.ccsa.ca./2005%20CCSA%20Documents/ccsa-004804-2005.pdf>.

187. *Id.* at 55.

188. HOME OFFICE RESEARCH, DEV. & STATISTICS DIR., DRUG MISUSE DECLARED IN 2000: RESULTS FROM THE BRITISH CRIME SURVEY, vi, 12 (2001), available at <http://www.homeoffice>.

lifetime experience rate of 38 percent, with some age cohorts reaching 58 percent, and even higher figures for male cohorts.<sup>189</sup> In France, available data indicates lower levels of lifetime use which is reported at about 26 percent.<sup>190</sup> Although the details of this data vary from country to country, the overall available evidence suggests that some experience with illicit drugs is sufficiently widespread that a screening criterion based on any past use is bound to reach broadly.

The high likelihood of some experience with drugs means that the drug inadmissibility ground, if fully applied, threatens to deny admission to large numbers of persons who might otherwise meet the standards for immigration, including the spouses of U.S. citizens and prized future employees.

*B. Comparable Zero-Tolerance Policies Have Proven To Be Unworkable and Unjustified*

Employment law and practice serve as a useful laboratory for examining the consequences of the kind of zero-tolerance policy embodied in the immigration laws. In the employment context, both law and practice have sought to find an appropriate balance between avoiding the risks of admitting those whose past behavior threatens to affect their future performance, and avoiding a screen that eliminates candidates from consideration arbitrarily or in contravention of the employer's interest in attracting the best talent for the job. In this setting, law and practice have rejected the kinds of rules that are found in the immigration system. Even the FBI, an employer that can be expected to have extremely high standards, has rejected a zero-tolerance, or multiple-transgressions tolerance, model for fear of losing valuable prospective employees.<sup>191</sup>

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gov.uk/rds/pdfs/hors224.pdf.

189. See Australian Inst. of Criminology, *Illicit Drugs and Alcohol: Lifetime Use of Any Illicit Drug*, Australia, 2004, <http://www.aic.gov.au/stats/crime/drugs/lifeuse/anydrug-2004.html> (last visited Sept. 28, 2008).

190. European Monitoring Ctr. for Drugs & Drug Addiction, *Profile for France*, <http://profiles.emcdda.europa.eu/index.cfm?fuseaction=public.Content&nnodeid=19694&sLanguageiso=EN> (last visited Sept. 25, 2008).

191. Kevin Johnson, *FBI Drug Standard Lowered for Hiring*, USA TODAY, Aug. 1, 2007, available at [http://www.usatoday.com/news/washington/2007-08-01-fbi\\_N.htm](http://www.usatoday.com/news/washington/2007-08-01-fbi_N.htm).

In the employment setting, as with immigration, any bar to employment operates like a bar to admission—it serves to exclude an otherwise eligible person from being hired for a job. Those who are screened out for a job, like those who are screened out for immigration, have passed all of the standard screens. In the job context, the individual will have passed a written test or obtained the necessary credentials for a job. The individual might have been interviewed and found to be the best candidate; however, due to the employer's screening criteria, the individual cannot be hired. Similarly, with inadmissibility, the individual will be among those who meet the criteria for admission. He or she, for example, may be married to an American citizen and have children who are U.S. citizens; or the individual may have been hired by a university as an outstanding scholar and may be seeking permanent status. Just as an employer faces costs in adopting an employment test that could screen out the best candidates for a job, the immigration system faces the cost of screening out parents, employees, spouses, and others who otherwise further the nation's immigration goals.

The experience of employers who are permitted to discriminate on the basis of past drug use points strongly in favor of reforming the drug inadmissibility ground. In the employment context, certain employers are expressly permitted to discriminate among job applicants on the grounds of past drug use.<sup>192</sup> Chief among these

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192. Federal employers are governed by 42 U.S.C. § 290dd(b). This provision permits screening of employees based on past drug use for selected agencies and positions. The statute provides:

(b) Deprivation of employment.

(1) Prohibition. No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the grounds of prior substance abuse.

(2) Application. This subsection shall not apply to employment in—

(A) the Central Intelligence Agency;

(B) the Federal Bureau of Investigation;

(C) the National Security Agency;

(D) any other department or agency of the Federal Government designated for purposes of national security by the President;

or

(E) in any position in any department or agency of the Federal Government, not referred to in subparagraphs (A) through (D), which position is determined pursuant to regulations prescribed by the head of such agency or department to be a sensitive position.

employers is the FBI. Pursuant to federal statute, the FBI is permitted to deny employment based on past drug use.<sup>193</sup> The agency's experience, however, has led it to reject past drug use as a disqualifying criterion for hiring agents.<sup>194</sup> The ban simply did not work and proved to be counterproductive.<sup>195</sup>

The FBI initially adopted an all-out ban on hiring those with any past drug use, other than "experimental use" of marijuana.<sup>196</sup> In 1994, it changed its policy to relax the ban on past drug use.<sup>197</sup> It adopted a set of rules relating to the amount, recency, and type of use of any controlled substance.<sup>198</sup> These rules essentially allowed for experimental use of a range of drugs, with the test for experimental use set by a rule as to the number of times that the person had, for example, used marijuana.<sup>199</sup> To discourage applicants who would fail the drug screen, the FBI cautioned potential applicants not to apply for a position if they would not be able to provide the necessary answers to drug questions.<sup>200</sup> The questions were based on numerical thresholds of drug use.<sup>201</sup> For example, one question was whether an applicant had used marijuana more than fifteen times in his or her life.<sup>202</sup> Another was whether the applicant had used an illegal drug other than marijuana more than five times.<sup>203</sup> The 1994 change in the rules was accompanied by the adoption of polygraph tests for all new agents.<sup>204</sup>

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42 U.S.C. § 290dd(b) (2000).

193. 42 U.S.C. § 290dd(b)(2)(B).

194. *FBI to Ask About Use of Drugs in Polygraphs for Applicants*, S. FLA. SUN-SENTINEL, Mar. 8, 1994, at 5A.

195. See Johnson, *U.S. Border Enforcement*, *supra* note 138, at 897.

196. It is unclear when this policy was adopted. Changes in the policy announced in 1994 make clear that there was an earlier policy. The author filed a Freedom of Information Request to obtain this information, but has not received any documents that show when the policy was first instituted.

197. *FBI Expands Polygraph Use*, 210 LEGAL INTELLIGENCER 44 (1994).

198. FBI Employment Policies and Practices, <http://www.fbi.gov/employment/policies.htm> (last visited Sept. 25, 2008).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* The post-December 2006 policy can be found at <http://www.fbijobs.gov/52.asp> (last visited Sept. 25, 2008).

204. *FBI Expands Polygraph Use*, *supra* note 197; *FBI To Ask About Use of Drugs in Polygraphs for Applicants*, *supra* note 194, at 5A.

In announcing the 1994 changes, FBI director Freeh cited his experience in trying to recruit people to work at the FBI after he became director.<sup>205</sup> He suggested that the FBI's pre-1994 ban, which barred candidates with any past use other than experimental use of marijuana, was overly rigid and did not provide necessary flexibility.<sup>206</sup> From his experience in other parts of the Justice Department, he was familiar with situations in which a more flexible test allowed for the selection of better job candidates.<sup>207</sup>

Even the policy adopted by the FBI in 1994, however, also proved to be too rigid. On December 21, 2006, the FBI abandoned the numerical tests.<sup>208</sup> FBI Director Mueller offered a cryptic explanation:

After a thorough review, the policy was modified to eliminate certain specific numeric thresholds as the sole determinant of suitability for employment in the FBI. Consistent with the approach taken by other Intelligence Community agencies, in making the determination about an applicant's suitability for FBI employment, all relevant facts, including the recency and frequency of use, now will be evaluated. Otherwise the pre-employment drug policy is unchanged.<sup>209</sup>

A spokesman for the FBI later explained that the department found it difficult to draw a distinction between those who met the numerical requirements and those who did not.<sup>210</sup> Director Mueller explained:

We have found the numeric thresholds to be arbitrary, not necessarily the key determinant of suitability for FBI employment. Too often, the focus of the inquiry into an applicant's background has centered on the number of incidents of usage, as

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205. *See id.* (discussing Goth polygraphs for applicants).

206. *Id.*

207. *Id.*

208. FBI Headline Archives, FBI Modifies Pre-Employment Drug Use Policy, Dec. 21, 2006, available at [http://www.fbi.gov/page2/dec06/employ\\_policy.htm](http://www.fbi.gov/page2/dec06/employ_policy.htm).

209. *Id.*; Memorandum from Robert S. Mueller, Director of the FBI, to FBI-HQ and FO Pocs (Dec. 21, 2006) (on file with author).

210. Dan Eggen, *FBI Bows to Modern Realities, Eases Rules on Past Drug Use*, WASH. POST, Aug. 7, 2007, at A3.

opposed to the recency, context as well as frequency of prior usage.<sup>211</sup>

Thus, despite statutory authority to ban employment of those with past drug use, and despite the sensitive nature of positions with the FBI, the FBI found that it simply did not work to bar employment of those who had used drugs in the past. In the end, it adopted a policy that does not include rigid one-time-use rules and that accepts former drug use, including past use of drugs other than marijuana. Under the current standard, a potential applicant is asked to self-screen by answering the following questions:

- Have you used marijuana at all within the last three years?
- Have you used any other illegal drug (including anabolic steroids after February 27, 1991) at all in the past 10 years?
- Have you ever sold any illegal drug for profit?
- Have you ever used an illegal drug (no matter how many times or how long ago) while in a law enforcement or prosecutorial position, or in a position which carries with it a high level of responsibility or public trust?<sup>212</sup>

The FBI is not alone. The same questions are asked of applicants to work at the National Drug Intelligence Center,<sup>213</sup> and for internships with the Naval Criminal Investigative Service.<sup>214</sup> Some federal agencies have more lax requirements. The CIA, for example, states on its website that applicants should generally not have used any illegal drugs within the previous twelve months and that prior drug use will be carefully evaluated.<sup>215</sup>

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211. Memorandum from Robert S. Mueller, *supra* note 209.

212. Federal Bureau of Investigations, Background Investigation, Employment Drug Policy, *supra* note 6.

213. National Drug Intelligence Center, NDIC Employment Drug Policy, <http://www.usdoj.gov/ndic/jobs/drugpol.htm> (last visited Sept. 25, 2008).

214. United States Naval Criminal Investigative Service, Internships at NCIS, <http://www.ncis.navy.mil/join/internships.asp> (last visited Sept. 25, 2008).

215. Central Intelligence Agency, Careers at CIA, <https://www.cia.gov/careers/faq/index.html> (last visited Sept. 25, 2008); *see also* 41 U.S.C. 701(a)(2) (2000) (“No Federal agency shall enter into a contract with an individual unless such individual agrees that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.”).

The same trend can be seen with state “public safety” employers.<sup>216</sup> Police departments across the country have relaxed their bars to hiring officers with past drug use. A recent study of criteria used by police departments found that, although there was an increase in drug testing of recruits, there was a “significant decrease” in the number of departments that require a clean criminal record for those seeking employment.<sup>217</sup> The report noted a “growing tendency” to tolerate some history of drug use.<sup>218</sup> These local policies often provide greater flexibility in terms of the range of past drugs used and the time frame in which they might have been used.<sup>219</sup>

The policies of these federal and local entities reflect the reality of past drug use throughout the population, and a judgment that past use is not a good measure of who will be a good employee. Given the high level of experience with drugs, employers have learned that they are simply cutting themselves off from many strong potential candidates if they adopt crude zero-tolerance tests

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216. The Americans with Disability Act (ADA) restricts the degree to which employers may ask questions that will elicit information about a disability. 42 U.S.C. § 112(b) (2000). There is some dispute about the degree to which this also restricts employers’ ability to inquire into past drug use because an inquiry into use could lead to information related to the disability of past addiction. *Compare* U.S. Equal Employment Opportunity Comm’n, EEOC Notice No. 915.002, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995) (stating that an employer may ask a question about past illegal drug use provided that the particular question is not “likely to elicit information about a disability”), *with* U.S. Equal Employment Opportunity Comm’n, EEOC Notice No. 915.002, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (July 27, 2000) (avoiding giving a specific answer on whether an inquiry into past use is permissible). Despite these issues, public safety employers have historically felt free to ask questions about past use. Matthew Antinossi, *Respect for the Law Is No Excuse: Drug Addiction History & Public Safety Officer Qualifications...Are Public Employers Breaking the Law?*, 60 OHIO ST. L.J. 711 (1999) (setting forth drug history criteria used by various state and local departments and arguing that these policies violate the ADA).

217. TAYLOR ET AL., *supra* note 6, at 6.

218. *Id.* at 12.

219. *See, e.g.*, Butte County Sheriff’s Office Pre-Employment Policy Regarding Illegal Use/Possession of Drugs, <http://www.buttecounty.net/sheriffs/pdfs/drug%20policy3-11.pdf> (last visited Sept. 25, 2008) (barring those who have used some drugs, but allowing for recruits who, *inter alia*, had not used cocaine, unauthorized prescription drugs, or steroids in the previous three years). In New York City, certain past convictions will bar employment, but there is no across-the-board publicly stated disqualifier based on past drug use. *See* NYPD Exam and Employment Requirements, [http://www.nypdrecruit.com/NYPD\\_ExamandEmploymentRequirements.aspx](http://www.nypdrecruit.com/NYPD_ExamandEmploymentRequirements.aspx) (last visited Sept. 25, 2008). In Los Angeles, the police department allows some past use of drugs other than marijuana. Kerry Cavanaugh, *A Little Past Coke Use OK, Says LAPD Hiring Policy*, L.A. DAILY NEWS, Nov. 2, 2006, at N3.

for past drug use. Immigration law rules on drug use, which are even more extreme than the ones the FBI recently abandoned, have the same problem of overbreadth that has proven unworkable in the employment context.

### *C. Disproportionality*

Extreme bars to admission based on past drug use are also vastly disproportionate to the multiple interests of the immigration system. Inadmissibility bars that cannot be waived act as complete bars to the admission of any person, no matter how strong the family relationship, how valuable the future employee, or how important any other national interest.

The immigration system is largely built around identified domestic interests. These include the interests of those who are here to bring their family members into the United States or to obtain permanent status, and the interest of employers in obtaining workers to meet domestic employer needs.<sup>220</sup> When a person who otherwise meets immigration criteria is barred from admission, it has direct costs, not only to the immigrant, but also to the domestic interest that supported the underlying immigrant petition.

The harm to Americans when the fine print of these laws is fully applied is palpable. Families are split apart, scientists cannot be hired, artists are denied entry, and so forth. Some of these consequences directly implicate international norms against the arbitrary separation of families.<sup>221</sup> Others speak to the sheer irrationality of the current rules. If, for example, a scientist would be a great addition to the scientific community in the United States, does it make any sense to deny admission based on the fact that this person once tried cocaine at a party? Or used speed while staying up all night to write a paper in college? Or used marijuana on a regular basis twenty years ago?

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220. H.R. REP. NO. 91-851, at 2751-52, 2760 (1970).

221. See HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 57-69 (2007), available at <http://hrw.org/reports/2007/us0707/us0707webwcover.pdf>; Morawetz, *Invisible Border*, *supra* note 43, at 57-69.

*D. The Dangers of Arbitrary Enforcement and Profiling*

Rules that are enforced erratically, but would apply to many if enforced uniformly, present additional dangers. As with vagrancy laws, they leave it to the enforcer to decide what law will be applied.<sup>222</sup> In the context of drug inadmissibility, the admission-based ground leaves it to the interviewer to decide just how far to probe and just how much to pursue independent evidence.<sup>223</sup> Only those who are interrogated face exclusion on the ground of an admission. Those who are not asked are not excluded.

Arbitrary enforcement is a particular concern with immigration law because of the stakes involved, including the interests of family members in living together and the interest of employers in bringing in talented employees.<sup>224</sup> In light of these interests, a drug inadmissibility ground that depends on the questions an immigration officer chooses to ask is highly problematic. The officer essentially gets to take the law into his or her own hands by deciding to ask questions that will dictate admission decisions based on any prejudice or preconception.<sup>225</sup> Such arbitrariness is itself harmful both to the individuals involved and to the integrity of the immigration system.

A screen based on a past conviction presents less of a danger of arbitrariness by immigration officers. But it solidifies any arbitrariness in criminal law enforcement as immigration policy. In the drug area, it is well documented that the criminal law is enforced in a disparate manner, meaning that persons of color are more likely to have the conviction records that will be treated as absolute bars to obtaining permanent legal status.<sup>226</sup>

*E. Penalizing Honesty*

The drug inadmissibility rules also threaten a more general governmental interest in encouraging candor in the immigration process. Those who honestly admit to past drug use when they are questioned are barred from admission. In contrast, those who deny

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222. See *supra* note 138 and accompanying text.

223. See Hunsucker, *supra* note 124.

224. See *supra* note 220 and accompanying text.

225. See *supra* notes 123-27 and accompanying text.

226. See, e.g., Golub et al., *supra* note 163, at 131.

past use (and can do so credibly because of the lack of any arrest or conviction) are able to keep their record clear of any proof of past use and may therefore be admitted. The message is clear: do not admit to that which cannot be proven. This message undermines the overall integrity of the immigration system.

The immigration system, like the tax system, depends on information that is provided by the many people who file applications with the government. Encouraging honest information is essential to the working of the system. But honest information depends on some fair treatment of the information that is provided. By treating any information of past drug use as a bar to immigration, the system discourages candor.

Penalties for honesty also place immigration inspectors in a difficult situation. Even if the inspector is not inclined to engage in interrogation techniques that will extract admissions and adopts a “don’t-ask-don’t-tell” policy on past casual drug use, the inspector will be hard pressed to ignore information that is volunteered. The inspector might be particularly sympathetic to an individual who is completely candid, but that very candor might leave the inspector feeling bound by the system’s inflexible rules.

#### IV. PROPOSALS FOR LEGISLATIVE REFORM

Legislative reform of the drug inadmissibility ground could begin by undoing some of the aspects of the current scheme which were adopted without careful review or analysis. These changes could be made through very minor and seemingly technical alterations to the INA. Alternatively, Congress could recognize that the entire system for screening out potential immigrants has become hostage to the inevitable politics of immigration and crime, and that it can only be properly fixed through depoliticization of the rule-making process.

##### *A. Technical Fixes*

Three technical alterations to the immigration law would go a long way towards restoring rationality and proportionality to the criteria for determining admissibility. These are: (1) abandonment of the use of conduct, as opposed to a conviction, to determine admissibility; (2) inclusion of an exception for petty offenses; and (3)

removal of the bar to waivers for drug-related offenses. Together, these changes would reduce arbitrary enforcement of the immigration laws and preserve the flexibility to admit worthy immigrants.

*1. Basing Inadmissibility on Convictions*

The first technical change is to delete the words “or who admits having committed, or who admits committing acts which constitute the essential elements of” from the text of § 212(a)(2)(A)(i) of the INA as it applies to persons with drug offenses.<sup>227</sup> This phrase serves little legitimate function in current immigration law and opens the door to arbitrary enforcement through the selective questioning of immigrants.

Ever since the 1950s, the immigration law has limited the potentially sweeping power of immigration inspectors to bar admission through their interrogation of persons seeking entry into the country. Though the “admits having committed” language had essentially become obsolete by 1990, this provision still has significant force with respect to drugs. It allows for immigration officials to select who to exclude simply by deciding when to ask questions. Furthermore, it is completely out of keeping with public values as reflected in the widespread evidence of use and attitudes towards past use.<sup>228</sup> It depends on answers to questions and penalizes those who answer honestly.

Other admissibility provisions are also in place to deal with those who are thought to be engaged in trafficking and those who are thought to be addicts or current abusers. The health related grounds of inadmissibility bar those who are drug addicts or drug abusers.<sup>229</sup> Other criminal inadmissibility grounds extend to situations in which the border official has reason to believe that the individual is

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227. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2000). This could be achieved by breaking 212(a)(2)(A)(i) at the point where it says “any alien” and placing the requirements with respect to a conviction or an admission in the subsections (I) and (II). Alternatively, the admission ground could be eliminated for both controlled substance and CIMT offenses. Although many of the arguments in this Article would apply as well to CIMTs, there are distinctions between the provisions, and this Article has not sought to explore fully the merits of eliminating the inadmissibility ground based on admitting the elements of a CIMT.

228. See *supra* notes 175-78 and accompanying text.

229. INA § 212(a)(1), 8 U.S.C. § 1182(a)(i) (2000).

engaged in trafficking.<sup>230</sup> Therefore, unless there is truly a national interest in excluding persons with past use, there exists no independent value in a provision that targets admission of the elements of a controlled substance offense.

### *2. Inclusion of a Petty Offense Exception*

The second technical fix is to extend the petty offense exception that is available for all other convictions to the inadmissibility rule based on a drug conviction. The petty offense exception is a narrowly designed aspect of the immigration law that recognizes the need to treat one-time offenders differently.<sup>231</sup> It serves to ignore a single youthful offense or a single adult offense that was punished leniently by the relevant state or foreign authority.<sup>232</sup>

There is no rational reason to have a petty offense exception for all crimes other than drug offenses. Indeed, given the large number of minor drug arrests and convictions, it would seem that if a particular set of crimes warranted a petty offense exception, the exception would be most appropriately provided for drug offenses.

The petty offense exception also serves the important role of providing a safety valve for cases in which the individual will not have the necessary relationships to be eligible for a waiver under 212(h). For some categories of immigrants, such as those who are brought in on an employment basis, there may be no pre-existing relationship that can serve as the basis of a 212(h) waiver. Absent a petty offense exception, these individuals are barred from admission even when the offense is minor, thereby undermining overall interests in immigration for that category of immigrant.

### *3. Eliminating Bars to 212(h) Waivers*

The third technical change is to eliminate the bars to 212(h) relief for those with a drug offense other than a single possession of under thirty grams of marijuana. The 212(h) waiver generally serves as a safety valve for considering whether to waive inadmissibility on

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230. INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C) (2000).

231. INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(ii) (2000).

232. *Id.*

criminal grounds. It allows for a balancing of all of the facts and an evaluation of the kinds of facts that might be considered by an employer—such as the nature, recency, and severity of the past offense.<sup>233</sup> In light of the wide variety of criminal laws, as well as the wide variety of offenses and the circumstances of these offenses, 212(h) is not generally subject to per se bars. Only drug crimes are singled out for exclusion from this form of relief.<sup>234</sup>

There is no rational reason to single out drug crimes for such a limitation. As the legislative history shows, the one-time minor marijuana offense provision was simply introduced on the floor of the Senate;<sup>235</sup> it was not the product of any careful consideration of different offenses and what they indicated about the desirability of different groups of immigrants.

Furthermore, 212(h) recognizes the serious family interests at stake that might warrant a waiver. On its own terms, 212(h) looks to extreme hardship of the parent, spouse, or child of a lawful permanent resident or U.S. citizen.<sup>236</sup> A bar to relief therefore operates as a requirement that such extreme hardship be ignored, and the question becomes which transgressions warrant ignoring the extreme family hardship. It is hard to fathom that a greater possession offense or a one-time offense involving a drug other than marijuana should be an automatic bar to relief when the law permits accommodation of those with other kinds of offenses.

### *B. Systematic Overhaul*

A more ambitious congressional agenda would call for an overhaul of the criminal grounds that bar admission. Such an overhaul could seek to identify those offenses that are truly problematic and to fashion waivers that can accommodate the multiple interests in protecting against those who might be at serious risk of committing a crime after their admission, and the interests of families and employers in not barring immigrants arbitrarily. But if recent experience is any guide, Congress cannot be trusted to approach this task with adequate consideration of the

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233. *Id.* § 212(h).

234. *Id.*

235. See *supra* notes 87-90 and accompanying text.

236. INA § 212(h), 8 U.S.C. § 1182(h) (2000).

complexity of the criminal law, the dangers of relying on labels of crimes, and the multiple interests involved. Indeed, many recent changes in immigration law that relate to the criminal justice system have been noteworthy for the lack of thought and process provided by Congress.<sup>237</sup> The dilemma is, therefore, how to allow for such an overhaul without incurring the danger of further undermining fairness through a poor legislative process.

One solution would be to set up a commission to look comprehensively at the criminal grounds of inadmissibility. Such a commission could undertake the task of developing a new set of rules, or could develop a procedure, such as a standing commission like the sentencing commission, which would be available to revise and adjust the rules in light of experience. Either way, the use of a commission could assist in depoliticizing the process of evaluating the history of those applying to immigrate or to adjust to permanent status.

Any overhaul of the criminal inadmissibility grounds must answer four questions: (1) which offenses are irrelevant or sufficiently minor that they need not be part of the criteria for determining admission to the country; (2) which offenses are sufficiently serious that they should be a bar regardless of the equities; (3) if a waiver is permitted, what should be the criteria for granting the waiver; and (4) under what circumstances should inadmissibility be determined on the basis of facts outside a criminal record.

An advantage of using a commission to address these questions is that it can take on the questions systematically, with the insight of criminal justice professionals who are familiar with a range of petty and serious offenses processed through the criminal justice system. In addition, a commission can be assigned to consider these questions on their own, rather than as bargaining chips to be traded in broader debates over immigration reform. Although politics will inevitably find its way into any overhaul of criminal inadmissibility grounds, a commission provides some chance at a more sensible and thoughtful approach to a system that is indefensible but difficult to change.

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237. See sources cited *supra* note 43.

## CONCLUSION

The drug grounds for inadmissibility and the rules for waivers of inadmissibility are the by-product of seriously flawed legislative process. The legislative patchwork that emerged from this process is out of touch with the reality of the public's experimentation with drugs both domestically and abroad. The law suffers from multiple flaws. It allows mere concession of past drug possession to trigger bars to admission to the country, thereby allowing selective interrogation of immigrants to determine who is allowed to immigrate. It adopts a virtual zero-tolerance policy for lifetime drug use, in the face of statistics that show widespread lifetime experimentation with drugs. And in the one place that the law offers some room for discretion, it relies on a form of marijuana exceptionalism that denies other minor offenders a chance to demonstrate their equities.

Whatever one's views about controlled substances, it is hardly sensible to have an immigration system that bars access to family members, workers, and exceptional artists and scientists based on past conduct that is so widespread and can be so remote in time. The experience of the FBI, which has rejected similar backwards zero-tolerance rules, is particularly telling. It is time for Congress to undo the damage.