

“The Rights of Irregular Migrants in the United States”

by Donald Kerwin, Executive Director, Catholic Legal Immigration Network, Inc.

I have been asked to speak on the rights of irregular migrants in the United States, with a particular emphasis on their right to counsel in deportation (now called “removal”) proceedings. In U.S. public discourse, these migrants are typically called “illegal aliens,” a term that denies their humanity. People can behave illegally, but they cannot *be* illegal, notwithstanding legislation passed late last year by the U.S. House of Representatives to make unlawful presence a felony. Human rights advocates prefer the term “undocumented,” though (truth be told) many irregular migrants possess documents. The undocumented are not “irregular” in the sense of uncommon in the United States. As of March 2006, they numbered nearly 12 million, headed 6.6 million families, and accounted for 5 percent of the U.S. labor force.¹ Let me outline four points that, I hope, will frame the complex question of their rights in the United States.

First, the United States honors the political and civil rights enshrined in the U.S. Constitution, but does not recognize (as such) economic and social rights. As the U.S. Supreme Court has put it, the Constitution does not guarantee a minimal standard of “social or economic well-being.”² Federal, state, and local governments may attempt to alleviate poverty and other socio-economic problems, although increasingly anti-poverty programs do not extend to the undocumented. More to the point, these problems do not implicate constitutionally recognized rights.³ For example, the situation of the 46.6 million people in the United States who lack (private or public)

¹J. Passel, “The Size and Characteristics of the Unauthorized Migrant Population in the U.S.” (Pew Hispanic Center, Mar. 7, 2006).

²*Dandridge v. Williams*, 397 U.S. 471, 487 (1971).

³*Id.* at 487 (“[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”)

health insurance⁴ violates the international right “to the enjoyment of the highest attainable standard of physical and mental health,”⁵ but it does not offend the U.S. Constitution. For present purposes, suffice it to say that the undocumented cannot avail themselves of rights that U.S. law does not recognize.

⁴U.S. Census Bureau, Current Population Reports, P60-231, “Income, Poverty, and Health Insurance Coverage in the United States: 2005” (Aug. 2006).

⁵International Covenant on Economic, Social and Cultural Rights, art. 12, para 1.

Second, U.S. law sharply distinguishes between U.S. citizens and all non-citizens (not just the undocumented) in the provision of certain rights and benefits. The right to vote in federal and state elections, and to hold certain elective offices, has long been limited to U.S. citizens. However, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has led to the deportation of lawful permanent residents for relatively minor offenses and the separation of thousands of immigrant families whose members have different immigration statuses.⁶ Similarly, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 has denied “means tested” public benefits to broad categories of lawful permanent residents.

The trend towards “criminalization” of immigration violations has widened the breach between U.S. citizens and non-citizens. Under U.S. law, immigration offenses have traditionally been treated as “civil” in nature. Yet prosecutions for an expanding list of crimes like illegal entry, document fraud, false claims to citizenship, and harboring the undocumented have increased to the point that “immigration” offenses now represent the largest category (32 percent) of all federal prosecutions.⁷ Beyond this phenomenon, the terrorist attacks of September 11, 2001 led to the aggressive use of immigration procedures as a national security tool. The Bush Administration characterized its domestic legal response to the terrorist threat as one of “preventive prosecution,” but its “prosecutions” in the months after September 11th mostly involved enforcement of civil immigration measures.⁸ Provisions like pre-charge detention, call-in registration, and closed removal proceedings arguably took immigration law beyond even the criminal framework.

⁶See generally, Catholic Legal Immigration Network, Inc., “Placing Immigrants at Risk: The Impact of our Laws and Policies on American Families” (2000), available at <http://www.cliniclegal.org/Publications/AtRisk/atrisk1.pdf>.

⁷Transactional Records Access Clearinghouse, “Prosecution of Immigration Cases Surge in U.S.” (TRAC DHS, Sept. 2005), available at <http://trac.syr.edu/tracins/latest/current/>.

⁸D. Kerwin, “The Use and Misuse of ‘National Security’ Rationale in Crafting U.S. Refugee and Immigration Policies,” *International Journal of Refugee Protection*, Vol. 17 (Oxford University Press, 2005).

Third, the civil rights recognized by the U.S. Constitution apply to “persons” or “people,” terms that encompass the undocumented. Thus, the undocumented can avail themselves of the right to assemble, to be free against unreasonable searches and seizures, to due process of law, to equal protection, to a speedy trial, to legal counsel in criminal cases, and to not having their property taken without just compensation. This tradition finds its strongest expression in a 1982 U.S. Supreme Court cases that invalidated on equal protection grounds a state scheme to deny undocumented children access to public education.⁹

⁹*Plyler v. Doe*, 457 US 202 (1982).

Conversely, the federal government enjoys broad power to regulate immigration. In practice, this means that if Congress acts in this area, its restrictions will likely to be upheld. Federal welfare classifications, for example, have been held to implicate Congress' power to control entry,¹⁰ even though public benefit eligibility may not, in fact, influence immigration control. The federal immigration power reaches its apex when applied to persons caught at the border, who are deemed (in a legal fiction) not to have formally entered the country, even if the United States permits their entry. Since the federal government enjoys "plenary" or "absolute" authority to regulate immigration, it is important to establish the contours of this power. Of primary importance, this power cannot be exercised in ways that violate the U.S. Constitution. To provide an extreme example, the federal government could not torture or shoot an immigrant at the border to prevent their entry. As the U.S. Court of Appeals for the Fifth Circuit recently put it: "There are ... no identifiable interests that justify the wanton infliction of pain."¹¹ Nor does every restriction on immigrants involve an exercise of the federal immigration power, which deals with who can enter, who must leave, and who can stay. Having said that, Congress possesses very broad authority to regulate immigration in the way it sees fit.

¹⁰*Matthews v. Diaz*, 426 U.S. 67 (1976).

¹¹*Martinez-Aguero v. Gonzalez*, No. 05-50471 (5th Cir. Aug. 4, 2006).

States and localities, frustrated by the lack of federal success in stemming illegal migration, have increasingly tried to restrict immigration on their own.¹² Typically these measures aim to convince the undocumented to abandon their communities by denying them what international law would characterize as economic and social rights, including housing, employment, benefits, and public services. These measures will not receive judicial deference, not because they violate substantive rights but because in encroaching on the federal government's immigration regime they violate the "supremacy clause" of the U.S. Constitution.¹³ Again, not every state or local restriction on immigrants implicates immigration, and some local restrictions on immigrants will be upheld. But preemption occurs if Congress expressed "an intent to occupy a given field" or if state or local law conflicts with federal law in an area (like immigration) of federal authority.¹⁴ Thus, the U.S. Supreme Court has invalidated state public benefit restrictions based on alienage,¹⁵ as well as state restrictions on eligibility for certain jobs.¹⁶ Even if a state or local restriction does not substantively run afoul of the supremacy clause, the manner of a law's enforcement may invalidate it. For example, a measure that required state or local officials to determine a person's immigration status or if an immigration offense had been committed would likely violate the "supremacy clause."¹⁷

The equation changes, however, when federal legislation directs or pressures states to deny drivers' licenses,¹⁸ in-state college tuition,¹⁹ or other benefits to undocumented persons. In these circumstances, state and local restrictions will likely be upheld.

Fourth, deportation proceedings closely resemble criminal trials, but are viewed as "civil" in nature. For this reason, even though immigrants in deportation proceedings may be separated from their families, banished to countries they do not remember, persecuted and tortured, they cannot avail themselves of the Sixth Amendment right to appointed counsel. In theory, the due

¹²N. Riccardi, "States Take on Border Issues," *Los Angeles Times* (Jan. 16, 2006).

¹³Under U.S. Const. art. VI, cl. 2, federal law is "the supreme Law of the Land."

¹⁴*Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 248 (1984).

¹⁵*Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶*Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

¹⁷Congressional Research Service, "Legal Analysis of Proposed City of Hazelton Illegal Immigration Relief Act Ordinance" (June 29, 2006).

¹⁸REAL-ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231 (2005).

¹⁹The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009 (1996).

process protections guaranteed by the Fifth Amendment – which applies to deportation proceedings – could require courts to appoint counsel in certain removal cases.²⁰ In practice, however, this virtually never occurs. In addition, a federal statute provides that persons facing removal have a right to counsel, but at “no cost to the government.”²¹

²⁰*Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (5th Cir. 1975), *cert denied* 423 U.S. 1050 (1976).

²¹Immigration and Nationality Act (INA) § 292.

Not surprisingly, most persons in deportation proceedings do not have legal counsel and those without counsel are deported at far higher rates, a trend most pronounced in cases of detained immigrants.²² A recent study found that unrepresented asylum-seekers were denied political asylum 93 percent of the time, compared to 64 percent for asylum-seekers with legal counsel.²³ Other analyses have concluded that represented asylum-seekers are up to six times more likely to prevail in their cases.²⁴ The immigration judge represents another important variable in case outcomes. Denial rates by individual judges vary from 9.8 to 96.7 percent,²⁵ a factor that increases the need for legal counsel. In short, many persons in deportation proceedings cannot afford counsel and those who must represent themselves do so at their peril.

The United States remains a generous nation towards immigrants. Its 37 million foreign-born residents have ushered in the largest wave of immigration in U.S. history. At the same time, the nation is in the throes of a divisive debate that features competing visions of “membership” and of the rights and privileges that should be extended to immigrants. Restrictionists seek to make life so difficult for certain immigrants – through a patchwork of federal, state, local measures – that they will be forced to leave. Human rights advocates seek to integrate immigrants (including the undocumented) into the nation’s life. The resolution of this debate will determine whether the United States puts the undocumented on a path to citizenship with all of its rights and responsibilities, or whether it perpetuates a two-tiered society characterized by a growing population of second-class non-citizens who lack rights, security or prospects.

²²D. Kerwin, “Revisiting the Need for Appointed Counsel,” *MPI Insight*, No. 4 (Apr. 2005).

²³Transactional Records Access Clearinghouse, “Prosecution of Immigration Cases Surge in U.S.” (TRAC Immigration, July 2006) [hereinafter “Prosecution of Immigration Cases Surge”], available at <http://trac.syr.edu/immigration/reports/160/>.

²⁴A. Schoenholtz and J. Jacobs, “The State of Asylum Representation: Ideas for Change,” 16 *G’town Immig. L.J.* 739, 740 (Summer 2002); D. Kerwin, “Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded,” *Immigration Briefings*, No. 04-06 (June 2004).

²⁵“Prosecution of Immigration Cases Surge”