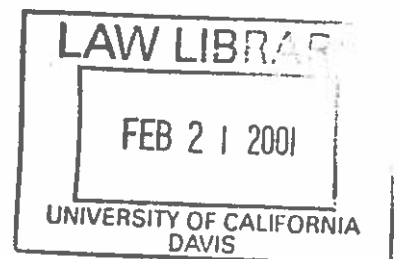


# CALIFORNIA CRIMINAL LAW AND IMMIGRATION

1999 Edition with December 2000 update

Katherine A. Brady  
Norton Tooby  
Michael K. Mehr  
*The Immigrant Legal Resource Center*

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TO: Subscribers to *California Criminal Law and Immigration*  
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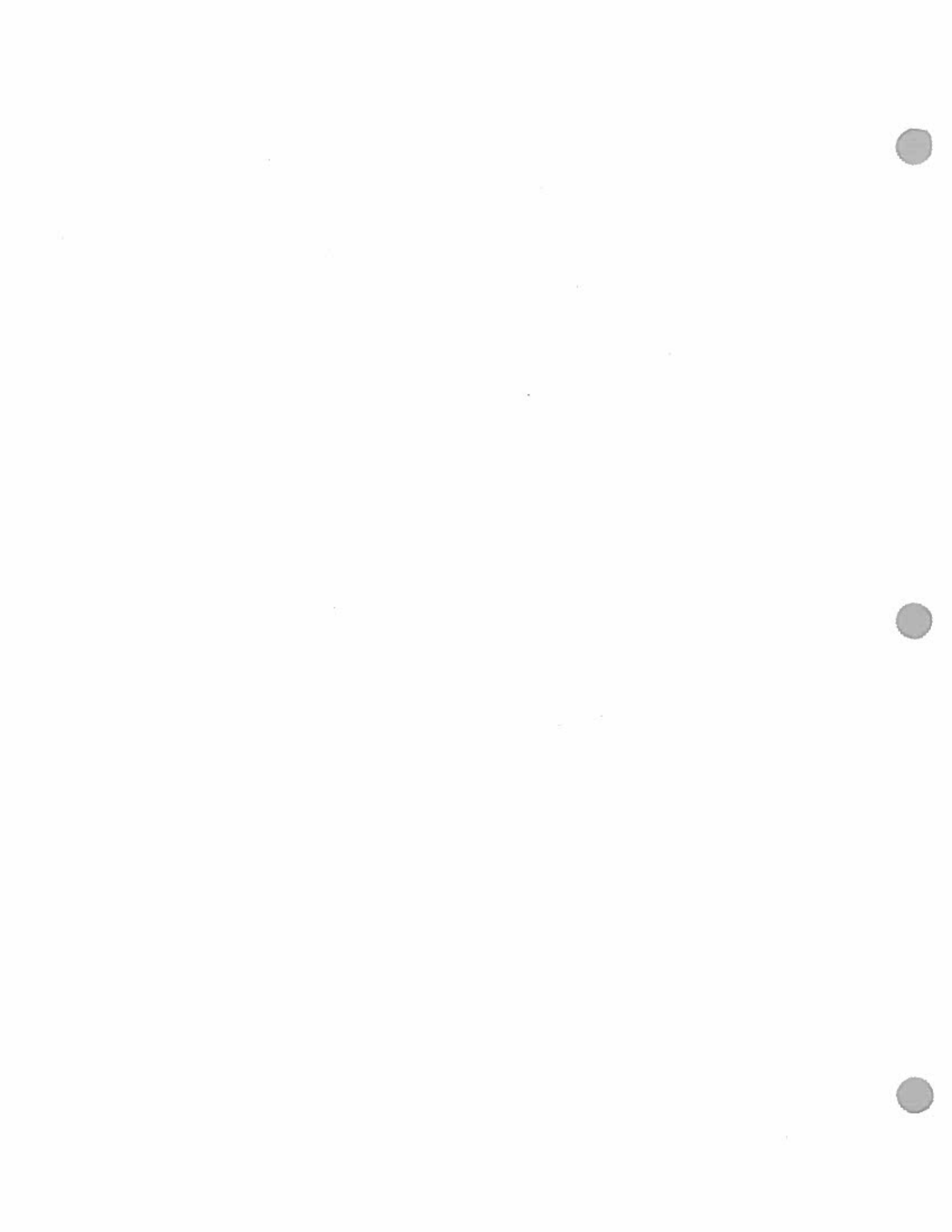
We are pleased to send you the December 2000 edition of *California Criminal Law and Immigration*. We want to remind you that the authors frequently not only report on the state of the law, but also suggest potential arguments. We mean this material to be a starting, not ending, point of discussion, and we are very interested in your feedback, arguments and ideas, which we will share with others. Please send briefs, arguments, decisions or other written material to Katherine Brady, ILRC, 1663 Mission St., Suite 602, San Francisco CA 94103, fax 415/255-9792, [kbrady@ilrc.org](mailto:kbrady@ilrc.org). If possible, copy the information to Dan Kesselbrenner, NLG National Immigration Project, 14 Beacon Street, Ste. 506, Boston MA 02108, fax 617/227-5495, [nipdan@nlg.org](mailto:nipdan@nlg.org).

Note that this is *not* an offer from the ILRC to consult on your individual case. We consulted for free on crimes for some years, but unfortunately had to stop because the demand was overwhelming. We do offer a contract system, if you would like to sign up with us to get advice and assistance on a billable basis. To request contract information, contact Lisa Gonzalves at the above address or at [lisa@ilrc.org](mailto:lisa@ilrc.org).

The tide might be turning in Congress. Proposals were made in Congress in 1999 and 2000 to “fix” some of the worst excesses of the 1996 legislation, and the possibility of legislative action may remain even given the great uncertainties facing the 2001 Congress. *Every* sympathetic story that illustrates why these laws need to be changed is valuable. If you have a sympathetic story, please forward it to American Immigration Lawyers Association, 1400 Eye St NW, Ste. 1200, Washington DC 20005, Attn: J. Golub, or [jgolub@aila.org](mailto:jgolub@aila.org). Please send the ILRC a copy as well.

We want to point out a few chapters that people sometimes overlook. **Chapter 1** is a nuts and bolts introduction for criminal defense counsel on representing noncitizen defendants (see especially §1.1). It includes a review of immigration law concepts such as admission that may be useful to immigration lawyers as well. **Chapter 8**, by Norton Tooby, is a whole manual in itself on how to obtain post-conviction relief. **Chapter 10** provides an overview of immigration and crimes strategies in quick outline form, as well as a client questionnaire and information on how to get a copy of a client’s INS file. **Chapter 11** is a summary of the ways an individual can become a permanent resident or avoid deportation/removal, with an in-depth analysis of how criminal record can affect each application. Experienced immigration attorneys as well as criminal defense attorneys may find this useful. **Chapter 12**, by Michael K. Mehr, discusses INS holds and detainers and other state enforcement issues.

Finally, I want to again thank the many people who contributed ideas and assistance with this book, and especially Dan Kesselbrenner, Norton Tooby, law students **Bernardo Merino** and **Stephen Hassid**, and the wonderful staff at the ILRC. Also, this year the ILRC was co-counsel in the successful appeal of *Matter of Roldan* at the Ninth Circuit, resulting in the *Lujan-Armendariz v. INS* decision. I want to thank the other co-counsel, all of whom worked *pro bono* on this appeal: **Don Ungar**, **Marc Van Der Hout**, **Robert Jobe**, **Linton Joaquin**, **Patsy Kraeger**, and **Dan Kesselbrenner**.





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FR: Katherine Brady

DA: December 5, 2000

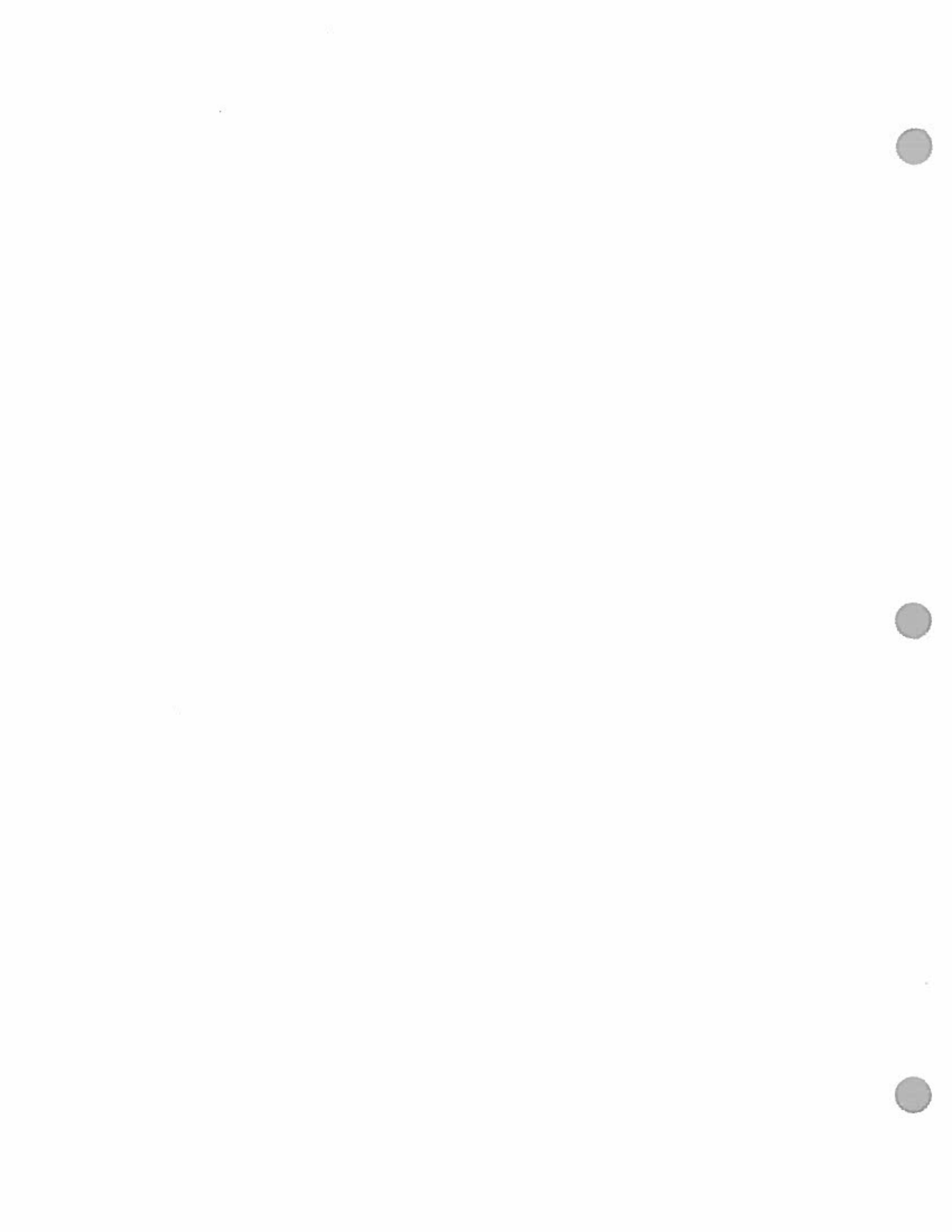
RE: Recent BIA decision; Meissner Memorandum

**Aggravated Felonies “Described in” Federal Statutes.** We want to alert you to an important BIA decision that was published just as this book went to press. In *Matter of Vásquez-Muñiz*, Int. Dec. 3440 (BIA 2000), the BIA held that conviction of being a felon in possession of a firearm in violation of Cal. Penal Code § 12021(a)(1) is not an aggravated felony as a state offense analogous to a federal gun felony. In the process the BIA discussed the test for which state offenses constitute aggravated felonies because they are “described in” one of the many federal offenses listed at INA § 101(a)(43), 8 USC § 1101(a)(43), the aggravated felony definition.

Section 101(a)(43) contains several paragraphs listing offenses “described in” dozens of federal statutes, relating to firearms, money laundering, unlawful monetary transactions, ransom, pornography, RICO, gambling, and document fraud. All of the listed federal offenses contain some “federalizing” element such as involvement of federal property or effect on interstate commerce. The BIA held that a state offense that lacks this federal jurisdictional element will not be an aggravated felony. As the INS pointed out, almost no state statute will involve such a federal jurisdictional element, so the decision prevents many state offenses from being aggravated felonies. The BIA majority found that if Congress wanted to draft the definition so as to include state offenses that had the same elements as federal offenses minus the jurisdictional element, it knew how to do so, and cited statutes where Congress in fact had made that clear.

The INS may ask for the Attorney General to review this BIA opinion. The Ninth Circuit specifically left this question open in *Sandoval-Barajas v. INS*, 206 F.3d 853, 856 (9th Cir. 2000). There the court ruled that a different state firearms offense (“alien” in possession of a firearm) didn’t have the same substantive elements as a listed federal offense (“illegal alien” in possession of a firearm), and so held that it was not an aggravated felony without having to reach the issue of whether the federal jurisdictional requirement alone would have been enough to disqualify the state offense.

**Prosecutorial Discretion Memo.** Also, please note that outgoing INS Commissioner Doris Meissner’s Memorandum on Prosecutorial Discretion, dated November 17, 2000, can be found at [www.ins.doj.gov/graphics/lawsregs/handbook/discretion.pdf](http://www.ins.doj.gov/graphics/lawsregs/handbook/discretion.pdf).



## **Acknowledgments**

This book would be impossible without the support and assistance of many people.

Dan Kesselbrenner of the National Immigration Project is a mentor, mensch, and invaluable source of advice and good humor for many people across the country. Norton Tooby has joined the immigration and crimes fray in the last decade and transformed it with his profound knowledge of criminal law, his commitment to serving the whole client, and his generous willingness to share his knowledge in written works, teaching and consulting. Michael Mehr brings a similar commitment to his clients and community, and has generously provided his expertise on state action, post-conviction relief and other issues.

The attorney staff at the Immigrant Legal Resource Center have all become experts in this field, based on need. The ILRC has worked intensively over the last few years on issues involving naturalization to U.S. citizenship, civic participation and leadership development of immigrants. In thousands of consultation calls on naturalization, the most common "difficult case" questions involve crimes, usually minor convictions from many years ago that may block a person from obtaining citizenship, or even result in his or her deportation. In many cases people who had no inkling that there was a problem have literally disappeared after their naturalization interview, because a long-ago conviction was reclassified as an aggravated felony and they have been arrested and detained pending deportation. The ILRC attorney staff has done great work in educating providers around the country about what offenses are and are not dangerous. The wonderful non-attorney staff also have supported this work (and often advocate for us to respond to letters from prisoners). They especially have supported the creation of this and other manuals. Bill Ong Hing, our volunteer executive director, works expertly on multiple levels to advance immigrants' rights and support the ILRC's efforts. The whole staff makes the ILRC a great place to work.

Really talented law students have worked on the last two editions of the book. In 1995 Amy Righter devoted a few months to the book and among other things did much of the original research on sex crimes (*see* § 9.8). Meredith Linsky, a veteran of many battles, updated and wrote several sections. Both Amy and Meredith are now public defenders. In 1999 Erica Tomlinson did excellent work in several areas, and especially in discovering the legislative history error that should produce a ruling that driving under the influence is not an aggravated felony (*see* Appendix 9-E). Dennis Prieto provided very valuable research and editing of several chapters.

Katherine Brady





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