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Ladies and gentlemen, it is a great pleasure for me to be back at the Golden Gate University Law School. Visiting here has become a habit with me, and it is not one that I intend to shake.

My subject today is what has happened to civil liberties in this country in recent years. Part of that — a very important part, I think — is the transformation of our immigration law. Let me begin that discussion with a story, a true story. It is about a man named Scott Shelley, who comes from Toronto, Canada. He is a physicist. In 1997, he visited California, and while there he met a woman from Portland, Oregon. Alexandrea Seminara. As he puts it, it was love at first sight. They were married. In June of that year he moved to Portland. He got a job as professor of physics at Portland Community College. It was a dream job and a dream life. But the dream ended.

Mr. Shelley applied to the Immigration and Naturalization Service for adjustment of status. That is a procedure used when someone comes to the United States as a visitor and wishes to remain with a different kind of visa. In this case, there was little doubt that Scott was entitled to adjustment of

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status because he was the husband of an American citizen. But it takes time and a lot of papers for that to become a fact.

In December 1997, Scott and Alexandrea visited his family in Toronto. When they went to the Toronto Airport to fly back to Portland, the U.S. immigration officer said Mr. Shelley had made a mistake. An immigrant going through adjustment of status, she said, had to file a form before leaving. It is a one-page form, and it costs $70 to file. But Mr. Shelley had not known anything about the form. Because he had not filed it, he was not allowed to board the plane. But the officer said he would be allowed to enter the United States if he showed them his birth certificate and marriage certificate. His wife flew on to Portland, faxed him those documents, and he went back to the immigration office the next day. This time he was allowed through but told to go to a "deferred inspection" in Portland. The officer said not to worry about it.

In February 1998 he went for the deferred inspection. He explained about his inadvertent failure to file the form. At that, he was arrested and put in detention. He asked to speak to the officer's supervisor or a lawyer and was told he could not do so. He was handcuffed, taken to the airport and put on a plane to Toronto. Now he is there and his wife is in Portland. He has lost his job. The Immigration Service has told him that he must apply all over again for a visa as the husband of an American citizen, resubmitting fingerprints and taking another medical exam. All that will take time. He estimates that it will be six months to a year before he can go back to Portland and his wife. My guess is that is optimistic. In the meantime, he has no income.

Scott Shelley wrote me about all this. At the end of his letter, he said: "The punishment, both emotional and financial, doesn't seem to fit the crime. I urge the United States Congress to reconsider this extreme penalty. Why not introduce a bill designed to unite married couples rather than to separate them?" I'd put it another way, if you step back and look at this case. If you had not heard the story I just told, and someone told you that because a person had failed to file a one-page form, he and his wife were to be separated for an

indefinite number of months or years, that he would lose his job, etc., what would you think? I think you might believe that you were hearing a description of a passage from Kafka or perhaps from the Soviet Union. I do not think you would anticipate that this was American law. And it should not be.

I think that Mr. Shelley's question is a good one. Why not introduce a bill designed to unite married couples? But it should be addressed not just to Congress but to President Clinton. Because it was Bill Clinton who signed into law the legislation that has brought about numerous human disasters and cruelties.[1] And it was not a reluctant signature, ladies and gentlemen. So far as I know, President Clinton never objected to the harsh provisions of the 1996 immigration bill. And the harshness goes very far.

One provision of the 1996 Immigration Act lists as grounds for deportation what it calls "aggravated felonies" committed by aliens in this country. In the past, the law called for the deporting of people who were guilty of grave crimes such as murder and rape. The 1996 change added all kinds of minor crimes, such as selling marijuana and some cases of drunk driving. It describes many misdemeanors as "aggravated felonies," including the one that has trapped a Brooklyn man named Jesus Collado and ruined his life.

Jesus Collado came to the United State from the Dominican Republic in 1972. Two years later, when he was 19 years old, he slept with his teen-age girlfriend. Her mother was angry and took him to court. Jesus pleaded guilty to the misdemeanor of contributing to the delinquency of a minor and was put on probation. That was that — he thought. In 1997 he made a brief trip abroad. When he came back, he was asked by the immigration officer at the airport whether he had ever been arrested. He answered honestly. As a result, he was imprisoned, held for deportation because of a twenty-three-year-old misdemeanor that was now called an aggravated

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1. Immigration and Naturalization Services Act of 1996, Public Law #104-208, 110 Stat. 3009-694 (codified as amended in scattered sections of 8 U.S.C.).

felony. He was taken to a state prison in York, Pennsylvania, that is used by the Immigration Service to hold its detainees, who are mixed in with murderers and other convicted criminals. While he was there, his daughter was nearly killed in a car accident, his wife had a serious operation, and the restaurant he owned lost much of its business in his absence. It was like the punishment of Job — all because Jesus Collado had slept with his girlfriend 23 years before.

After six and one-half months in the York prison, the I.N.S. released Collado on parole. Its lawyers discovered that the new 1996 immigration law allowed parole during a transition period, after which everyone it moves to deport will have to be imprisoned until the case is decided. The real reason the service released Collado was that many people had expressed outrage at his detention. But the deportation case is still going on. Unless there is a miracle of some kind,[2] Jesus Collado will be sent away from his wife and three children and never allowed to return. That is the penalty for teenage sex under the law passed by the last Congress and signed by President Clinton.

Congress made the 1996 act retroactive. That is, it made Mr. Collado and thousands of men and women like him deportable because of offenses long ago that were not grounds for deportation at the time. There is something about retroactive law that civilized societies find repellent. During the apartheid years in South Africa, one of the most appalling pieces of legislation — the "Terrorism Act of 1967"[3] — made all kinds of resistance to the racist system a crime. One of its paragraphs said that it should be deemed to have been enacted in 1962. "The statute was passed in 1967, but we are telling you it was actually passed in 1962." So things that people did between 1962 and 1967 were made retroactively criminal, and people were prosecuted for acts that had not been criminal at the

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2. There was a miracle of a kind. The I.N.S., under the pressure of adverse publicity over the case, decided to end the deportation proceedings against Collado. *See* "Immigrant Fights Off His Deportation," NEW YORK TIMES, Sept. 4, 1998, p. B3, col. 1.

3. Terrorism Act 83 of 1967 (South Africa).

time. That sounds like something that could not happen in our country.

The original Constitution, before the Bill of Rights, contains clauses that prohibit passage of ex post facto laws by both the federal government and the states.[4] But the Supreme Court has held that ex post facto laws are only criminal statutes and that deportation laws are not criminal statutes, even though they may deprive a person deported — as Justice Brandeis said — of "all that makes life worth living."[5]

In the past, our immigration law had a way of avoiding cruel results. For many years there was a provision allowing the attorney general to waive deportation when it would cause extreme hardship to someone who had developed strong ties to this country — someone like Jesus Collado, with a wife and children who are citizens. But the 1996 act eliminated the right to waive deportation, no matter how harsh the result. It is a law with no mercy.

A number of people had applications for waiver of deportation pending when the new law took effect. The Board of Immigration Appeals decided that those cases could continue. But in a rare step, Attorney General Janet Reno invoked a rarely-used power and overruled the Board. So the prohibition on waiver is also being applied retroactively.[6]

Another provision of the 1996 act calls for the "expedited removal" of anyone who comes to our borders and is found by an immigration officer to be inadmissible. Someone may come as a visitor, for example, but be suspected by the I.N.S. agent of wanting to stay in the United States. The fact that the person has a valid U.S. visa does not matter; if the agent thinks her a bad risk, she will be removed — and banned from entering the country for five years. There is no review of the agent's decision.

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4. U.S. CONST. art. I, section 9, cl. 3.
5. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
6. Goncalves v. Reno, 144 F.3d 110 (1998).

Here is an example of how that can work. Elba Wood is a Honduran woman who lives in Nicaragua with her husband. In 1994, she visited her sister in Houston, Texas. She was pregnant and planned to go home in September for the birth. But the baby was born prematurely in August, and she stayed until the doctor said she could go home, in December. In the summer of 1997 she flew to Miami with her daughter, then three years old, to see her sister. She had a U.S. visa, but at the Miami Airport she was stopped by I.N.S. agents. From 5:30 in the afternoon until 10:30 at night she was questioned, insulted, shouted at — and not allowed to use a bathroom. At 2 in the morning she was taken to an I.N.S. detention center. She was allowed to use the telephone and called her mother-in-law, who lives in Miami and took the child. Mrs. Wood was held in detention for a week, then put on a plane to Nicaragua with her daughter. Why was she barred? An I.N.S. officer screamed at her that she was a thief who had come to steal his taxes. Another said she was removed because she had overstayed her visa in 1994. The new immigration law makes anyone who overstays a visa inadmissible in future, but it is not clear that the provision applies to an overstay like Mrs. Wood's, on medical grounds.

Now here is a postscript to the story of Elba Wood. When I wrote about her treatment by the I.N.S., the commissioner of immigration, Doris Meissner, telephoned me and said she was ashamed at what had been done to Mrs. Wood. "She had a valid visa," Ms. Meissner said. "She should have been admitted." Ms. Meissner gave instructions that Mrs. Wood be admitted if and when she came again. Encouraged by this, Mrs. Wood went to the U.S. consulate in Managua to apply for a new visa. She waited in line for eight hours. When she got to the window, the vice consul turned her down — without explanation.

The 1996 immigration act also makes radical changes in the way people who come here seeking asylum from political persecution are treated. Before applying for asylum they must first convince an officer at the border that they have a "credible fear" of persecution. If they pass that test, they are usually held in detention until, many months later, they get a hearing

before an immigration judge. And that is it: no appeal if they lose. How it works can be shown by contrast with a well-known case decided before the change in our asylum procedure.

Fauziya Kassindja came to this country from Togo. When she reached the immigration desk at Newark Airport, she told the officer that she was using a false passport in order to flee from what was about to be done to her at home: female genital mutilation. The officer did not believe her. Neither did an immigration judge when she had a hearing. All this time she was held in a notorious prison where the detainees were assaulted by guards. There she was discovered by a New York Times reporter, Celia Dugger, who told her story. That moved the I.N.S. to release her on parole. She also got a volunteer lawyer, who took her case to the Board of Immigration Appeals. It decided in Ms. Kassindja's favor, finding that fear of genital mutilation was a legitimate ground for seeking asylum and that she really had been threatened with mutilation. Celia Dugger, our reporter, then went to Togo to check into the story herself. She talked with Ms. Kassindja's mother and father and found that the story was true, grimly true. Fauziya's sister had died after it was done to her, and Fauziya's turn was next.

Ms. Kassindja was lucky. Because if she had come after the 1996 law had taken effect, she would have had no right to go to the Board of Immigration Appeals or to a federal court. When the immigration judge decided against her, she would have been sent back to Togo to be mutilated.

Another recent piece of legislation also has a grave effect on immigration law. That is the Anti-Terrorism Act proposed by President Clinton and passed by Congress.[7] It explicitly allows the Immigration Service to use secret evidence to deport someone when it alleges that he has a connection to a terrorist group. The connection need not be criminal. It may merely be the donation of money for non-terrorist purposes. That is a common phenomenon. During the apartheid years many

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

Americans gave money to the African National Congress for its schools and refugee camps and other peaceful activities. But the A.N.C. also carried out guerrilla attacks.

The use of secret evidence takes us back to the time of McCarthyism and the government loyalty program, when many people lost their jobs without ever knowing who was accusing them of exactly what. The issue has been dramatized lately by the government's move to deport six Iraqis who had helped us in a covert plan to overthrow Saddam Hussein. Now the government has decided that they are a threat to this country's security and proposes to send them back to Iraq, where their lives would no doubt be abruptly ended. The government will not tell the six what it suspects about them — or even give them an unclassified summary of the charges. It is hard for me to imagine a more poisonous process to be made a part of American justice.

Those are a few — just a sketchy few — of the unfairnesses introduced in our immigration law in the last few years. To those particulars I must add one general point of profound significance. In a number of places, the 1996 immigration law forbids the courts to review what has been done to individuals under the statute. That is the rule in asylum cases, for example. It is a break — to me a shocking one — from American tradition. The belief, indeed the assumption, that we can go to court when the government sets out to penalize us is built into the American bone. Independent judges have been the glory of our country. They have kept us free, and that is what the men who created our political system expected them to do. The Framers of the Constitution were not prepared to let government officials deal with citizens without the protective hand of the courts. The precedent of court-stripping set by the 1996 immigration act may be its worst disaster.

But the immigration legislation is by no means the only area where fairness and civil liberties have suffered in these last years. The anti-terrorism bill, which I mentioned earlier, has an extraneous section that undermines habeas corpus, the legal procedure that for centuries has been a fundamental guardian against injustice. Habeas corpus is a writ that

requires government officials to show a legal reason for anyone's imprisonment. It is an essential check against abuse of official power.

Federal habeas corpus law allows — or I should put it in the past tense: allowed — prisoners in state jails to bring suits in the federal courts alleging that they were convicted or sentenced in violation of the Constitution. The Supreme Court opened the way for that procedure in 1923, when it approved the use of federal habeas corpus to set aside convictions obtained in an Arkansas trial dominated by a mob.[8] Over the years, a substantial number of state prisoners won new trials through the habeas corpus process because they had been convicted in flagrantly unconstitutional ways. Some of them were on death row, and quite a few of those were eventually released as innocent. But conservatives in the states and in Congress grew increasingly angry at the delay in executions caused by habeas corpus proceedings. Year after year, attempts were made to restrict the use of the writ. All failed until President Clinton was in office. He announced that he favored "reform" only so long as it preserved the essential purpose of habeas corpus to correct unconstitutional convictions. But then one night he was on the Larry King program. King asked him whether he would agree to Republicans attaching to the pending Anti-Terrorism Bill an amendment to gut habeas corpus. President Clinton said yes, he would — without any qualifications. That sabotaged the fight being made against the amendment. The Senate came close to beating it, but the president's abandonment of his position made the difference. There are now procedural obstacles that effectively gut habeas corpus.

One more repressive piece of legislation should be mentioned. It is the Prison Litigation Reform Act, passed in 1996 and signed by President Clinton without objection.[9] It severely restricts lawsuits to correct prison conditions so horrifying that federal courts in the past have found them unconstitutional. In

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8. *See* Moore v. Dempsey, 261 U.S. 86 (1923).

9. Prison Litigation Reform Act of 1995, Pub.L.No. 104-134, 110 Stat. 1321-66 to 1321-77 (1996).

Pennsylvania, for example, hundreds of inmates in a prison were infected with tuberculosis when the authorities failed to take elementary protective health measures. And I doubt that I have to tell you about the many other cases where there was systematic brutality, rape by guards, and the like. Most of the lawsuits brought by inmates against such conditions have been settled by consent decrees. Those in charge, confronted with the facts, were usually disinclined to defend the state of their prisons. But the new law puts disabling conditions on consent decrees. First, it limits their duration to two years — far too short for effective improvement of prison conditions. Second, it forbids officials to agree to consent decrees unless they admit that they personally violated constitutional rights — which would open them to personal liability. The law also imposes costs on prisoners who sue and raises procedural obstacles. Again, as in the immigration law, the effect is virtually to insulate a sensitive area from judicial scrutiny. And, again, the victims are those least able to take care of themselves with political influence. Prisoners, like immigrants, are seldom influential.

The survey I have just given you leads me to an unhappy conclusion. I think the years since 1992 have been as bad a period as any in memory for civil liberties in the United States. In an important sense it is even worse than the age of McCarthy. That was a temporary setback. What has happened in the current phase is written into permanent statutes and will not be changed unless and until a Congress and president more devoted to American ideals are in power.

Why has it happened? The question is not one to which I have a ready answer. We are in a time of extraordinary prosperity, with no reason for the gnawing anxieties that so often put pressure on liberties. The Cold War is over, and we are military masters of all we survey. And yet we have written afresh into our laws some of the worst features of the Cold War and Red Scare periods. We have stripped our courts of jurisdiction in a way not known since the bad time after the Civil War, when a Congress bent on punishing the South took away the jurisdiction of the Supreme Court to consider cases

that the radical Republicans in Congress feared the Court would decide against their wishes.[10]

The other mystery is Bill Clinton. Here is a man who taught constitutional law at the University of Arkansas. Yet he has utterly failed as an educator on constitutional rights. He has failed to articulate the reasons why Americans should care about civil liberties, the reasons of history and of the deepest American values. The country was born, after all, in a struggle for those liberties. It should not be a hard lesson to teach.

But President Clinton's disappointing record goes beyond his failure to educate. He has seemed puzzlingly insensitive to constitutional rights. There is no sense that there is a bottom line on liberty, in the White House or for that matter in the Justice Department. I think Bill Clinton will go down as a president with a civil liberties record worse than any in my lifetime. Worse than Ronald Reagan's or Richard Nixon's. Far worse.

There is a particular irony in President Clinton's disregard for civil liberties. He is now the target of an independent counsel who has carried the powers of a prosecutor very far in his effort to drive Mr. Clinton from office — carried them, in my view, to the point of abuse. Kenneth Starr has not hesitated to question an assistant to the president about his conversations with the press. He has subpoenaed from a Washington bookstore the records of what books Monica Lewinsky has bought. He has issued many subpoenas to news organizations for unpublished material — subpoenas that are secret because they are under judicial seal.

But that, ladies and gentlemen, is another subject. My point here is that the press, in its zeal to get salacious stories about this president, has ignored the more lasting effect he has had on our liberties.

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10. Act of March 27, 1868, ch. 34, 15 Stat. 44 (1868). *See* Ex parte McCardle, 7 Wall. 506 (1868).