

Spring 2017

Finding a Right to Remain: Immigration, Deportation, and Due Process

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Recommended Citation

Simon Y. Svirnovskiy, *Finding a Right to Remain: Immigration, Deportation, and Due Process*, 12 Nw. J. L. & Soc. Pol'y. 32 (2017).
<http://scholarlycommons.law.northwestern.edu/njls/vol12/iss3/2>

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Finding a Right to Remain: Immigration, Deportation, and Due Process

Simon Y. Svirnovskiy*

Table of Contents

- I. INTRODUCTION**
- II. TWO UNCOMFORTABLE TRUTHS ABOUT AMERICAN IMMIGRATION**
 - A. Admissions Procedures for Prospective LPRs*
 - B. Introduction to “Crimmigration”*
 - C. The Expansion of Removable Offenses*
 - D. A More Crowded Immigration Court*
- III. LACHES CAN PROTECT LPRs WHERE DISCRETION FAILS**
 - A. Prosecutorial and Judicial Discretion are Insufficient Solutions to “Crimmigration” and Long-Delayed Removal Actions*
 - 1. Prosecutorial Discretion
 - 2. Relief Discretion
 - B. Laches is Available as a Mechanism for Relief for LPRs*
- IV. A NASCENT RIGHT TO REMAIN**
 - A. Applying Due Process to Non-Citizens*
 - B. An Emerging Awareness?*
 - 1. Detention and Deprivation of Liberty
 - 2. Limits on Removal, and Deportation as Punishment?
 - 3. Acceptance of Laches and Other Equitable Relief as Emerging Consensus
 - C. A Right to Remain from History and Tradition*
 - D. Implications of a Right to Remain*
- V. CONCLUSION**

I. INTRODUCTION

Hilario Rivas-Melendrez immigrated to the United States from Mexico when he was eleven years old, in 1970, as a lawful permanent resident (LPR).¹ In 1980, at age twenty-one, Rivas-Melendrez was convicted of statutory rape in California after a consensual sexual encounter with his seventeen-year-old girlfriend.² Over the next three decades, he

* J.D., Northwestern Pritzker School of Law, 2017; B.A., University of Virginia, 2012. I am immensely grateful to Professor Erin Delaney for her seemingly endless patience and passion for this project, as well as her thoughtful advice and numerous reviews. Additional thanks to the incredible members of the *Northwestern Journal of Law and Social Policy* who provided invaluable feedback. Finally, I thank my wife, Erika, my parents, and Victoria Ryan and Jared Calvert for their unwavering motivation and support. Any errors herein are my own.

¹ IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE 4 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.

² *Id.*

remained in the United States, served in the United States Navy, married another LPR, and had four U.S. citizen children.³ In 2009, almost thirty years after his conviction, the Department of Homeland Security (DHS) initiated the process to seek his removal from the United States based on his 1980 conviction.⁴ Rivas-Melendrez petitioned for habeas relief to the United States District Court, but the judge denied his petition on jurisdictional grounds.⁵

On appeal, the Seventh Circuit held that, while “remov[ing] a lawful permanent resident after 40 years of residency . . . and [] separat[ing] him from his wife and four children, is indeed a unique kind of hardship . . . this unique hardship does not translate into the kind of restraint needed to meet the ‘in custody’ requirement” for habeas relief.⁶ The court sympathized that Rivas-Melendrez’s family ties and three decades of lawful residence made his removal a “particularly harsh remedy,” but the court could do nothing because he was not in custody when he filed his habeas petition.⁷ Still, the appellate court echoed the concern of the district court, that in “cases like this one, there is effectively no remedy for what may have been procedural violations by [Immigration and Custom Enforcement] agents and perhaps other immigration officials.”⁸ Moreover, the court appeared to scold DHS for directing its removal efforts at Melendrez—whom the opinion described as a “long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed—on the basis of a 30-year-old statutory-rape conviction.”⁹ Finally, the court suggested the Board of Immigration Appeals’ procedures allowed for discretionary reconsideration of Rivas-Melendrez’s claims, and so comforted itself that he had “at least one potential avenue for relief.”¹⁰

This story shows that in certain circumstances, options for relief are unavailing. Lawful permanent residents who are convicted of a wide range of offenses—from violent aggravated felonies all the way down to traffic violations—can be made removable from the United States without avenue for relief. As Rivas-Melendrez’s case illustrates, neither prosecutorial nor judicial discretionary relief is available, even in such sympathetic situations.

This Article has two overall objectives. First, it aims to justify why laches, an equitable defense that prevents against enforcement of long-held but unused remedies,¹¹ can and should be applied *against* the U.S. government when the government sits on its rights and fails to remove a lawful permanent resident for committing a deportable offense in a timely manner, after she has served out her sentence. Second, this Article seeks to introduce a robust substantive due process right—the right to remain—which undergirds the Court’s more recent moves toward greater protection of LPR rights in cases of statutory ambiguity.

Part II spells out two uncomfortable truths about the U.S. immigration system—that it is now easier than ever before to initiate removal proceedings against LPRs, but it is also taking longer than ever before to remove them. Part II then lays out the complicated

³ *Id.*

⁴ Joseph Celentino, *No Relief Available to Expelled Immigrant*, COURTHOUSE NEWS SERV. (Aug. 2, 2012), <https://www.courthousenews.com/no-relief-available-to-expelled-immigrant/>.

⁵ *Id.*

⁶ Rivas-Melendrez v. Napolitano, 689 F.3d 732, 739 (7th Cir. 2012).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 739–40.

¹¹ 30A C.J.S. *Equity* § 138 (2015).

topography of U.S. immigration law that immigrants must navigate to arrive as LPRs in this country and to avoid making any mistakes that could jeopardize their ability to stay here. Next, it introduces the popular concept of “crimmigration,” the increasing criminalization of immigration violations, and highlights the growing categories of offenses, both violent and nonviolent, that can render one removable and explains how these categories have ballooned over time. Finally, Part II shows the impact of the heightened criminalization on the immigration courts and on LPRs themselves.

Building on the story of Mr. Rivas-Melendrez, Part III addresses the limited discretionary relief options that are available to LPRs at various points in time, including statutory cancellation and voluntary departure. It argues that the system is still sweeping up far too many nonviolent long-term LPRs, and that discretion—whether exercised by United States Immigration and Customs Enforcement (ICE) investigators, ICE prosecutors, or immigration judges—is itself too unpredictable a concept for LPRs to pin their hopes upon. Instead, Part III suggests laches as a potential relief mechanism for LPRs threatened with removal for offenses committed long ago. It explains the contemporary understanding of laches and then highlights how laches has been used against the government. Finally, this part argues there is a growing body of precedent allowing for the application of laches against the government in various areas of immigration.

Finally, Part IV introduces the substantive due process right to remain. First, it lays the foundation that due process rights have long been understood to apply to all *persons* rather than just *citizens* within the United States. Next, it explains how the right to remain flows from an emerging awareness in the courts in three areas: case law limiting alien detention during removal proceedings, case law that has barred removals altogether and began to consider deportation as something very close to punishment, and case law using laches to limit LPR removals. Then, it attempts to also ground the right to remain in our shared history and traditions before suggesting several potential implications that could come from formally recognizing the right to remain.

The Article concludes by calling upon immigration scholars and practitioners to help champion and continue to develop the right to remain, both through academic and legal research, and via legal arguments on behalf of LPRs throughout the country.

II. TWO UNCOMFORTABLE TRUTHS ABOUT AMERICAN IMMIGRATION

Mr. Melendrez’s tale evinces two uncomfortable truths in the American immigration system: it is now easier to deport individuals, including lawful permanent residents (LPRs),¹² than in recent history, but at the same time it is taking longer and longer to initiate deportation proceedings and subsequently deport removable LPRs. Both truths should strike us as being unfair. First, the growing list of removable offenses¹³ raises critical questions about the morality of the heightened requirements placed on LPRs, but not on citizens. An LPR’s conduct is held to a much higher standard than a citizen, even if the LPR has deeper familial, vocational, or economic ties to the United States, because the LPR’s consequences for even low-level criminal activity more and more frequently include

¹² Although these two problems affect all classes of entrants into the United States from abroad, this Article focuses primarily on the immigration treatment and consequences of lawful permanent residents.

¹³ See *infra* Part II(c).

banishment from the United States, *after* she has served any applicable prison sentence.¹⁴ However, a U.S. citizen who commits a similar or even worse offense than an LPR never has to risk a second, permanent incapacitation after serving his prison sentence; once the U.S. citizen is released, he may rejoin her family, friends, and potentially employer. Second, the lengthy removal process and longer wait times¹⁵ create uncertainty for LPRs, deny them efficient resolutions to their legal situations, and leave the threat of deportation hanging over them for years. The longest of the delayed removal actions also communicate another disturbing message: that we as a society believe citizens who have made criminal mistakes can be rehabilitated, but LPRs lack that same capacity.

This Part opens by detailing the process by which aliens get admitted for permanent residence into the United States. It then turns to the first of the major truths—the growing criminalization of immigration law—and it traces the problems of crimmigration to the bloated and unjust definitions of criminal behavior—specifically, what constitutes a “crime involving moral turpitude” and an “aggravated felony”—in the Immigration and Nationality Act (INA).¹⁶ Finally, this Part shows the practical consequences of this heightened criminalization by reviewing current removal procedures, highlighting the limited role of judicial review, and leading to the second major truth—how much time it takes to deport removable individuals.

A. *Admissions Procedures for Prospective LPRs*

The admissions procedures for prospective LPRs are taxing, and the qualifications required are high. Individuals who wish to immigrate to the United States and become permanent residents can do so through a variety of different methods, with family-sponsored or employment-based immigration being the most common routes.¹⁷ Family-sponsored permanent residents may enter as “immediate relatives,” a status reserved for spouses, children, and in some cases, parents of United States citizens,¹⁸ or through four family-sponsored preference categories.¹⁹ Employment-based slots are reserved for

¹⁴ See *id.*; Immigration and Nationality Act (INA) § 237(a)(4)(D) (2013) codified as 8 U.S.C. § 1227(a)(2)(a). Although the INA is codified under various sections of Title 8 of the *United States Code*, this Article refers only to the INA provisions as enacted in the Public Law

¹⁵ See *infra* Part II(d).

¹⁶ INA § 101(a)(43).

¹⁷ In FY 2013, 990,553 people became LPRs of the United States. Of these, 66% were granted LPR status based on a family relationship with a U.S. Citizen or a Permanent Resident, while another 16% entered with the backing of an employer. RANDALL MONGER & JAMES YANKAY, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., U.S. LAWFUL PERMANENT RESIDENTS: 2013 1, 4 (2014).

¹⁸ INA § 201(b)(2)(A). Immediate relatives face the shortest wait time and accounted for 44% of all new LPRs in 2013, amounting to 440,000 new entrants in 2013. MONGER & YANKAY, *supra* note 17, at 2. All persons who obtain LPR status based on a marriage that is less than two years old only receive “conditional” LPR status and, with certain exceptions, must provide more information to United States Citizenship and Immigration Services (USCIS) before the two-year mark to lift this conditional status. INA § 216. Exceptions to this conditional two-year check may be granted in cases of extreme hardship, *Id.* § 216(c)(4)(A), good faith or not at fault separations, *Id.* § 216(c)(4)(B), and individuals whose marriages ended because they were battered spouses, *Id.* § 216(c)(4)(C).

¹⁹ There are up to 226,000 slots for four family-sponsored preference categories, typically used by married or unmarried adult-age children of U.S. citizens, brothers and sisters of U.S. citizens, or children of current

immigrants,²⁰ prioritized by the need for, uniqueness of, and experience and educational qualifications of the non-citizen applicant.²¹ Finally, there are a limited number of Diversity Immigrants who come in under a lottery system.²²

Prospective LPRs petitioning from abroad require someone (either a family member or an employer) to file a petition with the United States Citizenship and Immigration Service (USCIS) on the LPR's behalf.²³ Family-sponsored applicants who are not immediate relatives, must, at a minimum, wait nearly seven years for their applications to become 'current' so that USCIS will begin to review them and some employment-based beneficiaries abroad also face significant waiting periods.²⁴

The application procedures are similar for both types of immigrants. For family-sponsored immigrants abroad, the U.S.-based family member must file a petition with proof of the qualifying family relationship, generally in the form of a birth or marriage certificate.²⁵ Employment-based immigrants abroad have an additional first step that requires employers to file documents with the Department of Labor to either receive (or bypass) labor certification, and prove the non-citizen will not take a job for which there are qualified American workers available.²⁶ For both types of applicants, once USCIS is satisfied the relationship is genuine and meets all legal requirements, it approves the visa petition. USCIS then transmits a copy to the consulate in the country the petitioner has designated as the place where the non-citizen beneficiary will actually apply for the immigrant visa.²⁷ The consular officer then applies the various inadmissibility grounds found in the INA that may bar potential LPR applicants from admission into the country.²⁸

Although the process for application appears to assume that the potential immigrant is outside the country, the majority of LPRs gain that legal status through petitions for

LPRs. *Id.* § 203(a)(2)(b). The various preference allotments are the current figures as of February 2017, before any alterations made by the Trump Administration.

²⁰ There are up to 140,000 slots available annually to four types of employment-based immigrants. *Id.* § 201(d)(1)(A).

²¹ *Id.* §§ 204(a), (b).

²² There are 50,000 spots available in the Diversity Immigrant lottery, *Id.* §§ 203(c), (e)(2), but high-admission countries are not eligible for the lottery, and applicants must have a high school diploma or its equivalent, as well as two or more years working experience, *Id.* § 203(c)(2).

²³ ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 275 (7th ed. 2012). The American family member or prospective employer is the petitioner, while the prospective immigrant is the beneficiary. *Id.*

²⁴ Other than FS-2A immigrants (spouses and unmarried minor children of LPRs), the *minimum* waiting period for an LPR applicant abroad, other than coming in as an immediate relative (see above), was nearly seven years. In December 2015, for example, the Department of Homeland Security was only then accepting for review Visa application that were filed in April 1994 for FS-4 applicants from the Philippines, and January 1995 for FS-3 applicants. Non-FS-2A applicants from Mexico faced at least a nineteen-year wait for their application to be reviewed. In contrast, most employment-based categories were 'current'—accepting visa applications immediately—other than multiple categories from India (seven- to eleven-year wait), the Philippines (four-year wait), and China (two- to seven-year wait). *See generally* U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN: IMMIGRANT NUMBERS FOR FEBRUARY 2017 (2017).

²⁵ ALEINIKOFF ET AL., *supra* note 23.

²⁶ *Id.*; INA §§ 204(b), 212(a)(5)(A).

²⁷ ALEINIKOFF ET AL., *supra* note 23.

²⁸ INA §§ 212(a), 204(b)–205. *See infra* Part II(b).

adjustment of status while already in the United States.²⁹ Those seeking to adjust their status include refugees, asylum-seekers, certain temporary workers, foreign students, family members of U.S. citizens and LPRs, and undocumented immigrants.³⁰ Their process involves filing an application for adjustment of status to LPR with USCIS.³¹ Then, the USCIS examiner interviews the applicant and applies the same scrutiny and inadmissibility grounds that would have been applied by a consular officer abroad.³²

The inadmissibility grounds—the grounds that make someone ineligible for entry or adjustment of status—are significant and numerous. INA § 212(a) lists groups of aliens who are ineligible to receive visas, making them unqualified to be admitted to the United States.³³ Categories of inadmissibility cover those who have committed crimes (including aggravated felonies and crimes of moral turpitude),³⁴ those who previously entered the United States through fraud or willful misrepresentation,³⁵ those who committed prior immigration violations,³⁶ those who may become public charges³⁷ or threaten public health,³⁸ and those who have been involved in, or have contributed to, terrorist organizations.³⁹ Furthermore, INA § 237(a)(1)(A) makes an alien immediately removable if she was either technically inadmissible at the time of entry, or at the time she petitioned for adjustment of status.⁴⁰

If an alien seeking a visa is denied at the consulate in her home country, she has limited recourse.⁴¹ There are no procedures permitting an applicant to appeal a consular visa denial to some higher administrative or judicial authority, outside of very few

²⁹ MONGER & YANKAY, *supra* note 17, at 2 (finding 53.6% of LPRs received adjustment of status, while 46.4% were new arrivals to the United States in 2013).

³⁰ ALEINIKOFF ET AL., *supra* note 23, at 512.

³¹ *Id.*

³² *Id.*; INA § 245(1)(2).

³³ *Id.* § 212(a).

³⁴ *Id.* § 212(a)(2).

³⁵ *Id.* § 212(a)(6)(c).

³⁶ *Id.* §§ 212(a)(6), (7), (9), (10) (affecting aliens who illegally entered or had previous immigration violations, who have made false claims of American citizenship, who lacked proper documents, or who voted unlawfully). INA § 212(a)(9)(A) institutes five- and ten-year bars for noncitizens who have previously been ordered removed, and INA § 212(a)(6)(A)(i) makes inadmissible an alien present in the United States who was not admitted or paroled into the country.

³⁷ *Id.* § 212(a)(4).

³⁸ *Id.* § 212(a)(1).

³⁹ *Id.* §§ 212(a)(3)(B), 219.

⁴⁰ *Id.* § 237(a)(1)(A).

⁴¹ ALEINIKOFF ET AL., *supra* note 23, at 566. Additionally, cases construing and applying the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706 (1966) are held to be presumptively reviewable, absent clear signals from Congress making review inappropriate. *See* Lincoln v. Vigil, 508 U.S. 182, 195 (1993). More recently, many circuits have explicitly reaffirmed the general doctrine of non-reviewability. *See, e.g.,* Onuchukwu v. Clinton, 408 Fed.App'x. 558 (3d Cir. 2010) (holding consular non-reviewability doctrine precludes that circuit's jurisdiction over challenge to diversity application visa denial); Saavedra Bruno v. Albright, 197 F.3d 1153, 1158–64 (D.C. Cir. 1999) (allowing no judicial review of a challenge filed by a foreign national to a denial of visa by an overseas consular official). The Supreme Court most recently held that even if a U.S. citizen, whose husband had been denied an immigrant visa by a consular officer, had a procedural due process right to an explanation of the grounds for denial of the application, that right was satisfied by the grounds given by the consular officer. *Kerry v. Din*, 135 S.Ct. 2128, 2138 (2015).

exceptions.⁴² And the State Department's internal review procedures are a small comfort: the only "review" is a de novo assessment by another officer within the consulate, who may then issue the visa in his own name.⁴³

Technically, a consulate-issued visa only grants the beneficiary the right to come to the United States and apply for entry at the border.⁴⁴ The immigration officer at the port of entry assesses the alien's admissibility by inspecting her entry documents and screening her identity against databases.⁴⁵ If she is stopped here, the alien may receive a secondary inspection from another officer.⁴⁶ At this point, the non-citizen may still withdraw her application and return home, at the discretion of the officer.⁴⁷ If she does not withdraw and is still denied entry, she may have a right to a removal hearing before an immigration judge (IJ) but she will carry the burden to prove admissibility.⁴⁸ Finally, aliens rejected either without documents, with fraudulent or invalid documents, or who have committed immigration fraud in the past may face expedited removal procedures either at ports of entry or beyond.⁴⁹

B. *Introduction to Crimmigration*

In the past two decades, Congress and the courts widely expanded the categories of deportable offenses.⁵⁰ More and more minor offenses are now considered aggravated felonies, which mandate removal and a permanent bar on returning to the United States.⁵¹ Underpinning these raw Congressional actions and judicial decisions, Professor Juliet Stumpf has traced the change in immigration law from the past practice of merely excluding foreigners who had committed past crimes to the present state of affairs, "where many immigration violations are themselves defined as criminal offenses and many crimes result in deportation."⁵² She argues that the merger of criminal law and immigration—crimmigration—has taken place on three fronts: "(1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure."⁵³ Criminal and immigration law

⁴² Judicial review of visa revocation is permitted as part of a review of a removal order when visa revocation is the sole ground for removability. INA § 221(i).

⁴³ ALEINIKOFF ET AL., *supra* note 23, at 565–66; INA §§ 336(a), 310(c).

⁴⁴ ALEINIKOFF ET AL., *supra* note 23, at 569.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ INA § 235(a)(4).

⁴⁸ *Id.* § 291. An alien must prove "clearly and beyond doubt" that she is entitled to be admitted. *Id.* § 240(c)(2)(A).

⁴⁹ *Id.* § 235(b)(1)(A)(i)–(ii). Immigration officers retain discretion to allow withdrawal at this point, per INA § 235(a)(4), but otherwise judicial review is available only in very limited circumstances—if the detained individual claims she was improperly identified or if she claims she is actually already a U.S. citizen. *Id.* §§ 235(b)(1)(C), 242(e)(2).

⁵⁰ *See infra* Part II(c).

⁵¹ 8 U.S.C. § 1252(a)(2)(C) (2005) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason having committed a criminal offenses covered in . . . § 1227(a)(2)(A)(iii), (B), (C), or (D) of this title.").

⁵² Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006).

⁵³ *Id.* at 381.

began to overlap significantly in the 1980s when Congress proliferated grounds for excluding and removing aliens convicted of crimes⁵⁴ and the overlap continued with the passages of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. At the same time, Congress began crafting laws that made immigration violations, themselves, criminal acts, subject to criminal penalties.⁵⁵

Professor Rachel Rosenbloom, however, has recently argued that crimmigration can be traced back to at least the 1960s when the Immigration and Naturalization Service (INS)⁵⁶ used local police arrest records “as a screening device to net deportable non-citizens.”⁵⁷ Notwithstanding when the movement began, Professor Stumpf identifies the cause of the “crimmigration crisis” as membership theory, “which limits individual rights and privileges to the members of a social contract between the government and the people.”⁵⁸ Membership theory, explains Stumpf, manifests in immigration law “through two tools of the sovereign state: the power to punish and the power to express moral condemnation.”⁵⁹

Other scholars have agreed with Stumpf that immigration and criminal law “had wrapped themselves together so tightly that it was hard to know where one ended and the other began.”⁶⁰ Professor Hernández noted that crimmigration law was a “product of human experience” and “a testament to the United States’ greatest moments and its most visceral fears.”⁶¹ Importantly, however, because law in general “is perpetually malleable[,] [l]egislators, lawyers, and judges can and will continue to shape crimmigration law’s reach.”⁶²

After identifying causes of crimmigration, Professor Stumpf has also explained why it is so fundamentally unjust. It hyper-narrowly and solely reviews the moment of the crime

⁵⁴ *Id.* at 382–84. Previously, starting in 1917, the United States had only deported non-citizens convicted of crimes of moral turpitude, drug trafficking, and limited weapons offenses. *Id.* at 382–83.

⁵⁵ *Id.* at 384. In 1986, Congress began sanctioning employers for knowingly hiring undocumented workers with fines and prison time. *Id.* Further, since 1990, various immigration violations (marrying to evade immigration laws, voting in a federal election as a non-citizen, and falsely claiming citizenship) have been made criminal violations, leading to incarceration and subsequent deportation. *Id.*

⁵⁶ The INS was the precursor federal body to the Department of Homeland Security.

⁵⁷ Rachel E. Rosenbloom, *Policy Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About Its Present and Future*, 104 CAL. L. REV. 149, 155 (2016). Indeed, Rosenbloom sees the 1963 case of *George Fleuti (Rosenberg v. Fleuti)*, 374 U.S. 449 (1963), in which the Supreme Court held an LPR living in California was entitled to return to the United States after a brief visit to Mexico, not as a case of entry controls at the U.S. border, but rather as one about interior removal of LPRs who committed at-the-time illegal acts. *Id.* at 153–54.

⁵⁸ Stumpf, *supra* note 52, at 377.

⁵⁹ *Id.* at 378.

⁶⁰ César Cuauhtémoc García Hernández, *The Life of Crimmigration Law*, 92 DENV. U. L. REV. 697, 697 (2015). See also Allison S. Hartry, *Gendering Crimmigration; The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 7–11 (2012) (outlining the history and build-up of “crimmigration”); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 80 (2013) (defining the “crimmigration complex” as the expanding array of government agencies and private contractors using the threat of criminal sanctions to enforce civil immigration law).

⁶¹ García Hernández, *supra* note 60, at 698.

⁶² *Id.*

that made the non-citizen removable.⁶³ That one-strike approach, however, or, as Stumpf calls it, the “extraordinary focus on the moment of the crime,” stands in stark contrast to how we treat the criminal missteps of citizens: citizens get the benefit of their whole life’s work before the judge decides whether to mitigate or, sometimes, enhance their sentences.⁶⁴ Furthermore, Stumpf shows the real impact that crimmigration has, beyond a growing case backlog. She notes that it has resulted in “an ever-expanding population of the excluded and alienated,” and that “excluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or state-imposed criminal penalty.”⁶⁵

C. *The Expansion of Removable Offenses*

Once they arrive and are admitted into the United States, LPRs still remain in the country at the pleasure of the government, and may be removed for a variety of reasons, which include conduct occurring prior to their entry,⁶⁶ being excludable at the time of entry,⁶⁷ and conduct occurring *after* a lawful entry.⁶⁸ Beyond being physically separated from friends, family, and often their means of work, removed non-citizens face significant re-entry bars of five or ten years, though the bar can be longer depending on the individual’s circumstances.⁶⁹ More significantly, subsequent re-entry without permission is a criminal offense, subject to imprisonment for up to twenty years depending on the grounds for the resident alien’s initial removal.⁷⁰

Removable conduct occurring after a lawful entry includes many crime-related grounds, as defined in INA § 237(a)(2). This subsection will discuss three main categories—crimes involving moral turpitude, aggravated felonies, and public charge—and how the expansion of these categories has led to unprecedented numbers of removals in the last twenty years. In sum, LPRs are at risk of removal based on crimes that are significantly less severe than the INA-advertised felony-level threshold.⁷¹ Nonviolent and traffic-based offenses can and have resulted in significant numbers of removals, and these numbers (and proportions) are growing.⁷² These offenses, additionally, can hang over LPRs’ heads for decades.⁷³

⁶³ See Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709–10 (2011).

⁶⁴ *Id.* at 1705, 1709–10.

⁶⁵ Stumpf, *supra* note 52, at 378.

⁶⁶ INA § 237(a)(1)(A).

⁶⁷ *Id.* § 237(a)(2)(A). For instance, someone may have been inadmissible but may have gotten through the consular process.

⁶⁸ *Id.* § 237(a)(4)(D).

⁶⁹ *Id.* § 212(a)(9)(A).

⁷⁰ *Id.*

⁷¹ See *infra* Part II(c).

⁷² See *infra* note 133 and accompanying text. MARC ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 13 (2014), <http://www.migrationpolicy.org/sites/default/files/publications/Deportation-Discretion-Report.pdf> (stating that in 2008, FBI-nonviolent, drug possession, traffic, and nuisance crimes were the basis of 43,957 removals, and that number increased to 72,781 removals in 2013).

⁷³ IMMIGRATION POLICY CTR., *supra* note 1, at 4.

One of the most capacious categories is the “crime involving moral turpitude” (CIMT). Non-citizens convicted of a CIMT within five years of admission into the United States are removable.⁷⁴ Never affirmatively defined in the INA, a CIMT has been defined by the Board of Immigration Appeals (BIA)⁷⁵ as an “act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which” makes it a CIMT.⁷⁶ The Fifth Circuit, however, approved of a different BIA definition that defines moral turpitude as “conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”⁷⁷ Other circuits have applied similar definitions.⁷⁸ CIMTs may involve intent to defraud, to commit theft with intent to permanently deprive, or intent to inflict great bodily harm; but they also include serious crimes against persons, like murder, voluntary manslaughter, rape, aggravated assault, and kidnapping; and crimes against property like arson, burglary, or embezzlement.⁷⁹ Two or more crimes of moral turpitude after admission automatically render an alien removable, regardless of the dates of conviction or the length of her sentence.⁸⁰

Coupled with the vagueness of the moral turpitude definition is the expansive definition of “conviction” in use by ICE.⁸¹ The CIMT removal category is contested by disagreeing courts and results in a patchwork application across the country, increasing uncertainty and unfairness for LPRs.⁸² For instance, the Fifth Circuit recently held that

⁷⁴ INA § 237(a)(2)(A)(i).

⁷⁵ The BIA sits within the Department of Justice’s Executive Office of Immigration Review (“EOIR”) and is the country’s highest administrative body for interpreting and applying immigration laws, and reviews decisions of administrative immigration judges (“IJs.”) *Board of Immigration Appeals*, U.S. DEP’T JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> (last visited Feb. 25, 2017).

⁷⁶ *In re Fualaau*, 21 I. & N. Dec. 475, 477 (B.I.A. 1996).

⁷⁷ *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996) (citing *In re Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1989)). Most BIA decisions may be appealed, by either the government or the petitioner, up to the Circuit Court of Appeals in which the petitioner resides. *Board of Immigration Appeals*, *supra* note 75; *see also Appeals*, JUSTIA, <https://www.justia.com/immigration/appeals/> (last visited Apr. 12, 2017).

⁷⁸ *See, e.g., Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007) (quoting *Gill v. INS*, 420 F.3d 82, 89 (2d Cir. 2005)) (explaining that moral turpitude captures conduct that is “inherently base, vile, or depraved”); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 636 (3d Cir. 2002) (quoting BLACK’S LAW DICTIONARY (7th ed. 1999)) (defining moral turpitude as something “contrary to justice, honesty, or morality”).

⁷⁹ IMMIGRANT LEGAL RES. CTR., § N.7 CRIMES INVOLVING MORAL TURPITUDE 111 (2013), http://www.ilrc.org/files/documents/n.7-crimes_involving_moral_turpitude.pdf; *See also ALEINIKOFF ET AL.*, *supra* note 23, at 694.

⁸⁰ INA § 237(a)(2)(A)(ii).

⁸¹ The definition of conviction is broader than one may think, and it includes a guilty verdict or a *nolo contendere* plea. INA § 101(a)(48)(A)(i). Suspended sentences count as part of the ICE’s calculation of an LPR’s length of imprisonment, and reversals on appeal do not count to expunge the conviction or reduce the sentence length for ICE’s purposes *if* the reversals were made specifically to avoid immigration consequences of the conviction. *Id.* § 101(a)(48)(B). Furthermore, while a pardon generally eliminates all immigration consequences for convictions, pardons do not affect removability or lessen re-entry bars for crimes of domestic violence or substance abuse. *ALEINIKOFF ET AL.*, *supra* note 23, at 698.

⁸² *See, e.g., Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) (holding that crimes involving moral turpitude required conduct that was “inherently base, vile, or depraved”); *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (requiring a “corrupt *scienter*” as the “touchstone of moral turpitude”); *Partyka v. Attorney Gen. of the U.S.*, 417 F.3d 408, 414 (3d Cir. 2005) (finding that a “hallmark of moral turpitude” was a

misuse of a Social Security number counted as a crime involving moral turpitude,⁸³ while the Ninth Circuit explicitly disagreed.⁸⁴ The Ninth Circuit also bucked with other circuit courts when it held that accessory after the fact did not count as a crime involving moral turpitude.⁸⁵ Most recently, the Third Circuit grappled with how to determine if LPRs convicted of state-law offenses had, in fact, committed CIMTs (as defined in the federal Immigration and Nationality Act).⁸⁶ Finally, while CIMTs generally require baseless or vile action, there is currently a circuit split over whether driving under the influence is a crime of moral turpitude.⁸⁷ In addition to rendering an LPR removable, these vaguely defined offenses also bar LPRs from cancellation of removal—a form of discretionary relief that could otherwise let removable aliens remain in the country.⁸⁸

The expansion of the CIMT category raises a key issue integral to the rule of law: notice. Non-citizens are not adequately warned about what makes them deportable, as the definition is vague and variable. The Supreme Court did address this issue in *Jordan v. DeGeorge*,⁸⁹ and upheld CIMTs over a void for vagueness challenge.⁹⁰ And recently, the Second Circuit upheld an INA provision rendering deportable any alien convicted of stalking over a void for vagueness challenge.⁹¹ However, the Seventh Circuit remanded a decision to the BIA when it could not determine whether falsely using a Social Security number constituted a crime involving moral turpitude and, if so, whether LPRs could be expected to know this.⁹² There, Judge Posner remarked in his concurring opinion that “[t]he concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work.”⁹³ And, as discussed above, courts commonly split over the same issues arising in different circuits, begging the question of whether Congress may provide a more consistent solution for interpreting when a CIMT is implicated in a defendant-LPR’s conduct.⁹⁴ Indeed, if

“reprehensible act committed with an appreciable level of consciousness of deliberation”); INA § 237(a)(2)(A)(i).

⁸³ *Hyder v. Keisler*, 506 F.3d 388, 392 (5th Cir. 2007).

⁸⁴ *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000).

⁸⁵ *See Navarro-Lopez v. Gonzalez*, 503 F.3d 1063 (9th Cir. 2007). *But see, e.g., Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002), and *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005) (both holding that accessory after the fact is a crime involving moral turpitude).

⁸⁶ *Jean-Louis v. Attorney Gen. of the U.S.*, 582 F.3d 462, 468 (3d Cir. 2009) (holding state-law reckless assault of a minor, without more, did not constitute a crime involving moral turpitude for INA purposes because the state statute defendant was convicted under encompassed broader actions than the federal definition).

⁸⁷ *See Keungne v. U.S. Attorney Gen.*, 561 F.3d 1281, 1288 (11th Cir. 2009); *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 927 (9th Cir. 2007) (holding that a DUI was a crime involving moral turpitude under INA § 237(A)(2)(a)(ii)); *but see Knapik*, 384 F.3d at 93 (holding defendant’s attempted reckless endangerment from a DUI is not a crime involving moral turpitude).

⁸⁸ Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 11 (2014); *See infra* Part III.

⁸⁹ 341 U.S. 223 (1951).

⁹⁰ *Id.* at 703.

⁹¹ *Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008).

⁹² *Arias v. Lynch*, 934 F.3d 823, 825 (7th Cir. 2016).

⁹³ *Id.* at 835 (Posner, J., concurring).

⁹⁴ *See infra* notes 83–85 (*Hyder*, 506 F.3d at 392; *Navarro*, 503 F.3d at 1063; *Beltran-Tirado*, 213 F.3d at 1179); *but see Padilla*, 397 F.3d at 1016, and *Itani*, 298 F.3d at 1213 (both holding that accessory after the

Congress fails to act, then perhaps a challenge to *DeGeorge* may be appropriate now, as the Supreme Court has shown a renewed interest in taking up “void for vagueness” challenges.⁹⁵

In addition to being convicted of a CIMT, committing an aggravated felony at any time after admission will also put an alien at risk of removal.⁹⁶ Although courts have expanded the definition of CIMT, the meaning of “aggravated felony” has been stretched and broadened by Congress, itself. The term “aggravated felony” was first introduced in the 1988 Anti-Drug Abuse Act and applied specifically to immigrants and asylum seekers.⁹⁷ It was originally limited to serious crimes like murder and drug trafficking, but was most significantly expanded in two 1996 laws—AEDPA and IIRIRA.⁹⁸ The term “aggravated felony” now covers more than twenty categories of offenses and includes all crimes of violence for which punishment is over one year imprisonment.⁹⁹ An aggravated felony conviction, as defined in the INA, also makes the alien ineligible for most forms of relief from removal, including asylum,¹⁰⁰ cancellation of removal,¹⁰¹ or voluntary departure,¹⁰² and she is also barred for life from re-entry without special consent from the Attorney General.¹⁰³

The bar for what counts as an aggravated felony has been lowered considerably, and the INA’s definition has grown to include less serious offenses; courts have interpreted “aggravated felony” under the INA expansively to include misdemeanors and less serious offenses than those explicitly defined in 101(a)(43).¹⁰⁴ A growing number of smaller offenses now count as aggravated felonies; a category that began with murder, rape, sexual abuse of minors, and drug trafficking now includes firearm possession, theft, and burglary.¹⁰⁵ Other notable examples “aggravated felonies” include any drug or firearm trafficking convictions, regardless of sentence length,¹⁰⁶ entry without inspection (EWI)

fact is a crime involving moral turpitude); *See Keungne*, 561 F.3d at 1288; *Marmolejo-Campos*, 503 F.3d at 927.

⁹⁵ *See, e.g., Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015) (holding the term “violent felony” in the Armed Career Criminal Act sentencing enhancement law was unconstitutionally vague and, therefore, violated Due Process).

⁹⁶ INA § 237(a)(2)(A)(iii).

⁹⁷ Steve Patrick Ercolani, *Why Are Immigrants Being Deported for Minor Crimes?* ATLANTIC (Nov. 20, 2013), <http://www.theatlantic.com/national/archive/2013/11/why-are-immigrants-being-deported-for-minor-crimes/281622/>.

⁹⁸ *Id.*

⁹⁹ *Id.*; INA § 101(a)(43).

¹⁰⁰ *Id.* § 208(b)(2)(B)(i).

¹⁰¹ *Id.* § 240A(a)(3).

¹⁰² *Id.* § 240B(a).

¹⁰³ *Id.* § 212(a)(9)(A).

¹⁰⁴ *United States v. Ramirez*, 731 F.3d 351, 354–55 (5th Cir. 2013); *United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir. 2002).

¹⁰⁵ Aaron Lang, Note, *An Opportunity for Change? Aggravated Felonies in Immigration Proceedings and the Effect of Moncrieffe v. Holder*, 33 B.U. INT’L L.J. 101, 120 n.148–49 (2015) (citing RICHARD S. STEEL, STEEL ON IMMIGRATION 508–15 (2013)); *see also* INA § 101(a)(43). Some additional crimes, such as domestic violence offenses, while frequently overlapping with CIMT and aggravated felony grounds for removal, also explicitly make a noncitizen removable. *Id.* § 237(a)(2)(E).

¹⁰⁶ *Id.* § 101(a)(43)(B)–(C).

after previously being removed,¹⁰⁷ failure to appear for a sentence or before a court,¹⁰⁸ counterfeiting or forgery,¹⁰⁹ and any obstruction of justice or perjury.¹¹⁰ What's more, non-citizens who are removable on aggravated felony grounds are not eligible for most forms of judicial discretionary relief, regardless of their ties in the United States or the time that has passed since their offense.¹¹¹

Roland Sylvain's case is illustrative of this expansion: ten years before his arrest by ICE, Sylvain, a Haitian native who had arrived legally in the United States with his family when he was seven years old, received a speeding ticket in Virginia.¹¹² At the time he had signed the ticket with the name of his cousin, who was with him in the car, but then panicked and immediately confessed to the highway patrolman.¹¹³ Sylvain was charged with forging public records and received two suspended sentences for a total of three years that he never had to serve.¹¹⁴ He never had any trouble with the law afterwards, but he nonetheless faced imminent deportation.¹¹⁵

The power of the "aggravated felony" category may be fading soon however. In September 2016, the Tenth Circuit held the INA's definition of "aggravated felony" was unconstitutionally vague because it included 18 U.S.C. § 16(b)'s definition of "crime of violence."¹¹⁶ The Tenth Circuit ruled that because the Supreme Court held the Armed Career Criminal Act's residual definition of "violent felony" was void for vagueness in *Johnson v. United States*,¹¹⁷ the incorporation of "crime of violence" into the INA's definition of an "aggravated felony" was likewise too vague.¹¹⁸ The Supreme Court has not yet granted certiorari, however, so for now the "aggravated felony" removal grounds stand.¹¹⁹

Next, any controlled substance possession now also makes a lawful permanent resident or an undocumented alien removable¹²⁰ and, as noted above, the immigration consequences for these convictions do not disappear even after full pardons.¹²¹ Non-citizens are removable for most drug offenses, including for being a drug abuser or addict, even in the absence of an underlying criminal conviction.¹²² With one exception (for possession thirty grams or less of marijuana for personal use), this provision applies

¹⁰⁷ *Id.* § 101(a)(43)(O).

¹⁰⁸ *See id.* § 101(a)(43)(Q)–(T).

¹⁰⁹ *See id.* § 101(a)(43)(R).

¹¹⁰ *See id.* § 101(a)(43)(S).

¹¹¹ *See Cade, supra* note 88, at 6, 10.

¹¹² *See Ercolani, supra* note 97.

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ Christie Thompson, *Deporting 'Felons, Not Families'*, MARSHALL PROJECT (Nov. 21, 2014), <https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families#.jEpI1JR9d>.

¹¹⁶ *Golicov v. Lynch*, 837 F.3d 1065, 1067 (10th Cir. 2016).

¹¹⁷ 135 S.Ct. 2551 (2015).

¹¹⁸ *Golicov*, 837 F.3d at 1067 (granting petitioner's petition for review, vacating his order of removal, and remanding the case to the BIA).

¹¹⁹ *See id.*, *petition for cert. filed*, Sessions v. Golicov (U.S. Feb. 2, 2017) (No. 16-966).

¹²⁰ *Id.* *See* INA § 237(a)(2)(B)(i).

¹²¹ ALEINIKOFF ET AL., *supra* note 23, at 698.

¹²² *See* Thompson, *supra* note 115.

extraterritorially, threatening to remove LPRs for violating the drug laws of any country they visit.¹²³

Finally, in rare cases aliens may even be removed for being a “public charge”—a drain on public government resources—from “causes not affirmatively shown to have arisen since entry.”¹²⁴ President Donald Trump has signaled this removal category may be used more aggressively by his administration, as he issued a draft executive order that would exclude LPR-hopefuls who may require public assistance and deport LPRs and other non-citizens in the U.S who rely on social services help.¹²⁵ This prioritization would starkly contrast with the policies of the George W. Bush and Barack Obama administrations, which scaled back the “public charge” deportation rules.¹²⁶

These factors have led to more deportations than ever before. In 2013, the United States removed nearly 440,000 individuals from the United States, the most ever in a single fiscal year.¹²⁷ Of those, 198,000 were removed for criminal convictions.¹²⁸ Approximately 136,000 of those aliens were removed for non-immigration criminal offenses—that is, for crimes that did not have to do with actual illegal entry or re-entry into the United States.¹²⁹ By 2016, those figures rose to 450,954 removals and returns, although the government formally initiated *new* enforcement actions—apprehensions, after-the-fact inadmissibility determinations, and ICE arrests—against 805,071 individuals.¹³⁰

Since 2008, each year has seen a greater number of less and nonviolent offenders removed than aggravated felons or multiple-time felony offenders.¹³¹ Marc Rosenblum and Kristen McCabe concluded that “[w]hile criminals account for a growing share of

¹²³ *Id.*

¹²⁴ INA § 237(a)(5).

¹²⁵ Andrew Bremberg, *Memorandum for the President: Executive Order on Protecting Taxpayer Resources by Ensuring our Immigration Laws Promote Accountability and Responsibility*, WHITE HOUSE (Jan. 23, 2017), <http://apps.washingtonpost.com/g/documents/national/draft-executive-orders-on-immigration/2315/>. See also Abigail Hauslohner & Janell Ross, *Trump Administration Circulates More Draft Immigration Restrictions, Focusing on Protecting U.S. Jobs*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/world/national-security/trump-administration-circulates-more-draft-immigration-restrictions-focusing-on-protecting-us-jobs/2017/01/31/38529236-e741-11e6-80c2-30e57e57e05d_story.html?hpid=hp_rhp-banner-low_eoimmigration-120pm:homepage/story&utm_term=.da3076d3abf3.

¹²⁶ Janell Ross, *Trump Draft Executive Order Full of Sound and Fury on Immigration, Welfare and Deportation*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/02/trump-draft-executive-order-full-of-sound-and-fury-on-immigration-welfare-and-deportation/?utm_term=.bd0157f4113d. In 1999, the Clinton administration edited the public charge law to ensure participation in food aid programs, medical care, job training, education, and childcare would not constitute “public dependency.” *Id.* Then, in 2002, the Bush Administration guided immigrant children could receive food aid during the existing five-year waiting period for LPR adults to be eligible for most aid programs. *Id.* Finally, since 2009 states have been able to provide independent health care coverage to legal immigrant children and pregnant women in their first years in the United States. *Id.*

¹²⁷ JOHN F. SIMANSKI, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 1 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

¹²⁸ *Id.* at 9.

¹²⁹ *Id.*

¹³⁰ *DHS Releases End of Year Fiscal Year 2016 Statistics*, U.S. DEP’T HOMELAND SEC. (Dec. 30, 2016), <https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics>.

¹³¹ ROSENBLUM & MCCABE, *supra* note 72, at 13.

removals, a sizeable share of those removed are not the most serious criminals.¹³² Indeed, the percent of nonviolent (e.g., drug possession, nuisance, and traffic-based)¹³³ removals has grown from 14% of all removals in 2008 to 16% in 2013, representing an absolute increase of 29,000 annual removals.¹³⁴ Finally, Syracuse University's TRAC Immigration Project has also found that the percent of removals based on alleged criminal activity has fallen each year since 2010, to its lowest level ever in 2016.¹³⁵ More than ever before, DHS, through its enforcement arm, ICE, has been focusing on removing nonviolent non-citizen offenders. Furthermore, in contrast to the prioritization categories for removal issued by the Obama administration,¹³⁶ the Trump administration plans to remove any alien who has been convicted of, charged with, or committed acts that constitute *any* criminal offense.¹³⁷

Finally, the rising list of crimes that make an LPR removable, even ten or twenty years after their commission, also make the LPR inadmissible and, therefore, permanently ineligible for naturalization. Indeed, in 2013, of the 13.14 million immigrants in the United States, 4.35 million were not eligible to naturalize.¹³⁸ Committing a removable offense can serve as a permanent bar to naturalization because of the INA's good moral character requirement¹³⁹—the same aggravated felony that may render an LPR removable at any

¹³² *Id.* at 12.

¹³³ FBI-designated nonviolent crimes (excluding drug, traffic, domestic abuse, and nuisance offenses) included fraud and shoplifting. Fed. Bureau of Investigation, *Crime in the United States, 2011: Offense Definitions*, U.S. DEP'T JUST., <https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offense-definitions> (last visited Apr. 11, 2017).

¹³⁴ ROSENBLUM & MCCABE, *supra* note 72, at 13 (showing that in 2008, FBI-nonviolent, drug possession, traffic, and nuisance crimes were the basis of 47,869 removals). That number increased to 72,781 removals in 2013. *Id.*

¹³⁵ *Nature of Charge in New Filings Seeking Removal Orders through February 2017*, TRAC REPORTS, INC., http://trac.syr.edu/phptools/immigration/charges/apprep_newfiling_charge.php (last visited Mar. 28, 2017).

¹³⁶ See *infra* Part III(a) for more discussion about prosecutorial discretion and its pending changes.

¹³⁷ Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, U.S. Customs & Border Prot. 2 (Feb. 20, 2017) (available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf). The revised version of the memorandum (released Feb. 20 rather than Feb. 17), does note the heads of ICE, CBP, or USCIS may issue further guidance to prioritize enforcement—for instance, by prioritizing removal of *convicted* felons, or aliens involved in gang activity or drug trafficking. *Id.* However, ICE arrests in the first months of 2017 indicate the Trump Administration has not yet established any prioritization schemes: from January through mid-March, ICE arrested 21,362 immigrants—compared to 16,104 in the same period in 2016—and “[a]rrests of immigrants with no criminal records more than doubled to 5,441.” Maria Sacchetti, *ICE immigration arrests of noncriminals double under Trump*, WASH. POST (Apr. 16, 2017), https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html?utm_term=.08d4b0160908.

¹³⁸ BRYAN BAKER & NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., *ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN THE UNITED STATES: JANUARY 2013 3* (2014), https://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2013_0.pdf.

¹³⁹ Though the INA does not explicitly define “good moral character,” it lists acts that evince a lack of good moral character, and includes references to most criminal offenses, crimes involving moral turpitude, and crimes involving controlled substances. INA §§ 101(f)(3), 316(e), 212(a)(2).

time after her admission into the United States¹⁴⁰ also serves to permanently disqualify her because it would violate the good moral character naturalization requirement.¹⁴¹

D. A More Crowded Immigration Court

The increase in removal actions due to the congressional and judicial broadening of removal definitions as well as other identified factors has led to a significantly more crowded immigration court. The number of pending deportation cases in immigration courts has increased each year since 2006.¹⁴² The number of cases has grown from 174,935 in 2007 to 533,909 in the last decade.¹⁴³ California, alone, has nearly 97,000 deportation cases as of the start of 2017, while immigration courts in Texas and New York have almost 95,000 and 73,000, respectively.¹⁴⁴

A short review of removal procedures is necessary to understand the context for this backlog. The removal process begins when the DHS serves a charging document, called a Notice to Appear (NTA), to an alien either in person or by mail, which commands a hearing before an IJ at a designated time and place.¹⁴⁵ Generally, NTAs afford DHS the power to arrest an LPR who does not attend her hearing, but ICE officers may also serve the notice to an LPR in person with an accompanying custodial arrest.¹⁴⁶ The hearing must be scheduled at least ten days after service, though it can stretch to as far as three years from the receipt of the NTA.¹⁴⁷ Respondents in removal proceedings must pay for their own counsel¹⁴⁸ and may usually receive one or two continuances, typically to seek counsel.¹⁴⁹ Indigent respondents must be informed of free legal services in the area if they cannot afford counsel.¹⁵⁰ After either the arrest or the individual hearing, the DHS officer examines the case and determines if and what bond will be made available. The respondent may then obtain review of the bond decision from an IJ at a bond redetermination hearing.¹⁵¹

The arrest itself may be warrantless.¹⁵² Specifically, immigration officers may arrest without a warrant any alien who the officer believes is either entering or attempting to enter the United States in violation of immigration laws, or is present in the United States in

¹⁴⁰ *Id.* § 237(a)(2)(A)(iii).

¹⁴¹ *Id.* §§ 316(a), 101(a)(43), 101(f)(8). INA § 101(f)(8) excludes from naturalization anyone who “*at any time* has been convicted of an aggravated felony,” and, as mentioned before, aggravated felonies include not just murder, rape, and sexual abuse, but also money laundering, perjury, failure to appear for sentencing, and failure to appear before a court. *Id.* § 101(a)(43).

¹⁴² *Backlog of Pending Cases in Immigration Courts as of February 2017*, SYRACUSE UNIV.: TRAC, <http://trac.syr.edu/> (last visited Mar. 28, 2017).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ ALEINIKOFF ET AL., *supra* note 23, at 1148; INA § 239. More commonly, though not the scope of this paper, an alien is not served with an NTA because she is picked up near land borders and agrees to a quick return to Canada or Mexico (after fingerprinting). *Id.* at 1149.

¹⁴⁶ ALEINIKOFF ET AL., *supra* note 23, at 1148-49.

¹⁴⁷ *Id.* at 1148.

¹⁴⁸ *Id.* at Ch. 10 Sec. A. 2 at 1150; INA § 240(b)(4)(A).

¹⁴⁹ ALEINIKOFF ET AL., *supra* note 23, at 1148.

¹⁵⁰ *Id.* at Ch. 10 Sec. A. 2 at 1150; INA § 239(b)(2).

¹⁵¹ ALEINIKOFF ET AL., *supra* note 23, at 1149.

¹⁵² INA § 236(a).

violation of immigration laws and is likely to escape before a proper warrant can be obtained.¹⁵³ In these cases, the alien is also brought before another immigration officer and if this agent believes there is a *prima facie* case against the alien, formal removal proceedings are initiated.¹⁵⁴

The first judiciary involvement occurs at the master calendar hearing (the subject of the NTA), which determines whether an individual merits hearing is even required, based on whether the individual admits the allegations and waives relief or whether she chooses to dispute the facts, contest her removability, or seek asylum or another form of relief.¹⁵⁵ If it is required, the IJ sets the individual merits hearing for some date in the future. The alien may then appeal to the BIA and, from there, to the United States Appellate Courts.¹⁵⁶ Beyond asking for review of the decision, aliens may file, generally within ninety days, up to one motion to reopen to offer previously unavailable material evidence¹⁵⁷ or, within thirty days, a motion to reconsider based on claimed errors in an earlier appraisal of the law or the facts of the case.¹⁵⁸ Importantly, however, these motions do not automatically stay the execution of removal orders unless the alien filed a motion to reopen an *in absentia* order.¹⁵⁹ Furthermore, if the removal order was made *in absentia*, (around 15% of all IJ decisions), the non-citizen ordered removed is ineligible for any discretionary relief for ten years, though there are some allowances for rescission and equitable tolling.¹⁶⁰ In total, LPRs' appeals aim for two types of relief: either a hearing and grant of some sort of statutory relief provided by a judge, or favorable prosecutorial discretion exercised by DHS. These, along with one other kind of discretion, are discussed in the next Part.¹⁶¹

As a result of higher volumes in immigration courts, individuals threatened with removal have had to wait longer and longer for their cases to be heard and resolved. The average wait time to hear a removal case has increased from 406 days in 2006 to 672 days in 2016—a 66% increase.¹⁶² However, the wait time to hear a removal case brought for a *criminal*, national security, or terrorism removal ground has gone up from 353 days in 2006 to 822 days in 2016—a 133% increase.¹⁶³ In California, criminal-based removal cases languish for an average of 964 days before they are heard by a judge, and in Texas individuals have to wait an average of 1,007 days.¹⁶⁴ Once they were heard, by 2016 these

¹⁵³ *Id.* § 287(a).

¹⁵⁴ *Id.*

¹⁵⁵ ALEINIKOFF ET AL., *supra* note 23, at 1149.

¹⁵⁶ *Id.* at Ch. 10 Sec. A. 5 at 1187-88.

¹⁵⁷ INA § 240(c)(7).

¹⁵⁸ *Id.* § 240(c)(6).

¹⁵⁹ ALEINIKOFF ET AL., *supra* note 23, at 1188.

¹⁶⁰ INA §§ 240(b)(5)(a)–(c)(7); *What Happens when Individuals are Released on Bond in Immigration Court Proceedings?*, TRAC REPORTS, INC., <http://trac.syr.edu/immigration/reports/438/> (last updated Sept. 14, 2016).

¹⁶¹ *See infra* Part III.

¹⁶² *Immigration Court Backlog Tool*, TRAC REPORTS, INC., http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Feb. 2017) (follow “What to graph: Average Days” hyperlink; then follow “Charge Type: Immigration” hyperlink; then follow “What to tabulate: Average Days” hyperlink; then follow “State: Entire US” hyperlink).

¹⁶³ *Id.* (follow “What to graph: Average Days” hyperlink; then follow “Charge Type: Criminal/Nat. Sec./Terror” hyperlink; then follow “State: Entire US” hyperlink).

¹⁶⁴ *Id.* (follow “What to graph: Average Days” hyperlink; then follow “Charge Type: Criminal/Nat. Sec./Terror” hyperlink; then follow “What to tabulate: Average Days” hyperlink; then follow “State:

cases took another 571 days, on average, to be resolved (up from 228 days in 2006—a 150% increase), and the process took significantly longer in California (739 days) and New York (902 days).¹⁶⁵ Cases that ended in removal—a presumably more straight-forward procedure—have also felt the brunt of the processing backlog, stretching from 131 average processing days in 2006 to 353 processing days in 2016—a 169% increase.¹⁶⁶ And, the processing backlog has been more pronounced for individuals who were awarded discretionary relief (599 days in 2006 versus 880 days in 2016—a 47% increase) and who could prove there were no actual grounds for their removal (373 days in 2006 versus 500 days in 2016—a 34% increase).¹⁶⁷

Furthermore, among individuals who were removed from the interior (not at the border), 51% of their qualifying convictions occurred more than a year before their ICE apprehension, and 25% were more than five years old.¹⁶⁸ Though roughly 66% of these five-year-or-more delayed removals were based on violent crimes (which likely involved lengthy prison sentences), *more than 30%* of these long-delayed removals were for nonviolent crimes, drug possession, traffic, or nuisance crimes.¹⁶⁹ Overall, nearly four thousand removal events occurred between 2003 and 2013 on the basis of a traffic or nuisance crime that was more than five years old.¹⁷⁰

These immense delays present serious ethical problems. There is something morally suspect about holding the threat of removal—banishment from one’s family, friends, jobs, home, and livelihood—over an LPR for years *after* she serves the applicable prison sentence for the crime that has rendered her removable. Although presumably she has paid her debt to our society with her time in jail, she is now left to linger and wait in an uncertain immigration status.¹⁷¹ Many LPRs, like Mr. Melendrez and Mr. Sylvain, upon their release have no further contact with DHS or ICE for years, and are left to believe their debts were properly paid. They create more connections in this country—meet and marry significant others, raise families, rise in their careers, and become Americans—until they are suddenly ripped away from them. U.S. citizens can rest comfortably, by simple virtue of their birth or naturalization, in knowing that once they serve their sentence they may rejoin their communities. By setting limits on prison sentences, we express the belief that

California”); *Id.* (follow “What to graph: Average Days” hyperlink; then follow “Charge Type: Criminal/Nat. Sec./Terror” hyperlink; then follow “What to tabulate: Average Days” hyperlink; then follow “State: Texas”).

¹⁶⁵ *Immigration Court Processing Time by Outcome*, TRAC REPORTS, INC., http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last updated Feb. 2017).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ ROSENBLUM & MCCABE, *supra* note 72, at 16.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016). Professor Kleinfeld suggests “reconstructivism” as an alternative to the traditional foundational accounts of criminal law—retributivism and consequentialism—and argues that punishment “reconstruct[s] a violated normative order in the wake of a crime.” *Id.* at 1491, 1513. Under this theory, the normative order would be sufficiently reconstructed once the LPR serves her prison sentence as society would demonstrate its condemnation for the criminal behavior and, instead, its preference for law-abiding actions. Reconstructivism would see the additional, uncertain threat of deportation as unnecessary and gratuitous, and a kind of over-punishment that risks individuals disrespecting or de-legitimizing the law.

citizens who stepped afoul of the law may be rehabilitated. However, the current immigration regime unjustly refuses to extend that faith to LPRs—residents who often have ties that are as strong or stronger to the United States than comparable citizens. In 2003, Javier Licón was cited for a DUI, went to court, spent three nights in jail, and took remedial DUI classes.¹⁷² Five years later he met and then married an American citizen, Sherrie Soria.¹⁷³ As a citizen, if Ms. Soria was caught committing the same crime, either ten years ago or two weeks ago, then she would simply pay the same fine and spend the same three days in jail as Mr. Licón. Her punishment would be complete and her crime atoned for.¹⁷⁴ Mr. Licón, however, risks the threat of removal—banishment—from his wife, his friends, and his job. Keren Zwick, managing lawyer for the National Immigrant Justice Center in Chicago, summarized it bluntly: “Whether an offense happened thirty years, ten years, one day ago, there is no difference in the system” for LPRs.¹⁷⁵ She summarized the current situation, remarking that “[w]e are deporting generally good people and we will continue to deport generally good people.”¹⁷⁶

III. LACHES CAN PROTECT LPRS WHERE DISCRETION FAILS

As demonstrated, the situation faced by long-term resident aliens suddenly charged as removable for a crime (violent or nonviolent) committed many years ago remains bleak. Courts currently offer LPRs limited avenues for relief, and some resort to encouraging LPRs to seek favorable discretion from prosecuting officials.¹⁷⁷ This discretion, however, is exercised by different parties at different times and can be divided into two categories: prosecutorial discretion and relief discretion. This Part reviews the current potential avenues for relief and explains why they are inadequate as practical solutions or, often, completely unavailable to the LPR in question. It will show that current statutorily provided discretion is not only insufficiently broad, but that in fact discretion waivers are applicable to a smaller and smaller cohort of LPRs. Ultimately both prosecutorial and relief discretion are unable to provide the equitable remedies required for the grave moral violations outlined in Part II.

The remedy that remains—laches—is underexplored in this context. Although it is an old, equitable relief mechanism, laches may and has been used in the past to bar actions of the federal government. Furthermore, there is a growing body of precedent allowing for the application of laches against the government in various areas of immigration.

A. *Prosecutorial and Judicial Discretion are Insufficient Solutions to Crimmigration and Long-Delayed Removal Actions*

Two popular solutions to the increased volume of removal actions and the growing backlog of immigration cases call for increased prosecutorial and judicial discretion. ICE

¹⁷² Tina Griego, *A Single Mistake Made Over a Decade Ago Can Get You Deported—Even After Obama’s Action*, WASH. POST (Dec. 10, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/10/a-single-mistake-made-over-a-decade-ago-can-get-you-deported-even-after-obamas-action/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See, e.g., Rivas-Melendrez*, 689 F.3d at 739–40.

prosecutors, proponents contend, should serve as a safety valve and decline to prosecute or enforce removal of LPRs on a case-by-case basis. Judges, in turn, should act as secondary stop-gaps to prevent LPRs like Mr. Sylvain or Mr. Melendrez from being removed from their families, friends, and homes. Discretion, however, is inherently ad hoc and may come with painful and politically unpalatable consequences. A brief review of the various discretion options may help explain the varied application of these two tools.

1. Prosecutorial Discretion

Prosecutorial discretion is more wide-ranging than relief discretion. At many stages of the removal process, the government (prosecutor) may exercise varying degrees of discretion.¹⁷⁸ Perhaps the most critical decision is whether to charge the individual in the first place, and for how long to pursue removal charges against an individual who has committed a removable offense. Thus, when I refer to prosecutorial discretion, I mean the decision at “Time Zero” made by ICE officials to file an NTA against an LPR or not. There are far more removable individuals than the government has the resources to deport, so prosecutorial discretion is a response to this backlog—an attempt to make the best use of limited government resources. In theory, ICE and DHS prosecutors could choose not to prosecute an LPR for a minor crime, or to drop the charges if the LPR has been a longstanding and productive participant in her community.

The justification for relying on prosecutorial discretion is the “flexibility” that a case-by-case approach can engender.¹⁷⁹ Law professor Jason Cade argues that discretion allows “the complexity of an individual’s situation” to be taken into account to “avoid an overly harsh application of statutory law.”¹⁸⁰ At bottom, the problem is the poor drafting and sledgehammer approach of the INA; its “categorical[] and unforgiving approach thus elevates the role of enforcement discretion, which must compensate for the statute’s lack of nuance.”¹⁸¹

In fact, Cade argues ICE prosecutors, who “decide whether to pursue removal, which charges to levy, what trial tactics to employ, and whether to appeal adverse decisions in hundreds of thousands of cases . . . every year,” have a *duty*, rooted in statutory provisions, case law, and agency guidance, to exercise their discretion in the interest of justice.¹⁸² Other commentators agree, arguing for extending case-by-case discretionary analysis and judicial review, especially for LPRs who could show “significant contributions to their community, as well as other mitigating factors.”¹⁸³ Aaron Lang has explained, “[i]f the LPR has not conclusively committed a crime deserving of removal, mandatory removal under the

¹⁷⁸ This includes deciding whether to investigate and determine if an individual is removable; what grounds to charge that individual under (be it an aggravated felony, a CIMT, a controlled substance offense, or something else); when to issue an NTA; whether and what level to set bond at during the entire process; whether to fight or appeal an alien’s claims for relief; and whether to grant the alien’s requests for cancellation of removal, asylum, or voluntary departure. Cade, *supra* note 88, at 5.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 13.

¹⁸² *Id.* at 5–6. Specifically, Cade notes prosecutors have discretion over the “evidence and tactics to use in establishing removability or contesting eligibility for relief.” *Id.* at 13.

¹⁸³ Lang, *supra* note 105, at 543.

current . . . felony regime finds no logical or moral justification.”¹⁸⁴ More discretionary review would let ICE prosecutors consider other mitigating factors before they issue NTAs.¹⁸⁵ However, Lang does not explain how a prosecutor could determine what crimes conclusively *deserve* removal. Discretion, therefore, appears to stand on a foundation of more discretion.

Based on early guidance, prosecutorial discretion in the new administration does not look like it will be used in the way that this Article believes it should be. Previously, the Obama Administration had explicitly codified its prosecutorial discretion guidance to ICE officers by creating three distinct “priority” categories for removal in the November 2014 Johnson Memorandum.¹⁸⁶ Even under the Obama Administration’s prioritization program, however, LPRs could still have been removed for crimes like a DUI, simple assault, or even shoplifting that results in just a single-year suspended sentence.¹⁸⁷ The Trump Administration has repealed the Johnson Memo and replaced it with a new scheme that rejects “exempt[ing] classes of removable aliens from potential enforcement.”¹⁸⁸ Instead, the Kelly Memorandum appears to prioritize *all* removable aliens:

Department personnel should prioritize removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.¹⁸⁹

¹⁸⁴ *Id.* at 544.

¹⁸⁵ *Id.* at 534.

¹⁸⁶ Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski et al., Acting Dir., U.S. Immigration & Customs Enf’t 2, 3–4 (Nov. 20, 2014) (available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf). President Obama’s enforcement guidelines were issued in a November 2014 memorandum, which took effect in 2015, and aimed to define what offenses were and were not eligible for discretion. *Id.* The memo designated three removal categories: Priority 1—threats to national and border security, and public safety— included aliens engaged in, or suspected of, terrorism or espionage, aliens apprehended at ports of entry or the border, gang members, convicted felons, and those convicted of an “aggravated felony,” and their removal “must [have been] prioritized” unless they qualified for asylum or other relief. *Id.* at 3. Priority 2— misdemeanants and new immigration violators—consisted of aliens convicted of three or more misdemeanors, significant misdemeanors, visa or waiver program abusers, and aliens apprehended in the interior after unlawful entry, and these aliens “should [have] be[en] removed.” *Id.* at 3–4. Finally, Priority 3 aliens—other immigration violators who were issued a final removal order since 2014—“represent[ed] the third and lowest priority for apprehension and removal” and “should [have] generally be[e]n removed.” *Id.* at 4.

¹⁸⁷ *Id.* Although these crimes are considered misdemeanors in many states, they are treated in immigration law as aggravated felonies. *Id.*

¹⁸⁸ Memorandum from John Kelly to Kevin McAleenan et al., *supra* note 137, at 2.

¹⁸⁹ *Id.*

Of particular concern is the guidance to remove aliens who have not been convicted of *or even charged* with criminal offenses. The final version of the memo does add that the heads of ICE, CBP, or USCIS may issue subsequent prioritization guidance, but it does not provide any kind of hierarchy among removable individuals.¹⁹⁰

Today, ICE is a very flat and tightly controlled organization.¹⁹¹ It is the second largest criminal investigative agency in the U.S. government, behind only the Federal Bureau of Investigation,¹⁹² with over 20,000 employees and an annual budget of \$6 billion.¹⁹³ ICE describes its field officers as being rigorously trained to “investigate, identify and arrest those who not only came here unlawfully, but who turned to a life of crime and don’t want to be caught, such as gang members, drug dealers and violent criminals.”¹⁹⁴ Now, though, with no prioritization hierarchy, ICE agents enjoy more freedom to target wider alien populations.¹⁹⁵ A ten-year ICE veteran noted, “[b]efore, we used to be told, ‘You can’t arrest those people [aliens with low-level felony or misdemeanor convictions, or no criminal histories at all],’ and we’d be disciplined for being insubordinate if we did Now those people are priorities again.”¹⁹⁶ Although the Obama Administration’s priorities

¹⁹⁰ *Id.* In a recent opinion piece, Yale Philosophy Professor Jason Stanley noted, “[t]he [Trump] administration’s hard line on the standard for criminalization has gone so far as to alarm several members of the Supreme Court, as demonstrated during an argument before the Court (*Maslenjak v. United States*), in which a Justice Department lawyer argued that, as *The New York Times* reported, “the government may revoke the citizenship of Americans who made even trivial misstatements in their naturalization proceedings,” including not disclosing a criminal offense of any kind, even if there was no arrest.” Jason Stanley, *Who Is a ‘Criminal’?*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/opinion/who-is-a-criminal.html?_r=0. Stanley continued, relaying that Chief Justice John Roberts confessed to driving 60 miles per hour in a 55-mile-per-hour zone several years ago, and asked the government’s attorney if this situation would have led a person who had not disclosed the violation on his naturalization application to have his citizenship revoked? *Id.* When the government attorney answered, “Yes,” the justices responded with “indignation and incredulity,” and Justice Anthony Kennedy told the attorney his “argument is demeaning the priceless value of citizenship.” *Id.*

¹⁹¹ ICE’s Director reports directly to the Secretary of Homeland Security, and supervises the Deputy Director, who then oversees many positions including, for our purposes, the Executive Associate Director of Enforcement and Removal Operations (“ERO”). *U.S. Department of Homeland Security*, https://www.dhs.gov/sites/default/files/publications/Department%20Org%20Chart_2.pdf (last visited Apr. 23, 2017); *U.S. Immigration and Customs Enforcement*, <https://www.ice.gov/sites/default/files/documents/Document/2016/ICE-OrgChart.pdf> (last visited Apr. 23, 2017). Within the ERO are seven units, including removal, field operations, and enforcement among others. *Id.* Finally, since 1996 ICE has been permitted to delegate certain immigration functions related to investigating, apprehending, and detaining noncitizens to state and local law enforcement agencies. INA § 287(g). It is within these four vertical levels (five, including the President) that immigration removal choices are made and then enforced. *Id.*

¹⁹² *John T. Morton*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/john-t-morton> (last visited Aug. 25, 2015).

¹⁹³ *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> (last visited Feb. 5, 2016).

¹⁹⁴ *ICE’s ERO Officers are Rigorously Trained to Arrest and Remove Criminal Aliens*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/news/releases/ices-ero-officers-are-rigorously-trained-arrest-and-remove-criminal-aliens> (last visited May 12, 2015).

¹⁹⁵ Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html?_r=0.

¹⁹⁶ *Id.*

hierarchy required agents to focus on deporting gang members and other violent and serious criminals, the new guidelines were aimed, as White House Press Secretary Sean Spicer explained, to “take the shackles off” of ICE agents.¹⁹⁷

2. Relief Discretion

In contrast to prosecutorial discretion, relief discretion can be provided by two parties: either ICE or the immigration courts. First, relief may come in the form of a decision by the ICE prosecutor, *after* issuing the notice to appear, to suspend the agency’s prosecution of an individual LPR. Until 1996, immigration prosecutors explicitly *did* have discretion when dealing with LPRs charged with aggravated felonies, and could halt removal proceedings based on the nature of the offense, the length of the immigrant’s residence in the United States, evidence of rehabilitation, or the hardship faced by the non-citizen’s family, though only if these factors were brought to the prosecutor’s attention.¹⁹⁸ The 1996 AEDPA and IIRIRA reforms, however, eliminated many cases of discretionary waivers and discretionary relief from removal.¹⁹⁹ Today, ICE officers have limited relief discretion; their enforcement guidelines remain bound to the INA, whose expansive definitions “Aggravated Felony” and “Crime involving Moral Turpitude” capture many more offenses than the terms were originally designed for.²⁰⁰

Under the current enforcement preference memorandum, relief discretion that relies on prosecutors fails to provide consistent and predictable equitable relief. The Kelly Memo includes a catch-all category to prioritize the removal of any alien who “in the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security.”²⁰¹ The Kelly Memo also guides that prosecutorial discretion “shall be made on a case-by-case basis,” by the appropriate head of the field office that would initiate the enforcement action.²⁰² By explicitly turning away from known categories, the newly encouraged form of discretion is ripe for personal bias and arbitrariness to creep in.

Secondly, relief discretion may come in the form of an immigration or appellate judge’s decision to rule in the immigrant’s favor in the face of significant legal and factual hurdles. Even after being set for removal, an alien may still petition for limited relief options. The first of these options is statutory cancellation of removal, which allows the judge to permanently cancel the removal order based on discretionary balancing that considers the amount of time the LPR has spent in the United States, the LPR’s family ties, employment history, property or business ties, value and service to community, and proof of genuine rehabilitation if a criminal record exists.²⁰³ A favorable exercise of this discretion is not easy to achieve: individuals charged as removable for committing a loosely

¹⁹⁷ *Id.*

¹⁹⁸ Cade, *supra* note 88, at 11.

¹⁹⁹ INA §§ 242(a)(2)(B), (C).

²⁰⁰ *Id.* § 101(a)(43); *Id.* § 237(a)(2)(A)(i); *see surpa* Part I(c).

²⁰¹ Memorandum from John Kelly to Kevin McAleenan et al., *supra* note 137, at 2. Previously, the Obama Administration’s enforcement priorities left explicit determinations for Priority 2 and 3 level offenders to be made per “the judgment of an ICE field office director.” Memorandum from Jeh Charles Johnson to Thomas S. Winkowski et al., *supra* note 186, at 3.

²⁰² Memorandum from John Kelly to Kevin McAleenan et al., *supra* note 137, at 3.

²⁰³ INA § 212(c), *repealed by* Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (Sept. 30, 1996); *see also In re Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978).

defined aggravated felony are not eligible for statutory cancellation of removal at all.²⁰⁴ Prior to 1996, all LPRs could take advantage of the above-described generous former INA § 212(c) relief, which allowed LPRs to seek waivers of exclusion grounds if they had seven years lawful domicile in the United States and could show countervailing equities to the IJ when seeking relief from deportation, even in cases of criminal convictions.²⁰⁵ However, this option was repealed by IIRIRA.²⁰⁶

For other removable LPRs, INA § 240A(a) allows them to seek waivers of exclusion grounds if they resided in the United States for seven years after lawful entry and were an LPR for at least five of those years,²⁰⁷ but these waivers are not granted as a matter of course, and they are still prohibited for any LPRs who have been convicted of an “aggravated felony.”²⁰⁸ There is tremendous variation in the degree to which judges use discretion. As of February 27, 2017, immigration judges had granted relief in 8.1% of all removal cases nationwide, but this ranged from 3.1% in Arizona and 3.6% in Texas up to 20.7% in New York.²⁰⁹ Controlling for location, variation within a state is also significant: in California, just 3% of judges in Los Angeles granted judicial relief, while 5.6% of San Diego and 16.5% of San Francisco judges did so.²¹⁰ The variety is even more pronounced in asylum cases: for example, in New York City, Judge Terry Bain approved 94.5% of asylum applicants from October 2005 through May 2011, while Judge Alan Vomacka, in the same court, accepted only 28.3% of applicants he had seen.²¹¹

²⁰⁴ INA § 240A(a)(3).

²⁰⁵ *Id.* § 212(c); MARIA BALDINI-POTERMIN, NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD, CHART: ELIGIBILITY FOR A § 212(C) WAIVER 1 (2012),

https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/212c-post-judulang.pdf.

²⁰⁶ Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (Sept. 30, 1996). The Court held, however, that the section 212(c) waiver remains available for aliens in removal proceedings who were convicted, pled guilty, or were in those removal proceedings before April 1, 1997; i.e. those who were eligible for the waiver at the time of its repeal. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

²⁰⁷ INA § 240A(a).

²⁰⁸ *Id.* § 240A(a)(3).

²⁰⁹ *Immigration Court Processing Time by Outcome*, *supra* note 165 (under “Outcome Type:” select “All” radio button; then compare with “Relief Granted” radio button). Overall, 40.4% of removal actions resolved through February 27, 2017, ended in removal, 4.3% ended in voluntary departure, 28% resulted in administrative closure (by ICE or DHS), 8.1% ended in judicial relief, and 13.5% resulted in a finding of no grounds to remove for the alien. *Id.* (under “Outcome Type:” select “All” radio button; then compare with each of the following radio buttons; “Removals,” “Voluntary Departures,” “Administrative/Other Closure,” “Relief Granted,” and “No Grounds for Removal (Terminations)”). However, nearly 60% of removal actions resolved in Texas in that time period ended in removal, while just over 20% of cases in New York, 28% in California, and 42% in Florida ended in removal. *Id.* (under “Outcome Type:” select “All” radio button; then compare with “Removals” radio button).

²¹⁰ *Id.* (select “California” under “Fiscal Year 2017” table; then compare numbers from “State = California” table with “All” radio button and “Relief Granted” radio button). Aliens marked for removal in Los Angeles relied more significantly on prosecutorial discretion (48.3% of their cases were administratively closed, while just 24.3% of San Diego cases were administratively closed). *Id.* (select “California” under “Fiscal Year 2017” table; then compare numbers from “State = California” table with “All” radio button and “Administrative/Other Closure” radio button). In fact, within the state, the highest removal rates were found in San Diego (33.7%) and lowest were in Los Angeles (24.6%). *Id.* (select “California” under “Fiscal Year 2017” table; then compare numbers from “State = California” table with “All” radio button and “Removal” radio button).

²¹¹ Erica Pearson, *Some Immigration Judges Cruel, Some Kind in New York’s Chancy ‘Refugee Roulette’*, N.Y. DAILY NEWS (Aug. 1, 2011), <http://www.nydailynews.com/new-york/immigration-judges-cruel-kind->

Discussing the fact that roughly 50% of applications for discretionary relief by LPRs from 2003–2013 were granted, law professor and immigration scholar, Daniel Kanstroom, notes that this shows the “immigration court system is completely overwhelmed.”²¹² Kanstroom was the first modern writer to propose various structural changes, including a potential known and publicized statute of limitations, as a “more efficient, cheaper, and fairer” solution.²¹³ Even Jason Cade admits that excessive workloads lead as often to “prosecutorial inattention” as they do to prosecutorial discretion.²¹⁴ Their observations bear out in the numbers: Federal immigration judges, who must share clerks, hear up to 1,500 cases per year, and the average claim in front of an IJ lasts only seven minutes.²¹⁵ Adding to the difficulty of presenting a coherent case on behalf of a long-standing LPR, attorneys in the field may represent up to 300 individual immigrant clients annually and these clients often must present their cases to the judge through a language barrier and over a video screen while being detained in facilities hundreds of miles from the courthouses.²¹⁶

More commonly, aliens who are set for removal choose to petition instead for voluntary departure, which grants them up to 120 days to leave the country and allows them to avoid a formal removal order that would, itself, trigger a ten-year inadmissibility bar on returning to the United States.²¹⁷ Once more, though, this option is not available to individuals who ICE seeks to remove on the basis of an aggravated felony.²¹⁸ Moreover, it is an inadequate solution as it requires LPRs to formally depart the country and leave their

new-york-chancy-refugee-roulette-article-1.949545. Furthermore, a 2008 study by the Government Accountability Office found that petitioners for asylum in the San Francisco immigration court were twelve times more likely to be granted asylum than applicants in the Atlanta courts. U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 2 (2008). Moreover, even with the same city courts, applicants were at least 4 times as likely to be granted asylum if their cases were decided by the immigration judge in that city with the highest grant rate versus the lowest grant rate. *Id.* Male judges, finally, granted asylum in only 60% as many cases as female judges. *Id.* at 36.

²¹² Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 489 (2015).

²¹³ *Id.* Kanstroom cited the 1953 Presidential Immigration Commission's recommended general ten-year statute of limitations for any lawful immigrant. PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM SHALL WE WELCOME 202 (1953).

²¹⁴ Cade, *supra* note 88, at 7.

²¹⁵ Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASH. POST. (Feb. 2, 2014), https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.

²¹⁶ *Id.*

²¹⁷ INA §§ 240B, 212(a)(9)(A). Voluntary departure is not available for anyone deemed removable for an aggravated felony, regardless of the sentence, or on terrorism-related grounds. *Id.* § 240B(a). Voluntary departure benefits are structured as a sliding scale, depending on when in the removal process the alien petitions for this discretionary relief. *Id.* § 240B(a)(2). If the alien requests to leave voluntarily before being subject to removal proceedings, she may get up to 120 days to do so. *Id.* There are more stringent limits on voluntary departure, however, if the alien petitions only after the conclusion of removal proceedings. *Id.* To merit voluntary departure relief at that stage, the alien must have been physically present in the United States for at least one year before receiving the NTA, show good moral character for at least the preceding five years, pay a departure bond sufficient to ensure she is leaving, and show she has the means and intent to depart the country. *Id.* § 240B(b).

²¹⁸ *Id.* § 240B(a)(1).

families, loved ones, and jobs behind. It does not, in fact, provide immediate relief from removal but is rather like a plea bargain.

A system relying solely on the backstop of discretion—either from an ICE prosecutor or a judge—falls victim to traps inherent to all discretionary relief mechanisms in the law: arbitrariness, favoritism, and conscious and unconscious biases.²¹⁹ Scholars and activists Wade Henderson and Nancy Zirkin of the Leadership Conference on Human and Civil Rights suggested alternate forms of discretion, including having programs apply to all of DHS rather than just ICE, providing advance timeframes to the discretionary grants, treating some discretion requests in groups to ensure more fairness for affected individuals, and creating a review process at DHS Headquarters to ensure compliance with department-wide discretionary programs.²²⁰ However, this Article suggests a role for an older form of equitable relief.

B. *Laches Is Available as a Mechanism for Relief for LPRs*

Laches, or “staleness of demand” is a defense in equity,²²¹ and the concept is based on the maxim that “equity aids only the vigilant, not those who sleep on their rights.”²²² This Article suggests laches is available as a remedy for LPRs who face long-delayed removal actions. To this end, this Section introduces the relief mechanism of laches, and then shows the ways it has been used to bar actions of the federal government. Next, it reviews more recent court decisions, in which judges have expressed a greater willingness to use laches to protect LPRs against federal immigration actions.

The doctrine of laches is rooted in “the injustice which might result from the enforcement of long-neglected rights.”²²³ It is based not only on the concept of time passing, but also on changes in the conditions involved with the claim—whether certain witnesses can still recall enough to effectively and honestly present evidence for or against the defendant.²²⁴ Laches penalizes “knowing inaction” by a party with a legal right by preventing that party from enforcing that right after such a long amount of time has passed that prejudice has resulted to the other parties.²²⁵ The doctrine is not just useful to shake off delayed charges; rather, what is more important for our purpose is that the right to

²¹⁹ See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012), for a review of implicit bias research and how it can impact the decisions of prosecutors. See also Madison Burga & Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Directive: Families Are Still Being Torn Apart*, 42 W. ST. UNIV. L. REV. 25 (2015), for a discussion of prosecutorial discretion in immigration law and its limitations.

²²⁰ Wade Henderson & Nancy Zirkin, *Letter to President Obama Re: Immigration Enforcement*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 19, 2014), <http://www.civilrights.org/advocacy/letters/2014/letter-to-president-obama-re.html>.

²²¹ 30A C.J.S. *Equity* § 138 (2015).

²²² *Id.* See also *Chattanooga Mfg., Inc. v. Nike*, 301 F.3d 789, 792 (7th Cir. 2002); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006). Section 3527 of the California Civil Code codifies the maxim, providing “[t]he law helps the vigilant, before those who sleep on their rights.” CAL. CIV. CODE § 3527 (West 2015).

²²³ 30A C.J.S. *Equity* § 138 (2015); See also *McNeil v. Springfield Park Dist.*, 656 F. Supp. 1200, 1202 (C.D. Ill. 1987).

²²⁴ 30A C.J.S. *Equity* § 138 (2015).

²²⁵ *L.V. v. R.S.*, 788 A.2d 881, 885 (N.J. Super. Ct. App. Div. 2002).

enforce an order of court may be lost through laches.²²⁶ Laches is an affirmative defense to a prosecutor's charge or a plaintiff's allegation and, as such, the burden of proof lies with the defendant.²²⁷ The defendant must prove the affirmative defense by a preponderance of the evidence.²²⁸

A laches defense has two elements. First, there must be an "unreasonable delay in assessing one's rights."²²⁹ Second, one has to show "a resulting prejudice to the defending party."²³⁰ Both elements must be proven because the injury, prejudice, occurs only at the second prong.²³¹ The Tenth Circuit has noted that the most important question is "whether the assertion of the plaintiffs' cause has, through lapse of time considered with the circumstances and nature of the alleged cause, become unconscionable and, if allowed to prevail, *would constitute an injustice to defendants.*"²³²

Although they often serve the same purpose and have similar underlying rationales, laches is distinct from statutes of limitations.²³³ Laches originated in equity in situations lacking a statutory time limit on prosecution²³⁴ and has thus existed independent of statutes of limitations.²³⁵ Rather, the concept functioned as a "flexible" common law statute of limitations, serving to limit long-delayed claims where there was no statute of limitations specifically made available.²³⁶

In the past, laches had not been widely used against actions taken by the federal government, and when it was applied, it was done so narrowly.²³⁷ In 1961, in *Costello v. United States*,²³⁸ the Court summarized the state of the law at the time: "[i]t has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government."²³⁹ In *Costello*, the Court denied the defendant's argument that laches should have precluded the U.S. government from bringing denaturalization proceedings against him twenty-seven years after he engaged in illegal bootlegging

²²⁶ *Trapp v. Schaefer*, 30 A.2d 287, 289 (N.J. Ch. 1943) ("The doctrine of laches is based on the injustice that might result from the enforcement of long neglected rights.").

²²⁷ *LaSalle Nat'l Bank v. Dublin Residential Cmtys. Corp.*, 785 N.E.2d 997, 1002 (Ill. App. Ct. 2003).

²²⁸ *Id.*

²²⁹ *Brown-Graves Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000).

²³⁰ *Id.*

²³¹ *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 195 (6th Cir. 1992).

²³² *Hunt v. Pick*, 240 F.2d 782, 785 (10th Cir. 1957) (emphasis added).

²³³ Enforcement of Statutes of Limitations shows that courts are willing to adopt the codification of laches-based rationales. For example, Congress has specified a twenty-year statute of limitations for art theft, ten years for arson and some crimes against financial institutions, and eight years for nonviolent violations of terrorism-associated statutes. CHARLES DOYLE, CONG. RESEARCH SERV., STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 3 (2012), <https://fas.org/sgp/crs/misc/RL31253.pdf>. While a widespread immigration enforcement statute of limitations is possible, it is not practical under current congressional deadlock conditions and is not the goal of this Article.

²³⁴ 30A C.J.S. *Equity* § 138 (2015).

²³⁵ *Id.*

²³⁶ DAN B. DOBBS, *LAW OF REMEDIES* § 2.4(4) (2d ed. 1993).

²³⁷ *Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1049 (D.C. Cir. 2008).

²³⁸ 365 U.S. 265, 281 (1961).

²³⁹ *Id.*

activities.²⁴⁰ Indeed, the Court generalized that “laches is not a defense against the sovereign”²⁴¹ because the public should not be injured or suffer losses due to the “negligence of public officers.”²⁴² This case set the hurdle that any laches claim against the government would need to clear in the future, and it was interpreted in this way by the Sixth Circuit, which held that “[t]he ancient rule *quod nullum tempus occurit regi*—‘that the sovereign is exempt from the consequences of its laches . . .’ has enjoyed continuing vitality for centuries.”²⁴³

However, the Supreme Court itself cast doubt on that interpretation as early as 1977 in a case addressing the validity of an individual’s defense against long-delayed federal agency charges.²⁴⁴ In *Occidental Life*, the Court held that courts could step in if the defendants would be “significantly handicapped” in making their defenses due to “inordinate” delays by the Equal Employment Opportunity Commission (EEOC), a federal agency, in filing actions against them.²⁴⁵ The Court went on to explain the same discretionary power, rooted in laches, “‘to locate a just result in light of the circumstances peculiar to the case’ can also be exercised when the EEOC is the plaintiff.”²⁴⁶ Seven years later, the Court again questioned the finality and scope of *Costello*, when it held that it was “still an open question whether, in some future case, ‘affirmative misconduct’ on the part of the Government might be grounds for an estoppel.”²⁴⁷

At the appellate level, the tide also appears to be turning in favor of a legitimate rule of reason review, rather than a per se blanket ban on the use of laches against the U.S. government.²⁴⁸ In 1985, the Federal Circuit ruled a government contractor *could* argue that the government’s efforts to obtain a refund of its money were barred by laches in *S.E.R. Jobs For Progress Inc. v. United States*.²⁴⁹ Two district courts then used the *S.E.R.* decision to consider the availability of laches as a defense in student loan debt collection cases.²⁵⁰ In 1986, the Seventh Circuit, in *United States v. Kairys*,²⁵¹ commenting on the *Costello* decision, painted the Court’s proclamation in *Costello* as dicta, explaining that while “[t]he [*Costello*] Court noted that the lower courts had consistently disapproved of the use of laches in denaturalization proceedings . . . [t]he [*Costello*] Court went on to *hold* that in

²⁴⁰ *Id.* at 288.

²⁴¹ *Id.* at 281.

²⁴² *Id.* (quoting *United States v. Hoar*, 26 F. Cas. 329, 330 (D. Mass. 1821)).

²⁴³ *United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir. 1996); *See also* *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979) (holding that it is well established that the Government is generally exempt for the consequences of its laches).

²⁴⁴ *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 372–73 (1977).

²⁴⁵ *Id.* at 373.

²⁴⁶ *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931))).

²⁴⁷ *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 67 (1984) (citing *INS v. Hibi*, 414 U.S. 5, 8 (1973)).

²⁴⁸ *S.E.R., Jobs For Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir. 1985).

²⁴⁹ *Id.* at 1, 8–9.

²⁵⁰ *United States v. Zue*, 704 F. Supp. 535, 537 (D. Vt. 1988) (denying application of laches to a student loan debt collection based on a *factual* analysis that conditions for laches had not occurred); *but see* *United States v. Rhodes*, 788 F. Supp. 339, 343 (E.D. Mich. 1992) (applying laches to bar government collection of student loan).

²⁵¹ 782 F.2d 1374, 1384 (7th Cir. 1986).

any event the defendant had not adequately demonstrated prejudice.”²⁵² Subsequently, the Third Circuit agreed, and interpreted the *Costello* decision to leave on the table the question of whether laches were available against the sovereign.²⁵³

In *Costello* . . . the Supreme Court acknowledged that some federal courts have held that “laches is not a defense against the sovereign,” but because the Court concluded that the laches claim in that case would fail on its merits, it did not decide whether the defense was applicable in a denaturalization proceeding.²⁵⁴

By 1990, in appropriate circumstances, the Seventh Circuit wrote that it long believed laches could preclude suits brought by the federal government.²⁵⁵ In *P*I*E Nationwide*, Judge Richard Posner wrote that “[f]ollowing dictum in *Occidental Life* [] and the general principle noted earlier that government suits in equity are subject to the principles of equity, laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties.”²⁵⁶ Then, in 2005, the Second Circuit explained that while “the United States has traditionally not been subject to the defense of laches . . . this does not seem to be a *per se* rule.”²⁵⁷ Two years later, the Ninth Circuit also came down in favor of the possibility of laches in *United States v. Dang*.²⁵⁸ The Ninth Circuit concluded, “*Costello* reserved judgment on the applicability of the [laches] defense to a denaturalization action.”²⁵⁹ In the case at bar, Dang had failed to prove “lack of diligence,” a requisite element of a laches defense.²⁶⁰ However, the laches defense was not foreclosed to a theoretical defendant who could make out the necessary second prong of the common law laches defense.²⁶¹

More recent decisions further suggest that there may, indeed, be room for laches in combating removal actions.²⁶² In 2012, the Third Circuit admitted that it had not yet “addressed whether the defense of laches is available in a removal proceeding.”²⁶³ And though the Sixth Circuit, in *Haddad v. United States*,²⁶⁴ ultimately denied the defendant’s laches defense, it did so not because that defense was entirely unavailable, but because the defendant could not establish the requisite “prejudice” element.²⁶⁵ Currently, the key for a defendant appears to be an elemental analysis with an admittedly high bar that he must

²⁵² *Id.* (emphasis added).

²⁵³ *United States v. Koreh*, 59 F.3d 431, 445 (3d Cir. 1995).

²⁵⁴ *Id.* at 445 (quoting *Costello v. United States*, 365 U.S. 265, 281 (1961)).

²⁵⁵ *See* *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893–94 (7th Cir. 1990).

²⁵⁶ *Id.* at 894 (citing *EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988)).

²⁵⁷ *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005).

²⁵⁸ 488 F.3d 1135, 1144 (9th Cir. 2007).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *See id.*

²⁶² *See, e.g., Williams v. Attorney Gen. of U.S.*, 458 F.App’x 148 (3d Cir. 2012).

²⁶³ *Id.* at 151.

²⁶⁴ 486 F.App’x 517 (6th Cir. 2012).

²⁶⁵ *Id.* at 520.

clear, which comes from the old elements of laches—showing (1) a lack of diligence by the federal government and also (2) resulting prejudice to the defendant.²⁶⁶

Opponents to using a laches defense against the federal government in removal actions may point to congressionally set statutes of limitations in other areas of immigration, such as naturalization fraud and passport fraud.²⁶⁷ This could present an issue where laches and a statute of limitations could conflict. The Fourth Circuit observed that “laches is a judicially created doctrine, whereas statutes of limitations are legislative enactments.”²⁶⁸ And, when laches conflicts with a statute of limitations, the New Jersey Supreme Court held, “or where the equitable cause of action is analogous to one at law, laches may depend solely on the comparable statute of limitations.”²⁶⁹ Thus, the statute of limitations would *generally* guide a court’s use of laches if the two concepts cover the same act at issue.²⁷⁰

However, “where there has been an *unreasonable* delay, laches has been applied to defeat a claim despite the fact that the time fixed by the comparable statute of limitations has not passed.”²⁷¹ In 1944, Justice Owen Roberts explained that “[s]tatutes of limitation, like the equitable doctrine of laches . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”²⁷² The Court, summarizing its rationale, explained “the right to be free from stale claims in time comes to prevail over the right to prosecute them.”²⁷³ Furthermore, even LPRs who did commit naturalization or passport fraud, while no longer subject to *criminal* prosecution for these crimes after ten years, may still face the threat of removal for their entire lives after committing a removable offense, especially since convictions are not required for removal prioritization under the new Kelly Memorandum.²⁷⁴ Finally, the Supreme Court has recognized that there are political process breakdowns and has previously stepped in to fashion quasi-equitable remedies in immigration issues before.²⁷⁵

²⁶⁶ See *Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 128 (3d Cir. 2005).

²⁶⁷ “No person shall be prosecuted, tried, or punished for violation of any provisions of Sections 1423 to 1428, inclusive, of Chapter 69 [nationality and citizenship offenses] and Sections 1541 to 1544, inclusive, of Chapter 75 [passport and visa offenses] of Title 18 of the U.S. Code . . . unless the indictment is found or the information is instituted within *10 years* after the commission of the offense,” Crimes and Criminal Procedure, 18 U.S.C. § 3291 (2010) (emphasis added).

²⁶⁸ *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001).

²⁶⁹ *Lavin v. Bd. of Educ. of City of Hackensack*, 447 A.2d 516, 520 n.1 (1982) (citing *Cole v. Brandle*, 11 A.2d 255 (N.J. 1940)).

²⁷⁰ *Id.*

²⁷¹ *Id.* (citing *Patterson v. Hewitt*, 195 U.S. 309, 319 (1904)); see also *Connin v. Bailey*, 472 N.E.2d 328, 329 (Ohio 1984) (holding laches “signifies delay independent of limitations in statutes”).

²⁷² *Order of R.R. Telegraphers. v. Ry. Express Agency*, 321 U.S. 342, 349 (1944).

²⁷³ *Id.* at 348–49.

²⁷⁴ Memorandum from John Kelly to Kevin McAleenan et al., *supra* note 137, at 2.

²⁷⁵ See, e.g., *St. Cyr*, 533 U.S. 289 (holding that Congress, through IIRIRA and AEDPA, could not have intended to deny existing 212(c) relief to removable aliens who would have been eligible for that relief at the time of their convictions); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (overturning Mr. Padilla’s removal order and fashioning a new requirement that counsel must inform a client if the client’s plea carries a risk of deportation, based on Sixth Amendment precedent, the seriousness of deportation, and the impact of deportation on families living in the United States lawfully).

In fact, the suggestion for a time-bar on removal has roots going back over sixty years. The 1953 Presidential Immigration Commission recommended a general ten-year statute of limitations for any lawful immigrant.²⁷⁶ The Commission reasoned “it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law,” and found that this “is a principle deeply rooted in the ancient traditions of our legal system.”²⁷⁷ Where statutes of limitations are lacking, federal courts have already begun to at least consider the availability of laches as another means of protection against a lifetime of unrest and worry for affected LPRs.

Laches is, admittedly, a second-best remedy because it only addresses the second uncomfortable truth—the delay issue—and not the first—the increased criminalization—of our immigration system. A more impactful remedy would be a more robust due process right, which could protect long-time LPRs from both crimmigration and its resulting removal backlog. This right is discussed in the last Part.

IV. A NASCENT RIGHT TO REMAIN

Although laches is the only remedy currently available that could help LPRs, there is hope on the horizon. In Part II, this Article identified two ethical challenges in immigration—it is now easier to deport people than before, and it is taking longer to do so.²⁷⁸ Part III offered a partial response to the second problem by explaining how the doctrine of laches could be applied against the federal government’s enforcement of long-delayed removal actions. In Part IV, this Article suggests a possible resolution of *both* major problems that lawful permanent residents face by using a new substantive due process right—the right to remain. The right to remain not only would preclude the government from seeking removal years after a removable offense, but also would provide many other protections for LPRs to protect against unjust deportations for minor or noncriminal offenses.

This Part opens by explaining that Due Process rights are not, and for over a hundred years have not been, reserved strictly for U.S. citizens. As a result, substantive due process rights could and should be made available to LPRs. Next, it formally introduces the right to remain as a substantive due process right.²⁷⁹ It reviews recent case law to show that the recognition of this right has been building through an emerging awareness of it in the

²⁷⁶ Kanstroom, *supra* note 212, at 489.

²⁷⁷ PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, *supra* note 213, at 202.

²⁷⁸ See *supra* Part I.

²⁷⁹ I take the point, made well by Professors David S. Rubenstein and Pratheepan Gulasekaram, that if one fashions a new right or, perhaps, unearths an old right by utilizing immigration exceptionalism, then she must be cognizant of the fact that this would embolden the other end of exceptionalism—the federal government’s plenary power over immigration—and impact federalism. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 614-15 (2017). This Article, however, will seek to root the right to remain not in immigration exceptionalism but in the definition of personhood. Furthermore, as Professor Erin Delaney explains, the Supreme Court may well use the Trump administration’s unprecedented reliance on immigration exceptionalism to finally and clearly evaluate that doctrine. Erin Delaney, *Immigration in the Age of Trump*, 2017 U. ILL. L. REV. ONLINE: Trump 100 Days (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/immigration-in-the-age-of-trump/>.

courts,²⁸⁰ both in cases involving removal and in those focused solely on detention. Third, it also attempts to ground the right in our shared national history and traditions.²⁸¹ This Part will end by discussing implications of a right to remain and calling upon immigration scholars to help fully identify and develop it as a substantive due process right, and on practitioners to further test it in courts. The right to remain can then combat the inequities LPRs currently face under our immigration system when they are held to a wire-thin standard of conduct and then face those pressures for an uncertain and currently unlimited amount of time.

A. *Applying Due Process to Non-Citizens*

The concept and rights associated with due process can and have been granted to lawful permanent residents and other non-citizens within the United States. The Fourteenth Amendment to the United States Constitution reads, “. . . nor shall any State deprive any *person* of life, liberty, or property, without due process of law.”²⁸² Although privileges and immunities of only *citizens* are expressly protected, due process (and equal protection) is guaranteed to all *persons* within the United States’ jurisdiction.²⁸³ The Fifth Amendment, passed as part of the Bill of Rights, also extends due process protections based on *personhood* rather than only *citizenship*.²⁸⁴ Specifically, it provides “nor shall any *person* be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”²⁸⁵ As applied against both the states and the federal government, due process rights are not reserved to citizens but are instead granted, at a minimum, to those persons within the government’s territorial jurisdiction.²⁸⁶

There is a long history of applying Due Process to LPRs and other non-citizens in this country. Over 120 years ago, the Supreme Court held the Due Process Clause protected aliens who were subject to a final order of removal.²⁸⁷ The reason for this, the Court has stated, is the need for fairness: “[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”²⁸⁸ Indeed, the notion of fairness is *especially*

²⁸⁰ *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“These references [in prior case law] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”).

²⁸¹ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”) (quoting *Moore v. City of E. Cleveland, Ohio*, 432 U.S. 494, 503 (1977) (plurality opinion)).

²⁸² U.S. CONST. amend. XIV, § 1 (emphasis added).

²⁸³ *Id.*

²⁸⁴ U.S. CONST. amend. V.

²⁸⁵ *Id.* (emphasis added).

²⁸⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding the Fifth Amendment’s protections do not extend to aliens outside the territorial U.S.); *but see* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (arguing the Fifth Amendment Due Process Clause, when read properly, actually limits federal actions in a similar way to how the Fourteenth Amendment Due Process Clause curtails state actions).

²⁸⁷ *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

²⁸⁸ *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953).

important for “aliens whose roots may have become . . . deeply fixed in this land.”²⁸⁹ The Supreme Court observed as much in *Yick Wo v. Hopkins*,²⁹⁰ holding “[t]he Fourteenth Amendment of the Constitution is not confined to the protection of citizens.”²⁹¹ Rather, its “provisions are universal in their application to all persons within the territorial jurisdiction”²⁹² And, in the late twentieth century, the Supreme Court held it is “well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”²⁹³ Most recently, in 2001, in *Zadvydas v. Davis*,²⁹⁴ the Court explained “once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁹⁵

This modern conception of due process for aliens follows a *territorial* line of demarcation first illustrated in two dissents from the Supreme Court’s 1893 opinion in *Fong Yue Ting v. United States*.²⁹⁶ There, a Chinese laborer was removed from the United States, where he had lived and worked for several years, because he failed to find a white witness to certify that he had resided in the United States lawfully.²⁹⁷ The majority opinion upheld both the 1892 Exclusion Act’s deportation of unlawful Chinese laborers and also the Act’s requirement that all Chinese laborers in the United States had to procure a “certificate of residence” from a revenue collector.²⁹⁸

Although the 1886 *Yick Wo* decision had only purported to apply to the states rather than the federal government, two justices built upon the importance of *personhood* rather than *citizenship* in their dissents in *Fong Yue Ting* seven years later. First, Justice David J. Brewer presented a textual argument, maintaining “[i]f the use of the word ‘person’ in the Fourteenth Amendment protects all individuals lawfully within the State, the use of the same word ‘person’ in the Fifth must be equally comprehensive”²⁹⁹ To this end, Brewer proposed to extend personhood protections to limit actions taken by the federal as well as state governments.³⁰⁰

Second in dissent, Justice Stephen J. Field argued for a strict territorial approach that was rooted in fairness: “[t]he moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection.”³⁰¹ Justice Field’s dissent focused almost exclusively on territoriality: at the moment an individual enters U.S. territory, she becomes entitled to more protections. Field grounded this rights-extension in

²⁸⁹ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

²⁹⁰ 118 U.S. 356 (1886).

²⁹¹ *Id.* at 359.

²⁹² *Id.*

²⁹³ *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 100–101 (1903)).

²⁹⁴ 533 U.S. 678 (2001).

²⁹⁵ *Id.* at 693; *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98, 596 n.5 (1953); *Yick Wo*, 118 U.S. at 369.

²⁹⁶ 149 U.S. 698 (1893).

²⁹⁷ *Id.* at 700.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 739 (Brewer, J., dissenting).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 754 (Field, J., dissenting)

two beliefs. First, although legal alien residents could not vote or hold public office, “as men having our common humanity, they are [still] protected by all the guaranties of the Constitution.”³⁰² Second, because foreigners and citizens were equally subject to the laws of the United States and any prohibitions therein, foreigners must be afforded similar procedural protections and privileges as were provided to citizens.³⁰³ To fail to do this “would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its consent, and such an exercise of power is not permissible under our Constitution.”³⁰⁴ Field supported his due process extension on territoriality and the familiar concept of fairness—when one is subject to the United States’ rules, regardless of citizenship, she should receive some protections in turn. These decisions thus far have been viewed as landmarks of providing procedural due process to resident aliens. However, when they are viewed in concert with more recent Supreme and Appellate Court decisions about the length of pre-removal detention and deportation as punishment, one may recognize the Court is crafting a different right altogether. In the cases that follow, by prodding DHS (and its predecessor, the INS) for more favorable exercises of discretion on behalf of aliens, and through its growing body of precedent gradually extending more protections to LPRs, the Supreme Court has been providing more remedies to non-citizens with a significant stake in the United States, but without articulating the right that holds these remedies together.³⁰⁵

B. *An Emerging Awareness?*

Writing for the Court in *Lawrence*,³⁰⁶ Justice Anthony Kennedy suggested that fundamental rights, or substantive due process rights, were not found just by looking at history and tradition, but that they could be discovered by reviewing more recent case law for an emerging awareness in the courts. In that vein, another way to understand what the Court has been doing in its immigration cases is to see it as gradually recognizing a quasi-right to remain.

Leading immigration scholar Hiroshi Motomura has argued that “phantom norms” have “produce[d] results that are much more sympathetic to aliens than the results that would follow from the interpretation” of the INA alone in recent immigration cases.³⁰⁷ He conceptualizes these phantom norms as having “enough gravitational force to exercise a pull on these other sources of law.”³⁰⁸ Professor Motomura traced a line of cases whose results,

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Writing the Court’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Justice John Marshall accepted Sir William Blackstone’s maxim that, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy.” *See id.* (showing Justice Marshall discussing that this maxim can be found on page twenty-three of the third volume of Sir William Blackstone’s commentaries). Justice Marshall, himself warned that the U.S. “government of laws, and not of men” would cease to exist “if the laws [were to] furnish no remedy for the violation of a vested legal right.” *Id.* I now contend, though, that the existence of a remedy hints that there is some right being protected.

³⁰⁶ 539 U.S. at 572.

³⁰⁷ Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–65 (1990).

³⁰⁸ Congress’s complete authority over many matters related to immigration. *Id.* at 564.

he argued, followed not from statutory interpretation or even the Court's understanding of Congress's plenary power³⁰⁹ on its own.³¹⁰ He explained that a pattern emerged that first "allowed phantom constitutional norms to guide statutory interpretation by reading statutes in favor of aliens," and second, "produced results that directly conflicted with those that the Court would have reached by applying the 'real' constitutional norms."³¹¹ The right to remain is one of these phantom rights, and it formed through the combination of due process and stake theory—the understanding that "LPRs present for many years and with stronger ties to the United States are afforded [more] constitutional rights."³¹² This Section will lay out how the Court has begun to utilize the previously unidentified right to remain in its cases that have restricted detention during and after removal proceedings, limited removal, and come close to recognizing deportation as punishment.

1. Detention and Deprivation of Liberty

The first shades of the right to remain have come from recent limitations courts have put on the detention removable LPRs may be subjected to during and after their removal proceedings. As mentioned above, in *Zadvydas*, the Court applied procedural due process protections to aliens caught up in deportation proceedings,³¹³ but it continued to go to great lengths to deny an alien's permanent detention. There, the Court consolidated two cases against aliens made removable for committing serious aggravated felonies, and even under these circumstances it held that INA § 241(a)(6)³¹⁴—the post-removal detention statute—did not authorize the attorney general to detain a removable alien indefinitely beyond the removal period.³¹⁵ Writing for the Court, Justice Stephen Breyer "found nothing in the history of [Congress's] statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention."³¹⁶ Instead, Breyer explained, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."³¹⁷ Indefinite detention, then, could not be ordered unless it came from "a *criminal* proceeding with adequate procedural protections,"³¹⁸ or in "nonpunitive" and narrow circumstances where a special justification, like a harm-threatening mental illness, would outweigh the individual's "constitutionally protected interest in avoiding physical restraint."³¹⁹ The *Zadvydas* Court

³⁰⁹ *Id.* at 547.

³¹⁰ *Id.* at 573.

³¹¹ *Id.*

³¹² Alyssa Markenson, Note, *What's at Stake?: Bluman v. Federal Election Commission and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech*, 109 *Nw. U. L. REV.* 209, 218 (2015).

³¹³ 533 U.S. at 693.

³¹⁴ Codified and referenced in the case as 8 U.S.C. § 1231(a)(6).

³¹⁵ *Zadvydas*, 533 U.S. at 693.

³¹⁶ *Id.* at 699.

³¹⁷ *Id.* at 690.

³¹⁸ *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)) (emphasis in original).

³¹⁹ *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

considered a ninety-day removal period to be presumptively valid, and set six months as the appropriate limit before the Government would need to provide more evidence.³²⁰

Then, in 2003, the Court in *Demore v. Kim*³²¹ upheld INA § 236(c),³²² a statute which imposed mandatory detention without bail for deportable criminal aliens, including those who committed an aggravated felony.³²³ The Court credited Congress's "justifiabl[e] concern" that these aliens would continue engaging in crime and fail to appear for their removal hearings,³²⁴ and also acknowledged the proposition in *Diaz*,³²⁵ which allowed Congress to make rules for aliens that would not constitutionally apply to citizens. However, in his concurrence, Justice Anthony Kennedy noted that even if an alien is given an initial hearing, his detention may still run against the Due Process Clause if "the continued detention became unreasonable or unjustified."³²⁶ Resident aliens, thus, unquestionably enjoy due process protections. Justice Kennedy also opined that if there were to be an unreasonable delay by DHS in "pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons."³²⁷

Dissenting in the same case, Justice David Souter provided the loudest call for the right to remain by arguing that Mr. Kim could not be locked up without some kind of individualized hearing to determine the danger he posed to the community or as a flight risk.³²⁸ Souter grounded his argument in the belief that aliens have long had due process rights, and that constitutional protections are "particularly strong in the case of aliens lawfully admitted to permanent residence."³²⁹ LPRs, like citizens, pay taxes, support the U.S. economy, serve in the military, and "contribute[] in myriad other ways to our society."³³⁰ Finally, Justice Souter concluded that the law considers LPRs "to be at home in the United States, and even when the Government seeks removal, we have accorded LPRs greater protection than other aliens under the Due Process Clause."³³¹

³²⁰ *Id.* at 680. After six months, the alien would have "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," [and] "the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701.

³²¹ 538 U.S. 510 (2003).

³²² Codified and referenced in the case as 8 U.S.C. § 1226(c).

³²³ 538 U.S. at 513.

³²⁴ *Id.*

³²⁵ 426 U.S. 67.

³²⁶ *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

³²⁷ *Id.* at 532–33.

³²⁸ *Id.* at 541 (Souter, J., dissenting).

³²⁹ *Id.* at 543.

³³⁰ *Id.* at 544 (quoting *In re Griffiths*, 413 U.S. 717, 722 (1973)).

³³¹ *Id.* at 547 (citing *Landon v. Plasencia*, 459 U.S. 21 (1982)).

Appellate courts have weighed in as well, repeatedly warning that long-term civil detention is an issue. The Third Circuit,³³² as well as the Sixth,³³³ First,³³⁴ and Eleventh³³⁵ Circuits have all suggested a case-by-case approach to determine the reasonableness of an alien's mandatory detention under INA § 236(c),³³⁶ a provision of the 1996 IIRIRA reforms that mandated detention for any removable alien for a CIMT or crime involving a controlled substance. In the Third Circuit case, *Diop v. ICE/Homeland Security*,³³⁷ the court held a criminal alien petitioner's 1,072-day detention, justified by the government on the grounds that he was removable because of a CIMT, was unreasonable as applied and violated the Due Process Clause.³³⁸ Judge Julio M. Fuentes diligently retraced Diop's 1,072 days in custody, filled with occasional master calendar hearings, government-requested stays, and ineffective assistance of counsel until he was finally granted withholding of removal.³³⁹ "Diop's prolonged detention," Judge Fuentes concluded, "was certainly an injury in fact, caused by the Government."³⁴⁰

More recently, the Ninth³⁴¹ and Second³⁴² Circuits definitively ruled, as matters of first impression, that immigrants detained and awaiting removal proceedings pursuant to mandatory detention statutes must receive a bail hearing before an immigration judge within six months of their detention. Indeed, the Second Circuit explained that it "join[s] every other circuit that has considered this issue . . . in concluding that in order to avoid serious constitutional concerns, [the mandatory detention provision] must be read as including an implicit temporal limitation."³⁴³ Both decisions, which set a bright line at the six-month mark, grounded the impermissibility of indefinite detention in the due process rights afforded to *all persons* within the United States.³⁴⁴

The Supreme Court is now poised to take this issue up again after the Ninth Circuit in 2015 held that aliens subject to prolonged detention required automatic, individualized bond hearings, and that IJs were required to consider the length of detention and afford

³³² *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011) ("Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case.").

³³³ *Ly v. Hansen*, 351 F.3d 263, 272–73 (6th Cir. 2003) (holding the reasonableness of detention under INA § 236(c) should be found on a case-by-case basis given the "inevitable elasticity of the pre-removal period").

³³⁴ *Reid v. Donelan*, 819 F.3d 486, 498 (1st Cir. 2016) (finding case-by-case reasonableness review of INA § 236(c) detention "adheres more closely to legal precedent").

³³⁵ *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016) (identifying factors to consider, including the amount of time the alien spent in custody without a bond hearing, why the proceedings have taken so long, whether removal will actually be practicable after the final order is given, whether the civil immigration detention exceeds the time the alien spent in criminal custody for the crime supporting his removal, and whether the civil detention facility is meaningfully different from a criminal penal institution).

³³⁶ Codified and referenced in the case as 8 U.S.C. § 1226(c).

³³⁷ 656 F.3d 221.

³³⁸ *Id.* at 234.

³³⁹ *Id.* at 223–226.

³⁴⁰ *Id.* at 227 ("[W]hen detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.").

³⁴¹ *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).

³⁴² *Lora v. Shanahan*, 804 F.3d 601, 614–15 (2d Cir. 2015).

³⁴³ *Id.* at 614.

³⁴⁴ *Id.* at 606; *Rodriguez*, 715 F.3d at 1138.

aliens bond hearings every six months.³⁴⁵ The named plaintiff in the case, Alejandro Rodriguez, was brought to the United States by his parents when he was a year old and became an LPR at nine.³⁴⁶ Due to two convictions for joyriding (for which he served two years in prison) and misdemeanor drug possession, Rodriguez faced deportation in 2004 and was subject to “mandatory detention” under 8 U.S.C. § 1225(b), without any bond hearings.³⁴⁷ He waited in detention for three years without a hearing, lost his job, was separated from his two children, and was finally released and granted relief from deportation in 2007.³⁴⁸ The Court granted certiorari and heard arguments on November 20, 2016, in *Jennings v. Rodriguez*,³⁴⁹ and then asked the parties to submit supplemental briefings on several issues: (1) whether aliens subject to mandatory detention under immigration law³⁵⁰ must receive bond hearings with a real possibility of release if their detention lasts six months, and also what level of proof the government must provide to warrant further detention,³⁵¹ (2) what factors may be considered on the alien’s behalf,³⁵² and (3) whether new bond hearings must be offered to the alien every six months.³⁵³

These limits on detention get us part of the way down the path to the right to remain, but the other half of support comes from a line of cases that have, at times, precluded resident alien removals entirely.

2. Limits on Removal, and Deportation as Punishment?

Hints of this right have also been seen in the Supreme Court’s legal reasoning for at least the last sixty years, as it has outright overturned the removal of LPRs in certain situations. In 1953, the Court overturned the indefinite detention of Mr. Chew, a Chinese-born LPR who traveled on an American vessel to the Far East.³⁵⁴ He was barred from re-entering the United States when the ship returned.³⁵⁵ The Court, engaging in some legal fiction writing, assimilated Chew to the status of an LPR who never left the United States, and held that because Chew never took shore leave or left his ship, this was a removal rather than exclusion issue.³⁵⁶ The Court appeared to recast the facts in this way because removing Chew seemed unfair, but it did not yet have the tools to make more than a territorial argument. Thus, the Court reasoned an LPR who remains physically *present* would at least retain Fifth Amendment procedural protections, and could only be deported after receiving

³⁴⁵ *Rodriguez v. Robbins*, 804 F.3d 1060, 1074 (9th Cir. 2015).

³⁴⁶ Christie Thompson, *The Crucial Immigration Case About to Hit the Supreme Court*, MARSHALL PROJECT (Nov. 29, 2016), <https://www.themarshallproject.org/2016/11/29/the-crucial-immigration-case-about-to-hit-the-supreme-court#.c6WLZkFiv>.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (mem.) (2016).

³⁵⁰ 8 U.S.C. § 1225(b) (2012) for aliens seeking admission to the U.S., and 8 U.S.C. § 1226(c) for aliens marked as criminals or terrorists. *Jennings v. Rodriguez*, 137 S. Ct. 471, 472 (2016).

³⁵¹ Clear and convincing evidence that he or she is a flight risk or danger to the community, or some lower standard. 137 S. Ct. at 472.

³⁵² Whether the length of the alien’s detention must be weighed in favor of his or her release. *Id.*

³⁵³ *Id.*

³⁵⁴ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 593–94 (1953).

³⁵⁵ *Id.* at 594–95.

³⁵⁶ *Id.* at 599.

a chance to be heard.³⁵⁷ In *Rosenberg v. Fleuti*,³⁵⁸ the Court held that its decision in *Chew* recognized the due process rights of a resident alien who returned from a brief trip abroad.³⁵⁹ Under what became known as the “Fleuti doctrine,” LPRs “were not regarded as making an ‘entry’ into the United States” for immigration purposes after they returned from “brief, casual, and innocent” trips abroad.³⁶⁰ As a result, LPRs were able to briefly travel abroad and return to the United States without facing the exclusion rules then in force, as long as their absences were not “meaningfully interruptive” of their LPR status.³⁶¹

More concretely recently, in *Landon v. Plasencia*,³⁶² Justice Sandra Day O’Connor, writing for the Court, concluded that once an alien gains admission and “begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”³⁶³ At first, O’Connor reiterated that since *Chew*, the Court “developed the rule that a continuously present permanent resident alien has a right to due process in such a situation” as exclusion upon re-entry, whereas a non-LPR or noncontinuously-present alien would not have such due process rights.³⁶⁴ However, moving beyond a physical presence argument, O’Connor guided future decision makers to weigh the *interests at stake* for resident aliens and the risk of erroneous deprivation of that interest through the procedures used by immigration authorities, and balance these against the interest of the government in continuing to use its current procedures.³⁶⁵

The balance tips toward further due process protections if one accepts that removal is a kind of punishment. Professor Jason Stanley effectively explains the historical context and social stakes of deportation, writing, “[e]xile from one’s home is historically considered one of the worst punishments the state could employ; it was, after all, one of the traditional Greek and Roman punishments for murder, their alternative to the death penalty.”³⁶⁶ And although courts have not explicitly held that yet, several decisions have come quite close.³⁶⁷ This notion, once more, goes back to Justice Brewer’s dissent in *Fong Yue Ting*, where he wrote: “Deportation is punishment. It involves—[f]irst, an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property.”³⁶⁸ Also in dissent in that same case, Justice Field agreed and argued that this punishment was “beyond all reason in its severity” and “out of all proportion to the alleged

³⁵⁷ *Id.*

³⁵⁸ 374 U.S. 449 (1963).

³⁵⁹ *Id.* at 460.

³⁶⁰ Susan Schreiber, *Supreme Court Says Fleuti’s Back! (Who’s Fleuti?)*, CATH. LEGAL IMMIGR. NETWORK, INC. (Apr. 2012), <https://cliniclegal.org/April2012/Newsletter/Fleuti>.
<https://cliniclegal.org/April2012/Newsletter/Fleuti>.

³⁶¹ *Rosenberg*, 374 U.S. at 462; see also Rosenbloom, *supra* note 57, at 155.

³⁶² 459 U.S. 21 (1982).

³⁶³ *Id.* at 32.

³⁶⁴ *Id.* at 33 (citing U.S. *ex rel.* Vajtauer v. Comm’r of Immigration, 273 U.S. 103, 106 (1927); *Bridges*, 326 U.S. at 153–54; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950)).

³⁶⁵ *Id.* at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

³⁶⁶ Stanley, *supra* note 190.

³⁶⁷ This Article does not suggest the Court will admit this anytime soon, because labeling something to be punishment would expose it to important Bill of Rights limitations. Although the author would certainly agree that deportation *is* punishment and, therefore, aliens threatened with removal ought to receive complete Sixth and Eighth Amendment protections, this Article is not the venue for that battle. For a more nuanced discussion, see Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

³⁶⁸ 149 U.S. at 740 (Brewer, J., dissenting).

offense.”³⁶⁹ Field continued that, “as to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business there contracted.”³⁷⁰ A half century later, in *Bridges v. Wixon*,³⁷¹ the Court explained that when “the liberty of an individual is at stake,” the fact “[t]hat deportation is a penalty—at times a most serious one—cannot be doubted.”³⁷² This consideration of deportation as a penalty inched quite close to labeling it as punishment. And two decades later, the Court held Congress lacked the power to expatriate citizens—to revoke their U.S. citizenship—against their will as punishment.³⁷³ In practice, deportation and forcible expatriation achieve the same ends, yet one is available to the government and the other is not.

The Court’s gradual recognition of deportation as punishment may, at first, be seen as an alternate explanation for its various seemingly conflicting decisions. That argument would contend that rather than the right to remain, what is driving the Court’s jurisprudence is the realization that deportation is a tremendous cost to exact from LPRs, so there must be more protection to prevent this exaction unless it is absolutely warranted. However, deportation becomes only a *stronger* punishment the longer an LPR has been in the United States. Thus, the recognition that deportation may, in fact, be punishment flows smoothly alongside the right to remain. The consequences of deportation become more pronounced and egregious as the individual’s claim to a right to remain grows on the other side of the balance.

The most recent Supreme Court case on the matter was *Padilla v. Kentucky*.³⁷⁴ There, the Court admitted that it has long believed that “deportation is a particularly severe ‘penalty,’”³⁷⁵ and that a removal order is more burdensome than many civil or criminal sanctions.³⁷⁶ In doing so, the Court acknowledged the argument made in dissent by the Sixth Circuit thirty-seven years earlier; that removal is tremendously jeopardizing to an alien’s basic right to person liberty.³⁷⁷ In *Aguilera-Enriquez v. Immigration and*

³⁶⁹ *Id.* at 759 (Field, J., dissenting). Justice Field was echoing James Madison’s 1798 denunciation of the Alien & Sedition Acts, where Madison wrote, “if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” *See id.*

³⁷⁰ *Id.*

³⁷¹ 326 U.S. 135.

³⁷² *Id.* at 154.

³⁷³ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

³⁷⁴ 130 S.Ct. 1473.

³⁷⁵ *Id.* at 1481 (emphasis added) (quoting *Fong Yue Ting*, 149 U.S. at 740). *See also* *Boutilier v. INS*, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) (“Deportation is the equivalent to banishment or exile . . . The penalty is so severe that we have extended to the resident alien the protection of due process.”) (citation omitted).

³⁷⁶ *Padilla*, 130 S.Ct. at 1483 (quoting *St. Cyr*, 533 U.S. at 322) (“Preserving the client’s right to remain in the U.S. may be more important to the client than any potential jail sentence.”).

³⁷⁷ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting) (“Expulsion is such lasting punishment that meaningful due process can require no less [than the assistance of appointed counsel.]”). *See generally* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1459 (2011) (“Deportation, because of its close relationship to the historical punishments of banishment and exile, is a quasi-punishment legitimately considered in plea-bargaining, charging, and sentencing, either to avoid deportation when it is unwarranted, or to mitigate a sentence when it will be followed by deportation.”).

Naturalization Services,³⁷⁸ Judge Robert E. DeMascio, sitting by designation to the Sixth Circuit, concluded that because he considered removal to be punishment, counsel must be guaranteed for the proceeding to be fundamentally fair.³⁷⁹ Other criminal procedure safeguards would also have to be provided to aliens facing removal, including Miranda warnings prior to interrogation, the right to a speedy trial, full Fourth Amendment exclusionary rule protections, a comprehensive discovery process, and prohibitions on cruel and unusual punishment.³⁸⁰ Currently, LPRs receive none of these protections, while citizens, who may have been arrested for more severe crimes, claim these defenses as a matter of course. Recognizing a right to remain would give LPRs a stronger foundation from which to demand more important and just procedural guards. Under the status quo, however, withholding these protections only contributes to the unjust gap in our treatment of LPRs—we have made them more removable, it is taking longer to remove them, but when facing this “particularly severe penalty”³⁸¹ we give them shockingly little process.

More recently, in 2016, the Third Circuit reaffirmed that aliens seeking initial admission to the United States were merely requesting a privilege and had no constitutional rights in their applications.³⁸² The Court, however, explicitly noted that this class of plaintiffs—“aliens seeking initial admission”—were distinctly different from LPRs, “a category of aliens (unlike recent clandestine entrants) whose entitlement to broad constitutional protections is undisputed.”³⁸³ The case remains on a cert petition to the Supreme Court.

3. Acceptance of Laches and Other Equitable Relief as Emerging Consensus

Various courts’ willingness to entertain laches defenses against the federal government in removal actions may also be seen as evidence of a latent right to remain. First in 1999, the Seventh Circuit found an alien stated a substantial due process claim where the INS filed an Order to Show Cause in 1992, but then “drag[ged] its feet,” despite the alien’s continued pleas for a hearing, until 1996, by which point the AEDPA reforms had eliminated his ability to seek 212(c) discretionary relief.³⁸⁴ Then, in 2004, the Second Circuit refused to rule out a laches defense that satisfied the doctrine’s necessary elements, although it ultimately upheld the removal of an LPR convicted of an aggravated felony.³⁸⁵ By noting that this particular petitioner did not properly argue “the government’s conduct

³⁷⁸ *Aguilera-Enriquez*, 516 F.2d 565.

³⁷⁹ *Id.* at 572 (DeMascio, J., dissenting).

³⁸⁰ IMMIGRATION POLICY CTR., *supra* note 1, at 5–12.

³⁸¹ *Padilla*, 130 S.Ct. at 1481.

³⁸² *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 445 (3d Cir. 2016) (citing *Landon*, 459 U.S. at 32). Under this rationale, the Court denied habeas review to asylum petitioners who were “apprehended within hours of surreptitiously entering the United States,” and denied asylum after an interview with an officer. *Id.*

³⁸³ *Id.* at 446. Indeed, the Third Circuit carefully limited its holding only to *aliens seeking initial entry*, pointing out that this class differed from the plaintiffs in *Yick Wo* and *Zadvydas* (long-time resident aliens), *Mathews* (lawfully admitted resident aliens), *Plyler* (undocumented resident aliens), and even *Mezei* (former resident alien seeking readmission after extended absence). *Id.* at 447–48.

³⁸⁴ *Singh v. Reno*, 182 F.3d 504, 507 (7th Cir. 1999).

³⁸⁵ *Thom v. Ashcroft*, 369 F.3d 158, 159, 165, 167 (2d Cir. 2004) (“Rather than deciding the question, we, like the Supreme Court in *Costello*, find it more expedient to dispose of Petitioner’s claim on its specific merits.”).

rose to the level of a due process violation,”³⁸⁶ the court appeared to lay out a roadmap to success for a future claimant. In 2010, the Ninth Circuit affirmed a BIA ruling against a resident alien’s laches defense, but they did so because the petitioner “point[ed] to no evidence demonstrating affirmative misconduct on the part of the government,” and thus, “because equitable estoppel is not available to [petitioner], laches is not available to him either.”³⁸⁷ And once more, in *Haddad v. United States*,³⁸⁸ the Sixth Circuit held laches may be available to otherwise-removable LPRs if it was properly proven—by showing a lack of diligence by the federal government and resulting prejudice to the defendant.³⁸⁹

Interestingly, in its decision in *Thom v. Ashcroft*,³⁹⁰ the Second Circuit noted in a footnote that “[i]n contrast with the various decisions on laches, it seems settled that the government may, in the appropriate circumstances, be *equitably estopped* in the immigration context,” and proceeded to cite previous cases going back to 1976.³⁹¹ Those circumstances exist when the alien could show “affirmative misconduct” by the government.³⁹² For instance, in *Mauting v. Immigration and Naturalization Service*,³⁹³ the Ninth Circuit held that the petitioner aliens brought a colorable claim of equitable estoppel against the INS by alleging, with documentary support, that the INS deliberately delayed processing an adjustment of status petition until just before the petitioner aged out of eligibility for the provision.³⁹⁴ Overall, along with this potential for estoppel, there is a reason courts around the country are reluctant to rule out the laches defense for LPRs—an emerging consensus that there are limits on the government’s removal powers. Those limits, the “remedy” as Justice Marshall would understand it, are only made necessary because there is a right to remain.

C. *A Right to Remain from History and Tradition*

The newer theory of finding substantive due process rights from an emerging awareness among lower federal courts has made certain members of the Court uneasy.³⁹⁵ Rather, in *Washington v. Glucksberg*,³⁹⁶ Chief Justice William H. Rehnquist observed, “the [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”³⁹⁷ The lawful permanent resident’s right to remain is also grounded in our shared history and tradition, if you take a

³⁸⁶ *Id.* at 166.

³⁸⁷ *Perez v. Holder*, 411 F.App’x 34, 36 (9th Cir. 2010).

³⁸⁸ 486 F.App’x at 520.

³⁸⁹ *Id.*

³⁹⁰ 369 F.3d at 158.

³⁹¹ *Id.* at 159 n.13 (citing *Rojas-Reyes v. INS*, 235 F.3d 115, 126 (2d Cir. 2000); *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir. 1998); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 307 (2d Cir. 1976)).

³⁹² *Rojas-Reyes*, 235 F.3d at 126.

³⁹³ 16 Fed. App’x. 788 (9th Cir. 2001).

³⁹⁴ *Id.* at 791; *see also* *Kowalczyk v. INS*, 245 F.3d 1143, 1148 (10th Cir. 2001) (holding the BIA violated an alien’s due process rights in his asylum application by taking administrative notice of facts relating to changes in the Polish government since he departed, without giving the alien a chance to respond).

³⁹⁵ *See* *McDonald v. City of Chi.*, 561 U.S. 742, 789 (2010) (Alito, J.) (“[W]e have never held that a provision of the Bill of Rights applies to the States only if there is a “popular consensus” that the right is fundamental.”).

³⁹⁶ 521 U.S. 702 (1997).

³⁹⁷ *Id.* at 703.

holistic view of the history of United States immigration policy, and also recognizes some important limitations of current proposed reforms.

Although the nation's current immigration policies are quite restrictive, the United States was founded with relatively free and inclusive immigration policies throughout the 18th and 19th centuries.³⁹⁸ The Naturalization Act of 1790 simply required two-years of residency for aliens, although it limited citizenship to a "free white person" who possessed "good moral character."³⁹⁹ It was replaced by the Naturalization Act of 1798, which permitted President John Adams to deport foreigners he considered dangerous⁴⁰⁰ and bumped the residency requirement up to fourteen years to limit voters for the Republican Party, but the Act of 1798 was, itself, revised by the Jefferson Administration just four years later to lower the residency requirement to five years.⁴⁰¹ The nation remained largely open-border until the 1880s when, as more immigrants arrived and economic conditions worsened, Congress passed the first immigration legislation aimed at exclusion.⁴⁰² At the same time, though, the United States still solicited European immigrants.⁴⁰³ Finally, until 1926, resident aliens were still able to vote in many local and state elections.⁴⁰⁴ An LPR's right to exist and participate in the United States, from the days of the revolution and through the Civil War, was accepted and praised, as that meant the resident was assimilating to American culture.⁴⁰⁵ The INA's formal exclusion and removal grounds were only instituted in 1952,⁴⁰⁶ and the widespread growth of removal grounds is an even

³⁹⁸ USCIS HISTORY OFFICE & LIBRARY, U.S. CITIZENSHIP & IMMIGRATION SERVS., OVERVIEW OF INS HISTORY 3 (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

³⁹⁹ *Key Dates and Landmarks in U.S. Immigration History*, HARV. U. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/timeline.html> (last visited Mar. 28, 2017).

⁴⁰⁰ Although Adams had this new authority, he never used it or enforced the Naturalization Act. *This Day in History: Adams Passes First of Alien and Sedition Acts*, HISTORY.COM, <http://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts> (last visited Mar. 28, 2017).

⁴⁰¹ *Key Dates and Landmarks in U.S. Immigration History*, *supra* note 399.

⁴⁰² USCIS HISTORY OFFICE & LIBRARY, *supra* note 398.

⁴⁰³ *A Brief History of Civil Rights in the United States: Historical Overview—Immigration*, GEO. L. LIBR., <http://guides.ll.georgetown.edu/c.php?g=592919&p=4171684> (last visited Feb. 15, 2017).

⁴⁰⁴ Simon Thompson, *Voting Rights: Earned or Entitled?* HARV. POL. REV. (Dec. 3, 2010), <http://harvardpolitics.com/united-states/voting-rights-earned-or-entitled/>. Indeed, Professor and now U.S. Representative, Jamin B. Raskin, explained that in the early days of America, "a self-defined immigrant republic," alien voting, allowed in state, federal, and territorial elections, "reflected [] an openness to newcomers," so long as those newcomers were wealthy, white, and male landowners. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1395 (1993).

⁴⁰⁵ Raskin noted that alien suffrage was intended to incentivize immigration and also assimilation. *Id.*

⁴⁰⁶ An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. No. 82-414, 66 Stat. 163 (1952). Interestingly, then-President Harry S. Truman vetoed the 1952 INA because he believed it was discriminatory and "un-American." Harry S. Truman, *182—Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality*, AM. PRESIDENCY PROJECT (June 25, 1952), <http://www.presidency.ucsb.edu/ws/?pid=14175>. In his veto message, he wrote, "Today, we are "protecting" ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic We do not need to be protected against immigrants from these countries—on the contrary we want to stretch out a helping hand [This is only one example] of the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law." *Id.*

newer phenomenon that was accelerated by the AEDPA and IIRIRA reforms.⁴⁰⁷ Thus, reviewing America’s long-term immigration history and traditions shows there is a place for the right to remain.

Furthermore, the understanding that LPRs have different and deeper rights than other non-citizens even appears to be shared by the Trump administration, which has begun shaping what appears to be the harshest immigration policy this nation has seen since the days of the Chinese Exclusion Acts. Shortly after President Trump issued his January 27, 2017 Executive Order (EO), which barred individuals from seven Muslim-majority nations from entering the United States, DHS announced the EO did not apply to LPRs, and that their entry “is in the national interest.”⁴⁰⁸ DHS followed this up with a statement announcing, “absent significant derogatory information indicating a serious threat to public safety and welfare, *lawful permanent status will be a dispositive factor* in our case-by-case determinations.”⁴⁰⁹ Even under the Trump administration’s more hostile and restrictive immigration policies, LPRs retain a special and preferred status.⁴¹⁰

D. *Implications of a Right to Remain*

Further determining the precise contours and limits of the right to remain should be a goal of immigration academics and future litigation. We do not yet know when it would attach, and whether it could or should apply beyond LPRs. However, beginning to recognize a right to remain for long-term LPRs would have several important and just implications. First, it would provide important predictability and equality in how immigration cases are decided throughout the country. As Professor Motomura observed, current ad hoc judicial efforts “might suffice to prevent injustice in a particular case but do little to find a coherent and fully satisfactory solution if the particular injustice is merely symptomatic of a more fundamental problem that is rooted in the alien’s inability . . . to raise a constitutional claim directly.”⁴¹¹ Rather than requiring the LPR to depend on the mercy of discretion shown by individual immigration officers, a judicially-recognized right

⁴⁰⁷ See Stumpf, *supra* note 54.

⁴⁰⁸ *Fact Sheet: Protecting the Nation from Foreign Terrorist Entry to the United States*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states> (released Jan. 29, 2017).

⁴⁰⁹ *DHS Statement on Compliance with Court Orders and the President’s Executive Order*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-presidents-executive-order> (released Jan. 29, 2017) (emphasis added). LPRs remain protected under President Trump’s Second Executive Order on March 6, 2017, which bars entrants from the same Muslim-majority nations aside from Iraq: “The suspension of entry pursuant to section 2 of this order shall not apply to: (i) any lawful permanent residents of the United States.” Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Foreign nationals seeking to enter the United States to visit with a close family member who is an LPR are also eligible for case-by-case waivers if they can show the denial of entry during the suspension period would cause them undue hardship. *Id.*

⁴¹⁰ Josh Gerstein & Matthew Nussbaum, *White House Tweaks Trump’s Travel Ban to Exempt Green Card Holders*, POLITICO (Feb. 1, 2017), <http://www.politico.com/story/2017/02/white-house-green-card-holders-no-longer-covered-by-trump-executive-order-234505>. The story quotes White House Press Secretary, Sean Spicer, stating, “[t]hey no longer need a waiver because if they are a legal permanent resident they won’t need it anymore,” but also warning, “[i]f they’re not a legal [sic] permanent resident, then they have to go back and that’s part of this vetting process. There’s a big difference.” *Id.*

⁴¹¹ Motomura, *supra* note 307, at 600.

to remain would guard against abuses of the LPR by the federal government (and also state governments through increased access to habeas corpus protections) because it gives an LPR standing and legitimacy before a court which cannot be bought or bargained for. Indeed, as Motomura hopes, judges, armed with the LPR's right to remain, "should find that they do not need to grope for . . . awkward and unpredictable subconstitutional solutions."⁴¹²

Second, the right to remain would strengthen the ability of LPRs to participate in, contribute to, and entrench themselves and their families within their communities. It would result in a positive feedback loop whereby individuals granted more rights would now have the incentive and, more importantly, the opportunity to act on these rights. LPRs would have a stable foundation to take economic risks, speak out against perceived injustices, and contribute to strengthening the societies they are a part of. Without the specter of removal hanging over their heads, LPR families—matriarchs and patriarchs, especially—could feel confident in investing in their neighborhoods.

Third, recognition of this right would protect LPRs from being taken advantage of at their places of business and in the education system. Again, without the endless threat of removal, LPRs have more bargaining power and options they can turn to, which makes under-the-table or illegal alternatives much less attractive or necessary. Fourth, a recognized right to remain could, in time, naturally stem illegal immigration because it only makes legal immigration a more attractive and *stable* alternative.

Finally, a firmly entrenched right to remain, and limit on LPR removals, would decrease the catastrophic impact that removals have on families. In 2010, the Urban Institute sampled six study sites throughout the country and examined the consequences of LPR parental arrest, detention, and deportation on 190 children in eighty-five families.⁴¹³ Their study found that children in families who had one or more parent arrested and/or subsequently detained or deported "experienced severe challenges" that "contributed to adverse behavioral changes."⁴¹⁴ Many families experienced housing instability⁴¹⁵ and food insufficiency,⁴¹⁶ and children suffered in school, either as a result of disruptions in attendance, or because they were unable to adjust to losing one or both of their parents.⁴¹⁷ Stability for individuals and their families is extremely valuable.

V. CONCLUSION

Forty-two years after he immigrated to the United States, and thirty-two years after his conviction for statutory rape, U.S. Navy veteran Hilario Rivas-Melendrez was deported

⁴¹² *Id.* at 602.

⁴¹³ AJAY CHAUDRY ET AL., THE URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT vii (2010), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412020-Facing-Our-Future.PDF>.

⁴¹⁴ *Id.* at viii.

⁴¹⁵ *Id.* at ix ("Lost incomes in our sample were associated with housing instability. Many families started out in crowded conditions, but conditions worsened when families needed to move in with other relatives to control costs. One in four families moved in with others to save on housing costs.").

⁴¹⁶ *Id.* ("Nearly three out of five households reported difficulty paying for food 'sometimes' or 'frequently' in the months following parental arrest Nearly two out three parents reduced the size of their meals, over half ate less than before, and more than a fifth reported having experienced hunger because they did not have enough to eat.").

⁴¹⁷ *Id.* at x.

to Mexico in 2012.⁴¹⁸ Though the Seventh Circuit hoped he could acquire discretionary relief, he was sent away from his family, friends, and livelihood because of the ultimately unforgiving definition of an aggravated felony in the INA.

The application of laches against the federal government, to prohibit the government from initiating or completing removal proceedings against lawful permanent residents a significant number of years after they have served their sentences, finds justification in the common law understanding of laches and in the historical and precedential way laches have been applied against the federal government. Bundled together, these concepts are compelling enough to limit sovereign power in this unique space in immigration.

Laches is only a partial solution, however. It guards against long-delayed removal actions, but not against the wild expansion of removable offenses in the first place. Instead, a novel way of re-reading Supreme Court and Appellate Courts' precedent suggests there is something more that the common law, the Constitution, and courts are actually protecting here. That force is a substantive due process right to remain that lawful permanent residents acquire as they spend more time in the United States, and it grows, and ought to grow, as they remain peaceful and productive neighbors and members of our communities. The right to remain has driven the Court to push for more prosecutorial and judicial discretion *in favor* of LPRs contesting long-distant immigration violations, and it has motivated the Court's immigration due process jurisprudence to create results, or at least to contemplate decisions, that cannot result from bare interpretation of the INA on its own.

This right to remain should be recognized outright by the Court and then, hopefully, as part of comprehensive congressional immigration reform. Only then can policymakers and the Court begin to properly understand, triage, and remedy deficiencies in our immigration system. However, as evidenced above, the right to remain may not yet be completely accepted and is not fully defined, so this Article calls on scholars in the field to embark on a mission to help refine and codify it. More importantly, it calls on legal practitioners to demand from the courts the recognition of the right to remain—to test it, earn it, and continue to develop it. What is clear, now, is that without a right to remain, all lawful permanent residents experience *de facto* conditional LPR status. A right to remain would alleviate the pressure to live a completely mistake-free life, an expectation the U.S. government does not burden any of its own citizens with. At the same time, the newly recognized right would not force the LPR to become a U.S. citizen, and potentially have to give up citizenship elsewhere. It would give lawful LPRs like Mr. Rivas-Melendrez a sound hook to contest their removal proceedings after they have served their lawfully imposed sentences and proven themselves to be rehabilitated. The right to remain would recognize that LPRs, like citizens, have the capacity to rehabilitate themselves after making mistakes, and it would provide much-needed stability to LPRs' lives, which could yield positive results for everyone in the country—citizens and non-citizens alike.

⁴¹⁸ Noel Brinkerhoff, *Navy Veteran Deported after 40 Years in U.S.*, ALLGOV.COM (Aug. 8, 2012), <http://www.allgov.com/news/us-and-the-world/navy-veteran-deported-after-40-years-in-us?news=844886>.