
CONSTITUTIONALIZING IMMIGRATION LAW: THE VITAL ROLE OF JUDICIAL DISCRETION IN THE REMOVAL OF LAWFUL PERMANENT RESIDENTS

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*For decades, scholars and advocates criticized the harsh, mandatory nature of the Federal Sentencing Guidelines. They argued that federal district court judges should have discretion to authorize a punishment that fits the facts and circumstances of the crime and the defendant. Similarly, immigration scholars and advocates criticize the harsh laws that categorically remove lawful permanent residents, even after minor crimes, from the United States. In 2005, in *United States v. Booker*, the Supreme Court “constitutionalized” the Sentencing Guidelines by rendering them advisory, and returning judicial discretion to federal judges.*

This Article argues that the similar constitutional, historical, theoretical, societal, and humanitarian policy considerations underlying sentencing and removal support the return of judicial discretion to the removal proceedings of longtime lawful permanent residents. By returning judicial discretion, Congress and the President would “constitutionalize” the deportation process rather than wait for Supreme Court action. The Article concludes with a proposal for legislative reform: “The Longtime Lawful Permanent Residents and Family Unit Relief Act.”

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The injustice of an adjudicative proceeding in which a judge’s discretion is essentially nullified first came to my attention during my tenure as a career law clerk to U.S. District Court Judge Wilkie D. Ferguson, Jr., the judge after whom the newest federal courthouse in Miami, Florida is named. Judge Ferguson felt personally the pains of the lack of judicial discretion under the mandatory Federal Sentencing Guidelines. There were cases where he would have ordered a lower sentence, but he could not exercise discretion. See *United States v. Onofre-Segarra*, 126 F.3d 1308, 1311 (11th Cir. 1997) (quoting statements made by Judge Ferguson on the record). Unfortunately, Judge Ferguson died before the Federal Sentencing Guidelines were finally rendered advisory, but his criticisms turned out to be prophetic. I humbly dedicate this Article in his honor.

TABLE OF CONTENTS

I.	INTRODUCTION	639
II.	WHO ARE LAWFUL PERMANENT RESIDENTS?.....	643
III.	CRIMMIGRATION AND THE ABSENT CONSTITUTIONAL ANALYSIS	648
IV.	THE PARALLEL DEVELOPMENT OF CRIMINAL SENTENCING AND IMMIGRATION REMOVAL	655
	A. <i>Expansion of Judicial Discretion</i>	656
	1. Sentencing Prior to the Sentencing Reform Act of 1984	656
	2. Deportation Prior to the 1996 Immigration Reform.....	657
	B. <i>Criticisms of Judicial Discretion</i>	658
	1. Federal Sentencing.....	658
	2. Deportation Adjudication.....	659
	C. <i>Legislative Responses to Criticisms of Judicial Discretion</i>	660
	1. Federal Sentencing Guidelines	660
	2. The 1996 Immigration Acts (AEDPA and IIRIRA)	662
	D. <i>Restriction of Judicial Discretion</i>	663
	1. Sentencing Under Mandatory Federal Sentencing Guidelines.....	663
	2. Removal After the 1996 Immigration Acts.....	665
V.	THE SUPREME COURT OF THE UNITED STATES AND JUDICIAL DISCRETION	670
	A. <i>United States v. Booker</i>	670
	B. <i>Fong Yue Ting v. United States</i>	672
	C. <i>The Trilogy: Fong Yue Ting, Padilla, and Booker</i>	673
VI.	ADDITIONAL SIMILARITIES OF CRIMINAL SENTENCING AND IMMIGRATION REMOVAL	676
	A. <i>Disparate Impact of Mandatory Imprisonment and Deportation</i>	676
	B. <i>Goals of Sentencing and Removal</i>	684
	C. <i>Societal Factors Surrounding Criminal Convictions</i>	685
	D. <i>Humanitarian Considerations Militating Against Categorical Sentencing and Removal</i>	687
VII.	THE RETURN OF JUDICIAL DISCRETION TO REMOVAL PROCEEDINGS	689
	A. <i>Judicial Discretion as a Preferred Alternative to the Status Quo</i>	691
	B. <i>Proposed Statute: “The Longtime Lawful Permanent Residents and Family Unit Relief Act”</i>	693
	C. <i>Rationale for the Proposed Factors to Consider in Removal Decisions</i>	694
	1. Factors # (1)–(7)	695
	2. Factors # (8)–(10)	696
	3. Factors # (11)–(13)	697
VIII.	CONCLUSION	698

I. INTRODUCTION

*“Sometimes only the law can fully vindicate our values, particularly when the rights and opportunities of the powerless in our society are at stake.”*¹

The following individuals, all lawful permanent residents, are subject to removal under the current immigration laws:

Edouard Colas was brought to the United States from Haiti as a lawful permanent resident at age 10. He was convicted in 1997 of Attempted Burglary in the Third Degree and sentenced to five years on probation. He has maintained gainful employment and is married to a United States citizen with whom he has two young sons. . . .

Lucila Cruz has been a lawful permanent resident of the United States since 1992. She was convicted of Attempted Grand Larceny in the Third Degree in 1996, and was sentenced to a conditional discharge. Many supporters, including her employer, have commended her for the care she provides to her severely disabled son. . . .

. . . .

Neil Drew has been a lawful permanent resident of the United States since he was 10 years old. He was convicted of third-degree grand larceny in 1998, for which he served a one-to-three year sentence and made restitution. He has earned a Bachelors Degree from the School of Visual Arts in New York City and has been gainfully employed as a graphic designer. His two brothers serve in the U.S. military. . . .

. . . .

Olusegun Ola Johnson, a lawful permanent resident since 1991, was convicted of three counts of second-degree forgery and one count of third-degree grand larceny in 1990, for which he was sentenced to five years of probation. He has had no further contacts with the criminal justice system, and is now an ordained deacon, who is married to a citizen and is the father of four children.²

Lawful permanent residents are powerless in the political process of the United States because they do not have the right to vote.³ Under pressure from immigrant

1. BARACK OBAMA, *THE AUDACITY OF HOPE* 62 (2006).

2. The unfairness of their potential removal from the United States came to the attention of New York Governor David A. Patterson who exercised discretion and granted them pardons so they could avoid deportation. Press Release, N.Y. State Office of the Governor, Governor Paterson Announces Pardons (Dec. 24, 2010), <http://readme.readmedia.com/Governor-Paterson-Announces-Pardons/1812512>.

3. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (refusing to apply “heightened judicial scrutiny” to voting restrictions); HIROSHI MOTOMURA, *AMERICANS IN WAITING* 5 (2006) (noting that noncitizens are not always treated equally because they do not enjoy certain rights, including the right to vote); Maritza I. Reyes, Note, *The Latino Lawful Permanent Resident Removal Cases: A Case Study of Nicaragua and a Call for Fairness and Responsibility in the Administration of U.S. Immigration Law*, 11 HARV. LATINO L. REV. 279, 281 (2008) (citing Daniel Kanstroom, Response, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation*, 39 CONN. L. REV. 1911, 1918 (2007)) (discussing lawful permanent residents as a discrete and insular minority). Professor Raquel Aldana advances that:

Noncitizens in the United States today, by lacking formal citizenship, are no different in the formal sense than pre-Fourteenth Amendment freed Blacks, who could not even be counted among the

rights groups, Congress and President Barack Obama have continued talks about an immigration reform bill.⁴ State immigration enforcement laws, such as Arizona's Senate Bill 1070 (S.B. 1070)⁵ and Alabama's House Bill 56 (H.B. 56),⁶ which are currently being challenged by the federal government as interferences with its exclusive authority over immigration policies and priorities,⁷ have put additional pressure on President Obama to finally push for comprehensive immigration reform.⁸

The national rhetoric continues, however, to focus on so-called "illegal aliens"⁹ and omits mention of changes to the laws that are used to deport lawful permanent residents, despite widespread criticism about the harshness of these laws as written and applied.¹⁰ Under the current removal system, longtime lawful permanent residents are categorically subject to deportation with little or no judicial discretion over their cases.¹¹ In a speech on March 18, 2009, President Obama articulated that immigration

citizens of this country. Lack of formal citizenship places the noncitizen, in the worst cases, into conditions that closely resemble slavery.

Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 266 (2007).

4. See President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), <http://www.whitehouse.gov/photos-and-video/video/president-obama-comprehensive-immigration-reform#transcript> ("[T]he [immigration] system is broken. And everybody knows it. Unfortunately, reform has been held hostage to political posturing and special-interest wrangling—and to the pervasive sentiment in Washington that tackling such a thorny and emotional issue is inherently bad politics. . . . Our task then is to make our national laws actually work—to shape a system that reflects our values as a nation of laws and a nation of immigrants. And that means being honest about the problem, and getting past the false debates that divide the country rather than bring it together."). In that speech at American University, President Obama began his comments about comprehensive immigration reform by referring to the "controversial law in Arizona." *Id.* But see Spencer S. Hsu & N.C. Aizenman, *Immigrant Rights Leaders Critical of Democrats Growing Disillusion over Slow Legalization Bill, Recorded Deportations*, WASH. POST, Mar. 9, 2010, at A02 (complaining about slow action on immigration reform by Congress and President Obama).

5. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

6. 2011 Ala. Acts 535.

7. See *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011) (No. 11-182) (Arizona's appeal from a finding in favor of the federal government granting injunctive relief as to four sections of S.B. 1070). Although the case currently before the Supreme Court of the United States involves only the Arizona Senate Bill, the issues to be decided may also determine the legality of the Alabama law. See Petition for Writ of Certiorari at i, *Arizona v. United States*, No. 11-182 (Aug. 10, 2011) (framing the question presented as "whether the federal immigration laws preclude [a state's] efforts at cooperative law enforcement and impliedly preempt . . . provisions [like those in] S.B. 1070 on their face."). The federal government has already challenged Alabama's H.B. 56. See Press Release, Dep't of Justice, Department of Justice Challenges Alabama Immigration Law (Aug. 1, 2011), <http://www.justice.gov/opa/pr/2011/August/11-ag-993.html>.

8. See *supra* note 4 and accompanying text for a discussion of the federal government's position on immigration policy and the need for comprehensive immigration reform.

9. The term "illegal alien" is not a term with a definite content and meaning in immigration law. See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440 n.69 (1995) ("'Illegal alien' gestures toward a legal concept of noncompliance with law, but the law is more complex than most politicians and voters realize.").

10. See generally Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

11. See generally *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478–80 (2010).

reform is unavoidable and cannot be achieved with a piecemeal approach.¹² He outlined a plan to deal with the undocumented immigrant population, but failed to mention legislation aimed specifically at the lawful permanent residents that suffer in detention centers and are removed permanently from the United States, even after having been lawfully admitted members of American society for many years, sometimes decades.¹³

The similarities between certain aspects of criminal law and punishment, and immigration law and removal (deportation),¹⁴ support a proposal in favor of the return of judicial discretion to immigration removal proceedings of longtime lawful permanent residents,¹⁵ similar to the way in which judicial discretion was finally returned to federal sentencing after the decision of the Supreme Court in *United States v. Booker*.¹⁶ The legislative histories of past immigration statutes disclose that policy considerations often shape congressional debates over immigration.¹⁷ Based on the similarities of criminal sentencing (incarceration) and immigration adjudication (removal), this Article argues that Congress should follow the lead of *Booker* and incorporate meaningful judicial discretion in future immigration legislation. The change in the federal sentencing scheme is an affirmation that decisions that serve to banish people from their communities and loved ones, like imprisonment and deportation, are of such magnitude and importance that they should be made by fellow

12. President Barack Obama, Remarks of the President at Costa Mesa Town Hall (Mar. 18, 2009), <http://www.whitehouse.gov/video/Town-Hall-in-Costa-Mesa-CA>.

13. The President made a passing reference to working on “illegal immigration” and border enforcement in his 2011 State of Union Address, but he did not discuss lawful permanent residents. President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

14. Scholars, practitioners, and judges in the field of immigration law use deportation to describe removal and vice versa. See *Padilla*, 130 S. Ct. at 1480 n.6 (noting the “change in nomenclature” in immigration legislation). Exclusion and deportation proceedings are now part of “removal” proceedings. Immigration and Nationality Act (INA) § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2006); see also Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 385 n.4 (2007) (“The Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996 consolidated two proceedings formerly known as ‘deportation’ and ‘exclusion’ into a single proceeding called ‘removal.’”); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641 (2010) (“Removal proceedings are the forum for determining whether noncitizens should be removed from the United States, either upon seeking admission (formerly called exclusion hearings) or after admission (formerly called deportation hearings).”). In this Article, the term “deportation” and any related variations are used in their ordinary meaning (expulsion from a country), and in their technical meaning (statutory removal from the United States).

15. It is conceded that the Supreme Court continues to hold that an “order of deportation is not a punishment for a crime.” *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893). Nonetheless, this Article argues that the similarities between criminal punishment and deportation for longtime lawful permanent residents are strong enough to warrant similar discretionary protections. See *infra* Part III for a discussion on the comparisons and analogies that may be drawn in the criminal and immigration law contexts, which justify an expansion of *Booker*’s logic to the context of deportation proceedings.

16. 543 U.S. 220 (2005). See *infra* Part V.A for a discussion of how *Booker* returned judicial discretion to federal criminal sentencing.

17. See, e.g., 142 CONG. REC. H11,064–71 (daily ed. Sept. 25, 1996) (debate on H.R. 2202, The Illegal Immigration Reform and Immigrant Responsibility Act) (discussing the IIRIRA’s effect on jobs, taxpayers, and U.S. borders).

human beings (judges) with full discretion to consider the facts of the case, including the particular circumstances surrounding the crime and the individual.¹⁸

The President has correctly noted that:

We need an immigration policy that works—a policy that meets the needs of families and businesses while honoring our tradition as a nation of immigrants and a nation of laws. We need it for the sake of our economy, we need it for our security, and we need it for our future.¹⁹

This immigration policy needs to account for the present and future collateral damage caused to American society by deportations of longtime lawful permanent residents. The goal of this Article is to remind the Obama Administration and those members of Congress who are evaluating comprehensive immigration reform to remember to return proportionality and fundamental fairness to the removal of longtime lawful permanent residents;²⁰ otherwise, the country may have to deal with short- and long-term consequences similar to those brought about by the criminal sentencing regime under the mandatory Federal Sentencing Guidelines.

The Article proceeds as follows: Part II defines lawful permanent residents and introduces their plight through cases of lawful permanent residents that have served in the U.S. military forces. Part III describes the reasons for the use of criminal law reform in support of immigration law reform, due to a trend labeled “cimmigration.”²¹ That Part also explains why the proposed *constitutionalization* of the immigration removal scheme is addressed to the President and Congress, rather than to the Supreme Court. Part IV provides a historical narrative of the parallel development in federal sentencing and immigration deportation/removal. It documents the analogous progression of sentencing and removal, starting with the period immediately prior to the enactment of the 1984 sentencing reform and the 1996 immigration reform and ending with the legislative changes that categorically removed judicial discretion from sentencing and removal. Part V explains how the Supreme Court *constitutionalized*

18. See *Pepper v. United States*, 131 S. Ct. 1229, 1239–40 (2011); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1252 (1997) (arguing for a return to judicial discretion in federal sentencing because “[t]he judge’s power to weigh *all* of the circumstances of the particular case and *all* of the purposes of criminal punishment represented an important acknowledgement of the moral personhood of the defendant and of the moral dimension of crime and punishment”).

19. President Barack Obama, Remarks by the President at the Congressional Hispanic Caucus Institute’s 33rd Annual Awards Gala (Sept. 15, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/15/remarks-president-congressional-hispanic-caucus-institutes-33rd-annual-a>.

20. When questioned about whether immigration reform would include consideration of how current laws affect longtime lawful permanent residents that have committed crimes, Janet Napolitano, Secretary of the Department of Homeland Security (DHS), responded: “I think some of those issues are being looked at by those in the Congress that are looking at such legislation, whether they in fact will be included in a package is too soon to tell.” Janet Napolitano, Sec’y of Homeland Sec., Speech at the Center for American Progress, Question & Answer Session (Audio and Video) (Nov. 13, 2009), available at <http://images2.americanprogress.org/Press/11-13%20Napolitano%20Event.mp3> (statement at 44:47 mark of audio).

21. Professor Juliet Stumpf coined the term “cimmigration,” a term that describes the convergence of criminal law and immigration law. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006). Other authors have referred to this development as “the ‘criminalization’ of immigration law.” *E.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476 (2007).

sentencing by returning judicial discretion, why it has refused to engage in a similar constitutional review of immigration deportation statutes, and how recent decisions may provide a basis for constitutional review in the area of deportations due to criminal convictions. Part VI compares additional policy and systemic similarities of sentencing and removal, including an analysis of the race/ethnic dimension. Part VII sets forth a proposal for legislative reform, specifies the factors that should be considered in the exercise of judicial discretion, and provides the rationale behind the proposed factors.

II. WHO ARE LAWFUL PERMANENT RESIDENTS?

As of the end of 2011, there were approximately 15.7 million lawful permanent residents in the United States.²² When it comes to immigration statuses, in statutory language, lawful permanent residents are “aliens” that have “been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”²³ Lawful permanent resident is the status immediately prior to attaining U.S. citizenship.²⁴ In layman’s terms, lawful permanent residents are persons that have been “lawfully” admitted to the United States as members of our society,²⁵ with the ability to reside and work in the United States,²⁶ the responsibility to pay taxes,²⁷ and the duty to register for

22. As of January 1, 2009, there were 12.5 million lawful permanent residents in the United States. NANCY RYTINA, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2009, at 1 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2009.pdf. In 2009, an additional 1,130,818 were added. RANDALL MONGER, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS: 2009, at 1 (2010) http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf. In 2010, 1,042,625 were added. RANDALL MONGER & JAMES YANKAY, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS: 2010, at 1 (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf. In 2011, 1,062,040 additional lawful permanent residents were added. RANDALL MONGER & JAMES YANKAY, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS: 2011, at 1 (2012), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf.

23. Immigration and Nationality Act (INA) § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006). The term “legal permanent resident” is sometimes used as a synonymous term to “lawful permanent resident.” See, e.g., MONGER, *supra* note 22, at 2 (defining a legal permanent resident as one who has been granted the status of lawful permanent residence).

24. See Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135, 144 (2002) (citing 8 C.F.R. § 316.2(a)(2)–(3) (2002)) (“LPRs are eligible for citizenship once they have maintained continuous residence for five years.”); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1736 (2009) (citing INA § 316(a), 8 U.S.C. § 1427(a)) (“[P]ermanent resident status is a mandatory prerequisite to naturalization.”).

25. MOTOMURA, *supra* note 3, at 7.

26. Bibring, *supra* note 24, at 144 (citing 8 C.F.R. §§ 1.1(p), 274a.12(a)(1)).

27. *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977) (“Resident aliens are obligated to pay their full share of the taxes that support the assistance programs.”). For a discussion of the duty of citizens and lawful permanent residents to pay taxes on their worldwide income, see Jeffrey M. Colón, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 8–10 (1997). See also KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 456–58 (2009) (discussing the tax treatment of worldwide income of noncitizens); Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 379 n.9 (2006) (explaining the tests applied to determine whether noncitizen individuals are taxed as resident aliens).

selective service under the Military Selective Service Act.²⁸ Thousands of lawful permanent residents serve in our military forces.²⁹ For all intents and purposes, lawful permanent residents bear the same duties in American society as U.S. citizens.³⁰ They are “Americans in waiting.”³¹ Yet, they lack the right to vote and, therefore, have no representation in the political process.³²

A review of congressional debates confirms that legislators often fail to distinguish between “illegal immigrants” and lawful permanent residents when debating immigration reform.³³ It has become standard practice to lump lawful permanent residents in the noncitizen category without specific consideration.³⁴ The media reports seldom go beyond sound bites, which do not allow for expert discussions about the nuances of immigration law and policy.³⁵ Also, immigration law is often viewed as an “immigration issue” rather than as a societal and national issue, and this may prompt the failure to fully discuss immigration law and policy.³⁶ Accordingly, the

28. 50 U.S.C. app. §§ 453(a), 456(a)(1) (2006). Knowingly refusing to register with the Selective Service System is a crime punishable by imprisonment for not more than five years or a fine of not more than \$10,000, or both. *Id.* § 462(a). If a lawful permanent resident uses his or her alien status as a reason not to serve in the Armed Forces or in the National Security Training Corps of the United States, he or she is permanently ineligible for U.S. citizenship. INA § 315(a), 8 U.S.C. § 1426(a).

29. Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Service Members Who Are Not United States Citizens*, 51 NAVAL L. REV. 53, 53 (2005). Lawful permanent residents were conscripted to serve along citizens in the Civil War, World War I, World War II, the Korean War, and the Vietnam War. Craig R. Shagin, *Deporting Private Ryan: The Less than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L.J. 245, 248 (2007). Noncitizens also served during the American Revolution. *Id.* at 253.

30. *See In re Griffiths*, 413 U.S. 717, 722 (1973) (“Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.”); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (“Aliens like citizens pay taxes and may be called into the armed forces.” (quoting *Leger v. Saler*, 321 F. Supp. 250, 253 (E.D. Pa. 1970))).

31. MOTOMURA, *supra* note 3, at 9.

32. *See Foley v. Connelie*, 435 U.S. 291, 308–10 (1978) (Stevens, J., dissenting) (acknowledging that noncitizens are sometimes denied benefits because they cannot vote; therefore, they do not have an opportunity to influence the policy-making process). In addition, Latinos are underrepresented in the political process because, even though they account for sixteen percent of the U.S. population, many of them are noncitizens or young people who are not eligible to vote. D’Vera Cohn, *Census Data on Hispanic Voters*, PEW RES. CENTER (Apr. 26, 2011), www.pewsocialtrends.org/2011/04/26/census-data-on-hispanic-voters.

33. *See, e.g.*, 142 CONG. REC. H11,064 (daily ed. Sept. 25, 1996) (statement of Rep. Patsy Mink) (expressing frustration at failure of Congress to distinguish between illegal immigrants and lawful immigrants in conference report on Immigration and Nationality Act).

34. MOTOMURA, *supra* note 3, at 142.

35. *See* Chris Koger, *Opinion: Who Knew Fieldwork Was Hard?*, FARMWORKERS FORUM (June 24, 2011), <http://farmworkersforum.wordpress.com/2011/06/26/opinion-who-knew-fieldwork-was-hard> (“To have a meaningful discussion on immigration reform, there needs to be an honest look at the consequences of what immigration hardliners propose.”); Crystal Williams, *Behind the Sound Bites on Arizona’s Immigration Law*, AILA LEADERSHIP BLOG (May 11, 2010, 12:21 PM), <http://ailaleadershipblog.org/2010/05/11/behind-the-sound-bites-on-arizona-s-immigration-law> (“One of the problems with debates on serious issues being played out in the media [such as debates on immigration reform] is that all sides, by necessity, make their arguments with shorthand and sound bites.”).

36. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1154 (1998) (arguing that immigration law should not

immigrant distinctions receive little or no media coverage. Or, the omissions may be an intentional way to sweep under the rug injustices that well-informed American citizens may reject.³⁷ Cases of lawful permanent residents that entered as children, served in the U.S. military, and face removal as a result of criminal convictions illustrate the lack of forethought that legislators gave to the consequences of the harsh immigration laws that were enacted in 1996.³⁸ Despite their service to the United States, these U.S. military veterans are subject to removal, notwithstanding repeated claims from all sides of the political spectrum that this country will take care of its soldiers.³⁹ Their entrance as children and status as U.S. veterans should be factors that merit special weight in the removal decision.⁴⁰

In *Theogene v. Gonzalez*,⁴¹ Elysee Theogene was ordered removed to Haiti after a conviction of first degree residential burglary for which he received a sentence of four years of imprisonment.⁴² Theogene was a U.S. Navy veteran who had served in combat operations during the first Gulf War.⁴³ He was admitted to the United States in 1974, at the age of six, received an honorable discharge from the Navy, did not speak French or Creole, had no relatives in Haiti, and had not returned to Haiti since his arrival in the United States.⁴⁴ He was convicted in 1998, five years after he was honorably discharged from military service, and twenty-four years after he entered the United States as a child.⁴⁵ He was ordered removed, and the Ninth Circuit washed its hands of its role in the final removal decision by stating:

We note our discomfort with a rule of law that results in the deportation of an honorably discharged former member of the United States armed forces who has lived in the United States since he was a child. It is, however, the role of Congress, and not the Courts, to alter this rule.⁴⁶

be “marginalized as simply an ‘immigration’ issue” because “[e]fforts to exclude noncitizen minorities from the country under the immigration laws [also] threaten citizen minorities”).

37. Some citizens have urged governors to grant pardons to help noncitizens that may be at risk of removal. See, e.g., Nina Bernstein, *After Governor’s Pardon, an Immigrant Is Sworn In as a Citizen*, N.Y. TIMES, May 29, 2010, at A20; George Joseph, *New York Sets Up Pardon Panel to Prevent Deportations*, INDIA ABROAD N.Y. EDIT., May 14, 2010, at A8; Kenneth Lovett, *Gov Pardons Ex-Con*, N.Y. POST, Dec. 22, 2007, at 12.

38. For example, sixty-eight percent of lawful permanent residents deported between 1997 and 2007 were removed for nonviolent offenses. HUMAN RIGHTS WATCH, TOUGH, FAIR, AND PRACTICAL: A HUMAN RIGHTS FRAMEWORK FOR IMMIGRATION REFORM IN THE UNITED STATES 12 (2010).

39. In an interview with Charlie Rose, Harvard Law Professor Laurence Tribe explained that the claims about honoring our veterans and living up to our values do not go beyond rhetoric. Tribe discussed some of the problems that U.S. veterans face, including homelessness, posttraumatic stress disorder, and brain damage. *Charlie Rose: Current Affairs* (PBS television broadcast July 11, 2011), available at http://www.charlierose.com/view/interview/11774?utm_source=News%40Law+subscribers&utm_campaign=da743bfb47News_Law_Week_of_Monday_July_18_2011_18_2011&utm_medium=email.

40. See *infra* Part VII.C.2 for a discussion of three of the thirteen factors that should be considered in removal decisions, including age at entrance.

41. 411 F.3d 1107 (9th Cir. 2005).

42. *Theogene*, 411 F.3d at 1109.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1113 n.6.

The appellate court also found that it was not unreasonable for the Board of Immigration Appeals (BIA) to decide that indefinite detention in a Haitian prison, under inhumane conditions, did not rise to the level of “torture” under the Convention Against Torture (CAT).⁴⁷ This hands-off approach by the judiciary has a long history, beginning in earnest with the Supreme Court’s deference to congressional enactment of a series of laws excluding most Chinese immigrants from U.S. shores in the late 1800s.⁴⁸

In *Aguilar-Turcios v. Holder*,⁴⁹ Rigoberto Aguilar-Turcios, a lawful permanent resident and former member of the U.S. Marine Corps, was found removable for having been convicted of an aggravated felony.⁵⁰ Aguilar-Turcios pled guilty, in a court martial proceeding, to a charge of failing to comply with a general order that government computers be used for official purposes.⁵¹ He had been downloading pornographic materials on the computer.⁵² The Ninth Circuit held that the conviction was not an aggravated felony, remanded the case to the BIA “with instructions to terminate the proceedings and order[ed] the government to release Aguilar[-Turcios].”⁵³ Unfortunately, despite an order staying removal, Aguilar-Turcios had been mistakenly deported to Honduras, and neither his lawyer nor the government had been able to locate him.⁵⁴

The wholesale removal of U.S. veterans, after they have risked their lives in furtherance of U.S. policy, represents a deep injustice.⁵⁵ Congress should seriously consider its role in the decision to remove U.S. veterans.⁵⁶ Moreover, Congress must face the reality that many lawful permanent residents have served and currently serve in Iraq and Afghanistan, and the experiences that they endure in these conflicts, in furtherance of U.S. foreign policy, make some of them more prone to commit crimes

47. *Id.* at 1113.

48. Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1623 (2009) (citing *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889)). For a discussion of the “plenary power” doctrine that developed from these cases, see *infra* Parts III and V.B.

49. 582 F.3d 1093 (9th Cir. 2009).

50. *Aguilar-Turcios*, 582 F.3d at 1094.

51. *Id.* at 1095.

52. *Id.* at 1094–95.

53. *Id.* at 1098.

54. *Id.* at 1098 n.5.

55. For websites documenting stories of U.S. veterans facing deportation, see *List and Stories of Veterans Facing Deportation & Deported Veterans*, BANISHED VETERANS, <http://banishedveterans.intuitwebsites.com/donations.html> (last visited May 25, 2012); Jan A. Ruhman, *American Combat Veterans Facing Deportation*, VETSPEAK.ORG: SPEAKING TRUTH TO POWER (Apr. 7, 2009), <http://vetspeakblog.blogspot.com/2009/04/veterans-ins-yet-more-lies.html>; *Banished Veterans*, FACEBOOK, <http://www.facebook.com/pages/Banished-Veterans/113182311221> (last visited May 25, 2012).

56. In 2008, Representative Zoe Lofgren (D-CA) introduced a bill to provide relief from criminal offense removal-related provisions for noncitizens that have served in the U.S. military and their families. Lance Corporal Jose Gutierrez Act of 2008, H.R. 6020, 110th Cong. (2008). The bill did not become law. *H.R. 6020: Lance Corporal Jose Gutierrez Act of 2008*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6020> (last visited May 25, 2012).

after they return from active duty.⁵⁷ They face many hardships after they return home, including unemployment, homelessness, drug addiction, mental and physical injuries, posttraumatic stress disorder, and family disruption.⁵⁸ After they commit crimes, these veteran lawful permanent residents should not be readily abandoned to countries that may not be prepared or willing to help or welcome heroes of American wars.⁵⁹

The cases of Theagene and Aguilar-Turcios provide a good illustration of the inequities faced by lawful permanent residents under the current removal statutes. Why does it matter what happens to lawful permanent residents? Because the end result of mass deportations of longtime residents may be negative socioeconomic consequences in U.S. society similar to the socioeconomic ills that plague the United States as a result of the mass incarceration of adults,⁶⁰ which includes a disproportionate percentage of racial/ethnic minority populations, mostly male.⁶¹ Lawful permanent residents have already achieved legalization (legal and permanent admission).⁶² They are on their way to citizenship.⁶³ Accordingly, in proceedings to remove them from the United States and their families, where many of those family members are U.S. citizens, lawful permanent residents should be entitled to paramount consideration of the hardships that they and their families would endure upon removal⁶⁴ and the proportionality of

57. Some veterans commit crimes or become addicted to drugs as a result of physical, psychological, and emotional problems that they face after serving during times of war. Shagin, *supra* note 29, at 305–07. In fact, all members of military families may suffer from these types of issues when a close family member is deployed to a combat zone. *Id.* at 306. What about veterans who return to find no jobs or social services? For various discussions on this topic, see Lizette Alvarez, *Nearly a Fifth of War Veterans Report Mental Disorders, a Private Study Finds*, N.Y. TIMES, Apr. 18, 2008, at A20; R. Jeffrey Smith, *Crime Rate of Veterans in Colo. Unit Cited—Soldiers Tell Newspaper of Sharp Rise in Violent Incidents After Iraq Deployments*, WASH. POST, July 28, 2009, at A3; Susan Donaldson James, *Traumatized Female Vets Face Uphill Battle*, ABC NEWS (Mar. 2, 2010), <http://abcnews.go.com/Health/female-veterans-traumatized-war-fight-battle-va-healthcare/story?id=9979866&page=1>.

58. *60 Minutes: Homeless Veterans: Stand Down* (CBS television broadcast July 10, 2011), available at <http://www.cbsnews.com/video/watch/?id=7372852n>; see also Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 4–15 (2011) (discussing the history and common development of posttraumatic stress disorder resulting from exposure to war or war-like trauma).

59. The legislative proposal in this Article includes military service as one of the factors to be considered in the removal decision. See *infra* Part VII.C.2 for a discussion of this factor. That said, Congress should strongly consider an outright ban on removal of lawful permanent residents that served in active duty during a war or military conflict.

60. LYNN S. BRANHAM & MICHAEL S. HAMDEN, *CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS* 3–4 (8th ed. 2007) (“[T]he United States incarcerates more people than any other country in the world, including countries that are much more heavily populated.”).

61. See *infra* Part VI.A for a discussion of mandatory imprisonment and deportation’s disparate impact on minorities.

62. MOTOMURA, *supra* note 3, at 8.

63. *Id.*

64. See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 50–51 (2010) (rationalizing that removal of longtime permanent residents fails to account for the hardship that families suffer and the investment that these individuals make in their communities). For a discussion of how removals negatively impact families, communities, and the Latino population overall, see generally Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

banishment⁶⁵ from the United States, in relation to the underlying criminal conviction(s) and punishment already imposed by the criminal system.⁶⁶ In sum, they deserve a level of due process that provides judicial discretion.⁶⁷

III. CRIMMIGRATION AND THE ABSENT CONSTITUTIONAL ANALYSIS

Criminal law and immigration removal law are becoming comparable and analogous areas of law, a phenomenon that scholars have labeled “crimmigration.”⁶⁸ This growing intersection of the two systems has developed with aggressive speed.⁶⁹

65. During the first century of American independence, noncitizens and citizens, without distinction, were banished from the United States as punishment for violations of state laws. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 22–23 (1996). Thankfully, the “archaic punishment of banishment” no longer applies to citizens except in cases where banishment is effected “through the grant of a conditional pardon, a form in which banishment persists to this day.” *Id.* at 23 (citations omitted); *see also* 59 AM. JUR. 2D *Pardon and Parole* § 68 (2012) (citations omitted) (“Some statutes authorize the governor to grant pardons on condition that the convicted person shall leave the state and never again return to it, but even in the absence of any statute, a number of cases have held that such condition is valid as is a condition requiring the prisoner to leave the United States and not return.”). But noncitizens, including lawful permanent residents, are now “subject to banishment for behavior that for a citizen would be constitutionally protected.” Burt Neuborne, *Harisiades v. Shaughnessy: A Case Study in the Vulnerability of Resident Aliens*, in *IMMIGRATION STORIES* 87, 105 (David A. Martin & Peter H. Schuck eds., 2005).

66. *See generally* Stumpf, *supra* note 24, at 1683.

67. *See* Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT’L L.J. 245, 263 (2004) (advocating that lawful permanent residents should be entitled to greater protection than undocumented noncitizens, including receiving a level of procedural and substantive due process that satisfies the constitutional guarantees of the Fifth Amendment).

68. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1574–75 (2010) (noting overlaps between the criminal justice system and immigration law); Stumpf, *supra* note 21, at 376–77 (defining “crimmigration law” based on the two systems being “merely nominally separate”). “Scholars of criminal and immigration law have tended to stay on their own sides of the fence, focusing on developments within their fields rather than examining the growing intersections between these two areas. As the merger of the two areas intensifies, however, the need for scholarly attention becomes critical.” *Id.* at 377 (footnote omitted) (citing Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 617–18 (2003)).

69. *See* Chacón, *supra* note 68, at 1574 (observing that noncitizens face deportation in addition to criminal punishment for committing a number of different offenses); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1059 (2002) (arguing that detention and removal of Arab and Muslim immigrants since September 11, 2001, demonstrates the use of immigration law for law enforcement purposes); Kanstroom, *supra* note 10, at 1893–94, 1935 (calling for fresh examination of deportation because of its convergence with crime control); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 785–86 (2000) (arguing that the convergence of removal and criminal systems makes deportation “automatic”); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82 (2005) (“As the criminal justice system created punishments that ‘got tough’ on all convicted drug offenders, immigration law adopted harsh consequences for convicted noncitizen drug offenders.” (citations omitted)); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1132 (2002) (noting that the number of overlapping criminal and immigration cases grows each year). Professor Jennifer M. Chacón has also noted the influence of immigration law in “criminal prosecutions of migration-related offenses,” where “we are also witnessing the importation of

The foundational similarities between criminal law and immigration law are evident; “[b]oth criminal and immigration law are, at their core, systems of inclusion and exclusion.”⁷⁰ Both frameworks function to determine the laws that those present in the country must follow to remain free to partake in American society,⁷¹ with additional limitations on noncitizens depending on immigration status.⁷² The systems prescribe who is removed from society, either by incarceration or deportation, for violation of the rules.⁷³ Then, as it applies to the penalty of deportation, there is the ultimate inclusion and exclusion division: citizen versus noncitizen (insider versus outsider).⁷⁴ Underlying the legal construct of many laws, the “boundary between lawful immigrants and citizens is the line of greatest intimacy but also of most pointed exclusion between outsider and insider.”⁷⁵

The similarities in the development of the criminal sentencing structure and the immigration removal system are also irrefutable, especially in the area of removal (deportation) as a result of criminal convictions.

In many respects, immigration law appears to track the developments in the criminal arena, albeit time delayed. Starting in the late 1970s, guideline sentencing began to limit the discretion of sentencers by focusing them on the offense committed and the offender’s criminal record. In the 1980s, state legislatures, but especially Congress, added mandatory sentences that did not allow for the individualization of sentences but required the imposition of a specific prison sentence following the commission of a specific offense, generally a drug or weapons crime. The 1996 immigration acts replicate this development by requiring deportation following a specific conviction, independent of the offender’s background.⁷⁶

In 2010, in *Padilla v. Kentucky*,⁷⁷ the Supreme Court of the United States candidly recognized the “close connection” between deportation as a consequence of a criminal conviction and the criminal process itself.⁷⁸ Jose Padilla, a lawful permanent resident for more than forty years, and a U.S. veteran of the Vietnam War, faced certain

the relaxed procedural norms of civil immigration proceedings into the criminal realm.” Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 136–37 (2009).

70. Stumpf, *supra* note 21, at 380.

71. *Id.*

72. Some noncitizens are authorized to work and some are not; some are allowed to obtain driver’s licenses and some are not; some are qualified to receive social benefits and government aid and some are not. See generally Aldana, *supra* note 3, at 263.

73. Stumpf, *supra* note 21, at 380; see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 385 (2002) (“In addition to the role that the definition of crime plays in determining who is oppressed, crime also defines the limits and form of mainstream law-abiding society.”).

74. MOTOMURA, *supra* note 3, at 6.

75. *Id.*

76. Demleitner, *supra* note 69, at 1090–91.

77. 130 S. Ct. 1473 (2010).

78. *Padilla*, 130 S. Ct. at 1482.

removal after having pled guilty to transportation of a large amount of marijuana.⁷⁹ Padilla challenged his guilty plea in a postconviction proceeding, claiming that his defense counsel provided ineffective assistance by advising him that he did not have to worry about pleading guilty because he had resided in the United States for a long time.⁸⁰ Padilla further claimed that but for the incorrect advice he would have gone to trial.⁸¹ The Court agreed with Padilla that his counsel had rendered ineffective assistance, in violation of the Sixth Amendment to the U.S. Constitution, by failing to give Padilla correct advice regarding the risk of deportation as a consequence of his guilty plea.⁸² The Court remanded the case to the lower court for a finding of whether Padilla should be allowed to withdraw his plea of guilty, which would turn on whether he had suffered prejudice under *Strickland v. Washington*⁸³ as a result of the ineffective assistance of counsel.⁸⁴

As part of its review, the Court engaged in a historical account of the development of deportation sanctions in immigration law.⁸⁵ The Court acknowledged that the changes in the immigration laws now authorize automatic deportation for many noncitizens who are convicted of crimes.⁸⁶ These removals as direct results of criminal convictions, in the words of the Court, make it “‘most difficult’ to divorce the penalty [of deportation] from the conviction.”⁸⁷ The Court also recognized that the potential or conclusive penalty of deportation due to a criminal conviction⁸⁸ is very difficult to separate from the penal punishment.⁸⁹ Therefore, “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”⁹⁰ For lawful permanent residents who are removed from the United States, removal is punishment in the same

79. *Id.* at 1477. Conviction of violation of any law or regulation relating to a drug offense, with the exception of a single offense of simple possession of marijuana, makes any noncitizen deportable. *Id.* at 1477 n.1 (citing INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)).

80. *Id.* at 1478.

81. *Id.*

82. *Id.* at 1486–87.

83. 466 U.S. 668 (1984).

84. *Padilla*, 130 S. Ct. at 1483–84.

85. *Id.* at 1478–80.

86. *Id.* at 1478.

87. *Id.* at 1481 (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

88. The Court noted that some immigration statutes are “succinct, clear, and explicit in defining the removal consequences” for the noncitizen, whereas other statutes may not be as “succinct and straightforward.” *Id.* at 1483. In the area of immigration law, it often takes decades to settle contradictory agency and court interpretations of a particular statute and its application. *See* DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 236 (2007). The Supreme Court recently settled a circuit split over the interpretation of a rule that has been around for over three decades by holding the BIA’s “comparable-grounds” rule, which the BIA applied to permanent residents seeking relief in the deportation context under section 212(c) of the Immigration and Nationality Act, to be arbitrary and capricious. *Judulang v. Holder*, 132 S. Ct. 476, 481, 483, 490 (2011).

89. *Padilla*, 130 S. Ct. at 1480.

90. *Id.* (footnote omitted).

sense as (or worse than) incarceration in the criminal context.⁹¹ Incarceration may be temporary, whereas removal for so-called “aggravated felonies” generally amounts to permanent banishment from the United States⁹² and permanent separation from family members.⁹³ For this reason, some lawful permanent residents would prefer longer incarceration in order to avoid removal.⁹⁴ Beyond *Padilla*’s ramifications for criminal representation of noncitizens, the case has implications in immigration proceedings because the Court appeared to come close to holding that deportation is punishment in the constitutional sense.⁹⁵

Removal proceedings do not provide the constitutional and procedural safeguards available in criminal prosecutions⁹⁶ because deportation has been held not to be punishment in the constitutional sense.⁹⁷ Additionally, the Eighth Amendment’s prohibition against cruel and unusual punishment does not apply to deportation.⁹⁸ There is no Sixth Amendment right to trial by jury in removal proceedings and no

91. *See id.* at 1483 (recognizing that a right to remain in the United States may be more important to the noncitizen than any time he or she may have to serve in jail). “Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent . . . to a distant land, is punishment, and that oftentimes most severe and cruel.” *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

92. Sweeney, *supra* note 64, at 84–85. See also *infra* note 238 and accompanying text for a discussion of the statutory bar to readmission.

93. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1954 (2000).

94. Sweeney, *supra* note 64, at 50.

95. Professor Daniel Kanstroom put it this way: “So does *Padilla v. Kentucky* mean that deportation is/may be punishment for constitutional purposes? It is hard to say.” Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 325 (2011). In a book published before the decision in *Padilla*, Professor Kanstroom wrote: “Of course, the Supreme Court is far from concluding that there is anything *constitutionally* wrong with a harsh deportation law aimed at minor crimes.” KANSTROOM, *supra* note 88, at 244. After *Padilla*, however, some legal scholars see possibilities for constitutional protections. *See, e.g.*, Maureen A. Sweeney, *Where Do We Go From Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 355–57, 365–66 (2011) (considering Sixth and Eighth Amendment implications of the Court’s recognition of removal as a penalty resulting from a criminal proceeding).

96. *See* Chacón, *supra* note 69, at 135–36 (citing Legomsky, *supra* note 21, at 472) (noting that removal proceedings have imported criminal adjudication’s methodologies but not its procedural protections); Kanstroom, *supra* note 69, at 785 (suggesting that removal proceedings could incorporate some criminal procedural protections); Kanstroom, *supra* note 10, at 1893–94 (arguing that similarities between the justification for and structure of criminal and deportation proceedings support applying constitutional protections to individuals in removal proceedings like those provided to criminal defendants); Legomsky, *supra* note 21, at 469 (arguing that “asymmetric” importation of criminal law norms into immigration law has left out constitutional procedural protections).

97. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). *But see id.* at 740 (Brewer, J., dissenting) (“Deportation is punishment. It involves first, an arrest, a deprivation of liberty, and, second, a removal from home, from family, from business, from property.”); *id.* at 758–59 (Field, J., dissenting) (“[D]eportation is . . . the punishment for his neglect, and that, being of an infamous character can only be imposed after indictment, trial, and conviction.”); *id.* at 763 (Fuller, C.J., dissenting) (“[D]eportation denounced for failure to [register] is by way of punishment to coerce compliance No euphuism can disguise the character of the act in this regard.”).

98. *Id.* at 730 (majority opinion).

Fourth Amendment protection against unreasonable searches and seizures.⁹⁹ A Sixth Amendment right to counsel at the government's expense for indigent noncitizens has been denied in removal proceedings, even for lawful permanent residents.¹⁰⁰ Immigration deportation laws that are applied retroactively do not violate the Ex Post Facto Clause of the U.S. Constitution.¹⁰¹ The Double Jeopardy Clause of the Fifth Amendment has been held inapplicable to deportation,¹⁰² even though "in the English common law . . . nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation."¹⁰³ The distinguishing factor that the Court has relied upon is that deportation is not deemed punishment for the crime, but a method to remove noncitizens that have not complied with the immigration laws.¹⁰⁴ Deportation proceedings have been characterized as civil actions to determine noncitizens' eligibility to remain in the country.¹⁰⁵

Moreover, in the "legal deportation realm," constitutional protections and analysis are often absent "as a result of the persistence of the plenary power doctrine."¹⁰⁶ The plenary power doctrine originated in the 1889 Supreme Court decision in *Chae Chan*

99. *Id.* The exclusionary rule has limited application in removal proceedings. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1030 (2010).

100. 8 U.S.C. § 1362 (2006); *see also* *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) ("Litigants in removal proceedings have no Sixth Amendment right to counsel . . .").

101. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

102. *See Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (stating that deportation is not a punishment, but rather an exercise of the plenary power of Congress).

103. *United States v. DiFrancesco*, 449 U.S. 117, 133 (1980) (citing Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342–43 (1956)).

104. *Fong Yue Ting*, 149 U.S. at 730. *But see* *Scheidemann v. INS*, 83 F.3d 1517, 1527–29 (3d Cir. 1996) (Sarokin, J., concurring) (stating that "deportation of aliens for the commission of crimes is clearly punishment," but recognizing that the court was bound by Supreme Court precedent holding that deportation is not punishment). Legal scholars have carefully analyzed and concluded that deportation is punishment. *See* Kanstroom, *supra* note 69, at 788 (concluding that "being kicked out of the country for having done something wrong" is obviously punitive); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 208 (2007) (arguing that deportation of long-term lawful residents amounts to punishment because of the incapacitating effect on the deported and deterrent effect upon others); Kidane, *supra* note 14, at 446 ("There is no gainsaying that deportation as a prescription for a refugee's commission of a specific class of crimes is a punishment."); Legomsky, *supra* note 21, at 513 (offering historical and functional arguments for classifying deportation as punishment); Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 305–06 (2000) (observing that resignation to the "fiction" of deportation as a civil action has resulted in blindness to its punitive character); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 64 (2003) ("[R]emoval proceedings are clearly more criminal in nature than civil."); Salinas, *supra* note 67, at 246 (arguing that deportation can be more severe punishment than confinement).

105. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *see also* Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings: Matter of Compean and the Fundamental Fairness Doctrine*, 22 FLA. J. INT'L L. 65, 70–75 (2010) (describing the development of case law holding deportation to be a civil, rather than criminal, action).

106. KANSTROOM, *supra* note 88, at 244.

Ping v. United States,¹⁰⁷ or, the *Chinese Exclusion Case*.¹⁰⁸ The doctrine is a judicially developed constitutional tenet pursuant to which courts defer to the political branches of government in the area of immigration legislation and often refuse to engage in the constitutional analysis that would apply if the laws affected citizens.¹⁰⁹ This plenary power of Congress over the policies¹¹⁰ pertaining to the right of noncitizens to remain in the United States has become a precedent-developed principle of immigration law, through repetition in countless judicial opinions, to the point that, in the words of former Supreme Court Justice Frankfurter, it is “not merely ‘a page of history,’ but a whole volume.”¹¹¹ The plenary power doctrine forecloses constitutional challenges to deportation grounds enacted by Congress.¹¹² However, the Court has entertained some constitutional arguments (i.e., due process claims by lawful permanent residents under a Fifth Amendment procedural due process analysis).¹¹³

In *Landon v. Plasencia*,¹¹⁴ the Supreme Court held that lawful permanent residents have a right to procedural due process in exclusion proceedings,¹¹⁵ a point

107. 130 U.S. 581 (1889).

108. MOTOMURA, *supra* note 3, at 26–27.

109. See *Chinese Exclusion Case*, 130 U.S. at 606 (“If . . . the government of the United States, through its legislative department, considers the presence of foreigners . . . to be dangerous to its peace and security . . . [that] determination is conclusive upon the judiciary.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[I]n the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’” (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976))). For a discussion of the development of the plenary power doctrine, see generally Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010); Daniel J. Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 308–11 (2007).

110. See *Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) (“The policy decision to deport aliens who have committed certain crimes is for Congress to make.”).

111. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (citation omitted) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Constitutional and immigration law professor Gerald L. Neuman posits that ratification of plenary power by repetition is not “an adequate substitute for careful analysis of whether particular rules are constitutionally unacceptable as applied to all aliens or to particular categories of aliens.” Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1990–91 (2000).

112. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–91 (1952) (explaining the judiciary’s extreme deference to the political branches on matters of international policy, including the power of deportation). The plenary power doctrine does not apply in full measure to “alienage laws,” which are laws that govern the lives of noncitizens in the United States, apart from the concepts of immigration admission and deportation. MOTOMURA, *supra* note 3, at 46–47. In the ambit of alienage laws, the Court has upheld noncitizens’ rights under the Equal Protection Clause. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (rejecting the argument that undocumented aliens are not “persons” within the state’s jurisdiction and holding that children have a right to a free public education, even if they are undocumented); *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (concluding that noncitizens are persons for equal protection purposes and states’ desire to preserve welfare benefits for their own citizens is an inadequate justification for denying them to noncitizens).

113. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 164–66 (5th ed. 2009).

114. 459 U.S. 21 (1982).

115. *Plasencia*, 459 U.S. at 32. Ironically, the due process argument was a “throw-in.” Kevin R. Johnson, *Maria and Joseph Plasencia’s Lost Weekend: The Case of Landon v. Plasencia*, in *IMMIGRATION STORIES* 221, 235 (David A. Martin & Peter H. Schuck eds., 2005) (quoting Gary Manulkin, *Plasencia’s attorney*).

that the Government conceded in its brief and at oral argument.¹¹⁶ The Court held that the conventional *Mathews v. Eldridge*¹¹⁷ balancing test applies when evaluating whether the procedures used to exclude a returning lawful permanent resident meet due process.¹¹⁸ In reaching its holding, the Court established that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”¹¹⁹ The Court cited several cases in support of its ruling and observed that “[a]lthough the holding was one of regulatory interpretation, *the rationale was one of constitutional law.*”¹²⁰

Although it is still reasonable to expect that the Supreme Court will soon hold that (1) deportation of lawful permanent residents is punishment deserving of the constitutional protections available in criminal proceedings¹²¹ and (2) the plenary power doctrine does not shield immigration statutes from full constitutional review,¹²² this Article advocates that the executive and legislative branches of government must extend constitutional-type protection, specifically, the type the Supreme Court provided in *Booker*,¹²³ in an area analogous to criminal sentencing—removal of lawful permanent residents due to criminal convictions.¹²⁴ Professor Hiroshi Motomura has poignantly stated the basis for this type of proposal:

In any area of government activity, there is a body of court decisions that uphold or strike down government decisions as consistent or inconsistent with the Constitution. . . . In immigration law, however, it speaks volumes about our attitudes toward noncitizens and their role in American society that courts often will not even listen to claims by noncitizens that the government’s immigration decisions violate the Constitution.

116. Johnson, *supra* note 115, at 235.

117. 424 U.S. 319 (1976).

118. *Plasencia*, 459 U.S. at 34.

119. *Id.* at 32.

120. *Id.* at 33 (emphasis added).

121. In a very compelling concurrence, Third Circuit Judge Sarokin recommended:

I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment. To conclude that it is not punishment for a person to be banished from the country in which he has lived for thirty-six years, to be denied the love and presence of his wife, children and parents, and to be sent to a country to which he has no ties, is to deny reality. Given the choice, I would imagine most persons would choose prison.

Scheidemann v. INS, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring).

122. In light of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *INS v. St. Cyr*, 533 U.S. 289 (2001), some legal scholars predicted that the Court would continue to take steps toward diminishing the effect of the plenary power doctrine; but, three months after those decisions, the terrorist attacks on September 11, 2001 turned the tide in the opposite direction. Aldana, *supra* note 3, at 296 (citing Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365 (2002)). For an interesting and recent proposal on a proportionality of punishment review in light of *Padilla*, see generally Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?*, IMMIGRATION POLICY CTR. (April 2012), http://www.immigrationpolicy.org/sites/default/files/docs/wishnie_-_proportionality_in_immigration_041112.pdf.

123. See *infra* Part V.A for a discussion of *Booker*.

124. Removal of lawful permanent residents due to criminal convictions is “the only large category of lawful immigrant removals.” MOTOMURA, *supra* note 3, at 195.

Even when no court issues a ruling on the constitutionality of a government decision, constitutional ideas crystallize the public values that permeate everyday discussions involving everyday people on topics of public significance. These values also guide legislators and government agency officials when they draft, debate, enact, and administer new laws.¹²⁵

The Supreme Court has already analogized discretionary relief in deportation proceedings to criminal sentencing.¹²⁶ But Congress should not wait for the Court to *constitutionalize* the removal laws as the Court finally did, after almost three decades, with the Federal Sentencing Guidelines.¹²⁷ The executive and legislative branches already consider the potential constitutional implications of pending legislation.¹²⁸ Indeed, Congress may be better suited to respond more rapidly to constitutional developments, such as the Court's decision in *Booker*, because "analogous judicial doctrine lags" perhaps "because the lack of significant litigation hinders doctrinal development."¹²⁹ "General analogical extension" has been used to import principles from one area of law to another.¹³⁰ Hence, if Congress has mirrored criminal law in its enactment of immigration legislation that punishes immigrants, then Congress should likewise recognize that defendants' constitutional right to judicial discretion in criminal sentencing supports the return of judicial discretion to the removal process of lawful permanent residents. The constitutional, historical, theoretical, societal, and humanitarian considerations behind the evolution of criminal sentencing provide comparable authority for similar changes in immigration removal.

IV. THE PARALLEL DEVELOPMENT OF CRIMINAL SENTENCING AND IMMIGRATION REMOVAL

Criminal proceedings are judicial adjudications, whereas immigration proceedings are administrative decisions.¹³¹ Beyond this distinction, a review of the evolution of the sentencing and deportation schemes shows that the two systems have developed on parallel, albeit not contemporaneous, tracks.

125. *Id.* at 12.

126. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 637 n.102 (citing *Jay v. Boyd*, 351 U.S. 345 (1956)).

127. Professor Kevin R. Johnson exhorts that lawyers may need to use the political process, rather than the courts, to effect social change. Johnson, *supra* note 99, at 1074–75.

128. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1463 (2010) (outlining how the Office of Legal Counsel reviews pending legislation for potential constitutional concerns).

129. William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 453–54 (2010).

130. See Kanstroom, *supra* note 10, at 1931–32 (noting importation of the standard of proof from denaturalization to deportation).

131. See Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1523–24 (2010) (explaining that immigration judges are located within the executive branch and have "considerably less independence" than Article III federal judges.).

A. *Expansion of Judicial Discretion*

Before the legislative changes in the 1980s, federal district court judges exercised broad discretion over sentencing decisions.¹³² Similarly, before the legislative changes in the 1990s, immigration judges also exercised broad discretion over deportation decisions of lawful permanent residents that had resided in the United States for seven or more years.¹³³

1. Sentencing Prior to the Sentencing Reform Act of 1984

There is general consensus that before the 1984 sentencing reform the goal of incarceration was rehabilitation.¹³⁴ The rehabilitative model traces its roots to the modern penitentiary in the late 1800s, and gained prominence during the 1900s.¹³⁵ Incarceration was prescribed “as long as necessary to ‘cure’ the offender.”¹³⁶ Beyond rehabilitation, sentencing was approached on an individualized level.¹³⁷ Judicial sentencing permitted wide discretion through a “detailed consideration of differences” in culpability.¹³⁸ The personal characteristics of the offender were properly considered in imposing individual sentences.¹³⁹ The circumstances of the crime were also considered.¹⁴⁰ When sentencing an individual for armed robbery, the judge could contemplate whether the “armed robbery was committed with a machine gun, a revolver, a baseball bat, a toy gun or a finger in the pocket.”¹⁴¹ The reason for the crime was also considered; whether the crime was “motivated by a desperate family financial

132. See Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 239–40 (2008).

133. Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891, 904 (2005).

134. See *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (“Both indeterminate sentencing and parole were based on concepts of the offender’s possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.”); see also BRANHAM & HAMDEN, *supra* note 60, at 9 (identifying that “for much of the twentieth century the pendulum was swinging away from retribution and deterrence and in the direction of rehabilitation as the chief goal of punishment”); NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY* 139–40 (2d ed. 2007) (describing the rehabilitative “‘medical’” model of criminal sentencing that dominated most of the twentieth century); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991) (discussing that rehabilitation was “the predominant justification of punishment”); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 215 (2008) (explaining that “in the nineteenth and most of the twentieth century, American prison and punishment reforms were designed primarily to rehabilitate the prisoner as a protection against further crime”).

135. DEMLEITNER ET AL., *supra* note 134, at 145 (citing David Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 111–29 (Norval Morris & David Rothman eds., 1995)).

136. Vitiello, *supra* note 134, at 1012.

137. *Id.* at 1028.

138. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 557 (1978).

139. *Id.*

140. *Id.*

141. *Id.*

situation or merely a desire for excitement.”¹⁴² These types of considerations were a salient aspect of a judge’s discretion in imparting justice and imposing a sentence that fit all relevant facts of the crime and circumstances of the individual offender—punishment proportional to the crime; no cruel and unusual punishment.¹⁴³ This indeterminate sentencing was guided “more by discretion than by law.”¹⁴⁴

2. Deportation Prior to the 1996 Immigration Reform

Prior to the enactment of the 1996 immigration reform laws, some longtime lawful permanent residents could receive a waiver of deportation under section 212(c) of the Immigration and Nationality Act (INA).¹⁴⁵ Section 212(c) provided that immigration judges had discretion to waive deportation for lawful permanent residents who had a “lawful unrelinquished domicile of seven consecutive years” in the United States.¹⁴⁶ The language of the section specifically allowed for admission of excludable aliens, but it was interpreted by the courts and the BIA to authorize the same discretionary relief from deportation.¹⁴⁷ Section 212(c) did not exclude from its reach lawful permanent residents that had been convicted of an aggravated felony if the term of imprisonment actually served was less than five years.¹⁴⁸ If the lawful permanent resident persuaded an immigration judge to exercise favorable discretion and the waiver was granted, the person remained in the United States as a lawful permanent resident.¹⁴⁹ The factors that an immigration judge could consider in making a decision on whether to deport included the individual’s “crime, prison experience, current living situation, demeanor, attitude, job skills, employment status, family support, friends, social network, and efforts at rehabilitation.”¹⁵⁰ Judges were even able “to postpone [a]

142. *Id.*

143. See Adelman & Deitrich, *supra* note 132, at 246 (explaining that the number of factors affecting a sentencing decision are virtually unlimited when resolving questions of moral culpability needed to issue an appropriate punishment).

144. Indeterminate sentencing gave judges discretion to craft individualized sentences within wide statutory ranges. See DEMLEITNER ET AL., *supra* note 134, at 140, 142–43 (citing MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3–10, 16–19, 39–41, 47, 89–123 (1973)) (arguing that judges could make sentencing decisions based on even unarticulated hunches).

145. Pub. L. No. 414, § 212(c), 66 Stat. 163, 187 (repealed 1996).

146. INA § 212(c), U.S.C. § 1182(c) (repealed 1996).

147. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 295, 326 (2001) (holding that the section 212(c) discretionary waiver remains available to noncitizens whose removal is based on a guilty plea entered before the section was repealed, and noting BIA policy adopting the holding of *Francis v. INS* and extending the availability of section 212(c) discretionary relief to deportation proceedings); *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (holding that section 212(c) must be available in deportation proceedings in the same way as it is available in exclusion proceedings); *Matter of Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (concluding that a waiver under section 212(c) may be granted in a deportation proceeding regardless of whether the alien leaves the country after the deportable act). See also *Judulang v. Holder*, 132 S. Ct. 476, 480–81 (2011) (discussing the history of the application of section 212(c) to deportation).

148. INA § 212(c), U.S.C. § 1182(c) (repealed 1996).

149. *Ong Hing*, *supra* note 133, at 904.

150. *Id.* at 908; see also *Matter of Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) (enumerating relevant factors including “the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if

case to monitor the respondent's behavior before rendering a decision."¹⁵¹ In sum, immigration judges had discretion to make an individualized determination and decide whether ordering deportation—which, in many cases, constituted a noncitizen's severance of ties with the United States and family members—was warranted by the facts of the criminal conviction(s) and the circumstances of the individual, including considerations of the likelihood of the noncitizen's rehabilitation.¹⁵² This individualized decision making was similar to the process for making sentencing decisions prior to the enactment of the mandatory Federal Sentencing Guidelines.

B. Criticisms of Judicial Discretion

Judicial discretion in criminal sentencing and immigration deportation received much scrutiny.¹⁵³ The criticisms of indeterminate sentencing and section 212(c) discretion boiled down to essentially the same censure: too much discretion, which led to disparity.¹⁵⁴

1. Federal Sentencing

Beginning in the 1950s, critics of the pro-rehabilitation criminal sentencing system began to mount an attack.¹⁵⁵ They questioned the soundness of rehabilitation as a penal theory.¹⁵⁶ Additionally, some on the political left argued that the system created discrepancy in sentences, which violated the "ideals of equality and the rule of law."¹⁵⁷ They blamed this alleged discrepancy on the "unguided discretion" granted to judges

so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country").

151. Ong Hing, *supra* note 133, at 908.

152. Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1669 (2009) (citing *In re C-V-T*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998); *Marin*, 16 I. & N. Dec. at 585–86).

153. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–29 (1993) (explaining the major criticisms raised against indeterminate federal sentencing by liberal reformers and Judge Marvin E. Frankel, including lack of success, uncertainty, and disparity); Julie K. Rannik, Comment, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 139–41 (1996) (discussing the major arguments advanced by critics of judicial discretion in deportation, including inconsistency and arbitrary decision making, lack of uniformity, lack of review, and lesser officials exercising great discretionary authority).

154. See, e.g., Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295 (1993) (citing generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973)) (recounting Judge Frankel's main argument that "sentencing disparity and uncertainty were inevitable in the absence of any type of guideline constraints on the sentencing judge"); Rannik, *supra* note 153, at 140 (citing Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 878 (1994)) (summarizing the argument that a judge with too much discretion "acts without constraint and proceeds differently from case to case").

155. Stith & Koh, *supra* note 153, at 227.

156. *Mistretta v. United States*, 488 U.S. 361, 365 (1989) (citing NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 24–43 (1974); FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981)). In *Mistretta*, the Court upheld the constitutionality of the enactment of the Guidelines by the U.S. Sentencing Commission. *Id.* at 412.

157. Stith & Koh, *supra* note 153, at 227.

and parole officials.¹⁵⁸ Critics from the political right also attacked the sentencing scheme.¹⁵⁹ They alleged that sentencing was too lenient.¹⁶⁰ Some academics joined in the criticism of what they labeled “indeterminate sentencing and parole.”¹⁶¹ By the 1970s, even criminal justice scholars were challenging “unpredictable and widely disparate sentences.”¹⁶² Members of Congress argued that the “‘outmoded rehabilitation model’” created variation in sentences for similarly situated offenders, and uncertainty as to the term of imprisonment.¹⁶³ Federal District Court Judge Marvin Frankel delivered the ultimate blow to the rehabilitative sentencing model in his influential book, *Criminal Sentences: Law Without Order*, published in 1973.¹⁶⁴ In his book, Judge Frankel proposed a sentencing scheme based on a mathematical-type computation to arrive at an overall result, “a score.”¹⁶⁵ Frankel (a former Columbia Law School professor) argued that this mathematical approach would render sentencing more certain.¹⁶⁶ He also suggested the establishment of a “Commission on Sentencing.”¹⁶⁷

2. Deportation Adjudication

Prior to 1996, section 212(c) permitted immigration judges to exercise broad discretion over the removal of some longtime lawful permanent residents.¹⁶⁸ Between 1989 and 1995, over 10,000 lawful permanent residents were granted relief under section 212(c).¹⁶⁹ Critics of immigration judges’ discretion in granting section 212(c) waivers from deportation argued that unlimited discretion led to discrepancies in the application of immigration laws.¹⁷⁰ They posited that individual judges made decisions based on their individual interpretations and experiences, and that this produced inconsistent decisions and a lack of uniformity in section 212(c) cases.¹⁷¹ Some argued that too many waivers were granted and, consequently, many criminals were released into society.¹⁷² An examination of the *Congressional Record* reveals that some members of Congress that were directly involved in drafting subsequent removal laws

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 227–28.

162. DEMLEITNER ET AL., *supra* note 134, at 140.

163. *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (quoting S. REP. NO. 98-225 (1983)).

164. DEMLEITNER ET AL., *supra* note 134, at 140.

165. *Id.* at 144, 140.

166. *Id.* at 140, 142–44.

167. *Id.* at 144. Judge Frankel stated in *CRIMINAL SENTENCES: LAW WITHOUT ORDER*: “The uses of a commission, if one is created, will warrant volumes of debate and analysis. For this moment and this writer, the main thing is to plead for an instrumentality, whatever its name or detailed form, to marshal full-time wisdom and power against the ignorance and the barbarities that characterize sentencing for crimes today.” *Id.* at 145 (including excerpt from Frankel’s book in casebook).

168. *INS v. St. Cyr*, 533 U.S. 289, 294–96 (2001).

169. *Id.* at 296 (citing Rannik, *supra* note 153, at 137 n.80).

170. Rannik, *supra* note 153, at 140.

171. *Id.*

172. *E.g., id.* at 142.

“believed that immigration judges were abusing their discretion in granting relief too freely to criminal aliens.”¹⁷³ Some members of Congress argued that “section 212(c) relief was being ‘abused by aliens seeking to delay proceedings.’”¹⁷⁴ But, according to Representative Zoe Lofgren, “the advocates of repeal never established that there were a large number of frivolous cases filed by legal permanent residents seeking section 212(c) relief.”¹⁷⁵ And the statistics did not support the claim of excessive grants of relief.¹⁷⁶

C. *Legislative Responses to Criticisms of Judicial Discretion*

A Republican President and a majority Democratic Congress responded to the attacks on criminal sentencing by enacting legislation that eradicated judicial discretion.¹⁷⁷ A decade later, a Democratic President and a Republican Congress followed that lead and passed legislation that effectively removed judicial discretion from the deportation/removal laws that apply to many lawful permanent residents convicted of crimes.¹⁷⁸

1. Federal Sentencing Guidelines

Judge Frankel’s book proposing mathematical sentencing “provided a provocative blueprint for change.”¹⁷⁹ Policy workshops at Yale Law School examined the issues, including Frankel’s proposal, and culminated in the publication of a legislative proposal for sentencing reform.¹⁸⁰ The suggested changes found fertile ground during the presidency of Ronald Reagan, a time when many argued that blame for social

173. Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief?—The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 4 (2000) (citing 142 CONG. REC. S12,294–95 (daily ed. Oct. 3, 1996) (statements of Sen. Spencer Abraham and Sen. Orrin Hatch)).

174. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 360 (2005) (quoting H.R. REP. NO. 104-469, 122 (1996)).

175. *Id.*

176. *E.g.*, Hunker, *supra* note 173, at 4.

177. Stith & Koh, *supra* note 153, at 265–66. The Republican minority position prevailed in the majority Democratic House Judiciary Committee when Republicans outmaneuvered Democrats through political and procedural tactics. *Id.* at 264.

In a masterful parliamentary maneuver by House supporters of the Senate’s Comprehensive Crime Control bill, that measure (including Senator Kennedy’s Sentencing Reform Act) was attached to an urgent funding bill on the House floor. Indeed, passage of the Sentencing Reform Act in 1984 may be attributed not to the inexorable attraction of the radical sentencing changes it contained but to the inexorable force exerted by two other types of legislation—anticrime bills and continuing appropriations resolutions.

Id. (footnote omitted).

178. See KANSTROOM, *supra* note 88, at 229 (crediting the passage of the 1996 Antiterrorism and Effective Death Penalty Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act with taking deportation law “outside the mainstream of the U.S. rule of law”).

179. DEMLEITNER ET AL., *supra* note 134, at 146.

180. *Id.* The proposal was included in a book. PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977).

problems, such as crime, should shift from society to the individual.¹⁸¹ It was in this new political climate and social mood that the Reagan Administration and Congress joined forces to create the Federal Sentencing Guidelines.¹⁸² This was accomplished through the enactment of the Sentencing Reform Act of 1984 (the “Sentencing Reform Act”),¹⁸³ which created the United States Sentencing Commission (the “Commission”).¹⁸⁴ Senator Edward M. Kennedy was the Act’s principal sponsor.¹⁸⁵ The Sentencing Reform Act focused on the retributive, educational, deterrent, and incapacitative goals of punishment.¹⁸⁶ The Commission drafted the Federal Sentencing Guidelines (the “Sentencing Guidelines” or “Guidelines”),¹⁸⁷ which were mandatory and terminated the discretion of judges to order sentences based on the seriousness of the particular crimes and any aggravating or mitigating factors.¹⁸⁸ The Commission enacted the Guidelines to promote uniformity in sentencing—“similar offenders who commit similar offenses receive similar sentences.”¹⁸⁹ Offenders were lumped in the “similar offenders” with “similar offenses” categories, however, without consideration of their individual characteristics or their particular offenses.¹⁹⁰ As applied, the Sentencing Guidelines eradicated individualized sentencing and parole, and ended the purely rehabilitative model of incarceration.¹⁹¹

181. Erik S. Siebert, Comment, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 882 (2010).

182. *Id.* at 882–83.

183. Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended at 28 U.S.C. §§ 991–998 (2006)). The Sentencing Reform Act was part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.). Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 694 n.6 (2005).

184. 28 U.S.C. § 991; *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011).

185. Adelman & Deitrich, *supra* note 132, at 240. Senator Kennedy was highly influenced by the ideas of Judge Marvin A. Frankel of the Southern District of New York, a former administrative law professor. *Id.* To support the Act, Kennedy joined forces with Senators Joseph Biden, Strom Thurmond, and Orrin Hatch. Feinberg, *supra* note 154, at 292.

186. *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (citing 18 U.S.C. § 3553(a)(2) (1984)).

187. U.S. SENTENCING GUIDELINES MANUAL (1987). The Guidelines did not become effective until November 1987. DEMLEITNER ET AL., *supra* note 134, at 160.

188. Klein, *supra* note 183, at 702. The official description and purpose of the U.S. Sentencing Commission are defined as follows:

The U.S. Sentencing Commission, an independent agency in the Judicial Branch of the federal government, was organized in late 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines, which went into effect November 1, 1987, structure the courts’ sentencing discretion to ensure that similar offenders who commit similar offenses receive similar sentences.

News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Submits New Recommendations on Cocaine Sentencing (Apr. 29, 1997), http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/19970429_Press_Release.htm.

189. News Release, U.S. Sentencing Comm’n, *supra* note 188.

190. See Stith & Koh, *supra* note 153, at 251 (indicating that Commission mandates had the effect of “discouraging individualization of sentences”).

191. See DEMLEITNER ET AL., *supra* note 134, at 145–46 (stating that Frankel’s proposed determinate sentencing model resulted from his disbelief of the “effectiveness and appropriateness of a purely rehabilitative model”); Siebert, *supra* note 181, at 869–70 (noting that support for discretionary sentencing was

2. The 1996 Immigration Acts (AEDPA and IIRIRA)

During the 1990s, the United States was dealing with fears of the growing Hispanic immigrant population.¹⁹² The April 19, 1995 Oklahoma City bombing fueled the anti-immigrant rhetoric, even though the terrorists in that attack were U.S. citizens.¹⁹³ Soon after the bombing, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁹⁴ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁹⁵ (collectively, the “1996 Immigration Acts” or the “1996 Acts”). The 1996 Immigration Acts included removal (deportation) provisions that adversely impacted the lawful permanent resident population, and ended judicial discretion over their removal.¹⁹⁶ Section 212(c) was repealed by IIRIRA.¹⁹⁷ In its place, Congress enacted the Cancellation of Removal statute,¹⁹⁸ which provides limited relief from removal, but does not allow relief for noncitizens, including lawful permanent residents, that have been convicted of an “aggravated felony.”¹⁹⁹ The “aggravated felony” categories were expanded to include relatively minor crimes.²⁰⁰ President Bill Clinton expressed concern about the “ill-advised” changes to the immigration laws, but he nevertheless signed them into law.²⁰¹

eroded by research questioning the success of the rehabilitative model); Vitiello, *supra* note 134, at 1012 (noting that “almost everyone involved in the criminal justice system has rejected the rehabilitative ideal”).

192. See generally Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111 (1996) (responding, in part, to the nativist and anti-Hispanic claims made by Peter Brimelow in his book ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER (1995)).

193. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1851 (2007); see also Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in IMMIGRATION STORIES 279, 282 (David A. Martin & Peter H. Schuck eds., 2005) (explaining how early suspicions that noncitizen terrorists carried out the Oklahoma City bombing prompted the AEDPA); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833, 877 (1997) (observing that history indicates that American society often blames foreigners for domestic problems).

194. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

195. Pub. L. No. 104-208, div. C., 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

196. See generally Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893 (2007).

197. Pub. L. No. 104-208, div. C, § 304(b), 110 Stat. 3009-546, 3009-597. Section 212(c) is still applicable, however, to aliens whose removal is predicated on a guilty plea entered before its repeal. *Judulang v. Holder*, 132 S. Ct. 476, 481 (2011) (citing *INS v. St. Cyr*, 533 U.S. 289, 326 (2001)).

198. Pub. L. No. 104-208, div. C, § 304(b), 110 Stat. 3009-546, 3009-594; *Holder v. Martinez Gutierrez*, Nos. 10-1542, 10-1543, slip op. at 2 (2012) (citing the replacement of section 212(c) relief with cancellation of removal).

199. INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006).

200. For example, in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), a lawful permanent resident who had entered the United States at the age of seven was deemed an aggravated felon for participating in a robbery of \$714 from a coffee shop. *Id.* at 54. He committed the crime at the age of twenty-one, fourteen years after entering the United States. *Id.* See also *infra* notes 203 and 221–22 and accompanying text for descriptions of state misdemeanor convictions that qualify as “aggravated felonies.”

201. Margaret H. Taylor, *Demore v. King: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 352 (David A. Martin & Peter H. Schuck eds., 2005) (quoting *President Signs Terrorism Bill Into Law*, 73 INTERPRETER RELEASES 568 (1996)).

By the time it was confirmed that the Oklahoma City bombing was perpetrated by U.S. citizens, no one dared to point out the elephant in the room—that the underlying reason for the broad and sweeping legislative changes had proved non-existent.²⁰² The attacks against legal and illegal immigration resulted in harsher removal laws similar to, and perhaps even more punitive than, the harsher sentences under the mandatory Federal Sentencing Guidelines.²⁰³

D. Restriction of Judicial Discretion

After sentencing and deportation reform, sentencing and removal became mechanical tasks.²⁰⁴ Judges were relegated to the role of supervising categories without individual decision making.²⁰⁵

1. Sentencing Under Mandatory Federal Sentencing Guidelines

The Federal Sentencing Guidelines made sentences determinate, but allowed judges limited discretion to depart from the applicable Guideline range if the judge found aggravating or mitigating factors that the Commission had not adequately considered when formulating the Guidelines, and the judge announced his or her

202. Soon after passage of the AEDPA, during discussions of H.R. 2022, an immigration reform bill, Representative Chris Smith of New Jersey protested, “Mr. Speaker, the anti-terrorism bill passed by Congress in April contained several provisions that had nothing whatever to do with terrorism.” 142 CONG. REC. H11,066 (daily ed. Sept. 25, 1996) (statement of Rep. Chris Smith); *see also* Neuman, *supra* note 111, at 1975 (explaining that the AEDPA, “despite its title[,] included several immigration provisions that had no connection to either terrorism or the death penalty”). Fear of terrorism continues to be a theme with some advocates of immigration control. One proponent of Arizona’s S.B. 1070 claims to have been influenced by the terrorist attacks of September 11, 2001. Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, N.Y. TIMES, July 21, 2009, at A10.

203. Judge Sarokin of the U.S. Court of Appeals for the Third Circuit recognized that when given the choice between deportation and prison, most people would choose prison. *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring). The case of Carlos Pacheco supports Judge Sarokin’s assessment. *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). Pacheco, a lawful permanent resident who had entered the United States at the age of six, was ordered deported at the age of twenty-seven as an “aggravated felon” for state misdemeanor convictions. *Id.* at 149–50. His criminal record revealed the following convictions: (1) a conviction of larceny under \$500, for a theft of a small video game valued at approximately \$10; (2) a shoplifting conviction, for a theft of four packs of Newport’s cigarettes and two packs of Tylenol Cold Medicine, valued at \$83.50; and (3) a conviction for simple domestic assault. *Id.* at 150. As part of his removal, he received Form I-294 warning him that he was permanently barred from the United States and that, if he re-entered, he could be convicted of a felony and could be imprisoned for a period of two to twenty years and/or fined up to \$250,000. *Id.* Pacheco risked prison again and was caught attempting to re-enter the United States; he pleaded guilty to the charge of aggravated re-entry following deportation, was sentenced to prison, and will be deported once again after serving his forty-six month federal sentence. *Id.* at 149–50, 156.

204. *See* Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 267 (2009) (observing that after the creation of the Sentencing Commission, “judges were relegated to the role of ‘expert clerks’”); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1526 (1997) (“Congress has structured the removal process in a way that renders the deportation decision a rigid, mechanical process that leaves no discretion to the factfinder.”).

205. Gertner, *supra* note 204, at 267; Medina, *supra* note 204, at 1526.

reasons for deviating from the prescribed range.²⁰⁶ In 2003, during the administration of George W. Bush, the Feeney Amendment of the PROTECT Act of 2003²⁰⁷ sought to curtail and monitor downward departures.²⁰⁸ In reality, the limited discretion of granting downward departures was “a mechanism which was frowned upon and often reversed on appeal.”²⁰⁹

U.S. District Court Judge Jack B. Weinstein was an early critic of the loss of judicial discretion.²¹⁰ Judge Weinstein and other jurists complained that the mandatory nature of the Guidelines transformed sentencing into a mathematical equation that failed to account for the human factor, and basically turned judges into robots or clerks.²¹¹ The Sentencing Guidelines defined “similar offenders” in terms of generic descriptions of the criminal offenses of which they were convicted, without consideration of the individual facts, characteristics, and circumstances of the offenders and their crimes.²¹² More specifically, the Sentencing Guidelines prohibited judges from considering the following factors in deciding on the appropriate term and length of imprisonment: education, vocational skills, employment record, family ties and responsibilities, community ties, military service, civic service, charitable or public service, employment-related contributions, or prior good works.²¹³ These factors were found to have no relevance under a nonrehabilitative sentencing model.²¹⁴ Ultimately, one of the major flaws of the Guidelines was that judges were denied discretion to

206. *Mistretta v. United States*, 488 U.S. 361, 367–68 (1989).

207. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401, 117 Stat. 650 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

208. See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1388–89 (2008) (stating that the Feeney Amendment was about “limiting judges’ ability to depart from Guidelines calculations that reflected a high degree of prosecutorial input”); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 229–36 (2004) (stating that the Feeney Amendment “deterred” district court judges from departing downward at sentencing).

209. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial “Leniency,” the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 523 (2009).

210. See Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 30 (1987) (arguing that the complexities involved in sentencing cannot be reduced to “purely mathematical formulas”).

211. See, e.g., Weinstein, *supra* note 134, at 227–30 (criticizing the mechanical nature of the Sentencing Guidelines and stating that “[t]o pass judgment on another human being requires the engagement of the entire person’s legal acumen, reason and moral faculties”); Gertner, *supra* note 204, at 267 (stating that the Guidelines “failed to live up to the Commission’s mandate to consider all the purposes of sentencing and our ever-increasing understanding of human nature”). Soon after the Sentencing Reform Act was enacted, over two hundred federal judges ruled that the Act was unconstitutional, but the Supreme Court ruled otherwise in *Mistretta*, 488 U.S. 361. DEMLEITNER ET AL., *supra* note 134, at 162.

212. See Gertner, *supra* note 204, at 274 (arguing such “[h]arsh punishment that does not take into account individual facts and circumstances promotes disrespect for the law”).

213. Stith & Koh, *supra* note 153, at 249–51.

214. Feinberg, *supra* note 154, at 301.

impart a sentence in proportion to the specific crime and offender.²¹⁵ In effect, the Sentencing Guidelines eradicated individualized sentences.²¹⁶

2. Removal After the 1996 Immigration Acts

After the 1996 Acts, the removal process was structured to render “the deportation decision a rigid, mechanical process that leaves no discretion to the factfinder.”²¹⁷ Like sentencing under the mandatory Guidelines, the removal decision is categorically determined by the label of the crime of which the person was convicted and the sentence imposed.²¹⁸ Section 237 of the INA includes several categories of violations that subject lawful permanent residents to automatic removal; the three major categories are: crimes of moral turpitude, drug offenses, and aggravated felonies.²¹⁹ Under the INA and court interpretations, some misdemeanor offenses may qualify as crimes of moral turpitude,²²⁰ drug offenses,²²¹ and aggravated felonies²²² that subject lawful permanent residents to automatic removal.²²³ In addition to criminal convictions, the controlled substances category makes a lawful permanent resident deportable if he or she is or has been a drug abuser or addict “at any time after admission”—*no criminal conviction is necessary*.²²⁴ Lawful permanent residents that are not convicted of an aggravated felony may now seek “cancellation of removal,”²²⁵ a more limited discretionary relief than the former 212(c) waiver, if they otherwise meet

215. See Klein, *supra* note 183, at 702. In an internationally publicized federal case in 2000, Southern District of Florida Judge Wilkie D. Ferguson, Jr. noted the absurdity of a Guideline sentence that could subject a person convicted for possession of \$400 worth of crack cocaine to a life sentence, but prescribed a four years and eight months sentence for the gang leader of an Irish Republican Army gun smuggling operation. Malcolm Brabant, *US Jails IRA Gun-Runners*, BBC NEWS (Sept. 28, 2000), <http://news.bbc.co.uk/2/hi/americas/945705.stm>. One conspirator, the Florida arms dealer, was sentenced to only one day in jail because he cooperated with the government. *Id.*

216. Stith & Koh, *supra* note 153, at 250–51.

217. Medina, *supra* note 204, at 1525–26.

218. Morawetz, *supra* note 93, at 1955–62.

219. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006); *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010).

220. See, e.g., *Mehboob v. United States*, 549 F.3d 272, 277 (3d Cir. 2008) (finding that misdemeanor indecent assault is a crime of moral turpitude, even if the statute does not contain a mens rea element as to age of the victim).

221. See, e.g., *Garcia v. Holder*, 638 F.3d 511, 515, 518 (6th Cir. 2011) (misdemeanor state offense for attempted possession with intent to deliver less than five kilograms of marijuana is a drug offense and an aggravated felony).

222. See, e.g., *United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001) (misdemeanor shoplifting is an aggravated felony); *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (misdemeanor theft is an aggravated felony); *Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000) (misdemeanor sexual battery is an aggravated felony); *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999) (misdemeanor petit larceny is an aggravated felony).

223. *Padilla*, 130 S. Ct. at 1478.

224. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

225. In 2010, immigration judges granted cancellation of removal to 3,716 lawful permanent residents. EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK, at R3 tbl.15 (2011). This number is 2.2% of the total removals for criminal convictions. See *infra* note 241 and accompanying table for the total yearly removals during the period of 1981 to 2010.

the requirements of the Cancellation of Removal statute.²²⁶ The 1996 repeal of 212(c) discretionary relief and the expansion of the aggravated felony categories now make lawful permanent residents automatically removable for broad categories of violations.²²⁷ As the Supreme Court made clear in *Padilla*:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.²²⁸

There are twenty-one subcategories of aggravated felonies in the INA.²²⁹ The categories range from murder, rape, or sexual abuse of a minor, to offenses relating to commercial bribery, counterfeiting, forgery, or theft for which the term of imprisonment is at least a year.²³⁰ Because the application of the 1996 Immigration Acts’ removal provisions were made retroactive,²³¹ many longtime lawful permanent residents became removable even if they had not been convicted of “aggravated” crimes or “felonies,” or had served no time in jail prior to enactment of the legislative changes.²³² Furthermore, the aggravated felony classification makes lawful permanent residents convicted of such crimes ineligible for other forms of relief, including:

(1) *discretionary waiver of deportability* (“No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony”);²³³

(2) *asylum* (Asylum shall not be granted if “the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. . . . For purposes of [this

226. INA § 240A(a), 8 U.S.C. § 1229b(a). The person must (1) have been a lawful permanent resident for no less than five years; (2) have resided continuously in the United States for seven years (after admission in any status); and (3) not have been convicted of an aggravated felony. *Id.*

227. See Jacqueline P. Ulin, *A Common Sense Reconstruction of the INA’s Crime-Related Removal System: Eliminating the Caveats from the Statue of Liberty’s Welcoming Words*, 78 WASH. U. L.Q. 1549, 1564 (2000) (noting that “cancellation of removal is generally unattainable for most aliens who have committed crimes”).

228. *Padilla*, 130 S. Ct. at 1478 (citation omitted).

229. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

230. INA § 101(a)(43)(A)–(U), 8 U.S.C. § 1101(a)(43)(A)–(U).

231. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

232. Chacón, *supra* note 193, at 1844–48; Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 394 (2007); see also Sara A. Rodriguez, Note, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 491 (2006) (explaining that “for immigration purposes a ‘conviction’ includes a sentence of deferred adjudication and that a ‘sentence of imprisonment’ is deemed to include a term of probation” (citing INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B); *Moosa v. INS*, 171 F.3d 994, 1005 (5th Cir. 1999)).

233. INA § 212(h)(2), 8 U.S.C. § 1182(h)(2).

section], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.”);²³⁴

(3) *cancellation of removal* (“The Attorney General may cancel removal . . . if the alien . . . has not been convicted of any aggravated felony.”);²³⁵

(4) *voluntary departure* (“The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense . . . if the alien is not deportable under [the aggravated felony section].”);²³⁶

(5) *withholding of removal* (Withholding of removal is not available if an “alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;” a “particularly serious crime” is defined to include an aggravated felony for which an aggregate term of imprisonment of at least five years has been imposed, or an aggravated felony that the Attorney General determines is a “particularly serious crime,” regardless of the length of the sentence imposed.);²³⁷

(6) *re-admission to the United States* (Any alien who has been ordered removed or departed while an order of removal was outstanding and who again seeks admission “at any time in the case of an alien convicted of an aggravated felony [] is inadmissible.”);²³⁸ *and*

(7) *U.S. citizenship* (“No person . . . shall be naturalized unless such applicant . . . during all the period referred to in this subsection has been and still is a person of good moral character” “No person shall be regarded as . . . a person of good moral character who . . . is, or was . . . one who at any time has been convicted of an aggravated felony.”).²³⁹

The expanded aggravated felony categories and the foreclosure of any type of relief make removal automatic for many longtime lawful permanent residents.²⁴⁰

234. INA § 208(b)(2)(A)(ii), (B)(i), 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

235. INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).

236. INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1).

237. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

238. INA § 212(a)(9)(A)(i)–(ii), 8 U.S.C. § 1182(a)(9)(A)(i)–(ii). This section provides an exception from the permanent bar if the noncitizen has a basis to apply for admission and the Attorney General consents to the reapplication for admission. INA § 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). But this permission is rarely granted. See Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 67 & n.123 (2007) (recognizing that only a handful of decisions are reported, primarily consisting of appellate decisions sustaining the denials of the waivers).

239. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).

240. Section 212(c) remains available for lawful permanent residents “whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.” *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). In that sense, Section 212(c) provides somewhat of an afterlife for lawful permanent residents with particularly old criminal convictions. See *Judulang v. Holder*, 132 S. Ct. 476, 481 (2011). And the Court’s most recent immigration law opinion, decided on May 21, 2012, shows that section 212(c) keeps coming back to life even when it is not directly applicable. *Holder v. Martinez Gutierrez*, Nos. 10-1542, 10-1543, slip op. at 7–12 (2012) (distinguishing section 212(c) and cancellation of removal and deciding that a parent’s years of residence or immigration status cannot be imputed to a child in determining the residence requirements of the cancellation of removal statute for lawful permanent residents).

The yearly removals as a result of criminal convictions for the period of 1981 to 2010 are presented below in Table 1. This compilation was prepared based on data collected and reported by the U.S. Department of Homeland Security (DHS).²⁴¹ The data is continuously updated and corrections are reported in subsequent years; therefore, several *Yearbooks of Immigration Statistics* were reviewed to collect the most up-to-date data (as of the end of 2010). Due to the continuous updates, some of the most recent data, including some of the numbers reported below, may change in future years. As the figures demonstrate, after 1996, removals for criminal convictions skyrocketed and have increased consistently ever since. In one year alone, immediately after the 1996 Acts, from 1996 to 1997, there was a 40% increase. And from 1996 to 2010 there was a 343.3% increase.

241. Table 1 was created by using yearbooks of immigration statistics created by the U.S. Department of Homeland Security, and can be found at <http://www.dhs.gov/files/statistics/publications/yearbooks.shtm> and <http://www.dhs.gov/files/statistics/publications/archive.shtm>.

Table 1
Total Yearly Removals (2010–1981)
Persons Removed For Criminal Convictions

Yearbook	Year	Deportations/Removals
2010 – Table 38		
	2010	168,532
	2009	131,840
	2008	105,266
	2007	102,394
	2006	98,490
	2005	92,221
	2004	92,380
	2003	83,731
	2002	73,429
	2001	73,298
2009 – Table 38		
	2000	72,061
2008 – Table 37d		
	1999	71,188
2007 – Table 37		
	1998	62,108
2004 – Table 43		
	1997	53,214
	1996	38,015
	1995	33,842
	1994	32,510
	1993	29,457
1996 – Table 66		
	1992	23,073
	1991	16,014
	1990	10,914
	1989	7,370
	1988	5,782
	1987	4,385
	1986	1,873
	1985	1,702
	1984	1,061
	1983	956
	1982	477
	1981	364

The 1996 legislative changes eliminated judicial discretion from removal adjudications of many lawful permanent residents convicted of crimes.²⁴² If the conviction fits one of the broad crime categories in the aggravated felonies section, the judge has no discretion to hear the circumstances of the underlying crime or any other humanitarian or mitigating factors—removal must be ordered.²⁴³ This categorical approach, like the pre-*Booker* mandatory Guidelines sentencing framework, deprives lawful permanent residents of the human consideration, by a human being, that such a life-altering decision—removal from the United States—merits.²⁴⁴ Consequently, in the case of many noncitizens placed in removal proceedings as a result of criminal convictions, the discretion of immigration judges over their removal is as limited as the discretion of federal judges under the mandatory Federal Sentencing Guidelines.

V. THE SUPREME COURT OF THE UNITED STATES AND JUDICIAL DISCRETION

The Supreme Court, as the highest court of the land, makes the final determination on the constitutionality of acts of other branches of government.²⁴⁵ In the area of sentencing, the Court has finally excised the unconstitutional portions of the Federal Sentencing Guidelines and returned broad discretion to judges.²⁴⁶ As discussed in Part III of this Article, however, because deportation has been held not to be punishment deserving of constitutional protection, and because the Court defers to congressional power over the admission and deportation of noncitizens, the Court has refused to engage in a constitutional analysis of the removal laws.²⁴⁷ But recent jurisprudence may provide an avenue for review of the constitutionality of removal laws that are tied to criminal convictions.

A. *United States v. Booker*

Twenty-three years after the enactment of the Sentencing Reform Act, the Supreme Court of the United States, in *United States v. Booker*,²⁴⁸ finally rendered the Federal Sentencing Guidelines advisory rather than mandatory, and ordered appellate review of all sentences for “reasonableness.”²⁴⁹ The Court held that the Guidelines are subject to the Sixth Amendment’s jury trial requirement, under the principle of

242. See generally Taylor, *supra* note 201, at 343–76.

243. See, e.g., INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (classifying as deportable any alien convicted of an aggravated felony); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (limiting cancellation of removal to those never convicted of an aggravated felony); INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (denying the application of cancellation of removal in the case of an alien convicted of certain offenses including those classified as aggravated felonies).

244. Cf. Weinstein, *supra* note 134, at 230–31 (explaining that justice, mercy, and common sense should play a role in a judge’s decision making). In the end, the imposition of punishment must entail more than mere mechanics. *Id.*

245. *Marbury v. Madison*, 5 U.S. 137 (1803).

246. See *United States v. Booker*, 542 U.S. 220 (2005).

247. See, e.g., *United States v. Graham*, 169 F.3d 787, 792 (3d Cir. 1999), *cert. denied*, 528 U.S. 845 (1999).

248. 543 U.S. 220 (2005).

249. *Booker*, 543 U.S. at 222–25.

Apprendi v. New Jersey,²⁵⁰ in that the Government must prove every element of an offense, including any fact (other than a prior conviction) that increases the Guideline range, beyond a reasonable doubt.²⁵¹ To remedy the constitutional problem, the Court excised the section that prescribed the mandatory nature of the Guidelines and the related appellate review section.²⁵² In its analysis, the Court emphasized that “[t]he availability of a departure in specified circumstances d[id] not avoid the constitutional issue” because “departures are not available in every case, and in fact are unavailable in . . . most cases, as a matter of law, [because] the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible.”²⁵³

Once the Supreme Court rendered the Guidelines advisory, the Court returned wide judicial discretion to federal judges.²⁵⁴ The holding of *Booker* allows judges to exercise discretion by permitting them to regard Guideline ranges as advisory and authorizing them to consider individual characteristics of the offense and defendant in exercising discretion, including the factors outlined in 18 U.S.C. § 3553(a):²⁵⁵

The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.²⁵⁶

In exercising their discretion to choose an appropriate sentence, federal judges are free to receive any information “concerning the background, character, and conduct of a person convicted of an offense.”²⁵⁷ In its analysis, the *Booker* Court noted that the goal of the Sentencing Guidelines—diminishing sentencing disparity—“depends for its success upon judicial efforts to determine and to base punishment upon, the *real conduct* that underlies the crime of conviction.”²⁵⁸ The Court recognized that a single crime category could encompass a range of conduct.²⁵⁹ To support this proposition, the

250. 530 U.S. 466 (2000).

251. *Booker*, 543 U.S. at 230–45.

252. *Id.* at 245, 258–61.

253. *Id.* at 234.

254. *Id.* at 245–46.

255. *Id.*

256. 18 U.S.C. § 3553(a)(1)–(2) (2006) (emphasis added).

257. *Id.* § 3661. This statute remains the same as it did pre-*Booker*. See *Pepper v. United States*, 131 S. Ct. 1229, 1233 (2011).

258. *Booker*, 543 U.S. at 250–51.

259. *Id.* at 251.

Court cited several examples, including the crime of robbery, a crime that “can be committed in a host of different ways.”²⁶⁰ Therefore, the Court determined that sentencing should entail consideration of the actual conduct of the particular defendant in committing the crime, which means that the sentencing judge cannot be limited to the particular statute under which the defendant is charged and convicted, and the corresponding Guideline range.²⁶¹ The Court’s holding in *Booker* thus returned individualized sentences and human judgment to criminal sentencing.²⁶²

B. *Fong Yue Ting v. United States*

Immigration judges remain unable to exercise meaningful and informed human judgment under the current removal adjudication system because they remain bound by rigid removal categories that, in the case of aggravated felonies, foreclose all discretion.²⁶³ This is similar to the pre-*Booker* mandatory sentencing, which limited discretion categorically.²⁶⁴

*Fong Yue Ting v. United States*²⁶⁵ is the seminal case that courts credit as firmly establishing that deportation is not punishment.²⁶⁶ *Fong Yue Ting* involved three writ of habeas corpus petitions filed by Chinese laborers challenging the constitutionality of the White witness requirement under the Chinese Deportation Act of May 6, 1892.²⁶⁷ Under the Act, the laborers, who had not procured a certificate of residence required by the Act, had to provide a White²⁶⁸ witness to corroborate that they were in fact

260. *Id.* at 250–53. Interestingly, the Court used the same analysis that had been advocated in a law review article twenty-seven years earlier. See Alschuler, *supra* note 138, at 557 (using an example of different factual circumstances that could amount to robbery).

261. *Booker*, 543 U.S. at 250–53.

262. After *Booker*, “some judges are availing themselves of the opportunity to reject what they consider draconian drug sentences for low-level ‘mules,’ as the Guidelines base the penalty upon the actual quantity of the drug possessed or that is the subject of the conspiracy, regardless of whether a particular defendant knew the quantity involved or was aware of the full scope of the conspiracy.” Klein, *supra* note 183, at 728.

263. Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 60–61 (2007).

264. See *supra* Part IV.D.1. for a discussion of the pre-*Booker* categorical sentencing scheme.

265. 149 U.S. 698 (1893).

266. *E.g.*, Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Wong Wing v. United States, 163 U.S. 228, 231 (1896). But some federal judges have recognized that deportation of lawful permanent residents is punishment. See, *e.g.*, Jordan v. DeGeorge, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (recognizing that deportation of lawful residents is a “savage penalty”); United States v. Ju Toy, 198 U.S. 253, 273 (1905) (Brewer, J., dissenting) (recognizing that “banishment is a punishment, and of the severest sort”); *Fong Yue Ting*, 149 U.S. at 732–63 (Brewer, J., dissenting) (Field, J., dissenting) (Fuller, J., dissenting) (recognizing that the deportation of lawful permanent residents is tantamount to punishment); Scheidemann v. INS, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) (recognizing that “deportation of aliens for the commission of crimes is clearly punishment”); Aguilera-Enriquez v. INS, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting) (recognizing that “[n]o matter the classification, deportation is punishment, pure and simple”).

267. *Fong Yue Ting*, 149 U.S. at 699–703.

268. White and Black are capitalized in this Article in the same way as Latino and African American. This change in general capitalization rules has also been implemented by other authors. See, *e.g.*, Laura Ho et al., *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 384 n.5 (1996).

residents of the United States at the time of passage of the Act.²⁶⁹ The Court, relying on the plenary power doctrine espoused in *The Chinese Exclusion Case*,²⁷⁰ held that the right of a nation “to expel or deport” noncitizens “rests upon the same grounds [of plenary power], and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”²⁷¹ The Court thus dismissed the petitions for writ of habeas corpus.²⁷² To this day, *Fong Yue Ting* continues to restrain the Court’s constitutional review of deportation statutes.²⁷³

C. *The Trilogy: Fong Yue Ting, Padilla, and Booker*

In its analysis in *Fong Yue Ting*, the Court distinguished three methods of exclusion and found that “extradition,” the surrender of someone to another country to be tried for a crime, and “transportation,” punishment of someone convicted of a crime, were different from “deportation,” which the Court found to be

removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.²⁷⁴

The specific language of *Fong Yue Ting* that prevents constitutional protections like those provided in criminal proceedings is the following:

The [deportation] proceeding before a United States judge . . . is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. *The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.* It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. *He has not, therefore, been deprived of life, liberty or property, without due process of law, and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.*²⁷⁵

269. *Id.* at 703–04.

270. *Chae Chan Ping v. United States*, 130 U.S. 581, 581 (1889).

271. *Fong Yue Ting*, 149 U.S. at 707.

272. *Id.* at 732.

273. *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (acknowledging that under the holding of *Fong Yue Ting* deportation is a harsh penalty, “but it is not, in a strict sense, a criminal sanction”); *Negusie v. Holder*, 555 U.S. 511, 526 (2009) (recognizing that *Fong Yue Ting* has long been understood to hold that deportation is not a punishment for crime).

274. *Fong Yue Ting*, 149 U.S. at 709. The last part of the sentence raises an interesting point—what if the noncitizen faces imprisonment upon return to his country of origin? This is the case for Haitian deportees. *See infra* note 480 and accompanying text for a discussion of the fate of Haitian deportees.

275. *Id.* at 730 (emphasis added).

But the facts of *Fong Yue Ting* are very different from the facts of the current removals of lawful permanent residents that are deported as a result of criminal convictions. The Chinese laborers in *Fong Yue Ting* had not been convicted of any crime; they simply had failed to procure the required residency certificate.²⁷⁶ Deportation for post-entry criminal convictions did not exist at the time of *Fong Yue Ting*.²⁷⁷ In particular, the Court had not yet entertained what the Supreme Court in *Padilla* recently considered: that deportation cannot be easily divided from the criminal sentence,²⁷⁸ that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”²⁷⁹ The Court in *Fong Yue Ting* asserted that it could not interfere with the political departments over the power “to exclude or to expel aliens, . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.”²⁸⁰

Today, pursuant to *Fong Yue Ting* and *Padilla*, it may be possible for the Supreme Court to review to a case wherein a lawful permanent resident argues that permanent banishment from the United States, as a result of a criminal conviction, constitutes cruel and unusual punishment in violation of the Eighth Amendment.²⁸¹ Implicit in that determination, the Court would have to re-examine whether deportation under the facts of today’s removals is punishment deserving of the constitutional protections denied in *Fong Yue Ting*. Moreover, the Court in *Booker* recognized that “tradition . . . does not provide a sound guide to enforcement of [constitutional] guarantee[s] . . . in today’s world.”²⁸² This was of particular importance in *Booker* when it “became clear [to the Court] that sentencing was no longer taking place in the tradition[al way].”²⁸³ When “faced with the issue of preserving an ancient [constitutional] guarantee under a new set of circumstances,” the Court decided to return judicial discretion to sentencing.²⁸⁴ *Booker* could be the third case in the trilogy that gets the Court to reconsider its holding

276. *Id.* at 731–32.

277. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 515 (2009) (explaining that post-entry criminal convictions as grounds for deportation began in 1917).

278. *Padilla*, 130 S. Ct. at 1478.

279. *Id.* at 1480 (footnote omitted).

280. *Fong Yue Ting*, 149 U.S. at 713 (emphasis added).

281. See Kanstroom, *supra* note 10, at 1930–31 (explaining that Justice Souter’s approach to substantive due process may lend support for a theory against extremely disproportionate deportation of longtime lawful permanent residents for minor offenses). As this Article was getting ready for publication, the Court issued an important immigration law decision striking down the BIA’s “comparable-grounds” rule as arbitrary and capricious. *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011). The Court explained that the BIA must employ approaches that support the goals of the immigration laws and immigration system when it comes to deportable aliens—deciding on “an alien’s fitness to remain in the country.” *Id.* at 485. And, as it applies to an important premise in this Article, the Court recognized the higher stakes at issue in a case that involves the deportation of a longtime lawful permanent resident. *Id.* at 487 (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). Mr. Judulang was admitted to the United States as a lawful permanent resident when he was eight years old and was convicted of a crime fourteen years after his admission. *Id.* at 482–83.

282. *United States v. Booker*, 543 U.S. 220, 235–36 (2005) (emphasis added).

283. *Id.* at 237 (emphasis added).

284. *Id.* (emphasis added).

in light of today's removal realities.²⁸⁵ Notwithstanding existing jurisprudence, the "Supreme Court, of course, may revisit its own precedents. If it could not, *Plessy v. Ferguson*, would still be good law."²⁸⁶

But even if the Supreme Court of the United States continues to hold, in the foreseeable future, that it is rendered powerless by the plenary power doctrine,²⁸⁷ and refuses to decide that Congress's failure to grant immigration judges meaningful discretion over the removal of lawful permanent residents violates constitutional principles, it may still, as the branch of government least susceptible to public attack,²⁸⁸ be the institution best suited to advise Congress about the injustices of the current removal laws.²⁸⁹ For example, Justice Ginsburg exercised this prerogative in her determined dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,²⁹⁰ urging Congress to

285. Professor Maureen A. Sweeney argues that the theoretical characterization of removal [as a "civil sanction and a collateral, rather than direct, consequence of a conviction"] developed many decades ago in the context of the very different immigration law that existed then. It no longer corresponds in any meaningful way to the realities of immigration law and enforcement, which have changed radically in the last two decades. It has become a fiction that obscures rather than reflects any level of reality.

Sweeney, *supra* note 64, at 49.

286. *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring) (citation omitted) (recognizing, in a deportation case of a longtime lawful permanent resident, that, unfortunately, the court was bound by Supreme Court precedent that holds that deportation is not punishment).

287. As this Article is getting ready for publication, the most controversial provisions of Arizona's S.B. 1070 are before the Court and the forthcoming analysis may go beyond preemption to include a review of the plenary power of Congress over immigration. See *Petition for Writ of Certiorari, Arizona v. United States*, No. 11-182 (Aug. 10, 2011) (petition granted on Dec. 12, 2011), 2011 WL 3562633. The complaint filed by the federal government in the district court does not specifically mention "plenary power"; it cites to the Supremacy Clause, preemption, and the Commerce Clause as bases for its attack on the constitutionality of the Arizona law. Complaint at ¶¶ 63, 65, 68, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-NVW), 2010 WL 2653363. The federal government's Motion for Preliminary Injunction and Memorandum of Law cites the Naturalization Clause, and states: "The Constitution vests the political branches with exclusive and *plenary authority* to establish the nation's immigration policy." Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 3, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW), 2010 WL 2959365 (emphasis added). Before the Supreme Court, Arizona contends that it is not "impliedly stripped of its plenary authority and at the mercy of the federal executive's lax enforcement policy." Brief for Petitioners at 26, *Arizona v. United States*, No. 11-182 (Feb. 6, 2012), 2012 WL 416748. But the federal government argues that "[c]ontrary to [Arizona's] assertion that the States may exercise 'plenary authority' in [the area of immigration enforcement], it is Congress that has been granted and exercised plenary authority over alien registration, employment, apprehension, detention, and removal." Brief for the United States at 22-23, *Arizona v. United States*, No. 11-182 (Mar. 19, 2012), 2012 WL 939048 (citation omitted). The true extent of Congress's plenary power, therefore, seems open for review in this case.

288. The Framers of the Constitution safeguarded an independent judiciary that could act as a check on any abuses of power by the two other branches of government and resist "the tides of majoritarian oppression." Amy D. Ronner, *Denaturalization and Death: What It Means to Preclude the Exercise of Judicial Discretion*, 20 GEO. IMMIGR. L.J. 101, 106-07 (2005) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1953)).

289. On the other hand, if the Court continues to let Congress legislate with unchecked power under the plenary power doctrine, "Congress could expel all or any class of resident aliens whenever it wants without judicial opposition." Neuman, *supra* note 126, at 620.

290. 550 U.S. 618 (2007).

correct the Court's majority holding.²⁹¹ The *Lilly Ledbetter Fair Pay Act of 2009*,²⁹² the statute superseding the *Ledbetter* decision, was the first legislation signed into law by President Obama.²⁹³ The Court's ruling in *Landon v. Plasencia*²⁹⁴ is heralded by Professor Kevin Johnson as "an example of the Court prodding the political process in a way that resulted in the expansion of rights for noncitizens."²⁹⁵ The Court also put the ball in Congress's court in *Booker*: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."²⁹⁶ In the case of the Federal Sentencing Guidelines, however, before sending the ball back to Congress, the Court played its constitutional role and excised the unconstitutional portions of the Act, thereby making the Guidelines advisory and returning discretion to federal judges. "One lesson . . . that we can derive from the recent controversial decision in *United States v. Booker* . . . is that even ostensibly settled legal regimes can still be excised, reexamined, or reformed."²⁹⁷

VI. ADDITIONAL SIMILARITIES OF CRIMINAL SENTENCING AND IMMIGRATION REMOVAL

The similarities between criminal sentencing and immigration removal are palpable on additional levels. As discussed in Part IV, the systems have progressed on parallel tracks and, in the case of noncitizens convicted of crimes, now intersect.²⁹⁸ But the resemblance goes beyond systemic development. The racial/ethnic demographics of the minority populations disproportionately impacted by sentencing and removal also show related patterns. The underlying theoretical, societal, and humanitarian policy considerations are also comparable.

A. *Disparate Impact of Mandatory Imprisonment and Deportation*

Historically, racism has created a recurring, though unacknowledged, pattern in the development of the criminal justice system, criminal law, and sentencing.²⁹⁹

291. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

292. Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

293. President Barack Obama, Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act Bill Signing (Jan. 29, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-lilly-ledbetter-fair-pay-restoration-act-bill-signin>.

294. 459 U.S. 21 (1982).

295. Johnson, *supra* note 115, at 241. After the Court's decision, "[t]he executive branch and Congress followed the Court's lead and lawful permanent residents returning to the country today generally have the right to fundamental procedural protections before they can be denied entry into the country." *Id.*

296. *United States v. Booker*, 543 U.S. 220, 265 (2005).

297. Ronner, *supra* note 288, at 103-04.

298. Stumpf, *supra* note 21, at 376-77.

299. Craig Haney, *Psychology and the Limits to Prison Pain Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 512-15 (1997).

Racism has also been a recurring theme in the immigration system.³⁰⁰ When open expressions of racism became politically incorrect, the country began to speak in terms of the “war on crime” and “war on drugs,”³⁰¹ themes that were construed to encourage and displace “racial animosity onto criminals.”³⁰² Under this rhetoric of protecting the country from the criminal element among us, the Federal Sentencing Guidelines caused an insidious racial disparity that dramatically increased incarceration rates for Black³⁰³ and Hispanic³⁰⁴ men.³⁰⁵ The average sentence of an African-American defendant is twenty-five percent higher than the sentence of a White defendant.³⁰⁶ As with the disparity in incarceration rates of African Americans and Latinos, “a defendant’s status as a noncitizen significantly increase[s] his length of imprisonment.”³⁰⁷

The criticism of the disparate impact of sentencing under the Federal Sentencing Guidelines on members of minority groups began decades ago. In a visionary and early critique of the Guidelines, Professor Charles J. Ogletree, Jr. commented:

The Commission failed to draft guidelines addressing some of the complex issues involved in sentencing, particularly the significance of the purposes of sentencing and the individual characteristics of offenders. In an effort to meet an unreasonable congressional timetable, the Commission did not, in my view, adequately weigh the risks that a mandatory guideline system will result in unreasonably long sentences and unnecessary hardship for many

300. See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 171 (5th ed. 2003) (citing “racism and nativism” as underlying reasons for the enactment of the “so-called ‘Chinese exclusion laws’”). Professor Kevin R. Johnson was an early advocate of legal scholarship that addressed the historical dynamic of race discrimination in immigration law and the consequences for noncitizen and citizen minorities. Johnson, *supra* note 36, at 1152–58.

301. Siebert, *supra* note 181, at 891.

302. Adelman & Deitrich, *supra* note 132, at 251 (citing Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines, How Congress Judged the Judges from Brown to Booker*, 11 *ROGER WILLIAMS U. L. REV.* 473, 492 (2006)).

303. The terms Black and African American are used interchangeably throughout this Article and in materials cited herein. See *UNTOLD STORIES: CIVIL RIGHTS, LIBRARIES, AND BLACK LIBRARIANSHIP* 7 (John Mark Tucker ed., 1998) (explaining use of different nomenclature based on historical use, current scholarly conventions, or ideological commitments). The term African American is not hyphenated per Rule 3.83 of the Chicago Manual of Style, unless the term is used as an adjectival phrase, in which case it is hyphenated per *Temple Law Review’s* internal Rules of Style.

304. The terms Hispanic and Latino are used interchangeably throughout this Article and in materials cited herein. See Gerald P. López, *Learning About Latinos*, 19 *CHICANO-LATINO L. REV.* 363, 392–99 (1998) (describing the use of different labels by Latinos for the purpose of self-identification).

305. Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51 *INDUS. & LAB. REL. REV.* 654, 659 (1998).

306. Adelman & Deitrich, *supra* note 132, at 255 (citing Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 *DENV. U. L. REV.* 51, 56–57 (2007)).

307. Jeff Yates et al., *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 *MD. L. REV.* 875, 881 (2005) (citing Kristin F. Butcher & Anne Morrison Piehl, *The Role of Deportation in the Incarceration of Immigrants, in ISSUES IN THE ECONOMICS OF IMMIGRATION* 351, 370–78 (George J. Borjas ed., 2000)). Noncitizen status also triggers additional negative treatment during incarceration, including denial of benefits that are made available to the general prison population, such as early release, probation, and access to a minimum-security facility or half-way house. Francesca Brody, Note, *Extracting Compassion from Confusion: Sentencing Noncitizens After United States v. Booker*, 79 *FORDHAM L. REV.* 2129, 2153–54, 2163–65 (2011).

convicted defendants. The Commission also failed to address through the promulgation of guidelines the particular problem of racial disparity in sentencing.³⁰⁸

Professor Ogletree's assertions were correct and farsighted. Minorities in the United States suffer the brunt of imprisonment disproportionately.³⁰⁹ As of April 21, 2012, over 217,000 inmates were incarcerated in federal prisons.³¹⁰ Over 70% of those inmates are Blacks and Latinos (37% Blacks and 35% Latinos).³¹¹ These percentages show the high representation of Blacks and Latinos in federal prisons when we account for their overall U.S. population percentages: approximately 12% for Blacks and 16% for Latinos.³¹² The overwhelming majority of prisoners are male.³¹³

The U.S. incarceration rate was relatively stable at approximately 110 prisoners per 100,000 people from 1925 to 1975[, the period before the Guidelines], but then it began increasing sharply. Between 1980 and 2005, the rate grew from 139 prisoners per 100,000 people to 491 prisoners per 100,000 people. Of the . . . people behind bars, two-thirds are in federal or state prisons and one-third are in local jails. The vast majority are young men between eighteen and thirty-nine, overwhelmingly high school dropouts, and disproportionately black or Hispanic . . .³¹⁴

Furthermore, the majority of those currently incarcerated have been convicted of drug crimes.³¹⁵ The Sentencing Guidelines prescribe longer sentences for crack cocaine offenses compared to shorter sentences for powder cocaine crimes (until recently a "100 to 1 drug quantity ratio between the two forms of cocaine").³¹⁶ The divergence in

308. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988).

309. See Haney, *supra* note 299, at 512 (discussing the disproportionate imprisonment of minorities, especially Black men, compared to that of their White counterparts); Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1489 (2000) ("Put in the simplest terms, the criminal justice system treats African Americans and Hispanic Americans differently than it does whites." (quoting David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679–80 (1994))). See generally Nunn, *supra* note 73.

310. *Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp#1> (last updated May 29, 2012).

311. *Id.*

312. See Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CTR. (July 26, 2011), <http://pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics>.

313. Over ninety-three percent are male. *Quick Facts About the Bureau of Prisons*, *supra* note 310.

314. M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 374 (2010) (footnotes omitted).

315. Almost fifty percent of the federal prison population is incarcerated as a result of drug convictions. *Quick Facts About the Bureau of Prisons*, *supra* note 310.

316. News Release, U.S. Sentencing Comm'n, Change in Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress (Apr. 5, 2002) [hereinafter Change in Federal Cocaine Sentencing Policy], http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020405_Press_Release.htm; see also J.C. Oleson, *Blowing out all the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 737 (2011); News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007) [hereinafter Sentencing Commission Votes Unanimously],

the crack cocaine versus powder cocaine sentencing has resulted in a negative, disparate impact on members of disadvantaged minority populations that receive longer sentences because they commit a higher proportion of crack cocaine offenses (the cheaper form of cocaine), versus Whites, who are more likely to commit powder cocaine crimes (the more expensive form of cocaine), and receive shorter sentences.³¹⁷ In addition, “despite similar rates of illicit drug use, disparate results in traffic stops of racial minorities greatly contribute to the disparate rates of criminal convictions and imprisonment of racial minorities.”³¹⁸ The drug sentencing disparity has remained unresolved for decades, even though incremental steps have been taken to try to diminish the sentencing unfairness.³¹⁹

In *Kimbrough v. United States*,³²⁰ the Supreme Court strengthened its holding in *Booker* and held that “it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3353(a)’s purposes.”³²¹ Subsequently, Congress enacted the Fair Sentencing Act of 2010³²² to try to ameliorate the crack versus powder cocaine sentencing disparities.³²³ President Obama signed the Act into law on August 3, 2010.³²⁴ The Act did not eliminate the sentencing disparity, but it did reduce the drug quantity ratio differential from 100:1 to 18:1.³²⁵ Additionally, “the amount of crack that would invoke a five-year minimum sentence [was] raised to 28

http://www.uscc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20071211_Press_Release.htm.

317. See LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 386–89 (2011); c.f. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1162–63 & n.147 (2010) (“Between 1994 and 2002, the average time served by African Americans for a drug offense increased by seventy-three percent as compared to an increase of twenty-five percent for white drug offenders.”).

318. Johnson, *supra* note 99, at 1073 (footnote omitted).

319. Congress failed to address the disparity in crack/powder cocaine sentencing, despite recommendations by the Sentencing Commission to substantially reduce the crack/powder ratio and the Commission’s modest amendment (without the approval of Congress). Sentencing Commission Votes Unanimously, *supra* note 316. The Commission began trying to reduce the crack/powder ratio disparity in 1995 by proposing Guideline amendments to replace “the 100-to-1 ratio with a 1-to-1 ratio.” *Kimbrough v. United States*, 552 U.S. 85, 99 (2007). But Congress rejected the amendments. *Id.* Subsequent recommendations in 1997 and 2002 were also ignored. *Id.* In 2007, the Commission changed its strategy and, rather than wait for congressional action, adopted ameliorating changes reducing “the base offense level associated with each quantity of crack by two levels.” *Id.* at 99–100 (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571–28572 (2007)).

320. 552 U.S. 85 (2007).

321. *Kimbrough*, 552 U.S. at 89; see also *Moore v. United States*, 555 U.S. 1, 3 (2008) (per curiam) (reaffirming holding in *Kimbrough* that a district court may consider the disparate treatment of similar amounts of crack and powder cocaine and impose a below-Guidelines sentence).

322. Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

323. *Id.*

324. Press Release, White House, Office of the Press Sec’y, *Statement by the Press Secretary on H.R. 4861, H.R. 5051, H.R. 5099 and S. 1789* (Aug. 3, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-press-secretary-hr-4861-hr-5051-hr-5099-and-s-1789>.

325. Oleson, *supra* note 316, at 737 n.274 (citing Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372).

grams, said to be roughly the amount a dealer might carry, and for a 10-year sentence, 280 grams.”³²⁶ The Act also “reduces the disparity in the amounts of powder cocaine and crack cocaine required for the imposition of mandatory minimum sentences and eliminates the mandatory minimum sentence for simple possession of crack cocaine.”³²⁷

Race also plays a role in immigration law and policy.³²⁸ The *Congressional Record* reveals that references to U.S. Census reports about the growing Hispanic population were cited in support of the enactment of the harsh immigration laws that were passed in 1996.³²⁹ Like the general prison population, most of the deportable lawful permanent residents have been convicted of drug crimes,³³⁰ but their rates of conviction are higher because many of them are racial minorities who are subject to racial profiling.³³¹ Accordingly, it should come as no surprise that the “war on drugs” also expanded the immigration consequences of drug crimes.³³² In *Leslie v. Attorney General*,³³³ the Third Circuit Court of Appeals referred to the removal of a lawful permanent resident, as a result of pleading guilty to a crack offense, as a “draconian and unsparing result”.³³⁴ the man had resided in the United States for two decades and established a life here.³³⁵

For the purpose of removal, the re-definition of criminality, by continually expanding the definitions of crimes that render noncitizens deportable to include even

326. Erick Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 29, 2010, at A16.

327. Jesse Lee, *President Obama Signs the Fair Sentencing Act*, THE WHITE HOUSE BLOG (Aug. 3, 2010, 4:58 PM), <http://www.whitehouse.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act>.

328. See Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 1964–67 (1996) (explaining that immigration law, “[u]ntil only thirty years ago” was structurally racist and acknowledging that, whereas we no longer have the racist national origin quotas, issues of race still permeate the immigration law and policy debates); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 309, 323–24 (2009) (arguing that U.S. immigration laws and enforcement policies are pervaded by racist views).

329. See generally Reyes, *supra* note 3, at 283–85 (citing discussions in the Congressional Record, 142 CONG. REC. 24,772–802 (1996), about how the legal immigrants of the early 1990s—Hispanics, as documented by U.S. Census figures that were also discussed—were making competition for jobs fierce, overcrowding the schools, and overpopulating urban areas).

330. The majority of federal prisoners have been convicted of drug crimes. Russell, *supra* note 317, at 1162–63. The leading crime category of aliens removed for crimes in fiscal year 2010 was the drug category. U.S. DEP’T OF HOMELAND SEC., ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 4 (2011); Hunker, *supra* note 173, at 31.

331. Johnson, *supra* note 99, at 1073.

332. Chacón, *supra* note 68, at 1577 (citing Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 166–67 (2008)). Whereas the phrase “war on drugs,” is most commonly associated with the Reagan and Bush Administrations, Yates et al., *supra* note 307, at 875–76, in a deliberate effort to be perceived as promoters of “law and order,” the Clinton Administration and the Democrats refused to address the sentencing disparities. Siebert, *supra* note 181, at 884–85.

333. 611 F.3d 171 (3d Cir. 2010).

334. *Leslie*, 611 F.3d at 181.

335. Leslie, a native and citizen of Jamaica, had pleaded guilty in 1998 to conspiracy to possess and distribute fifty grams or more of crack cocaine and was sentenced to a jail term of 168 months. *Id.* at 173. The Department of Homeland Security began removal proceedings in 2008, ten years after the conviction, for commission of an aggravated felony. *Id.*

minor transgressions, has allowed the government to discard immigrants from American society with little scrutiny.³³⁶ The media has played a major role in the dissemination of the myth of alien criminality.³³⁷ As a result of the 1996 laws, we are now facing what a newspaper reporter describes as the “war on criminal aliens.”³³⁸ “Illegal aliens,” “criminal aliens,” and “terrorists” are lumped together in the rhetoric and legislation.³³⁹ Immigrants of color become “illegal immigrants,” and, by targeting immigration status rather than race, people ignore the conscious and unconscious racial prejudice embedded in immigration law and policy.³⁴⁰ The fallacy³⁴¹ of alien criminality impacts Latinos in a disproportionate way.³⁴² Many of the immigrants that entered the United States over the last two decades and obtained lawful permanent resident status originated from Latin American countries.³⁴³ Additionally, “the focus on Latina/o ‘appearing’ people in immigration enforcement results in disparate deportation rates in which Latina/os are overrepresented compared to their relative proportion of the population of immigrants in the United States.”³⁴⁴ The lack of English proficiency may also be a factor that further disadvantages Latinos during criminal proceedings and increases their chances of conviction.³⁴⁵ The removal statistics detailed in Tables 2 and 3 below confirm that a disproportionate and increasing number of the current deportees that are removed as a result of criminal convictions originate from Mexico and Central

336. Miller, *supra* note 69, at 101; *cf.* Nunn, *supra* note 73, at 385 (“The definition of crime, then, is eminently political. Consequently, its manipulation by politicians and citizens’ groups alike is a well-known feature of American political life. For its part, race helps establish the boundaries of criminality and imbues it with a sense of political urgency.”).

337. Chacón, *supra* note 193, at 1849.

338. Joseph Reina, *Legislators Must Look to the Past Before Changing Immigration Law*, TEX. LAW., Vol. 17, at 5.

339. Miller, *supra* note 69, at 112–17.

340. Ong Hing, *supra* note 328, at 309, 324; *see also* Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1, 6 (2003) (“Race—now couched in the language of criminals, or of immigrants, or of terrorists—is the scare tactic that unifies a ‘white’ majority behind a cohort of political leaders who primarily serve an emerging plutocracy. Crack addicts, welfare queens, gang bangers, illegal aliens, enemy combatants, and terrorists are the racial images thrown down repeatedly to justify a politics of inequality that continually favors middle- and upper-class whites.”). For background on the concept of unconscious racism, *see generally* David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857 (2011).

341. Studies show that immigrants actually help to reduce crime and revitalize neighborhoods. Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 929 (2011) (citing studies by sociologists for this proposition).

342. *See* Dingeman & Rumbaut, *supra* note 314, at 366–67 (explaining that immigrants from Mexico and Central America are especially prone to be stereotyped because they are “often young men from racialized minorities with little formal education coming to work in low-wage manual labor jobs”).

343. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS: 2010 YEARBOOK OF IMMIGRATION STATISTICS 9–11 tbl.2 (2011) [hereinafter 2010 YEARBOOK].

344. Johnson, *supra* note 99, at 1073.

345. *See generally* Lupe S. Salinas & Janelle Martinez, *The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused*, 18 AM. U. J. GENDER SOC. POL’Y & L. 543 (2010).

America.³⁴⁶ The data used to prepare these tables was collected and reported by DHS.³⁴⁷

Table 2
Total Yearly Removals by Region and Overall Total Removals (2010–2007):
Persons Removed for Criminal Convictions

	2010 Removals	2009 Removals	2008 Removals	2007 Removals
Region				
Africa	641	718	647	805
Asia	1,483	1,334	1,339	1,217
Caribbean	4,081	4,543	4,216	4,207
Central America	29,257	20,839	17,045	14,913
Europe	1,227	1,078	1,076	953
North America *	128,173	100,037	77,878	77,378
Oceania	202	160	165	143
South America	3,450	3,118	2,890	2,774
Unknown	18	13	10	4
Total Removals	168,532	131,840	105,266	102,394

*North America includes Mexico and Canada. The removals for Mexico (as detailed in Table 3) comprise the great majority of removals for the North America region.

346. 2010 YEARBOOK, *supra* note 343, at 96–104 tbl.38d.

347. *Id.*

Table 3
Countries with Consistent High Removal Numbers (2010–2007):
Persons Removed for Criminal Convictions

	2010 Removals	2009 Removals	2008 Removals	2007 Removals
Country				
Mexico	127,728	99,619	77,531	76,967
Honduras	10,358	6,998	5,476	5,236
El Salvador	8,315	6,344	5,558	4,949
Guatemala	9,359	6,547	5,138	3,917
Total	155,760	119,508	93,703	91,069
% of Total Yearly Removals	92.4%	90.6%	89%	88.9%

Because DHS publishes the total removal numbers in an aggregate fashion, it is impossible to determine exactly how many deportees are lawful permanent residents and how many are undocumented immigrants,³⁴⁸ but the majority of deportable lawful permanent residents are removed as a result of criminal convictions.³⁴⁹ DHS has access to the information necessary to report how many lawful permanent residents are removed on a yearly basis, as this information must be disclosed and verified during the removal proceedings;³⁵⁰ but DHS fails to include these figures in the yearly statistics.³⁵¹ DHS's Office of Immigration Statistics currently prepares reports specifically estimating the number of lawful permanent residents in the United States during a specific time period.³⁵² These reports account for "emigration" of lawful permanent residents, but do not specify the number of lawful permanent residents that have been *forced* to emigrate (i.e., have been removed) from the United States on a yearly basis, or cumulatively. As the tables above show, among those removed for

348. See Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 440 (2007) (explaining that the aggregate data in the yearbooks "is not correlated" and does not permit the examiner to "draw clear conclusions"); see also HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 6 (2007) [hereinafter FORCED APART], available at <http://www.hrw.org/reports/2007/us0707/us0707web.pdf> (stating that there is no hard data to ascertain how many lawful permanent residents are deported).

349. MOTOMURA, *supra* note 3, at 195.

350. See Lonigan, *supra* note 263, at 81 (discussing an Office of Immigration Statistics report showing that its Deportable Alien Control System already allows Immigration and Customs Enforcement to collect and analyze extensive information on deported aliens; thus information about the deportation of lawful permanent residents should be easily accessible).

351. See, e.g., *Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/files/statistics/publications/yearbook.shtm> (last modified Apr. 12, 2012).

352. E.g., NANCY F. RYTINA, U.S. DEP'T. OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006, at 1 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_PE_2006.pdf.

criminal convictions, Latinos—immigrants from Mexico, Honduras, El Salvador, and Guatemala—make up an overwhelming percentage of deportees in recent years. These removal rates have remained consistent over the past decade.³⁵³

B. Goals of Sentencing and Removal

The same goals and theories for exclusion apply in criminal sentencing as in removal due to criminal convictions.³⁵⁴ The inherent goal of both systems, as it relates to exclusion of the person from society, has been described as follows:

Both [criminal and immigration] systems act as gatekeepers of membership in our society, determining whether an individual should be included in or excluded from our society. True, the outcomes of the two systems differ. A decision to exclude in criminal law results in segregation within our society through incarceration, while exclusion in immigration law results in separation from our society through expulsion from the national territory.³⁵⁵

Currently, the two main theories of sentencing in criminal law are (1) retribution (punishment) and (2) deterrence (preventing future crime).³⁵⁶ The societal reasons for incarcerating those who commit crimes are related to these objectives of criminal law.³⁵⁷ The convicted committed a social wrong.³⁵⁸ As a result, the convicted is excluded from society and imprisoned.³⁵⁹ Deportation of longtime lawful permanent residents as a result of a post-entry “bad” act is likewise based on retribution and deterrence.³⁶⁰ Incapacitation (through isolation or restraint) is another theory that applies in both criminal law and immigration law enforcement.³⁶¹ Under the theory of incapacitation, incarcerating or deporting the person is necessary to isolate him or her from society.³⁶² But, with the exception of sentences ordering the death penalty or life in prison,³⁶³ incapacitation applies to citizens on a temporary basis,³⁶⁴ whereas removal for lawful permanent residents is essentially a permanent incapacitation.³⁶⁵

353. See 2010 YEARBOOK, *supra* note 343, at 96–104 tbl.38d (providing removal rates for immigrants from these countries between 2001 and 2010).

354. See generally Pinzon, *supra* note 104, at 53–61.

355. Stumpf, *supra* note 21, at 396–97 (citations omitted).

356. Pinzon, *supra* note 104, at 50.

357. *Id.* at 52.

358. *Id.*

359. *Id.*

360. See KANSTROOM, *supra* note 88, at 244 (commenting that a “functional, historical, and intentional analysis” of deportation laws shows that Congress wanted to use these laws to punish, rather than to regulate).

361. Legomsky, *supra* note 21, at 514–15.

362. *Id.* at 515.

363. In England, deportation was used as a merciful alternative to the death penalty. Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons From the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 114 (2007).

364. See Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 303 (2009) (“An incapacitation-based system seeks to protect the public from the possibility of additional criminality by the defendant *during the term of imprisonment.*” (emphasis added)).

365. Cf. Chacón, *supra* note 193, at 1887 (questioning, under the theory of incapacitation, “why the criminal law is deemed to provide sufficient punishment for citizens, but not for non-citizens”). A lawful permanent resident who is removed for conviction of an aggravated felony is permanently inadmissible. See

Under the maxim in law that substance triumphs over form,³⁶⁶ a tenet of judicial interpretation recognized by the Court in *Booker*,³⁶⁷ crime-related deportation of lawful permanent residents is punishment,³⁶⁸ even if the courts have put a judicial stamp of approval on the legislatively and executively created myth that such deportation is not punishment.³⁶⁹ Removal, as a direct consequence of committing criminal acts, has, at its core, a purpose to punish.³⁷⁰ The added sanction for lawful permanent residents is that, after they serve a criminal sentence for crime(s), they are subject to a second punishment—deportation.³⁷¹ In spite of this, proportionality, “a classic retributive notion, is plainly absent” from removal adjudication.³⁷²

C. *Societal Factors Surrounding Criminal Convictions*

Individuals who end up in the criminal justice system or in removal proceedings as a result of criminal convictions—U.S. citizens, as well as longtime lawful permanent residents—are often victims of societal conditions that may pre-dispose or induce them to commit crimes.³⁷³ Many of those currently incarcerated are Black and Hispanic males who have been disproportionately subject to systemic discrimination (including racism in criminal law enforcement), socioeconomic ills (e.g., poverty), and government neglect (such as lack of adequate funding for education).³⁷⁴ Moreover, “[r]acial profiling in both criminal and immigration law enforcement adversely affects African Americans, Latinas/os, and other racial groups. . . . Intellectually and

supra note 238 and accompanying text for a more nuanced discussion of the statutory basis for this bar to admissibility.

366. The Framers intended for the Court to look at function and context to determine what Congress or any other coordinate branch of government has done. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3167 (2010) (citing *Crowell v. Benson*, 285 U.S. 22, 53 (1932); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854 (1986); *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988)).

367. See *supra* Part V.A and accompanying text for a discussion of this case.

368. Kanstroom, *supra* note 10, at 1935 (“It is time to recognize that deportation of legal permanent residents for criminal and other post-entry conduct is punishment.”).

369. See Banks, *supra* note 152, for an interesting discussion of deportation as punishment, even under a civil sanction framework.

370. See Kanstroom, *supra* note 10, at 1893–94 (asserting that deportation of lawful residents raises humanitarian and constitutional concerns because “deportation of long-term lawful permanent residents for post-entry criminal conduct seems in most respects to be a form of punishment”).

371. Kidane, *supra* note 363, at 114 (citing Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 120–22 (1999)) (“In Seventeenth Century England, deportation was a judicially sanctioned penalty.”).

372. Chacón, *supra* note 193, at 1890.

373. See Kanstroom, *supra* note 104, at 204 (noting that many immigrants, having spent their “formative years” in the United States, are a “product of our society,” even the less desirable parts (quoting PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 202 (1953))). See generally RENNY GOLDEN, *WAR ON THE FAMILY: MOTHERS IN PRISON AND THE FAMILIES THEY LEAVE BEHIND* (2005) (discussing conditions that cause crime).

374. Bruce Western et al., *Introduction* to IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 1–17 (Mary Pattillo et al. eds., 2004) [hereinafter IMPRISONING AMERICA].

practically, racial profiling in criminal law differs little in kind and substance from that employed in immigration enforcement.”³⁷⁵

Poverty also disadvantages African Americans and Latinos. The median wealth of White households is twenty times that of Black households and eighteen times that of Hispanic households.³⁷⁶ The housing market crisis and the recession have widened the equity gap.³⁷⁷ The wealth of households in America, computed as assets minus debts, is as follows: \$5,677 for Black households, \$6,325 for Hispanic households, and \$113,149 for White households.³⁷⁸ The percentage of persons living under the poverty level is even higher for children.³⁷⁹ African-American and Latino students are sixteen times more likely to attend schools with concentrated poverty.³⁸⁰ Educational failure makes students more vulnerable to incarceration.³⁸¹ Low educational attainment and African-American or Hispanic race/ethnicity have been shown to be “important determinants of institutionalization, and possibly of the underlying behavior leading to institutionalization.”³⁸² Therefore, it should come as no surprise that “the institutionalized are disproportionately poorly educated, African-American, and Hispanic.”³⁸³

There are also documented negative outcomes associated with assimilation and acculturation, including the economic and social forces underlying American society, which, for children and grandchildren of many immigrants, translate into higher rates of family disintegration and drug and alcohol addiction, maladies that increase the likelihood of criminal behavior among all Americans.³⁸⁴ The injurious effects of negative societal conditions that many poor immigrants face may explain why the longer an immigrant lives in the United States and assimilates to American culture, the higher the risk that he or she will engage in criminal behavior.³⁸⁵ On the other hand, as Census studies show, “for every ethnic group, without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated

375. Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 343 (2003).

376. Kochhar et al., *supra* note 312, at 1.

377. *Id.*

378. *Id.*

379. Michelle Chau et al., *Basic Facts About Low Income Children, 2009*, NAT'L CTR. FOR CHILDREN IN POVERTY, 1 (Oct. 2010), http://www.nccp.org/publications/pdf/text_971.pdf.

380. Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 100 (2005) (citations omitted).

381. Lizbet Simmons, *Buying into Prisons, and Selling Kids Short*, MOD. AM., Fall 2010, at 51, 51.

382. Butcher & Piehl, *supra* note 305, at 665 (studying the causes for the increase of incarceration in the 1980s).

383. *Id.* at 660.

384. See Dingeman & Rumbaut, *supra* note 314, at 377–81 (discussing the correlation between incarceration rates for individual members, intergenerational differences, and the likelihood of drug and alcohol abuse of various immigrant groups in relation to the amount of time those individuals had resided in the United States).

385. See generally RUBEN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN (2007), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20\(IPC\).pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf).

and the least acculturated.”³⁸⁶ A study of Mexicans, Salvadorans, and Guatemalans found that the foreign born 1.5-generation³⁸⁷ children of immigrants were significantly less likely to commit crimes than the native White population.³⁸⁸ Immigrants from Latin America have also been found to be less likely to commit violent crimes than the U.S. born population.³⁸⁹ Therefore, the deportation laws should take into consideration, as a mitigating factor against deportation, the reality that criminality for many immigrants, especially those who arrive as children and become de facto Americans, develops in the United States.³⁹⁰

D. Humanitarian Considerations Militating Against Categorical Sentencing and Removal

The tools of the criminal and removal systems—incarceration and deportation—contribute “to the disruption of the family, the prevalence of single parent families, and children raised without a father.”³⁹¹ The high levels of incarceration have caused a vicious cycle that is hard to break.³⁹² Decades of studies show that children that face adverse family circumstances are far more likely to engage in criminal behavior.³⁹³ The lock-them-up-and-throw-away-the-key approach (“zero tolerance”), and the refusal of government and society to boldly address the social conditions that cause crime, have become the main strategies in crime prevention.³⁹⁴

These punitive strategies are ill-advised and hurtful to the point of being debilitating and destructive, and, because they are wildly out of synch with what is known about the social contextual and situational roots of crime, they are likely to do as little for the long-term reduction of crime rates as for the promotion of social justice.³⁹⁵

386. *Id.* at 14; *see also* Butcher & Piehl, *supra* note 305, at 675 (conducting studies in 1980 and 1990, and concluding that native-born Blacks “had much higher incarceration probabilities (relative to White non-Hispanics) than Black immigrants in both years”).

387. The “1.5-Generation” are immigrants that entered the United States as children. Bill Ong Hing, *Refugee Policy and Cultural Identity: In the Voice of Hmong and Lu Mien Young Adults*, 1 HASTINGS RACE & POVERTY L. J. 111, 148 (2003).

388. Dingeman & Rumbaut, *supra* note 314, at 380.

389. *Id.* at 382. “[I]f natives had the same institutionalization probabilities as immigrants, our jails and prisons would have one-third fewer inmates.” Butcher & Piehl, *supra* note 305, at 677 (studying incarceration rates in 1980 and 1990).

390. *See supra* Parts VII.B and VII.C.2 for a discussion of a proposed statute addressing such problems and the policy reasoning behind such a solution.

391. Haney, *supra* note 299, at 514 (quoting William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177, 183 (1994)).

392. *See generally* IMPRISONING AMERICA, *supra* note 374; IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003).

393. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 6 (2005).

394. *See* BRANHAM & HAMDEN, *supra* note 60, at 19.

395. Haney, *supra* note 299, at 515. Preventive measures, such as programs for drug treatment, at-risk family intervention, and school completion, are more cost-effective than imprisonment. BRANHAM & HAMDEN, *supra* note 60, at 19.

The growing number of deportations of lawful permanent residents, the majority of them Latinos, and the resulting effects on the families that remain in the United States, reproduce the same social ills caused by the overreliance on incarceration.³⁹⁶ In 2006, it was estimated that twenty-one percent of all children living in the United States lived with at least one foreign-born parent.³⁹⁷ Of the native children with one foreign-born parent, eighty-two percent lived with two parents.³⁹⁸ In a report in July 2007 (relying on statistics from the 2000 Census), Human Rights Watch estimated that, since enforcement began under the harsh immigration laws of 1996, 1.6 million spouses, children, and parents, many of them U.S. citizens or lawful permanent residents, remained in the United States after their spouses, parents, or children were deported.³⁹⁹ As the figures in Table 3 show, removals have continually increased since this initial estimate.

Based on figures extrapolated from DHS reports, U.S. Census Bureau American Communities Surveys, and assumptions of population similarities between lawful permanent residents and other noncitizens, estimates indicate that, in the decade between 1997 and 2007, approximately 88,000 lawful permanent residents were deported as a result of criminal convictions.⁴⁰⁰ The majority of deportees had children.⁴⁰¹ Approximately 103,000 children suffered the deportation of a lawful permanent resident parent during this ten-year period.⁴⁰² More than 100,000 parents of U.S. citizen children have been deported during the decade of 1997 to 2007.⁴⁰³ In addition, between April 1997 and August 2007, over 217,000 spouses and siblings, some of them U.S. citizens, were affected by the deportations of lawful permanent resident family members.⁴⁰⁴

Congresswoman Zoe Lofgren documented an insider's perspective on the lack of consideration that Congress gave to the ramifications of the 1996 laws on American families:

[I]n the many cases that I have encountered as a member of Congress, nuclear families have been separated and adversely affected by enactment of IIRIRA's section 212(c) repeal of discretionary waivers, often by the deportation of a parent of U.S. citizens who committed only one minor crime many years before 1996. In fact, some scholars have noted that the repeal of

396. See generally INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW ET AL., *IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION* (2010) [hereinafter *IN THE CHILD'S BEST INTEREST?*], available at <http://www.law.ucdavis.edu/news/images/childsbestinterest.pdf>.

397. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, *AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2007*, at 8 (2007), available at http://childstats.gov/pdf/ac2007/ac_07.pdf.

398. *Id.*

399. *FORCED APART*, *supra* note 348, at 44.

400. *IN THE CHILD'S BEST INTEREST?*, *supra* note 396, at 4.

401. *Id.*

402. *Id.*

403. Sweeney, *supra* note 64, at 51 (citing Michael Falcone, *100,000 Parents of Citizens Were Deported over 10 Years*, N.Y. TIMES, Feb. 14, 2009, at A16).

404. *IN THE CHILD'S BEST INTEREST?*, *supra* note 396, at 4.

section 212(c) waivers arguably makes “second-class citizens” out of U.S. citizen children who have undocumented [or deportable] parents. When I raised this issue with colleagues, it was ignored.⁴⁰⁵

Legislative discussion about the end of judicial discretion and an immigration judge’s ability to weigh positive and negative factors before ordering deportation “lacked nuance, especially because legislators tended to lump all non-citizens convicted of crimes into one category—neglecting the fact that the legislation under consideration would include legal residents with minor offenses and affect US citizen family members.”⁴⁰⁶

When deportees are removed, they are no longer able to provide for their families in the United States and, in fact, most deportees become dependent on their U.S. family members for assistance.⁴⁰⁷ After the loss of a breadwinner to deportation, the U.S. family may have to turn to government assistance.⁴⁰⁸ Aside from the economic hardship, families of deportees suffer short- and long-term emotional and psychological damage.⁴⁰⁹ As a result of removals, families disintegrate and children suffer.⁴¹⁰ Consequently, the removal of longtime permanent residents and the disintegration of families will contribute to socioeconomic problems in the United States similar to those caused by imprisonment.⁴¹¹

VII. THE RETURN OF JUDICIAL DISCRETION TO REMOVAL PROCEEDINGS

The crimmigration trend and the congruence of enforcement models (imprisonment and deportation) demonstrate that legally, politically, socially, and practically, sentencing and removal cause similar direct and collateral consequences on the individual as well as on society. Thus, common sense and justice dictate that the United States must dutifully weigh the short- and long-term overall consequences of removal of longtime lawful permanent residents, and carefully contemplate that the adverse effects of deportations may, in individual cases, and cumulatively, outweigh any perceived benefit.⁴¹² The weighing of all relevant factors requires an individual fact

405. Lofgren, *supra* note 174, at 360–61.

406. FORCED APART, *supra* note 348, at 26.

407. Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1819–20 (2010).

408. *Id.* at 1820.

409. *Id.*

410. Stumpf, *supra* note 24, at 1735.

411. See IN THE CHILD’S BEST INTEREST?, *supra* note 396, at 5–9 (surveying various research and case studies that point to the negative impact that deportation of parents has on their children); PEW HISPANIC CTR., 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL I (2007), available at <http://pewhispanic.org/files/reports/84.pdf> (finding that “over half of all Hispanic adults in the U.S. worry that they, a family member or a close friend could be deported”). In addition, there are many stories detailing the life-altering experiences suffered by U.S. citizen children who are left behind after a parent is deported. See, e.g., Kanstroom, *supra* note 104, at 215–16 (describing how U.S. citizen children often fall into poverty after their breadwinner parent is deported and how family crisis occurs after deportation).

412. See generally Demleitner, *supra* note 69. “A cost-benefit analysis counsels that incapacitation is only cost-effective if the net benefit of removing the offender from our polity is greater than the net loss. If the

finding and decision making that can only be accomplished by restoring judicial discretion to the removal process.⁴¹³

As the American Bar Association recognizes: “Restoration of discretion to immigration judges is necessary in the interest of fairness, proportionality, and justice. Congress should enact legislation to restore the authority of immigration judges to grant discretionary relief on a case by case basis.”⁴¹⁴ In so doing, Congress must pay deference to how removal will affect lawful permanent residents, their families, and the United States. The proposal introduced in this Article recognizes that the actions of some lawful permanent residents may warrant removal.⁴¹⁵ There must be some level of proportionality⁴¹⁶ and human judgment,⁴¹⁷ however, in the decision of who deserves to be removed. These individuals have already been punished for committing the underlying criminal conduct.⁴¹⁸

offender no longer constitutes a threat to society, her deportation is not cost effective if she otherwise contributes positively.” *Id.* at 1069.

413. The structure of the immigration system is different from the structure of the criminal system in that immigration adjudication and immigration enforcement are both administrative functions that fall under the power of the executive branch of the federal government. LEGOMSKY & RODRÍGUEZ, *supra* note 113, at 3. “The immigration courts are not courts at all in the way Americans generally think of them. They are part of the Department of Justice, not the federal judiciary, and the judges, although they wear robes and sit in formal courtrooms, are employees of the attorney general.” Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES, Feb. 9, 2010, at A14. This organizational structure has been widely criticized, but a discussion of this topic is beyond the scope of this Article. For a recent proposal suggesting a restructuring of immigration adjudication, see generally Legomsky, *supra* note 14. A different proposal, by the President of the National Association of Immigration Judges, calls for the establishment of an Article I immigration court. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER’S IMMIGRATION BULLETIN (2008).

414. AM. BAR ASS’N, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 7 (2008), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf (paragraph break omitted).

415. *But see* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 323 (1956) (arguing that there should be no distinction between offenses committed by citizens and those committed by lawful permanent residents; therefore, proposing that no lawful permanent resident should ever be removed).

416. *See* Chacón, *supra* note 193, at 1890 (“To a greater degree than criminal detention, removal may be more punitive in some cases than in others. Removal is less of a penalty for the person who entered the United States three weeks ago on a visitor’s visa and has a stable home and job awaiting him than it is for the person who entered the country forty years ago at age two, and who knows no other home, or for the person who will face discrimination, persecution or starvation in their home country. Because of changes in the immigration laws, such equities play no role in the determination of whether removal constitutes an appropriate ‘civil sanction’ in the cases of individual non-citizens.”).

417. Only a human being can show mercy, and mercy can be granted only through individualized decision making. *See* Adelman & Deitrich, *supra* note 132, at 253 (arguing that individuals, be they prosecutors, members of parole boards, and judges with discretionary sentencing powers, are the only bulwarks against overly harsh penalties in the American justice system because mercy is something that is felt, not established in general rules).

418. *See generally* Stumpf, *supra* note 24 (advocating for the restructuring of the immigration system to include alternative sanctions to removal and a proportionality approach like the one used in imparting punishment for criminal violations).

A. *Judicial Discretion as a Preferred Alternative to the Status Quo*

The immigration adjudication system and the lack of independence of immigration judges and members of the BIA have raised many criticisms, among other things, due to documented cases of politicized hiring during President George W. Bush's administration.⁴¹⁹ Nonetheless, the return of judicial discretion to even a flawed system would be an improvement over the status quo.⁴²⁰ Proponents of immigration reform have advanced several proposals to address the current deficiencies in the immigration system, including narrowing the crimes in the aggravated felonies category,⁴²¹ re-enacting section 212(c),⁴²² mitigating the removal consequences associated with criminal convictions,⁴²³ creating independent immigration courts,⁴²⁴ campaigning to remove the worst immigration judges,⁴²⁵ hiring more judges,⁴²⁶ increasing decisional independence,⁴²⁷ implementing reforms to reduce implicit bias,⁴²⁸ viewing the crisis in immigration courts through the lens of judicial ethics,⁴²⁹ preserving judicial review as a check on bad decisions by immigration judges,⁴³⁰ reducing the caseload of immigration judges,⁴³¹ granting the Attorney General greater

419. See generally THE NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD & PENN STATE'S DICKINSON SCH. OF LAW, PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT'S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES (2009), available at http://law.psu.edu/_file/Playing%20Politics%20at%20the%20Bench%20101209.pdf; Carrie Johnson, *Internal Justice Dept. Report Cites Illegal Hiring Practices*, WASH. POST, July 29, 2008, at A01.

420. See Clara Long, *Crafting a Productive Debate on Immigration*, 47 HARV. J. ON LEGIS. 167, 167 (2010) ("The only political argument in the immigration debate with overwhelming support is the proposition that the status quo is intolerable.").

421. See Keeping Families Together Act of 2007, H.R. 4022, 110th Cong. (1st Sess. 2007) (bill introduced by Representative Bob Filner, D-CA, calling for the restoration of the pre-IIRIRA aggravated felony definitions); see also Hunker, *supra* note 173, at 39 (suggesting that only aggravated felons sentenced to a particular term of imprisonment be barred from discretionary relief).

422. See H.R. 4022 (calling for the re-enactment of section 212(c)).

423. Stumpf, *supra* note 24, at 1729–30.

424. Legomsky, *supra* note 14, at 1678–81, 1685–87 (proposing Article I immigration court with a trial division and an appellate division, and an Article III United States Court of Appeals for Immigration). Even the National Association of Immigration Judges is pushing for the "establishment of an independent agency or Article I court (like the tax or bankruptcy courts)." Dana Leigh Marks, Op-Ed., *Needed: An Independent Court*, N.Y. TIMES, July 12, 2011, <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed>.

425. Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 29–36 (2006).

426. *Id.* at 38–39.

427. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 385–403 (2006).

428. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 443–48 (2011).

429. See generally Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467 (2008).

430. Alexander, *supra* note 425, at 50.

431. *Id.* at 50–51; see also Baum, *supra* note 131, at 1514–21 (discussing how heavy caseloads and little staff support influence the decisions of immigration judges).

authority to grant cancellation of removal,⁴³² establishing a rights-based form of relief for crime-related deportation,⁴³³ introducing a system of graduated sanctions,⁴³⁴ placing time limits on deportability grounds,⁴³⁵ and starting from scratch by eradicating the INA.⁴³⁶ The proposal introduced below is one more contribution to the list of suggested reforms. It focuses on granting immigration judges discretion, judged for reasonableness (as in *Booker*),⁴³⁷ to determine whether longtime lawful permanent residents, even those convicted of aggravated felonies, warrant removal. The principle that the decision whether to deport should be judged in terms of proportionality has been a theme in criminal punishment.⁴³⁸ Additionally, the removal decision should be reviewable at the appellate level.⁴³⁹

The discretion and factors suggested in this proposal are further supported by a memorandum issued by U.S. Immigration and Customs Enforcement (ICE) Director, John Morton, on June 17, 2011 (the “ICE Morton Memo”).⁴⁴⁰ In that memo, Morton provides guidance for ICE agents, officers, and attorneys to consider when deciding whether to exercise prosecutorial discretion.⁴⁴¹ “Deportation law . . . allows immense prosecutorial discretion.”⁴⁴² The exercise of prosecutorial discretion is also present in the federal sentencing system.⁴⁴³ The ICE Morton Memo includes a non-exhaustive list of factors that agents should consider, on a case by case basis, and sets forth that the

432. Banks, *supra* note 152, at 1675 (“To enable immigration judges and the BIA to make these individualized determinations, the Attorney General would need greater authority to grant cancellation of removal, similar to the INA section 212(c) regime.”).

433. *Id.* at 1676.

434. Stumpf, *supra* note 24, at 1732–40; Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 264, 265 (2006).

435. See generally Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011).

436. Johnson, *supra* note 48, at 1637.

437. *United States v. Booker*, 543 U.S. 220, 262 (2005).

438. Stumpf, *supra* note 24, at 1690.

439. Why is appellate review crucial?

One could forcefully argue that careful judicial review is *most* necessary when the agency’s competence, independence, and impartiality have been seriously questioned. Especially in instances involving critically important decisions affecting a discrete and insular (and disenfranchised) minority, basic due process concerns militate in favor of meaningful judicial review. Limits on the power of courts to review administrative decisions adverse to noncitizens can only make matters worse for noncitizens, as well as undermine the perceived legitimacy of the agency’s actions.

Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 31–32 (2008) (footnotes omitted). Judicial review acts as a check on legal accuracy and promotes accountability. Baum, *supra* note 131, at 1521–22.

440. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secu-re-communities/pdf/prosecutorial-discretion-memo.pdf>.

441. *Id.*

442. KANSTROOM, *supra* note 88, at 230.

443. See DEMLEITNER ET AL., *supra* note 134, at 156–57 (stating that “no guidelines system has come up with an effective way of structuring prosecutorial sentencing power, and its potential for disparity and unpredictability”).

decision must be made based on the totality of circumstances.⁴⁴⁴ If ICE agents are deemed qualified to exercise discretion in deciding which noncitizens to place in removal proceedings, immigration judges should be presumed at least as competent to exercise discretion in deciding which lawful permanent residents should be allowed to remain in the United States.⁴⁴⁵ Moreover, judicial discretion would serve as a check on prosecutorial discretion.⁴⁴⁶

B. Proposed Statute: “The Longtime Lawful Permanent Residents and Family Unit Relief Act”

The proposed legislation is the “*Longtime Lawful Permanent Residents and Family Unit Relief Act*”—*An act to strengthen American families and society, honor those who serve or have served in the U.S. military forces, reduce dependency on government assistance programs, provide fundamental fairness and proportionality of punishment, and increase the goodwill of the United States.*

(a) Notwithstanding any other provision of law, a person lawfully admitted for permanent residence who is inadmissible or deportable shall not be removed from the United States if such person—

- (1) has been lawfully admitted for permanent residence for at least seven (7) years,⁴⁴⁷
- (2) has resided in the United States continuously after admission as a person lawfully admitted for permanent residence, and
- (3) has demonstrated that removal would constitute a disproportionate penalty after due consideration of the underlying criminal conviction(s), including the specific facts established in the underlying criminal proceeding(s), and the individual characteristics and criminal history of the person.

(b) In exercising discretion under subsection (a)(3), immigration judges shall consider the following factors:

- (1) ties to U.S. citizen and lawful permanent resident family members;
- (2) family relationships in the receiving country⁴⁴⁸ (including existence or lack of actual relationship with those family members);

444. Memorandum from John Morton, *supra* note 440, at 4.

445. After the enactment of the mandatory Federal Sentencing Guidelines and before *Booker*, some argued that power over sentencing shifted from judges to prosecutors because prosecutors could decide on what crimes to charge, plea bargain charges, and recommendations on downward departure based on “substantial assistance” by defendants. LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 195 (5th ed. 2001).

446. See DEMLEITNER ET AL., *supra* note 134, at 284.

447. It is difficult to choose an arbitrary number of years, and the ideal system would not have a length of status limitation. However, it is more likely to convince pundits that there comes a period of time after which a lawful permanent resident develops permanent ties in this country and merits a higher level of leniency. The seven-year requirement is the same as under former INA section 212(c). INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

448. The term “receiving country” means the country to which the alien will be removed.

- (3) economic, social, emotional, and psychological well-being of U.S. citizen and lawfully admitted family members (including the best interest of children and/or dependents);
- (4) length of continuous residence in the United States;
- (5) length of continuous residence in the receiving country;
- (6) ability to earn a lawful living in receiving country (considering education, language proficiency, and emotional, psychological, and health factors);
- (7) medical condition and ability to obtain medical care in the receiving country;
- (8) age on date of entry to the United States;
- (9) U.S. military service;
- (10) rehabilitation;
- (11) degree of U.S. involvement (foreign policy effects), if any, in causing the migration;
- (12) present conditions in receiving country (potential persecution, national disasters, wars, etc.); and
- (13) any equitable or exceptional circumstances not previously described.

(c) Notwithstanding any other provision of law, judicial review of a final determination made under this section is available upon a petition for review filed with an appropriate court of appeals.

C. *Rationale for the Proposed Factors to Consider in Removal Decisions*

The factors for immigration judges to consider in exercising judicial discretion should be included in the legislation, just as the Security Risk Assessment (“SRA”) includes the factors that federal judges consider in exercising discretion during sentencing.⁴⁴⁹ Congress may also add factors that were considered under section 212(c) before its repeal.⁴⁵⁰ The former 212(c) factors are currently considered in determining whether cancellation of removal under section 240A(a) should be granted.⁴⁵¹ Congress may also incorporate some of the factors considered in the decision whether to further detain or release a noncitizen detainee.⁴⁵² The ICE Morton Memo outlines factors that overlap the ones described in this proposal.⁴⁵³

449. See 18 U.S.C. § 3553(a) (2006).

450. See *Matter of Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) (adopting a discretionary and flexible balancing test when deciding whether 212(c) relief should be granted).

451. See *In re C-V-T-*, 22 I. & N. Dec. 7, 10–11 (B.I.A. 1998).

452. See 8 C.F.R. § 241.4(f) (2010).

453. Memorandum from John Morton, *supra* note 440, at 4. For a list of factors in a prior proposal, see Reyes, *supra* note 3, at 308–09. Additional factors are discussed in another proposal. See Stumpf, *supra* note 24, at 1731–32 (including basis for admission; post-admission ties; and disruption on employer or community).

1. Factors # (1)–(7)

The family separation caused by deportation runs afoul of the family reunification theme in our current U.S. immigration policy⁴⁵⁴ and American, pro-family values.⁴⁵⁵ Under this premise, it should be easy to recognize the family issues surrounding removal of longtime lawful permanent residents.⁴⁵⁶ American citizen and lawful permanent resident relatives of deportees, including spouses and children, are adversely affected by the removal of members of their families. For deportees, their family members in the United States may be their only family. The decision to disrupt family units and ignore the best interests of children and other dependents shows that we are unwilling to accord the same human dignities to noncitizens that we reserve for those of us in the privileged position of U.S. citizenship. The Supreme Court has recognized that there comes a point when noncitizens develop “substantial connections” with the United States, which, in some circumstances, justifies extending additional substantive protections.⁴⁵⁷

In the case of lawful permanent residents, their substantial connections evolve through the length of residence in the United States, which for many of them is often a longer time than the time that they spent in their countries of origin. During their residence here, they are allowed to earn a lawful living, attend our educational institutions, and serve in our military forces. They contribute to the social security system with the expectation that they will benefit from these contributions during retirement or disability.⁴⁵⁸ But, upon deportation, longtime lawful permanent residents are stripped of all right to these benefits.⁴⁵⁹ Many are unable to provide for themselves in their countries of origin due to factors such as education, language proficiency, or medical, emotional, and psychological problems that may or may not be caused by the removal. When lawful permanent residents (“Americans in waiting”)⁴⁶⁰ return to

454. Lonegan, *supra* note 263, at 70; Stumpf, *supra* note 24, at 1735.

455. Morawetz, *supra* note 93, at 1950–51.

456. For additional discussion of how deportations harm families of lawful permanent residents, see generally Lonegan, *supra* note 263.

457. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Some may argue that the “substantial connections” may also attach to long-term undocumented residents. This view, however, is beyond the scope of this Article. At least one scholar has already suggested that the holding of *Padilla* has little applicability to undocumented noncitizens. See generally César Cuauhtémoc García Hernández, *Padilla v. Kentucky’s Inapplicability to Undocumented and Non-immigrant Visitors*, 39 RUTGERS L. REC. 47 (2012).

458. See *Flemming v. Nestor*, 363 U.S. 603, 623 (1960) (Black, J., dissenting) (“Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.” (quoting 102 CONG. REC. 14,323, 15,110 (1956))); *id.* at 631–32 (Douglas, J., dissenting) (“Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. . . . Social Security benefits have rightly come to be regarded as basic financial protection against the hazards of old age and disability.”); *id.* at 635 (Brennan, J., dissenting) (“[Deportee’s] predicament is very real—an aging man deprived of the means with which to live after being separated from his family and exiled . . .”).

459. 42 U.S.C. § 402(n) (2006); *Flemming*, 363 U.S. at 612; DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION, at CRS-3 (July 20, 2006), available at <http://trac.syr.edu/immigration/library/P1077.pdf>.

460. MOTOMURA, *supra* note 3, at 9.

countries whose cultures and languages are foreign to them, they are viewed as strangers, and face hardship, danger, and despair.⁴⁶¹ Finally, lawful permanent residents may require healthcare that is not readily available in the receiving countries.⁴⁶²

2. Factors # (8)–(10)

There are equitable factors that must also be considered. The “age on date of entry” of the individual deserves to receive great weight in the removal decision.⁴⁶³ In 1926, the Second Circuit found that deportation of someone who entered as a child, despite criminal convictions, was a “deplorable,” “cruel and barbarous result,” and “a national reproach.”⁴⁶⁴ In 1953, President Harry Truman’s Commission on Immigration and Naturalization “recommended that no alien should be subject to deportation if he was lawfully admitted to the United States for permanent residence before reaching the age of sixteen years.”⁴⁶⁵ If lawful permanent residents entered as children and resided in this country during their formative years, they developed their criminal propensity here,⁴⁶⁶ and this country should be responsible for them.⁴⁶⁷ Immigrants who left their countries of birth as children endure worse consequences upon removal than lawful permanent residents that grew up in their countries of origin.⁴⁶⁸ Consequently, child entrants suffer stigmatization upon removal more intensely than adult entrants.⁴⁶⁹

The plight of deportable lawful permanent residents that have served in the U.S. military forces also deserves special consideration.⁴⁷⁰ These human beings risked their

461. *E.g.*, Dingeman & Rumbaut, *supra* note 314, at 389. In a study of Salvadoran deportees, some who had entered the United States as children no longer spoke Spanish. *Id.* at 393.

462. *See generally* Adela de la Torre et al., *Making the Case for Health Hardship: Examining the Mexican Health Care System in Cancellation of Removal Proceedings*, 25 GEO. IMMIGR. L.J. 93, 109 (2010) (describing the inadequacy of Mexico’s healthcare system and the medical hardships that returning immigrants face upon their deportation to Mexico).

463. Under the ICE Morton Memo, the fact that an individual has been in the United States since childhood is a positive factor that prompts “particular care and consideration.” Memorandum from John Morton, *supra* note 440, at 5.

464. *United States v. Davis*, 13 F.2d 630, 630–31 (2d Cir. 1926).

465. Maslow, *supra* note 415, at 324 (citing PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 198 (1953)). An outright prohibition of deportation for lawful permanent residents who obtained their status when they were children should be revisited.

466. The younger an immigrant arrives in the United States, the more opportunity he or she has to assimilate and adopt the higher “native propensities toward institutionalization.” Butcher & Piehl, *supra* note 305, at 670.

467. Maslow, *supra* note 415, at 323 (“When an alien has come to the United States as a child and has been reared in this country, it is particularly unjust to ship him to some foreign land for a transgression that is in part the result of our environment and culture. It is an imposition upon his country of origin and a cruelty for the alien thus uprooted.”). In the past, the United States acknowledged some responsibility for the crimes committed by longtime lawful permanent residents, especially those who entered as children. Demleitner, *supra* note 69, at 1090. Lawful permanent residents who entered as children are “in fact a product of an American upbringing”; they are “socially . . . American.” Shagin, *supra* note 29, at 273–74.

468. Dingeman & Rumbaut, *supra* note 314, at 393–95 (reporting findings of case study of deportees in El Salvador).

469. *Id.* at 394–95.

470. Under the ICE Morton Memo, service in the U.S. military is a positive factor that prompts “particular care and consideration.” Memorandum from John Morton, *supra* note 440, at 5.

lives to protect the United States, and their removal should be an option of last resort. Rehabilitation should also be considered, as it defies logic to remove lawful permanent residents that are contributing to society and are no longer a threat to the community. Lawful permanent residents may live productive lives after their convictions and still be subject to removal. As one federal judge recently recognized, ICE can wait as many years as it wants, even decades, before instituting removal proceedings.⁴⁷¹

3. Factors # (11)–(13)

Another factor that merits consideration is whether the individual migrated to the United States as a result of U.S. foreign policy.⁴⁷² American intervention may occur in different ways, including diplomatically, economically, militarily, and politically.⁴⁷³ The North American Free Trade Agreement (NAFTA)⁴⁷⁴ is an example of an economic policy that impoverishes rural, indigenous communities in Mexico and causes migrations to the United States.⁴⁷⁵ U.S. military interventions, as in Iraq and Afghanistan, also cause migrations.⁴⁷⁶ Yet, discussions surrounding immigration reform do not seem to acknowledge this cause-and-effect reality.

Another factor that should be considered is the country to which the lawful permanent resident will be removed. A lawful permanent resident that is ordered removed as a result of an aggravated felony is ineligible for asylum and withholding of removal.⁴⁷⁷ Therefore, if he faces persecution upon return to his country of origin that

471. See, e.g., *Keo v. Lucero*, No. 1:11cv614, 2011 WL 2746182, at *1 (E.D. Va. July 13, 2011) (deciding that lawful permanent resident was not subject to mandatory detention because ICE waited to charge him as deportable until eight years after he was released from state custody after serving his sentence for a marijuana conviction). Keo was admitted to the United States at the age of two and was convicted of distribution of marijuana twenty-two years later. *Id.* at *1.

472. See Reyes, *supra* note 3, at 287–93, 303.

473. See Eduardo Moises Peñalver, *The Persistent Problem of Obligation in International Law*, 36 STAN. J. INT'L L. 271, 288–89 (2000) (discussing different methods of U.S. intervention in Nicaragua). See Reyes, *supra* note 3, at Part II (discussing several forms of U.S. intervention in Nicaragua).

474. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8–17, 1992, 32 I.L.M. 289 (1993).

475. Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 724–25 (2011); see also Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1084 (2008) (explaining that “an explanation of mass migration, particularly from Latin America into the United States, rooted in U.S. foreign and economic policies with sending nations, shifts the lens away from the individual agency of the immigrant toward a more complex story of responsibility of U.S. multinationals and employers who cause and profit from mass migration”).

476. See Ong Hing, *supra* note 133, at 952–56 (advocating against deportations of Cambodian refugees due to moral implications created by the role that the United States played “in creating the circumstances that led to Cambodians fleeing to the United States”). The Hmong people fought on the side of the United States during the Vietnam War and, after the war, some of them eventually made their way to this country only to find that they were not welcomed. MOTOMURA, *supra* note 3, at 45–46. We have already begun to see a refugee crisis in Iraq. Eleanor E. Downes, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477, 488–90 (2007) (reporting that Australia, Denmark, Germany, Iran, the Netherlands, Sweden, and the United Kingdom have all accepted more Iraqi refugees than the United States).

477. See *supra* Section IV.D.2 for a discussion of the types of discretionary relief from deportation foreclosed by an aggravated felony conviction.

does not rise to the level of torture under the Convention Against Torture (CAT),⁴⁷⁸ he may be left without any relief.⁴⁷⁹ Haitians are jailed upon return to Haiti, and some have died in prisons under deplorable conditions.⁴⁸⁰ A new twist to the removal paradox is that lawful permanent residents that are removed to some Central American countries may face persecution by growing numbers of gang members that have been deported from the United States after growing up and learning the gang enterprise here,⁴⁸¹ or they may be marginalized and targeted as suspected criminals.⁴⁸² The dangers of removal to countries that have suffered natural disasters or wars involve similar considerations.⁴⁸³ Finally, the immigration judge should have latitude to contemplate any other equitable or exceptional factors not specifically listed.

VIII. CONCLUSION

When enacting comprehensive immigration reform, the President and Congress need to consider, methodically and thoughtfully, how current and proposed immigration laws impact the lives of lawful permanent residents, their families, their communities, and American society. The current removal provisions exist as stark reminders of the little attention that is often paid to the impact of immigration reform.⁴⁸⁴ Congress rushed and camouflaged the harsh immigration laws that apply to

478. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113, S. Treaty Doc. No. 100-20 (1988). This treaty was implemented by the U.S. Congress in 1998 and includes a prohibition against expelling, returning or extraditing a person to a country where "there are substantial grounds for believing that [the person] would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring (FARR) Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note (2006)).

479. See LEGOMSKY & RODRÍGUEZ, *supra* note 113, at 1096 (noting the CAT does help some individuals who are unable to receive nonrefoulement under the 1951 U.N. Refugee Convention).

480. Lonigan, *supra* note 263, at 75. See also *supra* note 47 and accompanying text for a discussion of a situation where deportation of a lawful permanent resident who would face indefinite detention in a Haitian jail, under inhuman conditions, did not rise to the level of torture under CAT.

481. See Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301, 310-13 (2008).

482. Lonigan, *supra* note 263, at 76.

483. See, e.g., Melissa Sanchez & Marina Giovanelli, *Activists Urge Halt to U.S. Deportations to Haiti*, MIAMI HERALD, Feb. 3, 2011, 2011 WLNR 2124836 (urging the Obama Administration to stop deportations after a man dies in a Haitian jail of suspected cholera, an epidemic that developed after the earthquake of January 2010); Lisa Schlein, *UNHCR Urges European Countries Not to Deport Iraqis*, VOICE OF AMERICA (June 8, 2010), <http://www.voanews.com/english/news/middle-east/UNHCR-Urges-European-Countries-Not-to-Deport-Iraqis-95887489.html> (urging host countries to stop deportations because it is not safe to return refugees to Iraq).

484. See, e.g., Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136 (2006) (referring to the "Real ID Act": "The legislative history of the Act is meager because it was adopted in the House of Representatives without a report, amendment and debate about it were severely restricted, and it was later attached to a 'must-pass' emergency supplemental appropriation bill."). Legislation that could harm refugees needs to be carefully crafted. See generally Ong Hing, *supra* note 133, at 904; Stacy Huber, Note, *Refugees in the U.S.: Protected from Persecution, or Vulnerable to Unjust Removal?*, 20 ST. JOHN'S J. LEGAL COMMENT. 199, 243 (2005).

lawful permanent residents convicted of crimes.⁴⁸⁵ Immigrant advocates were focused on “substantive issues of family reunification through immigration, asylum, and public benefits,” so they “paid little attention to proposals to bar relief from deportation for [lawful permanent residents] with criminal convictions.”⁴⁸⁶

On balance, if immigration reform truly aims to reward those immigrants that pursue a path to legalization and assimilate into our communities, then persons that have fulfilled the requirements to become lawful permanent residents merit the discretion that would enable immigration judges to make credibility determinations and review the case-specific factors in favor of and against removal.⁴⁸⁷ In the case of the Federal Sentencing Guidelines, the United States Supreme Court *constitutionalized* the sentencing process by returning broad judicial discretion in *Booker*. In contrast, the executive and legislative branches have been left free to police themselves in the area of immigration law.⁴⁸⁸ For the same reasons advocated in favor of judicial discretion in sentencing, this Article calls upon Congress and the President to *constitutionalize* the removal system by enacting and signing into law immigration reform that follows the lead of the highest Court of the land and returns meaningful judicial discretion to the deportation decision. President Obama has stated that he is willing to tackle the unpopular and hard battles, including immigration reform, if it is the right thing for our country. In his own words:

And I understand it may not be the easy thing to do politically. It’s easier to grandstand. But I didn’t run for President to do what’s easy. I ran to do what’s hard. I ran to do what’s right. And when I think something is the right thing to do, even my critics have to admit I’m pretty persistent. I won’t let it go. They can call me a lot of things, but they know I don’t give up.⁴⁸⁹

In the words of Dr. Martin Luther King, Jr., “The time is always right to do what is right.”⁴⁹⁰ The right thing to do is to finally return justice and fundamental fairness to the lawful permanent resident removal process by giving immigration judges broad discretion in removal decisions.

485. See Taylor, *supra* note 201, at 352–53 (discussing the unexpected inclusion of amended immigration statutes in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.)).

486. Morawetz, *supra* note 193, at 281, 283 (explaining that the repeal of section 212(c) was certain to pass because the immigration bill (IIRIRA) was “rolled into an omnibus budget bill” and “failure to pass the bill would literally shut down the government”). The Sentencing Reform Act was also passed after it was included in an omnibus appropriation resolution whose passage was assured because the federal government otherwise would have insufficient funds to operate. See Stith & Koh, *supra* note 153, at 264–66.

487. Ideally, immigration judges would serve as independent decision makers. See Legomsky, *supra* note 427, at 409.

488. MOTOMURA, *supra* note 3, at 27.

489. President Barack Obama, Remarks by the President at the Congressional Hispanic Caucus Institute’s 33rd Annual Awards Gala (Sept. 15, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/15/remarks-president-congressional-hispanic-caucus-institutes-33rd-annual-a>.

490. QUOTATIONS OF MARTIN LUTHER KING, JR. 20 (Applewood Books 2004).

