

A COMMON SENSE RECONSTRUCTION OF THE INA'S CRIME-RELATED REMOVAL SYSTEM: ELIMINATING THE CAVEATS FROM THE STATUE OF LIBERTY'S WELCOMING WORDS

I. INTRODUCTION

Emma Lazarus' poem on the pedestal of the Statue of Liberty contains no caveats. Her call to nations engraved below the copper lady states, "Give me your tired, your poor, your huddled masses yearning to breathe free. The wretched refuse of your teeming shore."¹ The poem's lack of caveats ironically reflects the tensions underlying United States immigration policy today. Each attempt by Congress to clarify and restrict American immigration laws swallows Lazarus' welcoming words.² One of the most illustrative examples of limits to Lazarus' broad invitation has been Congress's treatment of aliens who have committed crimes.³ Over the past

1. EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

2. *See id.*

3. Aliens who are convicted of crimes are often referred to as "criminal aliens." *See, e.g.*, Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999). As this Note will demonstrate, many of the aliens affected by congressional reforms to the Immigration and Nationality Act's (INA) removal provisions can hardly be considered "criminals." *See infra* Part IV.C. *See also infra* note 9. Although many of the targeted aliens were convicted of crimes, neither the severity of their offenses, nor their post-conviction rehabilitation, justify their current stigmatic classification as "criminals." Consequently, terminology such as "criminal alien," which broadly refers to all individuals targeted by Congress's recent INA reforms, is misleading. *See infra* Part IV.C. *See also infra* notes 9, 47, 59-61 and accompanying text (discussing the evolution and consequences of the current broad definition of "aggravated felony" under the INA that characterizes many trivial offenses as grounds for removal). The term "criminal alien" will be used in this Note to identify only those aliens whom I argue have committed crimes sufficient to constitute removal (i.e., those whose presence in the United States poses a real social threat). Limiting the term to aliens who are serious criminal offenders ensures that the classification is used in the correct context.

The identification of noncitizens as "aliens" is itself significant. For a commentary on the use and negative implications of characterizing noncitizens as "aliens," see generally Kevin R. Johnson, *"Aliens" and the United States Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997). *See also* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1698 n.7 (1999) (employing the term "immigrant" throughout her Note because of the "perjorative overtones of the word 'alien'").

The term "alien" will be used in this Note because that term is used consistently throughout immigration law in reference to noncitizens. *See* INA § 101(a)(3), 8 U.S.C. § 1101(a)(43) (Supp. IV 1998) (defining an alien as "any person not a citizen or national of the United States").

decade, the government's "tough on crime" position,⁴ coupled with xenophobic attitudes,⁵ has manifested itself in a series of drastic reforms⁶ to

4. See National Campaign Against Drug Abuse, 22 WEEKLY COMP. PRES. DOC. 1033 (Aug. 1, 1986). To fight the "war on drugs" in the 1980s, the federal government decided to get "tough on crime." As a result of polls demonstrating that drugs were the number one problem in the country, see *id.* at 1033, law enforcement policy debates focused on drug dealers and narcotics trafficking. *Id.* at 1038. Various provisions in the Anti-Drug Abuse Acts of 1986 and 1988, which targeted aliens involved in criminal activity, demonstrate the merger of immigration and anti-crime policies. See *infra* text accompanying notes 41-44.

The "tough on crime" rhetoric continued through the 1990s. See CONTRACT WITH AMERICA 37-64 (Ed Gillespie & Bob Schellhas eds., 1994). The *Contract with America* was a political agenda signed by GOP Congressional candidates in the fall of 1994, prior to the 1994 midterm elections. See *id.* at 6. The "tough on crime" message became a significant part of the *Contract*. See *id.* at 37-64. The introduction to the Taking Back Our Streets Act, as discussed in the *Contract*, states "[o]ur *Contract with America* calls for tough punishment for those who prey on society. For too long, Washington has refused to get tough—and even when they sound tough, there are always loopholes that favor the criminal, not the victims." *Id.* at 37.

The "tough on crime" agenda continued to target alien criminal activity as well. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 159 (1998) (stating that "the legislative history [of the 1996 reforms] is full of references to aliens who 'prey' on Americans."). See also 142 CONG. REC. S10,063 (daily ed. May 2, 1996) (statement of Sen. Byrd) (considering Senate Bill S. 1664, The Immigration Control and Financial Responsibility Act of 1996, which formulated part of the 1996 immigration reforms, stating "[f]or those individuals who come to this country and commit crimes—and there are an estimated 450,000 such criminal aliens in our jails and at large throughout the Nation—there are tough new provisions in this bill that will keep them off our streets and deport them more quickly."); Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883 (1997). In this Article, Congressman Lamar Smith, Chairman of the House Subcommittee on Immigration and Claims, and Edward Grant, Counsel to that subcommittee, propose various efforts that should guide general immigration reform efforts. In support of the 1996 immigration reforms, the authors state that "it is true that the vast majority of legal immigrants are law-abiding This does not mean that Congress has gone overboard, as some suggest, in getting tough on those immigrants who do commit crimes" *Id.* at 936.

5. Nativism greatly contributes to the impact that this "tough on crime" position has on the alien population in the United States. See Kevin C. Wilson, Recent Development, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 567 (1995) ("In recent years the United States has experienced a steady rise of anti-immigrant sentiment [I]mmigrants have become the unfortunate scapegoats for the ills of American society."). See also Smith, *supra* note 4, at 936 ("[w]hen immigration is accompanied by lawlessness, the American people suffer through loss of life, health, and property. In addition, when accompanied by crime, immigration comes to be seen not as a source of pride and renewal for all Americans but as a contributor to our problems."); 142 CONG. REC., *supra* note 4, at S10,063 (speaking of reforming United States immigration policy in general, Senator Byrd states: "[O]ur Nation must put its own citizens' concerns above the laudable goal of helping people from other nations. We must consider our own national priorities and the needs of our own citizens first."). It is this distinction between the alien population and "the American people"—between the citizen and "people from other nations" (i.e., "immigrants")—which perpetuates the notion of removal as an appropriate solution for dealing with aliens who have committed crimes. However, legal permanent residents who have established significant roots in the United States blur this distinction. See *infra* Part IV.A. For more commentary on the treatment of aliens as "outsiders", see *infra* note 140.

6. In 1988, Congress created an entirely new class of deportable aliens by adding the "aggravated felony" provision to the INA. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690,

provisions in the Immigration and Nationality Act (INA)⁷ that deal with such aliens.⁸ As a result of these reforms, the amended statutory provisions reach far beyond hardened alien criminal offenders and target those who have committed only minor offenses as well.⁹ Moreover, although some aliens may have resided in the United States for decades and may have established significant roots in this country, the Immigration and Naturalization Service (INS) has the power to remove¹⁰ them once they commit any one of a

§ 7347, 102 Stat. 4181, 4471 (1988). From 1990-1996, Congress continued to expand the definition of "aggravated felony" and made numerous other reforms to the INA provisions dealing with the removal of convicted aliens. *See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). *See also infra* text accompanying notes 41-54.

7. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (Supp. IV 1998)).

8. The "aliens" referred to in this Note are lawful permanent residents (LPRs). *See* INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (Supp. IV 1998) ("lawfully admitted for permanent residence" means the status of having 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"). LPRs are often referred to as "green card" holders. This reference derives from the previously green document (now pink) that the government provides to LPRs as evidence of their status. STEPHEN H. LEGOMSKY, IMMIGR. AND REFUGEE L. & POL'Y 1, 99 (2d ed. 1997). LPRs differ from both nonimmigrants and undocumented aliens. Nonimmigrants, admitted with a nonimmigrant visa, legally reside in the United States for a temporary period of time. *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (enumerating the various classes of nonimmigrants, for example, students). *See generally* LEGOMSKY, *supra*, at 223-289. Undocumented aliens are commonly referred to as "illegal aliens." These aliens have entered the United States unlawfully or have overstayed their nonimmigrant visas. LEGOMSKY, *supra*, at 953.

Nonimmigrants and undocumented aliens are not discussed in this Note. Although nonimmigrants are subject to the crime-related removal system, this Note focuses only on LPRs, because they have the most at stake under the current provisions. Additionally, undocumented aliens are not discussed because their unlawful presence in the United States automatically renders them removable. *See* INA §§ 212(a)(6), 237(a)(1), 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1) (Supp. IV 1998).

9. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (enumerating the offenses that constitute "aggravated felonies" for purposes of removal). This broad list, as well as the vague provision dealing with crimes of moral turpitude, INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), have provided the INS with the ability to remove many LPRs. State penal codes may classify certain crimes in ways that invoke the INA removal provisions for trivial crimes. For example, in Oklahoma, if an individual is convicted for the theft of goods valued at \$51.00, and he receives a one-year suspended sentence, he is deportable. *See* OKLA. STAT. tit. 21, § 1731 (West 2000). *See also* INA §§ 101(a)(43)(G), 101(a)(48)(B), 237(a)(2)(A)(iii), 8 U.S.C. §§ 1101(a)(43)(G), 1101(a)(48)(B), 1227(a)(2)(A)(iii). In New York, "two misdemeanor petty theft or public transportation fare evasion charges—turnstile jumping in the New York City subway system leading to a 'theft of services' misdemeanor conviction," constitute "crimes of moral turpitude" and can subject an alien to removal. *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997). *See also* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). For accounts of the harsh implications of the recent reforms on aliens who have committed only minor crimes, *see infra* Part IV.C.

10. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) drastically altered immigration terminology. Prior to IIRAIRA, if the INS determined that an alien was

number of specified crimes.¹¹ In some instances, the INS can even apply the provision deeming the aliens removable retroactively,¹² and the affected aliens may not have any opportunities for relief or judicial review. For example, consider the story of fifty-two year-old Gabriel Delgadillo.¹³ He is a Vietnam War veteran and has lived in the United States for thirty-seven years.¹⁴ Although he never applied for naturalization, his wife, seven children, and parents are all United States citizens.¹⁵ In early 1999, authorities discovered Delgadillo's 1988 burglary conviction after he applied for disability benefits from the Veterans Administration.¹⁶ Despite Delgadillo's veteran status, the duration of his residence, and his family ties in the United States, the INS removed him to his native Mexico on April 24, 1999.¹⁷

To resolve the inconsistency between the current crime-related removal system¹⁸ and Lady Liberty's welcoming words, Congress faces two options: it can engrave a long list of exceptions on the back of Lady Liberty's pedestal

inadmissible at a port of entry, the alien underwent an "exclusion" procedure. *See* INA § 236, 8 U.S.C. § 1226 (1994), *repealed by* IIRAIRA. If the alien had already been admitted to the United States, but the INS later determined that he was "deportable," the alien underwent a "deportation" proceeding. *See* INA § 242, 8 U.S.C. § 1222(b) (1994), *repealed by* IIRAIRA. Now, under IIRAIRA, the proceeding at which an alien's inadmissibility or deportability is determined is characterized as a "removal" proceeding. *See* INA § 240, 8 U.S.C. § 1229a (Supp. IV 1998). *See also* LEGOMSKY, *supra* note 8, at 1, 24, 374. However, Congress still provides separate grounds under which an alien may be found "inadmissible" or "deportable." *Id.* at 24. *See, e.g.*, INA § 212(c), 8 U.S.C. § 1182 (Supp. IV 1998) (enumerating the removal grounds for inadmissible aliens). *But see* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (Supp. IV 1998) (enumerating the removal grounds for aliens who have already been admitted to the United States and whose criminal activities render them "deportable").

This Note substitutes the current term "removal" for its predecessor "deportation." Although Congress no longer uses the word "deportation" in the INA, it does use the term "deportable" throughout the statute to characterize admitted aliens who may be removed. *See* INA § 237(a), 8 U.S.C. § 1227(a) (employing the term "Deportable Aliens" as the section's title). Therefore, the terms "removable" and "deportable" are used interchangeably throughout this Note. Moreover, Part IV.B of this Note uses the term "deportation," because the Supreme Court cases cited in that section were decided before the change in terminology in 1996.

11. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (enumerating the crime-related removal grounds). *See also* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (enumerating the offenses that constitute "aggravated felonies" under INA § 237(a)(2)(A)(iii)).

12. *See* § 101(a)(43), 8 U.S.C. § 1101(a)(43). *See also infra* note 54 and accompanying text.

13. Pamela Hartman, *Law Ships Vietnam Vet Back to Mexico- An '88 Burglary Forces His Deportation*, TUCSON CITIZEN, Apr. 24, 1999, at 1A.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. For the purposes of this Note, the "crime-related removal system" constitutes all of the provisions of the INA governing the removal of aliens who have committed crimes. This system involves the crime-related grounds for removal, discretionary relief available to removable aliens, and judicial review of both removal orders and denials of discretionary relief. *See infra* Part III.

bidding farewell to the numerous aliens adversely affected by the fine print caveats to Lazarus' poem, or it could revise the INA so that the removal provisions impact only those criminal aliens whose presence would actually jeopardize the safety of United States citizens.¹⁹

This Note provides a course of action for Congress should it choose the latter option. It examines the INA provisions that regulate the removal²⁰ of aliens who have committed crimes.²¹ It urges the abandonment of removal as an acceptable mechanism to solve alien criminal activity and proposes a new crime-related removal system grounded in flexibility and fairness. This common sense approach effectuates the removal of only those aliens who are serious criminal offenders. It accommodates Congress's intent to deter and reduce crime, while recognizing that removal is too harsh a consequence for aliens who have either committed minor criminal offenses, or who have committed more serious crimes but have established substantial roots in the United States.

Part II of this Note provides a brief history of the INA crime-related removal system. Part III provides an overview of the current INA crime-related removal system, focusing on the criminal grounds for removal, the types of relief available to some removable aliens, and the statutory bar to judicial review for most aliens involved in criminal activity.

Part IV analyzes removal as the ultimate fine print caveat to Emma Lazarus' poem.²² First, this section briefly assesses the distinction between citizens and aliens because that distinction serves as the basis for accepting removal as a mechanism to solve alien criminal activity. Second, it evaluates the nexus between congressional means and ends in the removal arena. After considering the justifications for removal, Part IV concludes that the INA's crime-related removal system is not sufficiently tailored to accommodate Congress's objective of promoting public safety and welfare. Third, it provides illustrations, like the story of Gabriel Delgadillo,²³ which demonstrate the flaws of the current INA crime-related removal system. These accounts attempt to "humanize" the problems raised in this Note.

19. See *infra* Part IV.

20. See *supra* note 10.

21. See, e.g., INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. IV 1998) (defining "aggravated felony"); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (Supp. IV 1998) (crime-related grounds for removal); INA § 240A, 8 U.S.C. § 1229b (Supp. IV 1998) (cancellation of removal), INA § 208, 8 U.S.C. § 1158 (Supp. IV 1998) (asylum procedure); INA § 241(b)(3), 8 U.S.C. § 1231 (Supp. IV 1998) (nonrefoulement); INA § 240B, 8 U.S.C. § 1229c (Supp. IV 1998) (voluntary departure); INA § 238, 8 U.S.C. § 1228 (Supp. IV 1998) (expedited removal of aliens convicted of committing aggravated felonies); INA § 242, 8 U.S.C. § 1252 (Supp. IV 1998) (judicial review).

22. See *supra* note 1.

23. See *supra* text accompanying notes 13-17.

Finally, this section acknowledges various solutions proffered by commentators to alleviate the harsh impact of the recent immigration reforms affecting aliens involved in criminal activity. However, it concludes that piecemeal reform of the crime-related removal system within Congress's "fixed rules" framework will have only limited effects.

Part V proposes a new three-part crime-related removal system. First, it suggests new criteria that establish a presumption of deportability. Second, it preserves discretionary relief through a balancing test for use by the immigration judge during the removal hearing. Finally, it restores judicial review to the removal process.

II. HISTORY OF THE INA CRIME-RELATED REMOVAL SYSTEM

In 1952, Congress consolidated various immigration laws²⁴ into one specific piece of legislation, the Immigration and Nationality Act (INA).²⁵ The INA enumerated several deportability grounds,²⁶ including various provisions for criminal activity.²⁷ Under the original INA, an alien was deportable if he committed offenses involving: moral turpitude;²⁸ narcotics trafficking and other drug-related crimes;²⁹ firearms;³⁰ prostitution;³¹ or violations of miscellaneous national security and immigration laws.³² The criminal offenses that constitute grounds for removal today have changed dramatically since 1952.³³ The current INA crime-related removal grounds can be roughly classified into six principal categories: crimes of moral turpitude;³⁴ aggravated felonies;³⁵ controlled substance offenses;³⁶ firearms

24. See 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02 (2000) (outlining the history of immigration laws prior to 1952). See generally U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY (Michael LeMay & Elliott Robert Barkan eds., 1999).

25. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (Supp. IV 1998)).

26. INA § 241(a), 8 U.S.C. § 1251(a) (1952) (codified as amended at INA § 237(a), 8 U.S.C. § 1227(a) (Supp. IV 1998)).

27. See *infra* notes 28-32 and accompanying text.

28. INA § 241(a)(4), 8 U.S.C. § 1251(a)(4).

29. INA § 241(a)(11), 8 U.S.C. § 1251(a)(11).

30. INA § 241(a)(14), 8 U.S.C. § 1251(a)(14).

31. INA § 241(a)(12), 8 U.S.C. § 1251(a)(12).

32. INA §§ 241(a)(13), (15-17), 8 U.S.C. §§ 1251(a)(13), (15-17).

33. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (Supp. IV 1998).

34. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). See also INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that multiple convictions for crimes involving moral turpitude not arising out of a single scheme of criminal misconduct are grounds for removal).

35. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). See also INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. IV 1998) (defining the term "aggravated felony" for purposes of the INA).

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

offenses;³⁷ miscellaneous offenses involving national security, selective service, and immigration;³⁸ and crimes involving domestic violence, violations of protective orders, stalking, and child abuse.³⁹ Although these general classifications resemble the offenses enumerated in the original INA, the current provisions embody numerous reforms Congress first implemented in the late 1980s.⁴⁰

The Anti-Drug Abuse Act of 1988 (1988 Act)⁴¹ was the first piece of legislation in which Congress drastically reformed the INA.⁴² The 1988 Act created an entirely new class of deportable aliens by adding the “aggravated felony” provision to the INA.⁴³ Under the 1988 Act, the definition of “aggravated felony” was quite narrow; Congress defined an “aggravated felony” as “murder, any drug trafficking crime . . . [,] any illicit trafficking in any firearms or destructive devices . . . [,] or any attempt or conspiracy to commit any such act . . . within the United States.”⁴⁴

In the 1990s, Congress continued to target aliens as part of its anti-crime

37. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

38. INA §§ 237(a)(2)(D)(i-iii), 8 U.S.C. §§ 1227(a)(2)(D)(i-iii) (regarding various national security and Selective Service violations). *See also* INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv) (regarding high speed flight from an immigration checkpoint); INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv) (regarding alien smuggling).

39. INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E).

40. *See infra* notes 41-54 and accompanying text. For more discussion regarding the history of the INA crime-related grounds for removal, see GORDON ET AL., *supra* note 24, § 71.05 (providing a detailed history of each of the crime-related removal grounds while also providing an overview of the current INA provisions).

41. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

42. Although the 1988 Act was the first piece of legislation to make drastic changes to the original INA, there had been other reforms to the INA prior to 1988. For example the Anti-Drug Abuse Act of 1986 (1986 Act) reformed then INA § 241(a)(11) by eliminating the enumeration of the types of drugs covered under the provision. The 1986 Act amended the statute so that it referred to aliens who had committed offenses “relating to a controlled substance.” *Compare* 8 U.S.C. § 1251(a)(11) (1982), *with* 8 U.S.C. § 1251(a)(11) (Supp. IV 1986). *See also* Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1751(b), 100 Stat. 3207 (1986); LEGOMSKY, *supra* note 8, at 446; 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, 127 (1996).

43. *See* Anti-Drug Abuse Act of 1988, § 7347. The 1988 Act created a presumption of deportability for aggravated felons, rendering deportable any alien who committed a specified “aggravated felony” after entry into the United States. *Id.* § 7347(c). Other consequences of the new “aggravated felony” classification included restrictions on discretionary relief from deportation, *id.* § 7343(b), and ineligibility to return to the United States for a period of ten years after deportation. *Id.* § 7349(a).

44. *Id.* § 7342. *See also* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988); Terry Coonan, *Dolphins Caught in Congressional Fishnets-Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 592-605 (1998) (tracing the establishment and evolution of the “aggravated felony” definition from 1988 through 1996); Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 698-702 (1998) (complementing Coonan's discussion).

agenda.⁴⁵ From 1990 to 1996, Congress enacted several statutes that reformed the removal system for aliens who committed crimes.⁴⁶ The legislation embodied four basic approaches. First, Congress broadened the removal grounds for criminal activity. The most notable example of this expansion involved additions to the list of crimes that constitute “aggravated felonies” under the INA.⁴⁷ Second, the Anti-Terrorism and Effective Death Penalty Act (AEDPA)⁴⁸ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)⁴⁹ reduced both the monetary thresholds and the sentencing requirements of the enumerated “aggravated felonies” and other offenses. As a result, these acts increase the number of predicate crimes sufficient for removal.⁵⁰ Third, both AEDPA and IIRAIRA

45. See *supra* note 4.

46. See *supra* note 6.

47. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988) (in 1988, the “aggravated felony” definition was limited to murder, drug trafficking, and firearm trafficking (including conspiracies and attempts to commit such crimes)). *But see* GORDON ET AL., *supra* note 24, at 18 (the current “aggravated felony” definition encompasses over fifty classes of crimes). To illustrate one example, section 440(e) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), added commercial bribery, counterfeiting, forgery, certain types of stolen vehicle trafficking, obstruction of justice, perjury, and bribery of witnesses to the “aggravated felony” definition. INA §§ 101(a)(43)(R), (S), 8 U.S.C. §§ 1101(a)(43)(R), (S) (Supp. IV 1998). See also LEGOMSKY, *supra* note 8, at 447-48; *infra* text accompanying notes 59-65; *supra* note 44.

Aside from broadening the crime-related removal grounds via expansion of the “aggravated felony” definition, Congress has also added other offenses to the list of the crime-related removal grounds. For example, section 350(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) amended § 237(a)(2) to make crimes involving domestic violence, stalking, child abuse, child neglect, child abandonment, and violations of protection orders, grounds for removal. See INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (Supp. IV 1998). See also *infra* notes 76-77 and accompanying text.

48. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

49. Division C of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

50. The Immigration and Naturalization Technical Corrections Act of 1994 made fraud and tax evasion aggravated felonies if they involved a loss of more than \$200,000 to the victim and the government, respectively. Immigration and Naturalization Technical Corrections Act of 1994 § 222(a); INA §§ 101(a)(43)(M)(i), (ii), 8 U.S.C. §§ 1101(a)(43)(M)(i), (ii) (1994). See also Coonan, *supra* note 44, at 598. However, section 321(a)(7) of IIRAIRA reduced the monetary threshold requirements for both of these crimes to \$10,000. INA §§ 101(1)(43)(M)(i), (ii), 8 U.S.C. §§ 1101(a)(43)(M)(i), (ii) (Supp. IV 1998). IIRAIRA also reduced the monetary threshold required to qualify money laundering as an aggravated felony. Immigration and Naturalization Technical Corrections Act of 1994 § 222(a); INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D) (1994) (money laundering constitutes an aggravated felony if the amount involved exceeds \$100,000). *But see* IIRAIRA § 321(a)(2); INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D) (Supp. IV 1998) (lowering the threshold to \$10,000). See also Coonan, *supra* note 44, at 603.

AEDPA and IIRAIRA decreased the sentencing requirements for various aggravated felonies as well. For example, section 440(e) of AEDPA lowered the five-year sentence threshold for document fraud to eighteen months. Just a few months later, however, section 321(a)(9) of IIRAIRA reduced the sentence requirement to one year. INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P) (Supp. IV 1998). See also LEGOMSKY, *supra* note 8, at 447; Coonan, *supra* note 44, at 601, 603. Section 321 of

IIRAIRA added the crimes of rape and sexual abuse of a minor to § 101(a)(43)(A), a subsection previously embodying only the crime of murder. INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (1994). This change was significant because both crimes had previously constituted aggravated felonies as a result of their status as crimes of violence. For the definition of “crime of violence,” see *infra* note 63. Section 501(a)(3) of the Immigration Act of 1990 added crimes of violence to the “aggravated felony” definition. Immigration Act of 1990, § 501(a)(3); INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (1990); Coonan, *supra* note 44, at 593-597. Thus, in 1990, because the two crimes qualified as crimes of violence aliens had to be sentenced to terms of five years or more before the INS could deem them deportable. However, by explicitly adding rape and sexual abuse of a minor to subsection (A), no specific sentence is now required for these crimes to be sufficient for removal. See Richard J. Prinz, *Criminal Aliens Under the IIRAIRA*, 61 A.L.I.-A.B.A. 319, 323 (1999). IIRAIRA also lowered the sentence-imposed requirement for crimes of violence, theft, and burglary from five years to one year. Immigration and Naturalization Technical Corrections Act of 1994 § 222(a); INA §§ 101(a)(43)(F), (G), 8 U.S.C. §§ 1101(a)(43)(F), (G) (1994). *But see* IIRAIRA § 321(a)(3); INA §§ 101(a)(43)(F), (G), 8 U.S.C. §§ 1101(a)(43)(F), (G) (Supp. IV 1998). See also LEGOMSKY, *supra* note 8, at 448; Coonan, *supra* note 44, at 602.

In addition to the decreased sentence requirement for aggravated felonies, AEDPA also modified the sentence required for a crime of moral turpitude to qualify as a removable offense. Prior to the enactment of AEDPA, an alien had to have an actual sentence of at least one year to qualify for removal. INA § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1251 (a)(2)(A)(i)(II) (1994). However, section 435 of AEDPA amended the requirement so that a potential sentence of one year is now sufficient, regardless of whether the alien serves a full twelve month sentence. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. IV 1998) (stating “[a]ny alien who is convicted of a crime involving moral turpitude . . . for which a sentence of one year or longer may be imposed, is deportable”). See also LEGOMSKY, *supra* note 8, at 443. For a discussion of other monetary and sentence threshold reductions, see Coonan, *supra* note 44, at 592-605.

Congress also implemented two other significant changes by adding a new paragraph to IIRAIRA entitled “Definition of Conviction and Term of Imprisonment.” First, prior to IIRAIRA, the question of whether a particular action by a court constituted a “conviction” for removal purposes plagued the courts. See *Matter of Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988). In *Ozkok*, the court held that one was “convicted” for immigration purposes if his situation satisfied each of the following three elements:

- (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilty;
- (2) the judge has ordered some form of punishment, penalty, or restraint on the person’s liberty to be imposed; and
- (3) judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court’s order, without availability of further proceedings regarding the person’s guilt or innocence of the original charge.

Id. at 549 & n.4. However, section 322 of IIRAIRA, which overruled *Ozkok*, eliminated the last prong of the court’s test. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (Supp. IV 1998). Consequently, whatever happens during or after deferred adjudication is irrelevant for removal purposes. See Prinz, *supra*, at 333. To understand the implications of this new “conviction” definition for attorneys representing alien criminal defendants, see Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 300-333 (1997). See also Franco Capriotti, et al., “*Small-Time Crime/Big-Time Trouble: The New Immigration Laws*,” 13 CRIM. JUST. 4, 7 (1998).

Aside from adding the definition for “conviction,” IIRAIRA also provided a definition for “term of imprisonment” to clarify the sentencing requirements for the enumerated offenses classified as “aggravated felonies,” which use that language. INA §§ 101(a)(43)(F), (G), (P), (R), (S), 8 U.S.C. §§ 1101(a)(43)(F), (G), (P), (R), (S). IIRAIRA § 322 created INA § 101(a)(48)(B), which states:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

limited the forms of discretionary relief⁵¹ and procedural safeguards⁵²

8 U.S.C. § 1101(a)(48)(B). Thus, “term of imprisonment” is intended to refer to the actual sentence imposed, regardless of whether it was suspended. In contrast, other sentence requirements in section 101(a)(43) of the INA qualify crimes as “aggravated felonies” for removal purposes if certain sentences “may be imposed” or are “punishable” by a certain sentence. INA §§ 101(a)(43)(J), (Q), (T), 8 U.S.C. §§ 1101(a)(43)(J), (Q), (T). *See also* Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 868-69 (1998) (citing legislative history that illustrates Congress’s intent for “term of imprisonment” to refer to actual imposed sentence); LEGOMSKY, *supra* note 8, at 449.

Because this Note will assess the weaknesses of section 237(a)(2) of the INA and the other INA removal provisions relating to that section, it is necessary to highlight an error in the “aggravated felony” definition that is pertinent to a discussion regarding the “term of imprisonment” language. In sections 101(a)(43)(F) and (G) of the INA, which describe when crimes of violence and theft and burglary offenses will constitute aggravated felonies for immigration purposes, the drafters omitted the verb “is” in stating the required sentences. The sentencing requirements for both provisions state “for which the term of imprisonment [sic] at least one year.” INA §§ 101(a)(43)(F)(G), 8 U.S.C. §§ 1101(a)(43)(F)(G). As other commentators have noted, this omission demonstrates that the legislation is “sloppy.” Prinz, *supra*, at 321.

United States v. Graham illustrates the consequences of this minor mistake. 169 F.3d 787 (3d Cir. 1999). In *Graham*, the alien defendant was previously convicted of petit larceny, a Class A misdemeanor in New York, with a statutory maximum sentence of one year. *Id.* at 789. He received the maximum one-year sentence and was thus removable. *Id.* *Graham* argued that because section 101(a)(43)(G) of the INA was missing a crucial verb, there were two plausible interpretations of the “aggravated felony” provision. *Id.* at 790. The statute could refer to theft offenses “for which the term of imprisonment is at least one year” or to theft offenses “for which the term of imprisonment imposed is at least one year.” *Id.* *Graham* argued that the court should adopt the former interpretation. *Id.* Such a reading of the statute, however, would require that the “minimum term for the theft offense has to be at least one year.” *Id.* *Graham* contended that because his offense carried no minimum term in New York, it did not constitute an “aggravated felony.” *Id.* The Court, relying on the definition of “term of imprisonment” in section 101(a)(48) of the INA as the actual sentence imposed, rejected *Graham*’s reasoning. *Id.* For a more detailed description of this mistake and another more intricate error, see Prinz, *supra*, at 329-30.

In addition to commenting on the mistake in the statutory language, Prinz also notes that certain drug crimes have been considered misdemeanors under state law. Thus, under the changes wrought by IIRAIRA, the INS may attempt to characterize theft or assault convictions (misdemeanors under state law) with a probated or suspended sentence as aggravated felonies. *Id.* Prinz’s assumption has proven to be accurate. *See Graham*, 169 F.3d at 791-793. While holding that *Graham*’s one-year petit larceny conviction qualified him as an “aggravated felon” for removal purposes, the court reasoned that “a carelessly drafted piece of legislation has improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors.” *Id.* at 788. For more illustrations of how the removal provisions impact aliens who have committed only minor crimes, see *infra* Part IV.C. *See also supra* note 9.

51. By incorporating relief provisions into the INA, Congress acknowledged that removal is a harsh sanction and that in some cases, the Attorney General should be able to waive it. LEGOMSKY, *supra* note 8, at 463. As Congress enacted provisions that expanded the definition of “aggravated felony,” however, it simultaneously withdrew the major forms of relief available to most of these felons. For example, prior to 1996 many aliens were eligible to apply for a section 212(c) waiver. INA § 212(c), 8 U.S.C. § 1182(c) (1994). From 1989 to 1994, the Attorney General granted section 212(c) relief to more than half of all immigrants who petitioned for it. Bennett, *supra* note 3, at 1701 n.23 (citing *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y.)). Section 212(c) of the INA waived grounds for deportability where there was a comparable ground of excludability. GORDON ET AL., *supra* note 24, § 64.04(1). After the 1990 reforms to the provision, an alien had to have maintained lawful

unrelinquished domicile in the United States for seven consecutive years to be eligible for a 212(c) waiver. Moreover, an alien was not eligible for such relief if he had been convicted of one or more aggravated felonies for which he had served a term of imprisonment of five or more years. INA § 212(c), 8 U.S.C. § 1182(c) (1994), *as amended by* Immigration Act of 1990, §§ 511, 601(d). *See also* GORDON ET AL., *supra* note 24, §§ 74.04(1), (2)(h). However, section 440(d) of AEDPA deemed aliens convicted of aggravated felonies and offenses involving firearms and controlled substances ineligible for § 212(c) relief. INA § 212(c), 8 U.S.C. 1182(c) (Supp. IV 1998). *See also* Mojico, F. Supp. 130, at 137.

Furthermore, IIRAIRA limited the relief available to aliens involved in criminal activity as well. IIRAIRA repealed the section 212(c) waiver altogether and modified another form of relief entitled "suspension of removal." INA § 240A, 8 U.S.C. § 1229b (Supp. IV 1998). Section 304(a)(3) of IIRAIRA altered the two forms of discretionary relief and consolidated them into one provision called "cancellation of removal." INA § 240A, 8 U.S.C. § 1229b (Supp. III 1997). This reform had two major consequences for the alien deemed removable on criminal grounds. First, prior to 1996, when an alien petitioned for a section 212(c) waiver, he not only had to establish that he was statutorily eligible for the relief pursuant to the conditions described above, but he had to receive the favorable exercise of the Attorney General's discretion as well. INA § 212(c), 8 U.S.C. § 1182(c) (1994). In *Matter of Marin*, the Board of Immigration Appeals specified the criteria for determining whether or not to grant discretion. *See* *Matter of Marin*, 16 I. & N. Dec. 581, 586 (B.I.A. 1978). The *Marin* court recognized factors adverse to the alien's petition, as well as those meriting favorable consideration. *Id.* The factors included, *inter alia*: the nature and underlying circumstances of the deportability ground at issue; the alien's criminal record; the nature, recency, and severity of the offenses; rehabilitation; family ties within the United States; duration of residence in the United States; service in the Armed Forces; history of employment; potential hardship to the alien and his family members; and other evidence of the alien's good character. *Id.* For a more thorough discussion of the discretionary considerations, see Rannik, *supra* note 42, at 126-139. *See also* GORDON ET AL., *supra* note 24, § 74.04(3); *infra* Part V. However, by eliminating this waiver and substituting "cancellation of removal" in its place, immigration judges, to whom the Attorney General has delegated the exercise of discretion, see 8 C.F.R. § 212.3(a), are no longer permitted to waive removal based on the balancing test prescribed in *Marin*. Moreover, under section 240A(a) of the INA aliens convicted of an aggravated felony continue to be barred from this form of relief. INA § 240A(a), 8 U.S.C. § 1229b(a)(3) (Supp. IV 1998).

The second consequence of IIRAIRA's creation of the "cancellation of removal" provision was the modification made to a form of relief known as "suspension of deportation." This type of relief became the second prong of the "cancellation of removal" provision. INA § 240A(b), 8 U.S.C. § 1229b(b) (Supp. IV 1998). As the title of the provision states, it provides cancellation of removal and adjustment of status to "certain nonpermanent residents." INA § 240A(b), 8 U.S.C. § 1229b(b). However, the actual language of the statute does not limit this form of relief to non-LPRs. LPRs who satisfy the requirement of section 240A(b)(1)(A), which requires continuous physical presence in the United States for a period of ten years or more immediately preceding the date of the alien's application, should be eligible for such relief. INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A). *See* GORDON ET AL., *supra* note 24, § 64.04(3). Prior to 1996, aliens convicted of various crimes, including those involving moral turpitude and controlled substances, may have been eligible for "suspension of deportation" as long as they satisfied the other statutory requirements. INA § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1994). *See* GORDON ET AL., *supra* note 24, §§ 64.04(3), 74.07 (3)(c). However, IIRAIRA amended the provision so that aliens are barred from such relief if they have been convicted of an offense listed under section 237(a)(2) of the INA. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (Supp. IV 1998). *See* GORDON ET AL., *supra* note 24, § 64.04(3). For an overview of the current "cancellation of removal" provision, see *infra* notes 83-99 and accompanying text. *See also* LEGOMSKY, *supra* note 8, at 464-498.

52. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in United States Immigration Law*, 71 TUL. L. REV. 703, 704 (1997) (stating that "[i]f judicial review of administrative orders depriving noncitizens of the opportunity to live in the United States is an essential part of the rule of law, then 1996 may well become known as the year in which the rule of

available to many of the aliens affected by the various reforms to the removal system. These restrictions made it more difficult, and in some cases impossible, for aliens to circumvent the removal process.⁵³ Finally, IIRAIRA attached language to the end of the “aggravated felony” definition to require retroactive application of the amended provision.⁵⁴ Therefore, aliens became removable for crimes that were not grounds for removal at the time that they

immigration law died.”) Section 440(a) of AEDPA and section 306(d) of IIRAIRA barred judicial review of final orders of removal for aliens who are removable under various crime-related grounds. INA § 242(a)(2)(C), 8 U.S.C. § 1252 (Supp. IV 1998). Moreover, section 306(a)(2) of IIRAIRA barred judicial review of denials of relief for cancellation of removal, voluntary departure, and adjustment of status (a form of relief for non-LPRs, which is therefore outside the scope of this Note). INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (Supp. IV 1998). *But see* Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 256-264 (1998) (contending that some form of judicial review still exists despite the INA bar, as aliens can exercise their rights to seek habeas corpus review). For an overview of the judicial review provisions in the removal context, *see generally* Benson, *supra*; David Cole, *No Clear Statement: An Argument for preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427 (1998); GORDON ET AL., *supra* note 24, § 104.13. *See also infra* Part III.C.

Another restriction on the procedural safeguards available to aliens deemed deportable on crime-related removal grounds occurred in 1990 with Congress’s repeal of a provision known as “judicial recommendations against deportation” (commonly referred to as JRADs). Only those aliens who were deportable under the moral turpitude grounds, the predecessors to sections 237(a)(2)(A)(i) and (ii), were eligible for JRAD relief. The sentencing judge had the authority to make a binding order that the alien not be deported. After such an order, the INS was barred from deporting the alien on the basis of the specified crime at issue in the JRAD. INA § 241(b)(2), 8 U.S.C. § 1251(b)(2) (1988). However, section 505 of the Immigration Act of 1990 withdrew the JRAD device from the removal context. LEGOMSKY, *supra* note 8, at 444-45. *See generally* Lisa R. Fine, Note, *Preventing Miscarriages of Justice: Reinstating the Use of “Judicial Recommendations Against Deportation”*, 12 GEO. IMMIGR. L.J. 491 (1998).

In contrast to the JRAD procedure where sentencing judges had the authority to issue binding orders against removal, today there are two statutory provisions that authorize judicial removal during sentencing of aliens deportable on crime-related grounds. INA § 238(c), 8 U.S.C. § 1228(c) (Supp. IV 1998); 18 U.S.C. § 3583(d) (Supp. IV 1998). For an overview of the judicial removal process, *see* LEGOMSKY, *supra* note 8, at 731-33. The issue of judicial removal has spurred much debate as the provisions permit criminal sentencing judges to determine removal issues which have always been considered civil in nature. *See infra* note 156. *See, e.g.*, Ethan Venner Torrey, *“The Dignity of Crimes”: Judicial Removal of Aliens and the Civil-Criminal Distinction*, 32 COLUM. J.L. & SOC. PROBS. 187 (1999).

53. *See supra* notes 51-52.

54. Section 321(b) of IIRAIRA added the following sentence to the end of the aggravated felony definition: “Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.” INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. IV 1998). *Cf.* LEGOMSKY, *supra* note 8, at 448 (demonstrating that under the Anti-Drug Abuse Act, the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994, and AEDPA, deportability was limited to convictions entered on or after the enactment dates of each statute). *See generally* Morawetz, *supra* note 4 (rebutting the contention that Congress’s plenary power bars judicial assessment of retroactive legislation in the immigration arena and questioning the constitutionality of such statutory provisions via a substantive due process analysis).

were committed, but became aggravated felonies subsequent to the enactment of IIRAIRA.

III. OVERVIEW OF THE CURRENT CRIME-RELATED REMOVAL SYSTEM UNDER THE INA

A. *Current Criminal Grounds for Removal*

INA section 237(a)(2) enumerates the current removal provisions for criminal activity.⁵⁵ Under that section, the INS may remove an alien if he commits a crime that falls in one of six general categories.⁵⁶ First, an alien is deportable if he is convicted of a crime of moral turpitude within five years after his admission to the United States—or within ten years in the case of a legal permanent resident—if a sentence of at least one year may be imposed.⁵⁷ Moreover, an alien is deportable if he is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal conduct, regardless of the potential sentences or those imposed.⁵⁸

Second, a conviction for an aggravated felony⁵⁹ at any time after admission is grounds for removal.⁶⁰ In light of the many statutory expansions to the provision since its inception in 1988, the definition now includes 50 classes of crimes⁶¹ ranging from theft⁶² to crimes of violence.⁶³

55. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (Supp. IV 1998). For a thorough overview of all of the current crime-related removal grounds, see GORDON ET AL., *supra* note 24, § 71.05.

56. See *supra* notes 34-39.

57. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

58. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

59. Section 101(a)(43) of the INA lists the specific offenses that qualify as aggravated felonies. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

60. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 237(a)(2)(A)(iii).

61. GORDON ET AL., *supra* note 24, § 71.05(2).

62. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (“a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [sic] at least one year”). For a discussion about the minor error in the drafting of this provision (the lack of the verb “is”), see *supra* note 50.

63. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). A “crime of violence” is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1994). The Board of Immigration Appeals (BIA) has held that driving while intoxicated constitutes a crime of violence because of the potential that it will result in physical harm. GORDON ET AL., *supra* note 24, § 71.05(2)(d)(ii), n.398-401. For an overview of case law interpreting “crimes of violence” as “aggravated felonies” for immigration purposes, see *id. supra*, § 71.05(2)(d)(ii).

Third, an alien is deportable if he violates, conspires, or attempts to violate, at any time after admission, any state, federal, or foreign law involving a controlled substance.⁶⁴ Moreover, drug abusers and addicts are also deportable.⁶⁵ However, the statute provides an exception for a single offense “involving possession for one’s own use of 30 grams or less of marijuana.”⁶⁶

Fourth, violations of any law relating to firearms or destructive devices at any time after admission are grounds for removal.⁶⁷

Fifth, violations of various national security, selective service, and immigration laws will result in removal.⁶⁸ The national security and selective service offenses relate to: espionage, sabotage, treason, and sedition;⁶⁹ threats against the President of the United States and successors to the Presidency;⁷⁰ participation in any form in an expedition against a friendly nation;⁷¹ and violations of the Trading With the Enemy Act and the Military Selective Service Act.⁷² The immigration offenses involve: high speed flight from an immigration checkpoint;⁷³ alien smuggling;⁷⁴ and importation of aliens for prostitution or other immoral purposes.⁷⁵

Finally, an alien is deportable if, at any time after admission, he is convicted of a crime of domestic violence, stalking, child abuse, neglect, or abandonment,⁷⁶ or a violation of a protection order.⁷⁷

B. Current Forms of Discretionary Relief Available to Removable Aliens

The INA authorizes various forms of relief for some removable aliens.⁷⁸

64. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. IV 1998).

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

66. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

67. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

68. INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D).

69. INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

70. INA § 237(a)(2)(D)(ii), 8 U.S.C. § 1227(a)(2)(D)(ii). *See also* 18 U.S.C. § 871 (1994).

71. INA § 237(a)(2)(D)(ii), 8 U.S.C. § 1227(a)(2)(D)(ii). *See also* 18 U.S.C. § 960 (1994).

72. INA § 237(a)(2)(D)(iii), 8 U.S.C. § 1227(a)(2)(D)(iii).

73. INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv).

74. INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv). *See also* 8 U.S.C. § 1185 (1994).

75. INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv). *See also* 8 U.S.C. § 1328 (1994).

76. INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

77. INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).

78. *See infra* notes 79-82. *See also* INA § 249, 8 U.S.C. § 1259 (Supp. IV 1998) (dealing with another form of relief known as “registry”). For an overview of the registry provision, see LEGOMSKY, *supra* note 8, at 498-500. Aside from those forms of relief listed in the INA, there are also two other measures available to some fortunate aliens. These measures include private bills and deferred action. Private bills are specific pieces of legislation that are introduced by individual members of Congress. Although Congress has recently reduced its employment of such bills, if enacted they function as a sort of Congressional “pardon” for the particular alien. For an overview of the private bill form of relief,

The four most significant forms of discretionary relief under the INA include cancellation of removal,⁷⁹ asylum,⁸⁰ nonrefoulement,⁸¹ and voluntary departure.⁸²

The cancellation of removal provision has two prongs: INA sections 240A(a)⁸³ and 240A(b).⁸⁴ Section 240A(a) is limited to certain permanent resident aliens⁸⁵ and is used most often when the grounds for removal are based on criminal activity.⁸⁶ Under section 240A(a), the Attorney General may cancel removal if the alien has been a lawful permanent resident for five years or more,⁸⁷ has resided continuously in the United States for seven years after having been admitted in any status,⁸⁸ and has not been convicted of an aggravated felony.⁸⁹

Section 240A(b)⁹⁰ succeeds a former relief provision entitled "Suspension of Deportation."⁹¹ The section contains four eligibility requirements.⁹² First,

see GORDON ET AL., *supra* note 24, § 74.09. See also Note, *Private Bills and the Immigration Law*, 69 HARV. L. REV. 1083 (1956).

For an example of a private bill, see H.R. 321, 106th Cong. (1999). This bill was sponsored by Congressman McCollum, a Florida Republican, to provide relief for Robert A. Broley, who was deported to his native Canada. See Anthony Lewis, *Abroad at Home; The Quality of Mercy*, N.Y. TIMES, Feb. 27, 1999, at A15. Some people question the motives of McCollum, a staunch supporter of the 1996 immigration reforms, in sponsoring a private relief bill for Broley whose father is the Treasurer of the Orange County Republican Executive Committee in Florida. *Id.*

The second form of relief, deferred action, is simply an administrative policy practiced by the INS. By "deferring" action on removal proceedings, the INS delays its formal removal procedures. In these cases, the INS can initiate removal proceedings but chooses not to do so. See 2 Immigr. L. Serv. § 17:153 (Supp. 2000) ("Deferred action status is granted as a matter of prosecutorial discretion.").

79. INA § 240A, 8 U.S.C. § 1229b (Supp. IV 1998).

80. INA § 208, 8 U.S.C. § 1158 (Supp. IV 1998).

81. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. IV 1998).

82. INA § 240B, 8 U.S.C. § 1229c (Supp. IV 1998).

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

84. INA § 240A(b), 8 U.S.C. § 1229b(b). These sections list the necessary requirements for the alien to be eligible for the specified relief. However, although an alien may satisfy all of the requisite statutory elements, he must show that he merits the favorable exercise of the Attorney General's discretion. For a good overview of "cancellation of removal", see GORDON ET AL., *supra* note 24, § 64.04.

85. INA § 240A(a), 8 U.S.C. § 1229b(a). For a good overview of "cancellation of removal," see Royal F. Berg, *Cancellation of Removal for Permanent Resident Aliens*, 61 A.L.I.-A.B.A. 301 (1999).

86. LEGOMSKY, *supra* note 8, at 465.

87. INA § 240A(a)(1), 8 U.S.C. § 1229b(a)(1).

88. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2).

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

90. INA § 240A(b), 8 U.S.C. § 1229b(b).

91. LEGOMSKY, *supra* note 8, at 465. Under subsection (b), the Attorney General has the power to not only cancel an alien's removal, but to adjust the status of the alien to that of a legal permanent resident as well.

The current section's title seems to limit cancellation of removal and adjustment of status to "certain nonpermanent residents." See INA § 240A(b), 8 U.S.C. § 1229b(a). However, the language of the provision does not state that legal permanent residents are excluded from its use if they are unable to meet the requisite elements enumerated in 240A(a). GORDON ET AL., *supra* note 24, § 64.04(3).

the alien must have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of his application for cancellation.⁹³ Second, the alien must have been a person of good moral character during the requisite ten-year period.⁹⁴ Third, the alien may not be inadmissible or removable under any of the criminal grounds.⁹⁵ Finally, the alien must establish that his removal would cause extreme or exceptional hardship to the alien's spouse, parent, or child, if those relatives are United States citizens or lawful permanent residents.⁹⁶

Because section 240A(a) precludes relief for aggravated felons⁹⁷ and section 240A(b) bars relief either for aliens lacking good moral character⁹⁸ or for those who have been convicted of any offense under section 237(a)(2),⁹⁹ cancellation of removal is generally unattainable for most aliens who have committed crimes.

Asylum and nonrefoulement (nonreturn) are intertwined remedies for aliens who fear that they would be subjected to human rights violations in their "home" countries.¹⁰⁰ A grant of asylum allows an alien to remain in the United States temporarily, and in most cases, permanently.¹⁰¹ Asylum is available to an alien if he establishes that he "is unable or unwilling to return to . . . [his home] country because of persecution or a well-founded fear of such persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰² An alien is barred from

92. See *infra* notes 93-96.

93. INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A).

94. INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B). Section 101(f) of the INA defines the term "good moral character." The list is not exhaustive, but it states that aliens lack good moral character if, *inter alia*, they are confined as a result of a conviction to a prison for a period of at least one hundred and eighty days, or if they have been convicted of an aggravated felony. INA § 101(f), 8 U.S.C. § 1101(f).

95. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C). Nor may the alien be removable for failing to register or falsifying documents. *Id.*

96. INA § 240(b)(1)(D), § 1229b(b)(1)(D). Aside from these statutory requirements, subsection 240A(b) contains a special rule easing some of the elements that battered spouses, children, and parents of battered children have to establish in order to be eligible for the relief. However, the alien spouse, child, or parent must demonstrate that the United States spouse or parent responsible for the battery or extreme cruelty is a United States citizen or lawful permanent resident. INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2).

97. See *supra* note 89.

98. See *supra* note 94.

99. See *supra* note 95.

100. See Pilcher, *supra* note 50, at 295. For a more thorough assessment of asylum and nonrefoulement, see generally LEGOMSKY, *supra* note 8, at 768-941.

101. See INA § 208(c)(2), 8 U.S.C. § 1158(c)(2) (Supp. IV 1998) (regarding "Termination of asylum").

102. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). The INA provisions for asylum, incorporate by reference the definition of refugee. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1).

receiving a discretionary grant of asylum if he has been convicted of a “particularly serious crime” and he “constitutes a danger to the community of the United States.”¹⁰³ For purposes of asylum, an “aggravated felony” is considered to be a particularly serious crime.¹⁰⁴ Therefore, aggravated felons cannot petition for asylum because courts have held that an alien who has been convicted of a particularly serious crime automatically poses a danger to the United States community.¹⁰⁵

Although similar to asylum, nonrefoulement encompasses different eligibility requirements and provides a more limited form of relief.¹⁰⁶ If an eligible alien establishes that his “life or freedom would be threatened in [his home] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion,” the Attorney General may not remove him to that country.¹⁰⁷ However, the Attorney General may remove the alien to a third country.¹⁰⁸ Like asylum, an alien may be ineligible for nonrefoulement if the Attorney General deems that an alien convicted of a particularly serious crime is a danger to the United States community.¹⁰⁹ In the nonrefoulement context, an alien who is convicted of a particularly serious crime automatically satisfies the danger to the United States community requirement as he does in the asylum arena.¹¹⁰ However, unlike in the asylum context, aggravated felonies constitute “particularly serious crimes” if the alien received a sentence of at least five years.¹¹¹ Although many of the offenses enumerated under the broad “aggravated felony” definition do not satisfy the five-year sentence threshold, whether they represent “particularly serious crimes” is to be assessed on a case-by-case basis.¹¹²

Voluntary departure¹¹³ represents another example of discretionary relief outlined in the INA. Its scope is more limited than the other INA relief

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

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

105. In *Matter of Carballe*, the BIA held that a conviction of a “particularly serious crime automatically renders the alien a danger to the community.” 19 I. & N. Dec. 357 (BIA 1986). This is true for both asylum and nonrefoulement. LEGOMSKY, *supra* note 8, at 888.

106. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. IV 1998) (entitled “Restriction on removal to a country where alien’s life or freedom would be threatened”). This section, although prohibiting return to a country where the alien’s life or freedom would be threatened (presumably his “home” country), does not preclude sending the alien to a safe third country.

107. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). *See also* Pilcher, *supra* note 50, at 295-96.

108. *See supra* note 106.

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

110. *See supra* note 105.

111. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (last paragraph of the provision).

112. Pilcher, *supra* note 50, at 296.

113. INA § 240B, 8 U.S.C. § 1229c (Supp. IV 1998).

provisions.¹¹⁴ Under this type of relief, an alien who departs “voluntarily” does so by leaving the United States before the INS issues a formal removal order against him.¹¹⁵ There are two advantages of this type of relief for the alien.¹¹⁶ First, once an alien receives a formal removal order, he is ineligible to return to the United States for at least ten years.¹¹⁷ This ineligibility period extends to twenty years if the alien is convicted of a second offense.¹¹⁸ An alien convicted of an aggravated felony is permanently barred from returning to the United States.¹¹⁹ By engaging in a voluntary departure, an alien can leave before the INS issues a removal order against him and thus circumvents the “ineligible to return” period.¹²⁰ Second, a removable alien often faces mandatory detention.¹²¹ If he voluntarily departs, he does not have to be detained and may not have to post bond.¹²²

There are two types of voluntary departure, which are distinguishable based on their timing.¹²³ The first form is embodied in INA subsection 240B(a).¹²⁴ That subsection authorizes the Attorney General to permit an alien to depart voluntarily, at his own expense, at any time before removal proceedings are final.¹²⁵ Subsection 240B(b) permits voluntary departure, at the conclusion of removal proceedings, at the alien’s expense.¹²⁶

Although Congress prohibits aggravated felons from returning to the United States after their removal,¹²⁷ they are completely barred from voluntary departure relief.¹²⁸ Moreover, section 240B(b) contains a good moral character requirement that also renders aliens who have committed crimes other than aggravated felonies unable to voluntarily depart.¹²⁹

114. LEGOMSKY, *supra* note 8, at 508-510.

115. *Id.* at 508.

116. *Id.* at 509.

117. INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii).

118. *Id.*

119. *Id.*

120. LEGOMSKY, *supra* note 8, at 509.

121. *Id.*

122. *Id.*

123. INA §§ 240B(a), 240B(b), 8 U.S.C. §§ 1229c(a), 1229c(b).

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

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

126. INA § 240B(b), 8 U.S.C. § 1229c(b). Like cancellation of removal, voluntary departure requires the Attorney General’s favorable exercise of discretion. *See* INA §§ 240B(a)(1), 240B(b)(1), 8 U.S.C. 1229c(a)(1), 1229c(b)(1) (stating “[t]he Attorney General may . . .”)

127. *See supra* note 117.

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

129. INA § 240B(b)(1)(B), 8 U.S.C. § 1229c(b)(1)(B).

C. *Judicial Review of Both Removal Orders and Denials of Discretionary Relief*

Through AEDPA and IIRAIRA, Congress enacted sweeping reforms to the judicial review procedures enumerated in the INA.¹³⁰ The current judicial review provisions raise numerous statutory interpretation and constitutional questions.¹³¹ AEDPA and IIRAIRA deprived the courts of jurisdiction to review both crime-related orders of removal¹³² and most denials of discretionary relief.¹³³ INA section 242(a)(2)(C) bars judicial review of any final order of removal against an alien who is removable as a result of committing an aggravated felony, two moral turpitude crimes for which a sentence of at least one year may be imposed, controlled substance and firearms offenses, or other miscellaneous crimes.¹³⁴ Therefore, although a majority of the aliens whom the INS deems removable as a result of criminal activity are not statutorily eligible for the most lasting forms of relief,¹³⁵ in most cases, courts of appeal do not even have jurisdiction to determine the legality of their removal orders.¹³⁶ Moreover, pursuant to INA section 242(a)(2)(B)(i), denials of both forms of cancellation of removal and voluntary departure are not reviewable.¹³⁷

IV. ANALYSIS: REMOVAL AS THE ULTIMATE CAVEAT

A. *The "Blurring" of the Citizen Versus Alien Distinction*

In evaluating the INA crime-related removal system,¹³⁸ it is necessary to question why policymakers recognize removal as an appropriate sanction.¹³⁹ The underlying assumption is that significant disparities exist between the

130. See GORDON ET AL., *supra* note 24, § 104.12(1).

131. See *id.* § 104.13(2).

132. AEDPA § 440(a), IIRAIRA § 306(d). See also INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. IV 1998).

133. AEDPA § 440(a), IIRAIRA § 306(d). See also INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).

134. INA § 242(a)(2)(c), 8 U.S.C. § 1252(a)(2)(c). Various complex statutory interpretation issues have surfaced as a result of the 1996 judicial review reforms. Although a discussion of these issues is outside the scope of this Note, three texts address many of the problems. See, e.g., Benson, *supra* note 52; GORDON ET AL., *supra* note 24, § 104.13; LEGOMSKY, *supra* note 8, at 618-645 & 1999 Supp. at 50-51. For a theoretical discussion of the limits on judicial review of discretionary decisions, see generally Kanstroom, *supra* note 52.

135. See *supra* notes 83-99 and accompanying text.

136. See *supra* notes 132, 134 and accompanying text.

137. INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). See also *supra* note 133.

138. See *supra* Part III.

139. See *supra* note 5. See also *infra* note 140.

rights of United States citizens and those of aliens, which permit removal as an acceptable way to solve problems related to immigration.¹⁴⁰ Although this premise is accurate,¹⁴¹ it is debatable whether a just rationale exists for the distinction between the two populations.¹⁴² Notwithstanding the different treatment of United States citizens and aliens, the conclusion that removal is an acceptable sanction for an alien who commits a crime must be examined.¹⁴³ This issue is particularly important in light of the fact that the current removal provisions may deem removable legal permanent residents who have established significant roots in the United States after decades of residence in this country.¹⁴⁴

B. Evaluating the Nexus Between Congress's Means and Ends in the Removal Arena

Congress's expansion of the crime-related removal grounds¹⁴⁵ and its restrictions on the forms of relief¹⁴⁶ and opportunities for judicial review available to aliens¹⁴⁷ make it necessary to compare the implications of such changes with the justifications for removal. The purpose of this comparison is to assess whether the adverse impact of the current INA crime-related removal provisions on the alien population¹⁴⁸ makes sense in light of the

140. See *supra* note 5. It is precisely the perpetuation of this distinction between United States citizens and the alien population as outsiders that makes removal seem like an acceptable solution. Many who advocate for the removal of aliens who have committed crimes do so based on nativist tendencies, which suggest that because aliens were born elsewhere, the United States should not have to bear the burden of their criminal behavior. In essence, those who maintain this idea argue that it is easier to send the aliens back to their original homelands rather than permit their continued residence in the United States. See generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994). See also T. Alexander Aleinikoff, *Aliens, Membership and the Constitution*, 7 CONST. COMM. 9 (1990); THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 956-973 (Interim 2d ed. 1991).

141. See LEGOMSKY, *supra* note 8, at 1011. Federal and state laws impose numerous restrictions on aliens as compared to citizens. *Id.* These restrictions include: professional licenses, government employment, public benefits, property ownership, and the right to vote. *Id.*

142. As noted by Professor Legomsky:

comparisons between the respective rights of citizens and aliens have produced discussion of (a) whether under existing law citizenship in fact has important consequences and (b) whether citizenship *should* be important. Few deny that significant differences do, and should, separate citizens from undocumented aliens or even from lawful nonimmigrants. The real issues have centered around the differences between citizens and lawful permanent residents.

Id. at 1017.

143. See *infra* Part IV.B.

144. See *supra* note 8. See also *infra* Part IV.C.

145. See *supra* notes 41-50 and accompanying text. See also *supra* Part III.A.

146. See *supra* note 51. See also *supra* Part III.B.

147. See *supra* note 52. See also discussion *infra* Part III.C.

148. See *infra* Part IV.C.

policy grounds for removal.¹⁴⁹

The Supreme Court has repeatedly defined the consequences of deportation.¹⁵⁰ For instance, in *Fong Haw Tan v. Phelan*,¹⁵¹ Justice Douglas stated that “deportation is a drastic measure and at times the equivalent of banishment or exile.”¹⁵² In *Ng Fung Ho v. White*,¹⁵³ Justice Brandeis declared that “[deportation] may result . . . in loss of both property and life; or of all that makes life worth living.”¹⁵⁴ However, although the Court has acknowledged that, with regard to a deportation proceeding, “[t]he stakes are indeed high and momentous for the alien who has acquired his residence here,”¹⁵⁵ it has consistently held that deportation is not intended to punish the individual.¹⁵⁶ In light of the Court’s denial that it is a punitive sanction, the

149. See *infra* notes 150-65 and accompanying text.

150. For a discussion of why the term “deportation” is used in this section rather than the term “removal,” see *supra* note 10.

151. 333 U.S. 6 (1948). Fong Haw Tan was convicted on two counts of murder. *Id.* at 9. The state separately charged him with the murder of two individuals although the homicides occurred “on or about the same date.” *Id.* at 8. The Court held that an immigration provision dealing with multiple criminal convictions for offenses involving moral turpitude, currently section 237(a)(2)(A)(ii) of the INA should be strictly construed. *Id.* at 9-10. The Court thus concluded that Tan’s two counts of murder did not constitute separate criminal offenses sufficient to invoke a deportation proceeding under the immigration statute. *Id.* at 9-10. The Court reasoned that “since the stakes are considerable for the individual, we will not assume that Congress meant to trench on [Tan’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.” *Id.* at 10.

152. *Id.* at 10.

153. 259 U.S. 276 (1922). In *Ng Fung Ho*, four Chinese individuals were detained under warrants of deportation that cited, *inter alia*, that they were in the United States in violation of section 6 of the Chinese Exclusion Act. *Id.* at 278. See Chinese Exclusion Act of May 5, 1892, ch. 60, 27 Stat. 25 (repealed 1943). Regarding two of the petitioners, Gin Sang Get and Gin Sang Mo, their assertions of United States citizenship entitled them to a judicial determination of the validity of their claims. *Id.* at 281-82, 285. The Court reversed the Ninth Circuit’s judgment relating to them and remanded to the district court for a judicial determination of the validity of their citizenship claims. *Id.* at 285. The Court reasoned that “[t]o deport one who so claims to be a citizen obviously deprives him of liberty . . .” *Id.* at 284.

154. *Id.* See also *Bridges v. Wixon*, 326 U.S. 135 (1945). In *Bridges*, the Supreme Court reversed a decision of the Ninth Circuit holding *Bridges* deportable. *Id.* at 157. The Court reasoned that the Court of Appeals had misconstrued the term “affiliation” as it was used in an immigration provision proscribing membership or affiliation in the Communist Party of the United States. *Id.* at 156. The Court found that deportation may “visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” *Id.* at 147. Thus, the Court assumed that Congress intended the term “affiliation” to be interpreted narrowly so that extreme harshness would not be imposed on the alien for “slight or insubstantial reasons.” *Id.*

155. *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947). The Court’s qualification that the stakes are high for one “who has acquired his residence,” here demonstrates that the Court recognized the importance of the possible roots that an alien could establish while living in the United States. *Id.*

156. See, e.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (deportation is not a punishment); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893):

The order of deportation is not a punishment for crime It is but a method of enforcing the

only justification it has provided for deportation is that “it is simply a refusal by the government to harbor persons whom it does not want.”¹⁵⁷ This exercise of congressional authority is grounded in Congress’ plenary power to regulate immigration and the assumed incidents of such regulation.¹⁵⁸

Considering this rationale for deportation in conjunction with Congress’s current crime-related removal system, it seems apparent that the crime-related removal grounds and statutory bars to relief and judicial review are not narrowly tailored to accommodate Congress’s objective of promoting public welfare and safety.¹⁵⁹ Although Congress has the power to render

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.

Id. at 730. *See also* Venner Torrey, *supra* note 52 (arguing that section 238(c) of the INA, which permits judicial removal orders at the time of sentencing, appends the deportation proceedings to criminal prosecutions, but simultaneously withholds the constitutionally-mandated protections accorded criminal proceedings because the Supreme Court has deemed deportation civil in nature); Pilcher, *supra* note 50, at 300-28 (examining the immigration consequences arising from decisions made at the various stages of the criminal justice process); *Mahler*, 264 U.S. at 39 (stating that the proscription against Congress passing an *ex post facto* law in Art. 1, section 9 of the Constitution applies only to criminal laws, and deportation is not criminal in nature); *Lieggi v. INS*, 389 F. Supp. 12 (N.D. Ill. 1975), *rev’d* 529 F.2d 530 (7th Cir. 1976). The district court held that the deportation of Lieggi constituted cruel and unusual punishment, *id.* at 21, because he had lived in the United States since he was 15, had maintained steady employment, and was the sole supporter of his family. *Id.* at 14. The Seventh Circuit reversed. 529 F.2d at 530. *See* Stephen H. Legomsky, *Reforming the Criteria for the Exclusion and the Deportation of Alien Criminal Offenders*, 12 IN DEFENSE OF THE ALIEN 64, 66 (1990) (stating that the Seventh Circuit reversed *Lieggi* because “the constitutional prohibition of cruel and unusual punishment simply did not apply to deportation”).

157. *Bugajewitz*, 228 U.S. at 591.

158. As a result of the plenary power doctrine, the judicial branch gives extraordinary deference to Congress in matters involving immigration law and policy. *See* LEGOMSKY, *supra* note 8, at 1015 (“[g]enerally congressional action that discriminates against even lawful permanent resident aliens has been upheld, in part because of Congress’s plenary power to regulate immigration and the assumed similarity between immigration laws and other alien regulation”). *See, e.g.*, *Matthews v. Diaz*, 426 U.S. 67 (1976); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Bugajewitz*, 228 U.S. at 591 (“[i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful”); *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (“[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . .”).

See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

159. The language used in this subsection implies that the crime-related removal system is subject to strict scrutiny equal protection analysis. Strict scrutiny analysis is applied to alienage classifications created by state and local governments because the Supreme Court has deemed such classifications to be “suspect.” *See* *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that “a state statute that

aliens removable in order to protect the national interest,¹⁶⁰ the adverse impact that the current INA removal provisions have had on numerous aliens demonstrates that Congress's means are overinclusive.¹⁶¹ Considering the high stakes involved,¹⁶² it is irrational for an individual who has committed only a minor criminal offense to be permanently removed from the United States under the guise of public safety.¹⁶³ Moreover, Congress may employ its broad plenary power and determine that it does not "want" to harbor¹⁶⁴ an alien who has committed a felony, but Congress's choice should be weighed against the inequities that such a removal would impose on the alien.¹⁶⁵ Congress's expansive power to regulate immigration should not so easily trump the rights of a legal permanent resident who has lived in the United States for decades and has developed and maintained significant roots in the United States, but who, unfortunately, has also committed a criminal offense.

C. Illustrations of the Flaws of the Current INA Removal System

Accounts of the harsh consequences of the INA crime-related removal system are prevalent in the media. Perhaps the best way to understand how the crime-related removal system impacts aliens is to consider some of these stories.

denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause"). On the other hand, due to the federal government's plenary power to regulate immigration, alienage classifications promulgated by Congress must only be rationally related to a legitimate government objective. *See supra* note 158; *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 621-22 (1997); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 729-31 (2d ed. 1991).

However, the author of this Note questions the logic behind this settled law. *See* text accompanying notes 162-165. *See also* Gerald M. Rosenberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 336-338, *cited in* CHERMERINSKY, at 622:

[T]he reasons for treating alienage as a suspect classification apply as forcefully to the federal government as to the states The Court's repeated insistence that Congress has plenary power to act against aliens in any way it wants must be seen as an invitation to Congress to act capriciously and without significant concern for the legitimate interest of resident aliens.

See also ALEINIKOFF, *supra* note 140, at 37-39 (citing commentary involving "modern attacks on 'plenary power'").

160. *See supra* note 158.

161. *See infra* Part IV.C.

162. *See supra* note 155 and accompanying text.

163. *See supra* note 9. *See also infra* Part IV.C. *See also* Morowetz, *supra* note 4, at 159 (in listing the rationales proffered for enacting retroactive legislation, Morowetz criticizes the justification that Congress has identified aliens involved in criminal activity as undesirables: "[c]an it be rational to say that a person is per se undesirable because of a twenty-year-old conviction for selling a marijuana cigarette?").

164. *See supra* note 157 and accompanying text.

165. *See* discussion *infra* Part V.

Mary Anne Gehris has resided in the United States for approximately thirty-three years.¹⁶⁶ Her German birth mother gave her up for adoption to an American serviceman and his wife.¹⁶⁷ Although Gehris was never naturalized, she has lived in the United States for her entire life.¹⁶⁸ In 1988, when Gehris was twenty-two years-old, she caught her boyfriend cheating on her in a car with another woman.¹⁶⁹ She yelled at the woman and pulled the woman's hair.¹⁷⁰ The woman subsequently pressed charges and Gehris pleaded guilty to simple battery.¹⁷¹ She received a one-year suspended sentence and a year's probation.¹⁷² Gehris is currently a wife and mother of two children, one of whom has cerebral palsy and is institutionalized.¹⁷³ In an attempt to obtain scholarship money for college courses in criminal justice, Gehris applied for citizenship in 1997.¹⁷⁴ When she provided the INS authorities information about her conviction, the INS informed her of her deportability status rather than furthering her citizenship application.¹⁷⁵ Gehris found a way around the threat of removal via a state pardon for her crime by the Georgia Board of Pardons and Paroles in March 2000.¹⁷⁶

Other LPRs are not as fortunate as Gehris. For example, Carlos Garcia Nunez, a forty-five-year-old native of the Dominican Republic, has lived in the United States for eighteen years.¹⁷⁷ In 1995, Garcia-Nunez pleaded guilty to a drug offense for which he received a five-month sentence.¹⁷⁸ A representative for the ACLU remarked that the sentencing judge reduced Garcia-Nunez's sentence pursuant to federal sentencing guidelines because of his minor role in the drug offense and his extraordinary family

166. Anthony Lewis, *Abroad at Home; This Has Got Me in Some Kind of Whirlwind*; N.Y. TIMES, Jan. 8, 2000, at A13. Anthony Lewis is a two-time Pulitzer-prize winning syndicated columnist for the New York Times. His "Abroad at Home" column often focuses on the harsh consequences of the 1996 INA reforms.

167. *Dateline NBC* (television broadcast, Feb. 9, 2000).

168. *Id.*

169. *Id.*

170. *Id.* The other woman also alleged that Gehris grabbed her around the neck, but Gehris denies this claim. *Id.*

171. *Id.*

172. Lewis, *supra* note 166.

173. *Dateline*, *supra* note 167.

174. *Id.* See also Anthony Lewis, *Abroad at Home; Rays of Hope*, N.Y. TIMES, Feb. 10, 2001, at A15.

175. *Dateline*, *supra* note 167; Lewis, *supra* note 174.

176. Anthony Lewis, *Abroad at Home; Measure of Justice*; N.Y. TIMES, July 15, 2000, at A13. Gehris became a United States citizen on February 9, 2001. See Lewis, *supra* note 174.

177. Karen Lee Ziner, *ACLU Joins Fight to Save Man from Deportation*, PROVIDENCE JOURNAL, September 10, 1999, at 3B.

178. *Id.*

circumstances.¹⁷⁹ Both of Garcia-Nunez's children suffer from medical conditions.¹⁸⁰ Moreover, Garcia-Nunez and his wife also care for one of their grandchildren.¹⁸¹ Garcia-Nunez's lawyer further states that his client "has demonstrated complete rehabilitation since his conviction, and evidences, primarily, through service to his family, outstanding character values."¹⁸² However, despite Garcia-Nunez's eighteen-year residence in the United States, his personal circumstances, and his demonstrated rehabilitation, an immigration judge ordered his removal.¹⁸³

In 1985, Gabriella Dee, another alien adversely affected by the INA criminal activity provisions, pleaded guilty to smuggling her Israeli boyfriend across the United States-Canada border.¹⁸⁴ She was a Canadian citizen residing in Canada at the time.¹⁸⁵ Dee was fined \$25.00 for the offense.¹⁸⁶ Years later, Dee obtained a student visa and moved to Pennsylvania.¹⁸⁷ She got married and earned a PhD. from Lehigh University.¹⁸⁸ However, in 1998, Dee's misdemeanor qualified as "alien smuggling" under the retroactive aggravated felony provision and the INS initiated removal proceedings against her.¹⁸⁹

These stories are just a sampling of the harsh consequences that the current crime-related removal system has had on the alien population.¹⁹⁰

D. A Critique of Congress's "Fixed Rules" Approach Within the INA Crime-Related Removal System

In assessing the weaknesses of the INA crime-related removal system, it would be unreasonable to assume that legislation can ever reach some degree of perfection. If that were the case, the legal profession would become virtually obsolete with no need for the challenges of statutory interpretation

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Christian D. Berg, *Deportation Case Isn't Unique, [Congressman] McHale Says—Her Lawyer Says Gabriella Dee is a Victim of Alien Smuggling Law*, ALLENTOWN MORNING CALL, February 8, 1998, at A2.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Michael D. Goldhaber, *Immigration Reform is a Hot Issue: Deportation Horror Stories Spur Congress to the Problem*, NAT'L L.J., Sept. 18, 2000, at A1 ("As one deportation horror story after another has made headlines in recent months, a consensus has quietly emerged that the strict immigration laws that give rise to such stories need to be fixed.").

and the discovery of legislative loopholes. However, building on that assumption, statutes can still be characterized as bad law, and numerous commentators agree that the INA crime-related removal provisions represent a case in point.¹⁹¹ Congress has exercised its plenary power in the immigration arena¹⁹² by implementing fixed rules to deal with the issue of alien criminal activity.¹⁹³ The provisions demonstrate an effort by Congress to solidify its “tough on crime” agenda within the immigration laws.¹⁹⁴ This Note questions the “fixed rules” approach in the crime-related removal context in light of the consequences it has had on the alien population in the United States.¹⁹⁵ Through the expansion of the crime-related removal grounds,¹⁹⁶ especially the increase in offenses considered “aggravated felonies”¹⁹⁷ and the statutory limits on discretionary relief,¹⁹⁸ Congress’s rigid rules unjustly impact many aliens.¹⁹⁹ Moreover, the “fixed” nature of the approach bars judicial assessments of the provisions²⁰⁰ and therefore, precludes even a modicum of flexibility. As a result of the high stakes involved in removal for the alien, a rigid system with little or no relief goes against the historical role of immigration policy.²⁰¹

E. The Limited Effectiveness of Reforming Parts of the Crime-Related Removal System: Can Real Change Occur Within this “Fixed Rules” Framework?

There have been numerous recommendations proffered to alleviate the

191. See Prinz, *supra* note 50, at 321 (characterizing the legislation as “sloppy”). See also Graham, 169 F.3d at 788 (remarking that the “aggravated felony” definition, section 101(a)(43) of the INA, is “carelessly drafted”); end of discussion *supra* note 50; Berg, *supra* note 184 “[the recent reforms] have the best of intentions and the sloppiest of language”) (quoting Congressman Paul McHale (R-PA)).

192. See *supra* note 158.

193. See *supra* Part III. See also *infra* note 194.

194. See *supra* note 4. See also Morowetz, *supra* note 4, at 157. Members of Congress who sponsored the legislation to make the definition of “aggravated felony” harsher expressed concern over the way in which the immigration judges and the BIA were granting relief. *Id.* Thus, the per se bar to relief for some aliens can be seen as a legislative attempt to control the exercise of discretion by saying that no circumstances could justify relief from deportation when the crime is one classified as an aggravated felony. *Id.* This rationale for barring judicial relief demonstrates the major problem with Congress’s “fixed rules” approach.

195. See *supra* Part IV.C.

196. See *supra* notes 41-50 and accompanying text. See also *supra* Part III.A.

197. See *supra* note 196.

198. See *supra* note 51. See also *supra* Part III.B.

199. See *supra* Part IV.C.

200. See *supra* note 52. See also *supra* Part III.C.

201. See *supra* notes 1-2 and accompanying text.

harsh effects that the recent reforms²⁰² have had on the alien population. A majority of the proposals advocate limited actions that would provide some form of flexibility within the current crime-related removal framework. Generally, commentators promote a middle ground by retreating to pre-1996 removal provisions and practices.²⁰³ For example, suggested reforms include: eliminating the retroactivity language that IIRAIRA attached to the “aggravated felony” definition;²⁰⁴ limiting the grounds for removal by narrowing the “aggravated felony” definition;²⁰⁵ restoring judicial recommendations against deportation;²⁰⁶ re-employing modified forms of discretionary relief;²⁰⁷ and repealing the statutory bar on various forms of

202. See *supra* note 6.

203. See *infra* notes 204-08 and accompanying text.

204. See Morawetz, *supra* note 4, at 160 (questioning the constitutionality of the retroactivity language in the current provisions). See also H.R. 5062, 106th Cong. (2000) (modifying the retroactivity language imposed by IIRAIRA so that most aliens convicted of aggravated felonies under the INA prior to 1996 would still be eligible for section 240A(a) relief). House Bill 5062 passed unanimously in the House on September 19, 2000. H.R. 5062, WL 1999 US H.B. 5062 (SN). However, the bill died in the Senate at the end of the 106th term. Lewis, *supra* note 174.

205. See Sara A. Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRAIRA*, 19 B.C. THIRD WORD L.J. 683, 707 (1999).

206. See Fine, *supra* note 52, at 507-08 (proposing the reinstatement of the JRAD in limited cases). See also LEGOMSKY, *supra* note 8, at 445 (suggesting as an alternative to JRADs, a more radical approach in which the INA could bar removal unless the sentencing judge recommends it).

207. This suggested reform has at least two variations. The first recommendation is the most basic, calling for the restoration of discretionary relief provisions such as the INA § 212(c) waiver. See Martin, *supra* note 205. For a brief overview of the § 212(c) waiver, see *supra* note 51.

See also H.R. 171, 107th Cong. (2001) (providing discretionary relief for alien veterans of the United States Armed Forces); H.R. 87 § 2(b), 107th Cong. (2001) (reinstating relief measures for LPRs “affected by the changes [to] the definition of ‘aggravated felony’” under IIRAIRA); H.R. 3272, 106th Cong. (1999) (same); H.R. 2999, 106th Cong. (1999) (providing section 204A(a) relief to some LPRs affected by changes made to the definition of “aggravated felony” under IIRAIRA and AEDPA); H.R. 1485, 106th Cong. (1999) (providing section 240A(a) relief to aliens who were convicted of crimes but sentenced to less than five years in jail).

The second reform suggests employing the INA § 241(b)(3) (nonrefoulement) definition of “particularly serious crime” in the cancellation of removal context. This would allow an alien to get some measure of relief if he were convicted of an aggravated felony with less than a five-year sentence. See Coonan, *supra* note 44, at 617.

Aside from proposing limited statutory reforms, some supporters of the harsh 1996 immigration laws advocated for the INS to exercise prosecutorial discretion in extreme hardship cases. Anthony Lewis, *Abroad at Home; Cases that Cry Out*, N.Y. TIMES, Mar. 18, 2000, at A15. On November 17, 2000, former INS Commissioner, Doris Meissner, issued guidelines to advise INS staff on exercising such prosecutorial discretion. Memorandum from Doris Meissner, Commissioner, INS, to INS Officials (Nov. 17, 2000), available at <http://www.ins.gov/graphics/lawsregs/handbook/polpromem.htm>. Guidelines for exercising prosecutorial discretion in particular program areas, such as for placing an alien in deferred status already existed. *Id.* See also *supra* note 78. However, due to the 1996 INA reforms and the “increased attention to the scope and exercise of the Immigration and Naturalization Service’s prosecutorial discretion,” the November 2000 INS guidelines advise INS officials on how to exercise general prosecutorial discretion. Memorandum, *supra*. Alluding to extreme hardship cases, the INS guidelines state that “As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the federal immigration enforcement interest that

judicial review.²⁰⁸ Although these solutions attempt to reduce the harsh implications of the current crime-related removal provisions, they modify only parts of the current system, thus the other crime-related removal sections remain untouched, limiting their effectiveness.

True reform under the INA crime-related removal system can occur only through a complete overhaul of the existing framework. An ideal system would abandon the notion that removal is a permissible mechanism to alleviate alien criminal activity.²⁰⁹ It would recognize that Congress's objective in maintaining the removal system is to protect the public from alien criminal offenders who pose an actual social threat. However, it would simultaneously acknowledge the high stakes involved in removal for the alien.²¹⁰

V. PROPOSAL: REMOVING THE FINE PRINT

This Note proceeds as though Congress has wiped the slate clean. It proposes a common sense crime-related removal system grounded in flexibility and fairness. This approach involves three parts. First, it suggests new criteria to determine a presumption of deportability. Second, it preserves discretionary relief through a balancing test assessed by the immigration judge during the removal hearing. Finally, it restores judicial review to the removal process.

The question of what criteria should be used to determine deportability is difficult for three reasons. First, because it involves a determination of what offenses are appropriate removal grounds in light of the congressional objective to protect public safety, value judgments about the severity of

would be served by prosecution is not substantial." *Id.* at 3.

The exercise of prosecutorial discretion within the INS is limited however, because there is no guarantee that INS officials will exercise such discretion in cases similar to those in Part IV.C. Moreover, although the INS may exercise its discretion and decline to initiate removal proceedings against an alien who has committed a crime, the alien will be ineligible for citizenship and unable to travel abroad. INA §§ 316(a), 212(a)(2), 8 U.S.C. §§ 1427(a), 1182(a)(2) (1994 & Supp. IV 1998). *See also* Lewis, *supra*.

208. *See* Martin, *supra* note 205, at 707. *See also* H.R. 87 § 7(a), 107th Cong. (2001) (reinstating judicial review); H.R. 1485 § 2(a)(7) (allowing judicial review of relief determinations). Some argue that despite the INA bar on judicial review of removal orders, removable aliens can assert their legal rights via habeas corpus review. *See* Benson, *supra* note 52. *See also* St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), *cert. granted*, 69 U.S.L.W. 3365 (U.S. Jan. 12, 2001) (No. 00-767) (involving whether or not federal district courts have habeas corpus jurisdiction to review orders of removal); Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000), *cert. granted*, 69 U.S.L.W. 3419 (U.S. Jan. 12, 2000) (No. 00-1011) (involving whether or not federal appellate courts have habeas corpus jurisdiction to review orders of removal).

209. *See infra* Part V.

210. *See supra* note 155.

crimes are inescapable. Second, because the criteria will be applied on a national level, the nonuniform state penal provisions make such applications quite complex.²¹¹ Third, if the INS assesses removal by balancing the social threat posed by the alien against the stakes involved for him, some means to consider the alien's roots in the United States must be part of the equation.

Under the current system, Congress has expressly defined all of the offenses that constitute grounds for removal.²¹² The current provisions are often broad,²¹³ in some cases vague,²¹⁴ and do not take into account the lack of uniformity amongst state criminal codes. The rigidity of the provisions and the statutory bar of discretionary relief²¹⁵ have resulted in the removal of aliens who have committed only trivial crimes.²¹⁶ Moreover, Congress has chosen to ignore the reality of the high stakes involved in removal for the alien.²¹⁷

This proposal begins with the premise that any criteria selected to determine deportability could not be implemented in isolation. The criteria must be assessed simultaneously through a process that would provide immigration judges with a discretionary balancing test to evaluate removal by weighing the interests of Congress against the burden involved for the particular alien. Although deportability criteria can be formulated that would address the complexities involved, a discretionary test employed during the removal hearing would ensure fairness.

Assuming that deportability criteria will be coupled with a discretionary test during the removal hearing, reform of the removal system must begin by outlining the proper criteria. In 1990, Professor Stephen Legomsky suggested a new proposal that would base the criteria used to determine removal on a series of variables involving the number of crimes committed, the sentences for those crimes, and duration of residence in the United States at the moment the INS has instituted removal proceedings.²¹⁸ Legomsky suggested substituting the INA crime-related removal grounds with a provision or set of

211. See generally Bennett, *supra* note 3.

212. See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). See also *supra* Part III.A.

213. See *supra* note 61.

214. See INA §§ 237(a)(2)(A)(i), (ii), 8 U.S.C. §§ 1227(a)(2)(A)(i), (ii). See also Jay Wilson, *The Definitional Problems with "Moral Turpitude,"* 16 J. LEGAL PROF. 261, 261 (1991) ("[m]oral turpitude is an elusive, vague, and troublesome concept in the law, incapable of precise definition, such is evidenced by the myriad of definitions and interpretations in judicial opinions.").

215. See *supra* note 51. See also *supra* III.B.

216. See *supra* Part IV.C. See also *supra* note 9.

217. See *supra* note 155. See also *supra* note 194.

218. Legomsky, *supra* note 156, at 68. Stephen H. Legomsky is the Charles F. Nagel Professor of International and Comparative Law at Washington University in St. Louis.

provisions that lists different combinations of the variables.²¹⁹ This Note's proposal adopts Legomsky's variable approach. However, although Legomsky focused on sentence in order to gauge the seriousness of the social threat posed by the alien,²²⁰ another variable that could serve as a substitute would be a "felony/misdemeanor threshold." Rather than utilizing the sentence of a crime to determine deportability, such a threshold test would create a presumption of deportability if the crime were a felony in the state of conviction. As in the sentence test, where the sentence alone is not dispositive in creating a presumption of deportability, the characterization of the crimes committed by the alien as "felonious" would also have to be weighed against the durational residence factor. This variable approach is beneficial because, by creating a presumption of deportability based on a long sentence or classification of the crime as a felony, it would give Congress the ability to remove an alien only if he posed a real social threat. Moreover, by assessing the length of time the alien has been in the United States at the moment that the INS initiates removal proceedings, the provision takes into account the stakes involved for the alien.

However, this variable approach has a major weakness, and although vesting the immigration judge with a discretionary balancing test during the removal hearing would theoretically alleviate this flaw, it deserves comment. The problem is grounded in the lack of uniformity among the state criminal codes.²²¹ With regard to the "felony/misdemeanor threshold," some states may classify a specific crime as a misdemeanor, while others may characterize the same crime as a felony.²²² The same problem holds true with the sentence factor. For instance, Legomsky's proposal contends that various policy decisions would need to be made in order to base the removal criteria on sentence.²²³ Professor Legomsky questions whether the sentence should be determined by relying on the maximum sentence that could be imposed under the statute, the sentence actually imposed by the sentencing judge, or the time actually served by the alien.²²⁴ Regardless of what sentence

219. *Id.*

220. *Id.*

221. *See generally* Bennett, *supra* note 3.

222. *Id.*

223. Legomsky, *supra* note 156, at 68.

224. *Id.* In basing the statutory criterion on the sentence imposed, Legomsky acknowledges that the requirement would be based on the biases of the sentencing judge. *Id.* However, basing the sentence requirement on time actually served would subject the requirement to the biases of the particular parole board. *Id.* As the discretionary balancing test exercised by the immigration judge during the removal hearing would take into account the maximum information available about the alien, including the time he actually served, it may make the most sense to base the statutory criterion on the sentence actually imposed.

determination is applied, the reality exists that the sentences for the crimes are formulated by the states.²²⁵ Although the state may employ a maximum sentence threshold and leave it to the sentencing judge's discretion as to which term of imprisonment should actually be imposed, the underlying sentence spectrum is delineated by the states. Although this issue of nonuniformity is very significant, presumably it could be solved by vesting the immigration judge with a discretionary power.

Once a presumption of deportability has been established based on the variable approach, the alien would have to rebut this presumption. The alien's rebuttal would take place during the removal hearing in which he would demonstrate that he does not in fact pose an actual threat to public safety, and/or that the stakes involved in his removal substantially outweigh the threat that he poses to society.²²⁶ In order for the immigration judge to make an equitable discretionary assessment regarding removal, the judge would need to evaluate a list of factors in each case. In *Matter of Marin*,²²⁷ the Board of Immigration Appeals (BIA) enumerated several factors that immigration judges were to consider in granting an INA section 212(c) waiver, a former type of discretionary relief.²²⁸ This proposal advocates the adoption of these factors during the removal hearing.

The BIA in *Marin* held that the following factors were considered adverse to a deportable alien's 212(c) waiver application: the nature and underlying circumstances of the removal ground; the alien's criminal record and the "nature, recency, and seriousness"²²⁹ of the crimes; any violations of United States immigration laws; and "the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident"²³⁰ The court held, however, that although one or more of these adverse factors may be dispositive in determining whether to grant section 212(c) relief to the alien, the presence of such factors would not preclude the alien from presenting evidence that would merit a favorable exercise of discretion.²³¹ Positive considerations included factors such as:

225. See generally Bennett, *supra* note 3.

226. It is important to note that aliens who are removed from the United States have already served their sentences. Therefore, it is questionable whether the alien would ever pose a real threat to society. This is true because if he has received a suspended sentence, or if he has been released, he has already served a punishment commensurate with the crime that he committed. His suspended sentence, or release from incarceration, is an acknowledgment by the criminal enforcement and judicial authorities that his presence would not be socially harmful.

227. 16 I. & N. Dec. 581 (B.I.A. 1978).

228. See *supra* note 51.

229. 16 I. & N. Dec. at 584.

230. *Id.*

231. *Id.*

family ties within the United States, residence of long duration in this country (particularly when the inception of such residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits of support from family, friends, and responsible community representatives).²³²

Aside from these favorable considerations, if the purpose of the discretionary test is to alleviate the possibility of trivial crimes being considered grounds for removal, the alien must be given the opportunity to demonstrate that his crime-related removal grounds are not considered as severe in other states.²³³ He could do this by demonstrating how his state's criminal code differs from the penal provisions in other jurisdictions. Moreover, he could present other sources that support his contention, such as the Model Penal Code. The policy behind adopting this test in the removal determination context is the same as that expressed by the BIA in *Marin*; by weighing "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf,"²³⁴ the immigration judge could determine what is in the best interests of both the United States and the alien.²³⁵ This balancing test at the removal hearing level would preserve relief without the requirements of statutory eligibility under the current system.²³⁶

Finally, aside from establishing new criteria to determine a presumption of deportability and preserving discretionary relief via a balancing test at the removal level, this proposal advocates the restoration of judicial review to the removal process. Judicial review of removal decisions is necessary if the system is going to remain true to its objectives of flexibility and fairness. In light of the balancing approach adopted at the removal hearing level, judicial review would necessarily be quite narrow in scope as it would be limited to

232. *Id.* at 584-85.

233. *See supra* note 9.

234. 16 I. & N. Dec. at 584.

235. *Id.*

236. This discretionary test is not like the others enumerated in Part III.B. *See* LEGOMSKY, *supra* note 8, at 532. Although those provisions are in the form of "[i]f A, B, and C, then the Attorney General may do X," *id.*, this balancing test does not mandate preliminary eligibility requirements before the immigration judge can assert his discretion. Such a test is similar to the procedure at work in New Zealand. *Id.* at 533.

an abuse of discretion standard.

This common sense removal system would ensure that only serious criminal aliens whose continued presence in the United States would jeopardize the public's safety and welfare are removed. Moreover, it would guarantee that the high stakes involved in the alien's removal²³⁷ would be taken into consideration via the balancing test during the removal hearing and the alien's opportunity for subsequent judicial review.

VI. CONCLUSION

The current crime-related removal system is not sufficiently tailored to accommodate Congress's objective of promoting public welfare and safety. Congress's "fixed rules" approach mandates the application of a rigid system that reaches far beyond true criminal aliens and targets those who commit only minor crimes as well.²³⁸ An ideal crime-related removal system would abandon the notion that removal is an acceptable solution to alleviate alien criminal activity. It would recognize that removal is too harsh a consequence for aliens who have either committed minor crimes, or have committed more serious offenses, but have established substantial roots in the United States. Congress's current fixed rules formulating the crime-related removal system represent significant fine print caveats to Emma Lazarus' poem engraved on the pedestal of the Statue of Liberty.²³⁹ The new system outlined in this Note replaces the fine print with a common sense approach.

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237. *See supra* note 155.

238. *See supra* Part IV.C

239. *See supra* note 1.

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