CHANGING THE RULES: ARGUING AGAINST RETROACTIVE APPLICATION OF DEPORTATION STATUTES

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INTRODUCTION

Carlos Valenzuela, a forty-five-year-old legal immigrant and father of five, spent nearly his entire life in the United States.[1] Days after his birth, Valenzuela's parents brought him from Mexico, where he was born, to Tucson, Arizona, where he grew up.[2] Enlisting in the Marine Corps in 1976 at age nineteen, Valenzuela served in Vietnam where his field commander helped him apply for United States citizenship.[3] But an injury prevented Valenzuela from going to Hawaii to be sworn in as a United States citizen.[4] In 1988 and 1992 he was convicted of aggravated assault, crimes which counselors attribute to post-traumatic stress disorder from his experience in Vietnam.[5] Subsequently, deportation proceedings were initiated against Valenzuela, due to his criminal record.[6] On April 24, 1996, Valenzuela filed for a waiver to avoid deportation,[7] a waiver for which he was a strong candidate, given his family ties and military service.[8] But he may have been too late.

Just three hours before Valenzuela filed for a waiver, President Clinton signed into law the Anti-Terrorism Effective Death Penalty Act[9] (AEDPA), a measure intended to crack down on crime and ter-

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1 See Alexa Haussler, Tucsonan Trapped by New Terrorism Law, Ariz. Daily Star, July 21, 1996, at B1.

2 See id.

3 See id.

4 See id.

5 See id.

6 See id.

7 See infra Part I.B.2. (explaining deportation waivers).

8 See Haussler, supra note 1; see also infra notes 71-74 and accompanying text (describing factors involved in decision to grant relief from deportation).

9 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.) [hereinafter AEDPA].

rorism.[10] AEDPA contains a provision, section 440(d), that restricts the availability of the deportation waiver Valenzuela sought.[11] Should the restriction attach to those convicted prior to AEDPA, Valenzuela will be one of many permanent residents with past convictions who will find themselves subject to automatic deportation.

Although the law was designed to crack down on terrorism and speed up executions, Clinton himself admitted that the bill made "a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism,"[12] criticizing specifically AEDPA section 440(d), which restricts availability of deportation waivers under section 212(c) of the Immigration and Nationality Act (INA).[13] Section 440(d) expands the class of permanent lawful residents with criminal convictions who could be automatically deported, depriving them of any opportunity to plead their case for relief before an immigration judge.

By failing to prescribe its temporal reach, section 440(d) has created confusion for the courts. Does the provision apply to individuals who committed a crime, making them subject to deportation before AEDPA was passed? To individuals who were convicted prior to AEDPA? To those in deportation proceedings when AEDPA was passed? To those who had already applied for section 212(c) waivers when AEDPA was passed? If applied to those convicted prior to AEDPA, section 440(d) would subject to automatic deportation many individuals who, like Valenzuela, were convicted of crimes years or decades ago.[14]

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[10] See President William J. Clinton, Statement Upon the Signing of AEDPA (Apr. 24, 1996) (White House press release) (on file with the *New York University Law Review*).

[11] See AEDPA § 440(d), 110 Stat. at 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c) (1994)), repealed by IIRIRA, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597.

[12] Clinton, supra note 10.

[13] Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) [hereinafter INA], repealed by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597 (codified at 8 U.S.C. § 1182(c) (Supp. II 1997)).

[14] See, e.g., S.L. Bachman, Criminal Pasts Haunt Immigrants: New Law Requires Deportation for Old Convictions, Seattle Times, June 15, 1996, available in 1996 WL 3668256 (describing case where permanent resident for 33 years was found automatically deportable for 1972 marijuana conviction); Elaine Song, Leaving the Land of the Free, Conn. L. Trib., July 8, 1996, at 1 (describing case of permanent resident from Jamaica who faced deportation for pre-AEDPA conviction for possessing 28 grams of marijuana); Lena Williams, A Law Aimed at Terrorists Hits Legal Immigrants, N.Y. Times, July 17, 1996, at A1 (discussing how several permanent residents are now subject to automatic deportation due to pre-AEDPA convictions); All Things Considered: Congress Urged to Revisit Rules in Anti-Terrorism Law Segment (National Public Radio broadcast, Aug. 12, 1996), available in 1996 WL 12726235 (interviewing woman whose Polish immigrant husband was placed in detention and was awaiting deportation due to 1987 drug possession conviction).

In a recent opinion, the Attorney General, articulating the Immigration and Naturalization Service's position on this question, concluded that section 440(d) should apply to all section 212(c) relief applications pending at the time AEDPA became law.[15] The Attorney General's interpretation of section 440(d) would foreclose relief to permanent residents who relied on the prior availability of relief when they made certain important decisions about the timing of their waiver applications.[16] For example, the following classes of individuals may be affected: permanent residents, formerly candidates for deportation waivers, who pleaded guilty to two crimes involving moral turpitude; permanent residents who did not appeal their convictions under the impression that their convictions did not expose them to automatic deportation; and those who agreed to a continuance of their deportation hearings until after April 24, 1996, under the assumption that there was no risk in doing so.

Using section 440(d) as a case study to analyze these retroactivity issues, this Note opposes the Attorney General's interpretation and instead proposes an antiretroactivity presumption applicable not only to the present confusion, but also to ambiguities in future deportation-relief restrictions, such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[17] passed by Congress on September 30, 1996, which further alters relief to permanent residents and raises its own retroactivity issues.[18] This antiretroactivity presumption springs from, among other sources, the reliance interests of immigrants—these interests arise out of the legal duty imposed on courts and defense counsel to advise noncitizens about the immigration consequences of being convicted of a crime.[19] In addition to these reliance interests, due process considerations also weigh in favor

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15 See Op. Att'y Gen., In re Soriano, 1997 WL 159795 (Feb. 21, 1997); see also infra text accompanying notes 149-57 (discussing opinion).

16 See infra text accompanying notes 180-86 (describing choices faced by permanent residents).

17 Pub. L. No. 104-208, Div. C, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546 (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

18 See infra Part I.C.2. (discussing retroactivity issues raised by IIRIRA). Given that immigration proceedings and subsequent judicial appeals can take years from start to finish, the retroactivity question created by section 440(d) will be relevant for several years. Pre-IIRIRA regulations pertaining to deportation and exclusion proceedings are preserved "for those individuals who will continue on in such proceedings after April 1, 1997." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 449 (1997) (to be codified at 8 C.F.R. pt. 240).

19 See infra text accompanying notes 187-97 (discussing duties imposed on courts and counsel to protect reliance interests of noncitizens in criminal proceedings).

of applying an antiretroactivity principle to deportation-relief restrictions.[20]

This Note is divided into three parts. Part I presents the historical background and fundamentals of immigration proceedings necessary to analyze the retroactivity issues surrounding section 440(d). Part II examines the general retroactivity standard set out in *Landgraf v. USI Film Products, Inc.*[21] *Landgraf*, a 1994 Supreme Court case, held that absent a clear statement from Congress, a new law should not be applied to penalize past conduct if new legal consequences would thereby attach to events completed before its enactment.[22] Part II also analyzes judicial decisions addressing the temporal reach of section 440(d).[23] Part III demonstrates how, given that section 440(d) may deprive a permanent resident of discretionary relief and thus attach a new legal consequence of automatic deportation to certain criminal convictions, section 440(d) triggers the *Landgraf* presumption against retroactivity. Permanent residents often decide to plead guilty or to refrain from appealing their convictions, relying on their opportunity to apply for section 212(c) relief and thus avoid deportation.[24] Many courts and legislatures have imposed a legal duty on defense counsel and judges to advise noncitizens of the deportation consequences of their convictions.[25] Part III argues that section 440(d) upsets these expectations in situations where it precludes previously eligible permanent residents with pre-AEDPA convictions from applying for such relief. Thus, Part III reasons that these expectations upset by section 440(d) trigger the *Landgraf* presumption against ret-

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[20] See infra Part III.C.1. (discussing due process concerns of all noncitizens facing deportation for their pre-enactment criminal convictions, even those without strong reliance interests).

[21] 511 U.S. 244 (1994).

[22] See id. at 269-70.

[23] See, e.g., Reyes-Hernandez v. INS, 89 F.3d 490, 491-92 (7th Cir. 1996) (stating that section 440(d) is not applicable to permanent residents who conceded deportability prior to AEDPA's enactment); Yesil v. Reno, No. 96CIV8409 (DC), 1997 WL 394945, at *2 (S.D.N.Y. July 14, 1997) (holding section 440(d) may not be lawfully applied to applications for section 212(c) relief pending AEDPA's enactment); Mojica v. Reno, 970 F. Supp. 130, 180 (E.D.N.Y. 1997) (finding section 440(d) inapplicable to those with pre-AEDPA convictions); In re Soriano, No. A39186067, 1996 WL 426888, at *9 (B.I.A. June 27, 1996) (stating section 440(d) should apply only to those who applied for section 212(c) relief after AEDPA was passed), rev'd, Op. Att'y Gen., In re Soriano, 1997 WL 159795 (Feb. 21, 1997); id. at *28-*29 (Rosenberg, Board Member, concurring in part and dissenting in part) (stating section 440(d) should apply only to those with post-AEDPA convictions); id. at *35 (Vacca, Board Member, dissenting) (stating section 440(d) should apply to all section 212(c) applications adjudicated after AEDPA's enactment).

[24] See infra text accompanying notes 180-86 (describing choices these permanent residents face and decisions they make).

[25] See infra text accompanying notes 187-97 (discussing duties imposed on courts and counsel to protect reliance interests of noncitizens in criminal proceedings).

roactivity, thus preventing application of section 440(d) to those convicted prior to AEDPA. Furthermore, even for fully contested and appealed convictions, where reliance interests are not implicated, considerations of due process and fair notice weigh against retroactive application. This Note concludes that restrictions on relief from deportation call for a strong presumption against retroactivity; thus, new statutory restrictions, like section 440(d), ought not apply to permanent residents with any pre-enactment conviction—guilty plea or otherwise.

I
AN IMMIGRATION PRIMER: BACKGROUND AND FUNDAMENTALS

This Part discusses the historical backdrop of immigration law against which Congress passed the recent immigration legislation. Part I.A. surveys instances when Congress has altered immigration sanctions for noncitizens' criminal activity, while Part I.B. sets forth the fundamentals of deportation proceedings and waivers. Part I.C. summarizes changes wrought by recent immigration legislation, focusing specifically on section 212(c) deportation waivers.

A. An Historical Overview

Through immigration laws, Congress[26] has consistently imposed

[26] A longstanding principle in immigration law—the plenary power doctrine—holds that Congress, wielding the power of a sovereign, has essentially unreviewable power to determine which noncitizens may enter or remain in this country. See, e.g., Fiallo v. Bell, 430 U.S. 787 (1977) (affirming plenary power doctrine); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of immigrants]"); Fong Yue Ting v. United States, 149 U.S. 698, 704-05 (1893) (asserting congressional power over immigration matters). Grounded in judge-made law, the plenary power doctrine springs from the notion that courts should not intrude in immigration decisions because of their political nature and their foreign policy implications. See Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (explaining rationale behind plenary power immigration doctrine).

Notwithstanding the plenary power doctrine, however, the Supreme Court does, in fact, exercise its power of review over immigration legislation; the degree of deference accorded to Congress seems to vary with the result reached. See generally Brian K. Bates & Bruce A. Hake, A Tale of Two Cities: Due Process and the Plenary Power Doctrine, 92-4 Immigration Briefings 1 (Apr. 1992) (comparing decisions according deference to Congress under plenary power doctrine with decisions engaging in substantive review on grounds of procedural due process rights of noncitizens); cf. Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 296-98 (citing instances where courts have invented creative devices to evade plenary power doctrine).

severe penalties on aliens[27] with criminal convictions.[28] Over time, these immigration laws made more people with criminal convictions subject to deportation proceedings and made a few classes of persons with convictions more likely to be deported. While limited forms of relief evolved to alleviate the harshness of these deportation consequences, subsequent legislation curtailed the scope of these relief measures.

The Immigration Act of 1917[29] provided aliens with the first form of discretionary relief from exclusion[30] in the Seventh Proviso.[31] Subsequently, in 1952, the Immigration and Nationality Act[32] replaced the Seventh Proviso with section 212(c) waivers of deportation and enumerated several grounds for deportation stemming from criminal conduct in the United States.[33] Regarding its temporal reach, the 1952 Act declared that, except where it specifically provided otherwise, an alien could be deported for crimes performed before passage of the Act.[34] The 1952 Act further broadened the temporal scope of deportation by eliminating the statute of limitations previously applicable to deportation for criminal acts.[35]

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27 The term "alien" refers to any person not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3) (1994). For purposes of this Note, "alien" is used interchangeably with "foreign-born person" and "noncitizen." I make minimal use of the term "alien" due to its obvious bias and negative connotation; however, it is used occasionally in this Note to track accurately the language of the INA.

28 See Dan Kesselbrenner & Lory D. Rosenberg, National Lawyers Guild, Immigration Law and Crimes § 1.1, at 1-2 (July 1994).

29 Pub. L. No. 64-301, 39 Stat. 874 (repealed 1952).

30 Exclusion pertains to the treatment of aliens who have not "entered" the United States. Compared to deportation proceedings, exclusion proceedings afford noncitizens fewer constitutional protections but greater procedural rights. See Gordon et al., supra note 54, § 61.01, at 61-4. Thus, the concept of entry plays a major role in determining the rights of a noncitizen in a given situation. See id. § 71.03[6], at 71-47 (explaining concept of "entry"); cf. Rosenberg v. Fleuti, 374 U.S. 449 (1963) (defining "entry" further in landmark Supreme Court case).

31 The Seventh Proviso to section 3 of the Immigration Act of 1917 provides in relevant part: "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." Immigration Act of 1917 § 3, 39 Stat. at 878.

32 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C.).

33 See id. § 212(c), 66 Stat. at 187 (codified as amended at 8 U.S.C. § 1182(c) (1994) (repealed 1996)). See generally Gordon et al., supra note 54, § 71.01[2], at 71-6 to -9 (describing 1952 Act).

34 See INA § 241(d), 66 Stat. at 208 (codified at 8 U.S.C. § 1251(d) (1988) (repealed 1991)).

35 See id. § 241, 66 Stat. at 204-08 (codified as amended at 8 U.S.C. § 1227 (Supp. II 1997)).

The Anti-Drug Abuse Act of 1988[36] altered the grounds of deportability to include those aliens who committed "aggravated felonies,"[37] which included persons convicted of murder, a weapons offense, or a drug trafficking offense.[38] Two years later, the Immigration Act of 1990[39] (IMMACT90) expanded the definition of aggravated felony to include money laundering and crimes of violence with a jail sentence of at least five years.[40] IMMACT90 also rendered aggravated felons who have served at least five years in prison ineligible for section 212(c) relief ("IMMACT90 aggravated felony bar").[41] Congress further expanded the definition of "aggravated felony" in the Immigration and Nationality Technical Corrections Act of 1994[42] and specified that its amendments to section 101(a)(43), the aggravated felony definition in the INA, shall apply "to convictions entered on or after the date of enactment of this Act."[43]

This overview illustrates that Congress has increasingly expanded the permissible grounds of deportation while simultaneously restricting the availability of relief from deportation. When Congress has intended that specific provisions apply retroactively to pre-enactment crimes and convictions, however, it has said so in clear language.[44]

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36 Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C.).

37 See id. § 7344, 102 Stat. at 4470-71 (codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. II 1997). The term "aggravated felony," as defined at the time AEDPA was enacted, referred to a long list of offenses enumerated in INA § 101(a)(43) and applied to an offense committed "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. § 1101(a)(43) (1994) (amended 1996). Section 321 of IIRIRA expands the "aggravated felony" definition. See IIRIRA § 321, 8 U.S.C.(a)(43) § 1101 (1994 & Supp. II 1997).

38 See Anti-Drug Abuse Act of 1988 § 7342, 102 Stat. at 4469 (codified as amended at 8 U.S.C. § 1101 (Supp. II 1997); see also Mary E. Kramer, Statutory Bars to Discretionary Relief in Deportation and Exclusion Proceedings, in Immigration Consequences of Criminal Convictions in the 1990s, at 11, 12-13 (Mary E. Kramer & Amy R. Novick eds., 1995).

39 Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. (1994)) [hereinafter IMMACT90].

40 See IMMACT90 § 501(a)(3), 104 Stat. at 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)(D), (F) (Supp. II 1997)).

41 See id. § 511(a), 104 Stat. at 5052, repealed by IIRIRA, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597; see also infra note 149 (discussing retroactivity cases which arose from IMMACT90 aggravated felony bar).

42 Pub. L. No. 103-416, 108 Stat. 4305 (codified as amended in scattered sections of 8 U.S.C.).

43 Id. § 222(b), 108 Stat. at 4322 (codified as amended at 8 U.S.C. § 1101 note (1994)).

44 See infra Part III.A.

B. *Immigration Fundamentals*

All persons who are not citizens of the United States are subject to immigration laws,[45] specifically the Immigration and Nationality Act[46] (INA) and regulations promulgated by the Immigration and Naturalization Service (INS), the federal administrative agency which handles immigration matters.[47] This Part explores the immigration regulations applicable to immigration proceedings that were initiated prior to April 1, 1997, when the extant waiver regime was eliminated.[48] This Part also highlights the critical points at which noncitizens in the criminal justice system or immigration "pipeline" may have relied on their understanding of then-existing law to what now may be their detriment.

1. *Deportation Proceedings*

Deportation, often referred to as expulsion, is one of the most severe immigration consequences of criminal activity. A deportation order compels a noncitizen to leave the country.[49] The INS initiates a deportation proceeding against a noncitizen by issuing and serving her with an Order to Show Cause why deportation should not be granted and by filing the order in immigration court.[50] Because Congress eliminated the statute of limitations for deportation in 1952,[51] individuals with deportable convictions, as defined by the INA, are subject to

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[45] A noncitizen in criminal or immigration proceedings may fall into one of many categories, including, inter alia, the following: (1) lawful permanent resident (i.e., green card holder); (2) lawful nonimmigrant (i.e., individual with current, valid temporary visa); (3) undocumented alien or worker illegally present in the United States; or (4) refugee granted political asylum or asylee status on account of feared persecution in the country from which he fled. See Kesselbrenner & Rosenberg, supra note 28, § 1.2, at 1-3 to -6. This Note focuses exclusively on lawful permanent residents. The term "lawfully admitted for permanent residence" is defined as "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." 8 U.S.C. § 1101(a)(20) (1994).

[46] 8 U.S.C. §§ 1101-1557 (1994 & Supp. II 1997).

[47] See Kesselbrenner & Rosenberg, supra note 28, § 1.1, at 1-2.

[48] Although written in the present tense, the following background relates to the pre-IIRIRA regime of deportation laws, a regime that recent IIRIRA regulations have preserved for individuals already in proceedings prior to April 1, 1997. See supra note 18. Thus, pre-IIRIRA law will become moot only after every individual who entered immigration proceedings before April 1, 1997 has exhausted his administrative and judicial remedies. See, e.g., Mojica v. Reno, 970 F. Supp. 130, 138 (E.D.N.Y. 1997) (stating that IIRIRA was not directly relevant to petitioner's proceedings, which were initiated before April 1, 1997).

[49] See Kesselbrenner & Rosenberg, supra note 28, § 1.1, at 1-2.

[50] See Gordon et al., supra note 54, § 72.03[1][a], at 72-58. The Order to Show Cause asks the respondent to appear before a hearing officer to show a cause why she should not be deported. See id.

[51] See supra note 35 and accompanying text.

deportation proceedings at any time regardless of rehabilitation in the intervening years. Any one of a number of events can trigger deportation proceedings—a permanent resident's return to the United States from a temporary trip abroad,[52] an application for citizenship, an application for replacement of a green card, or contact with the criminal justice system.[53]

Once in a deportation proceeding, a noncitizen has the option either to contest or to concede deportability in immigration court.[54] Either the noncitizen or the INS can appeal the court order to the Board of Immigration Appeals (BIA).[55] Once the BIA has issued a decision, the INS Commissioner is authorized to request that the Board refer the case to the Attorney General.[56] Under the pre-AEDPA regime, while the Attorney General's decision was binding at the administrative agency level, a noncitizen could appeal a decision by the BIA or the Attorney General to one of the United States courts of appeals.[57]

Although deportation has consistently been treated as a civil, rather than criminal, proceeding,[58] courts have long recognized the grave and severe consequences of deportation.[59] Aliens are separated from their jobs and families and are barred from reentering the United States for five years, unless they obtain special permission from the Attorney General to apply for admission.[60] Reentry without permission can result in criminal punishment[61] and/or ejection.[62] De-

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52 See, e.g., Williams, supra note 14 (describing travails of Olga Gonzalez, permanent resident placed in deportation proceedings for 1987 conviction upon returning from trip abroad to attend her mother's funeral).

53 See *Mojica*, 970 F. Supp. at 171 (citing "unwitting contacts with the INS" as potential triggers of deportation proceedings).

54 See 3 Charles Gordon et al., Immigration Law and Procedure, § 72.04[5][b], at 72-138 to -140 (Aug. 1996).

55 See id. § 72.07[3], at 72-230.

56 See 8 C.F.R. § 3.1(h)(iii) (1996) ("The Board shall refer to the Attorney General for review of its decision all cases which . . . the Commissioner requests be referred to the Attorney General for review.").

57 See INA § 106(a), 8 U.S.C. § 1105(a) (1994) (repealed 1996). But see AEDPA, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-77 (1996) (repealed 1996) (limiting judicial review).

58 See Harisiades v. Shaghnessy, 342 U.S. 580, 594 (1952). But see infra Part III.C.2. (surveying decisions recognizing punitive nature of deportation).

59 See, e.g., Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (holding that "deportation is a drastic measure and at times the equivalent of banishment or exile"); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (noting that deportation may deprive one of "all that makes life worth living"); see also infra Part III.C.2. (discussing punitive nature of deportation).

60 See Gordon et al., supra note 54, § 71.01[6][c], at 71-18.

61 See id.

62 See INA § 242(f), 8 U.S.C. § 1252(f) (1994) (amended 1996).

portation orders may also preclude the INS from considering a naturalization application,[63] and deportation may in some circumstances terminate a noncitizen's social security benefits.[64]

2. *Section 212(c): Deportation Waivers*

To help ameliorate the harsh consequences of deportation, Congress provided relief to deportable noncitizens in the form of discretionary waivers.[65] Until IIRIRA's passage, aliens could seek relief under section 212(c) of the INA.[66] Limited to permanent residents who have been lawfully domiciled in the United States for at least seven years, section 212(c) waivers allowed permanent residents to preserve their permanent resident status even after they had committed a deportable offense.[67] While the statutory language specifically referred only to relief from exclusion proceedings,[68] judicial decisions extended section 212(c) to apply to certain deportation grounds.[69] A lawful permanent resident in deportation proceedings was eligible for section 212(c) relief only for those grounds of deportation for which an equivalent ground of exclusion existed.[70]

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[63] See INA § 318, 8 U.S.C. § 1429 (1994) (amended 1996).

[64] See 42 U.S.C. § 402(n)(1) (1994).

[65] See Kesselbrenner & Rosenberg, supra note 28, § 11.1, at 11-2.

[66] See supra notes 18 & 48 (explaining that the pre-IIRIRA regime is preserved for those individuals already in proceedings prior to April 1, 1997). For a broad overview of other discretionary waivers available under the INA, see Kesselbrenner & Rosenberg, supra note 28, § 1.1, at 1-2.

[67] INA section 212(c) as amended by the Immigration Act of 1990, but prior to AEDPA, read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b) [8 U.S.C. § 1181(b)]. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

[68] See supra note 30 (defining and distinguishing exclusion from deportation proceedings).

[69] See Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) (holding that withholding section 212(c) waivers from aliens in deportation proceedings, while granting them to similarly situated aliens in exclusion proceedings, violated equal protection since distinction between deportation and exclusion was wholly unrelated to any legitimate government interest).

[70] See Hernandez-Casillas v. INS, 983 F.2d 231 (5th Cir. 1993); see also Kesselbrenner & Rosenberg, supra note 28, § 11.5(d)(1), at 11-27 to -29.

To qualify for relief under section 212(c), an alien first must have been lawfully admitted for permanent residence and remained in that status. Second, the alien must have maintained a lawful, unrelinquished domicile in the United States for at least seven years.[71] If a noncitizen could show that she met the lawful domicile and permanent resident status requirements mentioned above, an immigration judge or appropriate INS official had discretion to grant a waiver.[72] In *In re Marin*,[73] the BIA discussed the relevant factors involved in making a section 212(c) determination.[74]

Thus, with respect to the chance that they may be deported, lawful permanent residents acting under the old section 212(c) regime were faced with a series of critical decisions once they were charged with a crime. First, a lawful permanent resident had to decide whether to plead guilty or contest the charge before a jury. If a jury found her guilty, she was forced to decide whether or not to appeal the conviction to a higher court. Next, once the INS commenced deportation proceedings, she had to decide whether to contest or concede deportation and whether to apply for section 212(c) relief. If the immigration judge denied relief under section 212(c) and issued a deportation order, a permanent resident had to decide whether to appeal the order to the BIA. Finally, if the BIA issued a final deportation order, she had to decide whether to appeal the agency decision to the court of appeals. A permanent resident's expectations and reliance on the availability of section 212(c) relief significantly affected these crucial decisions made in criminal and immigration proceedings.

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71 Prior to IIRIRA, courts were split on how to calculate the time toward an alien's seven-consecutive-year unrelinquished domicile in the United States. See Kesselbrenner & Rosenberg, supra note 28, § 11.5(e), at 11-34 to -44 (summarizing approaches taken by different courts for calculating years of domicile).

72 Appeals of immigration judges' section 212(c) decisions are heard simultaneously with appeals of deportation orders. See supra notes 54-57 and accompanying text. Although the Attorney General has the discretionary power to award relief under the statute, that authority is delegated to the appropriate INS official or immigration judge. See 8 C.F.R. § 212.3(a) (1996).

73 16 I. & N. Dec. 581 (B.I.A. 1978).

74 The favorable factors include: (1) strong family ties in the United States; (2) extended residence in the United States—especially if the applicant entered as a child; (3) significant hardship that would result from deportation; (4) United States military service; (5) maintenance of a steady employment record; (6) property ownership or business ties in the United States; (7) community service; (8) rehabilitation after a criminal conviction; and (9) good moral character references. See id. at 584-85. Adverse factors typically include (1) nature and circumstances of the pertinent crime; (2) significant prior violations of immigration laws; (3) nature of any criminal record; and (4) other evidence of bad character. See id. at 584. Where the criminal offense is extremely severe, a heightened showing of "unusual or outstanding equities" is required. See id. at 585.

C. Recent Legislative Changes Affecting Immigration Consequences of Criminal Activity

1. Section 440(d):[75] Restricting Availability of Section 212(c) Relief

Passed in a highly charged climate of strong anti-immigrant sentiment,[76] AEDPA's enactment drastically altered the landscape of immigration law, amending the INA in ways that made the immigration consequences of criminal convictions more severe than ever before.[77] Section 440(d) is one such provision, as it eliminated section 212(c) relief for any alien who had committed an aggravated felony,[78] a controlled substance offense,[79] certain firearm offen-

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[75] AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c) (1994)), repealed by IIRIRA, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597.

[76] Driven largely by "a rising number of new immigrants and anxiety over dwindling resources," immigration has "burst onto the political landscape in the past [few] years with unusual and unpredictable force," and is "one of the trickiest and most emotional issues in contemporary politics . . . ." Eric Schmitt, Milestones and Missteps on Immigration, N.Y. Times, Oct. 26, 1996, at A1 (citing Republicans' use of "rising popular resentment against immigrants" to push through anti-immigrant legislation). For an example of strong anti-immigrant sentiment, see Peter Brimelow, Alien Nation: Common Sense About America's Immigration Disaster 262-63 (1995) (proposing "drastic cutback of legal immigration" via, inter alia, abolishing or restricting family based, refugee, and asylum immigration). Professor Peter H. Schuck warns against dismissing Brimelow's book as "another ideological tract, one to which only the already-converted will attend," but instead advises taking the book seriously, because "it is already influencing the public debate on immigration." Peter H. Schuck, Alien Rumination, 105 Yale L.J. 1963, 1964 (1996) (book review). Schuck notes that "[t]he media and Congress have . . . given *Alien Nation* much prominence" and cites several of Brimelow's appearances on national television programs and before Congress. See id. at 1964 n.6. But see Mojica v. Reno, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (describing nativist and anti-alien sentiments as "relatively small eddies in the broader river of tolerance" of our nation's history).

[77] A discussion of all the changes AEDPA wrought in the immigration field is beyond the scope of this Note. For a good overview of other changes, see Kesselbrenner & Rosenberg, supra note 28 (Supp., June 1996) (summarizing changes AEDPA made to INA).

[78] For a definition of "aggravated felony," see INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (1994) (redesignated as INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. II 1997)).

[79] For a definition of "controlled substances" offense, see INA § 241(a)(2)(B), 8 U.S.C. § 1251(a)(2)(B) (1994) (redesignated as INA § 237(a)(2)(B), 8 U.S.C. § 1227 (a)(2)(B) (Supp. II 1997)), which provided:

> (i) Conviction: Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.
>
> (ii) Drug abusers and addicts: Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

ses,[80] two crimes of moral turpitude,[81] or other miscellaneous crimes.[82]

Under section 440(d), a permanent resident convicted of a minor drug possession charge, or a combination of at least two petty theft or public transportation fare evasion charges (such as turnstile jumping in the New York City subway system), could be deported without any opportunity for equitable relief. As of July 1996, the Florence Project for Immigration and Refugee Rights in Arizona estimated that about twenty people at the Florence detention center who might have been eligible for waivers prior to AEDPA have been deported since April 24.[83] Such consequences led many, including INS officials, to denounce section 440(d).[84]

One criticism focuses on section 440(d)'s failure to state its temporal reach in express terms,[85] creating ambiguity as to whether Congress intended to restrict the availability of relief even to those with convictions prior to AEDPA's passage. In the absence of a clear instruction from Congress, courts have reached inconsistent results as to how to apply section 440(d) to individuals convicted before the enactment of AEDPA.[86] These retroactivity issues form the core subject of

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[80] For a definition of "certain firearm offenses," see INA § 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C) (1994) (redesignated as INA § 237(a)(2)(C), 8 U.S.C. § 1227 (a)(2)(C) (Supp. II 1997)), which provided:

> Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device . . . in violation of any law is deportable.

[81] For a definition of "miscellaneous crimes," see INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (redesignated as INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (Supp. II 1997)), which provided in relevant part: "Any alien who (I) is convicted of a crime involving moral turpitude committed within five [or ten] years . . . after the date of entry, and (II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer, is deportable."

[82] See INA § 241(a)(2)(D), 8 U.S.C. § 1251(a)(2)(D) (1994) (redesignated as INA § 237(a)(2)(D), 8 U.S.C. § 1227 (a)(2)(D) (Supp. II 1997)).

[83] See Haussler, supra note 1.

[84] For instance, David A. Martin, INS general counsel, called for the reinstatement of some of the discretion previously available in the waiver process, stating that "[i]n cases of longtime residents who have paid their debt to society and are rehabilitated, deportation would seem quite disproportionate for a single drug possession." Williams, supra note 14. President Clinton himself criticized AEDPA for eliminating "most remedial relief for long-term legal residents" and promised to push for a legislative fix. See Clinton, supra note 10. Immigration lawyers have also attacked section 440(d) for its failure to recognize the potential for rehabilitation and for its deleterious effect on family integrity. See Bachman, supra note 14.

[85] See infra Part III.A.

[86] See infra Part II.B.

this Note and will be analyzed in Part III.[87] In addition, availability of discretionary waivers is further complicated by certain provisions of another statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which is discussed in the following section.

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[87] AEDPA section 440(a), a jurisdictional provision in the same statute that restricts judicial review of administrative deportation orders, also raises its own retroactivity issues. It provides that final orders of deportation made against an alien who is deportable because he was convicted of certain crimes, such as aggravated felony offenses, controlled substance abuse offenses, or multiple crimes involving moral turpitude, may not be reviewed by a court.

Before AEDPA, noncitizens whom the Bureau of Immigration Appeals (BIA) ordered to be deported had a right to seek judicial review of a final order of deportation or of a denial of a section 212(c) waiver. See supra note 57 and accompanying text. Section 440(a), however, eliminated judicial review of final orders of deportation to those permanent residents foreclosed from section 212(c) relief by section 440(d). See AEDPA, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-77 (1996) (repealed 1996); id. § 440(d), 110 Stat. at 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c) (1994)), repealed by IIRIRA, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597. AEDPA section 440(a) has been criticized heavily. See Peter M. Knapp, Don't Let Terrorists Take Away Our Freedoms, The Patriot Ledger, Aug. 10, 1996, at 19, available in LEXIS, NEWS Library, PTLEDG File (attacking section 440(a) on grounds that deportation without appeal is "un-American, probably unconstitutional, and may not do a thing to prevent terrorist activities"); see Anthony Lewis, The Rest Is Silence, N.Y. Times, Nov. 11, 1996, at A15 (criticizing elimination of judicial review in asylum proceedings and highlighting importance of judicial review to correct administrative mistakes); cf. Peter H. Schuck & Theodore Hsien Wang, Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990, 45 Stan. L. Rev. 115, 167 (1992) (noting that in 1989-1990, aliens prevailed in approximately 28% of cases in which they sought judicial review of final orders of deportation or exclusion).

Like section 440(d), section 440(a) fails to specify its temporal reach. Consequently, courts deciding the temporal reach of section 440(a) have reached different results across circuits. Compare Reyes-Hernandez v. INS, 89 F.3d 490, 493 (7th Cir. 1996) (holding that section 440(a) does not bar section 212(c) relief where defendant conceded deportability prior to AEDPA and had colorable defense), with Hincapie-Nieto v. INS, 92 F.3d 27, 30 (2d Cir. 1996) (holding that section 440(a) bars judicial review in pending appeals), Duldulao v. INS, 90 F.3d 396, 399-400 (9th Cir. 1996) (same), and Mendez-Rosas v. INS, 87 F.3d 672, 673 (5th Cir. 1996) (same). Where a decision on the merits yields the same result as a conclusion that jurisdiction is lacking, some courts have applied the doctrine of hypothetical jurisdiction, evading the issue of section 440(a)'s temporal reach altogether. See, e.g., Nov v. INS, No. 95-70361, 1996 U.S. App. LEXIS 27260, at *2 (9th Cir. Oct. 16, 1996) (rejecting petition on its merits based on hypothetical jurisdiction); Zavala-Zaragoza v. INS, No. 95-70104, 1996 U.S. App. LEXIS 18544, at *2-*3 (9th Cir. July 23, 1996) (same); Hunter v. INS, No. 95-4227, 1996 U.S. App. LEXIS 13472, at *2 (2d Cir. June 6, 1996) (same); Lewin v. INS, No. 94-70867, 1996 U.S. App. LEXIS 16346, at *3 (9th Cir. June 4, 1996) (same).

For a general discussion of the retroactivity issues surrounding section 440(a), see Nadine Wettstein, Antiterrorism Law Scuttles Federal Court Jurisdiction, Bender's Immigr. Bull., Oct. 1996, at 3-8 (summarizing and criticizing recent decisions regarding temporal scope of section 440(a)).

2. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

On September 30, 1996, within months of AEDPA's enactment, Congress withdrew section 212(c) relief entirely,[88] replacing it with a new form of discretionary relief entitled "Cancellation of Removal" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[89] Under IIRIRA, to qualify for cancellation of removal relief, a noncitizen must be a lawful permanent resident for at least five years and must maintain continuous lawful domicile in the United States for at least seven years.[90] Authorizing immigration authorities to exercise their discretion in canceling the removal of a person found inadmissible or deportable, this new relief provision serves as a substitute for section 212(c). Consequently, IIRIRA section 304(a)(3) restores relief to those to whom AEDPA section 440(d) denied such relief—namely, permanent residents with no aggravated felony convictions[91] but with convictions for controlled substance violations, firearm charges, multiple crimes of moral turpitude, or other miscellaneous crimes.[92] The new law became effective on April 1, 1997;[93] the De-

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[88] See IIRIRA, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597 (codified at 8 U.S.C. § 1182(c) (Supp. II 1997)).

[89] Id. § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat.) at 3009-587, -594 (codified at 8 U.S.C. § 1229b(a) (Supp. II 1997)). The provision provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

The new immigration and welfare measures in IIRIRA have been called "the most punitive towards immigrants in years, stripping them of some of their most important legal protections and denying them a broad range of social benefits." Schmitt, supra note 76. For instance, IIRIRA significantly expands the definition of aggravated felony, see IIRIRA § 321(a), 8 U.S.C. § 1101(a)(43) (1994 & Supp. II 1997), and makes it harder for the government to sue employers who discriminate against immigrants by increasing the burden of proof in certain circumstances, see id. § 421(a), 8 U.S.C. § 1324b(a)(6) (Supp. II 1997).

[90] See id. § 304(a)(3), 8 U.S.C. § 1229b(a) (Supp. II 1997).

[91] The relief restored by IIRIRA is curtailed to a degree by the fact that IIRIRA expands the definition of aggravated felony to include crimes carrying a sentence of one year (down from five), and with a monetary threshold of $10,000, down from $100,000-$200,000. See id. § 321(a), 8 U.S.C. § 1101(a)(43) (1994 & Supp. II 1997).

[92] See id. § 304(a), 8 U.S.C. § 1229b(a) (Supp. II 1997).

[93] See id. § 309(a), 8 U.S.C. § 1101 note (Supp. II 1997). Under section 309(c)(1), for aliens already in proceedings prior to April 1, 1997, the new law does not apply, and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." Id. § 309(c)(1), 8 U.S.C. § 1101 note (Supp. II 1997). Nevertheless, the Attorney General may elect to terminate proceedings in which there has not

partment of Justice issued regulations implementing IIRIRA on March 6, 1997.[94]

At first glance, it appears that IIRIRA has eliminated some of the retroactivity problems raised by section 440(d) since it will restore the relief that AEDPA section 440(d) denied. However, a closer look at the new law's eligibility requirements—specifically those of continuous domicile—reveals that, in resolving the specific retroactivity problems posed by section 440(d), the new law creates retroactivity problems of its own.

While a section 212(c) deportation waiver required seven years of permanent resident status,[95] cancellation of removal only requires five years of lawful permanent residence.[96] Both cancellation of removal[97] and section 212(c)[98] waivers require seven years of continuous domicile. However, IIRIRA contains rules relating to continuous residence that make it more difficult for permanent resident aliens to establish the requisite seven years of continuous domicile. Under IIRIRA section 309,[99] the clock for continuous domicile tolls once the alien has committed an offense referred to in INA section 212(a)(2)[100] or is served a notice to appear under INA section 239(a).[101] In other words, an alien's continuous residence ends once he commits certain crimes, including controlled substance violations or prostitution. Thus, this new restriction precludes relief to many who previously would have met the requisite domicile requirements of section 212(c). Applied to permanent lawful residents convicted prior to IIRIRA's effective date, section 304(a) imposes new legal consequences on events long completed and creates a new retroactivity problem.

A case recently brought before the Supreme Court, *Elramly v. INS*,[102] crystallizes the retroactivity problems raised by both AEDPA and IIRIRA in a concrete fact pattern.[103] Mohammed Baher Elramly

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been a final administrative decision and to reinitiate proceedings under the amended statute. See id. § 309(c)(3), 8 U.S.C. § 1101 note (Supp. II 1997).

94 See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (1997) (to be codified at scattered sections of 8 C.F.R.).

95 See supra note 71 and accompanying text.

96 See IIRIRA § 304(a)(3), 8 U.S.C. § 1229b(a)(1) (Supp. II 1997).

97 See id. § 304(a)(3), 8 U.S.C. § 1229b(a)(2) (Supp. II 1997).

98 See INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

99 8 U.S.C. § 1229b(d)(1) (Supp. II 1997).

100 8 U.S.C.A. § 1182(a)(2) (West Supp. 1997).

101 8 U.S.C.A. § 1229(a) (West Supp. 1997).

102 73 F.3d 220 (9th Cir. 1995), cert. granted, 116 S. Ct. 1260 (1996), vacated, No. 95-939, 117 S. Ct. 31 (1996) (remanded for consideration in light of AEDPA).

103 The question of the retroactive effect of section 440(d) presented itself to the Supreme Court in this case when the Court invited supplemental briefs from the parties to

first entered the United States in 1976 on a nonimmigrant student visa.[104] Upon marrying a United States citizen, Elramly became a lawful permanent resident in 1979.[105] In 1982, Elramly pleaded guilty to selling about $100 worth of hashish.[106] When the INS initiated deportation proceedings against him in 1990,[107] Elramly conceded deportability, but sought a discretionary waiver under section 212(c).[108] Both the immigration judge and the BIA determined Elramly was eligible but nevertheless denied his waiver request.[109] Elramly took his case to the Ninth Circuit Court of Appeals, arguing that the BIA improperly ignored his rehabilitation and improperly weighed his "positive and negative equities."[110] The Supreme Court vacated the Ninth Circuit's decision and remanded the case for reconsideration in light of AEDPA.[111]

Elramly starkly presents the retroactivity issue that AEDPA section 440(d) raises: at the time when Elramly pleaded guilty to the sale of hashish worth $100, and when he conceded deportability, he remained eligible for a discretionary waiver under section 212(c). However, Congress passed AEDPA while Elramly's appeal was pending before the Supreme Court. Section 440(d), applied to Elramly's case, would render him ineligible for section 212(c) relief because of his controlled substance offense.[112]

While Elramly's appeal was still pending before the Ninth Circuit for reconsideration in light of AEDPA, Congress passed IIRIRA. *Elramly* also illustrates how IIRIRA, if it were applied to Elramly's case,[113] would raise new retroactivity complications of its own.[114]

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address the effects of section 440(d) and section 440(a) on Elramly's case. See INS v. Elramly, 117 S. Ct. 28 (1996).

104 See *Elramly*, 73 F.3d at 222.

105 See id.

106 See id.

107 See id.

108 See id.

109 See id.

110 See id.

111 See INS v. Elramly, 117 S. Ct. 31 (1996).

112 See supra note 79 and accompanying text.

113 Given that Elramly entered proceedings before April 1, 1997, IIRIRA's provisions would not apply unless the Attorney General chose to terminate and reinitiate his proceedings. See supra note 93.

114 It appears that Elramly would be precluded from relief by section 321(a)'s expanded definition of aggravated felon, a definition which Congress expressly applied without regard to "whether the conviction was entered before, on, or after [the date of this provision's enactment]." IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43) (Supp. II 1997). While acknowledging that IIRIRA's expanded aggravated felony definition would preclude section 212(c) relief, the discussion above concentrates on the continuous domicile issue to illustrate how these retroactivity issues may arise in future situations.

When Elramly filed his guilty plea in 1983 and conceded deportability in 1990, Elramly was eligible for discretionary relief because he had been a lawful permanent resident for over seven years and maintained a lawful domicile in the United States for seven years, as required under section 212(c).[115] Under Section 304(a) of IIRIRA,[116] however, Elramly's continuous domicile would terminate in 1982—the time he committed the controlled substance offense, only six years after his lawful entry into the United States. Thus, even under IIRIRA, Elramly would suffer the harsh effects of a retroactive application of these new laws, even though he pled guilty and conceded deportability well before the law was passed. In the context of section 440(d), Part II examines such retroactive interpretations and surveys various approaches courts and administrative agencies have taken to address the provision's temporal ambiguities.

II
JUDICIAL AND ADMINISTRATIVE RESPONSES

For help interpreting the temporal reach of section 440(d), courts and administrative agencies have looked to Supreme Court retroactivity jurisprudence, relying in particular on *Landgraf v. USI Film Products, Inc.*[117] In *Landgraf*, the Supreme Court established a presumption against retroactivity for new laws in civil contexts and enumerated the conditions under which that presumption applies.[118] A survey of judicial and administrative decisions reflects differing views on whether the *Landgraf* presumption against retroactivity applies to laws restricting section 212(c) relief.

A. Landgraf: *A Presumption Against Retroactivity*

The *Landgraf* rule can be stated simply: absent a clear statement from Congress, a new law should not be applied to penalize past conduct if it would "attach[ ] new legal consequences to events completed before its enactment."[119] *Landgraf* considered whether section 102 of the Civil Rights Act of 1991,[120] which permitted recovery of compensatory and punitive monetary damages in Title VII employment dis-

115 See INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996); see also supra note 67 and accompanying text.

116 8 U.S.C. § 1229b(d)(1) (Supp. II 1997).

117 511 U.S. 244 (1994).

118 See id. at 263-80.

119 Id. at 270.

120 Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a(a) (1994)).

crimination cases, applied to a case pending on appeal at the time Congress passed the law.[121]

In determining the temporal scope of section 102, the *Landgraf* Court drew upon a rich retroactivity jurisprudence "centuries older than our Republic."[122] In the course of its analysis, the Court faced two seemingly contradictory canons of statutory interpretation regarding the effect of intervening changes in the law. On the one hand, courts have developed a longstanding presumption against retroactivity.[123] By that view, antiretroactivity principles reflect the notion that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[124] Antiretroactivity principles in federal law find further expression in several constitutional provisions.[125] On the other hand, another common law canon states that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[126] The *Landgraf* Court illustrated through its analysis that the two rules operate in independent spheres; neither rule overrules nor contradicts the other.[127]

To reconcile these principles, the *Landgraf* Court engaged in a two-part inquiry to determine the temporal scope of the Title VII pro-

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121 See *Landgraf*, 511 U.S. at 247. In 1989, plaintiff Barbara Landgraf brought a sexual harassment action against, inter alia, her employer, USI Film Products, Inc. See id. at 248. Although the employee who allegedly engaged in sexually offensive behavior was eventually transferred to another department, Landgraf quit her job shortly after the transfer and filed this lawsuit. See id. At a bench trial, the district court dismissed Landgraf's complaint on the ground that the petitioner's employment was not terminated in violation of Title VII because she had not been constructively discharged. This finding prevented her from obtaining equitable relief, the only form of relief authorized by Title VII at that time. See id. at 248-49. Landgraf's appeal of the trial court's decision ultimately reached the Supreme Court.

122 Id. at 265; see id. at 265 n.17 (citing cases from as early as 1811 (Dash v. Van Kleeck, 7 Johns 477, 503 (N.Y. 1811))).

123 See id. at 265; see also, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

124 General Motors v. Romein, 503 U.S. 181, 191 (1992).

125 See *Landgraf*, 511 U.S. at 266-67 (citing prohibitions of bills of attainder, U.S. Const., art. I, § 9, cl. 3, which, the Court said, preclude "legislatures from singling out disfavored persons and meting out summary punishment for past conduct"; Due Process Clause, U.S. Const., amend XIV, § 1, which protects interests "in fair notice and repose"; and Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, which, the Court said, applies to penal legislation and "'restricts governmental powers by restraining arbitrary and potentially vindictive legislation'" (quoting Weaver v. Graham, 450 U.S. 24, 28-29 (1981))).

126 Bradley v. Richmond, 416 U.S. 696, 711 (1974).

127 See *Landgraf*, 511 U.S. at 273.

vision. First, did Congress evince a clear, unambiguous intent as to the temporal scope of the statutory provision? If Congress expressed a clear congressional intent to enact retroactive legislation, the legislation would have retroactive effect and the inquiry ends there.[128] Such "a requirement . . . helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[129]

Finding congressional intent ambiguous in this case, the Court proceeded to the second question: should a presumption against retroactivity attach to the Title VII provision in question? In setting forth a principled method of applying the antiretroactivity presumption, the Court faced the complex task of defining "retroactive" and determining when a statute operates "retroactively." Mere application in a case implicating pre-statute conduct does not render a statute retroactive; instead, the proper inquiry focuses on whether the "new provision attaches new legal consequences to events completed before its enactment."[130] Stated generally, a determination that a given law operates "retroactively" turns on the nature and extent of the change in the new law and the strength of the link between the operation of the new rule and a relevant past event.[131] The Court noted Justice Story's oft-quoted definition regarding penal legislation: "'[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .'"[132] Given that section 102 attached the new legal consequence of punitive damages to Title VII claims, the Court applied the presumption against retroactivity and did not apply section 102 to Landgraf's pending case.

The *Landgraf* Court did place certain types of laws outside the scope of the presumption against retroactivity. For instance, statutes affecting prospective relief (i.e., injunctive relief) may not be subject to the antiretroactivity presumption where they operate *in futuro* and fail to impair vested rights.[133] Changes in procedural or jurisdictional

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128 See id. at 280.

129 Id. at 268.

130 Id. at 270.

131 See id.

132 *Landgraf*, 511 U.S. at 269 (quoting Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.) (citations omitted)). See generally id. at 269 n.23 (citing Supreme Court cases that define retroactive statutes); Black's Law Dictionary 914 (6th ed. 1991) (quoting Justice Story in entry for "retrospective law").

133 See *Landgraf*, 511 U.S. at 273-74 (citing American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921)). In *American Steel Foundries*, the Court allowed

rules also fall outside the ambit of the presumption against retroactivity where diminished reliance interests are involved.[134] Thus, the *Landgraf* Court set forth a framework to govern courts' application of a presumption against retroactivity to laws in civil actions.

B. Applicability of the Landgraf *Antiretroactivity Rule to Section 440(d): Judicial and Agency Responses*

Judicial and administrative courts have reached different conclusions about the temporal reach of laws restricting relief from deportation resulting from criminal convictions.[135] These conclusions differ according to how one interprets the scope of *Landgraf*'s antiretroac-

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section 20 of the newly enacted Clayton Act, passed when the case was pending on appeal, to govern the propriety of injunctive relief against labor picketing. See *American Steel Foundries*, 257 U.S. at 201.

[134] See *Landgraf*, 511 U.S. at 275; see also, e.g., Ex parte Collett, 337 U.S. 55, 71 (1949) (holding that amendment to forum non conveniens doctrine of Judicial Code, 28 U.S.C. § 1404 (1994), governed transfer of action commenced prior to statute's enactment). However, the *Landgraf* Court did not suggest that procedural rules are per se void of retroactivity issues. See *Landgraf*, 511 U.S. at 275 n.29 ("[T]he applicability of such provisions ordinarily depends on the posture of the particular case.").

[135] At first glance, one may question whether courts should have judicial review power in the context of AEDPA section 440(d) since it is arguable that the Attorney General's position on the retroactivity issue is entitled to agency deference under the two-step test set out in Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). Under the *Chevron* test, courts first ask "whether Congress has directly spoken to the precise question at issue." If answered affirmatively, the inquiry ends there, and Congress's statutory requirement controls. See id. at 842-43. However, in the absence of an unambiguous message from Congress, the second step calls for deference to the agency so long as the agency interpretation is reasonable. See id. at 843. The general *Chevron* rule of deference does not apply, however, where established rules of statutory construction with substantive overtones conflict with an agency's construction. Instead, the rule of statutory construction trumps the agency interpretation. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255-57 (1991) (finding principle that, absent clear statement to the contrary, congressional legislation is intended to be applied only within United States territory and trumps Equal Employment Opportunity Commission's extraterritorial application of Title VII); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-46 (D.C. Cir. 1988) (holding that rule construing ambiguous statutes in favor of Native Americans overrode agency interpretation). In the context of section 440(d), the *Landgraf* judicial default rule against retroactivity thus can supercede the agency decision—made by the Attorney General—to apply section 440(d) to cases pending when AEDPA was enacted. See generally Op. Att'y Gen., In re Soriano, 1997 WL 159795 (Feb. 21, 1997). In addition, the underlying assumption behind the general rule of deference to agency interpretations is premised on the assumption that Congress left ambiguities in administrative statutes to be resolved by the agency. See Smiley v. Citibank, 116 S. Ct. 1730, 1733 (1996) (giving deference to Comptroller of the Currency's interpretation of term "interest" in the National Bank Act of 1864, 12 U.S.C. § 85 (1994)). With retroactivity issues, however, the *Landgraf* Court expected Congress to balance the benefits and drawbacks of retroactive application; thus, retroactivity issues should be addressed not by agencies but by courts. See Teitelbaum v. Chater, 949 F. Supp. 1206, 1214 n.7 (E.D. Pa. 1996) (concluding that any ambiguity as to retroactive application of new disability rules "is more likely due to imperfect draftmanship, not Congressional intent to allow the Commissioner to 'fill in the gaps'"); cf. Harper

tivity presumption and whether one characterizes section 212(c) relief as "retroactive" or "prospective" in nature. These positions are summarized here and will be analyzed further in Part III.

1. *The* Landgraf *Presumption Against Retroactivity Applies to Laws Restricting Section 212(c) Relief*

Similar to the conclusion reached by this Note,[136] some judges have taken the position that the *Landgraf* judicial default rule against retroactivity does apply to the laws restricting section 212(c) relief because these laws attach new legal consequences and upset the reasonable and well settled expectations of the parties involved.[137] Thus, given that Congress did not clearly specify section 440(d)'s temporal

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v. Virginia Dep't of Taxation, 509 U.S. 86, 95 (1993) (referring to "quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective").

136 See infra Part III.

137 See Reyes-Hernandez v. INS, 89 F.3d 490, 493 (7th Cir. 1996); see also Yesil v. Reno, No. 96CIV8409 (DC), 1997 WL 394945, at *10 (S.D.N.Y. July 14, 1997) (noting that application of *Landgraf* judicial default rules "confirms that section 440(d) does have 'retroactive effect' and that it may not be applied to pending cases"); Mojica v. Reno, 970 F. Supp. 130, 179 (E.D.N.Y. 1997) (stating that upholding application of AEDPA's restrictions on pending section 212(c) waivers would "undercut" *Landgraf* rule against retroactivity); In re Soriano, No. A39186067, 1996 WL 426888, at *29 (B.I.A. June 27, 1996) (Rosenberg, Board Member, concurring) (stating that applying AEDPA section 440(d) to section 212(c) discretionary waiver applications pending at time of AEDPA's enactment "would attach a new legal consequence" to settled events), rev'd, Op. Att'y Gen., In re Soriano, 1997 WL 159795 (Feb. 21, 1997). In this now-vacated BIA decision, the majority held that section 440(d)'s limitations did not affect Soriano's application for relief because it was filed before AEDPA was passed. The facts of *In re Soriano* are as follows: A native and citizen of the Dominican Republic, Soriano entered the United States in 1985 as a lawful permanent resident. See id. at *4. Following a 1992 conviction for attempted criminal sale of a controlled substance, the INS initiated deportation proceedings against Soriano in 1994. See id. After Soriano filed for section 212(c) relief on April 28, 1995, nearly a year before AEDPA was enacted, the immigration judge found Soriano eligible but used his discretion to deny Soriano the relief. See id. Soriano appealed the decision to the BIA, claiming that the immigration judge erred in the exercise of his discretion. See id. While his appeal was pending, Congress passed AEDPA. See id. at *5. Faced with the question of whether section 440(d) applied to Soriano, the majority, in a 7-5 decision, held AEDPA's reach would not extend to persons like Soriano, who filed for section 212(c) relief before AEDPA became law, but would apply to persons who filed for section 212(c) relief after AEDPA's passage. See id. at *8-*9. Decided June 27, 1996, this BIA decision temporarily settled the issue of section 440(d)'s temporal reach; however, on September 12, 1996, the Attorney General restored the confusion and uncertainty surrounding this question by vacating the BIA decision pending her determination. See Op. Att'y Gen., In re Soriano, 1997 WL 159795, at *15 n.4 (Feb. 21, 1997). Six months later, reversing the Board's decision, she held that AEDPA section 440(d) should be applied to INA section 212(c) cases pending on the effective date of AEDPA. See id. at *2-*3. She instructed that cases be reopened upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability. See id. at *12.

reach, these courts restrict the application of section 440(d) where it would attach new legal consequences and upset settled expectations.

Courts have disagreed as to when the new law attaches new consequences to past actions or decisions. The BIA took the position in its now-vacated decision that section 440(d) should not apply to section 212(c) applications pending at the time of AEDPA's enactment, finding that rule consistent with *Landgraf* because it does not disrupt the settled expectations of permanent residents whose applications for 212(c) relief were pending prior to AEDPA's enactment.[138] Several judges have made a different argument, contending that legal consequences attach at the point when a permanent resident is convicted of a crime; thus section 440(d)'s restrictions should not apply to those convicted prior to AEDPA's enactment, a position with which this Note concurs.[139]

The Seventh Circuit gave another interpretation of section 440(d) in *Reyes-Hernandez v. INS*,[140] holding that legal consequences attach and expectations are formed at the point when a permanent resident who had a colorable defense to deportability nevertheless conceded deportability before AEDPA's passage.[141] Chief Judge Richard

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138 See *In re Soriano*, 1996 WL 426888, at *10. In reaching its decision to apply section 440(d)'s restrictions only to those who filed for section 212(c) relief after AEDPA was enacted, the BIA stated initially that the absence of an express provision in section 440(d) postponing its effective date supported the conclusion that section 440(d) applied immediately to aliens already in proceedings as of April 24, 1996, especially in light of the fact that Congress expressly stated throughout AEDPA which provisions should apply only prospectively. See id. at *7-*8. The majority, however, distinguished from the above category a subcategory of aliens with pending applications for section 212(c) relief on the grounds that another AEDPA provision, section 413(g), expressly communicated Congress's intent that it apply retroactively to applications from aliens considered to be terrorists pending at the time AEDPA was passed. See id. To apply section 440(d) retroactively would render the language in section 413(g) unnecessary in deciding whether that section applies to asylum applications pending before AEDPA was enacted, and inconsistent with another rule of statutory construction that "no provision of law should be so construed as to render a word or clause surplusage." Id. at *9.

139 See *Yesil*, 1997 WL 394945, at *10 (observing that section 440(d) "impairs important rights possessed by aliens at the time they acted and significantly increases their liability for that past conduct"); *Mojica*, 970 F. Supp. at 179 (same); *In re Soriano*, 1996 WL 426888, at *19-*20 (Rosenberg, Board Member, concurring) ("[L]egal consequences attach, in fact, to the conviction itself and even to the commission of the offense."). See generally infra Part III.

140 89 F.3d 490 (7th Cir. 1996).

141 See id. at 493. The facts in *Reyes-Hernandez* are as follows: Reyes-Hernandez, a 45-year-old Mexican citizen, became a lawful permanent resident in 1981 when he married a United States citizen. See id. at 491. He was convicted twice for unlawful cocaine possession—once in 1986 and again three years later. See id. When the INS initiated deportation proceedings against him, Reyes-Hernandez conceded deportability but applied for section 212(c) relief prior to AEDPA. See id. The immigration judge and the BIA denied his request for relief so Reyes-Hernandez appealed the agency decision to the Seventh Circuit. See id. AEDPA went into effect while his petition was pending in the Seventh Circuit. See

Posner argued that many permanent residents, like Reyes-Hernandez, conceded deportability with the understanding that they could apply for section 212(c) relief, and that even if they were turned down at the agency level, they would have a chance to appeal to an appellate court.[142] This expectation of judicial relief was not unreasonable given that appellate courts often vacated the BIA's denial of section 212(c) relief and remanded cases for further proceedings.[143] Had Reyes-Hernandez known he was ineligible for section 212(c) relief when he was deciding whether or not to contest or concede deportability, he might have decided to contest.[144] "[T]o make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence."[145] The court also said:

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability.[146]

The *Reyes-Hernandez* decision limited itself strictly to the facts of the case; it did not address the problems faced by permanent residents who may have contested deportability and for whom the new law attaches new legal consequences to pre-AEDPA decisions.[147]

2. *The* Landgraf *Presumption Against Retroactivity Does Not Apply to Laws Restricting Section 212(c) Relief*

The Attorney General, speaking as the final authority for the immigration agency, along with other judges and administrative officials,

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id. at 491-92. The INS moved to dismiss, asserting that section 440(a) deprived the court of jurisdiction and that section 440(d) foreclosed section 212(c) relief to Reyes-Hernandez. See id.

142 See id. at 492.

143 See id. (citing, e.g., Cortes-Castillo v. INS, 997 F.2d 1199 (7th Cir. 1993); Akinyemi v. INS, 969 F.2d 285 (7th Cir. 1992)).

144 See id.

145 Id. at 492-93.

146 Id. at 492.

147 The decision "'merely insured that these [retroactivity] issues, which were thoroughly briefed and competently addressed at oral argument, must be litigated again in the next case involving a petitioner who contested his or her deportability.'" Two Federal Decisions Rendered on Antiterrorism Provisions, 73 Interpreter Releases 959, 962 (Federal Publications Inc., July 22, 1996) (quoting Arthur A. Liberty, Reyes-Hernandez's lead counsel).

has reasoned that the presumption against retroactivity in *Landgraf v. USI Film Products, Inc.*[148] does not apply to restrictions on section 212(c) relief because such restrictions fail to have "retroactive" effect.[149] Under this reasoning, section 440(d) should apply to all permanent residents being considered for section 212(c) relief after AEDPA became law, regardless of when they were convicted or when they applied for relief.[150]

Proponents of this position have made several arguments supporting their contention that restrictions on section 212(c) relief do not offend the presumption against retroactivity set forth in *Landgraf*. First, the *Landgraf* Court stated that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."[151] Thus, those advocating that the *Landgraf* presumption should not apply have characterized relief from deportation as "prospective" in nature, operating *in futuro*, as opposed to "retroactive" relief, such as damages or restitution.[152] They have likened deportation relief laws to statutes altering injunc-

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148 511 U.S. 244 (1994).

149 See, e.g., Op. Att'y Gen., In re Soriano, 1997 WL 159795, at *12 (Feb. 21, 1997); Petitioner's Supplemental Brief, 1996 WL 528331, at *16-*17, INS v. Elramly, 117 S. Ct. 31 (1996) (No. 95-939) (emphasizing prospective nature of deportation hearings); see also In re Soriano, No. A39186067, 1996 WL 426888, at *36-*37 (B.I.A. June 27, 1996) (Vacca, Board Member, dissenting). Ruling on the temporal scope of IMMACT90's bar on section 212(c) relief to aggravated felons who have served more than five years in prison, see supra note 41 and accompanying text, courts similarly held that the *Landgraf* presumption did not apply because the section 212(c) restrictions at issue lacked retroactive effect. See, e.g., Scheidemann v. INS, 83 F.3d 1517, 1523 (3d Cir. 1996) (holding that *Landgraf* presumption does not apply and that five-year rule should bar alien from discretionary relief); Samaniego-Meraz v. INS, 53 F.3d 254, 256 (9th Cir. 1995) (same); In re Gomez-Giraldo, No. A-22115816, 20 I. & N. Dec. 957, 963 (1995), available in 1995 BIA LEXIS 4, at *15-*17 (same, in dicta).

150 See *In re Soriano*, 1996 WL 426888, at *32 (Vacca, Board Member, dissenting); Petitioner's Supplemental Brief, 1996 WL 528331, at *17, *Elramly* (No. 95-939) (noting that due to prospective nature of deportation proceedings, AEDPA section 440(d) is properly applied to pending applications). Immigration judges in Atlanta, Buffalo, Houston, and Phoenix have issued decisions reflecting this view. See BIA Issues Major Decision in Terrorism Law's § 212(c) Changes, 73 Interpreter Releases 863, 866 (Federal Publications Inc., July 1, 1996).

151 Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 273 (1994).

152 See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain."); see also, e.g., *Scheidemann*, 83 F.3d at 1523 (noting that change in deportation relief law affects only "petitioner's future status with respect to the legality of his presence in the United States"); *In re Soriano*, 1996 WL 426888, at *34 (Vacca, Board Member, dissenting) (contrasting prospective and retroactive relief); Petitioner's Supplemental Brief, 1996 WL 528331, at *16-*17, *Elramly* (No. 95-939) (stating that deportation hearing only looks prospectively to alien's right to remain in United States).

tive relief,[153] thus arguing that "[t]he only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review."[154]

Second, those who find no retroactivity problem with section 212(c) argue that the section's discretionary nature precludes application of the *Landgraf* presumption. Because 212(c) relief is discretionary, permanent residents do not have a vested right to such relief and thus are not justified in relying on such relief. Thus, "[c]ongressional repeal of a discretionary power to relieve an alien from deportation does not attach any *new* legal consequence to the pre-enactment events."[155]

Furthermore, citing the *Landgraf* Court's observation that changes in procedural rules often entail diminished reliance interests, at least one court has argued that section 212(c) relief restrictions are best analogized to procedural rules.[156] That court and others also have argued that restrictions on relief from deportation are jurisdictional in nature, speaking only to the power of the Attorney General to waive deportation, not to any alien's right to such relief.[157]

The above arguments support the proposition that AEDPA section 440(d)'s restrictions on the relief available through INA section 212(c) do not offend the retroactivity concerns highlighted in *Landgraf* and, consequently, that the *Landgraf* presumption against retroactivity does not apply. The next Part highlights the flaws in those arguments and illustrates why the *Landgraf* presumption is relevant and applicable to restrictions on the availability of section 212(c) relief.

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153 See, e.g., Op. Att'y Gen., In re Soriano, 1997 WL 159795, at *10 (Feb. 21, 1997) (noting that, "[l]ike statutes altering the standards for injunctive relief, [a change in the attorney general's discretion to grant relief from deportation] has only a prospective impact"); *In re Soriano*, 1996 WL 426888, at *35 (Vacca, Board Member, dissenting) (stating that, "[l]ike injunctive relief, relief from deportation . . . is prospective in nature"); *Scheidemann*, 83 F.3d at 1523; Petitioner's Supplemental Brief, 1996 WL 528331, at *17-*18, *Elramly* (No. 95-939) (noting that "deportation hearing looks prospectively to the respondent's right to remain in this country in the future").

154 *In re Soriano*, 1996 WL 426888, at *36 (Vacca, Board Member, dissenting); cf. *Scheidemann*, 83 F.3d at 1523 (stating that IMMACT90 aggravated felony bar was "not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence").

155 Samaniego-Meraz v. INS, 53 F.3d 254, 256 (9th Cir. 1995).

156 See *Scheidemann*, 83 F.3d at 1523.

157 See id.; Op. Att'y Gen., *In re Soriano*, 1996 WL 426888, at *45-*46; Petitioner's Supplemental Brief, 1996 WL 528331, at *18, *Elramly* (No. 95-939); see also Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring))).

III
A Retroactivity Analysis for Laws Restricting Relief from Deportation

This Part argues that, under the *Landgraf* two-step retroactivity analysis, section 440(d)'s additional restrictions should not apply to permanent residents with pre-AEDPA convictions. Part III.A. demonstrates that section 440(d) lacks a clear statement articulating its temporal reach. Based on an analysis of the strong reliance interests and reasonable expectations of permanent residents who encounter the criminal justice system, Part III.B. argues that the *Landgraf* antiretroactivity presumption should apply to protect those permanent residents who relied on the availability of section 212(c) relief during their criminal proceedings. Given the harsh results wrought by deportation, Part III.C. proposes an even stronger antiretroactivity principle applicable to all permanent residents with pre-AEDPA convictions who were previously eligible for section 212(c) relief. This broader antiretroactivity principle is grounded in considerations of due process and fair notice.

A. Absence of Clear Statement from Congress Regarding Section 440(d)'s Temporal Reach

The rules of statutory construction discussed in *Landgraf* are activated only if Congress fails to state explicitly a given law's temporal reach.[158] As illustrated in this section, the text and legislative history of section 440(d) demonstrate clearly that Congress did not address the question of section 440(d)'s reach.

It is well established that the language mandating retroactivity must be "clear, strong and imperative."[159] Requiring a clear statement of retroactive intent "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[160] Most courts have focused on the text of the stat-

[158] See supra Part II.A. (discussing *Landgraf* analysis); see also *Landgraf*, 511 U.S. at 280 (stating that if Congress has expressly prescribed statute's proper reach, there is no need to resort to judicial default rules).

[159] United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806); see also Chew Heong v. United States, 112 U.S. 536, 559 (1884) (stating that statutes should never be construed to have retrospective effect if such construction "can be reasonably avoided"); United States v. Moore, 95 U.S. 760, 762 (1878) (similar proposition). Professor Nancy Morawetz suggests, however, that even clear statements by Congress to apply a deportation statute retroactively should be subject to review under a substantive due process analysis. See Nancy Morawetz, Rethinking Retroactive Deportation Law and the Due Process Clause, 73 N.Y.U. L. Rev. (forthcoming 1998).

[160] *Landgraf*, 511 U.S. at 272-73.

ute itself,[161] though at least one court has looked at the legislative history as well.[162]

In any case, neither the legislative history nor the statute itself contains language expressing Congress's intent that section 440(d) apply retroactively to those convicted prior to AEDPA's enactment. Four subsections call for retrospective application.[163] For instance, section 440(f) provides that "the amendment made by subsection (e)(3) shall take effect as if included in the enactment of section 222 of the Immigration and Nationality Technical Corrections Act of 1994."[164] In contrast, section 440(d) is silent regarding its temporal reach.[165]

These provisions in which Congress addressed temporal reach demonstrate that Congress knew how to articulate its intent to apply section 440(d) retroactively had it chosen to do so; instead, Congress remained silent. Moreover, the clear temporal language in earlier immigration legislation demonstrates Congress's ability to specify its intent that statutory provisions apply retroactively.[166]

Some have argued that section 440(d) is retroactive on the grounds that other AEDPA provisions expressly provide that they be applied only prospectively.[167] This argument, however, fails to ac-

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161 See, e.g., Shwab v. Doyle, 258 U.S. 529, 537 (1922) (holding that statute does not apply retroactively unless statute's "words make that imperative"); *Heth*, 7 U.S. at 408 (stating that unless "words are too imperious to admit of a different construction, [Court should] restrict[ ] the words of the law to a future operation").

162 See *Landgraf*, 511 U.S. at 250-57 (examining relevant legislative history of Civil Rights Act of 1991 for congressional intent to apply provisions at issue retroactively). But see id. at 287 (Scalia, J., concurring) (criticizing majority for "convert[ing] the 'clear statement' rule into a 'discernible legislative intent' rule").

163 See AEDPA § 107(c), 28 U.S.C.A. § 2261 note (West Supp. 1997) (providing that its amendments "shall apply to cases pending on or after the date of enactment of this Act"); id. § 401(f), 8 U.S.C.A. § 1105(a) note (West Supp. 1997) (providing that "[t]he amendments made by this section shall take effect on the date of enactment of this Act and shall apply to all aliens without regard to the date of entry or attempted entry into the United States"); id. § 413(g), 8 U.S.C.A. § 1253 note (West Supp. 1997) (stating that "[t]he amendments made by this section shall take effect on the date of enactment of this Act and shall apply to applications filed before, on, or after such date"); id. § 440(f), 8 U.S.C.A. § 1101 note (West Supp. 1997) (providing that "[t]he amendment made by subsection (e) shall apply to convictions entered on or after the date of the enactment of this Act," except for the amendment made by subsection (e)(5)).

164 Id. § 440(f), 8 U.S.C.A. § 1101 note (West Supp. 1997).

165 See id. § 440(d), 110 Stat. 1214, 1277 (1996) (amending INA § 212(c), 8 U.S.C. § 1182(c) (1994)), repealed by IIRIRA, Pub. L. No. 104-208, Div. C, § 304(b), 1996 U.S.C.C.A.N. (110 Stat.) 3009-546, 3009-597.

166 See *Landgraf*, 511 U.S. at 280.

167 See, e.g., In re Soriano, No. A39186067, 1996 WL 426888, at *7-*8 (B.I.A. June 27, 1996). More than a dozen specific AEDPA provisions expressly define their temporal reach. See, e.g., AEDPA § 211, 18 U.S.C.A. § 2248 note (West Supp. 1997) ("The amendments made by this subtitle shall . . . be effective for sentencing proceedings in cases in

count for the AEDPA provisions that Congress made expressly retroactive. The *Landgraf* Court specifically rejected an analogous argument when plaintiffs relied on two clauses in the 1991 Civil Rights Act requiring prospective application to infer that the remainder of the statute should apply retroactively.[168] Likewise, in *Montero v. Cobb*,[169] the district court rejected a similar argument concerning AEDPA section 440(c), finding that, despite the language in section 440(f), Congress's failure to supply similarly lucid text with regard to section 440(c)'s temporal scope should not be construed as an explicit mandate of retroactive application of section 440(c).[170]

Although beyond the scope of this Note, it is arguable that judicial default rules are not implicated because the plain language of AEDPA, read as a whole and in context, while failing to illustrate an express congressional intent in favor of retroactivity, creates a clear statement against retroactive interpretation of AEDPA section 440(d). Thus, the argument goes, by remaining silent, Congress explicitly mandated that AEDPA section 440(d) should not be applied to pre-AEDPA convictions.[171]

This argument is bolstered by a recent Supreme Court decision, *Lindh v. Murphy*,[172] dealing with a retroactivity analysis of another AEDPA provision pertaining to habeas corpus petitions.[173] Reversing the Seventh Circuit, the *Lindh* Court held that certain AEDPA habeas corpus provisions did not apply to pending noncapital cases such as Lindh's.[174] The Court did not utilize *Landgraf's* antiretroactivity presumptions, but rather found an implicit and silent statement

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which the defendant is convicted on or after the date of enactment of this Act."); id. § 235(h), 42 U.S.C.A. § 10608(h) (West Supp. 1997) ("This section shall only apply to cases filed after January 1, 1995."); id. § 440(f), 8 U.S.C.A. § 1326 note (West Supp. 1997) ("The amendments made by subsection (e) shall apply to convictions entered on or after the date of the enactment of this Act."); id. § 441(b), 8 U.S.C.A. § 1326 note (West Supp. 1997) ("The amendment made by subsection (a) shall apply to criminal proceedings initiated after the date of enactment of this Act.").

168 See *Landgraf*, 511 U.S. at 262-63. The Court rejected plaintiffs' argument on the grounds that there was "little to suggest that *Congress* understood or intended the interplay of [those sections] to have the decisive effect petitioner assigns them." Id.; see also Lindh v. Murphy, 117 S. Ct. 2059, 2064 (1997) (suggesting that, after *Landgraf*, Congress perhaps should know to make explicit statements of retroactivity).

169 937 F. Supp. 88 (D. Mass. 1996).

170 See id. at 94; DeMelo v. Cobb, 936 F. Supp. 30, 35 (D. Mass. 1996).

171 See, e.g., Yesil v. Reno, No. 96CIV8409 (DC), 1997 WL 394945, at *9 (S.D.N.Y. July 14, 1997) (construing congressional silence as clear statement of intent that section 440(d) not apply retroactively).

172 117 S. Ct. 2059 (1997).

173 See id. at 2059; see also *Yesil*, 1997 WL 394945, at *9 (citing *Lindh* for proposition that "text of the AEDPA demonstrates Congress's clear intent that section 440(d) not be applied to pending cases").

174 See *Lindh*, 117 S. Ct. at 2068.

against retroactivity in the statute, relying on the plain language and legislative history of the provisions.[175]

Leaving open the question whether the negative implication of Congress's silence creates a clear statement against retroactivity, this Note argues that, at the very least, omission of a clear statement creates doubt as to whether Congress itself has determined that "the benefits of retroactivity outweigh the potential for disruption or unfairness."[176] Congress's silence expresses no more than that Congress agreed to disagree about section 440(d)'s temporal scope and possibly chose instead to "pass the buck," leaving the courts and immigration agencies to make the decision.[177] Based on this absence of a clear statement, Part III.B. examines section 440(d) in light of the *Landgraf* judicial default rules.

B. Triggering the Landgraf *Antiretroactivity Presumption*

1. Reliance Interests, New Legal Consequences, and Upset Expectations

Close examination of the strong reliance interests of permanent residents not only demonstrates clearly that the *Landgraf* presumption against retroactivity should apply to section 440(d), but also addresses the question of how far back the presumption reaches. Is the date of conviction the relevant event to which the *Landgraf* presumption affixes? The date one conceded deportability? The date one applied for section 212(c) relief? Through a look at permanent

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[175] See id. at 2063-65. To find such an express intention, the Court looked to several provisions of AEDPA amending chapter 153 and creating an entirely new chapter 154 of title 28. See id. at 2063; AEDPA § 107(a)-(c), 28 U.S.C.A. §§ 2261-2266 (West Supp. 1997). Although silent as to the temporal reach of its amendments to chapter 153, AEDPA section 107(c) expressly stated that chapter 154 "shall apply to cases pending on or after the date of enactment of this Act." 28 U.S.C.A. § 2261 note (West Supp. 1997); see *Lindh*, 117 S. Ct. at 2063.

Given that the measures amending chapter 153 and creating chapter 154 were introduced as a single bill in the Senate, the Court held that nothing "but a different intent explains the different treatment." *Lindh*, 117 S. Ct. at 2064. Furthermore, given that "*Landgraf* was the Court's latest word on the subject when [AEDPA] was passed," Congress could have read the decision as "counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending." Id. at 2064. In other words, against the backdrop of the *Landgraf* rule, Congress expressed, through its silence, an intent not to apply amendments to chapter 153 retroactively. Thus, the Court held that the new provisions of chapter 153 generally applied only to cases filed after AEDPA became effective. Id. at 2068.

[176] See *Landgraf*, 511 U.S. at 263.

[177] See *Landgraf*, 511 U.S. at 261 ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue... Congress viewed the matter as an open issue to be resolved by the courts.... The only matters Congress did *not* leave to the courts were set out with specificity....").

residents' expectations at various stages in the immigration and criminal justice system, this section suggests that, because permanent residents most strongly form reliance interests during the conviction phase of criminal proceedings, a presumption against retroactivity ought to prevent section 440(d) from applying to aliens convicted prior to AEDPA's enactment.

In its now-vacated decision, the BIA missed the mark by designating the point at which a permanent resident applies for section 212(c) relief as the relevant event for retroactivity analysis purposes.[178] The act of applying for section 212(c) relief does not create any additional reliance interests or expectations in the minds of permanent residents; any expectations with regard to pursuing relief would have attached significantly earlier, at the point when a permanent resident chose to plead guilty, to concede deportability, or to refrain from appealing her conviction.

This proper analysis of the reasonable expectations of courts, prosecutors, and permanent residents who are defendants in the criminal justice system suggests that section 440(d)'s temporal reach ought to extend only to post-AEDPA convictions.[179] Retroactive application of section 440(d) to individuals convicted prior to AEDPA would upset settled expectations and would attach drastic legal consequences to decisions made prior to April 24, 1996.

When a permanent resident faces criminal charges, she, like all defendants, must make critical choices affecting the course of the criminal proceeding. She may enter a guilty plea,[180] plead guilty to a lesser charge, or contest the charges at trial. At trial, if convicted, she must choose whether or not to appeal. A defendant who plea bargains must choose among various dispositions, weighing potential sentencing outcomes and other consequences.[181] These consequences include whether the plea will lead to deportation.

Innocent parties accused of crimes must also make these choices:

> Though innocent, an individual accused of a crime may choose to plead guilty to a lesser charge in order to get out of jail (with a sentence of "time served" only) after a high bail has been set or, even if out on bail, in order to avoid any jail time. . . .
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> . . . Even if prison time cannot be avoided, the defendant may plead to a lesser charge in order to avoid the risk of a finding of

178 See In re Soriano, No. A39186067, 1996 WL 426888, at *8-*11 (B.I.A. June 27, 1996).

179 See, e.g., Mojica v. Reno, 970 F. Supp. 130, 177-78 (E.D.N.Y. 1997).

180 Of the noncitizens convicted in federal district courts during 1994, 92.3% entered guilty pleas. See Brief Amici Curiae of the National Association of Criminal Defense Lawyers & National Legal Aid and Defender Association at 14, In re Soriano, No. A39186067, 1996 WL 426888 (B.I.A. June 27, 1996).

181 See *Mojica*, 970 F. Supp. at 175-77.

> guilt and a stiffer sentence based on a more serious charge. Among the reasons an individual might agree to a plea to avoid any jail time, or more jail time, is simply to be able to retain employment and the ability to care for his or her family on a day-to-day basis.[182]

For noncitizens, these decisions hinge to a great extent on the effect their convictions will have on their deportability.[183] "An immigrant can be expected to weigh the likelihood of this drastic punishment just as he or she would weigh other matters in a plea—such as the likely sentence, the availability of parole, and the overall disruption the plea will cause to his life."[184] Courts have recognized that knowledge of deportation consequences significantly affects a noncitizen's decision to plead guilty or to appeal a conviction vigorously.[185] Former D.C. Circuit Judge Abner Mikva noted that "[t]he possibility of being deported can be—and frequently is—the most important factor in a criminal defendant's decision how to plead."[186]

Given the gravity of deportation, many courts have imposed a duty on criminal defense lawyers to advise their clients of the deportation consequences of their convictions. Failure to inform a client that a guilty plea may result in deportation can render a guilty plea withdrawable.[187] Some federal courts also have insisted that defendants have full knowledge of deportation consequences before entering a

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182 Id. at 175 (footnote omitted).

183 See People v. Pozo, 746 P.2d 523, 525 (Colo. 1987) ("A plea of guilty effects a waiver of fundamental rights and, therefore, must be knowingly, intelligently, and voluntarily made.").

184 *Mojica*, 970 F. Supp. at 177.

185 See, e.g., Edwards v. State, 393 So. 2d 597, 599 (Fla. Dist. Ct. App. 1981) ("Ignorance of the potential consequences of deportation cannot, in our view, make for an intelligent [plea]."); *Pozo*, 746 P.2d at 529 ("[T]he potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants are material to critical phases of such proceedings.").

186 United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring).

187 See, e.g., Marriott v. State, 605 So. 2d 985, 987 (Fla. Dist. Ct. App. 1992) (interpreting state rule as mandating trial judge to instruct all defendants regarding possible immigration consequences); People v. Soriano, 240 Cal. Rptr. 328, 336 (Ct. App. 1987) (allowing defendant to withdraw guilty plea due to failure to advise of deportation consequences); People v. Superior Court, 523 P.2d 636, 639 (Cal. Ct. App. 1974) (holding that defendant's lack of awareness of deportation consequences constituted good cause for vacating plea); People v. Padilla, 502 N.E.2d 1182, 1186 (Ill. App. Ct. 1986) (noting overall trend in state courts towards allowing defendants to withdraw guilty plea where they were not advised of possible deportation consequences); Commonwealth v. Wellington, 451 A.2d 223, 225 (Super. Ct. 1982) (instructing lower court to vacate plea due to counsel's failure to advise defendant of deportation consequences); see also Guy Cohen, Note, Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas, 16 Fordham Int'l L.J. 1094, 1096-97 (1993) (arguing that attorneys have affirmative duty to inform defendants of immigration ramifications of guilty pleas); David M. McKinney, Note, The Right of the Alien To Be Informed of Deportation

plea.[188] Moreover, several states have passed laws requiring that noncitizen defendants be advised of the deportation consequences of their criminal convictions.[189] Other legal institutions have recognized a similar duty of defense counsel to educate clients about the deportation consequences of plea bargaining.[190] Books and other publications keep criminal defense lawyers updated on new developments in immigration law.[191] Thus, it is evident that at least some courts, state legislatures, and criminal defense lawyers consider it "a duty of defense lawyers . . . to give proper advice to a criminally accused noncitizen of immigration consequences of the disposition of the criminal case."[192]

Some courts do not recognize such a duty on the grounds that deportation is a collateral, not direct, consequence of a criminal conviction.[193] However, a significant volume of authority—judicial and legal commentary—has criticized this position on the ground that deportation is much more severe than other collateral consequences.[194] Former D.C. Circuit Judge Abner Mikva, recognizing that "deportation is in a category so obviously distinct" from other collateral consequences, had "sore difficulty crediting the fiction that the defendant

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Consequences Before Entering a Plea of Guilty or Nolo Contendere, 21 San Diego L. Rev. 195, 223-24 (1983) (suggesting benefits of knowledge far outweigh burden of informing).

188 See, e.g., United States v. Briscoe, 432 F.2d 1351, 1353 (D.C. Cir. 1970) ("Under appropriate circumstances the fact that a defendant has been misled as to [the consequences] of deportability may render his guilty plea subject to attack."); United States v. Shapiro, 222 F.2d 836, 840 (7th Cir. 1955) (setting aside conviction to prevent manifest injustice where defendant entered guilty plea under belief he was United States citizen).

189 See, e.g., Cal. Penal Code § 1016.5 (West 1995) (imposing statutory duty upon judiciary to warn aliens about deportation possibilities before accepting guilty pleas); Conn. Gen. Stat. Ann. § 54-1j (West 1994) (same); Mass. Gen. Laws Ann. ch. 278, § 29D (West 1981 & Supp. 1997) (same); Ohio Rev. Code Ann. § 2943.031 (Banks-Baldwin 1997) (same); Or. Rev. Stat. § 135.385(2)(d) (1995) (same); Tex. Code Crim. P. Ann. art. 26.13(a)(4) (West 1989) (same); Wash. Rev. Code Ann. § 10.40.200 (West 1990) (same); Fla. R. Crim. P. 3.172(c)(8) (West Supp. 1997) (same).

190 See, e.g., ABA Standards for Criminal Justice, Pleas of Guilty, Std. 14-3.2, commentary at 75 (2d ed. 1982) (requiring that defense counsel explain deportation consequences to clients).

191 See, e.g., Kesselbrenner & Rosenberg, supra note 28, at vi; Kramer, supra note 38.

192 Mojica v. Reno, 970 F. Supp. 130, 177 (E.D.N.Y. 1997).

193 See United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954) (holding that deportation is collateral consequence of criminal conviction); People v. Huante, 571 N.E.2d 736, 741 (Ill. 1991) (same); New York v. Ford, 657 N.E.2d 265, 273 (N.Y. 1995) (holding that counsel's failure to warn of possibility of deportation does not constitute ineffective assistance of counsel).

194 See, e.g., United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring); Williams v. State, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994) ("It is our firm belief that the consequence of deportation, whether labelled collateral or not, is of sufficient seriousness that it constitutes ineffective assistance for an attorney to fail to advise a noncitizen defendant of deportation consequences of a guilty plea.").

has knowingly pled when he is not provided meaningful information about the relevant deportation consequences of his plea."[195] Another judge stated that, to classify deportation as a collateral consequence, "one must necessarily view the right to live in the United States of America, as well as banishment therefrom, as matters of small moment."[196]

Consequently, this legal duty imposed by state laws and courts has sent a clear signal to noncitizens that they have a right to be advised of the deportation consequences of their legal decisions. Given this legal duty, permanent residents legitimately rely on their knowledge of deportation consequences of their crimes when they enter a guilty plea.[197] These expectations would be upset by retroactive application of section 440(d).

2. *Rebutting Counterarguments: Flaws in the Attorney General's Analysis*

Contrary to the arguments made by the Attorney General,[198] restrictions on section 212(c) relief, applied to pre-enactment conduct, do have retroactive effect. These restrictions attach the new legal consequences of automatic deportation to certain criminal convictions where no such consequences ever existed. The following section addresses three arguments, made by the Attorney General and others, that the *Landgraf* antiretroactivity presumption does not apply to section 440(d) because section 440(d) does not have retroactive effect.[199]

First, characterizing section 212(c) relief as "prospective," as some have done,[200] does not diminish the fact that extending automatic deportation to pre-enactment conduct severely upsets expectations.[201] Furthermore, the analogy between section 212(c) relief and

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195 *Del Rosario*, 902 F.2d at 61 (Mikva, J., concurring) (proposing that Rule 11 of Federal Rules of Criminal Procedure, requiring that defendant be apprised of punishment triggered by guilty plea, also mandates that aliens be informed of such major consequences as deportation).

196 Tafoya v. State, 500 P.2d 247, 256 (Alaska 1972) (Rabinowitz, J., dissenting) (refusing to "mute the drastic ramification [of] deportation" by classifying deportation as merely collateral consequence of guilty plea).

197 See Yesil v. Reno, No. 96CIV8409 (DC), 1997 WL 394945, at *11 (S.D.N.Y. July 14, 1997) (acknowledging that availability of relief from deportation is critical to permanent resident's decisionmaking in criminal proceedings); *Mojica*, 970 F. Supp. at 176-78 (same).

198 See supra Part II.B.2.

199 See id.

200 See supra text accompanying notes 151-54.

201 See *Mojica*, 970 F. Supp. at 179 (rejecting placing prospective label on 212(c) relief, given that section 440(d) "effects a drastic change in the law relating to the immigration consequences for a lawful permanent resident of the past commission and conviction of certain criminal convictions").

prospective injunctive relief misconstrues *Landgraf*'s characterization of the role of current law in injunction cases. Operating *in futuro*, the injunctions to which *Landgraf* referred governed the ongoing relationship of the parties prospectively into the future and did not reach back into the past.[202] In contrast to deportation proceedings, injunctions are never truly final because pertinent changes in the law often compel courts to modify an injunction.[203] In the cases cited by *Landgraf—Duplex Printing Press Co. v. Deering*[204] and *American Steel Foundries v. Tri-City Council*[205]— the injunctive relief was *in futuro* and was applied to ongoing injunctions such as those restraining unionized workers from picketing.[206] Section 212(c) relief, in contrast, differs from injunctive relief because, applied to permanent residents with pre-AEDPA convictions, section 440(d) attaches the drastic legal consequence of deportation to events completed prior to AEDPA's enactment.

Second, equating a section 212(c) proceeding to an injunction that can be reopened implies that final grants of section 212(c) relief, no matter how dated, now can be reopened due to the change in the law effected by AEDPA. Federal regulations, however, do not allow for such a result and provide instead that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."[207] In any event, even if the determination of eligibility for a waiver under section 212(c) were prospective in nature, the restriction has a retroactive operation or effect as it constitutes a new legal consequence that attaches "at a minimum, to any lawful permanent resident already subject to an Order to Show Cause or otherwise in the agency 'pipeline'."[208]

Similarly, the discretionary nature of section 212(c) relief should not preclude application of the *Landgraf* presumption. "The mere la-

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202 See Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 273-74 (1994).

203 See Rufo v. Inmates of Suffolk Jail, 502 U.S. 367, 388 (1992) (requiring modification of consent decree when newly enacted laws render obligations under an injunction unlawful).

204 254 U.S. 443 (1920).

205 257 U.S. 184 (1921).

206 See *Landgraf*, 511 U.S. at 273; see also *Yesil*, 1997 WL 394945, at *12 (distinguishing injunctions discussed in *Landgraf* from type of relief offered by section 212(c)).

207 8 C.F.R. § 3.2(c) (1997); see also 62 Fed. Reg. 444, 458 (1997) (to be codified at 8 C.F.R. § 3.23) (proposing similar rule in context of removal proceedings).

208 In re Soriano, No. A39186067, 1996 WL 426888, at *19 (B.I.A. June 27, 1996) (Rosenberg, Board Member, concurring).

bel of relief as discretionary is irrelevant to retroactivity analysis."[209] Although no legal resident has the absolute right to be granted relief,[210] eligible residents may have a right to apply and be considered for such relief.[211] "A right to relief is still a substantive right, and the elimination of even the possibility of obtaining relief thus has a retroactive effect."[212] For instance, in *Rabiu v. INS*,[213] the court recognized such a right when it held that an attorney's failure to file a section 212(c) application on behalf of an otherwise eligible respondent could constitute ineffective assistance of counsel.[214] The Ninth Circuit, in *Bui v. INS*,[215] remanded the case for a new deportation hearing because the immigration judge had failed to inform the petitioner of his eligibility for relief from deportation.[216] And in *Campos v. Nail*,[217] the Ninth Circuit ruled that the immigration judge wrongfully denied respondent's motion for a change in venue prejudicing his right to a fair deportation hearing.[218] These cases demonstrate that, despite the discretionary nature of section 212(c) relief, courts have long recognized a permanent resident's right to apply for such relief.[219]

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209 Mojica, 970 F. Supp. at 178. In *Mojica*, the court noted that "changing a maximum sentence to a mandatory one has retroactive effect, even though the court always had the discretion to impose the maximum." Id. Courts have found that any change from a discretionary system to a system of mandatory penalties for prior crimes is retroactive. See, e.g., Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (finding that repeal of parole eligibility previously available would pose difficulties under U.S. Constitution's Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3); Lindsey v. Washington, 301 U.S. 397, 401 (1937) (forbidding application of new parole laws under Ex Post Facto Clause); United States v. Paskow, 11 F.3d 873, 879 (9th Cir. 1993) (finding that mandatory minimum penalty amendment was unconstitutional ex post facto law where applied retroactively); Fender v. Thompson, 883 F.2d 303, 305 (4th Cir. 1989) (forbidding application of parole statute which retroactively rescinded preexisting parole eligibility).

210 In any case, the *Landgraf* presumption is not restricted solely to those cases involving "vested rights." *Landgraf*, 511 U.S. 244, 275 n.29 (1994) (noting that Justice Story's definition of retroactivity is not to be so limited either).

211 See Rabiu v. INS, 41 F.3d 879, 882-83 (2d Cir. 1994) (holding that attorney's failure to file section 212(c) application on behalf of eligible individual constitutes ineffective assistance of counsel); *In re Soriano*, 1996 WL 426888, at *21 (Rosenberg, Board Member, concurring) (noting that amendment to 212(c) would not alter a permanent legal resident's expectations that she could apply for a waiver under section 212(c)); cf. Batanic v. INS, 12 F.3d 662, 667-68 (7th Cir. 1993) (recognizing petitioner's substantive right to apply for asylum and preserving right by granting new hearing to cure procedural defect).

212 Yesil v. Reno, No. 96CIV8409 (DC), 1997 WL 394945, at *11 (S.D.N.Y. July 14, 1997).

213 41 F.3d 879 (2d Cir. 1994).

214 See id. at 881-83.

215 76 F.3d 268 (9th Cir. 1994) (considering section 212(h) deportation waiver).

216 See id. at 271.

217 43 F.3d 1285 (9th Cir. 1994).

218 See id. at 1286.

219 See Mojica v. Reno, 970 F. Supp. 130, 179 (E.D.N.Y. 1997):

In an attempt to bolster the argument that section 212(c)'s discretionary nature precludes the *Landgraf* presumption, the Solicitor General has contended that a permanent resident cannot reasonably rely on the availability of a discretionary waiver because of the substantial showing required to obtain a waiver of deportation.[220] However, in the twelve months that ended October 31, 1995, 2,303 people were granted section 212(c) waivers out of 5,330 who applied.[221] For the twelve months ending in 1994, 1,778 of 4,134 applicants received waivers.[222] A provision for discretionary relief that affords such relief to about forty percent of its applicants naturally creates reasonable expectations and reliance interests.

The Attorney General, in supporting her *Soriano* decision,[223] has argued that deportation relief restrictions are jurisdictional in nature.[224] However, the Second Circuit in dicta previously distinguished jurisdictional provisions from the elimination of section 212(c) relief on the basis that the latter implicated substantive rights.[225]

Finally, simply labeling section 440(d) as procedural, without looking at the reliance interests it impacts, ignores the appropriate analysis of the retroactivity question. Recognizing that not all procedural rules involve diminished reliance interests, the *Landgraf* Court specifically clarified that "the mere fact that a new rule is procedural does not mean that it applies to every pending case."[226] In cases where strong reliance interests are at stake, the Court has long applied the presumption against retroactivity to new laws that otherwise could be characterized as procedural.[227]

> [The] right to rely on settled law is essential to a system of law in which people can have some measure of certainty that they will have fair notice of the system of rules that will govern the consequences of their actions. It is the essence of the Rule of Law in which we take such pride.

220 See Petitioner's Supplemental Brief, INS v. Elramly, 117 S. Ct. 31 (1996) (No. 95-939), available in 1996 WL 528331, at *11.

221 See Bachman, supra note 14 (citing INS figures).

222 See id.

223 Op. Att'y Gen., In re Soriano, 1997 WL 159795 (Feb. 21, 1997).

224 See id. at *9 (citing Petitioner's Supplemental Brief, 1996 WL 528331, at *13-*14, *Elramly* (No. 95-939); see also supra text accompanying notes 156-57.

225 See Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996). The Second Circuit held that AEDPA section 440(a), which eliminated federal appellate courts' routine jurisdiction to review certain classes of deportation decisions, was not subject to the statutory presumption against retroactivity because of 440(a)'s jurisdictional nature. See id. at 29. The issue was which tribunal would hear the claim, not whether the claim would be eliminated by putting it outside anyone's power. See id. The court distinguished between the jurisdictional provision at issue in the case and a provision eliminating 212(c) relief altogether where substantive rights would be at stake. See id.

226 Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 275 n.29 (1994).

227 See id. at 273-75; see also, e.g., United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928) (holding that new rule for calculating interest on tax refunds could not

In sum, rather than dwelling on characterizing a new law as "prospective," "procedural," "jurisdictional," or "discretionary," a proper analysis should focus on the "quintessentially backward looking"[228] nature of section 440(d) and should address the effect of the rule on settled expectations, thus revealing the provision's retroactive effect.[229]

C. *Beyond* Landgraf *Reliance: A Stronger Antiretroactivity Principle*

Examining the punitive nature of deportation and due process considerations raised by retroactive application of section 440(d), this Part proposes an antiretroactivity principle broader than the one set forth in *Landgraf*. This principle would be applicable to *all* previously eligible permanent residents with pre-AEDPA convictions, even those lacking strong reliance interests.

1. *Due Process Considerations*

Affirming the importance of fair notice in constitutional law, a recent Supreme Court decision, *BMW of North America, Inc. v. Gore*,[230] indicates that retroactive application of section 440(d) may raise due process concerns, thus supporting a stronger presumption

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be applied retroactively to refund granted under old rule but not yet paid); United States Fidelity & Guar. Co. v. Struthers Wells Co., 209 U.S. 306, 314-16 (1908) (holding that new procedure permitting materialmen to enforce claim against surety in government contract should not apply retroactively to cause of action arising while old rule in effect).

228 *Landgraf*, 511 U.S. at 282.

229 It is worth noting that the Supreme Court has long applied the presumption against retroactivity to immigration laws. For instance, in Chew Heong v. United States, 112 U.S. 536 (1884), the Supreme Court refused to apply a provision of the Chinese Restriction Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943), which barred Chinese laborers from reentering the United States without a re-entry certificate obtained prior to departure, to laborers who left the United States before the statute's enactment. See *Chew Heong*, 112 U.S. at 559-60. More specifically, courts have recognized that applying restrictions on section 212(c) relief to past convictions has retroactive effect. See Buitrago-Cuesta v. INS, 7 F.3d 291, 293-94 (2d Cir. 1993) (labeling application of IMMACT90 aggravated felony bar to past convictions as "retroactive"); In re A— A—, No. A-37007541, 20 I. & N. Dec. 492, 1992 BIA LEXIS 14, at *21 (B.I.A. 1992) (holding that, given express statutory language, new definition of aggravated felon in act "attaches retroactively to all convictions [entered prior to the statute's enactment]").

The only three federal judicial decisions to rule on the temporal reach of section 440(d) recognized the retroactive effect that section 440(d) would have should it apply to those who acted in reliance on availability of section 212(c) relief. See Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996); Yesil v. Reno, No. 96CIV8409(DC), 1997 WL 394945, at *10-*11 (S.D.N.Y. July 14, 1997); Mojica v. Reno, 970 F. Supp. 130, 169-71 (E.D.N.Y. 1997). For a detailed discussion of the cases, see generally supra Part II.B.1.

230 116 S. Ct. 1589 (1996).

against retroactivity.[231] Striking down a punitive damage award of $2 million as grossly excessive and unconstitutional,[232] the *Gore* Court held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the *severity* of the penalty that a state may impose."[233]

Similarly, section 440(d), applied retroactively, may raise due process issues. At the time many permanent residents chose to plead guilty or not to appeal a conviction, they realized their convictions might subject them to the *risk* of deportation, but not to automatic deportation, a much more severe consequence. More importantly, even in situations where bargained-for expectations may not be at issue,[234] permanent residents have a reasonable expectation to know the severity of the consequences flowing from their conviction at the time their conviction is entered. The punitive reality underlying the "civil" gloss of deportation proceedings makes the fair notice requirements in *Gore* even more imperative. Thus, permanent residents with pre-AEDPA convictions who are now subject to automatic deportation under section 440(d) would be deprived of fair notice of the severity of the immigration consequences of their convictions if section 440(d) were applied retroactively.[235]

2. *Punitive Nature of Deportation*

In addition to due process concerns, the harsh realities and punishment involved in deportation also mandate an antiretroactivity

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[231] See id. at 1598-99.

[232] Shortly after purchasing a new BMW automobile from an authorized dealer, plaintiff Gore discovered it had been repainted, thus reducing its value by $4000. See id. at 1593. Gore brought suit against BMW of North America, Inc. (BMW) for compensatory and punitive damages, alleging, inter alia, that BMW's failure to disclose the repainting constituted fraud under Alabama law. See id. At trial, the jury found BMW liable for $4000 in compensatory damages and $4 million in punitive damages. See id. at 1593-94. The Alabama Supreme Court subsequently reduced punitive damages to $2 million, and BMW appealed to the United States Supreme Court. See id. at 1595.

[233] Id. at 1598 (emphasis added). The Court used three factors to determine whether BMW had adequate notice and whether the penalty was grossly excessive: (1) the degree of reprehensibility of the offense, a concept rooted in the idea that damages on a defendant should reflect the enormity of his offense; (2) the ratio of the penalty to the actual harm inflicted on the plaintiff; and (3) the discrepancy between punitive damages and civil or criminal penalties that could be imposed for comparable misconduct. See id. at 1598-1603.

[234] For example, those noncitizens who were convicted by a jury and fully appealed their convictions unsuccessfully might not have bargained-for expectations created by a plea bargain or reliance interests resulting from a decision not to appeal a conviction.

[235] In addition, substantive due process concerns may be raised by retroactive application of section 440(d). See Morawetz, supra note 159 (providing theoretical and doctrinal justifications for substantive due process evaluation of deportation statutes applied retroactively).

principle more expansive than the one set forth in *Landgraf*. Despite enduring precedent that classifies deportation as a "purely civil action to determine eligibility to remain in this country,"[236] dicta and dissenting opinions are replete with attacks on this precedent as a legal fiction, illustrating instead how deportation operates as a form of punishment.[237] One commentator attacked the Court's jurisprudence in this area:

> The Court . . . engages in fictionalizing when it suggests that deportation . . . is not to punish an unlawful entry, but to determine eligibility to remain in the country. . . .
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> . . . [D]eportation is based on past conduct, and like traditional criminal punishment, is partly designed to send messages to society, particularly aliens, about the utility of compliance with the immigration laws. . . .
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> . . . .
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> . . . To reach the euphemistic conclusion that deportation is not punishment, the Court has to ignore reality and it does so by simply refusing to examine the people involved and their individual circumstances—length of time in the country, family situation, or ownership of property.[238]

One need not look deep into a deportation proceeding to see the harsh consequences it often entails—banishment from a country that a noncitizen may have considered home for many years; separation from friends, family, and loved ones; exile to a country with which a noncitizen may have tenuous ties or in which one may face persecution.[239] The Supreme Court has recognized the punitive nature of deportation, noting that "deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[240] In a dissenting opinion, Justice Brewer observed, quoting James Madison, "'if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a

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[236] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (refusing to extend exclusionary rule to deportation proceedings because they were civil, not criminal); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (classifying deportation as civil); 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.").

[237] See supra note 59 and accompanying text.

[238] Ibrahim J. Wani, Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law, 11 Cardozo L. Rev. 51, 104-06 (1989) (criticizing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)).

[239] See, e.g., Scheidemann v. INS, 83 F.3d 1517, 1530-31 (3d Cir. 1996) (Sarokin, J., concurring) (acknowledging harsh realities of deportation); Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting) (noting that nothing could exceed cruelty of forcible removal of noncitizens from their country, friends, and property).

[240] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (internal citations omitted).

doom to which the name can be applied.'"[241] Deportation also has been described as a "sanction which in severity surpasses all but the most Draconian criminal penalties."[242] Judge Frank noted in a dissent that "[d]eportation, while not literally constituting criminal punishment, may have far more dire effects" than incarceration.[243]

However, application of the Constitution's prohibitions on ex post facto laws[244] to restrictions on deportation relief is unnecessary. Rather, the striking similarity between deportation and criminal sanctions and the severity of deportation consequences relative to those of most civil proceedings should compel courts to apply a strong principle against retroactivity to deportation relief restrictions.

Thus, the harsh punitive realities underlying deportation proceedings for commission of crimes make it imperative that individuals be protected from retroactive application of statutory restrictions on relief from deportation and weigh heavily in favor of a strong antiretroactivity principle applicable to deportation relief restrictions such as section 440(d). Just as the severity of deportation has persuaded some courts to treat deportation as a direct consequence, despite its "collateral" label, this logic may also weigh in favor of applying a stronger presumption against retroactivity to shield permanent residents from the retroactive effect of newly enacted provisions that curtail relief from deportation, regardless of reliance interests.

CONCLUSION

AEDPA section 440(d) is simply one of several provisions in recent legislation that drastically alter the immigration law landscape. Given the absence of an express statement in the statutory text or legislative history prescribing section 440(d)'s temporal reach, courts and agencies must interpret the scope of such provisions so as to preserve the settled expectations of noncitizens who might have made critical decisions based on then-existing laws.

This Note concludes that the *Landgraf* presumption against retroactivity applies to the deportation relief restrictions in AEDPA section 440(d) and prevents such laws from affecting those convicted prior to the restriction's enactment. Noncitizens have come to rely on their right to have courts and counsel advise them of the immigration consequences of their criminal convictions; the recognition of this right by courts and legislatures has sent a clear signal to noncitizens

[241] *Fong Yue Ting*, 149 U.S. at 740-41 (Brewer, J., dissenting) (quoting Madison, 4 Elliot's Debates 546, 555 (1800)).

[242] Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977).

[243] United States v. Parrino, 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting).

[244] See U.S. Const., art. I, § 9, cl. 3.

that they have a right to be advised of deportation consequences. Thus, permanent residents legitimately expect to know the severity of the deportation consequences of their crimes prior to being convicted. Applying section 440(d) to permanent residents who, prior to AEDPA, pled guilty or chose not to appeal their convictions based on their pre-AEDPA expectations of section 212(c) relief raises due process and retroactivity concerns at least as, if not more, serious than those concerns raised in *Landgraf*. Given the Supreme Court's decision in *Landgraf* to extend a presumption against retroactivity to preserve expectations in a situation where merely monetary interests were at stake, it is reasonable to apply this presumption to deportation proceedings where a permanent resident's right to live in this country is at risk. Furthermore, this Note moves beyond *Landgraf* to propose that considerations of due process, efficiency, and fair notice call for an antiretroactivity principle applicable to all permanent residents with pre-AEDPA convictions previously eligible for section 212(c) relief regardless of how strong their expectations and reliance on the availability of relief.

A proper retroactivity analysis should examine the extent to which the new law attaches new consequences and upsets settled expectations of permanent residents. Despite the discretionary or prospective nature of deportation relief, restrictions on relief, applied to pre-enactment conduct, do have retroactive effect because these restrictions attach new legal consequences of automatic deportation where no such repercussions previously existed. The punitive nature of deportation is further testament to the fact that such restrictions applied to pre-enactment conduct raise retroactivity concerns similar to those raised in *Landgraf*. Thus, restrictions on relief from deportation, like AEDPA section 440(d) and IIRIRA section 304(a)(3), which fail to state expressly their temporal reach, are subject to the *Landgraf* presumption and should not be applied to permanent residents with pre-enactment convictions.