

## THE FUTURE RELIEF OF IMMIGRATION LAW

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### ABSTRACT

*Immigration law is in need of relief. Among the many problems affecting immigration law is the lack of respite from removal. The removal grounds – the characteristics and acts that render someone removable from the United States – are extremely broad and rigid. The only available penalty is removal. There is little proportionality in immigration law and qualifying for respite once one is determined to be removable is very difficult. This Article explores the lack of relief from removal in immigration law and shows how its stingy availability sheds light on other, broader problems afflicting immigration law. The current state of relief from removal helps to understand the conflicting signals of immigration law, the dysfunction of the immigration adjudication system, and the role of sovereignty in immigration law. This Article is a part of a symposium on the twentieth anniversary of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.*

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## INTRODUCTION

What is relief? In common English, it is something that eases pain or distress.<sup>1</sup> In immigration law, relief is often thought of in terms of relief from removal (deportation).<sup>2</sup> It is the means that provides the possibility to ease the pain and distress of removal from the United States. Relief has an alternative non-legal meaning that refers to a representation of the contours and characteristics of a particular terrain.<sup>3</sup> This Article focuses on respite from removal, but also connects the future of that respite to the future contours and characteristics of immigration law in general. Thus, the future “relief” of immigration law refers to both relief from removal and the future shape of immigration law in general.

Relief from removal has a long history in immigration law, but the arc of relief from removal tells a story of constricting relief as removal grounds broaden.<sup>4</sup> Thus, it is easier to become removable and harder to get relief from removal. Scholars have criticized the stingy relief from removal that current law provides.<sup>5</sup> This Article will review those critiques and then show how one immigration law concept, relief, exposes some of immigration law’s most challenging

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1. *Relief*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/relief> (last visited Apr. 28, 2017).

2. *See generally* 8 U.S.C. § 1229b (2015).

3. *Relief*, *supra* note 1.

4. *See infra* Part I.A.

5. *See infra* Part I.C.

shortcomings. This Article argues that the future of relief from removal is tied to the future shape of immigration law itself.

Part I explores the history of relief from removal in immigration law and explains cancellation of removal, the major form of relief from removal in current immigration law.<sup>6</sup> Part I also explains and analyzes existing critiques of the nature of relief afforded in immigration law today.

Part II shows that the current shortcomings of relief in immigration law provide a good lens through which to view some of the most serious problems afflicting immigration law generally.

## I. RELIEF FROM REMOVAL IN IMMIGRATION LAW

### A. A Brief History of Relief from Removal

The immigration statutes have long acknowledged a need to provide some mechanism of relief from removal.<sup>7</sup> The trajectory of relief, however, is one of less mercy over time. The standards for obtaining relief from removal have become stricter as the categories of removable behavior have become broader. The progression of immigration law reveals an attitude increasingly aimed at making more individuals removable and providing fewer opportunities for relief from removal.

In the United States, Congress did not begin to create deportable offenses<sup>8</sup> until the late nineteenth century.<sup>9</sup> When Congress began to populate the immigration laws with deportability grounds, those grounds were subject to a kind of statute of limitations where one could become deportable only within a narrow time frame after admission.<sup>10</sup> Once the individual established long-enough ties to the United States, the individual was no longer deportable.<sup>11</sup>

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6. 8 U.S.C. § 1229b. Cancellation of removal was added to the Immigration and Nationality Act (“INA”) in 1996. Those 1996 amendments are the focus of the symposium that houses this Article.

7. Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1583 (2014) (“Deportation relief, like deportation itself, has deep roots.”). Even the Alien and Sedition Acts of 1798 permitted discretionary relief. *Id.*

8. A deportable offense is different from something that makes an individual inadmissible. An inadmissibility ground prohibits legal entry. 8 U.S.C. § 1182 (2012). Under the current version of the INA, the deportability grounds attach after a legal admission into the United States. 8 U.S.C. § 1101(a)(13)(A) (2012); 8 U.S.C. § 1227 (2012).

9. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 124–25 (2007).

10. *Id.* at 124–26.

11. *Id.*

In the early twentieth century, Congress began to enact what Professor Daniel Kanstroom calls “post-entry social control” deportation grounds.<sup>12</sup> For example, in 1917 Congress legislated away the *de facto* statute of limitations for many deportation grounds by making a deportation ground applicable no matter how long an individual had been in the United States.<sup>13</sup> Also, the list of deportable offenses grew as Congress established criminal-related grounds of deportability.<sup>14</sup> Even in 1917, however, Congress recognized the need to provide relief from removal; for example, Congress allowed a sentencing judge to issue a recommendation against deportation during a criminal proceeding.<sup>15</sup> Immigration agents were bound to the judge’s recommendation.<sup>16</sup>

Alterations to the removal grounds continued through the twentieth century. The Alien Registration Act of 1940 (otherwise known as the Smith Act) made past membership in the Communist Party a deportable offense, even if the membership had ceased before passage of the Smith Act.<sup>17</sup> The Smith Act also provided for a form of relief from removal.<sup>18</sup> It allowed for “suspension of deportation” if an individual showed that removal would result in “serious economic detriment” to a citizen or legal resident alien who was a spouse, parent, or minor child of the removable individual.<sup>19</sup> The individual seeking relief also had to show good moral character for the preceding five years.<sup>20</sup> This relief was unavailable to “immoral classes,” including prostitutes and anarchists.<sup>21</sup>

In 1952, Congress broadened the criminal deportability grounds and tightened the suspension of deportation eligibility requirements.<sup>22</sup> Congress added a physical presence requirement of

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12. *Id.* at 125–26, 131.

13. *Id.* at 133.

14. *Id.*

15. *Id.* at 134.

16. *Id.*

17. *Id.* at 195.

18. *Id.* at 234. The Alien Registration Act of 1940 somewhat formalized and narrowed the general and opaque grants of discretionary authority to provide relief from removal that previously existed. *Id.* For example, the 1917 immigration laws allowed the executive branch broad authority to grant deportable foreign nationals permission to remain without much guidance on who should receive relief. *Id.* There were, however, restrictions on relief based on race. *Id.*

19. *Id.*; Curtis Pierce, *The Benefits of “Hardship”: Historical Analysis and Current Standards for Avoiding Removal*, 76 INTERPRETER RELEASES 405, 405 (1999).

20. KANSTROOM, *supra* note 9, at 234.

21. *Id.*

22. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

at least five years to the relief eligibility requirements and changed the “serious economic detriment” standard to “exceptional and extremely unusual hardship.”<sup>23</sup> In changing the standard to “exceptional and extremely unusual hardship,” Congress included hardship to the foreign national facing removal to the list of qualifying individuals.<sup>24</sup> The statute allowed consideration of hardship to the person seeking relief, and not just to certain relatives of that person.<sup>25</sup> However, the standard was raised from “serious economic detriment” to “exceptional and extremely unusual hardship.”<sup>26</sup>

Congress bifurcated the suspension of deportation prerequisites in 1962.<sup>27</sup> These amendments divided applicants for suspension of deportation into two groups: those who are removable due to a “serious crime” and those deportable for other reasons.<sup>28</sup> To suspend deportation, those outside the “serious crime” category needed to show: “(1) seven years of continuous physical presence . . . ; (2) good moral character; and (3) ‘extreme hardship’” to the individual facing removal or to the individual’s spouse, parent, or child that either was a U.S. citizen or possessed a green card.<sup>29</sup> For those removable due to a “serious crime,” the prerequisites were tighter. That group of individuals needed to show: “(1) 10 years of continuous physical presence . . . ; (2) proof of good moral character; and (3) exceptional and extremely unusual hardship” to the individual facing removal or to the individual’s U.S. citizen or green card-holding spouse, parent, or child.<sup>30</sup> For those in the “serious crime” category, the years of required continuous physical presence to suspend deportation were higher, as was the level of hardship.<sup>31</sup>

In 1996, Congress restructured relief from removal into a new statutory scheme called cancellation of removal.<sup>32</sup> The new relief scheme was accompanied by an expansion of the list of things a foreign national could do to become removable.<sup>33</sup> Proponents of the

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23. Pierce, *supra* note 19, at 406.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 406–07.

29. *Id.* at 406.

30. *Id.* at 406–07.

31. *Id.*

32. 8 U.S.C. § 1229b (2012).

33. 8 U.S.C. § 1182, § 1227 (2015); *see also* Walter Ewing, et al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL 14 (July 13, 2015),

1996 changes were motivated by a desire to expedite the removal of “criminal aliens.”<sup>34</sup> Despite arguments at the time that these changes to the Immigration and Nationality Act (“INA”) would consider too many crimes to be removable offenses and would strip too much equity from relief determinations, a narrative of crime and an urgency to remove “criminal aliens” won the day.<sup>35</sup>

### *B. Cancellation of Removal*

The evolution of relief from removal has left us with cancellation of removal.<sup>36</sup> The statute treats removal differently for lawful permanent residents—those individuals with green cards who may lose the green card—and those who never had lawful permanent resident status.<sup>37</sup> For current lawful permanent residents, cancellation of removal provides a possibility to cancel removal and to keep lawful permanent resident status.<sup>38</sup> For those without lawful permanent resident status, cancellation of removal not only cancels removal, but also bestows lawful permanent resident status.<sup>39</sup> Thus, an individual without legal status may gain legal status through a grant of cancellation of removal.

The removal of a lawful permanent resident may be cancelled if the individual: (1) has been a lawful permanent resident for at least five years; (2) has resided continuously in the United States for at least seven years; and (3) has not been convicted of an “aggravated felony.”<sup>40</sup> Even if an individual can meet these three prerequisites, a grant of cancellation of removal is discretionary. An immigration judge has the discretion to grant cancellation if an individual meets the prerequisites.<sup>41</sup>

The prerequisites narrow the population of individuals who could even hope to obtain cancellation of their removal. In practice, the prerequisites are even stricter than they appear. For example, continuous residence ends with the commission of certain offenses or

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[https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf).

34. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1290 (2013) [hereinafter *The Normative and Historical Cases*] (citing 141 CONG. REC. E330 (daily ed. Feb. 13, 1995) (statement of Rep. Lamar S. Smith)).

35. *See id.* at 1291–93.

36. *See* 8 U.S.C. § 1229b.

37. 8 U.S.C. § 1229b(a)–(b).

38. 8 U.S.C. § 1229b(a).

39. 8 U.S.C. § 1229b(b).

40. 8 U.S.C. § 1229b(a).

41. *See id.*

with the government's initiation of removal proceedings, whichever occurs earlier.<sup>42</sup> Therefore, an individual could be physically present in the United States for seven years or more, but not be able to establish seven years of "continuous residence" as defined under the statute.<sup>43</sup>

Another example of a prerequisite that narrows the population is the "aggravated felony" bar to cancellation. The INA defines the term "aggravated felony" very broadly.<sup>44</sup> The INA contains a list of offenses that are labeled "aggravated felony" for immigration purposes.<sup>45</sup> That list includes offenses that are neither aggravated nor a felony.<sup>46</sup> The list does include murder and rape, but also encompasses much less serious behavior.<sup>47</sup>

For those who do not have lawful permanent resident status, there are different prerequisites to eligibility for cancellation of removal. Those with no legal status or those with nonimmigrant (temporary) legal status must show: (1) ten years of continuous physical presence; (2) that the individual is a person of "good moral character"; (3) that the individual has not been convicted of certain offenses, including an aggravated felony; and (4) that removal of the individual would cause "exceptional and extremely unusual hardship" to the individual's spouse, parent, or child, if the spouse, parent, or child is a U.S. citizen or lawful permanent resident.<sup>48</sup>

Similar to the prerequisites for those with permanent residence, these prerequisites are also stricter than they seem. For example, "continuous physical presence" is subject to the same stop-time rule as continuous residence.<sup>49</sup> The clock stops for individuals when they commit certain offenses or when the government initiates removal proceedings, whichever happens first.<sup>50</sup> Additionally, presence is not "continuous" if the individual has left the United States for any

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42. *Id.*

43. *See* 8 U.S.C. § 1229b(d).

44. *See* 8 U.S.C. § 1101(a)(43).

45. *Id.*

46. *See id.*

47. *See id.*; *see generally* Ewing et. al., *supra* note 33, at 11 ("[A] more detailed examination of the data clearly illustrates that the majority of 'criminal aliens' are in fact *not* being removed for what most Americans perceive to be serious crime, such as the FBI's eight Index Crimes, which consist of 'Part I' offenses (homicide, assault, forcible rape, and robbery) and 'Part II' offenses (larceny, burglary, motor vehicle theft and arson).").

48. 8 U.S.C. § 1229b(b)(1)(A)-(D).

49. 8 U.S.C. § 1229b(d)(1).

50. *Id.*

period greater than ninety days or for an aggregate of more than 180 days.<sup>51</sup>

The pool of cancellation-eligible individuals is further narrowed by the good moral character requirement. The statute lists examples of characteristics or offenses that render an individual to be of bad moral character.<sup>52</sup> The characteristics and offenses include, but are not limited to, “habitual drunkard[s],” anyone convicted of an aggravated felony, and anyone convicted of two or more gambling offenses.<sup>53</sup>

Even if an individual can meet the presence, good moral character, and no listed criminal offenses prerequisites, an individual seeking relief who does not have a green card must also show that his or her removal would result in “exceptional and extremely unusual hardship” to a qualifying relative.<sup>54</sup> The only relatives that count—the only relatives whose hardship the statute is concerned about—are U.S. citizen or green card-holding spouses, parents, or children.<sup>55</sup> The statute currently is not concerned about hardship to the individual facing removal.<sup>56</sup>

The Board of Immigration Appeals has interpreted “exceptional and extremely unusual hardship” to mean hardship substantially beyond the hardship that the law expects and accepts that a mixed status family should face when one member of the family is removed from the United States.<sup>57</sup> In other contexts, the INA contains statutory language requiring “extreme hardship.”<sup>58</sup> Previously in the history of relief from removal, the statute called for proof of “extreme hardship” for those who fell in the non-serious crime category.<sup>59</sup> Congress’ use of the “exceptional and extremely unusual” language for all non-

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51. 8 U.S.C. § 1229b(d)(2).

52. 8 U.S.C. § 1101(f).

53. *Id.*

54. 8 U.S.C. § 1229b(b)(D).

55. *See id.*

56. *Id.*

57. *Matter of Gonzalez Recinas*, 23 I. & N. Dec. 467, 468 (B.I.A. 2002) (“[A]n alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure. We specifically stated, however, that the alien need not show that such hardship would be ‘unconscionable.’” (quoting *Matter of Monreal*, 23 I. & N. Dec. 56, 61–62 (B.I.A. 2001))).

58. *See, e.g.*, 8 U.S.C. § 1182(i)(1) (2015) (granting the Attorney General the discretionary power to waive inadmissibility of those who, through fraud or willful misrepresentation of a material fact, procured immigration documents when that person’s removal would cause a qualifying relative extreme hardship).

59. *See Pierce*, *supra* note 19, at 406–07 (“In 1957, Congress passed legislation allowing waivers of some criminal grounds of exclusion on the basis of extreme hardship to the alien’s family members.”).



permanent residents, therefore, was intended to raise the bar to access relief from removal.<sup>60</sup>

An additional restriction on the current availability of relief from removal is an annual cap on the number of individuals who may receive cancellation of removal, even if the individual meets all of the statutory prerequisites and the immigration judge agrees to exercise his or her discretion to grant cancellation of removal.<sup>61</sup> The statute directs that no more than 4,000 non-permanent residents per year may receive a grant of cancellation of removal.<sup>62</sup> In practice, this means that there is a backlog of individuals eligible for relief who may not receive relief in a given year because the cap has been reached.<sup>63</sup> In fiscal year 2015, all 4,000 slots were taken up by individuals whose cancellation applications were filed in the previous fiscal year and whose decisions were already under reserve.<sup>64</sup> Under current agency policy, immigration judges must reserve decisions in all cancellation applications once the yearly cap is reached.<sup>65</sup> No decisions may be announced; that is true even for negative decisions.<sup>66</sup> This cap not only restricts the number of non-lawful permanent residents who can receive cancellation of removal in any given fiscal year, but the way it is administered makes it another needlessly cumbersome feature that complicates the availability of relief from removal.<sup>67</sup>

The current form of relief from removal, cancellation of removal, continues the historical trend of stingier relief complemented by broader grounds of removability.<sup>68</sup> Congress has created a great need for relief from removal, but cancellation of removal is not a generous

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60. H.R. REP. 104-828, at 213 (1996) (Conf. Rep.).

61. 8 U.S.C. § 1229b(e).

62. *See id.* There is no limit on the number of individuals who may keep their green cards through cancellation of removal.

63. Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J. L. & POL. 527, 541-42 (2015).

64. *Id.* at 542. Individuals waiting for an open cap slot are granted work authorization during their waiting period. *Id.* at 542-43. As Professor Taylor has explained, the existence of the cap frustrates the work of immigration judges. *Id.* at 542-45.

65. *Id.* The Department of Justice filed a Notice of Proposed Rulemaking on November 30, 2016 that would allow immigration judges to deny applications for cancellation of removal even if the yearly cap has been exhausted. Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal, 81 Fed. Reg. 86291 (proposed Nov. 30, 2016) (to be codified at 8 C.F.R. pt. 1240).

66. *See id.*

67. *Id.*

68. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributions to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 556-58 (2011) [hereinafter *Beyond Decisional Independence*].

form of relief.<sup>69</sup> The grounds of removability, or the list of things that make a foreign national removable, are broad, harsh and complicated.<sup>70</sup> Elsewhere I have described the breadth, harshness, and opacity of the removal grounds.<sup>71</sup> The criminal activity grounds of removal, for example, cover even minor crimes and favor rigidity over thoughtfulness.<sup>72</sup>

One deportability ground allows the government to remove anyone who has been convicted of violating a controlled substance law.<sup>73</sup> The ground includes the violation of any state, federal, or foreign controlled substance law.<sup>74</sup> The ground excepts from its reach “a single offense involving possession for one’s own use of 30 grams or less of marijuana.”<sup>75</sup> Two offenses, possession of more than 30 grams of marijuana, possession of any amount of any controlled substance besides marijuana, or anything more than possession makes an individual removable.<sup>76</sup>

Similarly, the aggravated felony deportability ground takes a big bite. Anyone who is convicted of an aggravated felony is deportable.<sup>77</sup> It may seem reasonable for removal to be the consequence of doing something that deserves the label “aggravated felony,” but as described above, “aggravated felony” is actually a term of art in immigration law.<sup>78</sup> A conviction need not be for a felony nor be aggravated to qualify as an aggravated felony.<sup>79</sup> Some particularly egregious examples of crimes that have been transformed to an aggravated felony under the immigration statutes

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69. *Id.*

70. *Id.* at 552.

71. *Id.* at 552-63.

72. *Id.* at 555 (discussing removability for conviction of an aggravated felony).

73. 8 U.S.C. § 1227(a)(2)(B)(i) (2015).

74. *Id.*

75. *Id.*

76. *Id.*

77. 8 U.S.C. § 1227(a)(2)(A)(iii).

78. *See* 8 U.S.C. § 1101(a)(43) (2015).

79. *See* Ewing et al., *supra* note 33, at 14 (describing a situation where hair pulling resulted in conviction for misdemeanor assault which constituted an aggravated felony).

are hair pulling<sup>80</sup> and shoplifting.<sup>81</sup> Earning the “aggravated felon” label under the INA means certain removal.<sup>82</sup>

In addition to their breadth and harshness, the removability grounds are also overly complex. Federal agencies and federal courts have spilled much ink working through the applicability of the removal grounds and the availability of relief from removal. The Supreme Court has heard over twenty cases since 1996 implicating the “aggravated felony” removal ground.<sup>83</sup> And that is only one category of removability.<sup>84</sup>

### *C. Ending the Cancellation of Removal Experiment*

Scholars have illuminated the many shortcomings of cancellation of removal and have proposed immigration relief reform. One underlying theme among the critiques and proposals is a need to inject proportionality into the decision of whether to remove an individual from the United States. The current structure of immigration law is rigid. It consists of broad grounds of removability that contain few exceptions and sweep in even misdemeanor behavior. Once an individual is removable under a ground, the main relief provision, cancellation of removal, is very narrowly drawn. Proportionality is missing both from the removal grounds and from existing relief mechanisms. Because the existing relief mechanism is so narrow, it fails to inject meaningful proportionality into removal decisions. Scholars have proposed reforms that would inject more proportionality into the system. These proposed reforms come from three main inspirations: family law; international law; and immigration law.

Family law is implicated in relief from removal because family law involves adjudicating the rights and interests of children facing separation from one or both parents.<sup>85</sup> In immigration law, children

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80. *See id.* (describing hair pulling scenario).

81. A shoplifting offense may be an “aggravated felony” if it carries a sentence of one year or more, even if the sentence is suspended. 8 U.S.C. § 1101(a)(43)(G) (2014) (listing as an aggravated felony a theft offense where the term of imprisonment is at least one year); 8 U.S.C. § 1101(a)(48)(B) (explaining that any reference to a term of imprisonment disregards any suspension).

82. An aggravated felon is ineligible for relief from removal. *See* 8 U.S.C. § 1229b(a)(3), (b)(1)(C).

83. *See, e.g.,* *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).

84. *See* 8 U.S.C. § 1227(a) (2012).

85. *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189 (2006) [hereinafter *Choiceless Choices*].

who are U.S. citizens often face separation from parents who do not have legal permission to be in the United States.<sup>86</sup> Under the cancellation of removal scheme, the existence of a U.S. citizen child does not guarantee a parent relief from removal.<sup>87</sup>

For those who are already permanent residents and are seeking to keep that status, hardship is not a statutory factor at all.<sup>88</sup> For nonpermanent residents, the existence of a U.S. citizen child only matters if removal will result in “exceptional and extremely unusual hardship” to the U.S. citizen child.<sup>89</sup> Separation because of removal is just regular hardship and is the type of hardship that the immigration statutes expect families to suffer.<sup>90</sup> Even a showing of extreme hardship is not enough to support relief.<sup>91</sup> Also, even if there is extreme and exceptionally unusual hardship, that is not the only prerequisite to cancellation of removal for those without a green card.<sup>92</sup> All of the prerequisites must be met,<sup>93</sup> and the existence of the other prerequisites diminishes the importance of the U.S. citizen child’s interests. Professor David Thronson discussed how immigration law does not promote family integrity and diminishes the interests of children, including that a child with legal status cannot keep an undocumented or deportable parent in the United States based on the child’s legal status alone.<sup>94</sup>

Some scholars have argued that family law’s “best interest of the child” analysis should be used in immigration law as a way to promote and advance the interests of U.S. citizen children when a parent faces removal.<sup>95</sup> Instead of looking for situations that result in

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86. *See id.*

87. *See id.* at 1170–71.

88. In one sense, permanent residents have an easier time accessing cancellation of removal because showing hardship is not a requirement. Compare 8 U.S.C. § 1229b(a) (2012) with 8 U.S.C. § 1229b(b) (2012). On the other hand, the existence of hardship cannot overrule the failure to fulfill the statutory prerequisites. *See* 8 U.S.C. § 1229b(a)(1)–(3).

89. 8 U.S.C. § 1229b(b)(1)(D).

90. *See* *Matter of Gonzales Recinas*, 23 I. & N. DEC. 467, 468 (B.I.A. 2002).

91. *See* Thronson, *Choiceless Choices*, *supra* note 85, at 1170–72.

92. *See* 8 U.S.C. § 1229b(b)(1)(A)–(D).

93. *See id.*

94. *See* David B. Thronson, *You Can’t Get There From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 60 (2006) (“In other words, while many immigrants may attribute their legal status to a family connection, the existence of even close family relationships with persons permitted to live in the United States does not inevitably or even usually provide feasible avenues for legal immigration”); *see also* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 994 (2002).

95. Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009).

exceptional and extremely unusual hardship or ignoring the existence of family members (as is the case with the permanent resident prerequisites), the inquiry would seek out the best interest of the child and seek to accommodate the child's best interest into removal adjudication.<sup>96</sup> Guardians ad litem could be appointed to present to an immigration court what would be in the best interest of the child. The immigration court would then have to weigh the best interests of the child against other competing interests, such as the government's interest in removing the foreign national parent.

While not all scholars agree that importing family law's best interest of the child inquiry is a panacea for immigration law,<sup>97</sup> the motivation to look to family law is driven by a desire for more proportionality in removal decisions. The attraction of the best interest of the child standard is that it elevates the importance of the needs of the child and more seriously weighs the repercussions of family separation. An approach built around considering the best interests of the child would require the government to think differently about how removal affects children while balancing those effects against the government's need to remove the parent. The decision to remove would be more proportional and case sensitive.

International law is also a potential source for reforming relief from removal.<sup>98</sup> For example, Article 8 of the European Convention on Human Rights ("ECHR") explicitly recognizes a right to family life.<sup>99</sup> This right is not absolute, but any government interference with this

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96. *Id.*; see also Kari E. Hong, *Revisiting Cancellation of Removal: How Family Law Can Protect Children in Immigration Proceedings*, 28 GEO IMMIGR. L.J. 277 (2015).

97. Family law and immigration law, while they may overlap, are not the same. The issues presented arise in different factual contexts and in wholly different adjudication systems. For example, a family's circumstances may not meet the cancellation of removal prerequisites, but other areas of law may still consider the family a family. See Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 685 (2014). Professor Abrams and Mr. Piacenti caution that family law principles, including the best interest of the child standard, should not be imported to immigration law without thinking about the different purposes and government interests at stake in immigration law. See *id.* at 708. Professor Thronson similarly has observed that "immigration and family court proceedings best achieve the advancement of children's interests when the [immigration and family] courts operate with awareness of each other but with fidelity to their own aims and processes." Thronson *Choiceless Choices*, *supra* note 85, at 1213.

98. See DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 216-24 (David McBride ed. 2012) [hereinafter *AFTERMATH: DEPORTATION LAW*].

99. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950 [hereinafter *European Convention*]. There are other potential international law influences, such as the UN Convention on the Rights of the Child and the American Declaration on the Human Rights of Man. See KANSTROOM, *AFTERMATH: DEPORTATION LAW*, *supra* note 98, at 216-24.

right must be proportional.<sup>100</sup> Immigration law implicates a right to family life because family separation is a common consequence of removal. The starting point of the analysis under the ECHR is that family members should not be separated,<sup>101</sup> and the government must show that family separation would not violate the right to be with one's family. The ECHR requires an adjudicator to consider whether family separation would be proportional. The adjudicator must consider whether it is necessary to separate the family despite the family members' rights to be together.<sup>102</sup> Additionally, the separation must be proportional and must advance a legitimate government goal, such as national security or public safety.<sup>103</sup>

The structure of the ECHR analysis is fundamentally different from the governing legal doctrine in the United States. In the United States, there is no recognized constitutional right to be with one's family, at least in the context of immigration. In fact, the Supreme Court recently reaffirmed this status quo.<sup>104</sup> In the United States, the law presumes that a family will be separated, and relief is available only if the family can meet the strict cancellation prerequisites.

It certainly would be an improvement if the U.S. Supreme Court were to recognize a constitutional right to be with family in the immigration context, or if Congress were to restructure the statutory framework of relief from removal to look more like the ECHR proportionality analysis. Scholars have promoted and debated the desirability of a legal regime that looks more like what the ECHR provides.<sup>105</sup>

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100. The ECHR mandates:

[t]here shall be no interference by a public authority with the exercise of th[at] right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*European Convention*, *supra* note 99.

101. Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 26 *GEO. IMMIGR. L.J.* 802, 863 (2011).

102. *Huang & Kashmiri v. Sec'y of State* [2007] HL 11 2 AC 167.

103. *Id.*

104. *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) (“[C]oncern . . . for the unity and the happiness of the immigrant family . . . has been a matter of legislative grace rather than fundamental right.”).

105. See Angela M. Banks, *Deporting Families: Legal Matter or Political Question?* 27 *GA. ST. L. REV.* 489, 489-90 (2011); Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 *HOFSTRA L. REV.* 273, 301-08 (2003); Patrick Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 *BERKELEY J. INT'L L.* 1, 5-12, 21-30 (2012); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist*

As I have previously argued, a change to something like the ECHR approach would require not only a fundamental rethinking of rights in immigration law, but would also require a societal evolution on the meaning and role of sovereignty.<sup>106</sup> In the United States, the nineteenth century plenary power doctrine still captures many imaginations.<sup>107</sup> The plenary power doctrine gives the political branches extra-constitutional power to do what they want when it comes to who is admissible into the United States and who is deportable.<sup>108</sup> A standard of review of “facially bona fide” leaves very little room for courts to perform their Article III function and to review statutes and executive actions for constitutionality.<sup>109</sup> When it comes to these aspects of immigration law, according to the plenary power doctrine, Congress and the President have the authority to say what is constitutional.<sup>110</sup> It would be a big legal shift for the analysis to move to a paradigm where the government must justify to a court that its desire to separate a family is proportional to the family’s right to be together.<sup>111</sup>

The United Kingdom made the ECHR enforceable in its domestic courts through the adoption of the Human Rights Act.<sup>112</sup> The adoption of the Human Rights Act meant that in U.K. immigration cases, individuals could argue that an attempt to separate a family was not proportional to a family member’s right to family life. Despite this shift away from absolute government power in immigration law, the British public never became comfortable with

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*Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1275–87 (2008); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L. L. 213, 259–67 (2003); Ryan T. Mrazik & Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty-Based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651, 656–64, 675–84 (2010).

106. Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. L. REV. 99, 99–102 (2014) [hereinafter *Removing the Distraction*].

107. *Id.* at 117.

108. *Id.* at 112–16.

109. *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). The Supreme Court will decide a case during the October 2016 term that calls the plenary power doctrine into question in the context of bond hearings for applicants for admission. *Jennings v. Rodriguez*, No. 15-1204, 2016 U.S. LEXIS 7575, at \*471 (U.S. Dec. 15, 2016).

110. See *Fiallo*, 430 U.S. at 796 (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)).

111. Some scholars have argued, however, that the U.S. Constitution does require more proportionality than current immigration law statutes provide. See generally Angela M. Banks, Symposium: *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1652–53; Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 415–18 (2012); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 11–16 (2011).

112. See Family, *Removing the Distraction*, *supra* note 106, at 120–22.

this loss of immigration sovereignty.<sup>113</sup> The public revolt against a loss of immigration sovereignty was certainly a factor in the 2016 vote to leave the European Union.<sup>114</sup>

A third relief reform approach features scholars discussing how the lack of proportionality in relief from removal shifts the pressure to other actors to inject proportionality into the system.<sup>115</sup> A system that features broad removability grounds and extremely narrow opportunities for relief from removal has repercussions within immigration law generally as well as within the criminal justice system.

As Professor Jason Cade has explained, the lack of an opportunity for relief from removal moves the pressure point where equities may play a role.<sup>116</sup> Immigration and Customs Enforcement, a sub-agency of the Department of Homeland Security, has prosecutorial discretion to determine who is placed in removal proceedings.<sup>117</sup> If Department of Homeland Security officials know that if an individual is placed into removal proceedings that individual surely will be deportable and likely ineligible for any relief, then those officials with charging authority become a pressure point for any possible equity.<sup>118</sup> Because those enforcement officers have prosecutorial discretion to decide whether an individual is placed into removal proceedings in the first place, an exercise of prosecutorial discretion functions as equitable relief.<sup>119</sup> Professor Cade also has observed how the lack of proportionality affects the Supreme Court's decision making.<sup>120</sup>

The executive branch under President Obama tried to better organize itself in terms of how and when it would dole out its prosecutorial discretion.<sup>121</sup> Through Deferred Action for Parents of

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113. See *id.* at 124–29.

114. See Peter Walker, *Brexit: Theresa May Prioritises Immigration Curbs over Single Market*, THE GUARDIAN (Oct. 2, 2016, 11:54 AM), <https://www.theguardian.com/politics/2016/oct/02/brexit-theresa-may-prioritises-immigration-curbs-over-free-movement>.

115. This is in addition to suggestions to change some of the features of cancellation of removal itself. See *e.g.*, Taylor, *supra* note 63, at 548–53 (recommending repeal of the yearly statutory cap on cancellation of removal recipients and allowing individuals to apply for cancellation of removal outside of removal proceedings).

116. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 668 (2015) [hereinafter *Enforcing Immigration Equity*].

117. *Id.* at 666.

118. *Id.* at 671.

119. *Id.*

120. Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 UC DAVIS L. REV. 1029, 1033 (2017) [hereinafter *Judging Immigration Equity*].

121. See Cade, *Enforcing Immigration Equity*, *supra* note 116, at 694–98.



Americans (“DAPA”)<sup>122</sup> and Deferred Action for Childhood Arrivals (“DACA”),<sup>123</sup> the Obama administration announced policies intended to guide enforcement officers in prioritizing who should be in removal proceedings.<sup>124</sup> For those categories that the administration deemed to be low priority, individuals that belong in such categories were eligible for deferred action.<sup>125</sup> Deferred action is a revocable promise not to remove that individual for a specific period of time.<sup>126</sup> DACA was implemented in 2012,<sup>127</sup> but DAPA was never implemented due to a court injunction.<sup>128</sup> The future of DACA under the Trump administration is not clear.<sup>129</sup>

Professor Cade persuasively has illuminated the connections between a lack of availability of relief from removal and the need for programs like DAPA or DACA.<sup>130</sup> Through DAPA and DACA, the executive branch tried to establish a more transparent and formalized system to consider whether individuals should be granted prosecutorial discretion.<sup>131</sup> The need for such a system is amplified in an environment where the decision whether to put an individual into removal proceedings acts as the repository for equitable considerations.

Similarly, Professor Stephen Lee has illuminated how the harshness of the removal grounds and the accompanying unavailability of relief from removal turn criminal prosecutors into

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122. See generally Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter DAPA Memorandum, Nov. 20, 2014].

123. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, USCIS (Dec. 22, 2016), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Mar. 30, 2017) [hereinafter *DACA Website*].

124. See DAPA Memorandum, Nov. 20, 2014, *supra* note 122; see generally *DACA Website*, *supra* note 123.

125. See DAPA Memorandum, Nov. 20, 2014, *supra* note 122, at 2-3.

126. Written Testimony of Jill E. Family, Before the United States Senate Committee on the Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (Mar. 19, 2015), <https://www.judiciary.senate.gov/imo/media/doc/03-19-15%20Family%20Testimony.pdf>.

127. *DACA Website*, *supra* note 123.

128. *Texas v. U.S.*, 809 F.3d 134 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016).

129. The White House has found ways to end protection for ‘Dreamers’ while shielding Trump from blowback, <http://www.latimes.com/politics/la-na-pol-trump-daca-20170216-story.html> (last visited May 3, 2017).

130. See Cade, *Enforcing Immigration Equity*, *supra* note 116, at 694-98.

131. See *id.* at 697.

agents of immigration equity.<sup>132</sup> Because many criminal convictions guarantee removal, prosecutors may consider immigration consequences when deciding what crime to charge, or whether to accept a plea bargain to a lesser crime as a way to ease the immigration consequences of a criminal conviction.<sup>133</sup> Or perhaps the criminal prosecutor will not care about immigration consequences and will choose not to consider herself as a gatekeeper to removal.

As both Professors Cade and Lee astutely observed, neither of these scenarios is the preferred status quo. The power over immigration equity belongs in the hands of immigration adjudicators.<sup>134</sup> Enforcement officers have a different fundamental mission. While immigration prosecutors should have some role in administering equity (they should exercise prosecutorial discretion when appropriate), enforcement officers should not be the major pressure point for equity.<sup>135</sup> Similarly, while criminal prosecutors should be willing to consider immigration consequences, the influence of criminal law prosecutors in immigration law is too great.<sup>136</sup>

Other scholars have examined more generally the role of proportionality in immigration law. Professor Juliet Stumpf has proposed an alternative sanctions regime that is not limited to one sanction-removal.<sup>137</sup> Professor Stumpf argued for a more nuanced approach that would consider each individual's case holistically, including the nature of any offenses as well as the nature of an individual's contributions and connections to the United States.<sup>138</sup> A more calibrated system would allow a sanction to be more tailored on a case-by-case basis. For some wrongdoers, perhaps the punishment of the criminal justice system is a sufficient sanction.<sup>139</sup> Others may be subjected to probation-like conditions, where the individual's access to legal immigration benefits may be delayed.<sup>140</sup> Or perhaps community service or remedial citizenship classes may be more appropriate.<sup>141</sup> Removal is a drastic and major sanction, and it may

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132. See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 573 (2013). Hiroshi Motomura also has explored how state and local arrest authority limits the discretion of federal immigration actors. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1857 (2011).

133. See *Padilla v. Kentucky*, 559 U.S. 365, 365, 373 (2010); Lee, *supra* note 132, at 566.

134. See Cade, *Enforcing Immigration Equity*, *supra* note 116, at 668.

135. *Id.*

136. See Lee, *supra* note 132, at 571.

137. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1728 (2009).

138. *Id.* at 1684-89.

139. *Id.* at 1734.

140. *Id.* at 1737.

141. *Id.*

not be the most appropriate sanction in every case, especially when the removal grounds are drawn so broadly. If the sanctions for immigration violations varied in levels of severity, it would be less imperative that individuals be given relief from removal. Proportionality would be injected into the system in the sense that the sanction for the violation would be more proportional in the first place.

Professor Angela Banks also has argued for a more proportional removal system. Professor Banks has argued that citizenship is an undesirable proxy for determining who has the right to remain in the United States.<sup>142</sup> Professor Banks observed that individuals other than citizens may have “significant connections, commitment, and obligations to the State.”<sup>143</sup> Removal should be activated as a sanction only when it is proportional, and determining whether it is proportional requires a deeper look at each individual’s circumstances.<sup>144</sup> Thus, the decision to remove should encompass whether removal is proportional when measured against the equitable facts of any specific case, such as “length of residence, family ties, military service, or other factors that accurately reflect connections.”<sup>145</sup>

Additionally, Professor Allison Brownell Tirres has examined the role of mercy in immigration law.<sup>146</sup> Proportionality implicates mercy because proportionality is a potential salve for a system that currently is unmerciful. The lack of mercy is partially evidenced by the stingy availability of relief from removal.<sup>147</sup> Professor Brownell Tirres argued that “there are profound problems with the practice of mercy in immigration law,”<sup>148</sup> and she identified a contradiction in the immigration statutes. Congress legislated some mercy into the system (for example, cancellation of removal), but at the same time made the mercy difficult to access.<sup>149</sup> Professor Tirres identified “complacency about mercy” and other problems that result when the power to dole out mercy is limited.<sup>150</sup>

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142. Banks, *The Normative and Historical Cases*, *supra* note 34, at 1247.

143. *Id.*

144. *Id.* at 1246.

145. *Id.* at 1303–04.

146. Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1564–69 (2014).

147. *Id.* at 1568.

148. *Id.* at 1610.

149. *Id.* at 1589–90.

150. *Id.* at 1599–1600. Also, David Koelsch has argued that rehabilitation should be employed as a tool to determine relief from removal. David C. Koelsch, *Embracing Mercy: Rehabilitation as a Means to Fairly and Efficiently Address Immigration Violations*, 8 INTERCULTURAL

Each of these scholars helps us focus on a major problem with our removal system: it is not proportional. It is too knee-jerk and harsh. It demands removal in every case and then applies tough standards to determine whether any person is worthy of relief from that across-the-board sanction. The system removes the consideration of equities from immigration judges and places any consideration in the hands of immigration prosecutors and the criminal justice system.

## II. RELIEF LENS: FAILINGS OF IMMIGRATION LAW

Viewing immigration law through the lens of the availability of relief from removal provides perspective on the state of immigration law as a whole. It reveals that all of immigration law is in need of relief. A lack of opportunity for relief from removal is merely a topical symptom of what ails immigration law. The lack of proportionality is crucial, but there are other failings of immigration law that are illuminated by troubles with relief from removal. In fact, many of immigration law's fundamental problems are connected to relief from removal. Fixing relief from removal is not something to consider in a vacuum; the future of relief from removal is connected to the future shape, or relief, of immigration law generally.

Scholars who have demonstrated that proportionality is missing from our immigration removal system make an important point. As Part I discussed, the need for relief is especially high because the removal grounds are too broad and harsh. The lack of relief available leads to the separation of mixed-status families. The lack of proportionality is very important, and this Article does not intend to diminish its significance. Instead, this Article argues that there are other immigration law troubles that, in addition to a lack of proportionality, can be viewed through the lens of relief. Additionally, this Article argues that all of these challenges are interconnected and require comprehensive reform.

### *A. Relief from Removal Reveals the Conflicting Signals of Immigration Law*

Immigration law in the United States has a history of sending conflicting signals.<sup>151</sup> A major conflict exists between the narrative of an immigrant-friendly nation that highly values both immigrants and

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HUM. RTS. L. REV. 323, 323-24 (2013). A removal system more focused on rehabilitation would incorporate a better sense of proportionality. *Id.* at 367-68.

151. Jill E. Family, *Conflicting Signals: Understanding US Immigration Reform Through the Evolution of US Immigration Law*, 40 CATALAN J. PUB. L. 145, 145-47 (2010).

immigration by its welcoming policies, and the reality of immigration statutes that set broad grounds of removability while offering little in terms of relief from removal.<sup>152</sup> The lack of relief from removal illustrates this fundamental dichotomy of immigration law. There is not a consistent march toward increased individual rights for foreign nationals in the United States, rather, the immigration statutes are designed to give and take away at the same time.

The lack of relief from removal is one example of how the commitment to immigration and immigrants is hedged. There is a legal selection system, but it excludes many individuals. While legal immigrants are welcomed, that welcome may be retracted for a wide variety of reasons. Policymakers recognize that immigration can be good, yet at the same time, policymakers denounce immigration and equate it to a national security threat.<sup>153</sup> Immigrants have earned some, but not all constitutional protections.<sup>154</sup> For example, some individuals in removal proceedings are given a hearing, while others are not.<sup>155</sup> For those who do get a hearing, the hearing takes place within a dysfunctional adjudication system.<sup>156</sup> For most, there is no right to government-funded counsel within the system and it is common to wait years for a hearing.<sup>157</sup> Once a hearing takes place and relief from removal is considered, the prerequisites make relief impossible for many to access.<sup>158</sup>

The structure of the cancellation of removal statute reflects the hesitation to truly commit to the immigrant narrative. Under cancellation of removal, relief is divided into a hierarchy. Those who have achieved lawful permanent resident status, which is the most preferred legal immigrant status, are seemingly presented with fewer hurdles to overcome to be eligible for relief. Upon closer examination, however, those hurdles are high. The stop-time rule makes the continuous residence requirement harder to meet than it first appears. The no “aggravated felony” conviction requirement is much tougher than it appears due to Congress’s definition of the term for immigration purposes. For those without a green card, the conflicting

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152. See generally *id.* at 151–63.

153. See e.g., *Transcript of Donald Trump’s Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), [http://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?\\_r=0](http://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?_r=0) (discussing illegal immigration).

154. See Family, *Removing the Distraction*, *supra* note 106, at 112–16.

155. See generally Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611–32 (2009) [hereinafter *A Broader View*].

156. See *id.* at 598–611.

157. Jill E. Family, *The Procedural Fortress of US Immigration Law*, 3 BIRKBECK L. REV. 177, 183–84 (2015).

158. See *infra* Part I.

signals are evident in their set of cancellation of removal prerequisites. The stop-time rule and the criminal-based bars also apply here. The existence of relief from removal through cancellation helps to maintain the immigrant narrative, but the welcoming aspect of cancellation of removal is only a thin veneer.

Looking beyond cancellation of removal, the history of relief from removal reflects that mixed attitudes toward immigration are not new. For over one hundred years Congress has struggled to find a balance between disowning certain immigrants versus forgiving others. This historical struggle makes more sense with the understanding that Congress has never fully committed to one immigration law policy for the United States. Hedging is, and has been, a prominent feature of the system.

Viewed through the lens of conflicting signals, the lack of availability of relief from removal is seen as part of a bigger trend. The conflicting signals surrounding relief from removal are just like the conflicting signals surrounding all of immigration law. The conflicting signals reflect an uncomfortable attempt to have it both ways. The desire is to maintain the narrative of an immigrant-friendly country with immigrant pride while simultaneously expelling immigrants who cannot meet the stringent relief from removal standards. It is as if the United States wants to say it has relief from removal, but it does not want that relief to actually be granted. A similar characterization could be made about all of immigration law. The United States wants to say that it is welcoming to immigrants, but also wants to be able to easily revoke that welcome.

### *B. The Lack of Relief from Removal Contributes to a Dysfunctional Agency Adjudication System*

The reputation of the immigration adjudication system is poor. The system is plagued by unimaginable backlogs, critiques of the quality of administrative judging, and overburdened adjudicators who manage jaw-dropping caseloads in a system that gives them little time to digest each case and little room to consider equitable factors.<sup>159</sup> The lack of relief from removal is part of what ails the immigration removal adjudication system. One repercussion of the lack of relief from removal is that it turns the job of the immigration

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159. Family, *A Broader View*, *supra* note 155, at 598–611; *see also* Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN, (June 26, 2014, 9:29 AM) <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/>.

judge into a mostly punitive one.<sup>160</sup> Because the grounds for removal are broad and the relief available is narrow, immigration judges have little room to maneuver outside of a decision to deport.<sup>161</sup>

The role of an immigration judge is extremely challenging. Immigration judges are actually not judges at all and are not granted the same job protections as administrative law judges.<sup>162</sup> Immigration judges instead are attorney employees of the U.S. Department of Justice.<sup>163</sup> Immigration judges work for the Attorney General,<sup>164</sup> which limits decisional independence.<sup>165</sup> Concerns about decisional independence extend beyond but include decisions to grant relief from removal. Immigration judges make decisions whether to grant cancellation of removal in a system where those decisions can have real repercussions depending on the perspective of the boss: the Attorney General.<sup>166</sup>

Even beyond questions about how the status of immigration judges may influence decisions whether to grant relief from removal, there is a concern that immigration law suffers from a lack of esteem. Elsewhere I have described immigration law's esteem problem.<sup>167</sup> Immigration law is sometimes viewed as a less prestigious field of law. There are many contributors to this perception, including the overall lack of attorneys in the system, the poor performance of some immigration law attorneys, the harshness, complexity, and technicality of the law itself, the traditional view of immigration law as exceptional and removed from "normal" law, and the reputation of the immigration adjudication system.<sup>168</sup>

The narrowing of the availability of relief from removal exemplifies how the rigidity and punitive nature of immigration law contributes to immigration law's esteem problem. Because the statute leaves so little room for immigration adjudicators to grant relief, the job of the immigration adjudicator is focused on mechanically applying broad

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160. See Marks, *supra* note 159.

161. *Id.*

162. Family, *Beyond Decisional Independence*, *supra* note 68, at 543; Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 50–51 (2011) [hereinafter *Murky Immigration Law*].

163. Family, *Beyond Decisional Independence*, *supra* note 68, at 543.

164. *Id.*

165. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

166. Family, *Murky Immigration Law*, *supra* note 162, at 51 (describing evidence that Attorney General John Ashcroft fired ideologically selected members of the Board of Immigration Appeals).

167. See Family, *Beyond Decisional Independence*, *supra* note 68, at 569–72.

168. See *id.*

removal grounds. This, combined with prominent critiques of immigration judges, diminishes the stature of the position.<sup>169</sup> The lack of relief from removal therefore not only affects individuals applying for relief from removal, but also contributes to the diminishment of the entire immigration adjudication system.

The lack of relief from removal also interacts with the lack of lawyers in the immigration adjudication system. Because immigration law is classified as civil law, there is no right to government-funded counsel in a removal proceeding.<sup>170</sup> Therefore, it is up to an unrepresented individual to figure out for herself whether she is eligible for relief. Because of the hedging toward immigrants discussed above, the prerequisites are complex.<sup>171</sup> In reality, an unrepresented foreign national is left to the mercy of the immigration judge to uncover any eligibility for relief from removal.<sup>172</sup> This creates additional work for the immigration judge, which slows down the adjudication process.

The lack of relief from removal contributes to major problems with the immigration removal adjudication system. These problems are another connection between relief from removal and the future of immigration law as a whole. Improving immigration adjudication requires not only procedural reforms, but also contemplating the nature of the substantive law the system is required to apply.<sup>173</sup> The harshness and complexity of the substantive law contributes to the adjudication crisis.

### *C. The Evolution of Relief from Removal Reveals a System Still Steeped in Sovereignty*

According to the Supreme Court, immigration law's foundations are intertwined with sovereignty. As early as the nineteenth century, the Supreme Court linked the federal government's power to control immigration as an incident of sovereignty.<sup>174</sup> The idea is that control of individuals leads to control of borders, which leads to control over the sovereign destiny of the United States.<sup>175</sup> This connection to sovereignty led the Supreme Court to carve out plenary power for the

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169. *Id.* at 571-72.

170. 8 U.S.C. § 1229a(b)(4)(A) (2012).

171. *See supra* Part II.A.

172. Family, *Beyond Decisional Independence*, *supra* note 68, at 567.

173. *Id.* at 551.

174. *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

175. *See id.*



President and Congress when it comes to the admission of foreign nationals.<sup>176</sup>

While immigration constitutional law has evolved in some respects, at the foundational level it is still mired in its plenary power doctrine roots.<sup>177</sup> Notions of, and concern about, sovereignty still drive the political debate over immigration.<sup>178</sup> Despite some advancement in international law for the individual rights of migrants, the United States has not joined those international law developments.<sup>179</sup> The need to protect the sovereignty of the United States, or to put it another way, the idea that immigration is by nature a threat to sovereignty, is still a prominent and influential theme in US immigration law and discourse.

The developmental path of relief from removal traces the continuing importance and influence of notions of sovereignty in US immigration law. The combination of broad categories of removal and limited relief from removal establishes a system where the nation retains much leverage to determine who will be expelled.<sup>180</sup> Connections and contributions to the nation by foreign nationals are suppressed in importance to strengthen the government's power to dictate who will be removed. This approach to immigration operates from an all-or-nothing perspective. The recognition of connections and contributions is viewed as a threat to sovereignty that must be contained. The balance must be weighted heavily in favor of preserving sovereignty.

The diminishment of an immigration judge's power to grant relief from removal also reflects a desire to tighten and centralize the importance of sovereignty. By leaving little room for immigration judges to weigh the equities in individual cases, Congress is alleviating a concern that immigration judges were too generous.<sup>181</sup> In other words, because immigration judges were viewed as not exercising the full force of sovereignty often enough, Congress cabined immigration judge discretion. The "criminal alien" narrative

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176. See Family, *Removing the Distraction*, *supra* note 106, at 112–16.

177. *Id.* at 114–16.

178. President Trump has expressed his objective to swiftly remove millions from the United States. When an interviewer, Scott Pelley, questioned the practicality of that goal given the civil rights implications, saying, "there is something called civil rights," Trump responded by saying, "There is also called, 'We have a country.'" Chico Harlan & Jerry Markon, *What It Will Take for President Trump to Deport Millions and Build the Wall*, WASH. POST, (Nov. 9, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-it-will-take-for-president-trump-to-deport-millions-and-build-the-wall/?utm\\_term=.06859fcf553b](https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-it-will-take-for-president-trump-to-deport-millions-and-build-the-wall/?utm_term=.06859fcf553b).

179. See *supra* notes 98–113 and accompanying text.

180. See *supra* Part I.A–B.

181. See Banks, *The Normative and Historical Cases*, *supra* note 34, at 1285–90.

that motivated support for the 1996 restrictions on relief from removal shows that a traditional view of sovereignty motivated the desire to restrict the equitable powers of immigration judges. Supporters of the 1996 restrictions expressed frustration that “criminal aliens” had too many opportunities to argue why they should be allowed to stay.<sup>182</sup>

From the position of plenary power immigration sovereignty, the will of the nation takes absolute precedence. There is little to no room for individual voices or rights. The combination of broad categories of removability and few opportunities for relief from removal shows that the plenary power concept of immigration sovereignty still holds major influence over US immigration law. Therefore, the future of relief from removal is connected to a much larger question of the role of sovereignty in immigration law. The future of relief will continue to be affected by the failure to consider and to value individual interests.

#### CONCLUSION

Reforming relief from removal does require an understanding of the current lack of proportionality in immigration law. A broader view is also necessary. The future of relief from removal is connected to the future shape of immigration law as a whole. The lack of proportionality in cancellation of removal contributes to the woes of the immigration adjudication system. Unresolved questions about the nature of US immigration law policy and continuing commitments to a nineteenth century notion of immigration sovereignty dictate that we will continue to endure a system that contains some welcoming features, but also heavily hedges that welcome. It will also continue to be a system that raises the interests of the nation above the individual. Until the United States more fully embraces its welcoming immigrant narrative, the future of relief from removal and the future shape of immigration law generally promises to continue to manifest harshness, rigidity, and a lack of mercy.

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182. *See id.* at 1280–86.