

THE SECRETIVE STANDARD:
EXPLORING THE LACK OF NOTICE THE APPLICATION
OF AGGRAVATED FELONIES PROVIDES TO LEGAL
PERMANENT RESIDENTS IN IMMIGRATION COURTS

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INTRODUCTION

[W]e think it not proper to say that deportation under the circumstances would be deplorable . . . However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples . . . [S]uch a cruel and barbarous result would be a national reproach.

—Judge Learned Hand, *United States ex rel Davis* (1926)¹

Deportation² is a harsh consequence for any action. Losing the dream of a better life in the United States after working so hard to remain in the country can be earth shattering. Facing deportation for a crime that you were unaware would result in such a consequence can be even more jarring. It is problematic when an individual believes, based on the law, that a heinous crime will result in deportation, while in reality a series of tiny missteps can render the individual deportable.

It is not unusual for a country to exercise the right to regulate who can and cannot enter its territory and to evict certain people who commit crimes on its land.³ Because the United States is built upon the pillars of liberty, equality and fairness, the nation provides a level

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¹ *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630- 31 (1926).

² CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 2 (2015). Though formally referred to as “removal proceedings,” throughout this article, the term “deportation” is largely used and should be understood to be referencing deportation proceedings.

³ See *The Handbook on European Law Relating to Asylum, Borders and Immigration* 1, 137-38 (2014) http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf (discussing the EU’s regulation of immigrants convicted of a crime).

of due process to all individuals living within its borders; including immigrants, both legal and illegal alike.⁴ Despite this, when it comes to the deportation of immigrants who have committed criminal offenses, the recent culture of suspicion and push for deportation has clouded the nation's vision and led to more harsh immigration laws.⁵ Although the Constitution's language appears to specifically provide immigrants with due process and notice, the protections afforded by these rights are diminished when federal immigration and state criminal legal systems collide.⁶ Although the text of the U.S. Code, Immigration Nationality Act (INA),⁷ states that a person will be deportable for an aggravated felony, in application, the term was kept so vague that immigrants' misdemeanors have been treated as aggravated felonies in immigration court, resulting in the removal of some immigrants on that basis.⁸ The inconsistency between the language of the terms "aggravated felony" and "misdemeanor" means an immigrant who is convicted of a misdemeanor, which is not listed as a deportable offense, can suddenly be declared deportable for an aggravated felony in an immigration court.⁹ To remedy this issue, the language of the INA should be edited so state criminal laws and federal immigration laws are brought into uniformity, or in the alternative, federal immigration courts should bring their actions in compliance with the current criminal law standards, and only remove immigrants actually convicted of aggravated felonies.¹⁰

This comment will argue that treating the misdemeanors of a Legal Permanent Resident (LPR) as aggravated felonies that can sub-

⁴ See generally U.S. CONST. amend. V.; Karen N. Moore, *Aliens and the Constitution*, N.Y.U. L. REV. 801, 807 (2013) (suggesting that Constitutional protections apply to aliens).

⁵ See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding that the President was not allowed to limit the constitutional rights of those deemed "enemy combatants"); Dawn M. Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 480-85 (2001) (contrasting some immigration law before and after the 1996 reforms and showing that the laws after the reforms are harsher).

⁶ See U.S. CONST. amend. V.; see also Karen N. Moore, *Aliens and the Constitution*, N.Y.U. L. REV. 801, 808 (2013) (discussing the idea that the use of the word "person" in the Constitution encompasses aliens); Liem, *infra* note 79, at 1082 (discussing the struggle courts face with the collision of federal-based immigration law and state-based criminal law).

⁷ Throughout this comment the U.S. Code's Immigration Nationality Act (INA) is referred to as the "Code."

⁸ Dawn M. Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 482-83 (2001); Liem, *infra* note 79, at 1081-82.

⁹ Johnson, *supra* note 8, at 482.

¹⁰ See 8 U.S.C. §§ 1101-1178 (2013).

sequently result in deportation, conflicts with constitutionally guaranteed Due Process Rights, because the individual is deprived of proper notice of the consequences for his or her misdemeanors. Furthermore, this Comment will contend that, by virtue of the legal status that LPRs keep, they are entitled to receive constitutional rights resembling those of U.S. citizens, rather than those of illegal immigrants. Part I will begin by comparing U.S. citizens, LPRs, and illegal aliens. Next, it will discuss the constitutional rights afforded to each group, specifically referencing due process rights and the Supreme Court's view on the subject as iterated in the recent case of *Padilla v. Kentucky*. Lastly, Part I will delve into the criminal treatment of LPRs and illegal immigrants when it comes to misdemeanors and aggravated felonies. Part II will argue that the disparity between the application of aggravated felonies and misdemeanors in state criminal court and federal immigration court violates LPRs' constitutional right to due process. It will analyze the lack of notice that the treatment of misdemeanors as aggravated felonies provides. Part II will then argue that because of LPRs' legal status and the fact that they fulfill all the obligations of a citizen, they are even more entitled to the constitution's protections than illegal immigrants. It will achieve this by evaluating why the LPRs treatment should be more equitable to the treatment of citizens. Finally, this Part will conclude by introducing several solutions to the issue of a lack of notice.

I. BACKGROUND

A. *Understanding Status of People Living in the United States: Citizens, LPRs and Illegal Aliens*¹¹

1. The Distinction: The Different Categories of Aliens

Alien¹² and Immigrant are universal terms used when referring to

¹¹ This comment will focus on the rights that should be granted to LPRs by establishing the similarities between LPRs and citizens. The references made to illegal aliens are to provide context for how LPRs are more similar to citizens than to illegal aliens. This comment does not presume to say that these rights should not be expanded further to cover illegal aliens well.

¹² 8 U.S.C. §§ 1101(a)(3) (2013) (defining an alien as any person who is not a citizen or national of the United States). There is a debate surrounding the appropriateness of using the terms "alien" or illegal immigrant" to refer to those who have entered this country illegally or have overstayed their visas. See John Feere, *Language in the Immigration Debate*, Center for Immigration Studies (2012). This comment uses the term "alien" for the sake of consistency with

non-citizens living in the United States.¹³ There are three different groups of non-citizens: Legal Permanent Residents (LPRs), non-immigrant aliens, and illegal immigrants.¹⁴ LPRs, immigrant aliens, or green cardholders are all referred to as people who have been granted lawful permanent residency in the United States, and are working towards gaining citizenship.¹⁵ The non-immigrant aliens are visa holders.¹⁶ Unlike LPRs, they have not been granted permanent residency, but are instead allowed to stay in the country for a limited period of time, in the form of a work permit, tourist visa, or student visa among others.¹⁷ Illegal immigrants enter the country without using legal means or they overstay their visas.¹⁸ Unlike LPRs and visa holders, they do not have the legal basis to permanently or temporarily be in the country.¹⁹

2. U.S. Citizens and Legal Immigrants: Gaining Status

A person can become a U.S. citizen in one of two main ways.²⁰ Either an individual is born in the country, as a natural born citizen, or if an individual becomes naturalized, he or she goes through a process of testing and stays in the country for a certain amount of time to gain citizenship.²¹ Other ways of legally staying within the country, as previously mentioned, are by visa, or by applying for LPR status.²² One can become a LPR of the United States in two ways.²³ Before entering the country foreigners living abroad can apply to become a LPR

the language used in the INA. Similarly, the term “illegal immigrant” is used for the sake of consistency with current language norms.

¹³ See Karen N. Moore, *Aliens and the Constitution*, N.Y.U. L. REV. 801, 803, 809 (2013) (showing the terms “alien” and “immigrant” being used in a non-citizen context).

¹⁴ See *id.* at 809, 818.

¹⁵ See *id.* at 809.

¹⁶ See *id.* at 809.

¹⁷ See *id.* at 809.

¹⁸ See 8 U.S.C. § 1227 (2008) (showing that illegal aliens are deportable).

¹⁹ See Moore, *supra* note 13, at 803, 809 (2013) (discussing LPRs’ permanent residency status and nonimmigrants’ temporary residency status).

²⁰ See U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERV., *U.S. Citizenship*, <https://www.uscis.gov/us-citizenship> (last visited on Jan. 7 2015).

²¹ 8 U.S.C. § 1427 (detailing the requirements for naturalization); Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, 20 ILSA J. INT’L & COMP. L. 85, 90 (2013).

²² Moore, *supra* note 13, at 809.

²³ Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2012*, U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 1, 2 (2013), https://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf.

with the Department of State and, if they are approved, they can enter the country as an admitted LPR.²⁴ Immigrants who are already living in the United States, under a temporary visa, such as refugees, foreign students, family members of U.S. citizens, and temporary workers, can apply for an adjustment of status from non-immigrant alien to LPR.²⁵

There are limits to how many LPRs can be admitted into the U.S. each year.²⁶ In 2011, 1,062,040, in 2012, 1,031,631, and in 2013, 990,553, LPRs were admitted.²⁷ The status of LPR is granted based on a selective process, referred to as the preference system.²⁸ This system creates priority categories establishing which people should be given preference and receive LPR status before others.²⁹ One category, the family sponsored preference, is based on having a relative that is a U.S. citizen or LPR; these include admitted unmarried sons and daughters of U.S. citizens, spouses, and children, among others.³⁰ Another category is the employment related preference, which is given to people of exceptional ability, needed unskilled workers, and workers with coveted advanced degrees.³¹ There is also a diversity program that allows certain immigrants who come from countries that have low rates of immigration to the United States to receive priority for LPR status.³² Lastly, there is preference for refugees and asylees.³³

Within each of these preference categories, the preferences are further delineated.³⁴ For example, within the employment based preference, first preference is given to workers with extraordinary abilities like professors, researchers and multinational executives and managers; second preference is given to people who hold advanced degrees; third preference is given to professionals and other qualified workers

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (discussing limits on people admitted by each priority category within the preference system).

²⁷ *Id.* at 2.

²⁸ U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERV., *Preference System (Immigration Act of 1990)*, <https://www.uscis.gov/tools/glossary/preference-system-immigration-act-1990> (last visited on Feb. 8 2015).

²⁹ *Id.* at 1.

³⁰ See generally Monger & Yankay, *supra* note 23, at 1-2.

³¹ See generally Monger & Yankay, *supra* note 23, at 2.

³² See generally Monger & Yankay, *supra* note 23, at 2.

³³ Monger & Yankay, *supra* note 23.

³⁴ See U.S. CITIZENSHIP & IMMIGRATION SERV., *Green Card Eligibility* (2011), available at <http://www.uscis.gov/green-card/green-card-processes-and-procedures/green-card-eligibility> (last visited on Jan. 7 2015) [hereinafter *Green Card Eligibility*].

and the last preference is given to employment creation immigrants like investors or entrepreneurs.³⁵ Although no one preference is explicitly considered higher than the other, each category has an annual limit; for example, the annual limit for family sponsored preferences is about 400,000 and the employment based preference is about 140,000 people.³⁶ The family based preference has a higher annual limit than the employment based preference and the other preferences.³⁷ Immediate relatives of U.S. citizens are given the highest immigration priority.³⁸ Overall, the people who are in one of these preference categories receive priority over the people who are not.³⁹ With about 900,000 immigrants granted LPR status in 2013 and with about 400,000 to 700,000 of those selected based on the preference system, the preference system essentially controls who is given permission to reside permanently in the country.⁴⁰ This system is regulated by the U.S. Citizenship and Immigration Services and was created under the Immigration Act of 1990.⁴¹

There are currently about 5.5 million immigrants waiting to receive their green cards; this includes immigrants who are already in the country.⁴² Among this high number of immigrants who legally apply for LPR status, only about a million are selected based on this preference system and its categorical limits on people admitted per year.⁴³

³⁵ *Id.*

³⁶ Monger & Yankay, *supra* note 23.

³⁷ Monger & Yankay, *supra* note 23.

³⁸ See *Green Card Eligibility*, *supra* note 34.

³⁹ Monger & Yankay, *supra* note 23, at 2.

⁴⁰ See *id.* at 1-2 (showing the annual limit of immigrants that can be selected through the preference system).

⁴¹ U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERV., *Preference System (Immigration Act of 1990)*, <https://www.uscis.gov/tools/glossary/preference-system-immigration-act-1990> (last visited on Feb. 8 2015).

⁴² Daniel Gonzalez, *Millions of Immigrants waiting for Green- cards*, USA TODAY (June 3, 2013), <http://www.usatoday.com/story/news/nation/2013/06/23/millions-of-immigrants-waiting-for-green-cards/2450461/> (discussing how though the State Department reports 4.4 million people as waiting for their green cards, the state department does not count the amount of immigrants already in the U.S. with green-card applications pending. Factoring that excluded group in, experts find that there could be as much as 5.5 million people waiting for their green cards).

⁴³ Monger & Yankay, *supra* note 23, at 2.

3. U.S. Citizens, LPRs, Illegal Immigrants: Rights and Obligations

Visa holders or foreign nationals living outside of the United States who are lucky enough to be selected for LPR status are granted many rights and are expected to fulfill citizen-like duties.⁴⁴ LPRs are granted the right to live and work permanently anywhere in the United States, to own property, to attend public schools, colleges and universities and to apply for U.S. citizenship.⁴⁵ The rights accorded to a citizen are quite clear. A citizen is inarguably afforded the unhindered rights of the Constitution and as an off-shoot of that, they enjoy all the rights and are subject to all of obligations of their local, state, and federal government.⁴⁶ As will be elaborated on within this Comment, immigrants are afforded certain constitutional rights.⁴⁷ However, the constitutional rights they are afforded are not necessarily clear.⁴⁸ There is debate over which rights they should be granted and which should be withheld.⁴⁹ The constitutional rights that are clearly established as being withheld are the right to vote and the right to run for President.⁵⁰

In terms of duties, LPRs are required to pay the same taxes citizens pay, they are required to follow the same laws citizens follow; they are subject to a draft in the case of a war and in addition, may enlist in the Army, Air Force, and Reserves of the Armed Forces if they wish to.⁵¹ Currently, close to 31,000 Non-U.S. citizens serve in the United States Army, and are referred to as “Americans by

⁴⁴ See Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, 20 ILSA J. INT'L & COMP. L. 85, 90 (2013) (discussing how LPRs file tax returns and register for the selective service).

⁴⁵ Monger & Yankay, *supra* note 23, at 1.

⁴⁶ See generally U.S. CONST. amend. IV, U.S. CONST. amend XIV.

⁴⁷ See generally Moore, *supra* note 13, at 807 (discussing how the Constitution's protection extends beyond citizens).

⁴⁸ See generally Moore *supra* note 13, at 803 (beginning an argument on what rights the author believes immigrants to have, thereby showing a debate on the subject).

⁴⁹ See Moore, *supra* note 13, at 803.

⁵⁰ U.S. CONST. amend. XXIV; U.S. CONST. art. 2, § 1 cl. 5; Johnson, *supra* note 8, at 479.

⁵¹ Bahamonde, *supra* note 44, at 89-91; U.S. CITIZENSHIP & IMMIGRATION SERV., *Rights and Responsibilities of a Green-Card Holder (Permanent Resident)*, <http://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited Jan. 7, 2015).

Choice.”⁵² Essentially, there is no obligation that citizens fulfill that LPRs are not required to fill as well.⁵³

LPRs, like citizens and unlike illegal aliens, are legal residents of the United States.⁵⁴ They are required to fulfill all the duties of being a legal resident, but are not afforded the same rights.⁵⁵ Illegal aliens are similar to LPRs; both come from foreign countries to the United States, for similar reasons, in pursuit of work or because they have family that resides in the United States already.⁵⁶ The key difference between the two groups living in the United States is that one has legal permission to reside in the country, and by virtue of that permission must fulfill citizen-like duties, and the other does not have legal standing to be in the country.⁵⁷

B. *Constitutional Rights and Immigration: The Concept of Due Process in Immigration*

1. The Application and Interpretation of What Constitutional Rights Should be Afforded to Immigrants

The Constitution is fairly silent on the issue of its application to legal immigrants.⁵⁸ The naturalization clause, Article 1 Sec. 8, which

⁵² Ryan B. Byrd, *On Behalf of an Ungrateful Nation? Military Naturalization Aggravated Felonies and the Good Moral Character Requirement*, 15: SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 603, 605 (2013).

⁵³ See generally U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERV., *Rights and Responsibilities of a Green-Card Holder (Permanent Resident)*, <http://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident>, (last visited Jan. 7, 2015) [hereinafter *Permanent Resident*] (showing that LPRs are required to pay taxes, register for selective services, and follow the laws of the United States); U.S. CITIZENSHIP & IMMIGRATION SERV., *Citizenship Rights and Responsibilities*, <http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> (last visited Jan. 7, 2015) (showing that citizens are required to pay taxes, defend the country as needed, and respect and obey the laws of the United States).

⁵⁴ See Bahamonde, *supra* note 44, at 89-90.

⁵⁵ See Bahamonde, *supra* note 44, at 89-90 (discussing the obligations that LPRs fulfill and how they do not have the same bundle of rights as citizens).

⁵⁶ Monger & Yankay, *supra* note 23 (showing the rates of people who become LPRs based on family and employment related preferences); Peter Skerry, *Splitting the Difference on Illegal Immigration*, 14 NATIONAL AFFAIRS WINTER EDITION 3, 6, 15 (2013), http://www.nationalaffairs.com/doclib/20130102_Skerry.pdf (describing illegal immigrants coming to the U.S. for work and having family members join them).

⁵⁷ See 8 U.S.C. § 1227(a)(1) (2008) (showing that illegal aliens are deportable); see Bahamonde, *supra* note 44 at 89-90 (discussing that LPRs have a legal basis to be in this country and presenting the obligations).

⁵⁸ See Moore, *supra* note 13 (discussing that the Constitution only references aliens twice).

states that Congress has the power to establish a uniform rule of naturalization, and the natural born citizen clause, Article III Sec. 2, which references suits between “a State or the Citizens thereof, and foreign States, Citizens or Subjects,” when creating a basis for subject matter jurisdiction, are the only references to immigrants. No other part of the Constitution makes any explicit reference to immigrants.⁵⁹ This supposed oversight, perhaps, could be associated with the fact that at the time of the Constitution’s drafting, the issue of a federal immigration power was a sensitive topic.⁶⁰ With the British King having originally regulated immigration to the colonies, the view was that immigration should be free flowing and not regulated by a federal power.⁶¹ At that time, some states had instituted laws regulating undesirable immigration from foreign countries, overall however, immigration did not appear to be a significant concern to the Framers.⁶²

The immigration discussion has increased in relevance and importance with the advent of larger numbers of people clamoring to get into the country.⁶³ Where the Constitution is not completely specific on the rights that immigrants have, courts and legal scholars have stepped in to interpret its application to the alien population.⁶⁴ In a recent New York University (NYU) law review article, the scholar notes that in making explicit references to aliens in two parts of the Constitution, as noted above, and using the broader term of persons in other parts, like in the Fifth Amendment where it states that no person shall be . . . deprived of life, liberty or property without due process of law . . . ” the Constitution is actually making reference to the fact that the term “persons” applies more broadly and not just to citizens specifically.⁶⁵ The scholar states that this interpretation is consis-

⁵⁹ U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 2; Moore, *supra* note 13, at 806.

⁶⁰ See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the 19th century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81 (2002) (discussing that the King obstructed free immigration).

⁶¹ See *id.*

⁶² *Id.*

⁶³ See generally Gonzalez, *supra* note 42 (discussing the Senate’s reaction to the issues of the vast number of people who want to come into the country, and the long waiting times to achieve status).

⁶⁴ See generally Moore, *supra* note 13 (analyzing various courts interpretation of the Constitution’s application to immigrants).

⁶⁵ U.S. CONST. amend. V; Moore, *supra* note 13, at 806-08.

tent with Framers James Madison's view on the Constitution as well.⁶⁶ Madison understood that

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.⁶⁷

Madison's statement indicates that although aliens might not share the same connection with the Constitution that citizens do, it does not mean that they are excluded from its protection.⁶⁸ Madison states that as they are subject to the obligations of the Constitution, immigrants are also deserving of the advantage of its protection.⁶⁹ The Supreme Court mirrors this thinking as well in *U.S. v. Verdugo-Urquidez*, a case about the Fourth Amendment's application to the search of a nonresident alien's property in his country of origin.⁷⁰ The Court explicitly noted that the Fourth Amendment was meant to protect the people from search and seizure by their own government within the United States' territory and was not meant to restrict activity regarding foreign aliens in an international arena.⁷¹ In its discussion, the Court recognized that the term "the people" used in the Constitution "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."⁷² The Court's understanding of the term "person" in the Constitution hints that the Fifth and Fourteenth Amendments right to due process, as briefly mentioned above, applies to citizens and immigrants alike.⁷³

The applicability of constitutional rights, and more specifically due process rights, to LPRs is examined in *Kwong Hai Chew v. Colding*, in which the Court considered the rights of a LPR who had gone abroad and was later denied the Fifth Amendment right of due pro-

⁶⁶ Moore, *supra* note 13, at 807.

⁶⁷ Moore, *supra* note 13, at 807.

⁶⁸ See Moore, *supra* note 13, at 807.

⁶⁹ See Moore, *supra* note 13, at 807.

⁷⁰ United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

⁷¹ *Id.*, at 266.

⁷² See *id.* at 264-66.

⁷³ See *id.*

cess.⁷⁴ The Court noted that although a LPR's right to remain in the United States can be regulated, he cannot be deprived of his constitutional right to due process.⁷⁵ Specifically, the court states "[h]is [the LPR's] status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."⁷⁶ Likewise, in *Bridges v. Wixon*, the concurring opinion looked into constitutional rights for aliens and found that

. . . once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledge any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.⁷⁷

The cases above are an example of the Court's established precedent that the constitutional right of due process is applicable to LPRs.⁷⁸ Despite this seemingly clear precedent, the application of these constitutional rights appear to fluctuate based on the current political climate of the country.⁷⁹ For example, with the recent institution of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA),⁸⁰ Congress's effort to streamline immigration laws (creating a lack of due process by expanding the definition of what crimes can result in deportation), and after the occurrence of September 11th, the push for more stringent regulation

⁷⁴ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 593-95 (1953).

⁷⁵ *Id.* at 601.

⁷⁶ *Id.*

⁷⁷ *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

⁷⁸ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259 (1990); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

⁷⁹ See Natalie Liem, *Mean What You Say, Say What You Mean: Defining The Aggravated Felony Deportation Ground to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1094 (2007) (showing that Congressional changes have resulted in vague wording); Johnson, *supra* note 8, at 479-80 (discussing various events, such as California's Proposition 187, bringing the issue of immigration to the forefront of national debate and leading to stricter immigration reform).

⁸⁰ The Immigration Reform and Immigration Responsibility Act will be referred to as immigration reform of 1996 throughout this Comment.

of legal and illegal immigrants alike has increased.⁸¹ Despite cases from the 1940s and 50s establishing that due process is to be granted to LPRs, as recently as 2011, in *Padilla v. Kentucky*, it was necessary to fight all the way to the Supreme Court to have confirmed that the legal immigrant, on trial, had been denied certain due process rights that he was constitutionally due.⁸² Evidently, modern political sentiments on immigration influence the application of the Constitution's due process rights, resulting in these rights continuously being debated within the courts, instead of being regarded as precedent from the 1940's.⁸³

Through the fluctuations of the rights afforded to legal immigrants, one thing has stayed constant: legal immigrants are not provided all the same rights that are guaranteed to citizens.⁸⁴ For example, Congress at times has passed laws related to immigrants that would be unacceptable if applicable to citizens, such as the Alien Enemy Act of 1798, which allowed the removal of alien enemies at the order of the president.⁸⁵ However, this is problematic because, besides voting and running for president, as mentioned above, nothing explicitly states that aliens, specifically LPRs, should be denied general constitutional rights.⁸⁶ As noted in *Verdugo-Urquidez*, due process rights are granted to resident aliens regardless of the type of proceeding, by virtue of their connections and legal presence within the country.⁸⁷

⁸¹ See Liem, *supra* note 79 (stating that despite Congressional intent to increase efficiency, the provision's vague wording has led to issues); David Cole, *Are Foreign Nationals Entitled to all the same Constitutional Rights?*, 25 T. JEFFERSON L. REV. 367, 367 (2003) (stating that security measures aimed at foreign nationals have increased post 9/11).

⁸² See generally *Padilla v. Kentucky*, 559 U.S. 356 (2010) (specifically focusing on Padilla being denied Sixth Amendment rights, and holding that if one is denied accurate advice from counsel, they are effectively denied due process); Bahamonde, *supra* note 44, at 104 (stating that due process in immigration proceedings cannot exist without the right to counsel).

⁸³ See Bahamonde, *supra* note 44, at 104 (showing debate in the lower courts over the application of the Sixth Amendment, before the Supreme Court ultimately affirmed the right).

⁸⁴ Bahamonde, *supra* note 44, at 89-90.

⁸⁵ See generally Moore, *supra* note 13 (saying that only alien enemies are distinct from citizen enemies); Cole, *infra* note 86, at 368 (Congress regularly makes laws that would be unacceptable if applied to citizens).

⁸⁶ David Cole, *Are Foreign Nationals Entitled to all the same Constitutional Rights?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (discussing how the Framers limited voting and running for federal office to citizens).

⁸⁷ See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990).

Constitutional and due process rights are not only afforded to citizens and LPRs.⁸⁸ Courts have established that illegal immigrants have some claims to these rights as well.⁸⁹ Sentiment on this issue is split; some feel that because illegal immigrants are not authorized to be within this country, the protections of the Constitution should not apply to them. Courts in many instances have found otherwise, granting several constitutional rights to illegal immigrants.⁹⁰ The analysis of these cases is similar to those discussed for LPRs above, regarding the fact that the terms “persons” and “people” used in the Constitution are broad enough to not only cover the LPRs and visa holders that we allow to be in this country, but also go so far as to grant certain rights to illegal immigrants.⁹¹ For example, in *Plyler v. Doe*, Mexican children who entered the United States illegally filed for injunctive relief to prevent their exclusion from attending public schools in Texas.⁹² The Court held that under the Fourteenth Amendment Equal Protection Clause this group was entitled to attend school.⁹³ The Equal Protection Clause states, “no state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law.”⁹⁴ The Court held that the words “persons” and “within the jurisdiction” applied to illegal aliens, because in prior Court decisions they had held that the Fifth and Sixth Amendments applied to illegal immigrants as well.⁹⁵ They reasoned that the Due Process requirement of the Fifth Amendment was of equal stature to the Equal Protection clause in the Fourteenth Amendment and therefore if one applied to illegal immigrants, the other applied as well.⁹⁶

Two of the cases cited by the *Padilla* Court to show that due process applies to illegal immigrants are *Yick Wo v. Hopkins* and

⁸⁸ See generally *Plyler v. Doe*, 457 U.S. 202, (1982) (establishing that illegal aliens have the benefit of the Equal Protection Clause).

⁸⁹ *Id.*

⁹⁰ See generally *Plyler*, 457 U.S. at 202 (establishing that aliens have some constitutional rights); Moore, *supra* note 13, at 804 (discussing constitutional debate ensuing around illegal immigrants).

⁹¹ *Plyler*, 457 U.S. at 212; Moore, *supra* note 13, at 807-08.

⁹² *Plyler*, 457 U.S. at 206.

⁹³ *Id.* at 230.

⁹⁴ *Id.* at 210.

⁹⁵ *Id.* at 212-13.

⁹⁶ *Id.* at 213.

Mathews v. Diaz.⁹⁷ Although both these cases specifically deal with legal immigrants, the reasoning of each case implies that illegal immigrants are likewise entitled to certain constitutional protections. *Mathews* notes that:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.⁹⁸

The Court's use of the terms "unlawful," "involuntary," and "transitory" makes clear that it views the Constitution's protections as far-reaching and applicable to all who reside in the country, regardless of status.

2. Due Process and Notice

The Fifth Amendment states, "No person shall be . . . deprived of life, liberty, or property, without due process of law."⁹⁹ Procedurally, due process of law is broken up into two parts: notice and an opportunity to be heard.¹⁰⁰ Both concepts are fundamental to the due process guarantee and may not be ignored.¹⁰¹ Specifically, the right to notice in a procedural context is commonly thought to be the act of informing a person of the pendency of their suit in a reasonable time, so as to give them an opportunity to defend themselves.¹⁰² Additionally, notice is also used to describe whether a statute's language has provided fair warning to prospective defendants of what they are being sued for.¹⁰³ Courts have stated that "a statute fails to give fair notice if

⁹⁷ *Mathews v. Diaz*, 426 U.S. 67 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁹⁸ *Mathews*, 426 U.S. at 77-78.

⁹⁹ U.S. CONST. amend. V.

¹⁰⁰ *LaChance v. Erickson*, 525 U.S. 262, 266 (1998) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)).

¹⁰¹ See *id.* (discussing how notice and opportunity to be heard are the core of due process).

¹⁰² See *Morrison v. Warren*, 375 F.3d 468, 475 (2004).

¹⁰³ See generally Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 70 (1994) (describing when a statute fails to give notice).

‘[persons] of common intelligence must necessarily guess at its meaning and differ as to its application.’¹⁰⁴

In the United States, due process rights have commonly been afforded to illegal and legal immigrants alike.¹⁰⁵ As previously discussed, courts have construed the word “person” to be broad enough to extend to citizens and non-citizens.¹⁰⁶ Because the right to due process is extended to immigrants, it follows that the necessity of notice is applicable to this class of people as well.¹⁰⁷

The most recent and noteworthy look at the application of due process rights to immigrants is in *Padilla v. Kentucky*.¹⁰⁸ This case displays the recent trend towards the intersection and overlap between criminal and immigration law.¹⁰⁹ In *Padilla*, the Court specifically dealt with a LPR claiming post-deportation conviction that his counsel failed to inform him of the consequences of a guilty plea before he pled guilty.¹¹⁰ The Court found that Padilla’s counsel had been constitutionally deficient, because as per the Sixth Amendment that grants rights to criminal defendants, a counsel must inform a client whether his plea carries a risk of deportation.¹¹¹ Although this case particularly addresses the Sixth Amendment, not the Fifth Amendment issue of due process and notice, it suggests that Padilla was denied due process because his lawyer did not inform him that his guilty plea would result in deportation.¹¹² Where before, deportation was generally not considered to be a criminal sanction, in this case, the Court notes that recent immigration law has expanded the removal processes, making deportation an automatic result for a broad class of non-citizen offenders. Because of this, deportation is so linked to the criminal process as to be indistinguishable from it.¹¹³ In *Padilla*, specifically, the Court found that as deportation is similar to a criminal

¹⁰⁴ *Id.*

¹⁰⁵ See *Plyler v. Doe*, 457 U.S. 202, 212-13 (1982) (showing that the rights of due process are given to illegal immigrants); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (showing that the rights of due process are given to legal immigrants).

¹⁰⁶ Moore, *supra* note 13, at 807-08.

¹⁰⁷ See *Plyler*, 457 U.S. at 212-13; *Kwong Hai Chew*, 344 U.S. at 601.

¹⁰⁸ See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁰⁹ See generally HERNÁNDEZ, *supra* note 2, at 3.

¹¹⁰ See *Padilla*, 559 U.S. at 359.

¹¹¹ See *id.* at 374.

¹¹² See *id.* at 391 (discussing the requirement that a criminal defendant be aware that his plea deal carries the risk of deportation).

¹¹³ *Id.* at 365-66.

punishment, and because the expansion of immigration laws has made deportation a very likely consequence for a variety of crimes, it is necessary that noncitizens accused of crimes receive accurate legal advice.¹¹⁴ Although *Padilla* does not directly address the Fifth Amendment, its holding displays the current Supreme Court's sympathetic attitude towards the stringent standards of deportation for certain crimes and the heightened importance the Court places on protecting the constitutional rights of due process to immigrants.¹¹⁵ At the very least, *Padilla* hints towards deportation standards becoming more relaxed and the application of constitutional rights to immigrants becoming an accepted norm.¹¹⁶

B. *Immigration and Criminal Law*

Although LPRs appear to share many of the constitutional rights that U.S. citizens have, when it comes to crimes, citizens and LPRs face disparate treatment.¹¹⁷ Although deportation is not generally considered a punitive sanction for crime, an immigrant can face deportation as a result of undesirable criminal behavior.¹¹⁸ Below, this comment will elaborate on the treatment of aggravated felonies and misdemeanors in immigration courts.

1. Aggravated Felonies and Misdemeanors: A Summary

A misdemeanor is defined as a “crime that is less serious than a felony and is usually punishable by fine, penalty, forfeiture or confinement (usually for a brief term) in a place other than prison (such as a county jail).”¹¹⁹ As noted in common law practice, there is a difference between the treatment of felonies and the treatment of misde-

¹¹⁴ *Id.*

¹¹⁵ See generally *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (showing how courts believe that the criteria for which crimes result in deportation has expanded and that accurate legal advice has never been more important).

¹¹⁶ *Id.*

¹¹⁷ See generally *id.* at 359 (explaining that *Padilla* was facing deportation for drug distribution charges).

¹¹⁸ See generally *id.*

¹¹⁹ *Misdemeanor*, BLACK'S LAW DICTIONARY (10th ed. 2009); Johnson, *supra* note 8, at 478.

meanors.¹²⁰ For example, misdemeanors are crimes that result in a sentence of one year or less.¹²¹

A felony is regarded as a serious crime punishable by imprisonment for more than one year or death.¹²² Moreover, for a crime to go from the level of a felony to an aggravated felony, it must generally involve violence, such as with the use of a deadly weapon in commission of the crime.¹²³

2. The Criminal Standard: Aliens and Criminal Deportation Measures

In the United States, there are two main categories of crimes that can render an alien deportable; crimes of moral turpitude and aggravated felonies.¹²⁴ Black's Law Dictionary defines moral turpitude as "conduct that is contrary to justice, honesty or morality . . . in general, shameful wickedness – so extreme a departure from ordinary standards of honest, good morals, justice or ethics as to be shocking to the moral sense of the community."¹²⁵ With such a general and expansive definition, there has been debate in the courts over how to classify a crime of moral turpitude in the immigration context.¹²⁶ Although courts have made decisions endorsing various concepts of moral turpitude, no concrete definition has been established.¹²⁷ The INA states that if an alien commits two crimes of moral turpitude any time after admission to the country, they are rendered deportable.¹²⁸ It also states that if an alien is convicted of a crime of moral turpitude for which a sentence of one year or longer may be imposed, they are deportable.¹²⁹

The term aggravated felony offers ambiguities similar to those in the definition of moral turpitude.¹³⁰ The INA's definition section

¹²⁰ Johnson, *supra* note 8, at 478.

¹²¹ Johnson, *supra* note 8, at 478.

¹²² Johnson, *supra* note 8, at 478.

¹²³ Johnson, *supra* note 8, at 478-79.

¹²⁴ See 8 U.S.C. § 1227(2)(A) (2008).

¹²⁵ *Moral Turpitude*, BLACK'S LAW DICTIONARY (10th ed. 2009).

¹²⁶ See generally *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (1956) (discussing that extent of the expression "moral turpitude" is ambiguous).

¹²⁷ *Tseung Chu v. Cornell*, 247 F.2d 929, 933-34 (1957).

¹²⁸ 8 U.S.C. § 1227(a)(2)(A)(ii) (2008).

¹²⁹ 8 U.S.C. § 1227(a)(2)(A)(i) (2008).

¹³⁰ See *Liem*, *supra* note 79, at 1081 (describing how Congress left the language defining an aggravated felony broad enough to give courts flexibility to expand the definition over time).

offers a variety of crimes that are aggravated felonies, ranging from crimes as serious as murder to those as minor as a theft offense.¹³¹ Congress utilized expansive language when defining aggravated felony because it intended to maximize the government's power to regulate immigration.¹³² Unfortunately, this led to vague language that resulted in myriad unintended results, such as denying convicted immigrants the ability to apply for cancellation of removal.¹³³ Being convicted of an aggravated felony is a serious issue and results in many harsh consequences.¹³⁴ Specifically, after being removed, the immigrant is permanently barred from obtaining authorization to reenter the United States.¹³⁵ Additionally, they are indirectly barred from the naturalization process, because being convicted of an aggravated felony means they lack the good moral character required to achieve citizenship.¹³⁶ By expanding what constitutes an aggravated felony, Congress ultimately subjected LPRs, who have committed less serious crimes, to the consequences of deportation.¹³⁷ Courts specifically struggle with the collision of federal based immigration law and state based criminal law.¹³⁸ Overall, neither moral turpitude nor aggravated felony has been concretely defined in the immigration context, leaving courts to struggle with how to apply the term "aggravated felony" in immigration proceedings.¹³⁹

3. Criminal Conviction and Immigration Consequences: The Disparity

The distinction between aggravated felonies and misdemeanors has become blurred in the immigration context.¹⁴⁰ The interaction between federal immigration laws and state criminal laws creates two

¹³¹ See 8 U.S.C. § 1101(a)(43) (2008).

¹³² See Liem, *supra* note 79, at 1080-81.

¹³³ Liem, *supra* note 79, at 1079-81.

¹³⁴ Immigration Policy Ctr., *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2012), <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>.

¹³⁵ HERNÁNDEZ, *supra* note 2.

¹³⁶ HERNÁNDEZ, *supra* note 2, at 42.

¹³⁷ See Immigration Policy Ctr., *supra* note 134.

¹³⁸ Liem, *supra* note 79, at 1082.

¹³⁹ Liem, *supra* note 79, at 1084.

¹⁴⁰ See Johnson, *supra* note 8, at 482. A felony is considered to be in-between a misdemeanor and an aggravated felony, in terms of seriousness. Since aggravated felonies and misdemeanors are becoming blurred in the immigration context, this comment addresses those concepts and does not include extensive information on felonies.

different understandings of the terms “aggravated felony” and “misdemeanor,” one controlling in immigration courts and one in criminal courts.¹⁴¹ The uneven application of these terms is a result of the Supreme Court’s desire for uniform application of immigration laws and the IIRIRA that hardened criminal convictions on immigrants.¹⁴²

In terms of uniformity, immigration laws are exclusively within the control of the federal government.¹⁴³ Criminal laws on the other hand, are largely within the purview of the states.¹⁴⁴ Courts have struggled with how the two categories should interact when applied to immigrants convicted of crimes.¹⁴⁵ The Supreme Court decisions on interaction between the two suggest that national uniformity is crucial to the development of immigration law.¹⁴⁶

In general a conviction is required before any crime-based consequences can apply.¹⁴⁷ Additionally, a criminal conviction is necessary, in most cases, before a deportation will be authorized.¹⁴⁸ After an immigrant has been criminally convicted, for immigration law purposes, the court determines whether this is a removable offense. Using what is referred to as a categorical approach, the court only analyzes the statutory definition of the crime, not exploring the underlying facts of the conviction.¹⁴⁹ In immigration determinations, the Supreme Court has generally decided that where a federal criminal definition is applicable, it can override a state’s criminal definition.¹⁵⁰ In places where there is no federal criminal definition, courts will implement a definition of the particular crime, for which the immigrant is on trial, that produces uniformity with a majority of states, instead of applying the definition of the state in which the immigrant was criminally convicted.¹⁵¹ The court essentially goes through a three-step process. First, they try to understand what crimes Congress

¹⁴¹ See generally Johnson, *supra* note 8, at 482 (stating that petty theft is a misdemeanor under state law, but constitutes an aggravated felony for immigration purposes).

¹⁴² See Johnson, *supra* note 8, at 483 (discussing that more LPRs were deportable after the immigration reforms than before); Liem, *supra* note 79, at 1083-84.

¹⁴³ See Liem, *supra* note 79, at 1075.

¹⁴⁴ See Liem, *supra* note 79, at 1082.

¹⁴⁵ See Liem, *supra* note 79, at 1082.

¹⁴⁶ See Lopez v. Gonzales, 549 U.S. 47, 58-59 (2006); Liem, *supra* note 79, at 1083-84.

¹⁴⁷ HERNÁNDEZ, *supra* note 2, at 26.

¹⁴⁸ HERNÁNDEZ, *supra* note 2, at 26.

¹⁴⁹ HERNÁNDEZ, *supra* note 2, at 30.

¹⁵⁰ Liem, *supra* note 79, at 1084.

¹⁵¹ Liem, *supra* note 79, at 1084.

deemed removable. Second, they try to understand what the particular state's definition under which the immigrant was convicted of a crime meant; lastly the court determines whether the conduct under the second step fits under the generic federal categories for which an immigrant can be removed.¹⁵² Relying on the state criminal definitions when trying to achieve uniformity in immigration policy, breeds ambiguity.¹⁵³

The IIRIRA caused crimes typically classified as misdemeanors to be categorized as aggravated felonies for immigration purposes.¹⁵⁴ As mentioned above, these reforms were an effort by Congress to streamline immigration laws.¹⁵⁵ Unfortunately, in making criminal punishments for immigrants harsher, the application of the current laws expanded the definition of aggravated felonies to the extent that LPRs that commit a misdemeanor with a one-year potential sentence can be deported as aggravated felons, even if they actually received a sentence of less than a year.¹⁵⁶ Before 1996, aggravated felonies for immigration purposes were limited to murder, drug trafficking, and illicit trafficking in firearms.¹⁵⁷ However, after the 1996 changes, an immigrant who has been convicted in criminal court of a misdemeanor or felony can still be deported as an aggravated felon when his case goes to an immigration court.¹⁵⁸ In New York, for example, petty theft is a misdemeanor carrying a sentence of one year; however, under the heightened immigration laws instituted by the reforms, this became a deportable aggravated felony.¹⁵⁹ An example of the application of this increased standard is the Second Circuit case *United States v. Pacheco*.¹⁶⁰ In this case Pacheco, a LPR, was convicted of several misdemeanors, including the theft of a \$10 video game at one point, and four packs of cigarettes and two bottles of Tylenol Cold medicine at another time.¹⁶¹ For each misdemeanor he received a suspended

¹⁵² HERNÁNDEZ, *supra* note 2, at 33.

¹⁵³ See Liem, *supra* note 79, at 1084.

¹⁵⁴ Johnson, *supra* note 8, at 482.

¹⁵⁵ Liem, *supra* note 79.

¹⁵⁶ See 8 U.S.C. § 1101(a)(43)(F),(G),(P) (2008) (defining aggravated felonies and providing examples of crimes classified as aggravated felonies because they are punishable by at least 12 months imprisonment); Johnson, *supra* note 8, at 482.

¹⁵⁷ Johnson, *supra* note 8, at 480.

¹⁵⁸ See Johnson, *supra* note 8, at 482.

¹⁵⁹ See Johnson, *supra* note 8, at 482.

¹⁶⁰ See generally *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000).

¹⁶¹ *Id.*, at 150.

one-year sentence and one-year of probation.¹⁶² After the institution of the 1996 reforms, Pacheco was notified that he was deportable based on his misdemeanors.¹⁶³ Having received the one-year sentence, his crimes became aggravated felonies for the purpose of immigration.¹⁶⁴ The judge in this case stated “[i]n the case before us, we deal with the question of whether Congress can make the word ‘misdemeanor’ mean felony.”¹⁶⁵ The understanding was that because Congress found that the term aggravated felony could include “certain misdemeanants who receive a sentence of one year,” for immigration purposes, the court had to hold Pacheco deportable for his series of misdemeanors.¹⁶⁶ This disparity between the application of aggravated felonies within immigration courts has become such an issue that a fact sheet by the Immigration Policy Center stated that in today’s world an aggravated felony need not be “aggravated” or a “felony” instead it could be whatever offense Congress wants to label an aggravated felony.¹⁶⁷

As mentioned above, the federal government is striving for uniformity.¹⁶⁸ This was the motive behind the institution of the 1996 reforms.¹⁶⁹ Considering the government’s intentions, it seems that lack of consistency between federal immigration laws and state criminal laws was an unintended consequence of the federal government’s attempt to make immigration laws more uniform.¹⁷⁰ Misdemeanors are generally defined as much less serious than aggravated felonies.¹⁷¹ Having the ambiguous definition of aggravated felonies include minor misdemeanors as grounds for deportation wreaks havoc on the gen-

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.* at 152.

¹⁶⁵ *Id.* at 149.

¹⁶⁶ *See generally* United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000); Johnson, *supra* note 8, at 486 (stating that the court in *United States v. Graham* found that Congress allowed misdemeanors to be raised to the level of aggravated felonies).

¹⁶⁷ IMMIGRATION POLICY CTR., *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (March 16, 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf>.

¹⁶⁸ *See* Liem, *supra* note 79, at 1083-84.

¹⁶⁹ *See* Johnson, *supra* note 8, at 482.

¹⁷⁰ *See generally* Liem, *supra* note 79 (discussing that the federal government puts emphasis on national uniformity in the development of immigration law); Johnson, *supra* note 8, at 480 (stating that Congress may not have considered the ramifications immigration reform would have on illegal immigrants, especially LPRs).

¹⁷¹ *See generally* Johnson, *supra* note 8 (describing misdemeanors as less serious than felonies and felonies as less serious than aggravated felonies).

eral understanding of criminal law terms.¹⁷² What we generally believe a misdemeanor to mean is moot if one who commits a misdemeanor can be deported as an aggravated felon.

4. Illegal Immigrants and Crime

The disparity described above creates issues for all immigrants, illegal and legal alike.¹⁷³ Unlike legal immigrants who face deportation as the result of crimes, illegal immigrants are removable for many reasons unrelated to criminal charges.¹⁷⁴ For example, illegal immigrants who enter the country without permission are removable purely based on their inadmissible status at the time of entry.¹⁷⁵ Similarly, the INA specifies that one who enters legally as a non-immigrant, but has failed to maintain his or her legal status, is also subject to deportation.¹⁷⁶ Additionally, the INA states that an immigrant who re-enters the United States after being removed can be subject to criminal penalties, such as 10 to 20 years imprisonment.¹⁷⁷ Application of this criminal penalty does not differ between immigrants initially removed for illegal status and legal immigrants removed for other reasons.¹⁷⁸ Similarly, the INA discussing removal for an aggravated felony does not specify any difference in application to illegal immigrants and LPRs.¹⁷⁹

To summarize, an illegal immigrant is subject to removal by virtue of not being in the country legally, though his illegal stay is not a criminal offense.¹⁸⁰ When an illegal immigrant is convicted of a crime, the INA seems to indicate that the standards to be applied are the same as those applied to all immigrants.¹⁸¹

¹⁷² See generally Johnson, *supra* note 8, at 482.

¹⁷³ See generally 8 U.S.C. § 1227(a)(2)(iii) (2008) (showing that the expansive aggravated felony provision applies to all immigrants).

¹⁷⁴ See 8 U.S.C. § 1227(a)(2) (2008) (listing crimes for which immigrants can face deportation); 8 U.S.C. § 1227(a)(1) (2008) (showing that aliens who enter the United States illegally are deportable).

¹⁷⁵ See 8 U.S.C. § 1227(a)(1) (2008).

¹⁷⁶ See 8 U.S.C. § 1227(b) (2008).

¹⁷⁷ See 8 U.S.C. § 1326(b) (2008).

¹⁷⁸ See *id.*

¹⁷⁹ See 8 U.S.C. § 1227(a)(2)(iii) (2008).

¹⁸⁰ See 8 U.S.C. § 1227(a)(1) (2008) (showing illegal aliens are subject to deportation); 8 U.S.C. § 1325 (2008) (showing that aliens who enter illegally are subject to civil penalties); *Arizona v. United States*, 132 S.Ct. 2492, 2496 (2012).

¹⁸¹ See generally 8 U.S.C. § 1227(a)(2) (2008).

5. A Time of Fear: A Push for Criminal Deportation

In recent years, fear of immigrants and paranoia over the possibility of crimes they may commit has increased.¹⁸² While in office, President Obama instituted a tough immigration policy that has resulted in almost 1.5 million people being deported since 2012.¹⁸³ Although President Obama stated that he would go after those who were criminals harming the community, not after those who have come to this country to take care of their families, in reality, a majority of the people being deported do not have a criminal record and among those who do, the record is minimal.¹⁸⁴ About 10% of those who have been removed since 2012 have been convicted of assault and less than 3% have been convicted of other individual crimes such as burglary, fraud and weapons offenses, among other crimes.¹⁸⁵

It seems that fear of the potential criminal immigrant is at unprecedented levels.¹⁸⁶ A recent study shows that in the last 20 years, the immigrants who came to the United States were less likely to be involved in crime than earlier immigrants and even native-born U.S. citizens.¹⁸⁷ Despite these facts, the deportation of immigrants, especially those with criminal records, has become a priority.¹⁸⁸ Obama's 2014 executive action on immigration discusses "forcing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."¹⁸⁹ While this is an admirable goal, it appears as if in the push to get rid of undesirable immigrants and the institution of the harsher IIRIRA, the standards for what crimes garner deportation have become increasingly unclear.¹⁹⁰

¹⁸² Christina Carr, *Most Deportees Lack Criminal Record*, Congressional Quarterly (2014) (stating that President's administration is targeting those individuals who are a threat to safety).

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See generally* Jennifer Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* U. CHI. LEG. F. 317 (2007).

¹⁸⁷ *See* Erin O'Donnell, *Latinos Nix Violence*, HARVARD MAGAZINE, Sept.-Oct. 2006, at 15, available at <http://harvardmag.com/pdf/2006/09-pdfs/0906-15.pdf>.

¹⁸⁸ Remarks by the President in Address to the Nation on Immigration (2014) <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

¹⁸⁹ *Id.*

¹⁹⁰ *See generally* Christina Carr, *Most Deportees Lack Criminal Record, Data Show*, CQ Roll Call (Oct. 2, 2014) (showing that the administration wants to remove criminal immigrants);

II. ANALYSIS

Although a misdemeanor is not listed as a deportable offense in the INA, the clash between federal immigration laws and state criminal laws allows immigrants convicted of misdemeanors to be deported as aggravated felons.¹⁹¹ Heightening misdemeanors to the level of aggravated felonies results in a lack of due process for the immigrant community, LPR's and illegal immigrants alike.¹⁹² When committing a misdemeanor, generally considered a more minor crime than a felony, a LPR is not put on notice that his or her supposedly "minor crime" could result in deportation, just like a conviction of an aggravated felony, which in general criminal law terms is considered a more serious crime.¹⁹³ This conflict between the federal immigration laws and criminal state laws sets up an almost secretive standard which leaves LPRs unaware of what sorts of crimes may result in deportation.¹⁹⁴

The protections of due process are granted to illegal and legal immigrants alike.¹⁹⁵ Because LPRs are legal residents in the United States, and must go through a selective preference system and essentially fulfill all the obligations required of a citizen, the federal government should be even more concerned about making sure that this group is not denied due process and deported for crimes they were not given notice could result in deportation.¹⁹⁶ Section A of this Part analyzes how LPRs are deprived of the constitutional right of due process when misdemeanors are raised to the level of aggravated felonies

Johnson, *supra* note 8, at 481-82 (generally discussing how the terms misdemeanor and aggravated felony have been confused).

¹⁹¹ 8 U.S.C. § 1227(a)(2) (2008) (showing that a misdemeanor is not stated as a deportable offense); Johnson, *supra* note 8, at 482 (showing an example of a crime that is a misdemeanor under state law, constituting an aggravated felony under immigration law).

¹⁹² See generally U.S. CONST. amend. V; Johnson, *supra* note 8, at 482 (showing an example of a misdemeanor constituting an aggravated felony under immigration law).

¹⁹³ See U.S. CONST. amend. V; Johnson, *supra* note 8, at 482 (showing an example of a misdemeanor constituting an aggravated felony under immigration law); Rosato, *supra* note 103, at 73-74 (describing when a statute fails to give notice).

¹⁹⁴ See generally Johnson, *supra* note 8, at 482 (stating that petty theft is a misdemeanor under state law, but constitutes an aggravated felony for immigration purposes).

¹⁹⁵ See *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886).

¹⁹⁶ See *Monger & Yankay*, *supra* note 23 (discussing the preference system and other means of obtaining LPR status); Johnson, *supra* note 8, at 479 (stating that the distinction between U.S. citizens and LPRs is minimal).

in immigration proceedings. Section B of this Part discusses how this lack of due process is of particular importance when considering the similarities LPRs share with U.S. citizens and the stark differences LPRs have to illegal immigrants. Lastly, Section C of this Part offers two solutions to dealing with this disparity.

A. *Misdemeanors to Aggravated Felonies, the Lack of Due Process*

Constitutional rights are unevenly applied to immigrants; it seems that the political climate of the country can impact how the federal government extends and protects those rights for LPRs.¹⁹⁷ Despite this fact, the Fifth Amendment due process right, by court precedent and an analysis of the word “person” in the Constitution, has regularly been applied to both illegal and legal immigrants alike.¹⁹⁸ As displayed above, the clash between state criminal laws and federal immigration laws blurs the terminology of aggravated felonies and misdemeanors.¹⁹⁹ What appears to a LPR criminal to be a conviction for a misdemeanor in state criminal court may become a deportable aggravated felony when conviction renders the LPR to immigration court.²⁰⁰ This results in an apparent lack of notice to the criminal immigrant.²⁰¹ As misdemeanors are generally considered less serious than aggravated felonies, how should a LPR know that the two terms may be considered synonymous in immigration courts?²⁰²

A statute fails to give fair notice when its meaning must be guessed and it differs as to application.²⁰³ That is exactly the situation a LPR finds himself in when a crime is raised from the level of a misdemeanor to an aggravated felony, which subsequently results in

¹⁹⁷ See *Padilla v. Kentucky*, 559 U.S. 356, 374-75 (2010) (showing that the lower court and the Supreme Court differed in their opinion of how the Sixth Amendment applied to Padilla); Johnson, *supra* note 8, at 479-80 (stating that political prejudice and anti-immigrant sentiments influence the treatment of LPRs who commit crimes).

¹⁹⁸ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259-60 (1990) (discussing analysis of the word person); *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (showing that the rights of due process are given to illegal immigrants).

¹⁹⁹ See generally 8 U.S.C. § 1227(a)(2)(iii) (2008) (showing that the expansive aggravated felony provision applies to all immigrants); Johnson, *supra* note 8 (describing misdemeanors as less serious than felonies and felonies as less serious than aggravated felonies).

²⁰⁰ See *United States v. Pacheco*, 225 F.3d 148, 150 (2d Cir. 2000).

²⁰¹ See *Plyler*, 457 U.S. at 212; see Moore, *supra* note 13.

²⁰² See 8 U.S.C. § 1101(a)(43)(P) (2008); Johnson, *supra* note 8.

²⁰³ Rosato, *supra* note 103.

deportation.²⁰⁴ If a LPR were to look at the text of a criminal statute, that individual would see that an aggravated felony is described as a serious crime, not something as minimal as minor offenses, like the one at issue in *Pacheco*.²⁰⁵ In this case, the LPR would have had no idea that the repeated misdemeanor offenses would result in deportation.²⁰⁶ The immigration and criminal laws fail to give notice to LPRs where a person is convicted of a misdemeanor in a state court, but the punishment and conviction of an aggravated felony is applied in immigration courts.²⁰⁷ Nowhere in the text of the INA does it explicitly say that a misdemeanor will result in deportation.²⁰⁸ When comparing the same crime committed by a citizen and a LPR, charging a citizen with a misdemeanor and rendering a LPR deportable for an aggravated felony shows a distinct disparity in application of the criminal laws and results in a lack of notice to the LPR, thereby violating his constitutional right to due process.²⁰⁹

Even in places where the INA comes close to making clear that some minor crimes can result in aggravated felony convictions, the application is vague enough to create interpretation issues for any court.²¹⁰ For example, the INA describes one type of aggravated felony as “a theft offense” and uses the term “relating to” in fourteen different categories of the aggravated felony section; this ambiguous language leaves room open for courts to apply expansive procedures that change over time.²¹¹ An example of the vague effect this creates can be seen in the use of the term “relating to” in the fraud portion of the aggravated felony section.²¹² Courts are required to interpret a statute in a way that makes no word meaningless; to prevent the term “relating to” from being meaningless, it must be applied to the word it

²⁰⁴ See Johnson, *supra* note 8, at 482.

²⁰⁵ See *Pacheco*, 225 F.3d at 149-50; Johnson, *supra* note 8, at 478-79.

²⁰⁶ See Johnson, *supra* note 8, at 478-79.

²⁰⁷ See Johnson, *supra* note 8, at 482 (showing the same crime resulting in a misdemeanor in state court, but an aggravated felony in immigration court); Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

²⁰⁸ 8 U.S.C. § 1227(a)(2) (2008).

²⁰⁹ See Johnson, *supra* note 8, at 482 (showing that a petty theft misdemeanor in state court for a LPR can result in deportation for committing an aggravated felony); Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

²¹⁰ See Liem, *supra* note 79, at 1081.

²¹¹ See Liem, *supra* note 79, at 1081.

²¹² 8 U.S.C. § 1101(a)(43); see Liem, *supra* note 79, at 1081.

modifies, expanding that word's application.²¹³ This results in the term "relating to" applying to "offenses" even when the underlying elements of the claim have not been established.²¹⁴ With fraud in particular, though a majority of states require intent to defraud and an element of knowledge to establish a claim, the phrase "relating to" can allow an offense to be deemed fraud without fulfilling these key elements.²¹⁵ This is just one example of how the ambiguity in the INA can potentially result in a guessing game, for both courts and LPRs. Vague language leads to unclear application and provides little notice to LPRs of what sort of crimes can render them deportable.²¹⁶

Being convicted of a misdemeanor in a state court and subsequently rendered deportable in a federal immigration court for the same crime, now called an aggravated felony, creates an obvious issue.²¹⁷ It is the same crime, though with a different name, and therefore results in an inequitable result for a LPR. Clashes between state law and federal law have been seen in many arenas where a person's constitutional rights are being jeopardized, such as laws surrounding the legality of marijuana; therefore the disparity between the two is of particular importance and must be resolved.²¹⁸ The importance of the Constitution and the role it has played in making the United States a righteous country that values fairness and justice is well known and accepted. In line with that principle, the inconsistency between state criminal laws and federal immigration laws must be rectified so as to grant LPRs the notice that they are due under the Fifth Amendment.²¹⁹

²¹³ See Liem, *supra* note 79, at 1081; Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, CONGRESSIONAL RESEARCH SERVICES 13 (2011).

²¹⁴ See Liem, *supra* note 79, at 1081.

²¹⁵ See Liem, *supra* note 79, at 1081.

²¹⁶ See Liem, *supra* note 79, at 1081; Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

²¹⁷ See Johnson, *supra* note 8, at 482.

²¹⁸ See e.g., *Padilla v. Kentucky*, 559 U.S. 356, 359-60 (2010) (suggesting the importance of constitutional rights); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States Overlooked Power to Legalize Federal Crime*, 62 *VAND. L. REV.* 1421, 1422-23 (discussing how despite Congress banning marijuana outright, states have passed legislation legalizing its use for medical purposes).

²¹⁹ See generally Johnson, *supra* note 8, at 479, 482 (stating that LPRs are protected by due process rights and showing the disparity between state criminal laws and federal immigration laws).

B. *Citizens, LPRs and Illegal Immigrants: The Unconscionable Standard*

The lack of notice that is afforded to LPRs on what sort of crimes can render them deportable is unjustifiable in the face of all the criteria they fulfill to achieve this status and their relative similarity to U.S. citizens.²²⁰ As mentioned above, Fifth Amendment rights are afforded to illegal immigrants who do not pay taxes²²¹, do not go through a stringent preference system to be selected for LPR status, and have a somewhat ambiguous position when it comes to which constitutional rights they should be afforded.²²² This should not be the case with LPRs because they not only respect and comply with the procedures and requirements of the country to achieve a legal permanent status, but also essentially fulfill the obligations of a citizen.²²³ When LPRs are denied fair notice, they are treated more like illegal immigrants, a class of people with limited rights, than like U.S. citizens, a class with which they share more similarities.²²⁴ Outside of criminal law courts illegal immigrants are removable based purely on their unauthorized presence within the country, but even then they are generally granted due process rights.²²⁵ Essentially, illegal immigrants can be deported without having even committed a crime therefore the application of constitutional protections to this group is

²²⁰ See Johnson, *supra* note 8, at 479 (stating that LPRs and American citizens are similar); Monger & Yankay, *supra* note 23 (discussing the preference system and other means of obtaining LPR status).

²²¹ While acknowledged and protected frequently in criminal contexts, the extent to which constitutional protections extend to illegal immigrants is far from settled and hotly debated; continually blurring lines between immigration and crime causes further legal confusion. HERNÁNDEZ, *supra* note 2, at 6.

²²² See Mathews v. Diaz, 426 U.S. 67, 77-78 (1976) (discussing that illegal immigrants are due constitutional rights); Moore, *supra* note 13 (discussing that the rights accorded to illegal immigrants are in flux); *Permanent Resident*, *supra* note 53 (stating that LPRs are required to pay taxes); Monger & Yankay, *supra* note 23 (discussing the preference system for LPRs).

²²³ See generally Bahamonde, *supra* note 44, at 90 (describing that in terms of duties to the country, there are few differences between LPRs and American Citizens); *Permanent Resident*, *supra* note 53 (showing the responsibilities LPRs fulfill).

²²⁴ See generally Moore, *supra* note 13, at 801 (discussing that the rights accorded to illegal immigrants are in flux); Johnson, *supra* note 8, at 479 (stating that there is minimal difference between U.S. citizens and LPRs and that public prejudice against illegal aliens has led to inequality in the treatment of LPRs).

²²⁵ See 8 U.S.C. § 1227(a)(1) (2008) (describing that illegal aliens are removable based merely on their unauthorized entrance); Mathews v. Diaz, 426 U.S. 67, 77-78 (1976).

sometimes contested.²²⁶ LPRs' rights to this protection, however, should not be contested; they are legal residents of the United States, just like citizens, and should receive clear notice of what crimes can render them deportable.²²⁷ Just as illegal immigrants are deportable based purely on their status, LPRs should be granted the right to know what can render them deportable based purely on having complied with the rules and procedures to gain legal status within the country.²²⁸

Ultimately, both U.S. citizens and LPRs maintain a legal status to be in this country.²²⁹ Though LPRs do not have the type of relationship with the Constitution that U.S. citizens have, it is undeniable that they should have more rights, or at least a more concrete standard of rights, than what illegal immigrants receive.²³⁰

If the federal government does not grant basic constitutional rights to LPRs, what incentive does an immigrant have to subject himself to a stringent preference program and to fulfill the same duties required of a citizen, although being accorded an inferior status for a period of time? If we do not grant basic constitutional rights to those who have taken legal measures to enter the country, immigrants may see utility in entering illegally.²³¹ Entering the U.S. illegally would be faster than waiting to get accepted into the country legally, and if an illegal immigrant is caught committing a crime in the U.S., they are subject to the same blurred criminal immigration standards as LPRs.²³² Although the INA recognizes that illegal immigrants should be removable because they are not authorized to be in the country, it

²²⁶ See generally Cole, *supra* note 86 (discussing how some believe that foreign nationals do not deserve the same rights as citizens).

²²⁷ See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (stating that LPRs should be afforded constitutional rights); Johnson, *supra* note 8, at 479 (stating that LPRs and American citizens are similar).

²²⁸ See generally 8 U.S.C. § 1227(a)(1) (2008) (describing essentially that illegal aliens are removable based on their unauthorized entrance); *Bridges*, 326 U.S. at 161 (stating that LPRs should be afforded constitutional rights); *Permanent Resident*, *supra* note 53 (showing the responsibilities LPRs fulfill).

²²⁹ See Johnson, *supra* note 8, at 479 (stating that LPRs and American citizens are similar).

²³⁰ Moore, *supra* note 13, at 801 (stating that citizens and immigrants have a different relationship with the Constitution); see generally Bahamonde, *supra* note 21, at 89-90 (describing how LPRs are lawful residents in the U.S. who receive the privileges such as the right to own property).

²³¹ See Gonzalez, *supra* note 42 (discussing how waiting years or decades to get a green-card is normal).

²³² See 8 U.S.C. § 1227(a)(2) (2008) (showing that criminal punishments do not distinguish between illegal and legal aliens).

does not subject them to harsher criminal immigration standards than LPRs.²³³ This is not to say that if the United States denies LPRs constitutional rights, all immigrants will disregard legal means of entrance and begin entering the U.S. illegally. Instead, this is an attempt to draw a distinction between LPRs and illegal immigrants. LPRs and illegal immigrants are fundamentally different. Because of the difference in legality, even if the federal government does not want to apply the right of notice to illegal immigrants, it should still give notice to LPRs.²³⁴ As noted in *Padilla*, deportation is a harsh consequence in general; with the recent more stringent immigration laws deportation has become a very possible reality for many immigrants.²³⁵ Therefore, making sure LPRs are not denied of their constitutional rights is even more necessary.²³⁶ Similar to *Padilla*, where the Court determined that, partly because of the harshness of deportation, immigrants should not be deprived of the Sixth Amendment right to accurate legal advice, immigrants should also not be deprived of the Fifth Amendment right to the due process requirement of notice for which crimes may result in deportation.²³⁷

When comparing U.S. citizens, LPRs, and illegal immigrants, LPRs are more similar to U.S. citizens in status than they are to illegal immigrants.²³⁸ Between illegal immigrants and LPRs, only one of the groups has a legal basis to be in the country, has complied with the rules to be in the country, and in some cases have followed the procedures to work towards achieving naturalization.²³⁹ Therefore, LPRs should be afforded constitutional due process rights not only because the text of the Constitution guarantees them this right, but also based on the evident distinction between LPRs and illegal aliens.²⁴⁰ LPR individuals deserve to be afforded clear standards of what sort of crimes can render them deportable.²⁴¹

²³³ See 8 U.S.C. § 1227(a)(1)-(2) (2008).

²³⁴ See generally Byrd, *supra* note 52.

²³⁵ See *Padilla v. Kentucky*, 559 U.S. 356, 356 (2010).

²³⁶ *Id.*

²³⁷ See *id.* at 387-88.

²³⁸ See generally Byrd, *supra* note 52; Johnson, *supra* 8, at 479 (stating that LPRs and American citizens are similar).

²³⁹ See generally Byrd, *supra* note 52; Bahamonde, *supra* note 44, at 89-90 (describing the preference system, naturalization process and the responsibilities LPRs are required to fill).

²⁴⁰ See Byrd, *supra* note 52; Moore, *supra* note 13, at 808 (discussing that the use of the word “person” in the Constitution encompasses aliens).

²⁴¹ See generally Byrd, *supra* note 52.

C. *Solution: Concrete Standards*

To make sure that LPRs are granted adequate notice and are not denied basic Fifth Amendment rights when it comes to what crimes can render them deportable, it is essential that some changes be made.²⁴² One solution is to clarify the language of the INA.²⁴³ If LPRs can be deported for a series of misdemeanors, then the language should not call these mishaps aggravated felonies.²⁴⁴ It should clearly state that a series of misdemeanors could make one deportable. Calling a crime a misdemeanor in a state criminal court and an aggravated felony in a federal immigration court can lead to confusion and inconsistency.²⁴⁵ If Congress actually wants criminal misdemeanors to be deportable offenses, the language of the INA should state that clearly. Although it is true that immigration law understands an aggravated felony to be a crime that results in at least a year of jail time, this does not tell a LPR that misdemeanors with a possible sentence of one year can result in a deportable status.²⁴⁶ The language of the INA should explicitly state those crimes that can result in deportation.

Another solution is to change the application of the INA in courts. As the language of the INA is open-ended enough to allow room for interpretation, judges can choose to apply the act in a standard that is closer to only rendering LPRs deportable for actual aggravated felonies instead of misdemeanors.²⁴⁷ Because the text of the INA only states that aggravated felonies and not misdemeanors will result in deportation, this will be a step in the direction of giving more notice to LPRs of the possible consequences for the crimes they commit.²⁴⁸ Merely noting in some court opinions that misdemeanors can be raised to the level of aggravated felonies is not enough to satisfy

²⁴² See Johnson, *supra* note 8, at 479 (stating that LPRs are protected by due process rights).

²⁴³ See generally 8 U.S.C. § 1227 (2008).

²⁴⁴ See generally 8 U.S.C. § 1227(a)(2) (2008).

²⁴⁵ See generally Liem, *supra* note 79, at 1081-83 (discussing how the vague wording of the aggravated felony provision of the Code has created a struggle between federal immigration laws and state criminal laws, resulting in challenges for lower courts).

²⁴⁶ See Johnson, *supra* note 8, at 477.

²⁴⁷ See Liem, *supra* note 79, at 1081.

²⁴⁸ See generally 8 U.S.C. § 1227(a)(2) (2008); Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

the notice requirement.²⁴⁹ A reasonable person would not expect that a conviction under one category would result in deportation under a higher category; notice requires a clear standard that can be understood.²⁵⁰ This solution may also require some edits to the language of the INA, to ensure that there is no potential for misinterpretation or expansive application.²⁵¹ As mentioned under the first option, because terms used in the INA can lead to varied interpretations, creating a stricter standard will ensure that judges apply a more equitable and accurate definition of aggravated felony and that the current situation is not repeated.²⁵²

Whether federal immigration courts choose to only deport immigrants for those crimes described as aggravated felonies in state criminal courts or whether the language of the INA is edited to reflect that some misdemeanors can be deportable offenses, either suggested solution will provide LPRs with the notice they are guaranteed by the Fifth Amendment.²⁵³

CONCLUSION

The Constitution's Fifth Amendment due process clause requires that "no person" be denied of due process.²⁵⁴ Despite a shifting political environment, court precedent has long established that immigrants are included within the term "person" and therefore it is proper to grant them due process rights.²⁵⁵ Depriving LPRs of notice that being convicted of a misdemeanor in a state criminal court can result in deportation for an aggravated felony in a federal immigration court

²⁴⁹ See generally *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

²⁵⁰ See generally Rosato, *supra* note 103 (describing sufficient notice to a person as something that does not need to be guessed at and does not differ in application).

²⁵¹ See generally Liem, *supra* note 79, at 1081-83 (discussing how ambiguity in the INA led to an expansive application).

²⁵² See Liem, *supra* note 79, at 1081-83.

²⁵³ See Johnson, *supra* note 8, at 479 (stating that LPRs are protected by due process rights).

²⁵⁴ U.S. CONST. amend V.

²⁵⁵ See Johnson, *supra* note 8, at 479-80 (discussing various events, such California's Proposition 187, bringing immigration to the forefront of nation debate and leading to stricter immigration reform).

violates this Fifth Amendment right.²⁵⁶ Deportation, though not considered a punitive measure, is a harsh consequence to any crime. Additionally, the advent of recent immigration laws has considerably expanded which crimes can result in deportation.²⁵⁷ Therefore as suggested in the recent case of *Padilla*, it is very important to ensure that constitutional rights are applied before rendering an immigrant deportable.²⁵⁸ As LPRs are legal residents in the United States, going through a stringent preference system to achieve this status and essentially fulfilling all the same duties required of U.S. citizens, they should at least be granted clear notice of which crimes can result in deportation.²⁵⁹ The inconsistency caused by deporting an immigrant for an aggravated felony when the immigrant was neither convicted for an aggravated crime nor a felony, but instead for what is considered a more minor crime, a misdemeanor, must be dealt with.²⁶⁰ To solve this issue of lack of notice, the language of the INA should either reflect the action of the courts or the action of the courts should be brought into compliance with the text of the INA.

²⁵⁶ See *LaChance v. Erickson*, 552 U.S. 262, 265-66 (1998) (showing that notice is part of due process); see *Johnson*, *supra* note 8, at 482 (showing that, for an LPR, a petty theft misdemeanor in state court can result in deportation for committing an aggravated felony).

²⁵⁷ See generally *Padilla v. Kentucky*, 559 U.S. 356, 356-57 (2010).

²⁵⁸ See generally *id.*

²⁵⁹ See *Bahamonde*, *supra* note 44, at 89-90 (describing the preference system, naturalization process and the responsibilities LPRs are required to fill).

²⁶⁰ See generally Immigration Policy Ctr., *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (March 16, 2012), <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>.

