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# Reforming the Good Moral Character Requirement for U.S. Citizenship

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**Reforming the Good Moral Character Requirement  
for U.S. Citizenship**

KEVIN LAPP\*

*This Article explores the impact of the convergence of criminal law and immigration law on the most valued government benefit in the land: citizenship. Specifically, it examines how criminal history influences the opportunity to naturalize through the good moral character requirement for U.S. citizenship.*

*Since 1790, naturalization applicants have been required to prove their good moral character. Enacted to ensure that applicants were fit for membership and would not be disruptive or destructive to the community, the character requirement also allowed for the reformation and eventual naturalization of those guilty of past misconduct. This Article shows that recent changes in immigration law and the handling of naturalization petitions by the United States Citizenship and Immigration Services (USCIS) have turned the good moral character requirement into a powerful exclusionary device. Since 1990, Congress has added hundreds of permanent, irrebuttable statutory bars to a good moral character finding based on criminal conduct. Where no bar applies, examiners may still deny an applicant on character grounds in their discretion, which they are doing with management encouragement and increasing frequency. The effect is the creation of bars to citizenship not found in the statute, subverting the statutory and regulatory scheme governing naturalization.*

*The expressively punitive nature of the current good moral character provision and USCIS's misguided priorities in handling naturalization applications force legal resident immigrants with criminal histories to permanently live in the shadows of full membership, never able to possess the full rights, privileges, and respect that citizenship can bring. The Article argues that a robust, inclusive notion of citizenship remains necessary despite its apparent diminishment in the twenty-first century world. Informed by insights from sociological research on community cohesion and criminological findings on desistance, it shows why there must be space for those residents with a criminal past to demonstrate their current fitness for membership. It urges statutory and agency reforms that would realign the good moral character requirement with its historical purpose and understanding and promote a naturalization scheme that, at no cost to public safety, promotes social cohesion and advances democracy and equality by making redemptive citizenship possible.*

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#### INTRODUCTION

The Immigration and Nationality Act (INA) requires that all naturalization applicants demonstrate their good moral character.<sup>1</sup> This requirement has existed since Congress passed the first naturalization statute in 1790.<sup>2</sup> It aims to ensure the applicant’s fitness for full membership in the polity and that she will not be disruptive or dangerous to the community.<sup>3</sup>

For over 150 years, Congress offered no guidance whatsoever on what constituted good moral character in the naturalization context.<sup>4</sup> In the absence of a statutory definition, courts developed a flexible, forward-looking standard for evaluating good moral character that did not mean to punish for past conduct<sup>5</sup> but instead contemplated prior transgressions and recognized the potential for reform.<sup>6</sup> The immigration service adopted this view, stating in a mid-twentieth-century training manual that Congress “undoubtedly intended to provide for the reformation of those who have been guilty of past misdeeds.”<sup>7</sup>

Recent changes in immigration law and the handling of naturalization petitions by the U.S. Citizenship and Immigration Services (USCIS) have turned the good moral character requirement into a powerful exclusionary device. Since 1990,

1. 8 U.S.C. §§ 1427(a) (2006); 8 C.F.R. §§ 316.2(a)(7), 316.10, 329.2(d) (2010).

2. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.

3. See 1 ANNALS OF CONG. 1114 (1790) (Joseph Gales ed., 1834) (statement of Rep. Jackson) (“I think, before a man is admitted to enjoy the high and inestimable privileges of a citizen of America, that something more than a mere residence among us is necessary. I think he ought to pass some time in a state of probation, and, at the end of the term, be able to bring testimonials of a proper and decent behavior . . .”).

4. See *infra* Part I.B.

5. See, e.g., *Posusta v. United States*, 285 F.2d 533, 535–36 (2d Cir. 1961) (remarking that the standard is not “penal” and that “a person may have a ‘good moral character’ though he has been delinquent upon occasion in the past”).

6. See *infra* Part I.B.

7. IMMIGRATION AND NATIONALITY SERVICE, NATIONALITY MANUAL: FOR THE USE OF OFFICERS AND EMPLOYEES OF THE IMMIGRATION AND NATURALIZATION SERVICE § 773 (1945).

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Congress has added hundreds of permanent, irrebuttable statutory bars to a good moral character finding triggered by criminal conduct.<sup>8</sup> Where no statutory bar applies, naturalization examiners may still deny an applicant on character grounds in their discretion.<sup>9</sup> The effect of these statutory changes and agency practices is the creation of bars to citizenship not found in the statute, subverting the statutory and regulatory scheme governing naturalization.<sup>10</sup>

While many scholars have critically explored U.S. naturalization policies, few have discussed the good moral character requirement for citizenship at any length. Several articles predating the passage of the INA in 1952<sup>11</sup> and four articles from the early 1970s<sup>12</sup> discussed the various standards that courts used to determine good moral character and the lack of uniformity in the results reached. But the law and agency practices have changed significantly since then. Among recent scholarship, only Professor Peter Spiro's 1999 article, *Questioning Barriers to Naturalization*, spends any time explicitly exploring the good moral character requirement, and even there the discussion totals only a few paragraphs.<sup>13</sup>

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8. See *infra* Part I.B.

9. See *infra* Part II.B. Until 1990, exclusive jurisdiction to grant naturalization rested with courts. The Immigration Act of 1990 introduced administrative naturalization, vesting the Attorney General with exclusive jurisdiction to grant naturalization without permission from the district court. Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(14)(B), 104 Stat. 4978, 5044.

10. See *infra* Part II.

11. See generally Winfield E. Ohlson, *Moral Character and the Naturalization Act*, 13 B.U. L. REV. 636 (1933); Albert S. Persichetti, *Good Moral Character as a Requirement for Naturalization*, 22 TEMP. L.Q. 182 (1948); Elmer Plischke, "Good Moral Character" in the *Naturalization Law of the United States*, 23 MARQ. L. REV. 117 (1939); Note, *Good Moral Character in Naturalization Proceedings*, 48 COLUM. L. REV. 622 (1948).

12. See generally Lisa H. Newton, *On Coherence in the Law: A Study of the "Good Moral Character" Requirement in the Naturalization Statute*, 46 TEMP. L.Q. 40 (1972) (asserting that the law cannot be applied coherently or meaningfully and suggesting its elimination); Steven L. Strange, *Private Consensual Sexual Conduct and the "Good Moral Character" Requirement of the Immigration and Nationality Act*, 14 COLUM. J. TRANSNAT'L L. 357 (1975) (arguing against including private sexual conduct within the moral character inquiry for citizenship purposes); Note, *The Evaluation of Good Moral Character in Naturalization Proceedings*, 38 ALB. L. REV. 895 (1974) (urging a single, national standards test); Note, *Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty*, 47 N.Y.U. L. REV. 545 (1972) (arguing for the use of objective factors and a focus on the applicant's recent conduct).

13. Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 508–16 (1999) (positing that the good moral character requirement is surplusage when considered alongside deportation provisions). Recent works that analyze various requirements for naturalization discuss the good moral character requirement cursorily if at all. See PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 33–59 (2008) (devoting an entire chapter to the various naturalization requirements, such as the English language proficiency requirement and the civics exam, but failing to discuss the good moral character requirement); Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237 (1994) (mentioning but not discussing the good moral character requirement). Neither of the two leading immigration law textbooks, each over 1300 pages long, devotes more than a single page to the good moral character requirement.

This Article analyzes how the good moral character provisions in the INA and the current USCIS practices deny naturalization to legal residents with criminal history. Part I introduces the concept of citizenship broadly, outlining the important and increasing distinction between the status of citizen and that of legal permanent resident. It then traces the history of the good moral character requirement for naturalization in the United States, contrasting the flexible standard that recognized reform applied by courts and encouraged by the agency through the middle of the twentieth century with the current, wide-reaching, and permanent statutory bars to a good moral character finding for those with criminal convictions and the agency's current penchant for punitive discretion.

Part II shows how the good moral character requirement affects three groups of legal resident immigrants that share one thing in common: they have, at some point during their stay in the United States, been arrested for or committed a crime or violation of the law. Members of the first group faced formal removal charges but were granted relief under immigration law by an immigration judge and were welcomed to stay permanently in the United States. Such relief depended on proof that the applicant is a valuable, contributing member of society with many and deep ties to America.<sup>14</sup> Nevertheless, the INA bars many of them from ever satisfying the good moral character requirement.<sup>15</sup> These folks sit in a sort of limbo, neither deportable from the United States for their transgressions nor ever able to become American citizens.

The second group is composed of those who apply for naturalization and are denied on character grounds in the agency's discretion or are referred to Immigration and Customs Enforcement (ICE) for removal proceedings on the basis of prior conduct. Many of these denials are unlawful or unjustified. They happen because USCIS trains its adjudicators to deny on character grounds and directs them to refer applicants "who appear to be removable" to ICE for detention and removal,<sup>16</sup> and adjudicators misapply the law and regulations (sometimes blatantly and defiantly) about good moral character.

The third group consists of the wary, because they have heard about the second group. They are eligible to naturalize and are either not removable under the law or have solid cases for relief should the government charge them with removal. Despite their eligibility, they forgo applying for naturalization out of fear that old, minor criminal convictions will lead to federal detention, removal proceedings, or deportation. For these residents, the final step in their immigrant journey to America becomes an impossible one because the risks are too great.

The expressively punitive nature of the INA's current good moral character provision and USCIS's misguided priorities in handling naturalization applications force legal resident immigrants with criminal histories to permanently live in the shadows of full membership, never able to possess the full rights, privileges, and respect that citizenship can bring. Part III identifies three main failures with the

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See T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 117-18 (7th ed. 2011); STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1307 (5th ed. 2009).

14. See *infra* Part II.A.

15. See 8 U.S.C. § 1101(f) (2006).

16. See *infra* Part II.B.

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current scheme. First, permanently barring resident immigrants from citizenship, whether by statute or by intimidation, frustrates social cohesion by marginalizing the excluded and discouraging their investment in their community.<sup>17</sup> Second, denying full membership to resident immigrants threatens the integrity of democracy. Preventing their political participation creates a class of voteless community residents in violation of the consent principle of democracy.<sup>18</sup> Third, the current scheme wrongly denies redemption its proper place in the law by permanently casting individuals as morally corrupt. This conclusion contradicts the intent of the good moral character requirement, as well as criminological research on desistance from crime and emerging trends in the law on fixed character judgments.<sup>19</sup>

To correct these failures, Part IV proposes reforms. It calls first for legislative change—Congress should eliminate the good moral character requirement entirely or strike the permanent statutory bar to a finding of good moral character triggered by certain criminal convictions. Simply put, there must be space for those legal residents with a distant criminal past to demonstrate their current fitness for full membership. Should a character requirement remain, the Article proposes changes to how USCIS processes naturalization applications, particularly in the handling of good moral character assessments. These changes include the small—such as ensuring that all naturalization examiners are sufficiently trained and affirmatively tell applicants to provide evidence of their good moral character—and the large—ending the use of naturalization applications as a source for removal candidates. These changes will reduce the number of erroneous denials and denials by intimidation.

The reforms proposed will not impact public safety or diminish the integrity of American democracy. To the contrary, they will create a naturalization scheme that promotes social cohesion by offering all legal permanent residents the opportunity to become full members; advances democracy and equality by encouraging unfettered economic, social, and political investment and participation in American communities by all; and offers redemptive citizenship to long-time residents by recognizing that individuals can and do reform.

### I. U.S. IMMIGRATION AND NATURALIZATION LAW

In his sweeping history of American citizenship, Rogers Smith writes that “American citizenship . . . has always been an intellectually puzzling, legally confused, and politically charged and contested status.”<sup>20</sup> The intense scholarly interest in citizenship in the last thirty years has often contributed to the muddle, largely because different people use the term “citizenship” to mean different things. In fact, scholars invoke the concept of citizenship in a host of disciplines to

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17. *See infra* Part III.A.

18. *See infra* Part III.B.

19. *See infra* Part III.C.

20. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 14 (1997).

represent such a wide spectrum of practices and experiences that it is difficult for citizenship scholars to avoid talking past each other.

In its simplest form, citizenship is a legal status that defines the relationship between the individual and the state. It denotes who is a full member (citizen) and who is not (noncitizen).<sup>21</sup> The nation state owes to citizens the fullest protection of its law, and grants to citizens the broadest array of rights. Linda Bosniak calls this conception of citizenship “status citizenship.”<sup>22</sup>

Besides status, there are at least three other ways to conceive of citizenship.<sup>23</sup> Some define citizenship by its content, arguing that to be a citizen means you possess a particular or minimum set of rights and privileges.<sup>24</sup> Those who lack the full or necessary set are not citizens, or are described as second-class or semicitizens.<sup>25</sup> Alternatively, some emphasize behavior when they invoke citizenship. Most famously articulated by Aristotle in *Politics*, this definition considers citizenship to be the act of participating in and shaping the political community, and often induces appeals to the archetype of “good citizenship.”<sup>26</sup> Finally, some see citizenship as a component of identity and citizens as a class of people who share particular characteristics or culture.<sup>27</sup>

Further underscoring the term’s multivalence, scholars and advocates invoke citizenship in a variety of areas outside the relationship between the individual and the state. They assert a host of domains of citizenship, including the globe, the

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21. Citizenship and noncitizenship do not exist in a dichotomous relationship. See THOMAS ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 5 (2002) (“[C]itizenship defines neither the category of the governed [which includes noncitizens] nor that of the governors [residents of Puerto Rico and D.C. lack voting representatives in Congress.]”); ELIZABETH F. COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 36 (2009) (arguing that citizenship is a “gradient category”).

22. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 15, 18 (2006) (defining citizenship as a legal status says nothing about the necessary or ideal content of the relationship it describes).

23. See *id.* at 18–20 (identifying four conceptions of citizenship: (1) as formal legal status; (2) as entitlement to and enjoyment of rights; (3) as the process of democratic political engagement; and (4) as an identity of belonging).

24. See, e.g., T.H. Marshall, *Citizenship and Social Class*, in *CITIZENSHIP AND SOCIAL CLASS* (1992) (defining citizenship as composed of essential civil, political, and social rights).

25. See COHEN, *supra* note 21, at 204 (describing semi-citizens as “a group of persons living within the boundaries of a liberal democracy who have some, but not all, of the rights and status associated with full citizenship in that state”).

26. See ARISTOTLE, *POLITICS* 18–21 (W.E. Bolland trans. 1877) (defining citizen as a person who has the right to participate in deliberative or judicial office); Martin Luther King, Jr., Address to the Montgomery Improvement Association following the arrest of Rosa Parks (Dec. 5, 1955), available at [http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/address\\_to\\_first\\_montgomery\\_improvement\\_association\\_mia\\_mass\\_meeting\\_at\\_hol/](http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/address_to_first_montgomery_improvement_association_mia_mass_meeting_at_hol/) (“We are here this evening for serious business. We are here in a general sense because first and foremost we are American citizens, and we are determined to apply our citizenship to the fullness of its meaning.”).

27. See, e.g., Chantal Mouffe, *Democratic Citizenship and the Political Community*, in *DIMENSIONS OF RADICAL DEMOCRACY* 231 (1995).

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workplace, the marketplace, the neighborhood, unions, political movements, and families.<sup>28</sup> Citizenship carries a symbolic meaning as well, though one that has almost as many iterations as proponents. The dominant rhetorical camps emphasize citizenship's contribution to national unity<sup>29</sup> and the special affinity a citizen feels for his nation,<sup>30</sup> or exalt it as the fullest manifestation of inclusive, egalitarian ideals.<sup>31</sup>

When I use the term “citizenship” in this Article, I mean status citizenship—that is, the formal legal status of full membership within the nation state,<sup>32</sup> which brings with it certain rights and perhaps some obligations.<sup>33</sup> Conceiving of citizenship as a status that confers special rights, without identifying any rights that are minimally necessary to make out that status or behaviors and characteristics that define a citizen, allows for a critical assessment of both the normative ideals and practical realities regarding citizenship in any particular place. Through this lens, this Part addresses American citizenship in two sections. The first section offers a truncated

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28. See BOSNIAK, *supra* note 22, at 20–28 (discussing the various domains and locations of citizenship asserted by political and legal theorists).

29. See SMITH, *supra* note 20 (arguing that exclusionary citizenship practices have provided an important source of cohesion in American society).

30. See Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989).

31. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

32. Despite increasing calls for postnational understandings of citizenship, most scholars concede that the nation state monopolizes control over the central form of political membership. See, e.g., Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 616 (1999) (reviewing ROGER M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)) (discussing the claim that membership in particular political communities will have little or no importance but acknowledging that it is unlikely to be realized anytime soon).

33. I prefer this conception because of the limits of the other three. As practiced, citizenship does not guarantee an equal or superior bundle of rights to all citizens. Some U.S. citizens with felony records or mental illnesses cannot vote, for example, and those who reside in Washington, D.C. and Puerto Rico lack the same representation in Congress of citizens who live in the 50 states. See, e.g., MO. CONST. art. VIII, § 2 (“[N]o person who has a guardian . . . by reason of mental incapacity, appointed by a court of competent jurisdiction . . . shall be entitled to vote . . .”); *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff’d sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000), *aff’d*, 531 U.S. 941 (2000) (holding that denying District of Columbia residents the right to vote in congressional elections is constitutional). Defining citizenship as participation likewise fails to accurately reflect the practiced reality of the status because acting like a citizen does not make one a citizen, and those citizens who do not fulfill the ideal do not lose their citizenship. See *Trop v. Dulles*, 356 U.S. 86, 92 (1957) (“Citizenship is not a license that expires upon misbehavior.”). By conflating civicness with citizenship, the third definition does better at defining normative ideals than political and social fact. Finally, while the view of citizenship as an important component of identity holds much popular sway, it has limited application in today’s increasingly transnational world and fails to offer a basis for meaningful critique or comparison. See Michael Walzer, *What Does It Mean To Be an “American”?*, 71 SOC. RES. 633, 633 (2004) (“The adjective [American] provides no reliable information about the origins, histories, connections, or cultures of those whom it designates.”).

exposition of the principles and theories underlying American citizenship and explains its history and functional meaning today. The second section outlines the current requirements for U.S. citizenship, focusing on the good moral character requirement.

### A. American Citizenship

In the United States, citizenship sits atop a hierarchy of legal statuses respecting membership in the nation state. The other statuses, in descending order of protections offered by the state and rights held by the person, are (2) national;<sup>34</sup> (3) lawful permanent resident; (4) refugee and asylee; (5) temporary legal resident, such as one admitted on time-limited tourist, student, or work visa;<sup>35</sup> and (6) undocumented (illegal) immigrant.

As historian James Kettner succinctly put it, “The status of ‘American citizen’ was the creation of the [American] Revolution.”<sup>36</sup> The colonials quickly went to work defining citizenship in the new nation and setting the terms for access to it. Yet it was not immediately clear whether the Revolution had created one political community or a collection of many.<sup>37</sup> Perhaps this is why the Framers said remarkably little about citizenship in the Constitution. The lone reference to naturalization in the original document grants Congress the power “[t]o establish a uniform Rule of Naturalization.”<sup>38</sup> From its famous preamble, which begins “We the People of the United States,” and not “We the Citizens,”<sup>39</sup> the Constitution

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34. The INA confers nationality, but not citizenship, on persons born in or having ties with “an outlying possession of the United States.” 8 U.S.C. § 1408(1) (2006). The outlying possessions are defined as American Samoa and Swains Island. 8 U.S.C. § 1101(a)(29). Certain inhabitants of the Commonwealth of the Northern Mariana Islands, who became U.S. citizens by virtue of Article III of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, may opt for noncitizen national status. Pub. L. No. 94-241, § 301(a), 90 Stat. 263, 266 (1976).

35. U.S. law classifies all noncitizens as immigrants or nonimmigrants. Immigrants come to reside permanently in the country; those who enter as immigrants are often referred to as lawful permanent residents. *See* 8 U.S.C. § 1153(a)–(c) (identifying the allocation of visas for family-sponsored immigrants, employment-based immigrants, and diversity immigrants). Most nonimmigrant categories involve a temporary stay of fixed duration. *See* 8 U.S.C. § 1101(a)(15) (listing all possible categories of nonimmigrant aliens).

36. JAMES KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, 208 (1978). One of the grievances laid against King George III in 1776 was that he was “obstructing the Laws for Naturalization of Foreigners.” *THE DECLARATION OF INDEPENDENCE* para. 9 (U.S. 1776); *see* KETTNER, *supra*, at 104–05 (discussing, for example, a 1773 British order-in-council instructing colonial governors not to assent to further naturalizations and the colonists’ view that the denial of the right to determine the membership of their community was another strike at the liberty and prosperity of Americans).

37. KETTNER, *supra* note 36, at 209.

38. U.S. CONST. art. I, § 8, cl. 4.

39. U.S. CONST. pmbl. Indeed, the Supreme Court does not equate “the people” with citizens, but considers some noncitizens to be part of “the People of the United States.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). In a concurring opinion,

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appears to deliberately avoid using the word citizen when possible. It bestows rights to persons, not citizens, and sets the boundaries of permissible government action in its relations to persons, not citizens.<sup>40</sup> Indeed, the Framers made nothing depend on citizenship explicitly (not even the franchise) except the public offices of president, congressperson, and senator.<sup>41</sup> Where the Constitution uses “citizen” specifically, it does so either to establish requirements for elective office, declare that state citizens are entitled to the privileges and immunities of citizens in the several states,<sup>42</sup> or prohibit denying the right to vote based on race, sex, or other characteristics.<sup>43</sup>

The only constitutional provision that can be said to relate to a qualification for citizenship is the Fourteenth Amendment.<sup>44</sup> Enacted following the *Dred Scott* decision<sup>45</sup> and the Civil War, the Fourteenth Amendment provides a simple definition of citizen as anyone born or naturalized in the United States.<sup>46</sup> The Constitution says nothing else about the qualifications for, or the duties of, citizenship.<sup>47</sup> This led political theorist Alexander Bickel to conclude, perhaps somewhat aspirationally, that “we live under a Constitution to which the [simple] concept of citizenship matters very little, that prescribes decencies and wise modalities of government quite without regard to the concept of citizenship.”<sup>48</sup>

Devoid of content, however, citizenship performs no function. If membership means nothing, there is no reason to seek it, promote it, or grant it. Not

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Justice Stevens agreed that “the people” should be read to include, at the least, anyone “lawfully present in the United States.” *Id.* at 279 (Stevens, J., concurring).

40. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 35–36 (1975).

41. See U.S. CONST. art. I, § 2 (requiring House representatives be seven-year citizens); *id.* art. I, § 3 (requiring senators be nine-year citizens); *id.* art. II, § 1 (requiring president be a natural-born citizen).

42. U.S. CONST. amend. XIV, § 1.

43. See U.S. CONST. amend. XV (race, color, previous condition of servitude), amend. XIX (sex), amend. XXIV (taxes), and amend. XXVI (minimum voting age no higher than eighteen).

44. *Rogers v. Bellei*, 401 U.S. 815, 829 (1970) (“[A]lthough one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document or, indeed, in any of the amendments adopted prior to the War Between the States.”).

45. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that people of African descent, imported into the United States and held as slaves, and their descendants—whether or not they were slaves—were not protected by the Constitution and could never be citizens of the United States).

46. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898) (stating there are “two sources of citizenship, and two only: birth and naturalization”).

47. BICKEL, *supra* note 40, at 42–46. This is not to say that citizenship had no significance in the early Republic. It was quickly put to work as a racially-exclusive, rights-bearing device. Limited to “free white person[s],” it conferred the strongest protection of property rights. See Naturalization Act of January 29, 1795, ch. 20, 1 Stat. 414, 414 (limiting naturalization to “free white person[s]”); KETTNER, *supra* note 36.

48. BICKEL, *supra* note 40, at 53–54. *But see* COHEN, *supra* note 21, at 29 (constitutions commonly conflate “persons governed” with “citizens” and use the words “citizen” and “person” nearly interchangeably, “despite the fact that many of the persons directly governed by any given constitution are not full citizens. This makes the text of constitutions unreliable sources of ultimate authority on the meaning of citizenship . . .”).

surprisingly, almost everyone agrees that “citizenship means something.”<sup>49</sup> The Supreme Court has variously referred to it as “a status in and relationship with a society . . . more basic than mere presence or residence,”<sup>50</sup> “a most precious right,”<sup>51</sup> and the “right to have rights.”<sup>52</sup> Congress has called it “the most valued governmental benefit of this land.”<sup>53</sup>

Unsurprisingly, American history demonstrates that the status of citizenship has mattered quite a lot.<sup>54</sup> As mentioned above, in *Dred Scott*, the Supreme Court justified denying rights to slaves and free blacks based on their lack of citizenship.<sup>55</sup> The Civil War and the intense battle after it regarding the full implication of the Fourteenth Amendment’s grant of citizenship to African Americans revealed the tremendous consequence of access to citizenship.<sup>56</sup> Over the course of the twentieth century, American citizenship came to be seen as a method for ensuring full and equal treatment by offering an expanded set of rights to each citizen.<sup>57</sup> The robust egalitarian potential of citizenship took firm hold in the 1950s and 1960s largely through the discourse of the civil rights movement and decisions of the Warren Court, which linked equality and rights to citizenship.<sup>58</sup> This expansive and inclusionary project sought to make sure that all citizens were capable of fully participating in society and successfully used citizenship to remove longstanding barriers to equal participation and treatment.<sup>59</sup>

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49. *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 114 (1873) (Bradley, J., dissenting).

50. *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting).

51. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963).

52. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

53. BROOKS, NATURALIZATION AMENDMENTS OF 1989, H. REP. NO. 101-187, at 14 (1989).

54. See generally KETTNER, *supra* note 36; SMITH, *supra* note 20.

55. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

56. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state laws requiring racial segregation in private businesses); *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not outlaw racial discrimination by private individuals and organizations, and that the Civil Rights Act of 1875 was unconstitutional); and *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that a statute restricting jury service to white men violated the Equal Protection Clause of the Fourteenth Amendment).

57. The evolution of the content of citizenship was famously articulated by British sociologist T.H. Marshall in a seminal 1950 essay. Marshall, *supra* note 24. According to Marshall, during the eighteenth century a core set of civil rights held by citizens were established, such as liberty, freedom of speech and religion, the right to own property and make contracts, and access to courts. *Id.* at 8. Political rights were added to the bundle in the nineteenth century as the right to vote was slowly made available to more than just property-holding white males. *Id.* In the twentieth century, social rights to a basic level of economic welfare and security became linked to citizenship and made true equality and liberty for all citizens possible. *Id.*

58. During Earl Warren’s time as chief justice, the Supreme Court expanded the substantive reach of rights in the areas of criminal procedure, due process, voting, speech, and privacy and incorporated many of the rights found in the Bill of Rights against the states. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998).

59. See ALENIKOFF, *supra* note 21, at 72 (noting the Warren Court demonstrated that the “ideal of citizenship could be a powerful tool in the extension of rights, the ending of second-class citizenship, and the inclusion of previously subordinated and marginalized

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Today, the central significance of citizenship is found in the right to vote<sup>60</sup> and the right to remain. Citizens cannot be deported.<sup>61</sup> According to immigration scholar Cristina Rodriguez, the “indefeasible right to remain . . . is what makes the status [of citizen] irreplaceable.”<sup>62</sup> It provides security to the citizen and her family and friends in sustained relationships.<sup>63</sup> The right to vote also protects the individual by providing an equal voice in the process of choosing leaders and defining community norms.<sup>64</sup> Together, these two rights make possible a more active and participatory democracy by giving residents a voice in their government and eliminating any fear of removal for their activities.<sup>65</sup>

Citizenship brings many other rights and benefits, including traveling with a U.S. passport, eligibility for public jobs, becoming an elected official, and not having to carry and renew immigration papers.<sup>66</sup> A citizen can bring family members to the United States more easily and swiftly than a noncitizen, and can obtain citizenship for children born abroad.<sup>67</sup> Moreover, in a liberal democracy like the United States, an inclusive, robust citizenship regime promotes equality by promising equal treatment to all residents, fosters dynamic political participation by

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groups”); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 21 (1977) (“The Warren Court . . . did not invent the idea of equal citizenship, but recognized that its time had come.”). From the perspective of the noncitizen, Warren’s privileging of citizenship as a conduit of rights only goes so far. See BICKEL, *supra* note 40, at 53–54.

60. This was not always so. In the past, noncitizens could vote, while many citizens (for example, women and blacks) could not. See generally RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 15–40 (2006); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

61. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“Jurisdiction in the executive to order deportation exists only if the person arrested is an alien.”). Citizens can be denaturalized and then deported. See 8 U.S.C. § 1451(a), (e) (2006) (authorizing the government to revoke a grant of citizenship that was “illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation” and authorizing courts to set aside an individual’s grant of naturalization upon a criminal conviction for knowingly committing naturalization fraud under 18 U.S.C. § 1425).

62. Cristina M. Rodriguez, 103 AMER. J. INT’L LAW 180, 186–87 (2009) (reviewing PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN CITIZENSHIP AFTER GLOBALIZATION* (2008)).

63. See Cristina M. Rodriguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1120–21 (2008) (noting that it is destabilizing for citizen children to have a parent whose presence in the United States is not secure).

64. See Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993) (“[V]oting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity.”).

65. For example, noncitizens are deportable for “any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.” 8 U.S.C. § 1227(a)(4)(A)(iii). This includes protected First Amendment activity for which citizens cannot be punished.

66. U.S. CITIZENSHIP & IMMIGRATION SERVS., *A GUIDE TO NATURALIZATION M-476*, at 3 (2011) [hereinafter USCIS, *A GUIDE TO NATURALIZATION*].

67. *Id.*

granting community members the right to shape their community through the franchise, and facilitates social cohesion by offering a unifying identity and a sense of belonging in a diverse, transnational world.<sup>68</sup>

Consistent with the many benefits of citizenship, various programs and laws encourage noncitizens to naturalize. USCIS, the administrative agency that currently handles naturalization applicants, houses an Office of Citizenship to foster immigrant integration and encourage U.S. citizenship.<sup>69</sup> Among other things, the Office of Citizenship leads initiatives to promote citizenship and provides grants, materials, and assistance to national and community-based organizations that prepare immigrants for citizenship.<sup>70</sup> Several states also have citizenship assistance programs that encourage and help immigrants to naturalize.<sup>71</sup>

Public benefits legislation can also include restrictions or prohibitions for noncitizens that incentivize naturalization. For example, most legal permanent residents are currently barred from federal means-tested public benefits such as Temporary Assistance for Needy Families, Medicaid, and food stamps for five years after entering the country, and barred from supplemental security income (SSI) until citizenship.<sup>72</sup> Courts have upheld these provisions, finding that

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68. *See infra* Part III.

69. *See generally* *Office of Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVICES (DEC. 12, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a5e314c0cee47210VgnVCM100000082ca60aRCRD&vgnnextchannel=a5e314c0cee47210VgnVCM100000082ca60aRCRD>. The Office of Citizenship was created by the Homeland Security Act of 2002 to promote instruction and training on citizenship responsibilities for aliens interested in becoming naturalized citizens of the United States, including the development of educational materials. Homeland Security Act of 2002, 6 U.S.C. § 271(f) (2006).

70. USCIS awarded millions in federal funding in 2011 to support citizenship education and preparation programs for lawful permanent residents. *See USCIS Announces FY 2011 Citizenship and Integration Grant Program Recipients \$9 Million Awarded to Expand Citizenship Preparation Programs for Permanent Residents Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 21, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=61e8a0920dc82310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

71. *See* ANN MORSE & AIDA ORGOCKA, NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRANTS TO CITIZENS: A ROLE FOR STATE LEGISLATORS 5 (2004), *available at* <http://www.ncsl.org/Portals/1/documents/immig/immigrantstocitizens.pdf>.

72. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193 § 400, 110 Stat. 2105, 2260 (1996); 8 U.S.C. § 1613(a) (2006) (stating most legal immigrants are ineligible for most federal means-tested public benefits for five years after their date of entry); 8 U.S.C. § 1612(a)(3) (barring most permanent residents from receiving SSI or food stamps). *But see* 8 U.S.C. § 1612(a)(2)(A)(ii), (b)(2)(A)(ii), (b)(3)(C) (stating asylees and refugees are eligible for food stamps, five years of Medicaid, and seven years of SSI); 8 U.S.C. § 1612(a)(2)(E) (articulating that lawful permanent residents legally residing in the United States before August 22, 1996, are eligible for SSI benefits); 8 U.S.C. § 1612 (b)(2)(B) (asserting those who have paid social security taxes for ten years are eligible for SSI benefits).

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encouraging naturalization is a legitimate governmental interest justifying discrimination against noncitizens.<sup>73</sup>

The benefits reserved to citizens illustrate that citizenship necessarily operates as a tool of exclusion and subordination. Indeed, for much of American history, American citizenship was a racially exclusive status. From 1790 until the end of the Civil War, naturalization was limited to free whites.<sup>74</sup> African Americans and many native-born nonwhites first secured the right to citizenship through the Fourteenth Amendment's birthright citizenship provision.<sup>75</sup> Native American Indians were excluded from birthright citizenship until 1924,<sup>76</sup> and many foreign-born immigrants continued to be denied the opportunity to naturalize by racial and national origin restrictions on citizenship until their final elimination in 1952.<sup>77</sup> Today, no one is *per se* barred from naturalizing on the basis of race or national origin.

The important distinction between citizen and noncitizen has become more consequential in recent years. At the federal level, Congress passed three major pieces of legislation in 1996 that significantly curtailed the rights and benefits of noncitizens: the Illegal Immigration Reform and Immigrant Responsibility Act, the Antiterrorism and Effective Death Penalty Act, and the Personal Responsibility and Work Opportunity Act (also known as the Welfare Reform Act).<sup>78</sup> Many have

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73. For example, the Seventh Circuit held that, although it is not found in Congress's statement of policy in the 1996 Welfare Reform Act, the legitimate government interest in encouraging naturalization provided a rational basis for upholding the challenged portions of the Act that barred legal permanent residents from receiving SSI and food stamps. *City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000) ("The Act gives resident aliens in need of welfare benefits a strong economic incentive to become naturalized citizens."); *see also* *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976) (stating that a citizenship requirement for federal service would be "justified by the national interest in providing an incentive for aliens to become naturalized").

74. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795) (restricting naturalization to any "free white person" who met the residency and character requirements).

75. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; U.S. CONST. amend. XIV. There has been much recent attention on birthright citizenship, including proposals by members of Congress to eliminate or amend it. *See, e.g.*, Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329, 1333 (2009).

76. Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253, 253 (codified at 8 U.S.C. § 3 (2006)) ("[A]ll noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States.").

77. *See generally* IAN HANEY LÓPEZ, *WHITE BY LAW* (10th Anniversary ed. 2006); SMITH, *supra* note 20. For a specific case example, *see* *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (denying naturalization to applicant from India because he was not a "white person" as required by statute). Despite this discriminatory history, the arc of U.S. citizenship is one of an ever-increasing inclusion. In 2009, the United States naturalized people from almost 200 different countries. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 23, tbl.21 (2010) [hereinafter 2009 YEARBOOK OF IMMIGRATION STATISTICS].

78. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (increasing the number of crimes that

observed that the 1996 laws “were intended, among other goals, to increase sharply the value of American citizenship while reducing the value of permanent legal resident status.”<sup>79</sup> Recent state and local anti-immigrant provisions, such as Arizona’s Senate Bill 1070, have reinforced the importance of the status of citizenship in the United States.<sup>80</sup>

At its core, then, U.S. citizenship is a legal status that defines a relationship between the state and the individual. As originally intended, it lacked substantive content. Instead of being a rights-bearing device, it was largely a tool of (white) cohesion, bringing together a rapidly growing population under a unifying identity that helped the nation develop as a nation. Citizenship quickly evolved to deliver significant content, although never to all citizens equally. By the last third of the twentieth century, the Supreme Court had worked to ensure that all citizens held a robust set of political, civil, and social rights, diminishing longstanding barriers to equal participation and treatment and bringing America closer to its egalitarian and inclusive ideals. Yet throughout this history, and resurgently today, citizenship has also served as a tool of exclusion and subordination. While the original racist distinctions have faded in modern law, new restrictions and barriers to citizenship have arisen. This Article now turns to one such barrier: the good moral character requirement.

### *B. Good Moral Character Requirement*

With the notable exception of the explicit racial and national origin restrictions that lasted until 1952, U.S. naturalization has been relatively easy to obtain compared to other nations.<sup>81</sup> Still, various requirements have been imposed to

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made a lawful immigrant ineligible for naturalization and deportable, and making effecting that deportation easier, if not mandatory); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWOR), Pub. L. 104-193, 110 Stat. 2105 (eliminating immigrant eligibility for various public benefits). Several provisions of PRWOR, also known as the Welfare Reform Act, were later found unconstitutional or repealed, or their impact on lawful immigrants was reduced.

79. Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 2 (1997).

80. For the Justice Department’s challenge to S.B. 1070, see *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011). In just the last five years, states and localities have passed dozens of laws that authorize local police to enforce federal immigration laws, that require proof of legal status to access benefits, and that impose English-only rules. See, e.g., Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. Rev. 1557 (2008). These measures, while often aimed at undocumented immigrants, effectively devalue legal permanent residents by casting suspicion on all immigrants and discouraging citizens and businesses from working with and catering to them. See, e.g., Rigel C. Oliveri, *Between A Rock and A Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 72-81 (2009) (arguing that such measures lead to discrimination against members of ethnic minority groups perceived as foreign regardless of immigration or citizenship status).

81. See KETTNER, *supra* note 36 (arguing that the desire to spur population growth and economic expansion accounted for liberal naturalization laws); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989); Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17 (T. Alexander

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guard the gates. This section explains how the good moral character requirement has been interpreted by courts, and how the statutory definition has evolved from one with no crime-based character bars to today's broad provisions that trigger a permanent, irrebuttable presumption of a lack of good moral character.

The INA lays out a series of qualifications for those hoping to naturalize. An applicant for naturalization must:

- (1) be a legal permanent resident,<sup>82</sup>
- (2) be 18 or more years old,<sup>83</sup>
- (3) meet both a continuous residence and physical presence requirement,<sup>84</sup> and
- (4) be of good moral character during the required residence period and up to the time of admission.<sup>85</sup>

A character requirement for naturalization has existed since 1790.<sup>86</sup> It aims to ensure that the applicant is fit for membership, and will not be disruptive or destructive to the community.<sup>87</sup> In addition, it was likely meant to protect the political process by helping to assure a virtuous polity.<sup>88</sup>

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Aleinikoff & Douglas Klusmeyer eds., 2001).

82. 8 U.S.C. § 1429 (2006).

83. *Id.* § 1445(b).

84. See *id.* § 1427 for the various residence and presence requirements.

85. *Id.* §§ 1427(a)(3), 1430(a)(1); 8 C.F.R. §§ 316.2(a)(7), 316.10, 329.2(d) (2010). The United States is not unique in requiring good character for those who acquire citizenship by means other than birth. Several democratic states have a similar requirement. Australia, France, Ireland, Portugal, South Africa, and the United Kingdom require proof of good character, and several other countries require the absence of a serious criminal conviction for naturalization, including Austria, Canada, Denmark, Finland, Luxembourg, and Sweden. See Weil, *supra* note 81, at 22–23 tbl.1-2. Further provisions require that the applicant: be attached to the principles of the Constitution and well disposed to the good order and happiness of the United States, 8 U.S.C. § 1427(a)(3); be willing to bear arms, perform noncombatant service, or to perform work of national importance, *id.* § 1448(a)(5)(A)–(C); demonstrate knowledge of English language, U.S. history, and government, *id.* § 1448(a)(5)(A)–(C); and not be otherwise barred as a subversive, Communist party member, or convicted deserter during war time. *Id.* § 1425.

86. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795) (requiring applicants to demonstrate that they were “of good character”). The word “moral” was added in 1795. See Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802). This followed the tradition that had been set up by most states after independence of requiring proof of good character for state citizenship. See KETTNER, *supra* note 36, at 218. Prior to 1940, the statute read “behaved as a man of good moral character.” Act of June 29, 1906, ch. 3592, 34 Stat. 596, 597. Since 1940, the statute has read “has been and still is a person of good moral character.” Nationality Act of 1940, ch. 876, 54 Stat. 1138, 1142 (repealed 1952). This amendment induced no discernable change in good moral character assessments.

87. See *Luria v. United States*, 231 U.S. 9, 23 (1913) (“[I]t was contemplated that his admission [to citizenship] should be mutually beneficial to the Government and himself, the proof in respect of his . . . moral character . . . being exacted because of what [it] promised for the future, rather than for what [it] told of the past.”).

88. Spiro, *supra* note 13, at 516. “Good moral character” is a requirement for a broad range of immigration benefits. A noncitizen seeking relief under the Violence Against Women Act (VAWA), must establish that she is a person of good moral character. 8 U.S.C. § 1184(a)(1)(A)(iii)(II)(bb). So must a noncitizen seeking permanent residence under the special registry provision. See *id.* § 1259. Good moral character is a requirement for “special

In most cases, the time period during which good moral character must be demonstrated is the five years preceding the naturalization application.<sup>89</sup> The applicant bears the burden of establishing her good moral character.<sup>90</sup> The INA does not provide an affirmative statutory definition of what constitutes good moral character in the naturalization context.<sup>91</sup> Indeed, until 1952, the statute provided no guidance whatsoever on the character determination. Where the statute does not bar a finding (the specifics of which shall be discussed presently), the standard to be applied was judicially defined on a case-by-case basis.<sup>92</sup>

The first reported case to discuss good moral character was the 1878 decision *In re Spenser*.<sup>93</sup> In it, a federal district court held that the standard for determining good moral character will vary from generation to generation, and declared that “probably the average man of the country is as high as it can be set.”<sup>94</sup> The court stated that violating the law ought generally to be considered immoral, but recognized distinctions between *malum en se* and *malum prohibitum*,<sup>95</sup> as well as

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rule cancellation” under the Nicaraguan Adjustment and Central American Relief Act (NACARA), *see* NACARA, Pub. L. No. 105-100, § 203(b), 111 Stat. 2160, 2196 (1997), and certain applications for adjustment of status to lawful permanent residence. *See, e.g.*, 8 C.F.R. § 245.23(a)(5) (good moral character required for T visa applicants). A nonlawful permanent resident who is seeking relief in the form of Cancellation of Removal must establish her good moral character during the ten-year period preceding the date of the application. 8 U.S.C. § 1228b(b)(1)(B). A noncitizen seeking voluntary departure at the conclusion of removal proceedings must establish good moral character for the five-year period preceding the application for voluntary departure. *See id.* § 1229c.

89. Generally, applicants must be a continuous resident for five years subsequent to obtaining legal permanent resident status and continuously reside in the United States from the date of filing the application. That five-year period is reduced to three years if the applicant is married to a U.S. citizen if the citizen spouse has been a citizen for three years and the parties have been living in marital union for three years. *See id.* § 1427(a)–(b). For Armed Services veterans, the residency period is waived completely. *See id.* § 1439.

90. *See Berenyi v. District Director*, 385 U.S. 630, 637 (1967); 8 C.F.R. § 316.10(a)(1). The applicant must demonstrate her good moral character by a preponderance of the evidence. *See* 8 C.F.R. § 316.2(b).

91. *See* 8 U.S.C. § 1101(f) (outlining who cannot establish good moral character).

92. Naturalization petitions originally could be filed in “any common law court of record” where the applicant had resided for at least the previous year. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795). As a result, for much of the nineteenth and twentieth centuries, state and federal district courts reviewed naturalization applications directly. Only since 1990 have naturalization applications been determined in the first instance by an administrative immigration official. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(14)(B), 104 Stat. 4978, 5044 (giving the Attorney General authority to naturalize a citizen without permission from the district court); *Etape v. Chertoff*, 497 F.3d 379, 386 (4th Cir. 2007). Federal district courts review appeals of denials *de novo*. *See* 8 U.S.C. § 1421(c). Federal district courts also have jurisdiction over a naturalization application if USCIS fails to grant or deny an application before the end of the 120-day period after the date on which the naturalization examination is conducted. *See id.* § 1447(b).

93. *In re Spenser*, 22 F. Cas. 921 (C.C.D. Or. 1878).

94. *Id.* at 921.

95. “Malum in se” describes a crime or act that is inherently immoral, such as murder, while “malum prohibitum” describes an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral, such as jaywalking. *See* BLACK’S

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between isolated acts of wrongdoing and habitual conduct.<sup>96</sup> Following *Spenser*, most courts applied a flexible, community-based standard for evaluating good moral character that used the average citizen as a benchmark.<sup>97</sup> The standard, courts made clear, was “not penal; it does not mean to punish for past conduct.”<sup>98</sup> Instead, it contemplated prior transgressions and recognized the potential for reform because “circumstances may change us all.”<sup>99</sup>

Given the statute’s requirement of showing good moral character only during the required residence and physical presence period, it was long the law that an applicant’s conduct outside that period could not be used per se to deny a finding of good moral character.<sup>100</sup> That is, judges could not rely exclusively on convictions or criminal conduct to which the applicant admitted from outside the five-year period preceding the application to deny naturalization on character grounds. As many courts stated, an applicant’s “past is of course some index of what is permanent in their make-up, but the test is what they will be, if they become citizens.”<sup>101</sup>

Accordingly, the immigration service historically trained its nationality examiners to take a redemptive view toward prior criminal conduct.<sup>102</sup> A

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LAW DICTIONARY 978–79 (8th ed. 2004).

96. See *Spenser*, 22 F. Cas. at 922. The court added that certain “infamous” crimes, such as murder, robbery, theft, bribery, and perjury, should automatically disqualify an applicant from demonstrating good moral character, though no authority stated as much. This appears to be an early common law articulation of what today is the (much broader) per se bar to a finding of good moral character based on criminal convictions found in 8 U.S.C. § 1101(f).

97. See Lisa H. Newton, *On Coherence in the Law: A Study of the “Good Moral Character” Requirement in the Naturalization Statute*, 46 TEMP. L.Q. 40 (1972); Comment, *The Evaluation of Good Moral Character in Naturalization Proceedings*, 38 ALB. L. REV. 895 (1974); Note, *Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty*, 47 N.Y.U. L. REV. 546 (1972). As the above articles show, however, little rationality or uniformity emerged from the case law.

98. *Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961).

99. *Id.* at 535; see, e.g., *id.* at 535–36 (granting naturalization to applicant despite her adultery prior to the five-year statutory period, remarking that “a person may have a ‘good moral character’ though he has been delinquent upon occasion in the past”); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1131 (9th Cir. 1996).

100. See 8 U.S.C. § 1427(a)(3) (requiring proof of good moral character only during the required residency period); *Ikenokwalu-White v. INS*, 316 F.3d 798, 805 (8th Cir. 2003) (“[C]onduct predating the relevant statutory time period may be considered relevant to the moral character determination . . . but that such conduct cannot be used as the sole basis for an adverse finding on that element.”); *Santamaria-Ames*, 104 F.3d at 1132 (same). That is not to say that preperiod conduct could never be considered. See 8 U.S.C. § 1427(e) (“[T]he Attorney General shall not be limited to the applicant’s conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant’s conduct and acts at any time prior to that period.”); 8 C.F.R. § 316.10(a)(2) (allowing consideration of preperiod conduct “if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant’s present moral character”).

101. *Posusta*, 285 F.2d at 536.

102. In 1926, Congress formally authorized the federal courts to designate examiners from the Bureau of Naturalization to conduct preliminary hearings, and permitted a court to

mid-twentieth century Nationality Manual for agency employees stated that “[i]n fixing specific periods during which an applicant must establish his good moral character, Congress undoubtedly intended to provide for the reformation of those who have been guilty of past misdeeds.”<sup>103</sup> The manual declared that the good moral character provision “makes ample allowance for reformation,” so much so that it was the service’s position that “[n]otwithstanding that a petitioner may have been convicted of murder prior to the statutory period, he may nevertheless be in a position to establish good moral character.”<sup>104</sup>

While some courts, particularly early in the twentieth century, felt that any violation of the law showed a lack of good moral character, the bulk of midcentury good moral character cases exhibited a more nuanced and redemptive view.<sup>105</sup> As Learned Hand described the judge’s task at the time, “[w]e must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty.”<sup>106</sup> The standard permitted a finding of good moral character, for example, despite an applicant’s preperiod convictions for armed robbery and breaking into a U.S. Post Office with intent to commit larceny.<sup>107</sup> It even allowed for a grant of citizenship to an applicant who had pled guilty to manslaughter five years and a few weeks before his application and had been in prison for part of the five-year period during which he had to demonstrate his good moral character.<sup>108</sup> In another case, the court denied a

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grant naturalization without live testimony if it accepted the examiner's favorable findings and recommendations. *See* Act of June 8, 1926, ch. 502, 44 Stat. 709 (codified at 8 U.S.C. § 399a (1926)), *repealed by* Nationality Act of 1940, ch. 876, § 504, 34 Stat. 1140, 1172. The advisory character of the preliminary examination, and the exclusive jurisdiction of the courts to naturalize, was maintained in later codifications. *See* Immigration and Nationality Act of 1952 (INA), ch. 447, §§ 310, 335–36, 66 Stat. 239, 255–58 (codified as amended at 8 U.S.C. §§ 1421, 1446–47 (2006)); Nationality Act of 1940, ch. 876, §§ 301, 333–34, 54 Stat. at 1156 (repealed 1952). In 1990, Congress granted the Attorney General authority to naturalize a citizen without permission from a court, initiating the current system of administrative naturalization. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(14)(B), 104 Stat. 4978, 5044.

103. IMMIGRATION & NATIONALITY SERV., NATIONALITY MANUAL: FOR THE USE OF OFFICERS AND EMPLOYEES OF THE IMMIGRATION AND NATURALIZATION SERVICE § 773 (1944).

104. *Id.* at § 774 (Mar. 15, 1952). The Manual cited approvingly a district court case in which naturalization was granted to an individual who had been convicted of murder in the first degree thirty years before his naturalization application. *Id.* at § 774 (citing *In re Balestrieri*, 59 F. Supp. 181, 182 (N.D. Ca. 1945) (noting that petitioner was pardoned by the Governor of California for his crime, and that he has behaved as a person of good moral character for the five years preceding his petition)).

105. *See* Martin Shapiro, *Morals and the Courts: The Reluctant Crusaders*, 45 MINN. L. REV. 897, 912 (1961) (“[C]ourts came to recognize that if Congress had intended so harsh a standard it could easily have said so, and that in adopting a phrase such as ‘good moral character’ Congress must have meant to assign to the courts some task other than the purely legal one of determining whether a statute had been violated.”).

106. *Johnson v. United States*, 186 F.2d 588, 589 (2d Cir. 1951).

107. *See Pignatello v. Attorney General of the United States*, 350 F.2d 719 (2d Cir. 1965) (finding applicant not statutorily barred from demonstrating good moral character despite old convictions).

108. *See Dadonna v. United States*, 170 F.2d 964, 966 (2d Cir. 1948) (“Good behavior

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naturalization petition because the applicant had deliberately put to death his bed-ridden, blind, mute, and deformed thirteen-year-old son within five years of his application; but “wish[ed] to make it plain that a new petition would not be open to this objection; and that the pitiable event, now long past, will not prevent [the applicant] from taking his place among us as a citizen.”<sup>109</sup>

All of this is to say that *present* good moral character was long the touchstone of the character inquiry for a naturalization applicant.<sup>110</sup> A more stringent, or backward-focused, conception of good moral character would result in the archaic and uncompromising view that people are beyond redemption or change. As the Ninth Circuit noted, “Such a conclusion would require a holding that Congress had enacted a legislative doctrine of . . . eternal damnation. All modern legislation dealing with crime and punishment proceeds upon the theory that aside from capital cases, no man is beyond redemption. We think a like principle underlies these provisions for naturalization.”<sup>111</sup> In short, federal courts recognized that, with respect to an applicant’s moral character, “Congress has made the judgment that rehabilitation is possible.”<sup>112</sup>

USCIS ostensibly adopts this position, claiming to view the good moral character requirement as reflecting a congressional intent “to make provision for the reformation and eventual naturalization of persons who were guilty of past misconduct.”<sup>113</sup> As such, USCIS generally precludes “a denial of naturalization when conduct had been exemplary during the statutory period, and the only adverse facts concerned offenses committed outside such period.”<sup>114</sup> That said, USCIS can deny a naturalization applicant on moral character grounds based on prior criminal conduct in two ways: (1) finding that the applicant is barred from showing it by statute, and (2) finding that the applicant has not met her burden of establishing her good moral character.

In 1952, Congress revamped the immigration and naturalization laws, passing the comprehensive McCarran-Walter Act (known as the INA).<sup>115</sup> It provided the first definition (of sorts) for good moral character in the citizenship context. While offering no affirmative definition, Congress listed in section 101(f) a series of offenses that would preclude a person from demonstrating good moral character if they were committed during the five-year period immediately preceding the application.<sup>116</sup> Included in the list were habitual drunkenness, adultery, polygamy,

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during incarceration may be one indication of the fitness of the applicant to assume the duties of citizenship.”).

109. *Repouille v. United States*, 165 F.2d 152, 153–54 (2d Cir. 1947).

110. *See Yuen Jung v. Barber*, 184 F.2d 491, 495 (9th Cir. 1950) (stating that Congress had the “deliberate intention . . . to make only *present* good moral character relevant.” (emphasis added)).

111. *Santamaria-Ames v. INS*, 104 F.3d 1127, 1131 (9th Cir. 1996) (quoting *Yuen Jung v. Barber*, 184 F.2d 491, 495 (9th Cir. 1950)).

112. *United States v. Hovsepian*, 422 F.3d 883, 886 (9th Cir. 2005).

113. U.S. DEP’T OF JUSTICE, INTERPRETATION 316.1 NATURALIZATION REQUIREMENTS, at \*1, \*13 (2001), 2001 WL 1333876.

114. *Id.* at \*14.

115. INA, Pub. L. No. 414, ch. 477, 66 Stat. 163.

116. *Id.* § 101(f), 66 Stat. at 172 (codified at 8 U.S.C. § 1101 (2006)). According to the INS, “the definition governing the ‘good moral character’ criterion . . . has intentionally been

deriving one's income principally from illegal gambling, and spending more than 180 days in jail.<sup>117</sup> Section 101(f) also introduced for the first time a permanent bar to a good moral character finding based on prior conduct: a murder conviction at any time meant an individual could never demonstrate the requisite moral character for citizenship.<sup>118</sup> Finally, a catch-all provision stated that "[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such a person is or was not of good moral character."<sup>119</sup>

The 1952 revisions provided courts with some guidance and limited their discretion on the character inquiry. It reflected a belief that the prerequisite of good moral character should be "even more strictly applied in determining the fitness of an applicant for citizenship."<sup>120</sup> While the new provisions were criticized by the President's Commission on Immigration and Nationality as too narrow and mechanical,<sup>121</sup> they did not indicate that any criminality should result in a denial on character grounds. Indeed, the act of listing certain behaviors and not others undoubtedly left some courts with the impression that a redemptive view should remain the approach for all other criminal acts.<sup>122</sup>

Since Congress first introduced explicit bars to a good moral character finding, the list has grown exponentially. The greatest expansion followed the invention of the term "aggravated felony" for immigration purposes in the Anti-Drug Abuse Act of 1988.<sup>123</sup> Part of an effort to reduce international drug trafficking, the statute defined three specific crimes as aggravated felonies: murder, any drug trafficking crime, and any illicit trafficking in firearms or destructive devices.<sup>124</sup> A noncitizen convicted of an aggravated felony after entry was deportable.<sup>125</sup>

The Anti-Drug Abuse Act's targeted definition of "aggravated felony" suggests that Congress did not intend to use the provision to rid the country of all immigrants with a criminal record.<sup>126</sup> Two years later, however, Congress broadened the reach of "aggravated felony" in two important ways. First, it

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left open-ended." 58 Fed. Reg. 49,905, 49,909 (Sept. 24, 1993).

117. Adultery and simple possession of marijuana were removed from the list. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611; H.R. REP. 97-264, at 11 (1981) ("Although a person could still be found to lack good moral character if he or she engaged in adultery or were convicted for simple possession of marijuana, such a finding would not be mandatory.").

118. INA, § 101(f)(8), 66 Stat. at 172.

119. *Id.* § 101(f), 66 Stat. at 172.

120. S. REP. NO. 81-1515, at 712 (1950).

121. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 246 (1953) (recommending that the INA offer no definition at all).

122. Moreover, despite the new statutory character bars, courts nevertheless found exceptions and granted naturalization despite the existence of a statutory bar. *See, e.g., In re Perdiak*, 162 F. Supp. 76, 77 (S.D. Cal. 1958) (finding false testimony lacked materiality and granting naturalization).

123. Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered titles and sections of U.S.C.).

124. *See id.* § 7342, 102 Stat. at 4469 (codified as amended at 8 U.S.C. § 1101(a)(43)).

125. *See id.*

126. *See* Andrew David Kennedy, Note, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1854 (2007).

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expanded the definition of “aggravated felony” to include any “crime of violence” for which the person was sentenced to greater than five years and “any illicit trafficking in any controlled substance.”<sup>127</sup> Second, it added a provision that barred anyone convicted of an aggravated felony at any time after passage of the act from ever establishing good moral character.<sup>128</sup> This eliminated an individual inquiry for any naturalization applicant convicted of an aggravated felony after November 29, 1990, substituting a *per se* conclusion regarding the applicant’s moral character that survived indefinitely.<sup>129</sup>

The character bar triggered by a conviction for an aggravated felony applies even if the conviction predates the five-year period during which good moral character must be shown, even if the conviction was obtained when a person was a teenager,<sup>130</sup> and even when there is overwhelming evidence of the individual’s rehabilitation since the crime. With this change, Congress imposed the fixed character judgment that the rule requiring good character only during the residency period rejected and that federal courts and agency training materials had long denied.

Congress broadened the definition of “aggravated felony” further in 1994 and 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>131</sup> did the most work, reducing the sentence length requirements for a crime of theft or violence to qualify as an aggravated felony from five years to one year, and increasing the number of crimes that qualify as aggravated felonies.<sup>132</sup>

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127. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (providing that “any crime of violence . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years” would be considered an aggravated felony); 18 U.S.C. § 16 (defining “crime of violence” as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”). The 1990 Act also modified the law to include state law convictions in the definition of “aggravated felony.” *See* 8 U.S.C. § 1101(a)(43).

128. *See* Immigration Act of 1990, § 509, 104 Stat. at 5051.

129. *See id.*

130. *See* *Donaldson v. Acosta*, 163 Fed. Appx. 261 (5th Cir. 2006) (denying naturalization based on “aggravated felony” marijuana conviction when respondent was nineteen years old even though it was his only conviction, he was granted deferred adjudication, and the criminal court later dismissed the case).

131. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546; *see* *INS v. St. Cyr*, 533 U.S. 289, 296 nn. 4 & 6 (2001) (noting that while “aggravated felony” has “been defined expansively, it was broadened substantially by IIRIRA to include more “minor crimes”).

132. *See* IIRIRA, § 321, 110 Stat. at 3009-627. IIRIRA also expanded what counts as a “conviction” for immigration purposes, created expedited removal and mandatory detention for “aggravated felons,” and restricted the availability of relief and judicial review for removal orders. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–43 (2000).

Today, the definition of “aggravated felony” is broader than ever, covering some twenty categories and hundreds of offenses.<sup>133</sup>

That is not to say, however, that an aggravated felony for immigration purposes necessarily correlates to a conviction for a serious or violent crime. Indeed, it does not even guarantee that the person was convicted of a felony.<sup>134</sup> A person with only misdemeanor convictions can be considered an aggravated felon. As just one example of many, misdemeanor theft of a videogame valued at approximately ten dollars can make someone an aggravated felon for immigration purposes.<sup>135</sup> Further, the INA’s broad definition of conviction captures criminal cases that result in deferred adjudications and suspended sentences via rehabilitative statutes that later erase the record of guilt.<sup>136</sup> As a result, drug treatment and domestic violence alternative-to-incarceration programs, which frequently vacate pleas after the program is completed, and expunged convictions count forever and always as convictions for immigration purposes.<sup>137</sup> This makes it possible for someone without a criminal record to be considered an aggravated felon for immigration purposes.

The aggravated felony provision is not the only good moral character bar in the INA. Many crimes that do not fall within the broad “aggravated felony” definition still trigger a bar to a good moral character finding for a certain number of years.<sup>138</sup>

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133. See 8 U.S.C. § 1101(a)(43) (2006) (listing such crimes as murder, drug trafficking, money laundering, and theft offenses).

134. Historically, in criminal law, the term “felony” distinguished certain “high crimes” or “grave offenses” like homicide from less serious offenses known as misdemeanors. As currently used, a felony is any crime punishable by incarceration of more than one year in prison. See, e.g., 18 U.S.C. § 3156(a)(3) (defining felony as an offense punishable by more than one year in prison); *id.* § 3559(a)(1)–(8) (classifying offenses punishable by more than one year in prison as felonies and those punishable by one year or less in prison as misdemeanors).

135. See *United States v. Pacheco*, 225 F.3d 148, 149 (2d Cir. 2000) (stating that “Congress can make the word ‘misdemeanor’ mean ‘felony’” by classifying misdemeanor shoplifting convictions for which an individual received a one year suspended sentence as “aggravated felonies” for immigration purposes); *United States v. Graham*, 169 F.3d 787, 788 (3d Cir. 1999) (Congress “improvidently, if not inadvertently, [broke] the historic line of division between felonies and misdemeanors”).

136. 8 U.S.C. § 1101(a)(48)(A); see also H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (“[E]ven in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws.”).

137. See *Roldan*, 22 I. & N. Dec. 512 (B.I.A. 1999) (holding that no effect is to be given in immigration proceedings to a state action which expunges, dismisses, cancels, vacates, discharges, or otherwise removes a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

138. For example, a conviction or admission to the following bars a good moral character finding for up to five years: any controlled substance offense (except a single offense of simple possession of thirty grams or less of marijuana); any crime involving moral turpitude except for a single offense not punishable by one or more years and that does not involve a prison sentence of more than six months (see *Flores*, 17 I. & N. Dec. 225, 225 (B.I.A. 1980) (defining “crime involving moral turpitude” as “conduct which is morally reprehensible and intrinsically wrong”)); two offenses of any type and an aggregate prison sentence of five or more years; two gambling offenses; and confinement to jail for aggregate period of 180

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A host of acts committed during the statutory period also trigger a finding of no good moral character, including willfully failing or refusing to support dependents and having an extramarital affair that tends to destroy an existing marriage.<sup>139</sup>

Of course, none of these bars is necessary for USCIS to deny citizenship on character grounds. As the catch-all provision in 101(f) states, “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such a person is or was not of good moral character.”<sup>140</sup> As will be discussed in Part II, USCIS frequently uses this provision to deny naturalization to applicants with minor criminal histories.

In sum, by requiring good moral character only during the residency period, Congress inserted a background belief in the possibility of redemption from past wrongs into U.S. membership law. No criminal act barred a good moral character finding for any applicant until 1952, when the lone exception of murder was made a permanent bar. Consistent with this, courts and naturalization examiners traditionally applied a forward-looking standard that recognized reform following past wrongs. In the last twenty years, immigration law has added thousands of permanent statutory bars to a good moral character finding, including those triggered by minor offenses. As a result, the INA prevents or hinders a greater number of immigrants than ever from proving their present good moral character.

## II. THE SHADOWS OF MEMBERSHIP

This Part examines how the statutory provisions regarding good moral character and current USCIS practices regarding naturalization applications deny citizenship to legal permanent residents with criminal histories and force them to live in the shadows of membership. It identifies three groups of affected residents. Part II.A explains how statutory relief from deportation interacts with the good moral character bar to create a class of half-welcome resident immigrants who can neither be deported nor naturalize. Part II.B shows that USCIS training, direction, and adjudication result in wrongful denials on character grounds for those applicants with criminal history. Part II.C identifies a group of wary residents who forgo pursuing citizenship because truthfully disclosing past misdeeds creates too great a risk of detention or deportation.

### *A. Half Welcome*

The INA makes noncitizens deportable for a whole host of postentry criminal conduct.<sup>141</sup> From 2001 to 2010, the United States deported over one million people

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days. *See* 8 U.S.C. § 1101(f)(3); 8 C.F.R. § 316.10(b)(2) (2004).

139. *See* 8 C.F.R. § 316.10(b)(3).

140. *See* 8 U.S.C. § 1101(f).

141. *See* 8 U.S.C. § 1101(a)(43); 8 C.F.R. § 316.10(b)(2)(iv) (individuals can be charged as removable for conduct that would be a crime even if they have not been convicted of a crime); Press Release, U.S. Immigration and Customs Enforcement, Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration (Oct. 6, 2010) [hereinafter U.S. Immigration Press Release] (noting that half of those removed in fiscal year 2010—more than 195,000 individuals—were convicted criminals and boasted that this represented a “more than 70 percent increase . . .

with criminal convictions.<sup>142</sup> In some instances, individuals can seek relief from removal under immigration law and be welcomed to stay permanently in the United States.<sup>143</sup> Winning such relief often depends on proof that the applicant is a valuable, contributing member of society, with many and deep ties to America.<sup>144</sup> Each year, approximately 30,000 individuals are granted relief from removal.<sup>145</sup> Nevertheless, many remain permanently barred by statute from demonstrating that they possess the good moral character required for citizenship. I call these individuals the “half welcome,” because they are allowed to make the United States their permanent home despite their transgressions but are not able to become citizens.

Understanding how the INA puts them in that situation requires background information on removal law and the various relief provisions available. What is popularly known as “deportation,” the INA calls “removal.”<sup>146</sup> Removal proceedings begin when the government asserts that a noncitizen is either inadmissible or deportable on at least one of many possible grounds,<sup>147</sup> including a criminal conviction.<sup>148</sup> A long list of convictions, from serious, violent felonies to minor misdemeanors like shoplifting can lead to deportation.<sup>149</sup> In an ever-increasing number of cases, most notably those involving what immigration law calls aggravated felonies,<sup>150</sup> removal based on a conviction is mandatory—that is, immigration law offers no relief. The broadened scope of removal provisions

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from the previous administration”); *U.S. Deportation Proceedings in Immigration Courts*, TRACIMMIGRATION (2012), [http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php) (charting deportation proceedings by charge, and noting that in fiscal year 2009 and 2010, approximately 40,000 individuals faced removal for criminal charges).

142. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T HOMELAND SECURITY, 2010 YEARBOOK OF IMMIGRATION STATISTICS 101, tbl.38 (2011).

143. See *infra* Part II.A.1.

144. See *infra* Part II.A.1.

145. *Immigration Court Processing Time by Outcome*, TRACIMMIGRATION (2012), [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) (charting the number of individuals granted relief from removal back to 1998, with an average of approximately 30,000 grants of relief per year since 2003).

146. See, e.g., 8 U.S.C. § 1229 (regarding removal proceedings).

147. Inadmissibility applies to those who have not been lawfully admitted; deportability applies to those who have been lawfully admitted to the United States. THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 583 (7th ed. 2011). For grounds of inadmissibility, see 8 U.S.C. § 1182(a); for grounds of deportability, see *id.* § 1227(a).

148. See 8 U.S.C. § 1227(a)(2) (listing offense that trigger deportability). A conviction is not necessary for removal charges. If an individual admits or is found to have engaged in conduct that would be a crime, he can be charged as removable for such conduct absent a conviction. See 8 C.F.R. § 316.10(b)(2)(iv) (2010).

149. See 8 U.S.C. § 1227(a)(2) (listing offenses, including those classified as aggravated felonies, that trigger deportability); *United States v. Pacheco*, 225 F.3d 148, 149 (2d Cir. 2000) (“Congress can make the word ‘misdemeanor’ mean ‘felony’” by classifying misdemeanor shoplifting convictions for which an individual received a one year suspended sentence as “aggravated felonies” for immigration purposes).

150. See 8 U.S.C. § 1101(a)(43) (listing offenses that constitute an aggravated felony).

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has taken on added importance recently as the Obama administration has prioritized criminal-record-based removals.<sup>151</sup>

Immigration authorities primarily learn of a noncitizen's criminal history in two ways. First, they conduct background checks at nearly every stage of the immigration process.<sup>152</sup> Noncitizens seeking admission to the United States, and those who apply to renew their lawful status or naturalize, must provide information about their criminal history. Alternatively, the Secure Communities Initiative and the Criminal Alien Program (CAP) identify noncitizens in criminal custody who are subject to removal as a result of their convictions.<sup>153</sup>

In removal proceedings, which are conducted before an administrative judge, individuals may seek relief from removal under various provisions in the INA.<sup>154</sup> This relief is separate and apart from challenging the grounds of removal—that is, even if found to be removable, an individual may have that removal waived and be allowed to remain lawfully in the country.<sup>155</sup> Relief from removal is granted at the

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151. See Memorandum from John Morton, Assistant Sec'y, Dep't Homeland Sec. to ICE Employees (June 30, 2010) (establishing those who pose a “risk to national security or danger to public safety” as “priority one”). An ICE press release noted that half of those removed in fiscal year 2010—more than 195,000 individuals—were convicted criminals and boasted that this represented a “more than 70 percent increase . . . from the previous administration.” U.S. Immigration Press Release, *supra* note 141. In fiscal year 2009, the Office of Immigration Statistics reported that the United States removed 128,345 persons with a criminal conviction. 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 77, at 103. To put the increase in broader historical perspective, in 1983, the United States deported 863 people on criminal grounds. See Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 707 (2006). Indeed, until 1907, there were no postadmission crime-based grounds of deportation. See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1714 (2009) (citing Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900).

152. See 8 U.S.C. § 1446(a) (requiring a personal investigation of naturalization applicants that the Attorney General may waive); *Manzoor v. Chertoff*, 472 F. Supp. 2d 801, 809 (E.D. Va. 2007); *Fingerprinting Applicants and Petitioners for Immigration Benefits; Establishing a Fee for Fingerprinting by the Service; Requiring Completion of Criminal Background Checks Before Final Adjudication of Naturalization Applications*, 63 Fed. Reg. 12,979, 12,981 (Mar. 17, 1998) (amending the administrative regulations to codify “[INS] policy that [INS] must receive confirmation from the Federal Bureau of Investigation (FBI) that a full criminal background check has been completed on applicants for naturalization before final adjudication of the application”).

153. According to ICE, CAP issued over 200,000 charging documents to noncitizens in fiscal year 2010, while Secure Communities resulted in the arrest of more than 59,000 individuals in fiscal year 2010. See OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 3 (2011); U.S. Immigration Press Release, *supra* note 141 (noting that the Secure Communities initiative expanded from fourteen jurisdictions in 2008 to over 660 in the fall of 2010, with plans to expand it to every law enforcement jurisdiction nationwide by 2013).

154. See, e.g., 8 U.S.C. § 1182(h) (discussed *infra* notes 160, 161 and accompanying text).

155. See, e.g., 8 U.S.C. § 1229b(a) (allowing for the discretionary cancellation of removal for those who are found to be deportable in certain circumstances).

discretion of the immigration judge,<sup>156</sup> and reflects the belief that, despite these noncitizens' prior crimes, they could be an integral and integrated part of American society.

The requirements for the various forms of relief can be quite complex. The waivable removal grounds vary from section to section, the period of residence required for eligibility differs, and some individual deportation grounds have their own specific waiver provisions. What follows is a brief overview of three forms of relief from removal for those with criminal convictions and an explanation of how the INA nevertheless denies a path to citizenship to those granted relief.<sup>157</sup>

### 1. Certain Criminal Offenses: INA 212(h) and Former 212(c)

Two provisions of the INA make relief available to individuals with certain criminal convictions. Former INA section 212(c) provides discretionary relief ("212(c) waiver") to lawful permanent residents who either temporarily leave the country and are excludable upon their return, or who have never left but are charged with deportability.<sup>158</sup> Each case is judged on its own merits and both adverse and positive factors are considered.<sup>159</sup> Under section 212(h), an immigration judge can waive certain grounds of inadmissibility<sup>160</sup> when the applicant proves (1) that she has rehabilitated from a conviction that is fifteen years old or more,<sup>161</sup> or (2) that her removal would cause extreme hardship to a U.S.

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156. The sole exception is withholding of removal under INA section 241(b)(3)—which is mandatory provided that the applicant prove his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3).

157. These provisions do not cover all the situations whereby an individual is granted legal permanent resident status but cannot naturalize. For example, someone may receive a U visa, as a victim of physical or mental abuse, and adjust to legal permanent resident status, or adjust under the Violence Against Women Act. 8 U.S.C. § 1101(a)(15)(U). That person could still be barred from naturalizing because of a criminal conviction that prevents a finding of good moral character.

158. *INS v. St. Cyr*, 533 U.S. 289, 294–95 (2001).

159. *In re Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978).

160. A section 212(h) waiver can waive the following crimes: crimes of moral turpitude except murder or torture; prostitution; one offense of simple possession of thirty grams or less of marijuana; and two or more offenses for which the aggregate sentences to confinement were five years or more. 8 U.S.C. § 1182(h). Relevant factors for extreme hardship include the relative's family ties to the United States; the extent of ties outside the United States; conditions in the country of removal; financial impact of departure from this country; and significant health conditions.

161. *Id.* § 1182(h)(1)(A). Courts consider many factors when examining rehabilitation, including: (1) acceptance of responsibility for criminal conduct; (2) guilty pleas; (3) educational efforts; (4) lack of infractions while imprisoned; (5) absence of commission of additional crimes; (6) participation in rehabilitation programs; and (7) letters regarding good character. *See Yepes-Prado v. INS*, 10 F.3d 1363, 1372 n.19 (9th Cir. 1993); *In re Arreguin de Rodriguez*, 21 I. & N. Dec. 38 (B.I.A. 1995).

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citizen or legal permanent resident parent, spouse, or child.<sup>162</sup> To be eligible, the applicant must have lived in the United States for seven consecutive years.<sup>163</sup>

Relief under either provision is difficult to achieve.<sup>164</sup> The burden is on the applicant to establish both eligibility and that the court should exercise its discretion and grant the waiver.<sup>165</sup> Favorable considerations include family, property, and business ties in the United States; long residence in the country; service in the U.S. Armed Forces; and evidence of good character and rehabilitation if a criminal record exists.<sup>166</sup> Relief is highly unlikely in cases involving “violent or dangerous crimes, except in extraordinary circumstances”<sup>167</sup> because a “heightened showing that [the] case presents unusual or outstanding equities” is required.<sup>168</sup> If relief is granted, the applicant retains legal permanent resident status or obtains that status.<sup>169</sup>

Congress eliminated eligibility for relief under section 212(c) in 1990 for those convicted of an aggravated felony who had served five years in prison.<sup>170</sup> It then repealed section 212(c) entirely in 1996.<sup>171</sup> Relief under section 212(c) remains available, however, to a dwindling number of legal permanent residents convicted by a plea entered prior to April 1, 1997.<sup>172</sup> Currently, approximately one thousand

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162. While a 212(h) waiver is unavailable to a person admitted as a legal permanent resident who is later convicted of an aggravated felony, a nonlegal permanent resident (such as an undocumented immigrant) with an aggravated felony conviction may receive a 212(h) waiver. See *In re Michel*, 21 I. & N. Dec. 1101, 1101 (B.I.A. 1998). But see *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008), *as amended* (June 5, 2008) (stating that for those legal permanent residents who adjust postentry to legal permanent resident status, section 212(h)’s plain language demonstrates unambiguously Congress’s intent not to bar them from seeking a waiver despite aggravated felony conviction).

163. 8 U.S.C. § 1182(h).

164. Caselaw granting a 212(h) waiver based on the rehabilitation prong is nearly non-existent. My research has not yet found a single case granting a 212(h) waiver under the rehabilitation prong, perhaps because an immigration judge’s finding of absence of rehabilitation is not reviewable. See *Al-Shahin v. Holder*, 354 F. App’x 583, 583 (2d Cir. 2009) (denying to reconsider immigration judge’s denial of 212(h) waiver because finding was not reviewable).

165. *In re Matter of Marin*, 16 I. & N. Dec. 581, 587 (BIA 1978).

166. *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (B.I.A. 1996). Adverse factors include “the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien’s bad character or undesirability as a permanent resident of this country.” *Id.*

167. 8 C.F.R. 212.7(d) (2010).

168. *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993).

169. *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

170. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052.

171. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, sec. 304, § 204B(b), 110 Stat. 3009-546, 3009-597.

172. *INS v. St. Cyr*, 533 U.S. 289, 294-95 (2001). For current eligibility requirements, see 8 C.F.R. § 1212.3. The Immigration Act of 1990 amended section 212(c) to ban aggravated felons from relief under section 212(c) if they had served a term of imprisonment of at least five years. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. at

lawful residents annually demonstrate that their ties, value and service to the community, and genuine rehabilitation are so overwhelming that relief is granted under 212(c) and they are welcomed as permanent residents.<sup>173</sup> Consider, for example, Courtney Donaldson, who legally entered the United States from Jamaica at the age of fourteen.<sup>174</sup> In 1990, at the age of nineteen, he was found guilty of possession of marijuana.<sup>175</sup> The court granted him deferred adjudication and, in 1991, placed him on probation for ten years.<sup>176</sup> Three and a half years later, the court dismissed the case and discharged Mr. Donaldson from probation.<sup>177</sup> In 1997, Mr. Donaldson applied for naturalization.<sup>178</sup> The INS denied his application on the basis that his conviction, which constituted an aggravated felony, statutorily barred him from ever demonstrating the requisite good moral character.<sup>179</sup> Not only that, the government initiated removal proceedings against him based on his conviction.<sup>180</sup> Mr. Donaldson requested and was granted a 212(c) waiver of deportation, in part because he was married to a U.S. citizen, with whom he had two citizen children; attended church with his family; had been steadily employed since 1989; paid his taxes; and had no further arrests or convictions.<sup>181</sup> The waiver permitted him to remain in the United States as a legal resident for the rest of his adult life, but he remains barred from ever naturalizing because his conviction triggers the permanent aggravated felon character bar.<sup>182</sup>

Another example involves Catalina Arreguin de Rodriguez, who was convicted in 1993 of importing marijuana into the United States.<sup>183</sup> She was forty years old at

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5052. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) further amended section 212(c) by reducing the class of legal permanent residents eligible for relief from removal. AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277. Section 440(d) of the AEDPA made the following ineligible for relief under 212(c): (1) aggravated felons; (2) those convicted of certain controlled substance offenses; (3) those convicted of firearm offenses; (4) those convicted of certain miscellaneous crimes; and (5) those convicted of multiple “crimes involving moral turpitude.” See AEDPA, § 440(d), 110 Stat. at 1277. Section 304(b) of IIRIRA repealed section 212(c), effective April 1, 1997. IIRIRA, § 304, 110 Stat. at 3009-586. .

173. After a bump in the number of people granted relief under former 212(c) following *St. Cyr*, the numbers have shrunk. In fiscal year (FY) 2006, 1437 individuals were granted a 212(c) waiver, 1405 in FY 2007, 1048 in FY 2008, 857 in FY 2009, 859 in FY 2010 and 892 in FY 2011. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK R3, tbl.16 (2012). A downward trend is likely to continue.

174. *Donaldson v. Acosta*, 163 Fed. App’x 261, 262 (5th Cir. 2006).

175. *Id.*

176. *Id.*

177. *See id.*

178. *Id.*

179. *Id.* at 263.

180. *Id.* at 262.

181. Plaintiff’s Motion for Summary Judgment at \*1, *Donaldson v. United States Citizenship & Immigration Services*, No. H 04 0911 (S.D. Texas 2004), 2004 WL 3722503, *aff’d sub nom Donaldson v. Acosta*, 163 Fed. App’x 261 (5th Cir. 2006)..

182. When Mr. Donaldson filed a second naturalization application in 2001, more than a decade after his lone conviction as a teenager for possession of marijuana, he was denied again, because his conviction forever barred him from demonstrating good moral character. *See Donaldson*, 163 Fed. App’x at 263.

183. *In re Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 39 (B.I.A. 1995).

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the time and had been residing in the United States since 1970.<sup>184</sup> It was her first and only conviction.<sup>185</sup> She was incarcerated and removal proceedings were initiated against her.<sup>186</sup> The Board of Immigration Appeals (BIA) overturned the immigration judge's denial of a 212(c) waiver, crediting Ms. Arreguin de Rodriguez's efforts at rehabilitation during her incarceration, as well as her nearly twenty years of lawful permanent residence in the United States and her five U.S. citizen children.<sup>187</sup> Despite her long permanent residence, which the BIA called an "unusual or outstanding equity,"<sup>188</sup> Ms. Arreguin de Rodriguez cannot ever naturalize because her drug conviction is an aggravated felony and prevents her from establishing her good moral character.

Countless others find themselves in a similar limbo—welcome to stay, despite their past crimes, because of their demonstrated ties and rehabilitation, but unable to become full members of their community.

### 2. 209(c)—Adjustment of Status for Refugees/Asylees

Each year, the United States takes in tens of thousands of asylees and refugees.<sup>189</sup> A grant of refugee status or asylum does not automatically confer lawful permanent resident status. To become a lawful permanent resident, asylees and refugees must apply for adjustment of status under INA section 209.<sup>190</sup> To be eligible for adjustment, a person must, among other things, be admissible.<sup>191</sup> Criminal convictions obtained after a grant of asylum, but before filing an application for adjustment, can make someone inadmissible.<sup>192</sup> Section 209(c) of the INA allows for a waiver of certain grounds of inadmissibility.<sup>193</sup> In adjudicating

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184. *See id.* at 38–39.

185. *Id.* at 42.

186. *See id.* at 39.

187. Evidence of her efforts toward rehabilitation included her acceptance of responsibility for her crime, her pursuit of further education while in prison, her exemplary disciplinary record in prison, and her participation in a church ministry. *Id.* at 40.

188. *Id.* at 41.

189. In 2009, the United States admitted 74,602 persons as refugees and granted asylum to 22,119 individuals. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT, REFUGEES AND ASYLEES: 2009 (2010). There is no content distinction between the two statuses. The refugee application is made outside of the United States prior to entry while asylum is available to those already in the United States.

190. 8 U.S.C. § 1159(b) (2006).

191. *Id.* § 1159(b)(5). The other things are (1) be physically present in United States for more than one year after being granted asylum; (2) continue to be a "refugee" under 8 U.S.C. § 1101(a)(42)(A); and (3) not "firmly resettled" in any foreign country. *Id.* § 1159(b).

192. *See In re K-A-*, 23 I. & N. Dec. 661, 662 (B.I.A. 2004).

193. *See* 8 U.S.C. § 1159(c) (granting waiver "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest"). Refugees and asylees are unique noncitizens because they have no home country they can safely return to. Adjusting their immigration status to legal permanent resident allows them to take an important (and required) step on the path to becoming an American citizen.

a waiver application, the applicant's equities are balanced against the seriousness of the criminal offense that made her inadmissible.<sup>194</sup>

For example, removal proceedings were brought against a Cambodian refugee who was convicted by plea of second-degree robbery and sentenced to three to six years in prison.<sup>195</sup> An *en banc* panel of the BIA upheld an immigration judge's grant of a 209(c) waiver to her, noting her four U.S. citizen children, a legal resident husband, her remorse for her prior actions, and over fifteen years of residence in the United States.<sup>196</sup> From that, the BIA concluded that her "conviction is not indicative of her overall character and that she is a person who would be an asset to our society."<sup>197</sup> Nevertheless, her conviction makes her an aggravated felon, and the INA permanently bars her from becoming a citizen.<sup>198</sup>

In sum, the same statute that affords relief from removal to individuals with a criminal record, and grants them lawful permanent resident status, shuts the door to full membership. It does so even though a judge has recognized their ties to the community, credited their rehabilitation, and welcomed them to stay permanently in the United States. While there is undeniable humanitarianism behind these waiver provisions, Part III, below, explains the significant drawbacks to permanently denying these residents an opportunity to become citizens.

#### *B. Denied on Character Grounds*

Immigrants who apply for naturalization do so at the risk of triggering removal proceedings against them.<sup>199</sup> The sweeping changes in immigration law, described above, have made many crimes, which did not previously carry the consequence of deportation, grounds for removal. In addition, many immigrants, who were not removable at the time they committed or admitted to a crime, may now be deportable for that conduct.<sup>200</sup>

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194. See *In re Jean*, 23 I. & N. Dec. 373, 383 (A.G. 2002) (noting that those who commit violent or dangerous crimes must show that denial of adjustment to legal permanent resident would result in exceptional and extremely unusual hardship, and even that might not be enough). It is unlikely that an individual with an aggravated felony conviction would apply for adjustment, because the upside (becoming a legal permanent resident) does not come close to the downside (being placed in removal proceedings and deported). However, the waiver would be sought if removal proceedings were initiated.

195. *In re H-N-*, 22 I. & N. Dec. 1039, 1049–50 (B.I.A. 1999).

196. *Id.* at 1045.

197. *Id.* But see *In re Jean*, 23 I. & N. Dec. at 382 (finding the majority opinion in *H-N-* upholding the grant of a 209(c) waiver "to be wholly unconvincing").

198. See 8 U.S.C. §1101(a)(43)(g) (2006) (identifying any theft offense for which the term of imprisonment is more than one year as an aggravated felony).

199. The same risk lies for those who apply to adjust their status, and most of the practices discussed in this Article apply to those who seek to adjust their status to legal permanent resident. For example, an asylee who seeks to adjust her status to legal permanent resident can trigger removal proceedings by submitting her application if she has a criminal conviction since her arrival.

200. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 97 (1998). Some immigrants plead guilty without being aware that their plea subjects them to deportation. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1473

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This section examines what happens to those with criminal history who apply to naturalize. First, it looks at those whose criminal history statutorily bars them from showing the necessary good moral character, and discusses a USCIS policy memorandum that directs naturalization examiners to issue removal charging documents against applicants “who appear to be removable” or refer them to ICE for possible detention and removal. Second, it discusses those who are not per se barred but are denied on character grounds via the agency’s exercise of discretion.

### 1. Statutorily Barred and Referred Removal

The story of Qing Hong Wu illustrates the precarious process currently faced by naturalization applicants with a criminal history. Mr. Wu legally immigrated to the United States from China with his parents at the age of five.<sup>201</sup> In 1995, at the age of fifteen, he committed several muggings, with other teenagers in Manhattan; received two convictions for robbery in adult court; and was sentenced to three to nine years at a reformatory. Good behavior earned his release after three years. From there, he supported his mother by working, moving his way up from data entry clerk to vice president for internet technology at a national company. A dozen years after his convictions, engaged to be married to a U.S. citizen, Mr. Wu applied for citizenship, disclosing in his application his robbery convictions. He had no other contact with the criminal justice system and was lauded by family, friends, and coworkers as a hard-working, upstanding member of the community.

Under immigration law, Mr. Wu’s convictions are aggravated felonies, making him statutorily unable to demonstrate his current good moral character and, thus, permanently ineligible for citizenship.<sup>202</sup> Instead of denying his application, USCIS transferred Mr. Wu’s case to ICE (the agency responsible for immigration enforcement), he was promptly placed in federal detention as a criminal alien, and mandatory removal proceedings were initiated against him. Remarkably for Mr. Wu, public outcry and media attention led New York’s governor to pardon Mr. Wu, and just two months later, his application was granted and he was sworn in as an American citizen.<sup>203</sup> In so doing, Governor Paterson noted that “Qing Hong Wu’s case proves that an individual can, with hard work and dedication, rise above

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(2010) (holding that noncitizens can base an ineffective assistance of counsel claim on the failure to inform of the immigration consequences of a plea bargain).

201. For details of Mr. Wu’s story, see Nina Bernstein, *After Governor’s Pardon, an Immigrant Is Sworn in as a Citizen*, N.Y. TIMES, May 29, 2010, at A20 [hereinafter Bernstein, *After Governor’s Pardon*]; Nina Bernstein, *Judge Keeps Word to Immigrant Who Kept His*, N.Y. TIMES, Feb. 19, 2010, at A1 [hereinafter Bernstein, *Judge Keeps Word*]; Nina Bernstein, *Paterson Rewards Redemption with a Pardon*, N.Y. TIMES, Mar. 7, 2010, at A29 [hereinafter Bernstein, *Paterson Rewards*].

202. See 8 U.S.C. § 1101(a)(43)(g) (identifying any theft offense for which the term of imprisonment is more than one year as an aggravated felony).

203. See Bernstein, *After Governor’s Pardon*, *supra* note 201; Bernstein, *Paterson Rewards*, *supra* note 201. Mr. Wu’s pardon petition was supported by his sentencing judge, family, friends, and employers, the New York City District Attorney, the Police Benevolent Association, and several Chinese, Asian, Pan Asian, and immigrant organizations from across the country. Bernstein, *Judge Keeps Word*, *supra* 201.

past mistakes and turn his life around.”<sup>204</sup> The criminal court judge who had originally sentenced Mr. Wu for his youthful robberies, and who supported his pardon petition, called the end result “truly a magnificent affirmation of American values and justice.”<sup>205</sup>

The result in Mr. Wu’s case is a just one, welcoming to the citizenry someone who residents and leaders consider a valuable and contributing member of the community. But his story also serves as an indictment of current naturalization policy. It should not require the extraordinary remedy of an executive pardon<sup>206</sup> to open a path to membership for people like Mr. Wu. Frustrated because it does, Governor Paterson announced not long after the Wu case’s resolution that New York would convene a special Immigration Pardon Panel that would accelerate the consideration of pardon petitions filed by legal immigrants for old or minor criminal convictions, with the aim of preventing them from being deported.<sup>207</sup> Paterson said that “some of our immigration laws . . . are embarrassingly and wrongly inflexible. . . . In New York we believe in renewal. . . . In New York, we believe in rehabilitation.”<sup>208</sup> In a press release announcing the panel’s first pardons, Governor Paterson declared:

That immigration officials do not credit rehabilitation, nor account for human suffering is adverse to the values that our country represents . . . . I have selected cases that exemplify the values of New York State and that of a just society: atonement, forgiveness, compassion, realism, open arms, and not retribution, punitiveness and a refusal to acknowledge the worth of immigration.<sup>209</sup>

Of course, not all immigrants with a criminal record subjecting them to deportation are as fortunate as Mr. Wu or the thirty-four immigrants in New York who received a pardon from Governor Paterson.<sup>210</sup> For immigrants across the

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204. Bernstein, *Paterson Rewards*, *supra* note 201.

205. Bernstein, *After Governor’s Pardon*, *supra* note 201.

206. At the time, Mr. Wu’s was only the twelfth pardon granted by New York since 1973. See Kirk Semple, *Hip-Hopper Is Pardoned by Governor*, N.Y. TIMES, May 24, 2008, at B1; *New York Clemency Decisions*, NEW YORK STATE DEFENDERS ASSOCIATION <http://www.nysda.org/html/clemency.html> (listing New York clemency decisions since 1995). This is part of a national pattern. The percentage of federal clemency applications granted has declined sharply in recent decades. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348 (2008).

207. Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 4, 2010, at A1; see also Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184 (2000–01).

208. Hakim & Bernstein, *supra* note 207.

209. Press Release, Governor Paterson Announces Pardons (Dec 6, 2010) [hereinafter Press Release, Governor Paterson]. All told, Governor Paterson granted twenty-four pardons to immigrants facing deportation for their crimes. Celeste Katz, *Gov. Paterson Grants 24 Pardons to Immigrants*, N.Y. DAILY NEWS (Dec. 24, 2010), <http://www.nydailynews.com/blogs/dailypolitics/2010/12/gov-paterson-grants-24-pardons-to-immigrants>; Press Release, Governor Paterson, *supra*.

210. Some may argue that the system works just as it should, reserving for the

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nation with a criminal record, applying for naturalization brings potential or mandatory banishment instead of membership.<sup>211</sup> While USCIS does not publish data on how many naturalization applicants it refers to ICE, anecdotal reports from practitioners support the fact that it happens quite frequently.<sup>212</sup>

An internal agency memo shows that the original course of Mr. Wu's case (from naturalization applicant to removal charges) is precisely what the agency wants. On July 11, 2006, Associate Director for Domestic Operations of USCIS, Michael Aytes, issued "Policy Memorandum No. 110: Disposition of Cases Involving Removable Aliens" ("Aytes Memo").<sup>213</sup> The internal USCIS memo prioritizes the removal of individuals by ICE over the adjudication of naturalization petitions by instructing immigration service officers (ISOs) to filter out naturalization applicants with a criminal record and refer them for removal proceedings.<sup>214</sup> While the Aytes Memo is not classified, it is an interoffice memo stamped "for office use only," written to agency directors and chiefs, and was not intended for public view.<sup>215</sup>

The Aytes Memo categorizes naturalization applicants<sup>216</sup> with arrests or criminal histories into five groups.<sup>217</sup> I will focus on applicants who fall under the memo's "Egregious Public Safety Cases" (EPSC) category because the memo directs that they be referred directly and immediately to ICE for determinations of removability.<sup>218</sup> EPSC is a term of art that covers any case where an applicant "is under investigation for, has been arrested for (without disposition), or has been convicted of" one of ten categories of conduct listed in the memo.<sup>219</sup> The Aytes

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extraordinary cases the grant of an executive pardon. But New York is just one state of fifty, and Governor Paterson is already out of office there.

211. *See discussion infra at nn. 213-231*

212. *See* Letter from The Legal Aid Society of New York, Immigration Law Unit, to Alejandro Mayorkas, Director, USCIS 1, 12 (May 24, 2010) (copy on file with author) [hereinafter LAS Letter] (describing "the placement of a substantial and increasing number of naturalization applicants into removal proceedings" and describing a long-time lawful permanent resident who was arrested at his naturalization interview and charged with removal in 2009 due to a twenty-six-year-old conviction for possession of a weapon in the fourth degree).

213. Memorandum from Michael Aytes, Associate Director, Domestic Services, U.S. Citizenship & Immigration Services, Dep't of Homeland Sec. Disposition of Cases Involving Removable Aliens to National Security & Records Verification (July 11, 2006) [hereinafter Aytes Memo].

214. *Id.* at 4.

215. *Id.*

216. The Memo's directives apply not just to naturalization petitions but to all cases where USCIS is making an adjudication, such as applications for permanent residence. *Id.*

217. The five groups are: (1) egregious public safety cases, (2) other criminal cases, (3) cases where the Notice to Appear (NTA) is prescribed by regulation, (4) cases denied by USCIS based on fraud, and (5) all other cases. *Id.* at 2-7.

218. *Id.* at 2.

219. The ten categories are: (1) murder, rape, or sexual abuse of a minor; (2) illicit trafficking in firearms or destructive devices; (3) offenses relating to explosive materials or firearms; (4) crimes of violence for which the term of imprisonment imposed or where the penalty for a pending case is at least one year; (5) offenses relating to the demand for or receipt of ransom; (6) child pornography; (7) offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons; (8) offenses related to alien smuggling; (9)

Memo directs USCIS to refer all EPSC applicants to ICE and either hold in abeyance the naturalization application or deny it outright, on the presumption that removal will follow the referral.<sup>220</sup> This holds even though the ultimate disposition of the arrest that makes an applicant an EPSC may not make the individual removable from the country. Indeed, the applicant may not have committed the alleged act, the applicant may be acquitted, or the charges may be dropped.

The mandatory referral for removal persists even though there are at least two ways that the EPSC definition captures individuals who are eligible to naturalize. First, it includes arrestees even though the INA and the regulations on good moral character do not include bars for merely suspected activity that the applicant does not admit to doing.<sup>221</sup> Second, while the INA bars a finding of good moral character only for those convicted of an “aggravated felony” after November 29, 1990, the EPSC definition covers those with “aggravated felony” convictions from any time.<sup>222</sup> By instructing examiners to deny these applications, the Aytes Memo creates per se bars to naturalization that are not found in the INA.

The agency is so keen on deporting these aspiring citizens that the Aytes Memo, for the first time, gave local USCIS district offices the authority to place applicants directly into removal proceedings.<sup>223</sup> In addition, it encourages ICE to request that “USCIS promptly schedule an interview for the purpose of ICE arresting and taking the alien into custody[,]” stating that recent cases where people were detained at their naturalization interview “demonstrated the effectiveness of this strategy.”<sup>224</sup> Practitioners have confirmed that USCIS has instructed several of their clients to appear for an interview related to their naturalization application, and those clients were detained by ICE on arrival.<sup>225</sup>

The expansive definition of EPSC in the Aytes Memo means that a significant number of individuals who are eligible to naturalize are wrongly denied or are detained and placed in removal proceedings before their naturalization application

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human rights violators, known or suspected street gang members, or Interpol hits; and (10) re-entry after an order of exclusion, deportation or removal subsequent to a conviction for a felony where permission to reapply for permission has not been granted. *Id.* at 2–3.

220. *Id.* at 3–5.

221. *Id.* at 3 (“[E]ven without a conviction, an alien may be an egregious public safety case . . .”).

222. The Aytes Memo nowhere states a time restriction for triggering offenses. *Id.*

223. See JoJo Annobil, *The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 *FORDHAM L. REV.* 517, 518 (2009) (“Previously, USCIS immigration service officers (ISOs) only had the authority to grant or deny an immigration benefit—such as naturalization or permanent residence—but not the authority to commence immigration proceedings against those applicants whose cases they had denied.”). Annobil notes that “[i]n fiscal year 2007, USCIS placed 23,211 applicants in removal proceedings and referred 813 applicants every month to ICE for placement into proceedings.” *Id.* at 518–19.

224. Aytes Memo, *supra* note 213, at 4 & n.7.

225. LAS Letter, *supra* note 212, at 12 (describing long-time lawful permanent resident who was arrested by ICE at his naturalization interview in 2009 and placed in removal proceedings due to a twenty-six-year-old conviction for possession of a weapon in the fourth degree). As the letter notes, because most naturalization applicants are not represented by counsel, those cases familiar to attorneys likely only represent the tip of the iceberg.

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is adjudicated. Delio Nunez is just one example.<sup>226</sup> Mr. Nunez, who is fifty-one years old, came to the United States as a child from the Dominican Republic.<sup>227</sup> In 2007, he applied for citizenship and disclosed that he spent two years in jail in the 1980s after he pleaded guilty to armed robbery.<sup>228</sup> Mr. Nunez eventually received a call from an ICE agent telling him that he was being charged with removal and that he had to surrender to federal authorities.<sup>229</sup> Because Mr. Nunez's conviction occurred prior to 1990, he is not per se barred from demonstrating his current good moral character.<sup>230</sup> Nevertheless, the conviction makes him removable,<sup>231</sup> and the Aytes Memo instructs naturalization examiners to refer individuals like Mr. Nunez to ICE for removal proceedings.

This is not a result that the INA demands, nor is it clear that it is the properly prioritized result. USCIS promotes naturalization, distributing information via its website and elsewhere that highlights the benefits of naturalization and encourages immigrants to apply.<sup>232</sup> For the same agency to affirmatively use the naturalization process as a source for removal candidates contradicts its mission and is fundamentally unfair.<sup>233</sup> Many who apply for naturalization are long-time residents of the United States with citizen family members.<sup>234</sup> The mere fact that someone applies for citizenship should not place her at a higher risk of removal than noncitizens who do not apply to naturalize.

Singling these individuals out for removal proceedings also poorly allocates limited agency resources. Some individuals referred for removal will qualify for relief, prevail during their removal proceedings, and seek naturalization again,

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226. See Erica Pearson, *Citizen Bid Turns Into Deportation Rap*, N.Y. DAILY NEWS, Nov. 3, 2010, at 24.

227. *Id.*

228. *Id.*

229. *Id.*

230. See 8 U.S.C. § 1427 (2006); 8 C.F.R. § 316.10 (2010); U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL ch. 73.6 (2011), available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> [hereinafter AFM]; Amended Definition of "Aggravated Felony" and the Section 101(f)(8) Bar to Good Moral Character, Genco Op. No. 96-16, (INS Dec. 3, 1996), at \*2, available at 1996 WL 33166347.

231. Armed robbery is an "aggravated felony" that triggers deportability. 8 U.S.C. §§ 1101(a)(43), 1227(a)(2).

232. See, e.g., USCIS, A GUIDE TO NATURALIZATION, *supra* note 66; Office of Citizenship, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a5e314c0cee47210VgnVCM100000082ca60aRCRD&vgnextchannel=a5e314c0cee47210VgnVCM100000082ca60aRCRD>.

233. For a discussion of agencies who seek to achieve multiple, and sometimes conflicting, missions, see Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

234. The typical successful naturalization applicant is married, thirty-nine years old, and has been a legal permanent resident for at least six years. See JAMES LEE, U.S. CITIZENSHIP & IMMIGRATION SERVS., ANNUAL FLOW REPORT: U.S. NATURALIZATIONS: 2010 4 (2011) (noting that 67% of persons naturalized in 2010 were married, and 30% were between the ages of 35 and 44).

where the result will ultimately be the same had the naturalization application been adjudicated completely in the first place.

A further impact of removal charges against naturalization applicants is that INA section 318 bars consideration of a naturalization application when removal proceedings are ongoing.<sup>235</sup> Section 318 was enacted to prevent individuals from circumventing removal proceedings by applying for naturalization in district court, which would serve as a complete defense to removal.<sup>236</sup> It therefore stands for the proposition that ongoing proceedings should not be interrupted by the initiation of a proceeding in another forum. But, for applicants like Qing Hong Wu and Delio Nunez, naturalization is not being used as an end-run around removal proceedings because they filed the naturalization application first. Yet, because of the Aytes Memo, removal proceedings triggered by naturalization applications now halt the prior naturalization proceeding. Therefore, the Aytes Memo's directive to shelve naturalization applications and proceed to removal is contrary to the statute.

## 2. Discretionary Denials

This Section demonstrates the intimidating and counterproductive ways that USCIS addresses good moral character issues for naturalization applicants whose criminal record does not statutorily bar a good moral character finding. It reviews the USCIS Adjudicator's Field Manual (AFM) that instructs examiners in making good moral character decisions and concludes that it is essentially a primer on how to deny applicants on character grounds. It Using actual good moral character denials, evidence shows that some examiners are misapplying the law and regulations, and consequently, the examiners are erroneously using the good moral character requirement to deny naturalization to those with minor criminal backgrounds.

### a. Agency Instruction to Naturalization Examiners

From 1790 until 1990, exclusive jurisdiction to grant naturalization rested with courts.<sup>237</sup> In response to increasing naturalization processing backlogs, Congress

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235. 8 U.S.C. § 1429.

236. *See* *Shomberg v. United States*, 348 U.S. 540, 544 (1955) (Congress enacted section 318 to end the “race between the alien to gain citizenship and the Attorney General to deport him.”).

237. The first Naturalization Act entrusted any common law court of record to hear and decide a naturalization petition. Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103, 103–04 (1790). Federal courts were granted concurrent jurisdiction in 1795. *See* Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414–15 (1795) (allowing a supreme, superior, district, or circuit court of any state or territory, or a circuit or district court of the United States, to handle naturalization actions). This continued throughout the nineteenth and twentieth centuries. *See* Naturalization Act of 1906, ch. 3592, § 3, 34 Stat. 596, 596 (conferring exclusive jurisdiction to naturalize aliens as citizens of the United States on specified courts, including United States circuit and district courts in any State, and all courts of record in any State or Territory having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.”)

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passed the Immigration Act of 1990, which was intended to streamline the naturalization process by establishing a system of administrative naturalization.<sup>238</sup> Effective October 1, 1991, Congress gave the attorney general authority to naturalize a citizen without permission from the district court.<sup>239</sup> This authority was delegated to the executive agency responsible for immigration and naturalization matters by regulation.<sup>240</sup> Today, that agency is called the United States Citizenship and Immigration Services.

The USCIS AFM is a several hundred-page document that details USCIS policies and procedures for adjudicating immigration benefit applications and petitions.<sup>241</sup> It is a significant information source for ISOs, the USCIS employees who review and decide naturalization petitions in the first instance. Chapters 71 through 76 of the AFM relate to naturalization, with chapter 73.6 devoted exclusively to good moral character considerations.<sup>242</sup>

The opening paragraph of the AFM chapter on good moral character begins with two telling remarks that show how USCIS wants ISOs to approach the character issue. The AFM notes that “[a]lthough the law specifies that the good moral character requirement applies to the statutory period,” and “[a]lthough the focus should be on conduct during the statutory period,” it makes clear that the character inquiry “should extend to the applicant’s conduct during his or her entire lifetime.”<sup>243</sup> The manual notably fails to clarify the rule that examiners cannot rely exclusively on pre-period conduct to deny an application on character grounds.<sup>244</sup> Instead, the AFM urges ISOs to “obtain a complete record of any criminal, unlawful, or questionable activity in which the applicant has ever engaged, regardless of whether such information eventually proves to be material to the moral character issue.”<sup>245</sup>

After outlining the permanent and conditional character bars to establishing good moral character,<sup>246</sup> the remaining three-quarters of the chapter fall under the

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238. Pub. L. No. 101-649, sec. 401–08, 104 Stat. 4978, 5038–47 (1990) (codified as amended in scattered sections of 8 U.S.C.).

239. The major change was made by a 1990 statute, which was followed by an adjustment in 1991 that slightly enhanced the role of the courts. *See id.* sec. 401, 104 Stat. at 5038, *amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §§ 101–02, 105 Stat. 1733, 1733–36 (codified as amended in scattered sections of 8 U.S.C.).

240. 8 C.F.R. § 310.1 (2010).

241. AFM, *supra* note 230.

242. *Id.*

243. *Id.* at ch. 73.6(a). A grammarian might notice the repeated use of the subordinating conjunction “although,” suggesting that the idea in the subordinated clauses (what the law specifies and what the focus should be) is less important than the idea in the main clause of the sentence (look everywhere for bad character evidence).

244. Interpretation 316.1 Naturalization Requirements, INS Interp. Ltr. 316.1 (2001) at \*14, *available at* 2001 WL 1333876 (as long as the pre-period conduct is not a post-November 29, 1990 “aggravated felony”).

245. AFM, *supra* note 230, at ch. 73.6(b). The AFM also reminds ISOs that Congress defines “conviction” broadly for immigration purposes to include, among other things, expungements. *Id.* at ch. 73.6(c).

246. *Id.* at ch. 73.6(a)–(c).

subheading “Finding a Lack of Good Moral Character.”<sup>247</sup> In it, the AFM teaches ISOs how to deny an application on character grounds and how to make sure that such a decision will stand up to a legal challenge.<sup>248</sup> It does so primarily by presuming that any prior criminal history denotes bad character. For example, if the examiner determines that the applicant’s criminal conviction constitutes an aggravated felony but that conviction occurred before November 29, 1990, and thus does not preclude a good character finding, the AFM teaches examiners how they can still deny on character grounds.<sup>249</sup> The manual states that the applicant’s actions during the statutory period must reflect a reform of character.<sup>250</sup> The AFM does not explain where this requirement comes from (it is nowhere in the law or regulations) and offers no guidance on what reflects reform. It does not, for example, instruct ISOs that character references from community members would help resolve the inquiry. Nor does it state that a lack of subsequent arrests, by itself, reflects positively.<sup>251</sup> Instead, it prioritizes the collection of negative evidence about the applicant.<sup>252</sup> So determined is the agency to find negative information, the AFM suggests that ISOs ask applicants the following Kafkaesque questions: “Have you ever been in a police station?” and “Have you ever had a record sealed by a judge and been told that you did not have to reveal the criminal conduct?”<sup>253</sup>

The AFM’s current language contrasts sharply with the agency’s mid-century view of the good moral character requirement.<sup>254</sup> As mentioned above, the 1944 *Nationality Manual* endorsed a decidedly redemptive view toward prior criminal conduct. It stated that “Congress undoubtedly intended to provide for the reformation of those who have been guilty of past misdeeds”<sup>255</sup> and declared that the good moral character provision “makes ample allowance for reformation,” so much so that it was the service’s position that “[n]otwithstanding that a petitioner may have been convicted of murder prior to the statutory period, he may nevertheless be in a position to establish good moral character.”<sup>256</sup>

The punitive and unforgiving framing of the character inquiry in the AFM combined with the Aytes Memo to produce what advocates describe as a growing number of naturalization denials on good moral character grounds and naturalization applicants placed in removal proceedings.<sup>257</sup>

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247. *Id.* at ch. 73.6(d).

248. *Id.*

249. *Id.*

250. *Id.* at ch. 73.6(d)(3)(A).

251. *Rashtabadi v. Immigration & Naturalization Serv.*, 23 F.3d 1562, 1571 (9th Cir. 1994) (stating that evidence of no further arrests or convictions is “at least probative of . . . rehabilitation” in context of waiver inquiry).

252. AFM, *supra* note 230, at ch. 73.6(b).

253. *Id.*

254. *See supra* Part I.B.

255. IMMIGRATION & NATIONALITY SERV., DEP’T OF JUSTICE, NATIONALITY MANUAL: FOR THE USE OF OFFICERS AND EMPLOYEES OF THE IMMIGRATION & NATURALIZATION SERVICE § 773 (1944).

256. *Id.* § 773–74.

257. Part of the increase in character-based denials may be a reaction to criticisms aimed at the immigration service following the 1995–96 Citizenship USA (CUSA) Initiative. CUSA was meant to reduce the backlog of pending naturalization applications, with a goal

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### b. Good Moral Character Denials

A look at recent naturalization denials and a deposition of an ISO demonstrate a further problem with regard to good moral character determinations: erroneous understandings of the applicable law leading to wrongful denials on character grounds. Some are wrongful because the examiner thought the denial was compelled when it was not, while others are inexplicable.

Consider the case of Kichul Lee. In 1999, Mr. Lee, a South Korean immigrant, received a \$152 ticket for collecting three dozen too many oysters along a Puget Sound, Washington beach.<sup>258</sup> He promptly paid his fine, and several years later applied for naturalization.<sup>259</sup> He had no contact whatsoever with the criminal justice system. USCIS denied his application, stating that Mr. Lee failed to establish his good moral character.<sup>260</sup> The Washington State Department of Fish and Wildlife officer who issued the ticket said that “I wouldn’t consider [the infraction] serious at all,” and “[i]t would have been very nice if [the immigration officer] had contacted me to discuss the case.”<sup>261</sup> But the ISO did not.

Mr. Lee’s experience is not isolated. So pervasive was the practice of denying citizenship based on minor infractions that Lee was the named plaintiff in a class action lawsuit against USCIS alleging a policy and practice of unlawfully denying naturalization on the basis of minor arrests or criminal convictions and considering only negative character evidence.<sup>262</sup> The government settled the matter, agreeing to improve its citizenship decision-making concerning applicants’ good moral character and better train and supervise adjudicators to ensure that they make legally proper decisions.<sup>263</sup> It also agreed to reopen and reconsider hundreds of

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of processing over one million naturalization applicants by the end of 1996. A 2000 Office of Inspector General (OIG) report on CUSA concluded that the “integrity of naturalization adjudications . . . suffered badly as a result of INS’ efforts to process naturalization applications more quickly.” OFFICE OF THE INSPECTOR GEN., DEP’T OF JUSTICE, SPECIAL REPORT: AN INVESTIGATION OF THE IMMIGRATION AND NATURALIZATION SERVICE’S CITIZENSHIP USA INITIATIVE: EXECUTIVE SUMMARY 5 (2000). Much of the criticism focused on hasty or incomplete criminal background checks that allowed applicants with potentially disqualifying criminal histories to be naturalized. *See id.* at 14–20. In addition, the OIG found that the service failed to provide adequate guidance concerning the evaluation of good moral character. *Id.* at 17–18. The upshot of the CUSA outcry was that the agency needed to scrutinize much more carefully the criminal backgrounds of naturalization applicants and ensure that those who lacked good moral character not be admitted to the citizenry.

258. Chris McGann, *One Mistake Robs Man of Citizenship: Moral Character Standard Challenged in Class Action Suit*, SEATTLE POST-INTELLIGENCER, May 10, 2004, at A1; Lornet Turnbull, *Goal of U.S. Citizenship Reached*, SEATTLE TIMES, Feb. 9, 2005, at B1.

259. McGann, *supra* note 258, at A1.

260. *Id.*

261. *Id.*

262. First Amended Complaint Class Action at ¶ 16, *Lee v. Ashcroft*, No. C04-449L (W.D. Wash. May 4, 2004) (identifying, for example, Plaintiff Sam Ta, who was denied citizenship on good moral character grounds on the basis of a violation of the Seattle Municipal Code for “a non-violent argument with his then-girlfriend, who was standing outside a locked door at the time of the incident”).

263. Settlement Agreement, *Lee v. Gonzales*, No. C04-449-RSL (W.D. Wash. July 10, 2005).

naturalization applications that were denied for a lack of good moral character based on a minor criminal conviction decided by the Seattle, Spokane, and Yakima offices during a specific time period.<sup>264</sup> Rejecting USCIS's austere view of the character requirement, the federal judge in the case ordered Lee sworn in as a U.S. citizen.<sup>265</sup> As a result of the class litigation, at least 158 of those who took advantage of the process were also granted naturalization.<sup>266</sup>

A more recent case from New York shows that the practice was not confined to the Pacific Northwest and has not stopped. Mr. A's naturalization application was denied by the New York office because, within the five-year statutory period immediately preceding his application, Mr. A received a traffic ticket for "failure to signal" a turn.<sup>267</sup> The naturalization examiner decided that, on the basis of that ticket, Mr. A lacked the good moral character necessary for citizenship.<sup>268</sup> Mr. A appealed the denial and was eventually naturalized, though not before he had to waste his own, and the agency's limited, resources in overturning the wrongful denial.<sup>269</sup>

In other situations, ISOs deny naturalization on character grounds mistakenly believing that the applicant is barred from demonstrating good moral character when in fact he is not. For example, USCIS denied the naturalization petition of Mr. M, a Vietnam veteran whose only criminal blemish was a 1976 court martial for selling marijuana while in the armed services.<sup>270</sup> The examiner stated that the court martial constituted an "aggravated felony," and someone convicted of an "aggravated felony" "at any time" could not demonstrate good moral character.<sup>271</sup> This is simply not the law. The INA, the regulations, the AFM, and an INS general counsel opinion letter all state that convictions entered before November 29, 1990, that constitute aggravated felonies do not preclude a finding of good moral character.<sup>272</sup>

A deposition of ISO Eladio Torres illustrates how the miscarriages described above can occur. The deposition relates to Mr. Torres's denial of naturalization to

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264. The *Lee v. Gonzales* litigation identified 1213 persons who had been denied on good moral character grounds in the Seattle District alone; of which approximately 500 had subsequently reapplied and been granted citizenship. Declaration of Michael P. Conricode, *Lee v. Gonzales*, No. C04-449 RSL \*7 (W.D. Wash. Jan. 27, 2006).

265. Turnbull, *supra* note 258, at B1.

266. Email to author from Robert Gibbs, lead counsel on behalf of plaintiffs in *Lee v. Gonzalez*, (Mar. 4, 2011) (on file with author).

267. LAS Letter, at 12.

268. *Id.*

269. While justice was done for Mr. A, USCIS never issued a decision on the appeal of the naturalization denial; instead, it simply sent Mr. A a notice to attend his swearing-in ceremony. As a result, the record is not corrected and ISOs are not educated in the proper scope of the character inquiry for naturalization. *Id.* at 12-13.

270. Telephone Interview with Amy Meselson, Legal Aid Soc'y of N.Y. Immigration Law Unit (Dec. 22, 2010).

271. *Id.*

272. See 8 U.S.C. § 1427 (2006); 8 C.F.R. § 316.10 (2010); AFM, *supra* note 230, at ch. 73.6; Amended Definition of "Aggravated Felony" and the Section 101(f)(8) Bar to Good Moral Character, Genco Op. No. 96-16, (INS Dec. 3, 1996), at \*2, available at 1996 WL 33166347.

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Vernon Lawson, a Vietnam veteran who was convicted in 1986 for manslaughter.<sup>273</sup> ISO Torres correctly concluded that Mr. Lawson’s conviction constituted an “aggravated felony” for immigration purposes.<sup>274</sup> He wrongly concluded, as did the ISO in Mr. M’s case above, that Mr. Lawson was “precluded by [§ 101(f)(8)] of the INA from establishing good moral character because during the period for which good moral character is required to be established, you remained, or are, one who at any time has been convicted of an aggravated felony.”<sup>275</sup> When asked about his understanding of the law, Mr. Torres testified that he had “come across” information that says a person whose aggravated felony conviction is before Nov. 29, 1990, is not precluded from establishing good moral character, but said that “[t]he way I read the law, um, I’m not so sure that that’s the case.”<sup>276</sup> Despite being shown the AFM, section 316.10 of the Code of Federal Regulations, and acknowledging familiarity with an INS General Counsel Opinion letter—each of which clearly states that pre-1990 aggravated felonies do not trigger the bar—Torres insisted that he read the law differently.<sup>277</sup>

The deposition of Mr. Torres betrayed further problems with the way some ISOs conduct the character inquiry. As mentioned above, naturalization applicants often find themselves in removal proceedings based on criminal history disclosed in their applications. While USCIS cannot approve a naturalization application for an applicant who is in removal proceedings,<sup>278</sup> a removal charge is not the same as a removal order. Every day, immigration judges rule that removal charges are unfounded or not proven, or they grant relief from removal under various statutory relief provisions.<sup>279</sup> Indeed, one in four removal cases end either in termination for

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273. Deposition of Eladio Torres, *Lawson v. USCIS*, No. 09 Civ. 10195 (S.D.N.Y.) (July 14, 2010).

274. *Id.* at 160.

275. *Id.*

276. *Id.* at 57.

277. *Id.* at 200. After Lawson’s administrative appeal was denied by USCIS, he appealed to federal court. There, the judge overturned the denial and granted Lawson’s naturalization application. *Lawson v. U.S. Citizenship & Immigration Servs.*, No. 09 Civ. 10195 (S.D.N.Y. July 7, 2011). The court found that USCIS was “plainly wrong in its invocation of the statutory bar for an aggravated felony conviction,” a position which the Government did not even seek to defend before the federal court. *Id.* at 32. The court then discussed Lawson’s life in the twenty-five years since he committed his crime, and found that Lawson is and has been a person of good moral character. *Id.* at 3. The court noted that “no man is beyond redemption” and stated that “the manner in which he has overcome his challenges is a testament to his character.” *Id.* at 37–38. The court further chastised the Government for pursuing Lawson’s removal, calling it “mean-spirited at worst and puzzling at best” and opining that it “betray[ed] a desire on the part of the Government to continue punishing Lawson for his actions of so long ago.” *Id.* at 41.

278. 8 U.S.C. § 1429 (“[N]o application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding . . .”).

279. Through the first 6 months of fiscal year 2012, 12,560 immigration court proceedings were terminated because there were no grounds for removal and another 16,744 individuals were granted some relief from removal (not including voluntary departure). *See* [http://trac.syr.edu/phptools/immigration/court\\_backlog/outcomes.php](http://trac.syr.edu/phptools/immigration/court_backlog/outcomes.php).

lack of grounds for removal or a grant of relief from removal.<sup>280</sup> Nevertheless, Mr. Torres testified that “when an alien is placed in deportation, removal, it’s an indication that his presence as a local permanent resident, or otherwise, is no longer desirable in this country. And so, that’s—that’s Congress’s intent. Congress said, send this person out of the country.”<sup>281</sup>

The view that convictions that make an immigrant removable requires a denial of naturalization on character grounds is not limited to those applicants already in removal proceedings. Nevertheless, USCIS denied the naturalization petition of Mr. O., whose sole 1989 weapon possession conviction is not an aggravated felony, concluding pithily that because his conviction constitutes a deportable offense, he cannot prove good moral character.<sup>282</sup> At the time, Mr. O was not in removal proceedings and had no outstanding order of removal against him.<sup>283</sup>

What emerges from these examples is that agency personnel tasked with adjudicating naturalization applications hold false impressions about the eligibility of those with a criminal past. Some naturalization examiners mistakenly believe that an aggravated felony conviction from any time precludes a finding of good moral character; some mistakenly believe that a conviction for a deportable offense precludes a finding of good moral character; and some mistakenly believe that pending removal proceedings indicate an incompatibility with membership. In each instance, ISOs are getting the law wrong. They are not required to deny a good moral character finding in any of those instances.

These USCIS practices are subverting the statutory and regulatory scheme governing naturalization. In ways not required by the INA, and in some instances in clear contradiction of the law and congressional intent, removability is trumping eligibility for citizenship as the agency uses the naturalization process to effectuate removal policies. The expanded deportation provisions, the AFM, the Aytes Memo, and misinformed examiners are increasingly preventing naturalization on character grounds. Individuals eligible to naturalize, who are encouraged to naturalize by a host of laws, policies, and programs, and who Congress meant for adjudicators to examine by focusing on their present character, are instead being judged harshly by their past misdeeds and placed in removal proceedings.

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280. In fiscal year 2011, over 25,000 immigration court proceedings (11.6% of decisions) were terminated because there were no grounds for removal, while another 31,763 individuals were granted some form of relief (not including voluntary departure) from removal (14.4%). EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK D2 (2012). In fiscal year 2010, nearly 25,000 immigration court proceedings (10.9% of decisions) were terminated because there were no grounds for removal, while another 30,838 individuals were granted some form of relief (not including voluntary departure) from removal (13.8%). EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, FY 2010 STATISTICAL YEARBOOK D2 (2011).

281. Deposition of Eladio Torres, *supra* note 273, at 190–91.

282. Telephone Interview with Amy Meselson, *supra* note 270. Mr. O was subsequently placed in removal proceedings, where he has a strong case for relief via cancellation of removal, and will likely apply again for naturalization if relief is granted. *Id.*

283. *Id.*

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### *C. Scared Citizenship-Less*

A third group of lawful immigrants denied citizenship are those chilled from applying. All are eligible to naturalize, in that they meet the statutory requirements and are not barred from showing their good moral character. Some are not removable under the law, others have persuasive cases for relief should they be charged with removability, while some are not eligible for relief. Despite their eligibility for naturalization, the fear that old, minor criminal convictions or conduct will lead them to the situations faced by Mr. Wu and Mr. Nunez dissuades them from applying. I call this group “scared citizenship-less” because the process is simply too risky.

There is no data on the number of eligible people who forgo applying for citizenship because the risks are so great. Undoubtedly, some do so because they have no defense to removal or lack a compelling case for relief, and do not wish to draw attention to their whereabouts. Anecdotal evidence nevertheless supports the notion that thousands of long-time permanent residents eligible for naturalization choose not to apply. Lawyers in the Legal Aid Society of New York’s Immigration Law Unit describe the chilling effect that using naturalization applications to identify removal targets has on the pursuit of citizenship by their clients.<sup>284</sup> One such client, Pablo, immigrated from the Dominican Republic and had been a lawful permanent resident since 1970.<sup>285</sup> Pablo’s sisters, wife, children, and grandchildren are all U.S. citizens, and his three brothers are lawful permanent residents.<sup>286</sup> He is a stable family man who supports himself by working in construction and maintenance.<sup>287</sup> However, Pablo fears applying for naturalization because of two old criminal convictions: criminal possession of a weapon in the fourth degree from 1982 and disorderly conduct from 1986.<sup>288</sup> Despite forty years in the country, more than twenty-five since his last criminal conviction, and eligibility for naturalization, Pablo faces a considerable risk of being placed in removal proceedings should he apply for naturalization.<sup>289</sup>

Judith Bernstein-Baker, executive director of the Hebrew Immigrant Aid Society and Council Migration Service of Philadelphia, has observed the same reticence in the immigrant community she serves. She wrote in a 2007 article that “[a]necdotally, we have met many individuals, including respectable professionals, whose problems in their youth prompted them to forego applying for naturalization because of the expanded grounds for deportation” and increased risk that the citizenship application process will turn instead into removal proceedings.<sup>290</sup>

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284. LAS Letter, at 10–11.

285. *Id.* at 11.

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Brooks v. Holder, 621 F.3d 88 (2d Cir. 2010) (holding that N.Y. conviction for second-degree criminal possession of a weapon constitutes a crime of violence for immigration purposes).

290. Judith Baker-Bernstein, *Citizenship in a Restrictionist Era: The Mixed Messages of Federal Policies*, 16 *TEMPL. POL. & CIV. RTS. L. REV.* 367, 376 (2007).

By making the naturalization process fraught with risk, USCIS actively discourages eligible lawful residents from pursuing citizenship. Instead of having their adopted country formally recognize the social fact of their membership, they remain in the shadows. In the case of those lawful residents who came to the United States as children, or asylees and refugees who fled dangerous conditions, there is no other place to go that would be home. Each has little choice but to remain permanent nonmembers of the American community.

In sum, various provisions of the INA offer relief from the severe consequence of removal for those with a criminal past. This reflects Congress's intent to recognize rehabilitation and preserve family and community ties that immigrants develop. The waiver hearing ensures that those who are not sufficiently connected to the American community, or who are likely to reoffend, do not stay. This relief framework indicates a view of immigration administration as a necessarily flexible institution that pays close attention to individual circumstances when making membership decisions. Nevertheless, the same statute that offers relief denies a path to full membership. In addition, USCIS policies and practices effectively deny citizenship to those whose criminal conviction does not bar them from establishing their good moral character, both through misapplication of the law and by intimidating noncitizens from even applying. In the next Part, I show why this is problematic.

### III. THE FAILURES OF THE CURRENT REGIME

The previous two Parts showed how the INA and USCIS deny naturalization to long-time permanent residents with a criminal past. This Part identifies three main failures with the current scheme. First, the current framework permanently relegates some residents to a subordinate, outsider status, frustrating the citizenship regime's potential to promote social cohesion. Second, it denies access to a full set of equal rights to community members and thwarts the egalitarian and inclusive potential of American democracy. Third, by declaring individuals to be morally corrupt, it rejects the role of redemption in a just system of laws. These undemocratic, unproductive, and unforgiving failures create a permanent second-class population of legal residents without justification.

#### *A. Social Integration and Cohesion*

The United States accepts more immigrants each year, from all over the world, than any other country.<sup>291</sup> In 2009 alone, just under forty million individuals from 190 different countries came to the United States.<sup>292</sup> This tremendous inflow of

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291. See *Top Ten Countries With the Largest Number of International Migrants*, MIGRATION POLICY INSTITUTE, <http://www.migrationinformation.org/datahub/charts/6.1.shtml>.

292. 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 77, at tbl.26. Of that number, over 36 million were nonresident or short-term resident admissions, *id.* at tbl.25, approximately 650,000 people arrived as legal permanent residents, *id.* at tbl.1, and an estimated 300,000 crossed the border without permission. PEW HISPANIC CTR, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE i (2010)

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diverse people makes social cohesion a considerable challenge.<sup>293</sup> The challenge is made even more daunting in a globally connected society where swift travel and widely available communication technology make it easy for individuals to come and go and retain all sorts of ties to their nation of origin.<sup>294</sup> The challenge is not limited to integrating a steady flow of newcomers; it also requires promoting functioning communities that include a significant population of noncitizen residents.<sup>295</sup> Current debates about birthright citizenship,<sup>296</sup> Arizona's Senate Bill 1070,<sup>297</sup> and the DREAM Act<sup>298</sup> illustrate the considerable fracture between citizens and noncitizens.

Many consider citizenship to be the finest form of societal integration, including state and federal governments, immigration advocates, and anti-immigration groups.<sup>299</sup> This cohesive function carries great importance in immigrant-receiving countries like the United States. As political scientist Robert Putnam has shown, successful immigrant societies foster social solidarity and dampen the negative effects of diversity by constructing more encompassing identities.<sup>300</sup> To accomplish this, he encourages identities that “enable previously separate ethnic groups to see themselves, in part, as members of a shared group with a shared identity.”<sup>301</sup> This increases what Putnam calls “social capital,” which he defines as “social networks and the associated norms of reciprocity and trustworthiness.”<sup>302</sup> Citizenship stands as just such a solidarity promoting shared identity.

American citizenship has historically served as a tool of social cohesion from its inception following the creation of the republic. Today, to help meet the challenge of social cohesion, the congressionally created Office of Citizenship promotes

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(estimating annual inflow of unauthorized immigrants at 300,000 for 2007–2009, down from 850,000 annually from 2000–2005).

293. When I say social cohesion, I do not mean national unity. Instead, I mean cooperation amongst the members of the community in the economic, social, and cultural spheres that tends to increase trust and reduce isolation.

294. Rodriguez, *supra* note 63, at 1116 (“[A] profusion of social science literature focused on the movement of people around the world is increasingly demonstrating that migrants have varied intentions and that much migration is best understood as cyclical or temporary.”).

295. As of 2009, approximately twenty-two million foreign-born noncitizens resided in the United States, comprising almost 7% of the total U.S. population. CONG. BUDGET OFFICE, A DESCRIPTION OF THE IMMIGRANT POPULATION: AN UPDATE 1 (2011).

296. Legislation recently proposed in the House and sponsored by almost 100 representatives would attempt to amend the Fourteenth Amendment and deny U.S. citizenship to children born in the United States to illegal immigrant parents. See Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009).

297. *U.S. v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011).

298. In 2010, the Development, Relief, and Education for Alien Minors (DREAM) Act was passed by the House, but was filibustered in the Senate and never came up for a vote. Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 HARV. J. ON LEGIS. 623, 636 (2011).

299. Baker-Bernstein, *supra* note 290, at 367–69.

300. Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty First Century*, 30 SCANDINAVIAN POL. STUD., 137, 137–139 (2007).

301. *Id.* at 161.

302. *Id.* at 137.

naturalization and includes in the federal budget spending for immigrant integration programs.<sup>303</sup> But as was shown in Part II, the current good moral character scheme denies citizenship to many lawful permanent residents. Rather than promote cohesion, an exclusionary membership policy with respect to individuals who permanently reside in the country and who participate daily in the community's social and economic spheres serves only to subordinate and marginalize.<sup>304</sup> Indeed, the cost of such a policy is community cohesion.<sup>305</sup>

Denying citizenship to permanent residents prevents some immigrants from making a public choice about their membership or expressing their commitment to the state. Sociological studies suggest that exclusionary policies can result in a "boomerang" counter-assimilatory effect, causing immigrants who are excluded in some manner to increasingly perceive themselves as outsiders.<sup>306</sup> This leads to self-identification by national origin or as a member of a pan-ethnicity rather than as an "American" or "hyphenated American."<sup>307</sup> The failure of noncitizens to socially integrate then becomes a self-fulfilling prophecy. Their exclusion from membership produces a noninclusive identity and noninclusive behaviors.<sup>308</sup>

This marginalization can trickle down to the children of the excluded. As they see how their noncitizen parents are treated, they may resist identifying as American and resist fully integrating themselves into their community.<sup>309</sup> The authors of one study concluded that "the process of growing ethnic awareness among the children of immigrants . . . appear[ed] to be a function of their experiences, expectations, and perceptions of racial and ethnic

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303. Although the initial FY 2011 budget passed by the House included a bar on spending for immigrant integration programs, *see* H.R. 1, 112th Cong. § 1635 (2011), that bar was not present in the final FY 2011 budget, H.R. 1473, 112th Cong. (2011). President Obama has requested nearly \$20 million for immigrant integration programs in his 2012 budget. *See* DEPT. OF HOMELAND SEC., FY 2012 BUDGET IN BRIEF 145 (2011), *available at* <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf#page=1540>.

304. Of course, political inclusion does not guarantee social integration as even with citizenship, immigrants suffer subordination and marginalization. Without citizenship, though, the dynamics of that marginalization are certainly more oppressive.

305. The Civil War can be seen as the climax of the tension that a racially exclusive citizenship regime created.

306. *See* RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 117 (2000) (arguing that exclusion from citizenship contributes to social exclusion because the relegation of individuals to the economic sphere does not encourage civic virtues and facilitates exclusion from the political community); T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 14 (1998).

307. Aleinikoff & Rumbaut, *supra* note 306, at 14 ("Membership may be as much a state of mind—a definition of the situation—as a set of social facts.")

308. *Id.*

309. Rodriguez, *supra* note 63, at 1121 ("A child's integration and social success depend in part on the framework for belonging available to the child's parents. The effects of the transnational lifestyle on the second generation are only now being studied, but it is safe to say that having parents whose presence in the United States is based on immigration as contract[, whose presence is not stable,] can be destabilizing . . . . The right to remain that citizenship provides is crucial for the migrant and those with whom he associates . . . .").

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discrimination . . . and their response to societal messages that tell them that they are not, and may never become, full-fledged members.”<sup>310</sup> The fact that the great majority of the children who exhibited this effect were natural-born U.S. citizens illustrates the power of the exclusion.<sup>311</sup>

Preventing community residents from attaining full membership also encourages citizens to view those individuals as strangers and outsiders instead of potential cocitizens. This diminishes the regard for immigrants generally and exacerbates distrust between citizen and noncitizen community residents,<sup>312</sup> undermining social cohesion and a sense of shared enterprise.<sup>313</sup> Because permanent noncitizens are not a constituency, the voting public and elected officials need not become aware of or address their needs and concerns in the process of setting community norms and defining the public good.<sup>314</sup> When permanent residents have no realistic chance to unite their family in the United States,<sup>315</sup> when they face permanently reduced benefit and employment opportunities,<sup>316</sup> and when they are continually reminded, especially during election season, that their voice does not count, they tend not to integrate as fully as they would were they on the path to citizenship.<sup>317</sup>

Some argue that exclusionary citizenship practices, while contrary to the foundational liberal democratic ideals of equality and welcome, nevertheless have provided an important source of cohesion in American society.<sup>318</sup> That community cohesion justification falls away, however, when applied to the long-term residents at the center of this paper. Exclusion on character grounds can serve a cohesive function when that exclusion keeps people physically out of the community. That

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310. See Aleinikoff & Rumbaut, *supra* note 306, at 19–20. Aleinikoff and Rumbaut “focus[ed] on relevant findings regarding linguistic assimilation and ethnic identification from the Children of Immigrants Longitudinal Study (“CILS”) . . . . The study, carried out in Southern California (San Diego) and South Florida (Miami and Fort Lauderdale), followed a large sample of over 5,200 youths from immigrant families representing seventy-seven different nationalities from the junior high school grades through the end of high school in the 1990s.” *Id.* at 11–12.

311. See Aleinikoff & Rumbaut, *supra* note 306, at 15.

312. Rodriguez, *supra* note 63, at 1121.

313. Political scientist Robert Putnam famously calls this “social capital,” by which he means “social networks and the associated norms of reciprocity and trustworthiness.” Putnam, *supra* note 300, at 137.

314. ALEINIKOFF, *supra* note 21, at 168 (“The concept of national membership is thus doubly exclusive. It designates nonmembers by defining members. It also recognizes an association that is expected to exercise power in the interests of members with less concern for the interests of nonmembers.”).

315. Currently, wait times for visas for unmarried sons and daughters of citizens are over one year shorter than those for the unmarried sons and daughters of lawful permanent residents. See U.S. Dep’t of State, Visa Bulletin for April 2012, [http://www.travel.state.gov/visa/bulletin/bulletin\\_5674.html](http://www.travel.state.gov/visa/bulletin/bulletin_5674.html) (showing that unmarried adult children of citizens wait an average of seven years and up to nineteen years for a visa, while unmarried adult children of legal permanent residents wait on average eight years and up to twenty years).

316. See *supra* Part I.A.

317. See Putnam, *supra* note 300.

318. See, e.g., SMITH, *supra* note 20.

is, refusing someone's admission, physically segregating them (as in Indian reservations or World War II internment camps), or physically removing them from the country could promote social unity among those who remain.

But excluding those like the Half Welcome, who had their removal waived by a judge and were granted lawful permanent resident status, and Kichul Lee, who was not deportable for his exuberant oyster picking, serves only to subordinate and marginalize. Recall that after being charged with removal for their crimes, the Half Welcome had a contested hearing before an immigration judge.<sup>319</sup> At the hearing, evidence of reform and community ties was tested by cross-examination and weighed against evidence regarding the nature, recency, and seriousness of the offense. For each member of this group, including the Cambodian refugee discussed above who the BIA concluded "is a person who would be an asset to our society,"<sup>320</sup> the applicant established not just her eligibility for relief, but that she merited the judge's exercise of discretion in waiving removal. Nevertheless, the law declares them permanently unfit for membership.

It is incoherent to decide that someone is a valuable and welcome part of the community and simultaneously proclaim that she cannot ever become a full member of the community. The waiver received by the Half Welcome is nothing other than a renewed admission to the community and provides a valid basis to presume that the immigrant currently possesses good moral character. Properly construed, the waiver is a membership decision. Since deportation is the "refusal by the Government to harbor persons whom it does not want,"<sup>321</sup> the government's decision to waive that sanction indicates that it does want that person. If she lacked good character, or posed a threat to the safety of the community, the waiver would have been denied and the person deported. That the waiver results in a grant of lawful permanent resident status, and not a temporary status, reinforces the conclusion that the government accepts the immigrant by the waiver. At the least, it should restart the clock for the probationary precitizenship residency period, after which the individual may apply for citizenship.

Because the Half Welcome, the wrongfully denied, and those chilled from applying for naturalization are not physically excluded from the United States, the character bar to citizenship does no protective work with respect to the community.<sup>322</sup> To the extent that supporters of the character bar are concerned about future crime and its threat to social cohesion, there is already in place a system to address law breaking: the criminal justice system. Criminal law and removal provisions, including relief from removal, address public-safety concerns with respect to noncitizens. Those who pose a serious threat are removed; those who do not, remain. If any person whose removal was waived commits future crimes, she would receive appropriate treatment,<sup>323</sup> including likely deportation.<sup>324</sup>

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319. See McGann, *supra* note 258.

320. In re H- N-, 221 I. & N. Dec. 1039, 1045 (B.I.A. 1999).

321. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

322. See Spiro, *supra* note 13, at 513 ("A con man vexes the community with or without citizenship.").

323. This argument was made as long ago as 1790 during debates about the first Naturalization Act's moral character requirement. Those who felt it was not a necessary requirement for citizenship asserted that criminal laws would suffice "to restrain and regulate

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As a result, membership law need not do the work of public safety.<sup>325</sup> Instead, it should promote social cohesion by offering a path to full membership to all lawful permanent residents.

### *B. Political Integration and Democracy*

Democratic theorists and the Supreme Court have frequently declared that the right to vote is “the essence of a democratic society”<sup>326</sup> that “makes all other political rights significant.”<sup>327</sup> Voting matters for many reasons. It is a means of expressing identity and influencing government policies; it is an inexpensive way of making a civic contribution; because each person’s vote counts the same as all the others, it is a symbol of equality; it gives voters a stake in the outcome and develops identification with the polity; it is evidence we live in a healthy democracy; and it confers legitimacy on the government and its policies.<sup>328</sup>

In the United States, access to the ballot has long signified full membership in the polity. When the propertyless African American, and other racial minorities, and women citizens secured the franchise, they transformed from subjects to members.<sup>329</sup> With each group of excluded residents welcomed to the voting fray, the United States moved closer to its founding promise of a robustly egalitarian democracy. While the United States has a long history of noncitizen voting, today it is all but extinct.<sup>330</sup> Immigrants who seek full political rights must naturalize. Because of the vote’s fundamental importance, any rule or practice that denies citizenship to permanent residents, and therefore denies them the franchise, deserves scrutiny.

A major justification for the good character requirement relates to the political process. It derives from the Aristotelian idea that self-governance only works when it is done by the virtuous.<sup>331</sup> As Senator Mitch McConnell put it while discussing

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the conduct of an individual.” 1 ANNALS OF CONG. 115 (1790) (remarks of Rep. Lawrence (New York)), *reprinted in* 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: DEBATES IN THE HOUSE OF REPRESENTATIVES: SECOND SESSION: JANUARY–MARCH 1790 148 (Helen E. Veit et al. eds., 1994).

324. See 8 U.S.C. § 1229b(c)(6) (declaring ineligible anyone “whose removal has previously been canceled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c)”).

325. Spiro, *supra* note 13, at 516 (“[T]he character qualification may be surplusage when considered aside deportation provisions.”).

326. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

327. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON’T VOTE* 3 (1988).

328. See JEFF MANZA AND CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 18–19 (2006). Additionally, voting may promote law-abiding behavior. Researchers are beginning to find a basic correlation between voting and crime—those who vote are less likely to be arrested and incarcerated, even among those with a criminal history. See *id.* at 131–35.

329. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009).

330. See HAYDUK, *supra* note 60, at 15–40; Jamin B. Raskin, *supra* note 60, at 1460–61; Gerald M. Rosberg, *Aliens and the Right to Vote*, 75 MICH. L. REV. 1092, 1093–1100 (1977).

331. ARISTOTLE, *POLITICS* 171 (Benjamin Jowett trans., Batoche Books 1999) (“A city

laws that disenfranchise felons, “states have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of representative democracy . . . those who break our laws should not dilute the votes of law-abiding citizens.”<sup>332</sup> According to this view, denying citizenship to permanent residents with criminal histories protects the integrity of American democracy.

The political process rationale has some initial plausibility. To the extent that democracy truly works only when not subverted by fraud or force, it makes sense to demand that newly chosen citizens have a demonstrated commitment to respecting the rules of society. American democracy, however, is not Aristotelian. The United States is decidedly not ruled by the virtuous, nor is political participation contingent on excellence. In fact, the Voting Rights Act prohibits rules which require voters to possess good moral character.<sup>333</sup>

Still, the government does limit the franchise based on criminal history. Today, every state but Maine and Vermont prohibit incarcerated felons from voting for some period of time.<sup>334</sup> Felon disenfranchisement seeks to exclude those with a criminal past from full community membership by preventing them from choosing leaders and setting policy. Senator McConnell’s remark quoted above captures the essential justification for disenfranchising felons. Supporters believe that restricting access to citizenship protects the ballot from supposed undesirables.

A growing literature, however, demonstrates that felon disenfranchisement does not serve any of the purposes that supporters claim it to have, nor does it meaningfully promote any traditional penological aim.<sup>335</sup> Perhaps most

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can be virtuous only when the citizens who have a share in the government are virtuous . . .”).

332. MANZA & UGGEN, *supra* note 328, at 12 (citation omitted).

333. 42 U.S.C. § 1973aa(b)(3); *Shaw v. Reno*, 509 U.S. 630, 639 (1993) (noting that “‘good character’ provisos were devised to deprive black voters of the franchise”).

334. For a current list of voting sanctions by state, see *Criminal Disenfranchisement Laws Across the Country*, BRENNAN CTR. FOR JUSTICE, [http://www.brennancenter.org/page/-/d/download\\_file\\_48642.pdf](http://www.brennancenter.org/page/-/d/download_file_48642.pdf). See also *Richardson v. Ramirez*, 418 U.S. 24 (1974) (affirming the right of states to disenfranchise felons under the 14th Amendment). *But see* *Farrakhan v. Gregoire*, 590 F.3d 989 (2010) (holding that because Washington’s criminal justice system is so infected with racial bias, the automatic disenfranchisement of felons results in the denial of the right to vote on account of race in violation of § 2 of the Voting Rights Act), *rev’d en banc*, 623 F.3d 990 (9th Cir. 2010). Sociologists Jeff Manza and Christopher Uggen estimated that there were 5.3 million disenfranchised felons on Election Day in November, 2004. MANZA & UGGEN, *supra* note 328, at 76.

335. See MANZA & UGGEN, *supra* note 328. While felon disenfranchisement is not considered punishment, but is instead a collateral consequence of a criminal sentence, analyzing it under the four justifications for punishment highlights its lack of justification. The four classical justifications for punishment are retribution, deterrence, incapacitation and rehabilitation. Retribution (as opposed to vengeance) necessarily requires that the punishment be proportional to the crime, with minor crimes receiving lesser punishments. Given the wide variety of offenses that constitute a felony and trigger disenfranchisement, blanket disenfranchisement for all felons is not properly retributive because it is not proportional. Since the loss of liberty has failed to serve as a deterrent to those with felony convictions, it can hardly be asserted (and most certainly has not been proven) that stripping the right to vote serves as a measurable deterrent to crime. With respect to incapacitation,

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importantly, disenfranchisement frustrates successful reentry by making participating in and contributing to society more difficult.<sup>336</sup> Numerous studies of disenfranchisement have documented the effect this has on the identity and behavior of the excluded.<sup>337</sup> In the words of one disenfranchised citizen, who could just as easily have been a permanent resident non-citizen, “[N]ot being able to vote kind of says you don’t matter, and you’re not really a part of this community. But then here I am, your next-door neighbor.”<sup>338</sup> Beyond affixing an outsider status, denying membership can also stigmatize the excluded.<sup>339</sup> As Frederick Douglass put it, “[b]y depriving us of suffrage, you affirm our incapacity to form an intelligent judgment regarding public measures . . . . [T]o rule us out is to make us an exception, to brand us with the stigma of inferiority . . . .”<sup>340</sup>

The good moral character bar to naturalization accomplishes the same as felon disenfranchisement: silencing the political voice of those who have committed crimes. Yet it suffers the same critique as felon disenfranchisement. Foreclosing access to full political rights frustrates social cohesion, and it does not sustain justification under any of the four classical justifications for punishment. A blanket bar to a good moral character finding based on a list of crimes that varies from the most serious to the petty is not proportional.<sup>341</sup> Since the consequence of criminal behavior by noncitizens is increasingly deportation, a collateral bar to citizenship cannot be said (and most certainly has not been proven) to provide any additional deterrence to crime. The bar does not manage risk because the people are not physically excluded but continue to live and work in the community. It does, however, frustrate rehabilitation by labeling these individuals as incorrigible outsiders.

To the extent that the opponents of a path to citizenship for those with criminal convictions assert that a concern for the integrity of the political process justifies permanent exclusion from the citizenry, those concerns are already addressed in several ways. For those whom I call the Half Welcome, a judge has concluded that they are rehabilitated and pose no threat to the community, and that they have significant ties within and to the United States. Their permanent political exclusion cannot be justified on character grounds after the waiver grant. In fact, to the extent

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disenfranchisement does not prevent individuals from committing crimes unrelated to voting, which means it has no effect on almost all kinds of crime.

336. See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).

337. See, e.g., Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281 (2006)

338. MANZA & UGGEN, *supra* note 328, at 163.

339. A further danger of political alienation is that it transfers to the children of those who cannot naturalize since parents’ political behavior shapes that of their children. IRENE BLOEMRAAD, *BECOMING A CITIZEN* 5, 241 (2006).

340. Frederick Douglass, *What the Black Man Wants*, in FREDERICK DOUGLASS, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 159 (Philip S. Foner ed., 1975).

341. See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (arguing for proportionate sanctions for immigration violations); Michael Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 PITT. L. REV. 431 (2011) (outlining an “ethic of proportionality” in immigration law).

that felon disenfranchisement laws operate, they serve the function of protecting the political process.<sup>342</sup> As is the case with public safety, naturalization law need not do that work.

Besides serving no productive or legitimate aim, using the character requirement to deny citizenship to permanent residents violates the consent principle of democracy.<sup>343</sup> It forecloses the ability of residents to fully and equally participate in the political arena.<sup>344</sup> While there are limits on the consent principle,<sup>345</sup> policy decisions are deformed when those who are governed cannot assert and protect their interests. Those without the possibility of future membership “experience the state as a pervasive and frightening power that shapes their lives and regulates their every move—and never asks for their opinion.”<sup>346</sup> Indeed, the lack of the franchise is the very reason that the Supreme Court considers noncitizens a “‘discrete and insular’ minority” deserving of heightened judicial protection.<sup>347</sup> The recent surge in anti-immigrant legislation demonstrates the relative ease of discriminating against noncitizens (at least until courts intervene).<sup>348</sup> Assuring a path to membership for all lawful permanent residents would make it more difficult to enact and sustain unequal or derogatory treatment.

The good moral character bar does more than deny certain lawful permanent residents the opportunity to exercise the most powerful political right. Permanently barring them from naturalization forecloses other opportunities for civic engagement. An example from Lewiston, Maine illustrates this point. In 2001, Somali refugees that the U.S. government had resettled in urban areas across the country decided to collectively resettle in the small town.<sup>349</sup> By 2007 some 3,000 Somalis had come to Lewiston, comprising approximately 10% of the city’s population.<sup>350</sup>

In May 2007, Lewiston Mayor Laurent Gilbert and several members of the town’s City Council sought to change the membership requirement for

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342. Spiro, *supra* note 13, at 516 (“[T]here are mechanisms other than naturalization laws, applied within the citizenry, for preventing the putative harm posed by ex-convicts participating in the political system.”).

343. The consent principle of democracy holds that government derives its legitimacy over its subjects through their consent. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”).

344. RUBIO-MARIN, *supra* note 306, at 2 (calling the exclusion of long-term residents from political participation a “democratic legitimacy gap”).

345. The lack of a vote is less problematic for temporary visitors (since they do not clearly have a long-run interest in the polity) and those who are on a path to citizenship (since they can be voters soon enough).

346. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983). Walzer made this point while talking about guestworkers, but it applies equally, if not more forcefully, to permanent residents.

347. *See* *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citation omitted).

348. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1594–60 (2008).

349. Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL’Y REV. 335, 361 (2009).

350. *Id.*

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participation on the Downtown Neighborhood Task Force from “registered voter” to “resident” of Lewiston.<sup>351</sup> Supporters explained that it would allow for “a larger cross section of folks to serve on the committee” and noted the hypocrisy of city officials who publicly stated that new immigrants should get more involved in community affairs while denying them a voice on the Task Force by limiting its membership to citizens.<sup>352</sup> Given the significant Somali population in Lewiston, Mayor Gilbert felt it important to have a Somali on the Task Force and supported the change.<sup>353</sup> He advocated for the appointment of Ismail Ahmed, a six-year legal resident who was in the process of gaining U.S. citizenship.<sup>354</sup> Several opposed the mayor’s proposal.<sup>355</sup> One resident, perhaps unaware that noncitizens cannot vote in any Maine election, declared that immigrants should care enough to be registered voters if they sought to get involved in community affairs.<sup>356</sup> The proposal failed.<sup>357</sup> Despite his willingness and desire to participate in local affairs, Ismail Ahmed’s lack of citizenship prevented his full civic engagement.<sup>358</sup>

As with social cohesion, the political process rationale does not provide a convincing justification for the good moral character bar to naturalization. Using criminal records as a proxy for virtue and a character test as a precondition for access to the franchise does not promote or protect democracy. This is especially so when the blunt instrument of immigration law’s “aggravated felony” provision does the decisive work.<sup>359</sup> To the contrary, excluding a portion of permanent residents from full political rights diminishes democracy.

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351. *Amendment to Order Establishing the Downtown Neighborhood Task Force Regarding the Number of Members on the Task Force Before the City of Lewiston City Council* (Me. 2007) (motion by Councilor Jean) [hereinafter *Lewiston City Council Meeting Minutes*], available at <http://www.ci.lewiston.me.us/archives/73/CC-Mins-05-15-2007.pdf>; see also Gilbert, *supra* note 349, at 370.

352. *Lewiston City Council Meeting Minutes*, *supra* note 351, at 5. Because noncitizens cannot vote in any election in Maine, ME. CONST. art. II, § 1 (defining electors as “citizen[s] of the United States of the age of 18 years and upwards”), the requirement that members be registered voters precluded any noncitizen resident of Lewiston from serving on the Task Force.

353. Gilbert, *supra* note 349, at 370.

354. *Id.*; *Lewiston City Council Meeting Minutes*, *supra* note 351, at 5.

355. *Lewiston City Council Meeting Minutes*, *supra* note 351, at 5.

356. *Id.*

357. *See id.*

358. A critic could suggest that those barred from citizenship always have the option of returning to their home country should they desire to live in a place where they have full political rights. In truth, leaving is often only a formal option. Legal permanent residents remain in the United States not only because it is their preference and right to do so, but also because of the strong family and economic ties they have established in this country and the hardship that leaving would bring for their citizen and legal resident relatives. For some, such as asylees, refugees, and those who came to the United States as children, the formality of such a choice is greatly magnified.

359. Danger to public safety or threat to the public order are not established merely by the fact of a criminal record. Desistance literature tells us that the type of crime, time since crime, and circumstances since crime matter a lot to assessing the risk of reoffending. *See infra* notes 385–87.

*C. Redemption*

In his 2004 State of the Union address, President Bush declared America to be “the land of second chance” and urged that a criminal past should not restrict the opportunities for any individual after she has completed her sentence.<sup>360</sup> The principle of redemption—that an individual can be released from bearing the mark of past misdeeds—has long played a role in the American legal system. Bankruptcy law and executive pardons, around since the founding, reflect a tradition of forgiving offenses or debts.<sup>361</sup> The prominence of redemption in the law arguably peaked during the rehabilitative-focused “penal welfare” reform efforts of the mid-twentieth century, which preached rehabilitative interventions over retributive punishments.<sup>362</sup> At no other time did American policy demonstrate such a commitment to the idea that a criminal act did not define the character of the person who committed it.

Since the 1950s, however, America has largely turned away from redemption, replacing it with an increasing emphasis on punishment and condemnation. As David Garland and others have shown, retributive punishment is marked by “reactive sanctioning of criminal individuals” that prefers uniform penalties that are mechanically dispensed.<sup>363</sup> Although individuals view themselves as capable of change, they see people with criminal histories as having “immutabl[y] and essential[ly] flawed natures.”<sup>364</sup> The new, but now ubiquitous, sex offender registries, the near extinction of the pardon, and the continued mass incarceration despite falling crime rates exemplify the prevailing preference for punitive justice.<sup>365</sup>

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360. President George W. Bush, State of the Union Speech (Jan. 20, 2004) (transcript available at U.S. Government Printing Office). The Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

361. Article I authorizes Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4. American courts since colonial times have nullified or reduced debts as a reward for the debtor’s cooperation in trying to reduce them. Article II states that the President “shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1. Between 1932 and 1980, for example, several hundred pardons or commutations were routinely granted each year by the President. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L. J. 1483, 1488, 1491 (2000). The percentage of pardon petitions acted on favorably approached or exceeded 30% in every administration from Franklin Roosevelt’s to Jimmy Carter’s. *Id.* at 1492.

362. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 34 (2001).

363. *Id.* at 39–40.

364. SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 4 (2001).

365. Bela August Walker, *Deciphering Risk: Sex Offenders and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183, 191–95 (2010); Office of the Pardon Att’y, *Presidential Clemency Actions by Administration: 1945 to Present*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/pardon/actions\\_administration.htm](http://www.justice.gov/pardon/actions_administration.htm) (showing President George W. Bush granted only 189 pardons in eight years, and President Obama has only granted nine in

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As with any other institution or regime, citizenship rules reflect the trends and values of the society that enact them. Not surprisingly, then, the story of redemption in immigration law looks much the same. As discussed in Part I, the touchstone of the good moral character inquiry for naturalization applicants was long the person's present good moral character. The Attorney General declared in 1943 that the "'American sense of justice and fair play' [should] 'respect . . . rehabilitation and not . . . brand and treat [the noncitizen] as a criminal perpetually.'"<sup>366</sup> The emergence of relief from removal reflected the belief that, despite noncitizens' past transgressions, they can still be an integral and integrated part of American society. Similarly, until 1990, a criminal judge could make a binding judicial recommendation against deportation (JRAD), based on the immigrant's ties to the United States and unlikelihood of recidivism, that precluded deportation based on a criminal conviction.<sup>367</sup>

In the last few decades, however, punitive justice notions have infected immigration law.<sup>368</sup> The elimination of the JRAD in 1990, and the strident opposition to anything that resembles an amnesty for undocumented immigrants, reflects the popularity of a punitive view toward noncitizens who violate the law. The 1996 federal legislation discussed above,<sup>369</sup> and subsequent laws that further increased the immigration consequences of criminal behavior and made those consequences much more likely,<sup>370</sup> also demonstrate the turn to a more punitive, and increasingly draconian, scheme. By concomitantly decreasing opportunities for relief and individual review, and extending those consequences into the citizenship realm through the "aggravated felony" good moral character bar, these changes have entrenched retribution in immigration law.

Recent U.S. Supreme Court cases and criminological research suggests a turning tide, outlining the appropriateness and necessity of a redemptive legal framework. In a pair of recent cases involving juveniles, the Supreme Court has made it clear that the Constitution does not allow us to permanently give up on people who commit crimes at a young age. In *Roper v. Simmons*, the Court held unconstitutional the imposition of capital punishment for crimes committed by someone under the age of eighteen.<sup>371</sup> As compared to adults, the Court found that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" and their characters are "not as well formed."<sup>372</sup> This made it difficult for expert

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his first twenty-four months of office).

366. MAE M. NGAI, *IMPOSSIBLE SUBJECTS, ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 86 (2004) (citing Memorandum, Attorney General to Sen. Rufus C. Holman, Jan. 4, 1943, file 55819/402D, INS) (regarding waivers of deportation for those with criminal convictions).

367. 8 U.S.C. § 1251(b)(2) (1988) (repealed by Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050).

368. See Juliet Stumpf, *The Crimmigration Crisis: Immigration, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

369. See *supra* Part I.A.

370. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), § 411, 107 Pub. L. No. 56, 115 Stat. 272, (2001) (adding terrorism grounds for removal).

371. 543 U.S. 551 (2005).

372. *Id.* at 569–70 (citations omitted).

psychologists to “differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>373</sup> Because juveniles are more capable of change than are adults, and their actions less likely to be evidence of “irretrievably depraved character[,]” the Court found it more likely that any character deficiencies evidenced by crime will be reformed.<sup>374</sup>

Drawing on its reasoning in *Roper*, the Supreme Court outlawed life without parole sentences for individuals who committed crimes other than homicide under the age of eighteen in *Graham v. Florida*.<sup>375</sup> As the Court explained, life without parole “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”<sup>376</sup> In short, it “requires the sentencer to make a judgment that the juvenile is incorrigible.”<sup>377</sup> Finding incorrigibility to be “inconsistent with youth,” the Court again outlawed a penalty that “forswears altogether the rehabilitative ideal . . . [and] makes an irrevocable judgment about that person’s value and place in society.”<sup>378</sup> The Court held that individuals must be given an opportunity to show, at some point in the future, that they have matured enough while in prison that they are fit to rejoin society.

In *Roper* and *Graham*, the Supreme Court disallowed conclusive character judgments based on an act committed while young. Because the “aggravated felony” bar to a good moral character finding does not take age at offense into consideration, *Roper* and *Graham* cast doubt on the legitimacy of a permanent character bar for those who committed crimes under the age of eighteen. That some noncitizens who committed crimes before they turned eighteen first arrived in the United States when they were much younger only reinforces the point.<sup>379</sup> The permanent character bar is also suspect because it denies immigrants with a criminal past a chance to demonstrate their reform and current fitness for full membership. As New York’s Governor Paterson declared, and President Bush implied,<sup>380</sup> inflexible laws that do not credit rehabilitation are “adverse to the values that our country represents.”<sup>381</sup>

It is not just Supreme Court holdings rejecting fixed character judgments that support a place for redemption in membership law. Criminological and sociological

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373. *Id.* at 573 (citation omitted).

374. *Id.* at 570.

375. 130 S. Ct. 2011 (2010).

376. *Id.* at 2027 (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).

377. *Id.* at 2029.

378. *Id.* at 2029–30 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)); *see also* *People v. Miller*, 781 N.E.2d 300, 309 (Ill. 2002) (holding mandatory life sentence for 15-year-old defendant unconstitutional given that “young defendants have greater rehabilitative potential”).

379. For these immigrants, their socialization occurred in the United States, which undermines the legitimacy of deporting them to a foreign land for crimes committed here.

380. *See supra*, note 360.

381. Press Release, New York State Office of the Governor, Governor Paterson Announces Pardons (Dec. 6, 2010).

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findings regarding reentry and recidivism demonstrate the necessity and appropriateness of a redemptive scheme. It is undisputed that most recidivism occurs within three years of release, and most offenders die or desist from crime by age seventy.<sup>382</sup> In fact, over 80% of people stop committing crimes by the age of twenty-eight.<sup>383</sup> Many criminologists argue that this “age-crime curve” has been “virtually unchanged for about 150 years.”<sup>384</sup> The evidence of desistance at relatively early ages rebuts the notion that criminal deviance is something permanent. Instead, it is most often short lived. The data strongly militate against life-long sanctions for criminal behavior and call for policies that allow for and recognize reform.

More recent research adds nuance and strength to these findings. Working from the premise that recidivism declines steadily with time, researchers have sought to compare the risks of rearrest for those with a prior contact with the criminal justice system to the risk of arrest for two cohorts: (1) all same-aged individuals from the general population and (2) same-aged individuals with a clean criminal record. They have sought to identify empirically a point in time when a person with a criminal record, who remained free of further contact with the criminal justice system, has no measurably greater risk of rearrest than either of the two cohorts.<sup>385</sup> Employing a statistical concept called the “hazard rate”, these studies have consistently found that individuals with a prior contact who stay arrest-free for seven years or more pose very little risk of future crime.<sup>386</sup> Moreover, that low risk converges with the risk of a same-aged individual from the general population at around seven years after contact, and approaches (though never equals) that of

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382. JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003); Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 *CRIMINOLOGY AND PUB. POL’Y* 697, 699–70 (2007).

383. TONY WARD & SHADD MARUNA, *REHABILITATION* 13 (2007).

384. MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 124 (1990).

385. *See, e.g.*, Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327 (2009) (studying individuals arrested in New York state for the first time as adults in 1980 at age sixteen, eighteen, and twenty); Bushway & Sweeten, *supra* note 381; Megan Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 *CRIME & DELINQUENCY* 64 (2007) (studying police contact data from the 1942 Racine, WI birth cohort study) [hereinafter Kurlychek et al., *Enduring Risk*]; Megan Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *CRIMINOLOGY & PUB. POL’Y* 1101 (2006) [hereinafter Kurlychek et al., *Scarlet Letters and Recidivism*] (studying data for males born in Philadelphia in 1958 and who resided in the city between the ages of ten and seventeen, followed until they turned twenty-six); Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 *HOW. J. OF CRIM. JUST.* 373 (2009) (studying conviction records from England in Wales for those born in 1953 and 1958).

386. The hazard rate is defined as the probability per time unit that a case that has survived to the beginning of the respective interval will fail in that interval. *See, e.g.*, Blumstein & Nakamura, *supra* note 385.

same-aged individuals with a clean criminal record.<sup>387</sup> These researchers have concluded from these findings that lifetime bans for ex-felons linked to prior crimes, such as those related to employment eligibility, are not consistent with the data on desistance and cannot be justified on the basis of safety or concerns about crime risk.<sup>388</sup> Instead, they assert that where such bars exist, the laws should include sunset clauses for individuals who stay straight for a certain period of time.<sup>389</sup>

The permanent good moral character bar that makes naturalization impossible for some immigrants is precisely the kind of lifetime bar that this data challenges. Because a person's criminal record empirically becomes stale enough that it largely ceases to provide any useful information relevant to assessing risk (presuming she avoids further contact with the criminal justice system), naturalization law should not impose lifetime bars to membership based on prior criminal behavior. Not only is the presumption behind the bar not borne out, the badge the bar imposes may contribute to a sense of hopelessness and frustrate reform.<sup>390</sup> In contrast, a policy that offered redemptive citizenship could provide additional incentive for immigrants to adopt prosocial, integrative attitudes.

A just naturalization scheme cannot reject redemption. Not only does a punitive framework cause the negative consequences outlined above, it refuses the positive effects of a legal regime that recognizes individuality and change. As numerous scholars have shown, the possibility of redemption can be a powerful incentive for individuals to expend the effort needed to achieve rehabilitation.<sup>391</sup> If America is to

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387. *See id.* at 338–44 (finding that after four to nine years, a person with a single prior record of aggravated assault, burglary, or robbery, who subsequently stayed clean has the same risk of reoffending as members of the general population of the same age, and the risk compared to those who had never been arrested becomes close enough to be largely irrelevant after anywhere between seven and twenty-five years, depending on the risk tolerance one is willing to accept); Soothill & Francis, *supra* note 385, at 373 (finding that after a ten-year conviction-free period, prior contact is no longer informative for future criminality and the risk of reconviction of those with a finding of guilt as a juvenile or before age twenty-one converges with non-offenders between the ages of thirty and thirty-five, or approximately ten to fifteen years after the initial conviction); Kurlychek et al., *Enduring Risk*, *supra* note 385, at 80 (“[I]f a person with a criminal record remains crime free for a period of about 7 years, his or her risk of a new offense is similar to that of a person without any criminal record.”); Kurlychek et al., *Scarlet Letters and Recidivism*, *supra* note 385, at 1117 (after five to seven years of law-abiding conduct, “the risk of a new criminal event among a population of nonoffenders and a population of prior offenders becomes similar”).

388. Bushway & Sweeten, *supra* note 382, at 702 (urging sunset clauses after seven to ten years of no criminal justice contact).

389. *Id.*

390. Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) (describing how collateral consequences impact employment and frustrate the ability “to lead law-abiding lives, to complete probation, or to avoid recidivism”).

391. *See, e.g.*, Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 213, 219 (Bruce J. Winick & John Q. La Fond, eds., 2003).

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be the land of second chance,<sup>392</sup> it must not be so only for citizens. It should restore a meaningful place for redemption in membership law. To promote a robust, egalitarian democracy and to foster a cohesive community, that second chance must offer the opportunity of citizenship to all permanent residents, even those with a criminal past.

A path to citizenship for all permanent residents encourages their investment in the community while discouraging citizens from marginalizing future fellow citizens. While naturalization is not an end point in the process of integration into the American community, it provides an individual with important rights, such as the vote and security against deportation, that make full participation possible. Indeed, full, secure social integration is impossible without citizenship. When we deny legal permanent residents a path to citizenship, we “limit[] the potential of U.S. citizenship to be a viable context for a sense of belonging, and for participat[ing] in civic, political, social, and economic life that is inclusive and ultimately respectful of all individuals.”<sup>393</sup> In a liberal democracy, no permanent residents should be relegated indefinitely to second-class status. To better meet the challenge of a pluralistic, globally-connected populace, our naturalization laws must allow and encourage all legal permanent residents the opportunity to become full members.

## IV. REFORMS

According to Professor Hiroshi Motomura, the long-standing view of immigration in America was one that saw immigrants as potential future citizens.<sup>394</sup> This approach promoted a participatory democracy and incentivized social cohesion by encouraging immigrants to commit to, and participate in, their community. It simultaneously encouraged the citizenry to view these residents as future members. While modifications today are necessary to incorporate the variety of temporary stays permitted by limited-duration visas, there is no compelling reason to treat lawful permanent residents as anything but potential American citizens. Some may choose not to pursue citizenship, but the primary purpose of the status is as a path to citizenship. When permanent residents are denied the opportunity to naturalize, they are less likely to identify with America and fully invest in its economic, social, political, and cultural arenas.

This Part proposes two complimentary solutions to the problematic practice of denying an opportunity for full membership to those with a criminal past. First, it urges Congress to eliminate the good moral character requirement entirely, or restrict the good moral character bar triggered by criminal conduct. Should a character requirement be kept, it recommends changes that USCIS should implement to realign the Agency’s actions with its mission and to assure fair and lawful character assessments.

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392. *See supra* note 360 and accompanying text.

393. MOTOMURA, *supra* note 31, at 166.

394. MOTOMURA, *supra* note 31. The long history of racial barriers to citizenship cannot be ignored, and undermines this description in important ways.

*A. Reform the INA: Eliminate or Restrict the Good Moral Character Requirement*

Administrative law scholars and those who write about immigration and naturalization frequently criticize the way that immigration bureaucrats exercise the considerable discretion afforded to them.<sup>395</sup> Given the way that USCIS is approaching good moral character decisions, the best way to ensure fairness might be to limit agency discretion. This can be most readily accomplished in two ways: (1) by eliminating the good moral character requirement entirely; or (2) by imposing a bright line rule stating that certain crimes denote a lack of good moral character.

First and foremost, a person's character should have no bearing on their membership in their political community of residence. While most scholars and theorists have long accepted that naturalization is a democratic process for determining membership, and that the distribution of membership is a political matter of which the state has sovereign power,<sup>396</sup> there is an emerging literature, of which my Article is a part, discussing a right of access to membership.<sup>397</sup> Under this rights-based norm, what matters for membership in the political community of residence is residence in the political community. Anything else—such as civic knowledge or language ability—should not bar membership to someone who has established (and been granted) permanent residence in the political community. This right of access norm can be seen emerging, for example, as racial, ethnic, and gender barriers to citizenship are coming under increasing stress, and as states relax their rules against dual nationality.<sup>398</sup>

A second reason to eliminate the good moral character requirement is that it is superfluous. As Part III showed, the character requirement is superfluous because of strict deportation provisions, limited relief granted only to those few who demonstrate reform and community ties, and widespread felon disenfranchisement. Its elimination from naturalization law, therefore, would not impact any of the goals of keeping the public safe or protecting the integrity of American democracy.

Furthermore, eliminating the character requirement would also avoid the problematic and largely unreviewable exercise of discretion by agency bureaucrats, as exemplified by Kichul Lee and the hundreds of individuals who joined him as

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395. See Hiroshi Motomura, *Prosecutorial Discretion: How Discretion is Exercised Through Our Immigration System* (Immigration Policy Center Special Report, April 2012), Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997), *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006) (remarking that “[t]he only consistency that we can see in the government’s treatment of the meaning of ‘aggravated felony’ is that the alien always loses.”).

396. WALZER, *supra* note 346 at 52.

397. See Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 717 (2011) (describing the introduction of international rights norms into membership laws of individual nation-states), JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 6 (2010) (arguing that residence over time produces a social membership that can trump legal status and justify and require regularization), SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS (2004).

398. See Spiro, *supra* note 397 at 717, 733.

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plaintiffs in a class action suit against USCIS regarding discretionary character-based denials.<sup>399</sup>

An additional reason to eliminate the good moral character requirement for citizenship is that a character inquiry itself is problematic, if not folly.<sup>400</sup> Character does not admit of an easy definition. It is something internal which cannot be observed or verified. Determining character necessarily requires an assessment of imperfect stand-ins, such as behavior and reputation, but these alone or together do not amount to character.<sup>401</sup>

As Chief Judge Learned Hand described the judge's task,

We must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty . . . . Left at large as we are, without means of verifying our conclusion, . . . the outcome must needs be tentative; and not much is gained by discussion.<sup>402</sup>

In another character case, Judge Hand confessed that the decision was made by “resort to our own conjecture, fallible as we recognize it to be.”<sup>403</sup> Professor Martin Shapiro observed that “more than anything else[, Judge Hand's] opinions seem to be pleas to Congress to get him out of the morals business.”<sup>404</sup>

The aggravated felony bar could be said to be an answer to that plea. It functions as a bright-line rule that constrains agency discretion. But Congress has imposed too bright a line. The fact that conduct as varied as murder, drug possession, writing a bad check, and misdemeanor shoplifting can come under the definition of “aggravated felony,” and thus equally and permanently bar someone from demonstrating good character, speaks to the senselessness of the current framework. The “aggravated felony” bar to a good moral character finding captures too many crimes which do not indicate a lack of character, and it endures too long even for more serious crimes. Moreover, some crimes that trigger a character bar reflect the grim economic circumstances or immaturity of the individual more than

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399. *See supra* notes 259–67, *Portillo-Rendon v. Holder*, 662 F.3d 815, 817 (7th Cir. 2011) (declining to review good moral character determination in the context of relief from removal because it “is a discretionary call and thus is not subject to judicial review).

400. *See Price v. INS*, 962 F.2d 836, 845 (9th Cir. 1991) (Noonan, J., dissenting) (“Beyond excluding persons committed to subversion or terror or under the orders of a foreign government, there is no conceivable way that the government can measure a person's character.”).

401. While the statute used to require that the applicant “behaved as a person of good moral character,” Act of June 29, 1906, ch. 3592, 34 Stat. 596, 597, it has since 1940 required that the applicant “has been and still is a person of good moral character.” 8 U.S.C. § 1427(a) (2006).

402. Shapiro, *supra* note 105, at 917 (quoting *Johnson v. United States*, 186 F.2d 588, 589 (2d Cir. 1951) and *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947)).

403. *Schmidt v. United States*, 177 F.2d 450, 451 (2d Cir. 1949).

404. Shapiro, *supra* note 105, at 917.

they indicate an irretrievably depraved character, but decision makers are not free to consider such factors where the statutory bar applies.<sup>405</sup>

Even when the character decision is constrained by bright-line rules, legislatively judging the character of others and discerning their worthiness cannot be anything but arbitrary and capricious. It substitutes a behavior determination for a character assessment,<sup>406</sup> and ignores the variety of factors that surround any single act—such as environment and intention, reformation and repentance—that speak to the character of the actor. For discretionary good moral character assessments, now conducted by low-level bureaucratic staffers who are not required to be lawyers,<sup>407</sup> psychiatrists, or counselors, much less divine beings, the determination is little more than wild guessing. It certainly is not informed by psychological training or knowledge of desistance data.

Assuming that there is some value and legitimacy to a moral character requirement and some truth to its presumptions (that we can comfortably assess a person's character or predict a person's future behavior), and presuming the good moral character requirement's survival,<sup>408</sup> the INA should nevertheless allow permanent residents with a criminal past the opportunity to demonstrate their current fitness for full membership.<sup>409</sup> In the "land of the second chance," a criminal conviction should not be a permanent bar to a good character finding.<sup>410</sup> The reasons have already been discussed above: the Supreme Court has rejected fixed character judgments based on youthful crime and desistance studies demonstrate that past criminal history becomes insignificant as a predictor of future conduct in a short number of years.<sup>411</sup> Just as most felon disenfranchisement laws

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405. See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM L. REV.* 307, 371-72 (2004) (discussing morally arbitrary factors such as being raised in a family in which physical and psychological abuse were commonplace, or being raised in a very poor family in a poor neighborhood, that can lead to the commission of crime), WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996) (arguing that inner city crime is, in part, a result of the disappearance of blue-collar jobs).

406. See Newton, *supra* note 12, at 68 ("Any approach which attempts to preserve the ordinary meaning of 'moral character,' yet can deal only with acts and conduct, is doomed to failure.").

407. See H.R. REP. 99-905 at 3 (Sept. 26, 1986) (noting that 1983 agency reforms allowed non-lawyers to review naturalization petitions).

408. I admit that eliminating the good moral character requirement in today's political climate is unlikely.

409. I concede that a Congress that proposed five years ago to eliminate district court review of USCIS good moral character decisions is not likely to embrace its elimination. See H.R. REP. 4437 § 5609(f) (2005), in 151 *CONG. REC.* H11800 (daily ed. Dec. 15, 2005).

410. Some may wish to retain a permanent bar for those convicted of serious crimes such as homicide and violent sex offenses, or those with multiple serious convictions. The unlikelihood that anyone so convicted would avoid deportation if released from prison significantly minimizes the necessity for such an exception. Moreover, there is no data from which to conclude that all serious violent offenders are incapable of rehabilitation.

411. See *supra* Part III.C.

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wear off with time,<sup>412</sup> redeeming the ex-offender's political rights, so too should laws regarding criminal convictions and eligibility for citizenship.

As before, the Half Welcome bring the shortcomings of the current provision into sharp focus. Properly conceived, the waiver of deportation is a new decision to admit the individual to the community. It is not just the fact of that decision, but its basis, that underscores the injustice of denying the Half Welcome an opportunity to become full members. The waiver was not based on the immigrant's special or needed skills in the labor force, but on her demonstrated ties to the community and evidence of reform.<sup>413</sup> As such, the decision to readmit the immigrant is truly about the emerging affiliated identity with, and integration into, America, not the immigrant's functional contribution to the community. Following a renewed probationary period, justice requires that they have an opportunity to demonstrate their fitness for full membership in the community, based on their behavior during that probationary period.

Legislative reform is not necessary only for the Half Welcome. For all those who live in the shadows of membership, whether wrongly denied or chilled from applying, the citizenship consequences of past criminal conduct should wear off with time. The permanent bar triggered by "aggravated felonies" should be replaced with a seven-year bar, to ensure that sufficient time passes after the conviction to conclude that the applicant has reformed. A clean record would not guarantee a good moral character finding, but it should be strong evidence in that regard. This accords with the historical purpose of legal permanent resident status as probationary period and aligns the character requirement with the desistance literature discussed in Part II above.<sup>414</sup> In addition, the seven-year period, as opposed to the regular five-year residency period required for most citizenship applicants, would account for the prior crime by requiring a longer period of lawful behavior.

Such legislative reform would not be unprecedented. A similar proposal was made in 2006. That year, an immigration reform bill proposed making the good moral character bar triggered by an "aggravated felony" inapplicable to those who had completed their term of imprisonment or sentence ten years prior to applying for naturalization.<sup>415</sup> That bill passed the Senate, but was never enacted into law.<sup>416</sup>

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412. Only two states, Kentucky and Virginia, permanently disenfranchise individuals for any felony conviction. Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 *HOW. L.J.* 587, 593 (2011).

413. *See supra* Part II.A.

414. *See also* FED. R. EVID. 609(b) (barring admissibility of a conviction more than ten years old without notice to the adverse party). The Senate Report on the Rules of Evidence notes that "convictions over ten years old generally do not have much probative value." S. Rep. No. 93-1277 (1947), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7061. Numerous courts have stated that the presumption against inadmissibility is "founded on a legislative perception that the passage of time dissipates the probative value of a prior conviction." *United States v. Cathey*, 591 F.2d 268, 275 (5th Cir. 1979).

415. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 204 (2006).

The United Kingdom offers a model for a naturalization scheme that redeems individuals from the burden of prior crimes. Under the Rehabilitation of Offenders Act of 1974, criminal convictions can become “spent” or ignored after a specified rehabilitation period.<sup>417</sup> All convictions for which the sentence was less than thirty months can become “spent.”<sup>418</sup> The length of the rehabilitation period depends on the sentence given and the age at the time of conviction. After the rehabilitation period, an individual is not obliged to mention the “spent” conviction when, among other things, applying for naturalization.<sup>419</sup> As such, those with prior convictions are, after a period of three to ten years of crime-free residence in the United Kingdom, freed from the burden of past mistakes and can naturalize.

Assuming a character requirement is kept, the number of crimes that prevent a good moral character finding should be reduced, and the duration of any character bar should be limited. This will ensure that only those who have committed the most serious crimes that reflect a lack of moral character will be denied naturalization on character grounds; it will ensure that the executive agency will not misuse any discretion to deny applicants on character grounds as it has done in cases like that of Kichul Lee; and it will restore the redemptive view that Congress and the Courts had long inserted into the good moral character requirement.

### B. Reforms at USCIS

In fixing specific periods during which good moral character must be shown, Congress clearly intended to make citizenship available to individuals who, despite

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(a) Definition of Good Moral Character—Section 101(f) (8 U.S.C. 1101(f)) is amended— . . . (2) in paragraph (8), by striking “(as defined in subsection (a)(43))” and inserting the following: “, regardless of whether the crime was defined as an aggravated felony under subsection (a)(43) at the time of the conviction, unless—

‘(A) the person completed the term of imprisonment and sentence not later than 10 years before the date of application; and

‘(B) the Secretary of Homeland Security or the Attorney General waives the application of this paragraph . . . .’

*Id.*

The same Senate Bill, it should be noted, proposed increasing the discretion of CIS to deny naturalization on character grounds, emphasizing that the decision was discretionary and could be based on the applicant’s conduct and acts at any time, even those occurring outside the period during which good moral character is required. *Id.*

416. Dorothy E. Hill, *Guest Worker Programs Are No Fix for Our Broken Immigration System: Evidence from the Northern Mariana Islands*, 41 N.M. L. REV. 131, 159 (2011).

417. Rehabilitation of Offenders Act, 1974, c. 53 (Eng.).

418. For those seventeen and under when convicted, the rehabilitation period is three and a half years for a prison sentence of six months or fewer and five years for a sentence of between six and thirty months. For those eighteen or over when convicted, the rehabilitation period is seven years for a prison sentence of six months or fewer, and ten years for a sentence of between six and thirty months. Offenses that resulted in probation, fines, community service, and drug treatment are “spent” in two and a half years for those seventeen and under and five years for those eighteen and over. *Id.*

419. See HOME OFFICE, UK BORDER AGENCY, GUIDE AN: NATURALISATION AS A BRITISH CITIZEN – A GUIDE FOR APPLICANTS 15 (2010) (U.K.) (“You do not have to give details of any offences which are ‘spent’ under the Rehabilitation of Offenders Act 1974.”).

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previous transgressions, currently are of good moral character.<sup>420</sup> Yet USCIS currently uses the good moral character requirement to prevent many with minor criminal histories from becoming citizens. This contradicts the statutory scheme and USCIS's mission and produces negative effects. This Section suggests several changes to USCIS practices, including better training, revising the Adjudicator's Field Manual and N-400 form, and retracting the Aytes Memo's directives about referring naturalization applicants with criminal history to ICE.

As the *Kichul Lee v. Gonzalez*<sup>421</sup> class action demonstrated, USCIS needs to better train ISOs and supervisors on how to make proper character assessments for naturalization purposes.<sup>422</sup> The deposition of ISO Eladio Torres shows that the problem was not isolated in Washington state, and that it persists. The law is clear: an "aggravated felony" conviction only bars a good moral character finding if it occurred after November 29, 1990;<sup>423</sup> preresidence period conduct cannot form the exclusive basis for a denial of good moral character;<sup>424</sup> and discretionary good moral character assessments must be made by considering both negative and positive equities.<sup>425</sup> Training must clarify this so that ISOs do not continue to apply an incorrect standard.

Revisions to the AFM's chapter on good moral character are necessary as well. As of now, the manual describes a one-sided inquiry, with USCIS singularly focused on collecting negative evidence regarding the applicant.<sup>426</sup> The government gets rap sheets and conducts an extensive background check on the applicants.<sup>427</sup> Those with criminal records receive a "Case File Review Notice" instructing them to provide original arrest records and dispositions for all criminal contacts.<sup>428</sup> And ISOs are instructed to ask crime-related questions in a dozen ways.<sup>429</sup> Even though the applicant bears the burden of establishing her eligibility, and USCIS is right to protect itself against fraud by conducting its own investigation; naturalization proceedings are not adversarial. The AFM should suggest to ISOs that they ask applicants with a criminal past to submit character evidence, and explain what such evidence might be. Similarly, the "Case File Review Notice" and N-400

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420. *See supra* Part I.B.

421. First Amended Complaint, Class Action, *Lee v. Ashcroft*, No. C04-449 RSL (W.D. Wash. May 4, 2004).

422. Such a conclusion is not new. In its 2000 report on the CUSA Initiative, the Office of Inspector General concluded that the INS failed to provide clear guidance regarding good moral character determinations to naturalization examiners, and concluded that the agency needed to develop better guidance concerning the appropriate evaluation of good moral character. *See Special Report*, Executive Summary, at 22.

423. 8 U.S.C. § 1427 (2006); 8 C.F.R. § 316.10 (2010).

424. *Ikenokwalu-White v. I.N.S.*, 316 F.3d 798, 805 (8th Cir. 2003) (holding that conduct predating the relevant statutory time period may be considered relevant to the moral character determination but that such conduct cannot be used as the sole basis for an adverse finding on that element).

425. *See Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (BIA 1978).

426. *See supra* Part II.B.2.a.

427. *See* LAS Letter, *supra* note 212, at 7.

428. *See supra* Part II.B.2.b.

429. *See supra* Part II.B.2.b.a.

Naturalization Application Form could easily advise applicants that they may submit evidence that would prove that they are, and have been for the past five years, a person of good moral character. USCIS materials should also indicate that a lack of negative information during statutory period reflects positively on the applicant's character. As federal courts have declared, evidence of no further arrests or convictions is "at least probative of . . . rehabilitation."<sup>430</sup>

USCIS should also retract the Aytes Memo. Rather than refer those with criminal contacts for potential removal and hold naturalization applications in abeyance, the better course would be for USCIS to fully adjudicate each naturalization application. If denied, USCIS could refer the case to ICE for review by agency lawyers to determine if removal charges could and should be filed. Given that naturalization applicants are likely to be stable residents with citizen or lawful permanent resident family members, they pose little risk of flight, and thus there is no need to immediately detain them pending ICE review.

The Aytes Memo is also wrong to give USCIS adjudicators the authority to issue NTAs or refer naturalization applicants to ICE for several reasons. First, it directs field offices to treat a naturalization application as denied when USCIS issues a Notice to Appear for the applicant.<sup>431</sup> This creates a perverse and appealing incentive for ISOs to clear naturalization backlogs and keep their decision-time average low.<sup>432</sup> Second, as demonstrated above, ISOs make erroneous good moral character decisions, either out of ignorance about the actual governing law or out of a good-faith mistaken interpretation of the law. What constitutes an "aggravated felony" is ever changing, and is often a difficult puzzle for even immigration and federal judges to untangle. Finally, because INA § 318 bars adjudication of naturalization applications when removal proceedings are pending, the issuance of a NTA denies applicants the opportunity to appeal improper denials, leaving errors uncorrected. For those applicants who were eligible to naturalize, their only recourse is to win their removal proceeding in immigration court and then *reapply* (and pay the naturalization fee again)<sup>433</sup> and hope that the error is not repeated. At the same time, other ISOs do not learn from the mistakes of their colleagues and will unnecessarily continue to make similar errors.

Together, these modest reforms would eliminate wrongful denials on character grounds, eliminate inefficiencies, and reduce the chilling effect that current practices have on those individuals who are eligible for naturalization but nevertheless refrain from applying.

The INA should not per se bar citizenship to permanent residents with criminal histories, nor should USCIS intimidate eligible applicants from applying and get the law wrong when they do. Instead of preventing political participation in local communities and marginalizing the noncitizen community, the naturalization framework should encourage economic, social, and political investment in American communities.<sup>434</sup> Inclusion and participation are self-reinforcing. Feeling

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430. *Rashtabadi v. I.N.S.*, 23 F.3d 1562, 1571 (9th Cir. 1994).

431. Aytes Memo, *supra* note 213, at 7.

432. The INS/USCIS has long been criticized for naturalization application backlogs.

433. 8 C.F.R. § 103.7(b)(1)(i)(C), (XX) (2011) (\$85 biometric fee and \$595 naturalization fee).

434. *Rodriguez*, *supra* note 63, at 1122 ("[C]onceptions of belonging must have content

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included encourages you to participate, and participating makes you more included. Therefore, the good moral character bar to a finding of good moral character should be eliminated or fitted with a seven-year sunset clause.

## CONCLUSION

Congress calls United States citizenship “the most valued governmental benefit of this land.”<sup>435</sup> It ensures secure, robust political participation. Many consider it the finest form of societal integration, including state and federal governments, immigration advocates, and anti-immigration groups. Nevertheless, citizenship is becoming more difficult to obtain, particularly for those with a criminal past. The expressively punitive nature of the INA’s current good moral character provision and USCIS’s misguided priorities and unlawful practices in handling naturalization applications are forcing legal residents with a criminal past to permanently live in the shadows of full membership. This fractures the community that the citizenship regime aims to promote and undermines American democracy.

There is undeniable merit to ensuring that the United States does not welcome to full membership those who repeatedly flaunt society’s rules and who pose a risk to the community’s safety. Still, there must be a rational justification for pinning such consequential importance to any and every act of wrongdoing. No such justification exists for the current character requirement and the way it is being applied by USCIS. Rather than excluding and subordinating community members, we must look for ways to restore the view of all lawful permanent residents as future citizens where possible. Eliminating the good moral character bar or restricting it temporally, and making USCIS implement the laws correctly and fairly, would do just that.

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that grounds migrants in the geographic space in which they actually, physically live . . . . This grounding secures social stability by requiring people to invest in the community around them.”).

435. Naturalization Amendments of 1989, H.R. REP. NO. 101-187, 14 (1989).