

2006

Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding over Indictments for Illegal Reentry

Anthony Distinti

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Anthony Distinti, *Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding over Indictments for Illegal Reentry*, 74 Fordham L. Rev. 2809 (2006).

Available at: <https://ir.lawnet.fordham.edu/flr/vol74/iss5/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding over Indictments for Illegal Reentry

Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. Thanks to Professor Jennifer Gordon and to Dan Kesselbrenner, Director of the National Immigration Project, for their extremely helpful guidance. Thanks to those close to me for their support and patience during the writing process.

GONE BUT NOT FORGOTTEN: HOW SECTION 212(C) RELIEF CONTINUES TO DIVIDE COURTS PRESIDING OVER INDICTMENTS FOR ILLEGAL REENTRY

*Anthony Distinti**

INTRODUCTION

In 1982, twelve-year-old Richard Copeland immigrated to the United States from Jamaica and became a lawful permanent resident.¹ He lived with his grandmother² and showed academic promise.³ In high school, Copeland began dating a female United States citizen.⁴ The couple eventually moved in together and had two children, whom Copeland helped support.⁵

Copeland's life had a darker side, however. By 1995, he had been convicted of four New York State crimes: disorderly conduct, attempted criminal sale of a controlled substance in the third degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the second degree.⁶ Furthermore, the circumstances behind Copeland's fourth conviction were extremely violent. Copeland had pulled a man from a car at gunpoint, demanded money, and shot the man in the throat when he tried to escape.⁷ Each time the police arrested Copeland, he gave false names, social security numbers, or birth dates.⁸ Based on Copeland's conviction for attempted criminal sale of a controlled substance,

* J.D. Candidate, 2007, Fordham University School of Law. Thanks to Professor Jennifer Gordon and to Dan Kesselbrenner, Director of the National Immigration Project, for their extremely helpful guidance. Thanks to those close to me for their support and patience during the writing process.

1. *United States v. Copeland (Copeland II)*, 376 F.3d 61, 62 (2d Cir. 2004). Lawful permanent residents ("LPRs") are "aliens lawfully admitted [into the United States] for permanent residence." Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 238 (4th ed. 2005). LPRs receive green cards, are permitted to work in the United States, and qualify for certain government-subsidized benefits. *Id.*

2. *Copeland II*, 376 F.3d at 62.

3. *United States v. Copeland (Copeland III)*, 369 F. Supp. 2d 275, 312-13 (E.D.N.Y. 2005), *on remand from Copeland II*, 376 F.3d 61.

4. *Id.* at 279, 319.

5. *Id.* at 319-20.

6. *Copeland II*, 376 F.3d at 62-63.

7. *Id.* at 63.

8. *Id.* at 62.

the Immigration and Naturalization Service (“INS”)⁹ initiated deportation¹⁰ proceedings against him.¹¹ Copeland’s deportation hearings took place before an immigration judge (“IJ”) in August and November of 1996.¹²

Before September 30, 1996, an immigrant in Copeland’s situation could have applied for a type of relief from deportation commonly called “section 212(c) relief.” To receive section 212(c) relief, an alien in a deportation proceeding had to (1) demonstrate that social and humane considerations outweighed his undesirability as a permanent resident and (2) convince an IJ to make the discretionary decision to grant the relief.¹³ If granted, section 212(c) relief entitled the alien to remain in the United States as a lawful permanent resident (“LPR”).¹⁴ When Copeland’s case came before an IJ in November 1996,¹⁵ however, the status of section 212(c) relief in cases such as his was in doubt.¹⁶ The confusion began earlier that year when Congress passed two amendments to the Immigration and Nationality Act¹⁷ (“INA”): the Antiterrorism and Effective Death Penalty Act of 1996¹⁸ (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁹ (“IIRIRA”) (collectively, “the 1996 Amendments”). The U.S. Attorney General insisted that the amendments retroactively eliminated section 212(c) relief, but some courts disagreed.²⁰ The IJ overseeing Copeland’s deportation proceeding took the Attorney General’s position and refused to consider Copeland for section 212(c) relief.²¹

9. The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified as amended in various sections of 5, 6, 18, 44, and 49 U.S.C.), dissolved the Immigration and Naturalization Service (“INS”) and gave its responsibilities to the newly created Department of Homeland Security (“DHS”). R. Blake Chisam & Robert C. Divine, *Immigration Practice* § 2-2, at 2-2 to -3 (2005-06 ed. 2005).

10. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in various sections of 8 and 18 U.S.C.), changed the word “deportation” to “removal.” *INS v. St. Cyr*, 533 U.S. 289, 315 (2001); see also Anna Marie Gallagher, *Immigration Consequences of Criminal Convictions: A Primer on What Crimes Can Get Your Client into Trouble*, in 1 *Immigration and Nationality Law Handbook* 132, 132 (Randy P. Auerbach et al. eds., 2003). Because this Note discusses immigration law before and after the passage of IIRIRA, the word “deportation” will be used throughout the Note for consistency.

11. *Copeland II*, 376 F.3d at 63.

12. *Id.*

13. See *Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978).

14. *St. Cyr*, 533 U.S. at 295. For a brief definition of an LPR, see *supra* note 1.

15. *Copeland II*, 376 F.3d at 63-64. The waiver was called “section 212(c) relief” after its section in the Immigration and Nationality Act (“INA”), Pub. L. No. 414, 66 Stat. 163, 187 (1952) (codified as amended at 8 U.S.C. § 1182(c) (1994)) (repealed 1996).

16. *Copeland II*, 376 F.3d at 64-65.

17. 66 Stat. 163.

18. Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

19. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in various sections of 8 and 18 U.S.C.).

20. See *Copeland II*, 376 F.3d at 64-65.

21. *Id.* at 64.

Copeland was subsequently deported,²² and he returned to the United States in 1999 without permission from the government.²³ As a result, Copeland was indicted for the crime of illegal reentry pursuant to 8 U.S.C. § 1326.²⁴ By the time Copeland appeared in federal court to face the charge, however, the U.S. Supreme Court had held in *INS v. St. Cyr*²⁵ that AEDPA and IIRIRA did not retroactively eliminate section 212(c) relief.²⁶ It was thus apparent that the IJ presiding over Copeland's original deportation proceeding in 1996 had incorrectly interpreted the law and that Copeland should have been considered for relief.²⁷ Consequently, the federal district court presiding over Copeland's 1999 case faced two pressing questions: Could Copeland claim successfully that the IJ's failure to consider him for section 212(c) relief made his earlier deportation order unfair? If so, should the court vacate his indictment for illegal reentry because the indictment depends on an unfair administrative order?

These questions have not been unique to Richard Copeland's case. Since the Supreme Court's *St. Cyr* decision, several courts have grappled with them and have produced different answers.²⁸ Part I of this Note describes the legislation underlying these questions and how the passage of AEDPA and IIRIRA created confusion in criminal reentry cases where the Board of Immigration Appeals ("BIA") or an IJ failed to consider a potentially eligible alien for section 212(c) relief during his deportation. Part II explains the different conclusions of circuit courts trying to resolve whether an alien indicted for criminal illegal reentry can collaterally attack his deportation order by arguing that a failure to consider him for section 212(c) relief was fundamentally unfair under § 1326(d)(3). Part III argues that such a failure should be considered fundamentally unfair, so long as the alien can prove that he had a plausible ground for relief at the time of his deportation. If the alien satisfies this burden, a court should vacate his indictment for illegal reentry.

I. THE BACKGROUND TO THE CURRENT QUESTIONS ABOUT SECTION 212(C) RELIEF

Some background information is necessary to understand how section 212(c) relief, which was eliminated almost ten years ago, continues to trouble courts presiding over criminal reentry cases. Accordingly, Part I.A offers relevant immigration law, including the basic principles behind deportation, the deportation procedures for criminal aliens such as Richard

22. *Id.*

23. *Copeland III*, 369 F. Supp. 2d 275, 282 (E.D.N.Y. 2005).

24. *See id.* A deported alien who reenters the country without permission from the Attorney General is subject to civil and criminal penalties. For a discussion of these penalties, see *infra* Part I.A.3.a.

25. 533 U.S. 289 (2001).

26. *Id.* at 325-26.

27. *See Copeland II*, 276 F.3d at 71.

28. *See id.* at 70-71 (citing circuit court cases confronting these questions).

Copeland, and the penalties for reentry after deportation. Part I.B then specifies how section 212(c) was applied before its elimination and how a past failure of the BIA or an IJ to consider an alien for section 212(c) relief creates problems for courts today.

A. *Relevant Immigration Law*

The following summaries focus on areas of immigration law that have a large impact on aliens such as Richard Copeland. Part I.A.1 describes the basic principles behind deportation. Part I.A.2 provides some of the basic deportation procedures for criminal aliens. Part I.A.3 summarizes the crime of illegal reentry.

1. The Basic Principles Behind Deportation

Congress determines immigration law and has plenary power to do so: “[O]ver no conceivable subject is the legislative power of Congress more complete.”²⁹ Congress first began restricting immigration in 1875,³⁰ and it granted the executive the responsibility for administering immigration laws.³¹ The executive has established agencies to accomplish this task, and as a result, deportations are regulated by both federal laws and agency regulations.³²

A deportation is a civil proceeding, and consequently, deportable aliens do not possess the same due process protections as criminal defendants.³³ The Supreme Court views deportation not as a punishment, but as a prospective look at an alien’s “right to remain in this country in the future.”³⁴ Historically, the Court has been very deferential toward Congress’s immigration power,³⁵ but the Court’s deference has not been

29. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); see also Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 *Hastings Const. L.Q.* 925, 926 (1995). For a discussion characterizing United States immigration policy as “schizophrenic” since the ratification of the Constitution, see James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 *U.C. Davis J. Int’l L. & Pol’y* 227, 228 (1995).

30. Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 *N.C. J. Int’l L. & Com. Reg.* 869, 883 (2005).

31. See Chisam & Divine, *supra* note 9, § 2-1, at 2-1.

32. See Tim Schepers, Note, *Does the Punishment Fit the Crime? U.S. Alien Deportation and the Requirement of Acceptance in Jama v. I.N.S.*, 28 *Hamline L. Rev.* 389, 399 (2005) (“Alien removal is regulated by both federal law and INS agency procedure and enforced by the Attorney General through INS adjudicative functions.”).

33. See *INS v. St. Cyr*, 533 U.S. 289, 324 (2001).

34. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

35. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953), and citing, among other cases, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and *The Chinese Exclusion Case*, 130 U.S. 581 (1889))); see also Legomsky, *supra* note 29, at 926.

absolute in recent decades.³⁶ For example, the Court has held that aliens residing in the United States and resident aliens returning to the country are entitled to certain procedural due process rights not accorded to aliens seeking initial admission.³⁷ In *Kwong Hai Chew v. Colding*,³⁸ the Supreme Court held that a resident alien who faces a deportation proceeding is entitled to notice of the nature of the deportation charge, a hearing at least before an executive or administrative tribunal, and a fair opportunity to be heard.³⁹ In *United States v. Mendoza-Lopez*,⁴⁰ the Court held that an alien indicted for criminal illegal reentry has the right to collaterally attack his initial deportation order.⁴¹ If the alien proves that the deportation order violated his rights, the court must throw out the indictment for illegal reentry.⁴² *Mendoza-Lopez* also recognized that a deportation hearing might contain procedural errors “so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction.”⁴³ The Court, however, expressly declined to enumerate those procedural errors.⁴⁴

36. Legomsky, *supra* note 29, at 926 (“In the early years, this principle of plenary congressional authority over immigration was often expressed in absolute terms; the suggestion was that courts had literally *no* power to review the constitutionality of Congress’s actions. In later years the Court began to hedge, leaving open the possibility of *some* judicial role in assessing the constitutionality of federal immigration statutes.”); cf. Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1616 (2000) (suggesting that there is a “clear though qualified pattern of genuine discomfort—on the parts of both Congress and the judiciary—with the notion of a significant judicial role in immigration matters” and noting that under Congress’s plenary immigration power, “when someone challenges the constitutionality of an immigration statute, the courts accord Congress unusually great deference, at or approaching nonreviewability”).

37. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int’l L. 862, 867 (1989) (“Under current doctrine, aliens seeking to enter the United States for the first time are entitled only to those procedures Congress decides to provide; resident aliens whom the Government seeks to deport, however, are accorded fairly substantial due process protections.”). *But see* Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. Davis L. Rev. 1683, 1700 (2005) (book review) (noting the argument that the Supreme Court “has steadily chopped away at the constitutional protections of U.S. citizens who seem to have a ‘foreign appearance’”).

38. 344 U.S. 590 (1953).

39. *Id.* at 597-98.

40. 481 U.S. 828 (1987).

41. *Id.* at 837-39.

42. *Id.* at 842.

43. *Id.* at 839 n.17.

44. *Id.* For a list of other procedural due process rights established by the U.S. Supreme Court in the context of deportations, see Julie K. Rannik, Comment, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. Miami Inter-Am. L. Rev. 123, 132 n.52 (1996).

2. Basic Deportation Procedures for Criminal Aliens

To understand the procedural history of a case such as Copeland's, it is necessary to review some of the history and practices of the agencies responsible for executing deportations. When Copeland appeared before an IJ, the INS was the executive agency responsible for deporting aliens.⁴⁵ It was part of the Department of Justice, headed by the Attorney General, and it was charged with enforcing immigration laws.⁴⁶ The Homeland Security Act of 2002,⁴⁷ however, dissolved the INS.⁴⁸ The act charged the newly created Department of Homeland Security ("DHS") with the task of deporting aliens, but the Attorney General retained some of his immigration responsibilities.⁴⁹ Among these responsibilities is overseeing the Executive Office for Immigration Review ("EOIR").⁵⁰ The EOIR includes the BIA and the Office of the Chief Immigration Judge, which manages the nation's immigration courts and judges.⁵¹ The Attorney General is also the ultimate authority for interpreting "all questions of law" in immigration matters.⁵²

Once an alien such as Copeland has been convicted of a deportable criminal offense, deportation proceedings are to begin "as expeditiously as possible."⁵³ Deportable crimes "have historically been defined broadly."⁵⁴

45. See Robert C. Divine, *Immigration Practice* § 2-2(f), at 2-8 (2002).

46. *Id.* §§ 2-2, at 2-1 to -3, 2-2(f), at 2-8.

47. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified as amended in various sections of 5, 6, 18, 44, and 49 U.S.C.).

48. See Chisam & Divine, *supra* note 9, § 2-2, at 2-2.

49. See Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, Division L, § 105, 117 Stat. 11, 526-32 (2003) (amending scattered sections of 6, 8, and 42 U.S.C.); Chisam & Divine, *supra* note 9, § 2-2, at 2-3 & n.6.

50. Chisam & Divine, *supra* note 9, § 2-2, at 2-3.

51. *Id.*

52. *Id.* § 2-2, at 2-2 n.6.

53. See INA § 239(d)(1), 8 U.S.C. § 1229(d)(1) (2000) ("In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceedings as expeditiously as possible after the date of the conviction."). If the DHS or the Attorney General does not discover that the alien is deportable, the alien can continue to live in the United States once he is released from prison. Chisam & Divine, *supra* note 9, § 11-3(h), at 11-23.

54. *INS v. St. Cyr*, 533 U.S. 289, 295 & n.4 (2001); *cf.* Gallagher, *supra* note 10, at 132 ("Since the early days of the republic, the United States government has made efforts and passed laws to limit and exclude the admission and residency of criminal convicts and 'dangerous aliens.'"). One example of an ever-broadening deportable offense is the "aggravated felony." Congress introduced this criminal category in the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181, 4469-70 (codified at 8 U.S.C. § 1101(a)(43) (2000)); see Yen H. Trinh, Note, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 Ga. J. Int'l & Comp. L. 543, 550 (2005). Aggravated felonies are defined by statute. See generally Gallagher, *supra* note 10, at 134-39. The Anti-Drug Abuse Act of 1988 originally stipulated that murder, rape, and sexual abuse of minors constituted aggravated felonies, but subsequent statutes throughout the 1990s added more crimes. *Id.* at 134-35. Aggravated felonies currently include illicit trafficking in a controlled substance, INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), illicit trafficking in firearms or destructive devices, INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C), offenses involving fraud or deceit in which the loss to the victim

If an alien must serve time for his conviction, the DHS can deport him once he completes his term of imprisonment.⁵⁵ Certain nonviolent offenders, however, can be deported earlier than their release dates.⁵⁶

Most deportation proceedings are overseen by an IJ.⁵⁷ In general, the government bears the burden of showing deportability by “clear, convincing and unequivocal evidence.”⁵⁸ An alien has no right to counsel during a deportation proceeding,⁵⁹ but an IJ owes special duties to pro se aliens.⁶⁰ Within thirty days of an IJ’s decision, either party may appeal to the BIA.⁶¹ Consisting of eleven board members, the BIA is the highest administrative body responsible for interpreting and applying immigration

or victims exceeds \$10,000, INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M), and an act of violence resulting in a sentence of at least one year, INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). A crime of violence is defined by 18 U.S.C. § 16 as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16 (2000). Another broad deportable offense is a crime of “moral turpitude.” Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 Geo. Immigr. L.J. 259, 259 (2001). The Immigration Act of 1917, ch. 29, 39 Stat. 874, introduced this deportable offense, but Congress left the task of defining moral turpitude to the courts. Harms, *supra*, at 259. “[W]hether illegal conduct constitutes moral turpitude often depends on the unique circumstances surrounding the commission of the crime . . . [and] what constitutes such a crime in one state may not in another state.” Jay Wilson, *The Definitional Problems with “Moral Turpitude,”* 16 J. Legal Prof. 261, 264-65 (1991). Nevertheless, moral turpitude “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality.” Gallagher, *supra* note 10, at 134 (quoting Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994), *aff’d*, Franklin v. INS, 72 F.3d 571 (8th Cir. 1995)). Currently, an immigration judge (“IJ”) can deport an LPR for one crime of moral turpitude if the crime occurred within five years of entry and resulted in imprisonment for at least one year. 8 U.S.C. § 1227(a)(2)(A)(i) (2000). If the alien’s LPR status is pursuant to 8 U.S.C. § 1255(j), the five year threshold extends to ten years. *See id.* An LPR is deportable at any time if convicted of two crimes of moral turpitude, so long as the crimes do not “aris[e] out of a single scheme of criminal misconduct.” *Id.* § 1227(a)(2)(A)(ii).

55. Chisam & Divine, *supra* note 9, § 11-3(g), at 11-21. The DHS must take almost all imprisoned criminal aliens into custody once they have completed their criminal sentences. *Id.*

56. *See* 8 U.S.C. § 1231(a)(4)(B); Chisam & Divine, *supra* note 9, § 11-3(g), at 11-21.

57. Chisam & Divine, *supra* note 9, § 2-2(g), at 2-17. “[F]ederal judges trying aliens in all criminal cases [possess] the power to enter an order of removal at the time of criminal sentencing rather than wait for normal Immigration Court removal proceedings” *Id.* § 11-4(i), at 11-45.

58. *See id.* § 11-2, at 11-4.

59. *See id.* § 11-3(e), at 11-12.

60. *Copeland II*, 376 F.3d 61, 73 (2d Cir. 2004). A pro se alien is one who represents himself, i.e., appears before an IJ without a lawyer. *See Black’s Law Dictionary* 1258 (8th ed. 2004).

61. Chisam & Divine, *supra* note 9, § 11-6, at 11-77, -78 (“Enforcement of a removal order is automatically stayed during an alien’s time to appeal and during the pendency of any appeal to the [Board of Immigration Appeals (“BIA”)], except as to (1) a custody or bond determination or (2) an order denying a motion to reopen or reconsider (except a motion to reopen an *in absentia* order) unless the Board grants a motion for stay.”).

law.⁶² The BIA reviews an IJ's factual findings under the "clearly erroneous" standard and reviews an IJ's conclusions of law de novo.⁶³ The Attorney General names the BIA board members, defines its jurisdiction, possesses the power to dissolve it, and can reverse any of its decisions.⁶⁴

At the time of Copeland's deportation, federal court review of a BIA decision was often available.⁶⁵ Under certain circumstances, an alien could appeal a BIA decision directly to the court of appeals of the circuit in which the IJ held the proceeding.⁶⁶ An incarcerated alien could also file a habeas petition in the district court, so long as the petition asserted only certain claims.⁶⁷

3. A Potential Consequence of Returning to the United States After Deportation: Prosecution for the Crime of Illegal Reentry

Immigration law prohibits deported aliens such as Richard Copeland from returning to the United States without the permission of the Attorney General.⁶⁸ As Part I.A.3.a discusses, aliens who reenter the country without permission can face severe consequences. Nevertheless, as Part I.A.3.b describes, the Supreme Court has allowed aliens to defend against these consequences by collaterally attacking their deportation orders.

a. *Illegal Reentry as a General Matter*

If a previously deported alien is found in the United States without the permission of the Attorney General, he is subject to both civil and criminal

62. United States Department of Justice, Board of Immigration Appeals, <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Feb. 2, 2006).

63. Chisam & Divine, *supra* note 9, § 11-6, at 11-81; see Rannik, *supra* note 44, at 137-38 ("The BIA was given authority to review discretionary decisions of immigration judges de novo in order to ensure uniformity of decision-making regarding Section 212(c) waivers."). De novo review is a "nondeferential review of an administrative decision." Black's Law Dictionary 864 (8th ed. 2004).

64. Legomsky, *supra* note 36, at 1630.

65. See Chisam & Divine, *supra* note 9, § 2-2(h), at 2-36 ("Many DHS and Immigration Court decisions are subject to some kind of appeal to or review in the federal courts, as long as the administrative remedies (appeals) available have been exhausted or some other basis for federal court jurisdiction is available." (footnote omitted)).

66. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000); see also Legomsky, *supra* note 36, at 1623-24 ("In 1961, Congress made petitions for review in the courts of appeals the 'sole and exclusive' procedure for obtaining judicial review of administratively final deportation orders, except that habeas corpus was still permitted for aliens in custody. Concerned by tales of long delays in executing deportation orders, Congress thought that the combination of district court review of the agency action and court of appeals review of the district court decision was slower and more cumbersome than a one-stop review process in the court of appeals."); see also Rannik, *supra* note 44, at 137-38 ("Decisions of the BIA were reviewable under an abuse of discretion standard and were upheld [by the courts of appeals] unless found arbitrary or capricious. The mere fact that the BIA may have reached a different result was inconsequential.").

67. See 8 U.S.C. § 1252(e)(2) (listing the limits on habeas petition claims).

68. See, e.g., *United States v. Mendoza-Lopez*, 481 U.S. 828, 846 (1987) (Scalia, J., dissenting).

penalties. The civil penalties occur immediately and include detention and deportation.⁶⁹ The criminal penalties are triggered if the alien is prosecuted successfully for illegal reentry, which is governed by 8 U.S.C. § 1326.⁷⁰ If an alien is convicted of illegal reentry, § 1326 imposes, at a minimum, fines and/or imprisonment for two years.⁷¹ Reentering aliens convicted of certain crimes before deportation can suffer higher penalties.⁷² For example, because Richard Copeland committed an aggravated felony⁷³ before his deportation, a conviction for illegal reentry could have earned him up to twenty years in prison.⁷⁴

Having now introduced illegal reentry, Part I.A.3.b describes a potential defense against such a charge.

69. See Chisam & Divine, *supra* note 9, § 10-6(f), at 11-67 to -68 (describing how an alien may be deported for past immigration-related violations, such as reentering after a prior deportation); *id.* § 11-3(f), at 11-16 (describing how the DHS may detain a potentially deportable alien).

70. For a summary of the historical development of the crime of illegal reentry, see Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After St. Cyr*, 19 Geo. Immigr. L.J. 455, 457 (2005).

71. The statute provides the following:

[A]ny alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (2000).

72. For example,

(b) Criminal penalties for reentry of certain removed aliens
Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both

8 U.S.C. § 1326(b).

73. See *supra* note 54 for a discussion of aggravated felonies.

74. See 8 U.S.C. § 1326(b)(2); *United States v. Copeland (Copeland I)*, 228 F. Supp. 2d 267, 270 (E.D.N.Y. 2002).

b. *Mendoza-Lopez and § 1326(d): Providing a Defense Against an Indictment for Criminal Illegal Reentry*

In *United States v. Mendoza-Lopez*, the Supreme Court held that a deported alien indicted for criminal illegal reentry has a constitutional right to defend against the indictment by collaterally attacking the validity of his underlying deportation order.⁷⁵ The Court reasoned that because deportation is an element establishing a violation of a criminal offense, “there must be *some* meaningful review” of the deportation proceeding, where the alien alleges that defects in the proceeding “effectively eliminate[d] the right of the alien to obtain judicial review.”⁷⁶ If the alien’s collateral attack demonstrates that the deportation proceeding violated his right to judicial review, the indictment for criminal illegal reentry must be dismissed.⁷⁷

Congress responded to *Mendoza-Lopez* by codifying the elements of a collateral attack and appending them to § 1326.⁷⁸ The resulting subsection, § 1326(d), provides that an alien indicted for illegal reentry cannot challenge the validity of his deportation order unless

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.⁷⁹

Congress listed these three elements in the conjunctive, and thus the alien must prove all of them to mount a successful collateral attack.⁸⁰

With a background of deportation and illegal reentry established by Part I.A, Part I.B focuses on how section 212(c) affected aliens such as Richard Copeland.

B. *Section 212(c): Its Purpose, Its Repeal, and Its Lingering Effect*

Richard Copeland is among the aliens who defended against his indictment for illegal reentry by collaterally attacking his original deportation order.⁸¹ The particular basis for his attack was the failure of an IJ to consider him for section 212(c) relief. To understand his arguments, it is necessary to review the history and nature of section 212(c). Part I.B.1 describes the purpose of section 212(c) relief and how IJs and the BIA

75. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-39 (1987).

76. *Id.* at 838-39.

77. *Id.* at 842.

78. *Copeland II*, 376 F.3d 61, 66 (2004).

79. 8 U.S.C. § 1326(d).

80. *See, e.g.*, *United States v. Torres*, 383 F.3d 92, 99 (3d Cir. 2004).

81. *See supra* notes 22-27 and accompanying text; *see also infra* notes 171-95 and accompanying text (describing the Second Circuit’s decision in Copeland’s case).

determined whether to grant this relief. Part I.B.2 recounts the reasons why Congress eliminated section 212(c) relief. Part I.B.3 specifies how section 212(c) relief continues to be an issue for courts presiding over indictments for illegal reentry.

1. The Purpose of Section 212(c): Relief from Deportation

Part I.B.1.a summarizes how section 212(c) affected potentially deportable aliens, and Part I.B.1.b describes how decision makers determined whether an alien's case merited an exercise of section 212(c) relief.

a. *The Function and Application of Section 212(c)*

Before its repeal, section 212(c) of the INA was very important to aliens facing deportation proceedings.⁸² Before the passage of the 1996 Amendments, section 212(c) afforded the Attorney General "broad discretion" to waive deportation orders for aliens who committed deportable offenses.⁸³ An alien could request this relief in immigration court if she had maintained an "unrelinquished domicile of seven consecutive years" in the United States and would prevail if she convinced the IJ that her circumstances merited an exercise of discretion.⁸⁴ If, however, the alien had committed one or more aggravated felonies and had served a sentence of at least five years, she was ineligible for section 212(c) relief.⁸⁵ The alien carried the burden of proving her eligibility.⁸⁶

82. See *INS v. St. Cyr*, 533 U.S. 289, 295 (2001) ("The extension of § 212(c) relief to the deportation context has had great practical importance . . ."); Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in *Immigration Stories* 279, 281 (David A. Martin & Peter H. Schuck eds., 2005) ("[R]elief under section 212(c) . . . served as the principle defense for LPRs who faced deportation due to a criminal conviction.").

83. *St. Cyr*, 533 U.S. at 294-95; see also Rannik, *supra* note 44, at 124 (noting that section 212(c) provided "the most common form of discretionary relief available to criminal aliens" (footnote omitted)).

84. Codified at 8 U.S.C. § 1182(c), section 212(c) provided as follows:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). Section 212(c) was literally applicable to exclusion proceedings, but the BIA consistently interpreted it to allow any deportable permanent resident alien to apply for relief so long as she had maintained an unrelinquished domicile for seven consecutive years. Rannik, *supra* note 44, at 134.

85. See INA § 212(c), 8 U.S.C. § 1182(c); Trinh, *supra* note 54, at 553 ("[T]o be eligible for the section 212(c) waiver, the LPR must not have committed a crime fitting the pre-1996 definition of an aggravated felony, nor have served more than five years in prison.").

86. Rannik, *supra* note 44, at 134.

An alien who received a discretionary waiver of deportation remained in the United States as a permanent resident.⁸⁷ Consequently, prior to 1996, many aliens charged with deportable offenses negotiated plea agreements so that their sentences remained below five years and they became eligible for section 212(c) relief.⁸⁸ Under 8 C.F.R. § 242.17(a), an IJ had a duty to inform a deportable alien of her apparent eligibility for any relief provided by statute—including section 212(c) relief—and to give her an opportunity to apply for the relief during a deportation hearing.⁸⁹ From 1989 to 1995, the BIA and IJs collectively “granted [section 212(c)] relief to more than half of those who applied.”⁹⁰

b. *How the BIA or an IJ Determined Whether to Grant Section 212(c) Relief*

In 1978, the BIA opinion *Matter of Marin*⁹¹ established a test governing whether the BIA or an IJ was to grant section 212(c) relief. The opinion instructed the decision maker to weigh “the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf.”⁹² Adverse factors included: the nature and circumstances of the grounds for the alien’s deportation; the presence of additional immigration law violations; the existence of a criminal record and its nature, recency, and seriousness; and the presence of other evidence indicative of an alien’s bad character or undesirability as a permanent resident.⁹³ Favorable considerations included: family ties within this country; residence of long duration in this country; arrival in the country at a young age; evidence of hardship to the alien and to the alien’s family upon deportation; U.S. Armed Forces service; employment history; community service; property or business ties; evidence attesting to good character, such as affidavits; and, in the case of an alien convicted of criminal conduct, proof of genuine rehabilitation.⁹⁴ Applications for relief were to be reviewed on a case-by-case basis.⁹⁵ If the alien faced deportation proceedings because he had two or more narcotics convictions,

87. *St. Cyr*, 533 U.S. at 295.

88. *See, e.g., id.* at 325-26.

89. *See* 8 C.F.R. § 242.17(a) (1997) (repealed 1998); *see also* Rannik, *supra* note 44, at 129 (“[M]ost criminal aliens who were deemed deportable were eligible to petition the immigration judge for a waiver of deportation. Immigration judges were required to conduct hearings for discretionary relief in a fundamentally fair manner and were not permitted to refuse to consider discretionary relief where the alien was prima facie eligible for such relief. Thus, in addition to due process protections, criminal aliens in deportation proceedings were also afforded an extra level of protection. Former Section 212(c) of the INA provided a second chance to aliens with significant ties to the United States.”).

90. Rannik, *supra* note 44, at 124 (citing 142 Cong. Rec. S12,294-01, S12,295 (daily ed. Oct. 3, 1996) (statement of Sen. Abraham)).

91. 16 I. & N. Dec. 581 (B.I.A. 1978).

92. *Id.* at 584.

93. *Id.*

94. *Id.* at 584-85.

95. Rannik, *supra* note 44, at 136.

or because he committed a violent crime, he might be required to demonstrate “unusual or outstanding countervailing equities to obtain a waiver of deportation.”⁹⁶

2. The Repeal of Section 212(c): The Enactment of AEDPA and IIRIRA

The 1990s witnessed a growing societal resentment toward aliens in the United States.⁹⁷ The animosity spiked after the 1993 World Trade Center bombing and the 1996 Oklahoma City bombing.⁹⁸ Congress reacted to public pressure by passing AEDPA⁹⁹ and IIRIRA.¹⁰⁰ AEDPA was enacted on April 24, 1996,¹⁰¹ and IIRIRA was enacted on September 30, 1996.¹⁰²

The 1996 Amendments dramatically affected the availability of section 212(c) relief. For example, AEDPA included a new, broad list of offenses that precluded section 212(c) relief.¹⁰³ Congress intended AEDPA to simplify the prosecution of accused terrorists and to facilitate the deportation of noncitizen criminals,¹⁰⁴ but several government officials quickly realized that AEDPA generated “problems with enforcement and efficiency in deportation proceedings.”¹⁰⁵ Even President Bill Clinton

96. See *Copeland III*, 369 F. Supp. 2d 275, 289-90 (E.D.N.Y. 2005).

97. See, e.g., Tallman, *supra* note 30, at 886-87 (describing a wave of “anti-immigrant sentiment” which resulted in Proposition 187 and other exclusionary legislation).

98. See Trinh, *supra* note 54, at 548 (“There has long been a negative sentiment toward immigrants based on the belief that they are responsible for social problems Often, these beliefs are shown to be unfounded, but the animosity towards immigrants remains. The resentment escalated when it was revealed that illegal aliens were responsible for the bombing of the World Trade Center on February 26, 1993, which killed six people and injured more than 1000 others. After the bombing of Oklahoma City on April 19, 1995, anti-immigration sentiment reached a new peak though it was later revealed that two U.S. citizens were responsible for the attack.” (footnotes omitted)).

99. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

100. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in various sections of 8 and 18 U.S.C.). For a description of Congress’s behavior during this time, see Trinh, *supra* note 54, at 548.

101. 110 Stat. 1214.

102. 110 Stat. 3009-546.

103. See *INS v. St. Cyr*, 533 U.S. 289, 295 n.4, 297 (2001). Section 440(d) of AEDPA also precluded relief for any LPR convicted of an aggravated felony or convicted of two or more crimes of moral turpitude. See Trinh, *supra* note 54, at 553 (“Under section 440(d) of the AEDPA, it was impossible for LPRs convicted of any crimes classified as ‘aggravated felonies’ to petition for a section 212(c) waiver regardless of the sentence imposed or time served.”); see also Rannik, *supra* note 44, at 129 (“AEDPA enhanced the ability of immigration officers to deport criminal aliens by eliminating judicial review for aliens deemed deportable for committing aggravated felonies. AEDPA also went a step further and recategorized most crimes involving moral turpitude as aggravated felonies, thereby eliminating Section 212(c) relief for all but the most minor criminal offenses.” (footnote omitted)).

104. Trinh, *supra* note 54, at 548.

105. *Id.* at 549-50 (noting several criticisms of AEDPA); see also Rannik, *supra* note 44, at 124-25 (“Following the enactment of AEDPA, members of Congress recognized that ‘there might be certain rare circumstances we had not contemplated, when the removal of a particular alien might not be appropriate.’” (quoting 142 Cong. Rec. S12,294-01, S12,294 (daily ed. Oct. 3, 1996) (statement of Sen. Hatch))).

acknowledged that AEDPA made “major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”¹⁰⁶

To address the problems remaining after the passage of AEDPA, Congress enacted IIRIRA only a few months later.¹⁰⁷ IIRIRA completely repealed section 212(c) relief.¹⁰⁸ The amendment created a new form of discretionary relief for LPRs under section 240A(a) of the INA called “Cancellation of Removal,”¹⁰⁹ but this relief was available for a very narrow class of aliens: “Congress explicitly stated that [section 240A(a)] relief is intended only for ‘highly unusual cases involving outstanding aliens.’”¹¹⁰ IIRIRA, along with AEDPA, created more than fifty new deportable offenses.¹¹¹

3. The Lingering Effect of Section 212(c): Confusion About the Application of AEDPA and IIRIRA

AEDPA and IIRIRA placed different restrictions on section 212(c) relief, and as each amendment became effective, a complicated question arose: If an alien was convicted of a deportable crime and was eligible for section 212(c) relief before the amendment went into effect, yet the alien’s deportation proceeding began or the case came before an IJ after the amendment went into effect, was the alien still eligible for section 212(c) relief? That is, did the provisions of AEDPA or IIRIRA retroactively eliminate an alien’s eligibility for section 212(c) relief? The BIA interpreted the 1996 Amendments as having this effect,¹¹² but in 2001, the

106. Trinh, *supra* note 54, at 549-50.

107. 110 Stat. 3009-546; Trinh, *supra* note 54, at 549 (“Shortly after AEDPA was passed, Congress launched an effort to address problems with enforcement and efficiency in deportation proceedings. Consequently, IIRIRA was enacted on September 30, 1996.” (footnote omitted)).

108. See 110 Stat. 3009-597.

109. INA § 240A, 8 U.S.C. § 1229b (2000).

110. Rannik, *supra* note 44, at 139 (quoting 142 Cong. Rec. H10,841-02, H10,896 (daily ed. Sept. 24, 1996) (Joint Explanatory Statement of the Committee of Conference)). An LPR is eligible for consideration of relief under section 240A(a) if she

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

INA § 240A(a), 8 U.S.C. § 1229b(a).

111. Trinh, *supra* note 54, at 552.

112. *Copeland II*, 376 F.3d 61, 64 (2d Cir. 2004). On February 21, 1997, the Attorney General issued an order interpreting AEDPA as applying retroactively. See Daniel P. Derechin, *AEDPA Amends Section 212(c): Alien Who Is Deportable Under Sections 241(a)(2)(A)(iii) and (B)(i) of the INA Is Ineligible for a Waiver of Inadmissibility Under Section 212(c) of the Act When the Waiver Is Requested Alone or in Conjunction with an Application for Adjustment of Status*, 11 Geo. Immigr. L.J. 922, 922-23 (1997). Consequently, the BIA interpreted the 1996 Amendments as stripping eligibility for section 212(c) relief from any LPR who had pled guilty to an aggravated felony, regardless of when the LPR entered his plea. See *Copeland II*, 376 F.3d at 64. Several federal courts, however, disagreed with the BIA’s interpretation and held that the 1996 Amendments did not have a

Supreme Court disagreed. In *INS v. St. Cyr*,¹¹³ the Court held that “§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who . . . would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.”¹¹⁴ In other words, notwithstanding the effective dates of AEDPA or IIRIRA, each amendment’s restrictions on section 212(c) relief do not affect an alien’s eligibility for that relief so long as (1) the alien pled guilty to a deportable crime and (2) the alien was eligible for section 212(c) relief at the time of his plea.¹¹⁵

Unlike Richard Copeland, the noncitizen in *St. Cyr* had not been deported; he was only ordered deported. However, *St. Cyr*’s deportation proceedings were quite similar to Copeland’s. *St. Cyr* had been an LPR in the United States.¹¹⁶ On March 8, 1996—before the passage of the 1996 Amendments—*St. Cyr* pled guilty to the aggravated felony of selling a controlled substance.¹¹⁷ The INS initiated deportation proceedings against him on April 10, 1997—after the passage of the 1996 Amendments.¹¹⁸ An IJ denied *St. Cyr*’s application for section 212(c) relief, and the BIA affirmed the IJ’s decision, reasoning that IIRIRA had eliminated his eligibility for relief.¹¹⁹ Unlike Copeland, *St. Cyr* subsequently filed a habeas petition, arguing that the BIA improperly failed to consider him for section 212(c) relief.¹²⁰ The district court accepted *St. Cyr*’s argument, the U.S. Court of Appeals for the Second Circuit affirmed, and the Supreme Court granted certiorari.¹²¹

The Court determined that the 1996 Amendments did not eliminate *St. Cyr*’s eligibility for section 212(c) relief based on two analyses. The first

retroactive effect. *Id.* at 65 (citing, as examples of opinions that rejected the Attorney General’s interpretation, *Goncalves v. Reno*, 144 F.3d 110, 133 (1st Cir. 1998), and *Mojica v. Reno*, 970 F. Supp. 130, 182 (E.D.N.Y. 1997)). For further details about this debate immediately after the passage of AEDPA, see Morawetz, *supra* note 82, at 283-87.

113. 533 U.S. 289 (2001).

114. *Id.* at 326. Before reaching this decision, the Court held that the 1996 Amendments did not eliminate the Court’s jurisdiction to hear the claims asserted by *St. Cyr*’s habeas petition. See generally *id.* at 298-314.

115. Although the Court’s holding meant that AEDPA did not retroactively eliminate section 212(c) relief for aggravated felons, the Court did not address whether AEDPA’s new lists of aggravated felonies could be applied retroactively to make aliens who committed those crimes before AEDPA deportable. So far, AEDPA has indeed had this effect. See Tracey Topper Gonzalez, *Individual Rights Versus Collective Security: Assessing the Constitutionality of the USA Patriot Act*, U. Miami Int’l & Comp. L. Rev., Fall 2003, at 75, 92 (“AEDPA provides for retroactive and prospective deportation of aliens convicted of certain listed ‘aggravated felonies’ . . .”); Trinh, *supra* note 54, at 545 (“[The 1996 Amendments] apply retroactively to punish LPRs for past crimes. Since the implementation of AEDPA and IIRIRA, many LPRs with criminal records find themselves facing deportation regardless of the severity of their crimes or how well they have rehabilitated.”).

116. *St. Cyr*, 533 U.S. at 293.

117. *Id.*

118. *Id.*

119. *St. Cyr v. INS*, 229 F.3d 406, 409 (2d Cir. 2000), *aff’d*, *St. Cyr*, 533 U.S. 289.

120. *St. Cyr*, 533 U.S. at 293.

121. *Id.*

analysis was a statutory interpretation of IIRIRA. The Court acknowledged that “Congress has the power to enact laws with retrospective effect,” but the Court also noted that a statute can have a retrospective effect only where Congress clearly intended it.¹²² The Court then found that the language of IIRIRA was unambiguous about retroactively eliminating section 212(c) relief,¹²³ leading the Court to conclude that such retroactive elimination would be “impermissible” when applied to defendants like St. Cyr, who entered into plea agreements in the hopes of obtaining relief from deportation.¹²⁴

The second basis for the Court’s holding was a fairness analysis. The Court frequently cited a statistic that from 1989 to 1995, 51.5% of section 212(c) waivers were granted.¹²⁵ This statistic indicated to the Court that “the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted.”¹²⁶ The heavy reliance of aliens like St. Cyr on the availability of section 212(c) relief when entering their pleas was especially persuasive to the Court that retroactive application of the 1996 Amendments was unfair:

Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens’ belief in their continued eligibility for § 212(c) relief, it would surely be contrary to “familiar considerations of fair notice, reasonable reliance, and settled expectations[]” . . . to hold that IIRIRA’s subsequent restrictions deprive them of any possibility of such relief.¹²⁷

Finally, the Court noted that the discretionary nature of section 212(c) relief “does not affect the propriety of [the Court’s] conclusion” because “[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.”¹²⁸ For all of these reasons, *St. Cyr* held that aliens who pled guilty to crimes before the effective dates of the 1996 Amendments in order to remain eligible for section 212(c) relief could still be considered for that relief.¹²⁹ After the

122. *Id.* at 316 (citations omitted).

123. *Id.* at 318-20.

124. *Id.* at 320.

125. *See id.* at 296 & n.5 (pointing out that “in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens”); *id.* at 323 (noting “the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA”); *id.* at 325 (“Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief.”).

126. *Id.* at 295-96; *see supra* note 125.

127. *St. Cyr*, 533 U.S. at 323-24 (citation omitted).

128. *Id.* at 325.

129. *Id.* at 326.

Court's decision, *St. Cyr* had a hearing before an IJ and received section 212(c) relief.¹³⁰

The Supreme Court's decision in *St. Cyr* had a large impact on the defense strategies of many aliens indicted for criminal illegal reentry. Aliens like Richard Copeland could now argue that their deportation orders were defective because the BIA or an IJ applied the 1996 Amendments retroactively before *St. Cyr* and failed to consider the aliens for section 212(c) relief.¹³¹ Courts thus had to decide whether to vacate an alien's indictment for illegal reentry because the failure of the BIA or an IJ to consider the alien for section 212(c) relief rendered the deportation order fundamentally unfair within the meaning of § 1326(d)(3).¹³² As Part II of this Note discusses, the circuit courts split over the resolution of this issue.

II. HOW COURTS CONTINUE TO GRAPPLE WITH SECTION 212(C) RELIEF

As of October 2005, several circuits have questioned whether a failure of the BIA or an IJ to consider a potentially eligible alien for section 212(c) relief renders a deportation proceeding fundamentally unfair under § 1326(d)(3). As Part II.A describes, the majority of the circuits that have considered the question have held that such a failure does not render a deportation proceeding fundamentally unfair. The Second and Ninth Circuits are the only jurisdictions to disagree, both holding that a deportation proceeding can be fundamentally unfair so long as the alien proves that he was prejudiced by the BIA's or IJ's failure to consider him for relief. Parts II.B and II.C outline the reasonings of the Second and Ninth Circuits, respectively. These parts also detail, however, how the Second and Ninth Circuits disagree about the appropriate prejudice standard. The Second Circuit holds that the alien must show a "reasonable probability" of relief at his deportation to demonstrate prejudice; the Ninth Circuit holds that the alien must only show a "plausible ground" for relief. Part II.D describes how district courts have responded to the Second and Ninth Circuits' prejudice standards.

A. *Interpretation One: A Failure to Consider an Alien for Section 212(c) Relief Is Not Fundamentally Unfair*

All of the decisions holding that a failure to consider a potentially eligible alien for section 212(c) relief is not fundamentally unfair involve an alien with the same basic immigration history as Richard Copeland. The alien in each case pled guilty to a crime prior to the passage of the 1996

130. Morawetz, *supra* note 82, at 306. Morawetz also notes that "[b]y 2001, when the Supreme Court issued its decision in *St. Cyr*[,] . . . thousands had been deported and would not reap the benefit of the decision." *Id.* at 280.

131. *See supra* notes 22-27 and accompanying text; *see also infra* notes 171-95 and accompanying text (describing the Second Circuit's decision in Copeland's case).

132. The question assumes that the alien can meet the requirements of § 1326(d)(1) and (2).

Amendments with the belief that doing so preserved the possibility of applying for section 212(c) relief; the alien was found deportable at proceedings that took place after the effective dates of the 1996 Amendments but before *St. Cyr*; the BIA or an IJ incorrectly failed to consider the alien for section 212(c) relief; the alien was deported; and after his deportation, the alien reentered the United States, was indicted for the crime of illegal reentry, and attempted to collaterally attack his deportation order based on the BIA's or IJ's failure to consider him for relief.¹³³ The cases described below delineate the various reasons why courts have rejected such a collateral attack, holding that a failure to consider an alien for section 212(c) relief is not fundamentally unfair.

1. *United States v. Wilson*

In *United States v. Wilson*,¹³⁴ the Fourth Circuit held that to establish "fundamental unfairness" under § 1326(d)(3), an alien had to show that "(1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects."¹³⁵ The Fourth Circuit then relied on one of its previous cases, *Smith v. Ashcroft*,¹³⁶ to hold that the alien in question could not prove fundamental unfairness because there was no due process right to section 212(c) relief.¹³⁷ In *Smith*, the court had held that "to advance a due process claim, [the defendant must have] a property or liberty interest at stake."¹³⁸ For a statute to create such a liberty or property interest, the statute must satisfy two elements: First, it must "direct" that the individual possesses "entitlement to the benefit;" and second, the statute must limit meaningfully the discretion of decision makers.¹³⁹ Regarding the establishment of entitlement to a benefit, the

133. See, e.g., *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004); *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004); *United States v. Wilson*, 316 F.3d 506 (4th Cir. 2003); *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002). For a discussion of a Seventh Circuit case seeming to agree with these decisions in dicta, see Wible, *supra* note 70, at 471-72 (summarizing *United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003)).

134. 316 F.3d 506 (4th Cir. 2003).

135. *Id.* at 510 (citing *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998); *United States v. Encarnacion-Galvez*, 964 F.2d 402, 407 (5th Cir. 1992)). As of 1999, all circuit courts held that a successful collateral attack requires a showing of prejudice. Stephen Yale-Loehr & Rachel J. Valente, *Current Trends in Illegal Reentry Cases*, 3 T.M. Cooley J. Prac. & Clinical L. 1, 7 (1999).

136. 295 F.3d 425 (4th Cir. 2002). *Wilson* was not governed by *Smith* because in *Smith*, the defendant-alien did not collaterally attack his deportation order on the basis of the IJ's failure to consider him for section 212(c) relief. Rather, the alien claimed that his due process rights were violated "because he was not given court review of the BIA ruling that he was not entitled to discretionary relief." *Id.* at 428.

137. *Wilson*, 316 F.3d at 510. The court also found that even assuming *Wilson* could prove a due process violation, he could not prove prejudice. *Id.* at 511.

138. *Smith*, 295 F.3d at 429 (citing *Stewart v. Bailey*, 7 F.3d 384, 392 (4th Cir. 1993); *Jamil v. Sec'y, Dep't of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990)).

139. *Id.* at 429-30 (quoting *Bd. of Pardons v. Allen*, 482 U.S. 369, 382 (1987) (O'Connor, J., dissenting)).

Smith court insisted that even where a state has frequently granted statutory, discretionary relief, this tendency does not create a right protected by the Due Process Clause.¹⁴⁰ The statute “must confer more than a mere expectation (even one supported by consistent government practice) of a benefit” to create a protected due process right.¹⁴¹ The *Smith* court then reasoned that the discretionary nature of section 212(c) relief kept section 212(c) from reaching this standard.¹⁴² Regarding meaningful limitations on the decision maker’s discretion, the court cited *St. Cyr*’s observation that the “Attorney General [had] broad discretion to admit excludable aliens”¹⁴³ to argue that section 212(c) relief did not limit the discretion of decision makers.¹⁴⁴ Thus finding that section 212(c) did not meet the two requirements to establish a liberty or property interest, the *Smith* court held that consideration for section 212(c) relief was not a due process right.¹⁴⁵ Based on this decision, the *Wilson* court concluded that a failure to consider an alien for relief did not render a deportation proceeding “fundamentally unfair” under § 1326(d)(3).¹⁴⁶

2. *United States v. Lopez-Ortiz*

The Fifth Circuit rejected an alien’s collateral attack for similar reasons in *United States v. Lopez-Ortiz*.¹⁴⁷ The court asserted that *St. Cyr* was “not grounded in § 212(c) relief having the status of a constitutionally protected interest; rather, [*St. Cyr*] was based on the Court’s interpretation of IIRIRA.”¹⁴⁸ The court also argued that “[a]s a piece of legislative grace, [section 212(c)] conveyed no rights, it conferred no status, and its denial does not implicate the Due Process clause.”¹⁴⁹ Ultimately, like the Fourth Circuit’s *Wilson* decision, *Lopez-Ortiz* held that section 212(c) does not establish a liberty or property interest, and thus the failure of the BIA or an IJ to consider an alien for section 212(c) relief cannot be a due process violation amounting to fundamental unfairness.¹⁵⁰

3. *United States v. Torres*

In *United States v. Torres*,¹⁵¹ the Third Circuit shared the Fourth and Fifth Circuit’s view that “discretionary relief is necessarily a matter of grace

140. *Id.* at 430.

141. *Id.* at 429.

142. *Id.* at 429-30.

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

144. *Smith*, 295 F.3d at 430.

145. *Id.* at 431.

146. *United States v. Wilson*, 316 F.3d 506, 510 (4th Cir. 2003).

147. 313 F.3d 225 (5th Cir. 2002).

148. *Id.* at 231.

149. *Id.* (quoting *Alfarache v. Cravener*, 203 F.3d 381 (5th Cir. 2000) (internal quotations omitted)).

150. *Id.*

151. 383 F.3d 92 (3d Cir. 2004).

rather than of right.”¹⁵² However, the court acknowledged that there was “superficial support” for the notion that an alien retained a due process interest in being considered for section 212(c) relief.¹⁵³ The court noted that there is a difference between the right to be considered for discretionary relief and the right to a favorable exercise of that relief.¹⁵⁴ Citing *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*,¹⁵⁵ the court observed that a prisoner may have a due process right to consideration of parole, even though a prisoner has no right to the favorable exercise of that relief.¹⁵⁶ In *Greenholtz*, the Supreme Court held that the “mere hope” of parole is not protected by due process.¹⁵⁷ “Where, however, a state creates a parole system that statutorily mandates release unless specified conditions are met, a prisoner eligible for parole consideration may be entitled to certain due process protections.”¹⁵⁸ Thus, the *Torres* court conceded that discretionary relief can amount to a due process right under certain circumstances.

To distinguish the immigration case before it from *Greenholtz*, however, the *Torres* court argued that section 212(c) uses no “explicit mandatory language” to create a due process right in consideration for section 212(c) relief and that thus the statute offers a “mere hope . . . of relief.”¹⁵⁹ The court also found that section 212(c) does not create a presumption in favor of relief¹⁶⁰ and that the possibility of relief was “speculative at best.”¹⁶¹ Based on these interpretations, the court concluded that a failure during a deportation proceeding to consider an alien for section 212(c) relief could not be fundamentally unfair.¹⁶²

4. *United States v. Aguirre-Tello*

In *United States v. Aguirre-Tello*,¹⁶³ the Tenth Circuit issued an en banc opinion similarly rejecting an alien’s argument that a failure to consider him for section 212(c) relief was fundamentally unfair.¹⁶⁴ While the courts in

152. *Id.* at 104.

153. *Id.* at 105.

154. *Id.*

155. 442 U.S. 1, 7 (1979).

156. *Torres*, 383 F.3d at 105.

157. *Greenholtz*, 442 U.S. at 11.

158. *Torres*, 383 F.3d at 105 (citing, along with some circuit court cases, *Greenholtz*, 442 U.S. at 12); see *Greenholtz*, 442 U.S. at 12 (“We can accept respondents’ view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.”).

159. *Torres*, 383 F.3d at 105.

160. *Id.*

161. *Id.* at 104.

162. *Id.* at 106.

163. 353 F.3d 1199 (10th Cir. 2004).

164. The en banc opinion reversed a panel decision, *United States v. Aguirre-Tello*, 324 F.3d 1181 (10th Cir. 2003), *rev’d*, *Aguirre-Tello*, 353 F.3d 1199.

Wilson, *Lopez-Ortiz*, and *Torres* based their decisions on a narrow interpretation of section 212(c) relief, the Tenth Circuit relied on a limited interpretation of deportation due process rights in general. The court began by recognizing that deportations are civil procedures not associated with the same constitutional protections as criminal proceedings.¹⁶⁵ The court then asserted that beyond this principle, “[t]he Supreme Court has not . . . defined what fundamental fairness requires in a civil deportation proceeding context, but [the Court] has suggested that [fundamental fairness] prohibits ‘procedural errors . . . so fundamental that they may functionally deprive the alien of judicial review.’”¹⁶⁶ The Tenth Circuit cited its own opinions defining due process for deportable aliens as “‘an opportunity to be heard at a meaningful time and in a meaningful manner.’”¹⁶⁷ This narrow view of due process for deportations led the court to conclude that a failure to consider an alien for section 212(c) relief does not amount to a constitutional violation.¹⁶⁸ Moreover, the Tenth Circuit questioned the predictive value of the statistic—relied on by the Supreme Court in *St. Cyr*—that 51.5% of relief applications were granted:

[The statistic] does not show . . . what proportion of those successful waiver applicants were convicted of serious violent felonies comparable to Aguirre-Tello’s conviction for attempted murder. Without any indication that any of those successful applicants were similarly situated to Aguirre-Tello, the conclusion that he had at least a 50% chance of receiving a discretionary waiver is pure speculation, if not actually misleading.¹⁶⁹

In the Tenth Circuit’s view, the Supreme Court’s mistake of relying on the statistic bolstered the Tenth Circuit’s holding that a failure to consider a potentially eligible alien for section 212(c) relief is not fundamentally unfair.¹⁷⁰

B. Interpretation Two: A Failure to Consider an Alien for Section 212(c) Relief Can Be Fundamentally Unfair, So Long as the Alien Demonstrates that There Was a Reasonable Probability of Relief

Richard Copeland’s case was the occasion on which the Second Circuit became one of two circuits to hold that a failure to consider a potentially eligible alien for section 212(c) relief can be fundamentally unfair. As discussed in the Introduction, Copeland was deportable for criminal offenses, was told by an IJ that there was no relief available to him, and was

165. *Aguirre-Tello*, 353 F.3d at 1204.

166. *Id.* (quoting *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 n.17 (1987)).

167. *Id.* at 1204-05 (quoting *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1292 (10th Cir. 2001)).

168. *Id.* at 1205. The court also established “reasonable likelihood” as the standard for prejudice and applied the facts to this standard in dicta. *Id.* at 1209-10.

169. *Id.* at 1210.

170. *See id.*

ordered deported.¹⁷¹ Copeland did not appeal the IJ's decision to the BIA within the mandated thirty-day limit,¹⁷² but in September 1998, Copeland filed a motion to reopen his deportation proceeding, alleging that the IJ "breached his obligation under 8 C.F.R. § 242.17(a) to inform Copeland of his eligibility for Section 212(c) relief."¹⁷³ The same IJ denied Copeland's motion, and although Copeland appealed this decision to the BIA, Copeland was deported before the BIA considered his appeal.¹⁷⁴ After Copeland reentered the country, he was arrested and indicted for the crime of illegal reentry.¹⁷⁵ A federal district court dismissed the indictment based on the IJ's failure to inform Copeland of his eligibility for section 212(c) relief, and on appeal, the Second Circuit agreed.¹⁷⁶ In *United States v. Copeland (Copeland II)*,¹⁷⁷ the Second Circuit reached two conclusions: First, a "failure to advise a potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be fundamentally unfair within the meaning of Section 1326(d)(3),"¹⁷⁸ and second, to prove prejudice, the alien must demonstrate that he had a "reasonable probability" of receiving relief.¹⁷⁹

In deciding the first point—that a failure to consider an alien for section 212(c) relief can be fundamentally unfair—the court noted that an alien can only demonstrate fundamental unfairness by showing a fundamental procedural error.¹⁸⁰ The court then challenged the decisions holding that an IJ's failure to consider an alien for section 212(c) relief is not a fundamental error. First, the Second Circuit focused on the language of § 1326(d)(3), pointing out that "fundamental unfairness" becomes very apparent in cases where an alien with a high chance of relief was not considered for it:

To be sure, relief under Section 212(c) is not constitutionally mandated and is discretionary. It does not follow, however, that where an alien is erroneously denied information regarding the right to seek such relief, and the erroneous denial of that information results in a deportation that likely would have been avoided if the alien was properly informed, such error is not fundamentally unfair within the meaning of Section 1326(d)(3).¹⁸¹

The unfairness of such cases, the court reasoned, is especially striking because IJs owe special duties to aliens to develop the records of their deportations and to inform them of any available relief.¹⁸² Second, the

171. *Copeland II*, 376 F.3d 61, 64 (2d Cir. 2004).

172. *Id.*

173. *Id.* at 65.

174. *Id.* The BIA then dismissed Copeland's appeal as moot under 8 C.F.R. § 3.6(b) because Copeland had already been deported. *Id.*

175. *Id.*

176. *Id.* at 66.

177. *Id.* at 61.

178. *Id.* at 71.

179. *Id.* at 73.

180. *Id.* at 70 (citing *United States v. Fernandez-Antonia*, 278 F.3d 150, 159 (2d Cir. 2002)).

181. *Id.* at 71.

182. *Id.* ("[A] ruling by an IJ that misleads an alien into believing that no relief exists falls into a different category because of the special duties of an IJ to aliens.").

court criticized the decisions not finding fundamental unfairness for collapsing the distinction between a right to seek relief and a right to the relief itself: Such decisions “incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error.”¹⁸³ The court embraced *St. Cyr*’s finding that section 212(c) relief was granted in a “substantial percentage” of cases,¹⁸⁴ and the court read *St. Cyr* as denying that the right to seek discretionary relief can be revoked.¹⁸⁵ Thus, the court concluded that the “denial of an established right to be informed of the possibility of [section 212(c)] relief can, if prejudicial, be a fundamental procedural error.”¹⁸⁶

After determining that Copeland could collaterally attack his deportation order, the court addressed Copeland’s burden to demonstrate prejudice. Borrowing the prejudice test for ineffective assistance of counsel claims from *Strickland v. Washington*,¹⁸⁷ the court held that “prejudice is shown where there is a reasonable probability that, but for the IJ’s unprofessional errors, the alien would have been granted Section 212(c) relief.”¹⁸⁸ The Second Circuit reasoned that the *Strickland* standard “is close-fitting because the denial of an opportunity to apply for Section 212(c) relief will generally be the result either of a lawyer having caused an eligible alien to fail to apply . . . or of an IJ, owing special duties to a *pro se* alien, having failed to give notice of such an opportunity.”¹⁸⁹

The Second Circuit explained that its “reasonable probability” standard makes the determination of prejudice “akin to a trial within a trial.”¹⁹⁰ The adjudicating court must gather all the facts relevant to the determination of relief for the alien, balance the factors stated in *Matter of Marin*,¹⁹¹ and take into account similar cases.¹⁹² The court further instructed that “[w]here . . . an alien is deportable by reason of two narcotics convictions, the alien must make a showing of unusual or outstanding countervailing equities to obtain a waiver of deportation.”¹⁹³ The court instructed that

183. *Id.* at 72.

184. *Id.* at 73 (citing *INS v. St. Cyr*, 533 U.S. 289, 296 (2001)).

185. *Id.*

186. *Id.* at 72.

187. 466 U.S. 668, 694 (1984) (noting that prejudice is shown where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

188. *Copeland II*, 376 F.3d at 73.

189. *Id.* (citation omitted).

190. *Id.*

191. *See supra* Part I.B.1.b (describing the *Marin* factors).

192. *Copeland II*, 376 F.3d at 74.

193. *Id.* (quoting *Lovell v. INS*, 52 F.3d 458, 461 (2d Cir. 1995)). In *United States v. Scott*, 394 F.3d 111 (2d Cir. 2005), the Second Circuit also suggested that a “lengthy criminal history” might require a defendant-alien to show “unusual or outstanding equities” in his favor. *Id.* at 120-21 (quoting *Burbano*, 20 I. & N. Dec. 872, 875 (B.I.A. 1994)).

Copeland's criminal record at the time of his deportation was relevant.¹⁹⁴ Because the court felt that the record did not contain enough information about any factors in Copeland's favor, the court remanded the case to the district court to determine "whether Copeland was prejudiced by the IJ's failure to advise him of his right to seek Section 212(c) relief."¹⁹⁵

C. Interpretation Three: A Failure to Consider an Alien for Section 212(c) Relief Can Be Fundamentally Unfair, So Long as the Alien Demonstrates that There Was a Plausible Ground for Relief

The Ninth Circuit is the only other circuit besides the Second to hold that a failure to consider an alien for section 212(c) relief can constitute fundamental unfairness. Several Ninth Circuit cases have addressed this issue. For example, in *United States v. Ubaldo-Figueroa*,¹⁹⁶ as in other Ninth Circuit cases, the court's holding had two points: First, a failure by the BIA or an IJ to consider a potentially qualified alien for section 212(c) relief is, if prejudicial, fundamentally unfair; and second, to demonstrate prejudice, an alien must show that he had a "plausible ground" for obtaining section 212(c) relief at the time of his deportation proceeding.¹⁹⁷

The alien in *Ubaldo-Figueroa* was deported after pleading guilty on separate occasions to one count of attempted first degree burglary of a dwelling, three counts of disorderly conduct, and driving under the influence.¹⁹⁸ During Ubaldo-Figueroa's deportation proceeding, an IJ failed to advise him of his eligibility for section 212(c) relief.¹⁹⁹ After being deported, Ubaldo-Figueroa reentered the United States and was indicted for criminal illegal reentry under § 1326.²⁰⁰ The Ninth Circuit vacated his indictment, reasoning that his deportation proceeding could be fundamentally unfair because section 212(c) relief was "at least one plausible legal challenge to his removal order."²⁰¹ Ubaldo-Figueroa's burden required that he demonstrate prejudice from the IJ's failure to consider him for relief, and thus Ubaldo-Figueroa had to show that he had a "plausible ground" for relief at the time of his deportation.²⁰² The court

194. *Copeland II*, 376 F.3d at 74; see also *Scott*, 394 F.3d at 119 (emphasizing this instruction and instructing that courts cannot consider any positive or negative factors occurring after the time of the deportation).

195. *Copeland II*, 376 F.3d at 74-75. For a discussion of other recent Second Circuit decisions relevant to criminal illegal reentry cases, see Wible, *supra* note 70, at 475.

196. 364 F.3d 1042 (9th Cir. 2004).

197. *Id.* at 1050. For cases with similar holdings, see *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003); *United States v. Leon-Leon*, 35 F.3d 1428, 1432 (9th Cir. 1994) ("An alien's due process rights are adequately protected if . . . he can establish in a later criminal case that the defects in the deportation hearing actually prejudiced him.").

198. *Ubaldo-Figueroa*, 364 F.3d at 1046 & n.5.

199. *Id.* at 1048.

200. *Id.* at 1047.

201. *Id.* at 1050.

202. *Id.*; cf. *Gonzalez-Valerio*, 342 F.3d at 1054 ("Once [the alien] makes a prima facie showing of prejudice, the burden shifts to the government to demonstrate that the procedural violation could not have changed the proceedings' outcome."); *United States v. Higareda-*

found that he satisfied this burden, but the court did not do so by explicitly balancing the factors listed in *Matter of Marin*.²⁰³ Rather, the court held that Ubaldo-Figueroa had a plausible ground for relief because of the “significant” equities in his favor: gainful employment since he came to the United States; “substantial family ties in the United States, including a United States citizen wife and two United States citizen children”; and an active role in his children’s education and upbringing.²⁰⁴ Considering these favorable factors, and not juxtaposing them to any negative factors, the court concluded that Ubaldo-Figueroa had been prejudiced by the IJ’s failure to advise him of eligibility for section 212(c) relief.²⁰⁵

The Ninth Circuit’s “plausible ground” standard is more generous than the “reasonable probability” standard of the Second Circuit.²⁰⁶ The Ninth Circuit’s prejudice standard, however, has not allowed every illegal reentry defendant to argue successfully that his deportation proceeding was fundamentally unfair. Two circumstances in particular have prevented some aliens from demonstrating a plausible ground for relief. The first circumstance has occurred where the alien committed a deportable offense after the 1996 Amendments took effect. For example, the defendant in

Ramirez, 107 F. Supp. 2d 1248, 1253 n.7 (D. Haw. 2000) (“The ‘prejudice’ requirement imposed in . . . cases involving direct judicial review of decisions of the Board of Immigration Appeals is identical to the ‘prejudice’ requirement imposed on a defendant who collaterally attacks a deportation order in a subsequent criminal prosecution for unauthorized re-entry after deportation.” (citing *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996))).

203. *See Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978).

204. *Ubaldo-Figueroa*, 364 F.3d at 1050-51.

205. *Id.* at 1051. Unlike the Second Circuit’s opinion in *Copeland II*, *Ubaldo-Figueroa* and other recent Ninth Circuit opinions do not explain in detail the basis for the Ninth Circuit’s prejudice standard. *See, e.g.*, *United States v. Interian-Mata*, 118 F. App’x 223 (9th Cir. 2004); *United States v. Gonzalez-Valerio*, 342 F.3d 1051 (9th Cir. 2003). One possible explanation for this is that the Ninth Circuit developed its prejudice standard over two decades ago. Several years before the Supreme Court’s decision in *Mendoza-Lopez*, the Ninth Circuit held that an alien indicted for illegal reentry could collaterally attack his underlying deportation. *See, e.g.*, *United States v. Barraza-Leon*, 575 F.2d 218 (9th Cir. 1978). In *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), the Ninth Circuit responded to an alien’s collateral attack by holding that a “[v]iolation of a[n] immigration] regulation does not invalidate a deportation proceeding unless the regulation serves a purpose of benefit to the alien.” *Id.* at 531. The court concluded by remanding the case to the district court and instructing that

[o]n remand the aliens should be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations. The district courts will determine whether [a] violation . . . harmed the aliens’ interests in such a way as to affect potentially the outcome of their deportation proceedings. Any such harm should be identified specifically. If either alien shows such prejudice, the indictment against him may be dismissed.

Id. at 532. The language in *Calderon-Medina*, warning against violations that could “affect potentially the outcome of . . . deportation proceedings,” *id.*, might have planted the seed that eventually produced the “plausible ground” standard.

206. For an argument that the Ninth Circuit’s prejudice standard can be interpreted “as granting defendants in illegal reentry cases the benefit of the doubt, even if they have a borderline claim of prejudice, as long as they establish that their deportation proceeding was procedurally deficient,” see Wible, *supra* note 70, at 475.

*United States v. Gonzalez-Valerio*²⁰⁷ had been convicted prior to the enactment of the 1996 Amendments of committing a lewd act upon a child.²⁰⁸ This crime alone did not bar him from consideration for section 212(c) relief, but after the 1996 Amendments took effect, he was convicted of battering his spouse.²⁰⁹ Therefore, the Ninth Circuit found that when Gonzalez-Valerio faced deportation proceedings after these two convictions and the IJ failed to consider him for section 212(c) relief, Gonzalez-Valerio was not prejudiced “because his 1997 conviction for [battering his] spouse statutorily barred him from receiving § 212(c) relief.”²¹⁰ As the court explained, “If [Gonzalez-Valerio] is barred from receiving relief, his claim is not ‘plausible.’”²¹¹

The second circumstance preventing an alien from demonstrating a plausible ground for relief has occurred where the alien has a serious criminal history. The BIA has required that such aliens demonstrate “unusual or outstanding equities in order to receive relief.”²¹² Serious criminal histories usually involve convictions for multiple crimes. For example, individual aliens have faced the “unusual or outstanding equities” doctrine due to convictions for lewd acts on a child, spousal abuse, and resisting arrest;²¹³ convictions for several drug transactions;²¹⁴ convictions for DUIs, petty theft, second degree burglary, and corporal injury on a spouse;²¹⁵ and convictions for one drug offense and multiple driving infractions.²¹⁶ If an alien with a serious criminal history cannot show

207. 342 F.3d 1051 (9th Cir. 2003).

208. *Id.* at 1052.

209. *Id.* at 1053.

210. *Id.* at 1054.

211. *Id.* at 1056. For other decisions in which the Ninth Circuit did not find prejudice on similar grounds, see *United States v. Garcia-Martinez*, 228 F.3d 956, 964 (9th Cir. 2000) (“[The defendant] must demonstrate actual prejudice.”); *United States v. Leon-Leon*, 35 F.3d 1428, 1432 (9th Cir. 1994) (“Leon-Leon argues prejudice should be presumed. . . . [Nevertheless,] Leon-Leon failed to refute the fact that he is clearly deportable.”).

212. *Gonzalez-Valerio*, 342 F.3d at 1056-57 (quoting *Edwards*, 20 I. & N. Dec. 191 (B.I.A. 1990)).

213. *Id.* (“Gonzalez’s claim of prejudice is further undermined by the requirement that an applicant for § 212(c) relief who has a serious criminal history must demonstrate unusual or outstanding equities in order to receive relief.”).

214. *Gutierrez-Chavez v. INS*, 298 F.3d 824, 825-27, 830 (9th Cir. 2002) (approving of the district court’s finding that the defendant failed to “make a showing of unusual or outstanding equities” because of the seriousness of his offense, which involved participating in ten drug transactions over six months).

215. *United States v. Hernandez-Sanchez*, 137 F. App’x 943, 944 (9th Cir. 2005) (unpublished opinion).

216. *Ayala-Chavez v. INS*, 944 F.2d 638, 641 (9th Cir. 1991) (“The outstanding equities standard is rationally related to the statutory scheme. . . . [T]he immigration laws clearly reflect strong Congressional policy against lenient treatment of drug offenders.” (citations and internal quotation omitted)). For a district court arguing that a conviction for forcible rape warrants the heightened standard, see *United States v. Interian-Mata*, 363 F. Supp. 2d 1246, 1249 (S.D. Cal. 2005).

unusual or outstanding equities in his favor, he has no plausible ground for relief.²¹⁷

D. District Court Responses to the Second and Ninth Circuit Prejudice Standards

Several of the district courts applying the Second Circuit's or the Ninth Circuit's prejudice standard have criticized these standards.

1. *United States v. Copeland*

After the Second Circuit remanded *Copeland II*²¹⁸ for a determination of whether Copeland had a reasonable probability of relief during his deportation, the District Court for the Eastern District of New York responded with a decision (*Copeland III*)²¹⁹ opining that there should be no prejudice standard. The district court felt uncomfortable with the broad discretion granted to courts to determine prejudice, arguing that the "reasonable probability" standard forced courts to do the "nearly impossible" task of determining what a hypothetical immigration judge would have decided.²²⁰ In *Copeland III*, the district court proposed that decisions in cases such as Copeland's should focus not on *Strickland*'s prejudice requirement, but on "the seriousness of the due process denial."²²¹ That is, *Copeland III* argued that courts should decide fundamental unfairness by a categorical approach rather than an individual approach²²²: "[A] readily applied—and probably fairer—test would require the defendant to prove only that his deportation resulted from a due process denial serious enough to make 'the entry of the [deportation] order . . . fundamentally unfair.'"²²³ The court explained that the Second Circuit's order "to take into account actual cases in the context of decisions by [IJs] and the Board of Immigration Appeals poses a substantial challenge" because the majority of IJ decisions are unavailable, unless a party seeks them through discovery.²²⁴ Furthermore, the BIA only reviews a small percentage of the cases heard by IJs.²²⁵ "This presents a skewed sample

217. See, e.g., *Gonzalez-Valerio*, 342 F.3d at 1056-57; *Gutierrez-Chavez*, 298 F.3d at 825-27.

218. 376 F.3d 61 (2d Cir. 2004).

219. *Copeland III*, 369 F. Supp. 2d 275, 311-12 (E.D.N.Y. 2005).

220. See *id.* at 309-11, 334 ("This is a troubling case, in part because it involves a non-citizen with a serious criminal record. More troubling still is that the United States Court of Appeals for the Second Circuit has asked the district court to determine—not what did happen, or what likely happened—but what might have happened had the defendant been permitted to seek section 212(c) relief.").

221. *Id.* at 311.

222. *Id.*

223. *Id.* at 278-79 (quoting 8 U.S.C. § 1326(d)(3) (2000)).

224. *Id.* at 305.

225. *Id.*

because non-citizens satisfied with the results of an [IJ's] decision, in cases where the government did not seriously object, were never appealed."²²⁶

Despite these criticisms, the *Copeland III* court recognized that it had to follow the "reasonable probability" standard established by the Second Circuit.²²⁷ Before deciding whether Copeland met the burden of proving prejudice, however, the court stated that it would be useful to quantify Copeland's burden, "given the difficulty of assessing what another adjudicator would have done when applying complex and subjective criteria."²²⁸ As a result, the court required Copeland to prove that his probability of obtaining relief was at least twenty percent at the time of his deportation.²²⁹ The court settled on twenty percent because the number represents "the approximate inverse of 'clear, unequivocal and convincing evidence'" and it "represents a sensible and enforceable standard, considering that deportation often has such serious consequences for the deportee and his or her family."²³⁰ After balancing the *Marin* factors, the court concluded that Copeland had failed to show a "reasonable probability" of obtaining relief, and the court reinstated his indictment.²³¹

2. District Courts in the Ninth Circuit

Like the *Copeland III* court, some district courts in the Ninth Circuit are critical of applying a prejudice standard to determine whether a failure of the BIA or an IJ to consider an alien for section 212(c) was fundamentally unfair. The opinions of these courts have been skeptical of the generosity of the Ninth Circuit's standard, which requires that the alien only demonstrate a "plausible ground" for relief. For example, in *United States v. Higareda-Ramirez*,²³² the district court commented that "[a] showing of prejudice [under the 'plausible ground' standard] is essentially a demonstration that the alleged violation affected the outcome of the proceedings."²³³ In *United States v. Andrade-Partida*,²³⁴ the district court opined,

226. *Id.*

227. *Id.* at 312.

228. *See id.* at 286.

229. *Id.* at 288.

230. *Id.* at 287; *cf.* *United States v. Russo*, No. 02CR482, 2005 WL 1243311, at *9 n.8 (E.D.N.Y. May 25, 2005) ("This court shares the view that the reasonable probability standard provides district courts with little guidance. This is so both because an alien bears the burden of demonstrating that his application merits favorable consideration, . . . while leaving the determination to the broad discretion of the IJ, and because of the paucity of published decisions of IJs and the BIA that would aid the court in its analysis. . . . While the court is not prepared to opine as to the quantum of proof necessary to establish a reasonable probability, the court understands defendant's burden to be not insubstantial, requiring more than a mere plausible claim for relief." (internal quotations omitted)).

231. *Copeland III*, 369 F. Supp. 2d at 344.

232. 107 F. Supp. 2d 1248 (D. Haw. 2000).

233. *Id.* at 1253; *see also id.* at 1254, 1256 (holding that the defendant was prejudiced during his deportation order because he had no interpreter or attorney, and because the case's record was inadequate).

One can only guess at what might have occurred had the IJ not neglected his mandatory duty The only conclusion that the [c]ourt can reach with certainty is that the IJ's error deprived defendant of the opportunity to apply for certain relief, the denial of which may have created an issue for appeal in federal circuit court.²³⁵

In *United States v. Saldivar-Vargas*,²³⁶ the court commented that in following Ninth Circuit precedent, the court “[was] constrained . . . to find that [the defendant] . . . was deprived of his right to judicial review because the IJ failed to inform him that he was entitled to apply for § 212(c) relief.”²³⁷ Perhaps as a reaction to the generosity of the “plausible ground” standard and as a desire to ground their decisions, district courts in the Ninth Circuit are more prone than appellate courts to consider the *Marin* factors when determining prejudice.²³⁸

Part II of this Note has summarized the three different holdings of circuit courts deciding whether a failure of the BIA or an IJ to consider a potentially eligible alien for section 212(c) relief is fundamentally unfair under § 1326(d)(3). Part II has also described some of the negative reactions of the district courts applying the holdings. Part III of the Note considers the judicial opinions described above and argues that the Ninth Circuit offers the best solution: A failure to consider an alien for section 212(c) relief should be fundamentally unfair, so long as the alien can prove that she had a plausible ground for relief.

III. A FAILURE TO CONSIDER AN ALIEN FOR SECTION 212(C) RELIEF SHOULD BE FUNDAMENTALLY UNFAIR, SO LONG AS THE ALIEN DEMONSTRATES A PLAUSIBLE GROUND FOR RELIEF

This Note has focused on whether a failure of the BIA or an IJ to consider a potentially eligible alien for section 212(c) relief can render a deportation proceeding fundamentally unfair under § 1326(d)(3). Although this issue is narrow, it has generated tremendous confusion and disagreement. Several circuit courts have held that a failure to consider an alien for section 212(c) relief can never amount to fundamental unfairness and thus never be a basis for collaterally attacking a deportation order.²³⁹

234. 110 F. Supp. 2d 1260 (N.D. Cal. 2000).

235. *Id.* at 1271.

236. 290 F. Supp. 2d 1210 (S.D. Cal. 2003).

237. *Id.* at 1214. In a footnote, the court went on to add as follows: “[A]t oral argument the government appeared to concede, as it must, that this court is constrained to follow Ninth Circuit precedent regardless of whether this court agrees with it or whether such precedent might be altered by the Supreme Court sometime in the future.” *Id.* at 1214 n.3.

238. Compare *United States v. Interian-Mata*, 363 F. Supp. 2d 1246, 1249 (S.D. Cal. 2005), *Saldivar-Vargas*, 290 F. Supp. 2d at 1214, and *Andrade-Partida*, 110 F. Supp. 2d at 1267 (all using the *Marin* factors to determine whether the defendant-alien was prejudiced), with *United States v. Aragon-Aviles*, No. 03-50327, 2005 WL 2250763, at *1 (9th Cir. Sept. 16, 2005), *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050-51 (9th Cir. 2004), and *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1085-86 (9th Cir. 1996) (all not using the *Marin* factors to determine whether the defendant-alien was prejudiced).

239. See *supra* Part II.A.

The Second Circuit and Ninth Circuit disagree with this stance, both holding that a failure to consider an alien for relief can be fundamentally unfair, so long as the alien demonstrates that the failure was prejudicial. Furthermore, the Second and Ninth Circuits disagree with each other about the requirements of the prejudice standard.²⁴⁰ Part III of this Note makes two arguments. First, Part III.A posits that a failure to consider an alien for section 212(c) relief can be fundamentally unfair, so long as the alien proves that she was prejudiced by this failure. Second, Part III.B argues that the Ninth Circuit's prejudice standard is the most workable: An alien's burden for demonstrating prejudice should require her to show that she had a "plausible ground" for section 212(c) relief.²⁴¹

A. A Failure to Consider an Alien for Section 212(c) Relief Can Be Fundamentally Unfair

When an alien collaterally attacks her original deportation order, a court must determine whether the alien meets the requirements of § 1326(d)(1), (2), and (3).²⁴² If the alien argues that the BIA or an IJ improperly failed to consider her for section 212(c) relief, and if the alien satisfies § 1326(d)(1) and (2), the court then has the discretion to decide whether the BIA or IJ's failure was "fundamentally unfair" under § 1326(d)(3). A majority of the circuits to rule on this issue have held that a failure to consider an alien for section 212(c) relief cannot be fundamentally unfair. As Part II.A of this Note discussed above, the basis for their decisions is a particular interpretation of section 212(c), one that views the statute as a "legislative grace" granting the Attorney General and his agents broad discretion to decide whether to grant relief from deportation to an alien. The majority circuits maintain that in light of this broad discretion, a failure to consider an alien for section 212(c) relief can never be fundamentally unfair because the statute does not establish a liberty or property right deserving due process protection. The majority circuits' instinct seems to be that due process does not protect a benefit that is entirely discretionary. As the scholar D.J. Galligan observed,

There may be . . . difficulties in making rights dependent upon discretionary assessments. . . . [A]s the discretionary element widens, the value of the right is reduced; there may even come a point where its content is so dependent on discretionary assessments that the very coinage of rights is debased.²⁴³

240. See *supra* Part II.B and II.C for summaries of the Second Circuit's and Ninth Circuit's holdings, respectively.

241. For a description of the Ninth Circuit's prejudice standard, see *supra* notes 196-203 and accompanying text. For an argument that the Second Circuit's prejudice standard is the correct approach, see Wible, *supra* note 70, at 485-92.

242. See *supra* notes 78-80 and accompanying text.

243. D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* 192 (1986).

Nevertheless, the majority circuits' interpretation misses a critical distinction between the right to section 212(c) relief itself (here, undeniably discretionary) and the right to be considered for the relief, which the Supreme Court in another context has held potentially protected by a due process interest even where the relief itself is not. The Supreme Court's decision in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*²⁴⁴ indicates that although someone may have only a "mere hope" in the exercise of discretionary relief, consideration for that relief may become protected by due process if other statutes so mandate. *Greenholtz* held that a Nebraska statute could elevate consideration for parole from a mere hope to a due process right.²⁴⁵ The majority circuits should acknowledge that federal statutes, BIA precedent, and Supreme Court holdings similarly elevated consideration for section 212(c) relief from an exercise of unguided discretion to a mandatory, established liberty interest so important to deportable aliens that it deserves due process protection.²⁴⁶ Therefore, as the Second and Ninth Circuits hold, a failure of the BIA or an IJ to consider a potentially eligible alien for section 212(c) relief can be fundamentally unfair under § 1326(d)(3).²⁴⁷

The first factor elevating consideration for section 212(c) relief from a mere hope to an established liberty interest is federal legislation. Although section 212(c) clearly granted discretionary power to the Attorney General, Congress did not make the consideration of relief discretionary: Under 8 C.F.R. § 242.17(a) (repealed in 1998) and § 212.3(e)(1), an IJ had a duty to inform an alien of any right to discretionary relief and thereafter conduct a hearing to determine whether to grant that relief if requested.²⁴⁸ Congress did not place further limits on the Attorney General's discretion, but a second factor did: the BIA's decision in *Matter of Marin*,²⁴⁹ which provided guidelines for the Attorney General's agents exercising his discretion. Consideration of the *Marin* factors was an established procedure

244. 442 U.S. 1 (1979).

245. *Id.* at 12 ("We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection."); see *supra* notes 155-58 and accompanying text (discussing the Third Circuit's interpretation of *Greenholtz* in *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004)).

246. For a discussion of Supreme Court decisions besides *Greenholtz* that distinguish a right to consideration for relief from a favorable exercise of that relief, see Wible, *supra* note 70, at 486-88 (discussing *Jay v. Boyd*, 351 U.S. 345 (1956); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

247. For a discussion of the Second and Ninth Circuits' holdings, see *supra* Part II.B and II.C, respectively.

248. See *Copeland II*, 376 F.3d 61, 72 (2d Cir. 2004). Congress has "sweeping power to enact retroactive laws," but as counsel for St. Cyr noted during oral arguments before the Supreme Court, "this power [is] all the more reason to apply the Court's rigorous clear statement rule before imposing a harsh retroactive consequence." Morawetz, *supra* note 82, at 303.

249. 16 I. & N. Dec. 581 (B.I.A. 1978).

and acted as a limit on the arbitrariness of the Attorney General's discretionary power.²⁵⁰

The third factor elevating consideration for section 212(c) relief to an established liberty interest is Supreme Court decisions. Both *Mendoza-Lopez*²⁵¹ and *St. Cyr*²⁵² protected the rights of aliens, and these decisions indicate that consideration for section 212(c) relief is a protected due process right. *Mendoza-Lopez* is frequently cited for its general warning that courts should nullify deportation orders based on procedural errors "so fundamental that they may functionally deprive the alien of judicial review."²⁵³ This case also held, however, that fairness during deportation proceedings requires considering an alien for any possible discretionary relief.²⁵⁴ The defendants in *Mendoza-Lopez* were indicted for illegal reentry and argued that they should be allowed to collaterally attack their original deportations.²⁵⁵ The aliens had two bases for their attack: An IJ had inadequately advised them about obtaining counsel, and the IJ had failed to obtain knowing waivers of the aliens' right to apply for a type of discretionary relief called "suspension of deportation."²⁵⁶ After determining that the aliens could collaterally attack their deportation order, the Court held that

250. See *supra* notes 91-96 and accompanying text (discussing the *Marin* factors). To understand how federal statutes and BIA precedent limited the discretionary aspect of section 212(c) relief to make consideration for it an established right, it is useful to compare another form of discretionary relief, the presidential pardon power. See U.S. Const. art. II, § 2, cl. 1 ("The President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."). The President's power to pardon is almost completely discretionary: The only mandatory limits are the Constitution's provisions that (1) the President possesses this power and (2) the power cannot be used to pardon an impeachment. See Paul J. Haase, Note, "*Oh My Darling Clemency*": Existing or Possible Limitations on the Use of the Presidential Pardon Power, 39 Am. Crim. L. Rev. 1287, 1292-93 (2002). Congress has attempted to provide some limits on the President's pardoning power, see, e.g., 28 C.F.R. §§ 0.35-.36 (2005); 28 C.F.R. §§ 1.1-.10 (2005), but these limits are advisory rather than mandatory. Haase, *supra*, at 1298. Thus, "a pardon 'need not satisfy any strict legal set of requirements, [a pardon] can be [granted] for no reason at all or for a coin flip, and in the end [a pardon] rests upon the exercise of boundless discretion.'" *Id.* (alterations in original) (quoting L. Anthony Sutin, *If Only You Asked: Trust the Pardon Review Process*, Jurist, Mar. 19, 2001, <http://jurist.law.pitt.edu/pardonop6.htm>). No one could reasonably argue that he or she is entitled to a presidential pardon and that a failure to consider someone for a presidential pardon amounts to "fundamental unfairness." This is precisely because there is no statutory or customary guidance for, or limits on, the presidential pardon power. In contrast, the Attorney General's discretionary power had to operate within the bounds of section 212(c)'s language, 8 C.F.R. § 242.17(a), 8 C.F.R. § 212.3(e)(1), and the factors enumerated in *Matter of Marin*. The establishment of such requirements indicates that our government took consideration for section 212(c) relief very seriously and that the consideration was an established right deserving due process protection.

251. 481 U.S. 828 (1987).

252. 533 U.S. 289 (2001).

253. *Mendoza-Lopez*, 481 U.S. at 839 n.17.

254. See *supra* notes 75-80 and accompanying text (describing *Mendoza-Lopez*).

255. *Mendoza-Lopez*, 481 U.S. at 831.

256. *Id.* "Suspension of deportation," which was codified at 8 U.S.C. § 1254(a), was very similar to section 212(c) relief. See *id.* at 831 n.3.

[b]ecause respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction, and the dismissal of the indictments against them was therefore proper.²⁵⁷

In other words, the Court explicitly recognized in *Mendoza-Lopez* that if an alien was deprived of judicial review and was not considered for possible relief from deportation, her indictment could not survive. The Court's holding thus indicates that a failure to consider a potentially eligible alien for section 212(c) relief can be a fundamentally unfair procedural error justifying a collateral attack on a deportation order.²⁵⁸

The Supreme Court's decision in *St. Cyr* similarly indicates that a failure to consider an alien for section 212(c) relief can be fundamentally unfair.²⁵⁹ At the beginning of its opinion, the Court characterizes *St. Cyr*'s entitlement to consideration for relief as "a substantive [question], concerning the impact of [the 1996 Amendments] on conduct that occurred before their enactment and on the availability of discretionary relief from deportation."²⁶⁰ The Court highlighted the importance of consideration for section 212(c) relief by discussing the basic unfairness of retroactively eliminating that relief.²⁶¹ The Court posited that retroactive application of IIRIRA would be a "new disability" to aliens such as *St. Cyr* who entered into plea agreements in reliance of the availability of section 212(c) relief and that "[t]he potential for unfairness . . . is significant and manifest."²⁶² As the Second Circuit noted in *Copeland II*, such assertions stand for the proposition that eligibility for section 212(c) relief cannot be lightly revoked.²⁶³ Furthermore, *St. Cyr* clearly stated that the discretionary nature of section 212(c) does not belittle its importance:

[T]he fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Prior to AEDPA and IIRIRA, aliens like *St. Cyr* had a significant likelihood of receiving § 212(c) relief. . . . [R]espondent, and other aliens like him, almost certainly relied upon that likelihood²⁶⁴

Reliance on section 212(c) relief, and not the statute's discretionary nature, was thus determinative in the Court's holding that section 212(c) relief remains available to aliens like *St. Cyr*. Aliens presently indicted for illegal

257. *Id.* at 842.

258. See Gerald P. Seipp, *Defense of INA § 276 Reentry After Removal Prosecutions—Circuit Confusion on the Collateral Attack Defense*, Immigr. Briefings, July 2004, at 1.

259. See *supra* notes 113-29 and accompanying text (discussing *St. Cyr*).

260. *INS v. St. Cyr*, 533 U.S. 289, 292-93 (2001).

261. See *supra* notes 125-29 (discussing *St. Cyr*'s fairness analysis).

262. *St. Cyr*, 533 U.S. at 323.

263. *Copeland II*, 376 F.3d 61, 73 (2d Cir. 2004); see also *supra* note 185 and accompanying text (discussing this point).

264. *St. Cyr*, 533 U.S. at 325.

reentry, however, may have equally relied on section 212(c) relief,²⁶⁵ and the fact that these individuals have reentered the country without permission makes their earlier deportation orders no fairer than *St. Cyr*'s. Courts should not be allowed to eliminate the consideration for relief that *St. Cyr* guaranteed simply because an alien's eligibility for section 212(c) relief is litigated at date later than her original deportation. *St. Cyr*, along with *Mendoza-Lopez*, represents the Supreme Court's view that consideration for section 212(c) relief is not a haphazard, unguided "grace," but an established procedure of incredible importance to aliens. Depriving an alien of the opportunity to seek relief should thus be "fundamentally unfair" under § 1326(d)(3), if—as discussed below—the alien proves that she was prejudiced by the failure.

B. *Demonstrating a "Plausible Ground" for Relief Is the Proper Prejudice Standard*

The Second and Ninth Circuits properly found that a failure of the BIA or an IJ to consider an alien for section 212(c) relief can be fundamentally unfair.²⁶⁶ Both courts maintain that a collaterally attacking alien proves fundamental unfairness only if she was prejudiced by the failure. The Second Circuit held that an alien demonstrates prejudice if she shows that she had a "reasonable probability" of receiving relief from deportation.²⁶⁷ The Ninth Circuit held that an alien demonstrates prejudice by showing that she had a "plausible ground" for relief.²⁶⁸ Part III.B.1 argues that despite the criticisms of the district courts applying the Second or Ninth Circuits' prejudice standards, some standard is necessary. Part III.B.2 argues that a collaterally attacking alien should bear a burden of showing prejudice and that this burden should require the alien to meet the Ninth Circuit's "plausible ground" prejudice standard.

1. The Justification for a Prejudice Standard, Despite the Criticisms of Several District Court Opinions

Although several district courts have been critical of applying a prejudice standard to collateral attacks such as Richard Copeland's,²⁶⁹ aliens should continue to bear some prejudice burden. The government and society would pay a high cost if aliens who were statutorily ineligible for section 212(c) relief or who had a miniscule chance of relief had their indictments

265. Cf. Morawetz, *supra* note 82, at 302 (describing an amicus brief filed on behalf of *St. Cyr* that "provided specific evidence of how criminal defense lawyers were trained to consider eligibility for 212(c) relief when negotiating a plea agreement").

266. See *supra* Part II.B-C (discussing the Second Circuit's and Ninth Circuit's holdings, respectively).

267. See *supra* notes 187-95 and accompanying text (describing the Second Circuit's prejudice standard).

268. See *supra* notes 202-05 and accompanying text (discussing the Ninth Circuit's prejudice standard).

269. See *supra* Part II.D (discussing these criticisms).

for illegal reentry automatically dismissed. Such dismissals would waste the considerable time and money already spent on prosecuting the aliens, as well as risk exculpating dangerous persons who deserve criminal sanctions. Therefore, federal courts should act as a filter, distinguishing aliens who had meritorious cases for section 212(c) relief from those who had no chance of relief. Furthermore, because an alien's burden of proving prejudice will require presenting factors in her favor,²⁷⁰ a determination of prejudice by a federal court will allow an alien with a sympathetic case more time to collect and prepare evidence for any future immigration proceedings.²⁷¹

270. See *supra* notes 91-96 and accompanying text (describing the *Marin* factors).

271. Although an alien may demonstrate prejudice and convince a federal court to vacate her indictment for illegal reentry, it is not certain that she will ultimately receive section 212(c) relief. Under 8 U.S.C. § 1231(a)(5), the federal government can reinstate an alien's prior deportation order "[i]f the Attorney General finds that [the] alien has reentered the United States illegally after having been removed." 8 U.S.C. § 1231(a)(5) (2000). Title eight, section 241.8 of the Code of Federal Regulations further describes how an alien has "no right to a hearing before an immigration judge in such circumstances" and how the reinstatement of the prior deportation order requires an "immigration officer" to make certain findings. 8 C.F.R. § 241.8 (2005). The Code of Federal Regulations allows an alien to submit an oral or written statement contesting an immigration officer's decision to reinstate a deportation, but the Code does not require the officer to determine whether the prior deportation order was fair or whether the alien should have been considered for some form of discretionary relief. See *id.* In fact, 8 U.S.C. § 1231(a)(5) commands that "the prior order of removal . . . is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under this chapter." 8 U.S.C. § 1231(a)(5). As a result, if a federal court in a criminal proceeding finds that an alien's prior deportation order was "fundamentally unfair" and vacates her indictment for illegal reentry, the federal government could reinstate that same deportation order despite the court's fairness determination and proceed with a civil deportation. In light of the federal government's reinstatement power, an alien has limited options if she seeks section 212(c) relief after a court dismisses her indictment for illegal reentry. If an immigration officer reinstates the prior deportation order pursuant to 8 U.S.C. § 1231(a)(5), the alien could submit a statement to the officer citing the federal court's determination that the prior deportation order was "fundamentally unfair." If the immigration officer declines to reverse the reinstatement, the alien could then appeal the reinstatement to the Court of Appeals for that jurisdiction. Nevertheless, under the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified as amended in various sections of 2, 8, 10, 12, 22, 28, 30, 33, 37, 38, 40, 42 U.S.C.), the alien's claims on appeal are limited and the alien's burden of persuasion is significant. For example, *Ramirez-Molina v. Ziglar*, No. 03-50596, 2006 WL 62862 (5th Cir. Jan. 12, 2006), describes how the REAL ID Act limits an alien to asserting only constitutional or legal claims when appealing a reinstatement order and describes how the Fifth Circuit further requires an alien to show that she exhausted her administrative remedies and that her initial deportation order was a gross miscarriage of justice, *id.* at *4. An alien in the Ninth Circuit has an additional option, however. In 2004, the Ninth Circuit invalidated 8 C.F.R. § 241.8, holding that the section's provisions were ultra vires to INA § 240(a), 8 U.S.C. § 1229a(a) (2000), which requires that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299, 1302-04 (9th Cir. 2004); cf. *Dinnall v. Gonzalez*, 421 F.3d 247, 253 n.9 (3d Cir. 2005) (noting the Ninth Circuit's holding in *Morales-Izquierdo*). When a reinstatement hearing within the Ninth Circuit takes place before an IJ, the alien could collaterally attack the prior deportation order. During the hearing, however, the alien would have to demonstrate that "the prior order resulted in a gross miscarriage of justice." See *Roman*, 19 I. & N. Dec. 855, 856-57 (B.I.A. 1988) ("[A]n alien may collaterally attack a final order of exclusion or

2. Why the Prejudice Standard Should Require an Alien to Demonstrate a Plausible Ground for Relief

As discussed above, when an alien indicted in federal court for criminal illegal reentry collaterally attacks her deportation based on a failure of the BIA or an IJ to consider her for section 212(c) relief, the federal court should determine whether the alien was prejudiced.²⁷² The purpose of the court's determination is to distinguish aliens who at least had a chance of receiving section 212(c) relief from those who had no chance of relief and should remain indicted.²⁷³ Consistent with this purpose, federal courts should apply the prejudice standard articulated by the Ninth Circuit: An alien should only have to demonstrate that she had a plausible ground for receiving section 212(c) relief.²⁷⁴ As noted by the district court in *Copeland III*, the determination of prejudice along any standard requires that a federal judge step into the shoes of a hypothetical IJ sitting before the passage of the 1996 Amendments.²⁷⁵ Several district courts have voiced concerns about this task,²⁷⁶ but so long as district courts must filter the aliens' cases to conserve judicial and administrative resources, the standard applied by the courts should be the least burdensome on both the courts and aliens. This seems to be the implication behind *Copeland III*'s attempt to quantify prejudice as a showing that the alien had at least a twenty percent chance of receiving relief from deportation.²⁷⁷ The *Copeland III* court realized that because aliens with meritorious cases have already suffered an improper decision during their deportations, fairness to such aliens requires a low prejudice burden.²⁷⁸ Although the "plausible ground" standard is a generous standard, considerations such as statutory ineligibility and the "unusual or outstanding equities" doctrine will minimize the extent to which federal judges must act as hypothetical immigration judges.²⁷⁹ In sum, a prejudice standard requiring an alien to show a plausible ground for relief is the most efficient standard for conserving judicial and administrative resources and for exculpating aliens who were unfairly denied consideration for deportation relief.

deportation in a subsequent deportation proceeding only if she can show that the prior order resulted in a gross miscarriage of justice.").

272. See *supra* Part III.B.1.

273. See *id.*

274. For a description of the Ninth Circuit's prejudice standard, see *supra* note 202 and accompanying text.

275. See *supra* note 220 and accompanying text.

276. See *supra* Part II.D (discussing the district courts' criticisms).

277. See *supra* notes 227-31 and accompanying text.

278. *Copeland III*, 369 F. Supp. 2d 275, 286-88 (E.D.N.Y. 2005); see *supra* notes 219-31 and accompanying text.

279. See *supra* notes 96, 212-17 and accompanying text (discussing the "unusual or outstanding equities" doctrine).

CONCLUSION

Section 212(c) was incredibly important to deportable aliens because it provided an opportunity for relief from deportation. Federal laws,²⁸⁰ BIA precedent,²⁸¹ and Supreme Court decisions²⁸² have all recognized how numerous aliens came to rely on this relief to remain in the United States. If the BIA or an IJ failed to consider an alien for section 212(c) relief and the alien is subsequently indicted for illegal reentry, the court presiding over the prosecution for illegal reentry should determine whether the alien had a plausible ground for relief at the time of her deportation. If so, the indictment for illegal reentry should be thrown out, for the courts should not condone a conviction that relies on a flawed administrative proceeding. To allow such a conviction is fundamentally unfair, regardless of the defendant's citizenship status.

280. *See supra* note 248 and accompanying text.

281. *See supra* notes 249-50 and accompanying text.

282. *See supra* notes 251-65 and accompanying text.

Notes & Observations