THE IMMIGRATION HOTEL

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Abstract

The image of a hotel with each floor representing different immigration statuses provides a way to introduce the confounding immigration system we have in the United States, on both technical and policy levels.

The imagery of the hotel helps to explain how one gets into the immigration hotel (the admissions process) and also how one gets kicked out (through various forms of removal proceedings). Analogies to different forms of eviction allow for parallels as well, depending on the nature of the building in question (e.g., hotel room, apartment, or condo) and the legal status of the person being removed (e.g., temporary traveler, renter/lease holder, or homeowner).

Drawing on property law also allows for different floors to represent different types of immigration status. In a nutshell, citizenship occupies the top floor and is akin to cooperative or condominium ownership. Legal permanent residency occupies the apartment floor, with occupants tied to leases with strict terms. Breaking the terms of the lease can lead to eviction (i.e., deportation).

Traditional hotel rooms are reserved for temporary (non-immigrant) visa holders. Sandwiched on a hard-to-get-to floor between the apartments and the hotel rooms is the sanctuary: a place for refugees, survivors of crimes and human trafficking, unaccompanied children, and those stranded in the United States as the result of natural and human-made disasters in their homelands. The lobby serves not only as the admissions entry point but also as a place of legal limbo (sort of like an

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easement), where people are sometimes allowed to hangout for years on end in renewable quasi-status, like parole and deferred action.

The basement holds those without status—either they never had it because of their unauthorized entry at an unregulated entry point, or they lost it because they have violated their terms of status. The cellar, or dungeon, is immigration detention.

Finally, an ancillary services floor (laundry and maid services) serves to briefly capture attempts by states and localities to regulate immigration and private employer attempts to intimidate unauthorized workers who have sought to unionize.

The building analogy proves durable, both on the surface, as an explanatory heuristic (e.g., "citizenship is like ownership"), and as a way to explore the history behind immigration categories (e.g., who has been entitled to citizenship mirrors who has been entitled to own real property).

Parallels between the history of real property ownership (through the use of restrictive covenants) and the history of immigration regulation (such as the Chinese Exclusion Acts) illustrate how the analogy can do more than just explain the current operation of immigration law; it can also illuminate how the laws came into being in larger historical context. Racial and economic barriers to real property ownership and control are often paralleled in the immigration hotel—the poor and marginalized often face high challenges to securing immigration status as well as stable living situations.

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INTRODUCTION

For over fifteen years, I have used the image of a hotel with each floor representing different immigration statuses as a way to introduce students to the confounding immigration system we have in the United States. The analogy has served me well, and I wish to share it with others. The analogy works at several levels. Law students have survived their first year of law school by the time they get to clinical work or the doctrinal immigration law course, and many parallels with

property law make some intuitive sense. The tiered nature of the analogy suggests hierarchy, inclusion and exclusion, issues of safety and protection, and benefits and limits of hospitality. In this hotel we find both legalized luxury and legalized squalor, often on the same floor. The analogy allows for discussions of conceptions of social justice and inequality.[1] Many of the same arguments and emotions stirred by property disputes (e.g., zoning, trespass and eviction, means of acquisition) arise in immigration debates.[2] When I started this Article, I saw the property law analogy as a useful pedagogical tool. By the time I finished it, I came to see that immigration law and property law often have been two interlocking pieces of a system of racialized and gendered exclusion and oppression. The system has come under attack and undergone change, but equal justice for many remains beyond reach.

In a nutshell, citizenship occupies the top floor and is akin to cooperative or condominium ownership. Legal permanent residency occupies the apartment floor, with occupants tied to "immigration leases" (i.e., green cards) with strict terms. Breaking the terms of the lease can lead to eviction (i.e., deportation). Hotel rooms are reserved for temporary (non-immigrant) visa holders, although "temporary" can often stretch into years. Sandwiched on a hard-to-get-to floor between the apartments and the hotel rooms is the sanctuary: a place for refugees, survivors of crimes and human trafficking, unaccompanied children, and those stranded in the United States as the result of natural and human-made disasters in their homelands.

The lobby serves not only as the admissions entry point, but also as a place of legal limbo, where people are sometimes allowed to hangout for years on end in renewable quasi-status, like parole and deferred

1. In a similar vein, the theologian Ched Myers writes of the Tower of Babel as a symbol of imperial homogeneity in Mesopotamian antiquity (in terms of monoculture, centralized military and economic power, and a single language). Ched Myers, *Cultural Diversity and Deep Social Ecology: Genesis 11 and Acts 2*, *in* OUR GOD IS UNDOCUMENTED: BIBLICAL FAITH AND IMMIGRANT JUSTICE 17, 19–28 (2012). In applying his thought to the present, he writes that "the Americas have always been defined by the struggle between dominant cultural ideologies of conformity imposed by those in power, and grassroots cultural diversity among those on the margins." *Id.* at 18.

2. Leti Volpp also has explored this metaphor of immigration and property, including notions of trespass, temporary license, burglary and how racist immigration policies have spatial and hierarchical implications. Leti Volpp, *Imaginings of Space in Immigration Law*, *in* LAW, CULTURE & THE HUMAN. 1, 10–12 (2012), http://ssrn.com/abstract=2127446. I am grateful to Professor Volpp for bringing this work to my attention.

action. The concept of easement might best describe the lobby. Finally, we have the subterranean floors. The basement holds those without authorized status—either they never had it, because of their unauthorized entry at an unregulated entry point, or they lost it, because they have violated their terms of status. The cellar or dungeon is immigration detention, the sprawling network of federal facilities, county jails, state penitentiaries, and family and youth shelters, where persons are held involuntarily on civil charges before, during, and after their immigration removal cases. Two caveats—first, at some point, analogies break down. Immigration law is not property law, so the parallels are not perfect. For instance, under property law, private individuals and corporations play a very large role in the exercise and enforcement of rights and responsibilities—whereas in immigration law, that is usually a matter for federal (and sometimes local) law enforcement. Living in a basement generally is not illegal, but the image of being underground serves the overall analogy well. And while I have created a separate "sanctuary" floor, the variety of immigration statuses found there could be allocated to other floors in the hotel.[3] Certainly other analogies have been used for unauthorized status.[4] My second caveat is that this Article aims to be introductory and not exhaustive—an extended metaphor, not a practice manual.

3. For instance, while asylum is not considered a non-immigrant visa, neither is it permanent residency, and it is subject to revocation (thus perhaps making it more appropriate for the Hotel room floor); Withholding of Removal might also be placed in the Lobby, as it is a statutory/treaty-based form of grace for otherwise deportable individuals; some forms of relief under the Violence Against Women Act are legal permanent residency, placing those visa categories on the Apartment floor; crime victims start out as non-immigrants and progress to permanent residency status.

4. Rose Cuison Villazor has elegantly described the unauthorized population as living in an "Immigration Closet," and noted that issues that face LGBTQ communities, the most powerful among them being the symbolic act of "coming out," bear comparison to unauthorized populations, most powerfully the symbolic act of "coming out." Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 1–2 (2013).

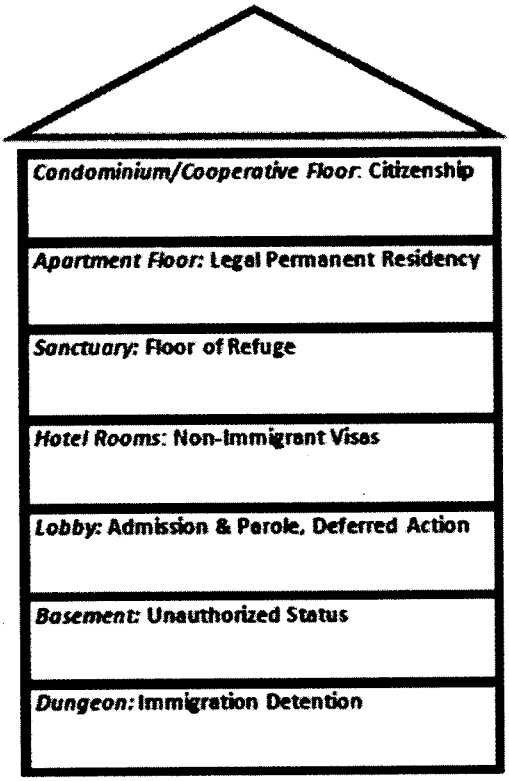

Illustration 1: The Immigration Hotel

Below I first address the basics of getting into, out of, and around the hotel, and how one moves legally (and sometimes illegally) through it. Knowing the basic architecture of the building (e.g., citizens at the top, residents in the middle, unauthorized immigration in the basement) is sufficient to get started in this way, but the reader should feel free to jump ahead to more detailed descriptions of types of immigration status. Each hotel floor is described later in more detail, starting with the lobby and moving up to the citizenship floor, before taking the elevator down to the basement of unauthorized presence and the dungeon of detention.

I. GETTING INTO, OUT OF, AND AROUND THE IMMIGRATION HOTEL

Describing how to get in and out of the Hotel before describing the building in any detail presents some challenges. The act of making a reservation (procuring a visa or applying for a status directly) depends on the type of room (i.e., immigration status) being sought. Being evicted (such as by losing permanent residency or being denaturalized) begs the question—being evicted from what? So, bear with the metaphor, as this is simply a chicken-or-egg problem of which to describe first. (Or you can just jump ahead to whichever floor is of most interest to you.)

A. Making Reservations: Visa Petitions and Applications

As with a regular hotel, getting into the U.S. immigration hotel does not necessarily in all cases require a reservation, but usually it does. Broadly speaking, a visa is the reservation. Getting a visa does not guarantee admission into the building; a visa indicates that a spot is designated as available but the person for whom it is reserved must still prove they are not disqualified in some other way (by a ground of inadmissibility, which this Article will get to in a moment).

Who can make a reservation for the intending immigrant depends on the type of immigration status being sought. For the vast majority of available permanent immigrant spots on the apartment floor in the United States each year (often referred to as green cards),[5] someone or some entity other than the person who will ultimately benefit from getting the visa must ask for the visa. Those making the requests for visas are called petitioners,[6] and the recipients are called beneficiaries.[7]

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5. The term has become so embedded in common usage that the government still refers to a legal permanent resident as a "Green Card holder." *Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/greencard (last visited July 10, 2016). In the first twenty years or so of working in the field, I think I saw a total of two truly "green" cards, undoubtedly because the last green card had been issued the year I was born. The government changed the color of the card from pea green to blue in 1964 and has redesigned the card many times since to prevent fraud. Juliana Jiménez Jaramillo, *Why Isn't My Green Card Green?*, SLATE (July 4, 2012, 6:15 AM), http://www.slate.com/articles/life/design/2012/07/green_card_history_u_s_immigrants_vital_document_through_the_years_.html. Coming full circle, newly issued green cards are green again. Sarah Stone, *Why are Green Cards Called That?*, TODAY I FOUND OUT (Feb. 26, 2015), http://www.todayifoundout.com/index.php/2015/02/green-cards-called/.

6. *Petitioner*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/petitioner (last visited July 10, 2016).

So, for example, U.S. citizens can petition for many non-citizen relatives, and U.S. companies can petition for non-citizen potential employees.[8] Getting the visa is just the first step. For many people seeking status who are already in the United States, they must apply for "adjustment of status."[9] For those abroad or those required to leave the United States in order to receive legal permanent residency, they must participate in "consular processing."[10] In both cases, one must overcome grounds of inadmissibility before being granted legal permanent residency.[11]

The process is similar for many, but not all, non-immigrant (or temporary) visas. Very roughly speaking, the longer the temporary stay is anticipated to be, the more likely it is that someone or some other entity will need to be involved in an invitation or petition. For example, a person seeking to come to the United States as a tourist or business traveler can apply for a visa without anyone else petitioning for them.[12] Someone seeking to work in a high-tech job for three to six years will need a company to petition for them.[13]

The Bureau of Consular Affairs in the Department of State possesses a great deal of power to decide who gets a visa and is even beyond the control of the Secretary of State.[14] This principle of

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7. *Glossary*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary?topic_id=b#alpha-listing (click on "Beneficiary") (last visited July 10, 2016).

8. For example, a U.S. citizen applies for a visa for their non-citizen spouse based on § 201(b) of the Immigration Act of 1952 and 8 C.F.R. § 204.2, using USCIS Form I-130. *See* Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (2012); 8 C.F.R. § 204.2 (2016); *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/i-130 (last visited July 10, 2016).

9. *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-status (last updated July 14, 2015).

10. *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing (last updated July 17, 2015). Persons who entered the United States without being admitted or paroled (i.e., those who entered illicitly) are required to consular process—meaning they must leave the United States and seek to be admitted even though they may have lived in the United States for many years. *See, e.g.*, *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers (last visited Oct. 30, 2016).

11. *See infra* Section I.B.

12. *See* Immigration and Nationality Act § 101(a)(15)(B); 8 C.F.R. § 214.2(b).

13. *See* Immigration and Nationality Act § 101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1).

14. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 260–63 (8th ed. 2016).

"consular nonreviewability" came under scrutiny by the Supreme Court in 2015, when it took the case of a naturalized U.S. citizen from Afghanistan who sought a resident visa for her Afghan husband.[15] Based on a Fifth Amendment liberty interest in residing with her husband, she sought the rationale for why the State Department had denied the petition on terrorism grounds.[16] A divided Court held 5–4 against her, but the main decision was only a plurality, and the concurrence, along with the dissent, left open the possibility of limited court review of such decisions in the future.[17]

B. What Stops You from Checking In at the Front Desk: Grounds of Inadmissibility as Akin to Restrictive Covenants

In order to be granted a visa and to actually be allowed to enter the United States (and in order to be granted permanent residence after arriving in the United States), an applicant must not be subject to any grounds of inadmissibility.[18] Grounds for inadmissibility are found in section 212 of the Immigration and Nationality Act ("INA" or the Immigration Act of 1990).[19] The list is long: former immigration violations, health reasons, criminal history, national security (including rather sweeping definitions of what constitutes terrorism), the likelihood of becoming a public charge, looking for a job that could be filled by a U.S. citizen or current resident, lack of proper travel documents, prior deportation, and a number of miscellaneous grounds (e.g., polygamy, international child abductors, and illegal voters).[20] Prior to 1996, these provisions of law were called grounds of exclusion.[21] Like restrictive covenants found in property law, one purpose is to exclude people from the "neighborhood," with the larger neighborhood

15. *See* Kerry v. Din, 135 S. Ct. 2128, 2131–32 (2015).

16. *Id.*

17. *Id.* at 2139–41 (Kennedy, J., concurring in the judgment); *id.* at 2142–44 (Breyer, J., dissenting). For an analysis of the decision, see Kevin Johnson, *Opinion Analysis: Limited Judicial Review of Consular Officer Visa Decisions—Foreshadowing the Result in the Same-Sex Marriage Case?*, SCOTUSBLOG (June 15, 2015, 5:02 PM), http://www.scotusblog.com/2015/06/opinion-analysis-limited-judicial-review-of-consular-officer-visa-decisions-foreshadowing-the-result-in-the-same-sex-marriage-case/.

18. *See* Immigration and Nationality Act § 212(a).

19. *Id.*

20. *Id.*

21. *See Exclusion*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/exclusion (last visited July 10, 2016).

in the immigration sense being the United States.

These grounds of inadmissibility are reviewed at several stages in an immigrant's journey. For example, when applying for a non-immigrant visa (like a tourist visa) or legal permanent residence at a U.S. consulate abroad, grounds of inadmissibility are considered and, if any apply, the intending immigrant must apply for a waiver of them (assuming such a waiver exists).[22] Then, when an immigrant arrives at a port of entry (think of it as the front desk of a hotel), these grounds can be reviewed again.[23] Grounds of inadmissibility apply not only when people are seeking to enter the United States, but may also apply when they are seeking to move between floors in the immigration hotel, such as when they are moving from non-immigrant status to legal permanent residency[24]—so it is like being sent back down to the front desk to change or upgrade your reservation, at which time the front desk checks for admissibility again to see if something was missed the first time around, or if you have done something in the meantime to get excluded.

Congress began putting together a systematic list of exclusion grounds in 1875, and it has grown ever since.[25] For significant periods of our history, Congress used race and nationality as explicit bases for refusing entry into the United States, not unlike the use of race in restrictive covenants.[26] In 1882, Congress passed the Chinese Exclusion Act, which the Supreme Court upheld in 1889 and which remained on the books until 1942.[27]

Roughly during the same period of time following Reconstruction, restrictive covenants arose to keep non-Caucasians, regardless of citizenship, out of white areas.[28] Whereas the Chinese Exclusion Act was fueled in large part by fear and scapegoating of foreign migration,[29]

22. *See, e.g., I-601, Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-601 (last visited July 10, 2016).

23. *See I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-212 (last visited July 10, 2016).

24. *See* Immigration and Nationality Act § 212(a)(6), (7)(B).

25. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 5–6 (3d ed. 2012).

26. *Id.* at 5–6.

27. *Id.* at 6.

28. *See* Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 739–41 (1989).

29. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 63–79 (2006).

the rise of restrictive covenants came about as the internal migration of rural blacks to urban areas in the early twentieth century prompted white backlash.[30] Efforts at race-based segregation ordinances failed at the Supreme Court in 1917, only to be replaced by private restrictive covenants.[31] It was not until 1948 that the Supreme Court ruled that a state court enforcement of a restrictive covenant barring ownership "by people of the Negro or Mongolian Race" was state action and therefore violated the Fourteenth Amendment.[32]

Republican presidential candidate Donald Trump famously called for a ban on all Muslims traveling to the United States in December 2015, following mass shootings in Paris and California.[33] However bad as a matter of policy and impractical as a matter of implementation, the Chinese Exclusion Act cases from the 1880s gave pause to at least some scholars from categorically saying such a move would be *per se* unconstitutional.[34]

Poverty is another ground of inadmissibility—the likelihood of

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30. Ware, *supra* note 28, at 739–40 (citing Buchanan v. Warley, 245 U.S. 60 (1917)).

31. *Id.*

32. Shelley v. Kraemer, 334 U.S. 1, 5, 11, 23 (1948). Thurgood Marshall represented the petitioners. *Id.* at 3. A case from 1892 in the Southern District of California earlier had held that prohibitions on the sale of property to a "Chinaman" was unenforceable as contrary to public policy and in violation of the Fourteenth Amendment and a treaty with China. Gandolfo v. Hartman, 49 F. 181, 183 (S.D. Cal. 1892). Other types of restrictive covenants have been upheld:

> The "state action" ruling in Shelley is largely limited to racially restrictive covenants or those involving other suspect classifications or covenants which impact important fundamental rights such as freedom from religious discrimination or the right to privacy. . . . Courts tend to apply a "reasonableness" standard, for example, to equal protection claims that looks for simply a rational connection to some private benefit secured by the covenant. Under this rationale, age-restrictive covenants and covenants requiring a family relationship among household members have been enforced.

5 ARDEN RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 82:8 (4th ed. 1998), Westlaw (database updated June 2016) (citations omitted).

33. Ben Kamisar, *Trump Calls for 'Shutdown' of Muslims Entering US*, THE HILL: BALLOT BOX (Dec. 7, 2015, 04:30 PM), http://thehill.com/blogs/ballot-box/presidential-races/262348-trump-calls-for-shutdown-of-muslims-entering-us.

34. Jacob Gershman, *Is Trump's Proposed Ban on Muslim Entry Unconstitutional?*, WALL ST. J.: L. BLOG (Dec. 8, 2015, 3:41 PM), http://blogs.wsj.com/law/2015/12/08/is-trumps-proposed-ban-on-muslim-entry-constitutional ("Constitutional challenges to immigration restrictions 'face unusually tough hurdles,' [said] Stephen H. Legomsky, of Washington University School of Law . . . . The hurdle he referred to is in the form of the so-called plenary power doctrine . . . . It was first laid down by the Supreme Court in the late 1880s when justices upheld the Chinese Exclusion Act . . . .").

becoming a public charge prevents entry,[35] and becoming a public charge within five years of admission under certain circumstances is also a ground for removability.[36] When applying for admission, it is analogous to presenting a credit card for a reservation or at the front desk and getting back the "your card has been declined" message from the front desk staff.

While the current list of grounds of inadmissibility does take its inspiration from the late nineteenth century,[37] the current Immigration and Nationality Act dates from 1952 and has been revised repeatedly.[38] An important feature of grounds of inadmissibility is that one often finds both exceptions to those grounds as well as waivers around them.

C. *Hallways and Elevators: Moving Around Within the Immigration Hotel*

Movement between floors in the immigration hotel happens all the time, both in sanctioned and unsanctioned ways. Imagine elevators as the authorized ways between floors. As in some buildings, there are inequities in the speed of different immigration elevators. The law provides for many forms of express treatment, from being able to get on the elevator faster (through the payment of premium application processing fees that get your application into the hands of adjudicators more quickly)[39] to special treatment for some members of the U.S. military with special language skills.[40] Broadly speaking, someone seeking (1) to extend their non-immigrant stay, or (2) to move from one hotel room to another on the non-immigrant floor, or (3) to move from

35. Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (2012).

36. *Id.* § 237(a)(5).

37. For instance, the Immigration Act of 1882, ch. 126, 22 Stat. 59 (1882), *amended by* Act of July 5, 1884, ch. 220, 23 Stat. 115 (1884), barring the landing of "idiots and lunatics," is the source for the current ground of inadmissibility found at § 237(a)(1)(A)(iii) of the INA.

38. *See* 8. U.S.C. ch. 12.

39. *How Do I Use the Premium Processing Service?*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/forms/how-do-i-use-premium-processing-service (last visited July 10, 2016).

40. *See* Margaret D. Stock, *MAVNI (Military Accessions Vital to the National Interest): Noncitizens May Bypass the Green Card Process and Earn U.S. Citizenship for Military Service*, LEXISNEXIS LEGAL NEWSROOM (Mar. 11, 2013, 04:58 PM), http://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2013/03/11/mavni-military-accessions-vital-to-the-national-interest-noncitizens-may-bypass-the-green-card-process-and-earn-u-s-citizenship-for-military-service.aspx.

the lobby (e.g., parole status) to the hotel room floor uses a form for the extension of status or change of status.[41]

Moving from the non-immigrant rooms of the hotel room floor (or some rooms on the sanctuary floor, like asylum) to the apartment floor of legal permanent residency requires one to use the "adjustment of status" elevators.[42] And even before one is allowed on the elevator, one must often present an immigrant visa for one's destination room. For example, someone on their way to family-based permanent resident status on the apartment floor must have an approved and current visa based on their relationship to a U.S. citizen or existing lawful permanent resident ("LPR").[43] Someone on their way to an employment-based permanent resident status on the apartment floor must usually have an approved labor certification secured by their future employer.[44] Finally, to move to the condominium floor of U.S. citizenship, the most common "elevator" for immigrants to take is that of naturalization.[45] To provide an example of movement through the hotel, a person might arrive in the United States on a non-immigrant student visa (F-1), complete their degree in the equivalent of a dorm room on the non-immigrant hotel room floor, and move into another non-immigrant room called Optional Practical Training ("OPT"), where they are allowed to work for a year or more after getting their degree.[46] A common transition is to then work as an H-1B visa holder as one with specialty skills, still on the non-immigrant hotel floor, for three to six years.[47] While doing so, one's employer may petition for labor certification for that person to move from the non-immigrant floor to the apartment

41. *I-539, Application To Extend/Change Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/i-539 (last visited July 10, 2016).

42. *See Adjustment of Status*, *supra* note 9.

43. *Lawful Permanent Resident (LPR)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr (last visited July 10, 2016).

44. *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/permanent-workers (last visited July 10, 2016).

45. *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/us-citizenship/citizenship-through-naturalization (last visited July 10, 2016).

46. *Questions and Answers: Extension of Optical Practical Training Program for Qualified Students*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/archive/archive-news/questions-and-answers-extension-optional-practical-training-program-qualified-students (last visited July 10, 2016).

47. *See, e.g.*, *International Students—Options After F1 Visa Graduation*, H1 BASE, http://www.h1base.com/visa/work/opt%20to%20h1b%20visa/ref/1264/ (last visited July 10, 2016).

floor by adjusting status to legal permanent resident.[48]

D. Means and Basis for Eviction: Grounds of Removal and Denaturalization and the Procedures to Achieve Removal

1. Grounds of Removability as Grounds for Eviction

Besides horizontal and upward movement within the immigration hotel, there's also movement out of the hotel. In recent years Congress has ramped up funding for enforcement and removal operations,[49] and the Obama administration has embraced mass deportation as, yet again, an unsuccessful political strategy for prompting immigration reform.[50] What forms the basis for evictions from this country, which happens not on a mass scale but one person at a time? As in an eviction from a piece of real property, there are both grounds for removal and processes for achieving it. Just to note, this Article uses the terms "deportation" and "removal" interchangeably—before 1996, grounds of removal were called grounds of deportation.[51]

Many grounds of removal are similar to grounds of inadmissibility. Found at section 237 of the Immigration Act of 1990, the most common grounds of removal include: having been inadmissible at time of entry,[52] having no legal status, violating the terms of one's nonimmigrant status, committing marriage fraud, smuggling people, committing certain crimes, being a national security threat, and using fraudulent documents.[53] Less common bases for deportation include: a failure to notify immigration of your address change, failure to register as an alien, becoming a public charge, unlawful voting, and falsely claiming

48. *See id.* Maintaining lawful status while moving from room to room is no easy feat. *See, e.g.*, *Lawful Status vs. Period of Authorized Stay: What do They Mean?*, MURTHY IMMIGR. PODCASTS (Dec. 18, 2013), https://itunes.apple.com/us/podcast/murthy-immigration-podcast/id521369178.

49. WILLIAM L. PAINTER ET AL., CONG. RESEARCH SERV., R44215, DHS APPROPRIATIONS FY2016: SECURITY, ENFORCEMENT AND INVESTIGATIONS 12–15 (2015), https://www.fas.org/sgp/crs/homesec/R44215.pdf.

50. Miriam Jordan, *U.S. Plans Mass Deportation of Illegal Central American Migrants*, WALL ST. J. (Dec. 24, 2015, 4:32 PM), http://www.wsj.com/articles/u-s-plans-mass-deportation-of-illegal-central-american-migrants-1450949524.

51. *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/deportation (last visited July 10, 2016).

52. *See supra* Section II.B.

53. Immigration and Nationality Act § 237, 8 U.S.C. § 1227 (2012).

U.S. citizenship.[54] As with grounds of inadmissibility, there can be exceptions and waivers and stays of removal in certain situations.[55] For example, if a person has a prima facie claim for a visa as a victim of human trafficking or crime (to be discussed below), that person can apply for a stay of removal while that application for protection is being processed.[56] So, thinking in terms of eviction, a very common ground of removability is found at section 237(a)(1)(C) of the Immigration Act of 1990 for someone who has overstayed their visa.[57] Such persons are often visitors for business or pleasure who decide to stay beyond when they are supposed to leave, and like someone staying in their hotel room too long, can face removal from the United States.[58] This might be similar to staying beyond the term of a lease of a residential property,[59] or overstaying a visit in a hotel (where stays of less than thirty days are often seen as licenses in which occupants have fewer rights than tenants).[60] Hotel stays are usually short, but a recent story out of Wisconsin, in which a woman lived in a Marriott for nine years before being evicted, shows that short-term stays can grow into more open-ended situations.[61] While the number of people in the United States who have overstayed their visas has been difficult to pin down, estimates put the figure in the range of forty percent of the estimated eleven million unauthorized immigrants in the United States.[62]

Another common ground of removal is section 212(a)(6)(A)(i) of the Immigration Act of 1990.[63] Yes, it is a ground of inadmissibility, but if

54. *Id.*

55. *Id.*; *see also supra* Section II.B.

56. Immigration and Nationality Act § 237(d).

57. *See id.* § 237(a)(1)(C).

58. *See id.*

59. *See, e.g.*, N.Y. REAL PROP. LAW § 711.1 (McKinney 2016) ("The tenant continues in possession of any portion of the premises after the expiration of his term, without the permission of the landlord or, in a case where a new lessee is entitled to possession, without the permission of the new lessee.").

60. *See, e.g.*, *Who Is A "Landlord" And Who Is A "Tenant"*, CAL. DEP'T OF CONSUMER AFF. (2012), http://www.dca.ca.gov/publications/landlordbook/whois.shtml ("If you are a resident in a hotel or motel, you do *not* have the rights of a tenant . . . [if] you live in a hotel, motel, residence club, or other lodging facility for 30 days or *less*, and your occupancy is subject to the state's hotel occupancy tax.").

61. Lisa White, *Wisconsin Woman Stays at Hotel for 9 Years, Now Being Evicted Over $29K in Late 'Rent'*, CHICAGOIST (Oct. 17, 2013, 5:00 PM), http://chicagoist.com/2013/10/17/wisconsin_woman_stay_at_hotel_for_n.php.

62. W. Gardner Selby, *Hard Numbers Lacking on 'Overstay' Immigrants*, AUSTIN AM.-STATESMAN, Sept. 8, 2013, at B1.

63. Immigration and Nationality Act § 212(a)(6)(A)(i).

one was inadmissible at the time of coming into the United States, he or she can be deported.[64] This particular ground is for people who, in essence, entered the United States illegally.[65] Under most state laws, squatting is the basis for eviction.[66] In our immigration hotel, these would be people living in the United States without permission. An estimated ten to twelve million people in the United States fall into these two grounds of removal (visa violations and unlawful entry).[67] Issues of squatting and trespassing, as related to internal migrants in U.S. history, have often been viewed in a much more positive light, at least in hindsight.[68]

Bad behavior can be another ground for eviction from an apartment—under New York law, one such ground involves use of the premises "as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business."[69] Under immigration law, bad behavior leading to deportation includes many criminal offenses,[70] but also other miscellaneous grounds such as falsely claiming to be a U.S. citizen.[71] Eviction from public housing for criminal activity, and the controversy surrounding that, provides a direct parallel:

> [A]ny criminal activity that threatens the health, safety, or

64. *See id.*

65. *See id.*

66. *See, e.g.*, N.Y. REAL PROP. LAW § 713.3 (McKinney 2016) ("He or the person to whom he has succeeded has intruded into or squatted upon the property without the permission of the person entitled to possession and the occupancy has continued without permission or permission has been revoked and notice of the revocation given to the person to be removed.").

67. Jerry Markon, *U.S. Illegal Immigrant Population Falls Below 11 Million, Continuing Nearly Decade-Long Decline, Report Says*, WASH. POST. (Jan. 20, 2016, 2:28 PM), https://www.washingtonpost.com/news/federal-eye/wp/2016/01/20/u-s-illegal-immigrant-population-falls-below-11-million-continuing-nearly-decade-long-decline-report-says/.

68. *See, e.g.*, Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam Or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 299–316 (2009) (pointing out the irony of strict anti-immigrant legislation in Oklahoma in light of the state's history in the dispossession of Indian lands and illegal migrants in the land rush now celebrated as "Sooners."). The Broadway play turned Hollywood film "Rent" celebrated squatters on New York's Lower East Side. *Synopsis for Rent*, IMDB, http://www.imdb.com/title/tt0294870/synopsis?ref_=ttpl_pl_syn (last visited July 10, 2016).

69. N.Y. REAL PROP. LAW § 711.5 (McKinney 2016).

70. *See* Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012).

71. *See id.* § 237(a)(3)(D).

> right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant . . . shall be cause for termination of tenancy.[72]

2. Methods of Removal—The Eviction Process under Immigration Law

Being evicted from a property or dispossessed of land ownership comes in many forms. The process by which a person can be removed from an apartment or have her real property taken from her often depends on the nature of the person—for example, are they a person unlawfully present on a property, a licensee, a tenant, or an owner? Proceedings can be summary in nature, or more involved. Importance is placed on proper notice to the parties concerned. Likewise, in immigration law, there exists multiple procedures by which a person can be removed from the United States. The level of process dispensed often depends on where a person alleged to be subject to removal is encountered and what status he or she is claiming to have. Described briefly below are the processes for immigration "eviction." They are not meant to be exhaustive recitations of all the procedures involved in each. A discussion of different defenses to removal (such as asylum or cancellation of removal) comes later when we consider the different immigration floors. We'll start with full-blown removal proceedings under section 240 of the INA, which provides the most due process protections.[73] Such proceedings will provide a contrast to more cursory procedures. Removal under immigration law is for persons who have some sort of status less than U.S. citizenship.

a. Regular Removal Proceedings: Full-Blown Eviction Hearings

Regular removal hearings bear some similarities to eviction procedures under state law. Regular removal proceedings are started

72. 42 U.S.C. § 1437d(l)(6) (2012); Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense in 2009 Still is Much More Than "Did You Pay the Rent?"*, 35 WM. MITCHELL L. REV. 762, 841–49 (2009).

73. Immigration and Nationality Act § 240.

with the service of a Notice to Appear ("NTA") on the alien, which must, among other things, include the alleged grounds of removal and notice that the failure to appear can result in an in absentia order of removal.[74] An eviction proceeding, under Minnesota law, of a tenant from a property likewise begins with the filing of a complaint by the landlord with the court, which then issues a summons served upon the tenant.[75] Failure to appear by the tenant at an eviction proceeding results in the issuance of a writ of recovery for the landlord.[76]

In both forms of proceedings, the first hearing, called a master calendar hearing in removal proceedings,[77] and an arraignment in Minnesota eviction proceedings,[78] may be fairly cursory if the respondent (the term given to an alien in removal proceedings) or tenant wishes to raise defenses. The presiding judge in both kinds of proceedings may set the case for later trial, at which both sides can present and challenge evidence and raise defenses.[79] In both kinds of proceedings, the judge may require the respondent or tenant to post a bond (in the case of an alien respondent, to insure appearance at future hearings; in the case of a tenant, to cover rent or damages).[80] In both kinds of proceedings, the parties to the dispute can appeal the judge's decision.[81] While parties can have attorneys, the government is not required in immigration proceedings (nor in most eviction proceedings) to provide counsel for the person facing removal or eviction.[82] While

74. The NTA must include the following: "[t]he nature of the proceedings against the alien"; "[t]he legal authority under which the proceedings are conducted"; "[t]he acts or conduct alleged to be in violation of law"; "[t]he charges against the alien and the statutory provisions alleged to have been violated"; "[t]he alien may be represented by counsel"; "[t]he requirement that the alien must immediately provide . . . a written record of an address and telephone number (if any)"; "[t]he time and place at which the proceedings will be held"; and "[t]he consequences . . . of the failure, except under exceptional circumstances, to appear at such proceedings." *Id.* § 239(a)(1)(A)–(G).

75. MINN. STAT. §§ 504B.321(1), .331(a) (2015).

76. *Id.* § 504B.345.

77. *See* Immigration and Nationality Act § 239(b)(1).

78. *See* MINN. STAT. § 504B.335.

79. *See* Immigration and Nationality Act § 240; MINN. STAT. § 504B.335.

80. *See* Immigration and Nationality Act § 240(b)(1); MINN. STAT. § 504B.341(5).

81. *See* Immigration and Nationality Act § 505; MINN. STAT. § 504B.371.

82. The statutory and regulatory bases for removal proceedings can be found at section 240 of the INA and 8 C.F.R. § 1003. Immigration and Nationality Act § 240; 8 C.F.R. § 1003 (2016). A brief summary of the procedures, including bond hearings, can be found at BOSWELL, *supra* note 25, at 37–44. The statutory bases for eviction under Minnesota law can be found at section 504B of the Minnesota Landlord and Tenant Code. MINN. STAT. § 504B. For a brief description of eviction actions under Minnesota housing

private landlords initiate eviction actions, government officials from U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Patrol, or U.S. Immigration and Customs Enforcement are the only officials empowered to initiate and prosecute removal proceedings.[83] In both kinds of actions, however, a third-party decision-maker (an immigration judge or a housing court judge) subject to appeal to a higher court is called upon to decide whether a respondent or tenant must vacate either the country or the premises.[84]

b. Summary Refusal of Admission and Summary Removal Under Visa Waiver Program: Evicting an Honored Guest

People from some countries with low rates of visa fraud can come to the United States without applying for a visa under the Visa Waiver Program ("VWP").[85] The flipside of such convenience is that one can be summarily refused entry upon arrival in the United States if found to be inadmissible by the port director or officer-in-charge of the border station.[86] In terms of our hotel imagery, this would be someone showing up at the hotel without a reservation and asking for a room. Normally, because people from that country of origin are allowed to show up without a reservation, the person would be allowed to come in, unless a ground of inadmissibility pops up. Additionally, if a person is admitted under the VWP, he or she can be summarily deported based on a determination of the immigration district director who has jurisdiction over the place where he or she is found.[87] Such a removal carries the full consequences of deportation after a full proceeding before an immigration judge, such as being barred from returning for a number of years.[88] This would be like the concierge (with a gun, no less) showing up at your hotel room door and saying it is time to leave, pack your bags, and get out.

In neither of these situations is the person allowed to go before an immigration judge, unless he or she expresses a fear of being persecuted

law, see McDonough, *supra* note 72, at 768–771.

83. *See* Immigration and Nationality Act § 239.

84. *See id.* § 240(a)(1), (b)(1).

85. *See infra* notes 195 and 217 and accompanying text.

86. 8 C.F.R. § 217.4(a)(1). Such a "refusal of admission" at this stage does not carry the lasting consequences of a formal removal. *Id.*

87. *Id.* § 217.4(b).

88. *Id.*

or tortured upon return to his or her country of origin.[89] In other words, no independent check exists on the decisions of the agency making the allegations of impropriety except in extreme cases.[90] The rational for such unchecked power makes some sense—a person arriving for a presumably short-term trip for business or pleasure is not *so* different from someone buying a ticket for a baseball game or renting a room for a night or two in a hotel. Getting easily kicked out for (even allegedly) misbehaving badly arguably should be easier in such situations. But in the second situation (being deported after having been let in), getting removed has really big consequences for the future—if a person is deported, they generally cannot come back to the United States for five (if refused admission) or ten years (if deported after admission).[91]

c. Expedited Removal: Evicting a Trespasser

Expedited removal allows for a similar process to summary removal, but for individuals other than those seeking admission under the VWP.[92] Unlike summary removal, for which any ground of inadmissibility can apply, an immigration inspector can only charge a person either for not having valid entry documents, or using fraudulent ones.[93] Three classes of people can be subjected to expedited removal: arriving aliens at a port of entry; all persons (except Cubans) who have arrived illegally by sea to the United States, unless they can prove being in the United States for at least two years; and all persons found within one-hundred miles of the border who have entered illegally and who cannot prove being in the United States for at least fourteen days.[94] A person subjected to expedited removal has few procedural rights and can be removed without a hearing before a judge.[95]

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89. *Id.* § 217.4(a)–(b).

90. For a commentary on summary removal, see David Isaacson, *The Prejudice Caused by Summary Removal After Visa Waiver Admission: What the Third Circuit Missed in* Vera *and* Bradley, THE INSIGHTFUL IMMIGR. BLOG (Mar. 12, 2012), http://blog.cyrusmehta.com/2012/03/prejudice-caused-by-summary-removal.html.

91. Immigration and Nationality Act § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2012).

92. *See* 8 C.F.R. § 235.3(b).

93. *Id.*

94. *See id.* § 235.3(b)(1)–(2). Under section 235(b)(1)(A)(iii)(II) of the Immigration and Nationality Act, this could apply to any such alien unable to show presence in the United States for two years.

95. *See* BOSWELL, *supra* note 25 at 38–39. Cubans who are arriving aliens at a port of entry are exempt from expedited removal, as are most unaccompanied children. *Id.*

Exceptions that might allow a person to get in front of a judge in regular removal proceedings described above are if the person claims to already be a refugee, an asylee, permanent resident, or U.S. citizen.[96] Additionally, a person who professes a fear of torture or persecution must be allowed to meet with an asylum officer in order to make a credible fear claim.[97] If an asylum officer finds credible fear, the person can apply for asylum and related relief before an immigration judge in regular removal proceedings.[98] A person can appeal a negative credible fear finding by an asylum officer to an immigration judge, but no further.[99] In 2013 and 2014, an increase in credible fear requests stirred controversy—are more people claiming credible fear to game the system and avoid deportation, or were they expressing genuine fear of return?[100] In response, the USCIS Asylum Office headquarters issued new guidance on how to conduct credible fear interviews,[101] a change greeted with criticism—with some calling it a limitation on the ability of genuine asylum seekers to get access to protection.[102]

In terms of analogizing property and criminal law, states and localities have tried to use criminal trespass laws to arrest and punish undocumented immigrants:

> In 2005, two jurisdictions in New Hampshire charged undocumented immigrants with trespassing under state criminal trespass laws, extending the logic of trespass to unlawful presence in the nation-state: since the undocumented immigrants were not licensed or privileged to be in the United States they were thus trespassing both in the United States as

96. 8 C.F.R. § 235.3(b)(5).
97. *Id.* § 235.3(b)(4).
98. *Id.*
99. *Id.* § 235.3(b)(4).
100. SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 8–13 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.
101. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE LESSON PLAN: CREDIBLE FEAR 17–40 (2014), http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf.
102. *See, e.g.*, Memorandum from Bill Ong Hing, Professor of Law, Univ. of S.F., to John Lafferty, Chief of Asylum Div., U.S. Citizenship & Immigration Servs. (Apr. 21, 2014), http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%20USCIS%20Credible%20Fear%20Memo,%0Bill%20Hing,%2004.21.2014.pdf.

well as in the town of New Ipswich.[103]

d. Withdrawal of Application for Admission: "You don't really want to check in, do you?"[104]

According to the INA, a person "applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States."[105] When a person arrives at the immigration equivalent of the front desk but appears not to be admissible to the immigration hotel, the official at the desk (i.e., a border official) has the discretion to invite the person to immediately leave voluntarily, often under escort, rather than being placed in regular or expedited removal proceedings.[106] This turn-away is to be used in situations of inadvertent and relatively minor violations.[107]

The person benefits from not being placed in removal proceedings (thus avoiding the potential of a five-year bar on re-entry under expedited removal or a similar ten-year bar under regular removal proceedings).[108] But there are potential consequences for a person applying for Non-LPR Cancellation of Removal (i.e., a person making a claim for "adverse possession" on the apartment floor).[109] If the person had been living in the United States, left, and then tried to re-enter the

103. Volpp, *supra* note 2, at 12. For an examination of criminal trespass used against immigrants, see Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 333–345 (2011).

104. This section draws heavily from a letter to President Obama primarily drafted by the author. Letter from author et al. to Barack Obama, President 1 (July 14, 2014), http://www.stthomas.edu/media/interprofessionalcenter/ProfessorsLetterFairnessforCentralAmericanChildren.pdf.

105. Immigration and Nationality Act § 235(a)(4), 8 U.S.C. § 1225(a)(4) (2012).

106. *See* 8 C.F.R. § 235.4 (2016).

107. U.S. CUSTOMS & BORDER PROT., CBP DIRECTIVE NO. 3340-043, THE EXERCISE OF DISCRETIONARY AUTHORITY §§ 8.4.6, 8.4.7 (2008) ("In light of the serious consequences of an expedited removal order, including a minimum 5-year bar on re-entry to the United States, the decision to permit withdrawal should be based on a careful consideration of relevant mitigating and aggravating factors in order to reach a reasonable decision. . . . Withdrawal of application for admission should not be permitted in situations involving obvious, deliberate fraud on the part of the applicant, or when especially egregious CBP violations are uncovered (e.g., long-term or repeated overstays, unauthorized employment).").

108. Immigration and Nationality Act § 212(a)(9)(A).

109. *See infra* notes 319 and 320 and accompanying text.

United States and was formally excluded, was expeditiously removed, withdrew their application for admission, or had an enforced voluntary return,[110] their period of continuous stay in the United States would be considered broken.[111]

There are special rules for treating children originating from contiguous states (Mexico and Canada) that include a presumption of immediate return to their home country with no hearing before an immigration judge, unless the child identifies as a victim of severe trafficking, demonstrates a credible fear of persecution, or cannot make independent decisions about his or her options.[112] A child capable of making decisions and who does not have such fears can be permitted to withdraw their application for admission and be sent home.[113] The legislation calls for such screening to occur promptly (within forty-eight hours), but if such screening does not occur within forty-eight hours, they are to be transferred to the Department of Health and Human Services ("HHS").[114] Safe repatriation of children to Mexico is presumably insured by contiguous country agreements and other procedures.[115]

Even though the rules for contiguous states found at section 235(a) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") are more permissive of quick return than for non-contiguous states, Congress passed the law in order to provide more protection for Mexican children than they had enjoyed up to that point.[116] But these safety determinations by Customs and Border Protection ("CBP") officials have often been inadequate and inconsistently applied, and there have been credible reports of pressure on Mexican children to accept removal from the United States.[117] In

110. *See supra* Section I.D.2.e.

111. *See In re* Avilez-Nava, 23 I. & N. Dec. 799, 805–06 (B.I.A. 2005); *see also* Charles Medina, *Expedited Removal, Withdrawal of Application for Admission and Voluntary Return,* ASIAN J. (Apr. 22, 2014), http://asianjournal.com/immigration/expedited-removal-withdrawal-of-application-for-admission-and-voluntary-return/.

112. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(2)(A), 122 Stat. 5044, 5075 (codified as amended at 8 U.S.C. § 1232 (2012)).

113. *Id.* § 235(a)(2)(B).

114. *Id.* § 235(a)(4).

115. *See id.* § 235(a)(2)(C), (a)(5).

116. *See id.* § 235(a).

117. *See* BETSY CAVENDISH & MARU CORTAZAR, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 2 (2011), http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1

contrast, unaccompanied minors from noncontiguous states are placed in regular removal proceedings described above.[118] Simultaneously, these children are transferred to facilities run by the Office of Refugee Resettlement ("ORR") in HHS where they are allowed to meet with social workers and attorneys experienced in working with children.[119] In addition, and pursuant to the TVPRA, HHS appoints independent child advocates for particularly vulnerable unaccompanied children in Chicago; their role is to meet with the children, learn their stories, and advocate for their best interests.[120] Recent controversy around the arrival of thousands of unaccompanied minors to the United States has prompted calls for these children to be treated the same as Mexican children,[121] notwithstanding grave concerns about how Mexican children are currently being "invited" to withdraw the "applications for admission."[122]

e. Voluntary Return—Showing a Trespasser the Door

Voluntary Return ("VR") occurs when Border Patrol encounters unlawful entrants in the United States (usually near a border), photographs and fingerprints them, and returns them to their home country (almost always Mexico) without further process.[123] One might

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.pdf; Dara Lind, *The Process Congress Wants to Use for Child Migrants is a Disaster*, VOX (July 15, 2014, 9:00 AM), http://www.vox.com/2014/7/15/5898349/border-children-mexican-central-american-deport-quickly-2008-law (detailing leaked UNHCR report on treatment of Mexican children).

118. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(a)(3), (a)(5)(D).

119. *See id.* § 235(b).

120. *See, e.g.*, *Our Projects*, THE YOUNG CTR. FOR IMMIGRANT CHILD. RTS., http://theyoungcenter.org/about/projects/ (last visited July 10, 2016).

121. On July 9, 2014, Senator Jeff Flake, along with several other Republican Senators, including John McCain, introduced an amendment to Senate Bill 2363, the Bipartisan Sportsmen's Act of 2014, which called for treating Central American children in the same fashion as Mexican children under the TVPRA. S. 2363, 113th Cong. (2014); *see also S.2363 - Bipartisan Sportsmen's Act of 2014*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/2363 (last visited July 10, 2016) (noting that the bill failed to pass the Senate by a vote of 41 to 56). The amendment provided the DHS Secretary broad and unchecked discretion to expand this treatment to any child from any country the Secretary deems appropriate. *See* S. 2363, 113th Cong. (2014).

122. Letter from author et al. to Barack Obama, *supra* note 104, at 2 (citing CAVENDISH & CORTAZAR, *supra* note 117).

123. U.S. CUSTOMS & BORDER PROT., *supra* note 107, §§ 8.5.1–8.5.4.

compare this to police forcibly removing a trespasser from a premises with a stern warning not to come back. Immigration officials find the exercise of VR in their discretionary toolkit,[124] meaning it has no explicit basis in statute.[125] The main difference from Withdrawal of Application for Admission discussed immediately above appears to be where the person is encountered; someone granted VR has attempted an irregular entry—in the hotel imagery, perhaps coming in the back door or through a window—while someone granted Withdrawal of Application for Admission has come to the front desk and tried to check-in.[126]

Similar to Withdrawal of Application for Admission, of primary legal significance is that a VR does not count as a formal deportation, and therefore the person who is "voluntarily returned" does not face a legal bar to coming back to the United States legally.[127] Derisively referred to by critics of the practice as "catch and release" (reducing human beings to the status of fish), this practice has been more steadily replaced by Stipulated Removal orders (described below) in recent years, which do carry the consequences of being barred from return to the United States.[128]

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124. *Id.* §§ 8.5.1–8.5.2 ("Voluntary Return (VR) is an act of discretion that can be applied to non-arriving aliens in circumstances analogous to those where withdrawal of application for admission is allowed. . . . Usually, when an alien has demonstrated his or her intent to depart the United States, it serves no purpose to issue a Notice to Appear, because the alien is already executing the ultimate objective, which is removal from the United States. There is generally no reason to burden the immigration court with these cases.").

125. Nonetheless, VR was recognized as impacting eligibility for legalization. *See* 8 C.F.R. § 245a.2(b)(5) (2016).

126. This appears to be the practice, even though a person who has not been admitted to the United States and who has arrived in the United States, "whether or not at a designated port of arrival" (i.e., entering through a window or the back door), is considered an "applicant for admission" and is therefore able to ask to withdraw their application for admission. Immigration Act of 1990 § 235(a)(1), (a)(4).

127. JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 4 (2011); Aileen B. Flores & Diana Washington Valdez, *US Will Toughen Voluntary Returns; Immigrants Will Be Sent Farther Away*, EL PASO TIMES, (Jan. 18, 2012, 12:18 AM), http://www.elpasotimes.com/ci_19762872.

128. Brian Bennett, *High Deportation Figures Are Misleading*, L.A. TIMES (Apr. 1, 2014, 8:55 PM), http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html.

f. Stipulated Removal—Eviction Without a Hearing

People may be removed from the United States by stipulated removal orders, in which a person agrees to accept an order of deportation based on charges pressed by the government without seeing a judge. An immigration judge must sign the order, and "[i]f the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent, [and] . . . that the alien understands the consequences of the stipulated request."[129] Under such orders, people waive their right to seek relief from removal and the right to appeal.[130] Consequences of such a removal order include being barred from re-entry to the United States,[131] and the risk of criminal prosecution and incarceration if one attempts to re-enter the United States illegally.[132] So, while an immigration judge must sign off on such orders, they may do so without seeing the individual in question.[133] The equivalent would be a landlord showing up in housing court with an eviction order signed by a tenant, and telling the judge, "trust me, I've explained to the tenant all of her rights and remedies and she agrees to leave." A recent study found that "stipulated removal is used primarily on immigrants who are detained, who do not have lawyers, and who face deportation due to minor immigration violations . . . [and] many may be eligible for relief" from removal.[134] The vast majority of those taking such orders came from Spanish-speaking countries, and the study found that language barriers plagued the program, where some immigration officers with rudimentary Spanish would reduce the issue to "[d]o you want to fight your case, or do you want to sign?"[135]

g. Expedited Removal of Aggravated Felons: Star Chamber Eviction

Section 238 of the INA provides for the expedited removal of aliens

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129. 8 C.F.R. § 1003.25(b), (b)(6) (2016).

130. *See id.* § 1003.25(b)(3), (b)(8).

131. Immigration and Nationality Act § 212(a)(9), 8 U.S.C. § 1182(a)(9) (2012) (barring re-entry after removal order).

132. *Id.* § 276(b) (criminal provision governing re-entry of previously removed aliens).

133. *See supra* note 129 and accompanying text.

134. KOH ET AL., *supra* note 127, at 6–7 (alterations omitted). Ninety-six percent did not have lawyers, and scripts used by immigration officials to explain the process were incomplete and inaccurate. *Id.* at 8, 10–11.

135. *Id.* at 16.

convicted of committing aggravated felonies.[136] While it is beyond the scope of this Article to discuss aggravated felonies in any depth, the range of state and federal crimes covered by the term under section 101(a)(43) of the INA is breathtakingly broad.[137] Of critical importance is that offenses under state criminal codes are not defined as "aggravated felonies"; that categorization is done by applying the definition of aggravated felony under immigration law to criminal convictions.[138]

The immigration act allows for immigration officials to charge, expeditiously order, and effect the deportation of persons convicted of aggravated felonies while those persons are still in criminal custody within a few days and with no access to an immigration judge (who in regular removal proceedings would review the correctness of an immigration official's assessment that a crime is an aggravated felony).[139] In the immigration hotel analogy, it would be as if employees of the landlord/hotel owner would decide whether a person has done something to violate the lease, then evict them, and then prevent them from ever being able to return to the hotel without the landlord's permission. As this Article examines different floors of the hotel, this is also a process that takes place while the person has been moved to the cellar (either from the basement of unauthorized presence or the apartment of conditional permanent residency).

h. Removal of Aliens Inadmissible on Security and Related Grounds

This means of removal frankly does not really have an easy property law analog. Under section 235(c) of the INA, an immigration judge or immigration official may order the removal of someone based on the mere suspicion that the person is inadmissible under most of the security and related grounds found at section 212(a)(3) of the INA (such as spies, terrorists, saboteurs, persons seeking to overthrow the government, and persons who could adversely affect U.S. foreign policy).[140] The decision is subject to review by the Attorney General,

136. Immigration and Nationality Act § 238.

137. *See generally* CATHOLIC LEGAL IMMIGRATION NETWORK, IMMIGRATION LAW AND THE CRIMINAL CLIENT (2013).

138. *See, e.g.*, Immigration and Nationality Act § 276.

139. *See id.* § 238; 8 C.F.R. § 238.1 (2016).

140. *See* Immigration and Nationality Act § 235(c).

who may choose to keep all the evidence related to the decision secret.[141] While it is clearly undesirable to allow people planning to, in essence, destroy or take over the Immigration Hotel through violence and mayhem, the definitions of what constitutes terrorism are so broad as to sweep in all sorts of activities not commonly thought of as terrorism.[142] Secret courts have generally been frowned upon in the American system of transparent justice.

3. The Hotel of the Deported: What Happens after Removal?

> *El Hotel Centenario* was once among the grandest in Mexicali, Mexico, in an era when the downtown arcades and honky-tonks drew throngs of round-the-clock revelers. It's now *El Hotel del Migrante Deportado*—the Hotel of the Deported Migrant—a temporary home for the rising population of people being deported into the border city. The occupants blame America for exploiting their labor, then discarding them. But they're also are [sic] haunted by their mistakes, accomplices to their own downfall.[143]

The stories told at the Hotel of the Deported Immigrant in Mexicali, Mexico, spell out the human costs, however well "deserved" or not, of mass deportation from the United States. Deported as a result of traffic infractions, drug offenses, drunk driving tickets, and, in some cases, violent crimes, people tell stories of having lived for years, even decades, in the United States, and are now separated from family and friends, often destitute.[144] Even in the Hotel of the Deported Immigrant, there are divisions—"fallen angels" (those who break the rules forbidding substance abuse) sleep on the ground floor with no

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141. *Id.*

142. *See, e.g.*, Martin Schwartz et al., *Recent Developments on the INS's Use of Secret Evidence Against Aliens*, in IMMIGRATION & NATIONALITY LAW HANDBOOK (2001–2002); Anwen Hughes, *Immigration Law's "Terrorism Bars" at Odds with U.S. National Security, Commitment to Refugees*, HUM. RTS. FIRST (Feb. 6, 2013), http://www.humanrightsfirst.org/2013/02/06/immigration-law%25e2%2580%2599s-%25e2%2580%259cterrorism-bars%25e2%2580%259d-at-odds-with-u-s-national-security-commitment-to-refugees.

143. *Mexicali's Hotel of the Deported Migrant*, L.A. TIMES: FRAMEWORK (May 26, 2012, 7:45 PM), http://framework.latimes.com/2012/05/26/mexicali-migrant-hotel/#/0.

144. Richard Marosi, *In Mexicali, a Haven for Broken Lives*, L.A. TIMES (May 26, 2012, 9:04 PM), http://www.latimes.com/local/la-me-hotel-deported-20120527-story.html.

amenities.[145] Daniel Kanstroom has documented in a more systematic and global fashion the lingering and devastating consequences of mass deportation in his book, *Aftermath*, including severe isolation, alienation, persecution, and, sometimes, death.[146]

4. Denaturalization: Revoking Ownership

> A top commander of a Nazi SS-led unit accused of burning villages filled with women and children lied to American immigration officials to get into the United States and has been living in Minnesota since shortly after World War II . . . . Michael Karkoc, 94, told American authorities in 1949 that he had performed no military service during World War II, concealing his work as an officer and founding member of the SS-led Ukrainian Self Defense Legion and later as an officer in the SS Galician Division . . . .[147]

Denaturalization is a process by which U.S. citizenship is revoked from a person who gained that citizenship through first becoming a legal permanent resident (in contrast to native-born citizens). In the immigration hotel, citizenship is the top floor, akin to cooperative or condominium ownership. In order to strip someone of their citizenship, an assistant U.S. attorney must prove to a U.S. district court judge by "clear, unequivocal, and convincing" evidence that a person procured citizenship illegally or by concealment of a material fact or willful misrepresentation obtained permanent residence status improperly or through misrepresentation.[148] While the news reports concerning Michael Karkoc grabbed attention, the United States decided not to prosecute,[149] likely influenced by the high standard of proof.

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145. *Id.*

146. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (2012).

147. David Rising et al., *Nazi Collaborator Living in Minneapolis; Unit He Commanded Linked to WWII Civilian Massacres*, TWINCITIES.COM PIONEER PRESS (June 13, 2013, 11:01 AM), http://www.twincities.com/2013/06/13/nazi-collaborator-living-in-minneapolis-unit-he-commanded-linked-to-wwii-civilian-massacres/.

148. Fedorenko v. United States, 449 U.S. 490, 505 (1981) (quoting Scheiderman v. United States, 320 U.S. 118, 125 (1943)); *see also* Immigration and Nationality Act § 340(a), 8 U.S.C. § 1451(a) (2012).

149. *The News Matrix: Tuesday 14 April 2015*, INDEPENDENT (Apr. 13, 2015) http://www.independent.co.uk/i/matrix/the-news-matrix-tuesday-14-april-2015-10174454.html. German prosecutors dropped their prosecution later that year, based on a

In 1939, the immigration service attempted to strip the citizenship of William Schneiderman for not being "attached to the principles of the [U.S.] Constitution" for having joined the Communist party two years before naturalizing.[150] In a strong defense of freedom of thought, the Supreme Court protected Schneiderman's citizenship and laid out the "clear, unequivocal, and convincing" evidence standard for revocation.[151] In arriving at such an exacting standard, it is quite bracing to discover that the Court looked to earlier cases analogizing some public grants of land to naturalization:

> *Johannessen v. United States* states that a certificate of citizenship is 'an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land.' 225 U.S. 227, 238 [1912]. To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'-'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt'. Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.), 121 U.S. 325, 381, [1887]. This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted.[152]

While Congress attempted in 1996 to allow immigration judges to oversee the denaturalization process, courts ruled that the Attorney

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"comprehensive medical documentation." David Chanen, *Germany Won't Continue Criminal Case Against Minneapolis Man Allegedly Linked to Nazi Atrocities,* STAR TRIB. (Aug. 1, 2015, 7:24 AM), http://www.startribune.com/germany-won-t-continue-criminal-case-against-minneapolis-man-allegedly-linked-to-nazi-atrocities/320351001/. Amid reports of Alzheimer's disease, Karkoc's father vigorously denied the allegations against Karkoc. *Id.*

150. *Schneiderman*, 320 U.S. at 121–22.

151. *Id.* at 125 (quoting United States v. San Jacinto Tin Co., 125 U.S. 273, 300 (1888); United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381 (1887)). Revoking citizenship is hard, but preventing naturalization in the first place on similar grounds is much easier. *See infra* Section IV.B.

152. *Schneiderman*, 320 U.S. at 125 (citations omitted). At the time, this standard came under considerable criticism for stretching the application of the land grant cases too far. *See* Walter B. Kennedy, *The* Schneiderman *Case—Some Legal Aspects*, 12 FORDHAM L. REV. 231, 237–43 (1943).

General (who is in essence the chief immigration judge) did not have such authority.[153] Those rulings underscore the difference between residency and citizenship in the same way that renting is treated differently than home ownership. An effort to take away someone's ownership interest does not take place by way of housing court through eviction proceedings. A citizenship certificate is more like a deed than a lease.

That the Supreme Court drew directly on a property ownership/land grant analog to create the standard for citizenship revocation brings to mind the current foreclosure crisis.[154] That crisis is a less direct analogy (as a land grant is a deal completed, while a mortgage still has the conditions of payment attached), but it gets at the idea of removing ownership rather than eviction. The recent crisis hit Latino communities particularly hard in different parts of the nation,[155] and a Federal Reserve study on foreclosures in California noted that the default rate for Blacks and Hispanics was more than double that of Whites.[156] Access to different mortgage markets by Blacks and Hispanics made a significant difference in their likelihood to default.[157] The authors also speculated that marginally higher rates of default amongst Asians and Latinos may have been due to differing immigration statuses, language barriers, and cultural differences.[158]

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153. *See, e.g.*, Gorbach v. Reno, 219 F.3d 1087, 1098–99 (9th Cir. 2000); *District Court Permanently Enjoins Application of Denaturalization Regulation*, 78 INTERPRETER RELEASES 442, 442–43 (Mar. 5, 2001) (discussing *Gorbach v. Reno*); *see also* BOSWELL, *supra* note 25, at 202–04.

154. *Schneiderman*, 320 U.S. at 125 (quoting Johannessen v. United States, 225 U.S. 227, 238 (1912)).

155. Evan F. Moore, *Foreclosure Crisis Hits Latinos Especially Hard*, EXTRA (Oct. 25, 2012), https://extranews.net/foreclosure-crisis-hits-latinos-especially-hard.html ("According to a study by the Woodstock Institute, the foreclosure crisis hit areas that are heavily populated by Latinos in the Chicagoland area harder than most."); Robert Selna, *Foreclosures in State Hit Latino Homes Hardest*, SFGATE (Aug. 18, 2010, 4:00 AM), http://www.sfgate.com/realestate/article/Foreclosures-in-state-hit-Latino-homes-hardest-3177463.php ("A review of the damage wreaked on California communities by the housing bust shows that Latino households suffered nearly 50 percent of the foreclosures and that loan defaults are concentrated in the state's Central Valley.").

156. Carolina Reid & Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links among Higher-Priced Lending, Foreclosures and Race in California* 18 (Fed. Reserve Bank of S.F., Working Paper No. 2009-09, 2009), http://www.frbsf.org/community-development/publications/working-papers/2009/november/subprime-lending-foreclosures-race-california/.

157. *Id.*

158. *Id.* at 17.

5. Passport Revocation Abroad: Overreaching Eminent Domain?

Recent controversies have erupted around the revocation or confiscation of passports of both native-born and naturalized U.S. citizens while those U.S. citizens were abroad. In 2013, the State Department revoked the passport of Edward Snowden, the former National Security Agency employee who leaked thousands of top secret documents to the press.[159] More recent reports accuse the U.S. embassy in Sana'a of improperly confiscating the passports of Yemeni-Americans, effectively denaturalizing them and making them stateless persons under the guise of combatting passport fraud.[160]

One might compare this to the expansive use of eminent domain by local governments to seize private property. The Fifth Amendment of the Constitution ends with the phrase, "[N]or shall private property be taken for public use, without just compensation."[161] That phrase forms the foundation for the exercise of eminent domain, which allows for private property to be taken for public use.[162] In 2005, the Supreme Court, by a 5–4 decision in *Kelo v. City of New London*, seemed to broaden the right of eminent domain, giving significant deference to local zoning authorities who allowed the seizure of private homes in order for a developer to convert the land into a commercial complex.[163] One commentator opined that "the Public Use Clause of the Fifth Amendment has been redefined such that eminent domain may be utilized for economic development whether or not a public benefit may ultimately accrue so long as an 'incidental' public benefit is identified."[164] Nearly a decade later, the decision still arouses intense passions, including efforts by the U.S. House of Representatives to pass legislation restricting its reach by barring federal economic

159. Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, YALE L.J.F. (Apr. 23, 2014), http://www.yalelawjournal.org/forum/citizenship-passports-and-the-legal-identity-of-americans.

160. *Id.*; Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099, 2100–02 (2014); *State Department Taking Passports Away from Yemeni-Americans*, MIDDLE E. RES. & INFO. PROJECT (Aug. 9, 2014, 4:18 PM), http://www.merip.org/state-department-taking-passports-away-yemeni-americans.

161. U.S. CONST. amend. V.

162. *See* Kelo v. City of New London, 545 U.S. 469, 506–08 (2005).

163. *See id.* at 489–90; *see also id.* at 494 (O'Connor, J., dissenting).

164. David Alan Ezra, *The Overreaching Use of Eminent Domain and the Police Power after* Kelo, 28 U. HAW. L. REV. 349, 349 (2006).

development aid to go to local governments for some types of projects.[165]

The parallels of taking one's private property and effectively taking one's citizenship should be obvious. Taking the analogy further involves not only what might be justifiable state interests in taking such actions (e.g., what is "public interest" and when should it allow the seizure of private property; and, when, or even if, "national security interests" should allow for the revocation of U.S. passports), but also who ultimately should be allowed to make such decisions with what sort of process. While denaturalization is reserved for USCIS and federal courts, can the State Department effectively do the same thing by taking one's passport without judicial recourse?

E. Moving Out: Voluntary Departure, Voluntary Losses of Permanent Residency and Voluntary Acts of Expatriation

One facing the threat of eviction can choose voluntarily to leave rather than be escorted off the premises by the sheriff. Under immigration law, the equivalent is called voluntary departure, which can be permitted by an immigration judge at the outset or at the end of removal proceedings.[166] Upon meeting certain conditions (such as posting a bond to insure departure from the United States), a person can avoid having a formal deportation order and the negative consequences that attach.[167] Taking voluntary departure rather than being formally deported makes it at least technically easier to return to the United States in the future.[168]

But there are other situations where persons can choose to lose an immigration status without facing affirmative efforts to deport them. Under commercial property law, there exists the notion that a lease may contain a condition that if the property is not used for a particular purpose (or not used at all), the landlord or owner of the property may reclaim it.[169] Legal permanent residency, in essence, carries such a

165. *See, e.g.*, Press Release, Am. Farm Bureau Fed'n, Eminent Domain Issue Resurfaces on Capitol Hill (Mar. 5, 2014), http://www.arfb.com/media-communications/press-releases/2014/eminent_domain_issue_resurfaces_on_capitol_hill_3_5_2014/; *see also* Lauren Krugel, *Texas Landowner Loses Pipeline Case*, MONTREAL GAZETTE, Aug. 24, 2012, at A19.

166. *See* Immigration and Nationality Act § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2012).

167. *See, e.g.*, *id.* § 240B(a)(3).

168. *See id.* § 240B(b)(1).

169. *See* 1 Alvin L. Arnold & Marshall E. Tracht, REAL ESTATE LEASING PRACTICE MANUAL § 3:12 (2015).

clause—if one abandons living in the United States, residency can be lost. LPRs may return to an "unrelinquished lawful permanent residence in the United States after a temporary absence abroad" upon presentation of certain documents, including an unexpired green card so long as their absence has been less than a year.[170] A waiver can be granted, allowing the LPR back into the country, if good cause is shown that residency has not been abandoned.[171]

Losing citizenship takes a bit more effort. Unlike the involuntary process of denaturalization, loss of citizenship can also occur through a variety of voluntary acts outlined in the INA.[172] Two examples of formal renunciation are the voluntary and intentional renunciation of citizenship before a U.S. consular or diplomatic official abroad or a justice department official in the United States.[173] Other informal acts, if done *with the intent to renounce U.S. nationality*, such as joining a foreign military, or taking certain oaths to foreign governments, or committing acts of treason, can also result in expatriation.[174] Voluntary loss of citizenship is irrevocable, with few exceptions—commission of acts of expatriation is presumed to be voluntary, absent a showing by a preponderance of the evidence that they were not done voluntarily.[175] In practice, the government has faced a fairly high burden in proving expatriation in cases of informal expatriation, particularly in light of the fact that the U.S. Supreme Court has recognized dual nationality.[176]

The closest equivalent under property law would be to unequivocally give ownership rights away while of sound mind. Some Vietnam-era draft evaders renounced U.S. citizenship and moved to Canada.[177] During the Civil War, U.S. citizenship was stripped from those fighting for the Confederacy and then restored after the war.[178]

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170. 8 C.F.R. § 211.1(b)(3) (2016).

171. *Id.* § 211.1(a)(2). See BOSWELL, *supra* note 25, at 166, for cited cases.

172. *See* Immigration and Nationality Act § 349(a).

173. *Id.* § 349(a)(5)–(6); *see also Legal Considerations: Renunciation of U.S. Nationality*, DEP'T OF STATE, http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html (last visited Oct. 31, 2016).

174. Immigration and Nationality Act § 349(a)(2)–(4).

175. *See id.* § 349(b).

176. Joseph W. Dellapenna, *The Citizenship of Draft Evaders After the Pardon*, 22 VILL. L. REV. 531, 545–46 (1977).

177. Janet Cawley, *Draft Evaders Have Few Regrets about Leaving U.S. Behind*, CHI. TRIB. (May 5, 1985), http://articles.chicagotribune.com/1985-05-05/news/8501270702_1_american-draft-dodgers-vietnam-war-canada.

178. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1272 (2009), https://fam.state.gov/

Now that this Article has taken a look at how to move around in and be moved out of the Immigration Hotel, the analysis can move to a closer examination of what the rooms are in the hotel.

II. THE LIMBO LOBBY: PAROLE AND PROSECUTORIAL DISCRETION AS EASEMENTS AND PERMISSION TO TRESPASS

Some people in a hotel are just hanging out in the lobby with permission to be there, but not officially checked in. In terms of the Immigration Hotel, one might think of it in terms of an easement—permission to use a piece of property without owning it.[179] Parole, prosecutorial discretion, and deferred action are three such forms of immigration limbo—quasi-statuses with little security that can be easily terminated but often last a long time.

A. Parole

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.[180]

So parole is a legal fiction—people are allowed physically into the United States, but are treated as if they are still at a port of entry seeking admission. In the 1990s, a large group of Haitians were granted

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FAM/07FAM/07FAM1270.html.

179. "An easement is the grant of a nonpossessory property interest that grants the easement holder permission to use another person's land. . . . [E]asements can also be terminated. An easement can be terminated if it was created by necessity and the necessity ceases to exist, if the servient land is destroyed, or if it was abandoned." *Easement*, CORNELL U. L. SCH., http://www.law.cornell.edu/wex/easement (last visited Oct. 31, 2016).

180. Immigration and Nationality Act § 212(d)(5)(A).

parole status after fleeing violence and political persecution in their country after being interdicted on the high seas.[181] The expedited removal process described in Section II.D.2.c, *supra*, found its genesis in that humanitarian crisis. Some Haitians, after being interviewed on Coast Guard cutters or after being taken to the U.S. Naval Base at Guantánamo Bay, Cuba, were paroled into the U.S. for the purpose of applying for asylum[182]—a parole status that lasted for seven or eight years for many of them as the asylum process was backed up by the huge demand.[183] Many were subject to "expedited removal" back to Haiti.[184] In contrast, similar groups of people fleeing Cuba were granted parole status more generously.[185] The current crisis involving thousands of Mexican and Central American children and families has revived controversy around the use of parole.[186]

B. Prosecutorial Discretion

> In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.[187]

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181. *Cf.* Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717, 722 (1999).

182. *See id.* at 729.

183. *See id.* at 718.

184. *Id.* at 733.

185. *See id.* For oral histories of the treatment of Guantánamo Haitian Refugees, see *Excavating Stories from GTMO's Haitian Refugee Camps*, GUANTÁNAMO PUB. MEMORY PROJECT: BLOG (July 16, 2013), http://blog.gitmomemory.org/2013/07/16/excavating-stories-from-gtmos-haitian-refugee-camps. Ronald Aubourg served as a translator at Haitian camps in the 1990s. *Ronald Aubourg*, GUANTÁNAMO PUB. MEMORY PROJECT, http://gitmomemory.org/stories/ronald-aubourg (last visited Oct. 31, 2016).

186. *See, e.g.*, Catherine E. Shoichet, *Crossroads of Hope and Fear: Stories from a Desert Bus Station*, CNN (June 21, 2014, 12:17 PM), http://www.cnn.com/2014/06/20/us/immigration-tucson-bus-station-scenes.

187. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All Field Office Directors, Special Agents in Charge, and Chief Counsel 2 (June 17, 2011) (footnote omitted), http://www.ice.gov/doclib/secure-communities/pdf/

Federal prosecutors, including those involved in immigration law enforcement, have broad authority to decide what cases to press forward on and which ones to put on the back burner.[188] In the Immigration Hotel, this basically works out to another form of allowing people to hang out in the lobby even though you might have grounds for removing them. The idea is to focus resources in other areas.

In 2011 and 2012, the Department of Homeland Security issued a number of memos broadly referred to as the "Morton Memos" (after the then Director of Immigration Homeland Security) to remind the agency of its discretionary authority.[189] Derided as backdoor amnesty by immigration restrictionists and disparaged somewhat by immigrant advocates,[190] even some in Congress, as not being applied in practice,[191] the memos increasingly were used to halt deportations.[192] In November of 2014, as part of a number of sweeping proclamations about executive immigration actions, the Secretary of the Department of Homeland Security announced new priorities and guidelines for the exercise of prosecutorial discretion.[193]

C. Deferred Action for Childhood Arrivals: A Schoolhouse in the Lobby

On June 15, 2012, following on the groundwork laid by the re-energizing of prosecutorial discretion and years of fruitless efforts to pass a law legalizing the status of unauthorized children brought to the United States, the Obama Administration announced the Deferred Action for Childhood Arrivals program.[194] Broadly speaking, out-of-status persons who had arrived in the United States under the age of

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prosecutorial-discretion-memo.pdf.

188. *See id.*

189. *See The Morton Memos: Giving Illegal Aliens Administrative Amnesty*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/morton-memos (last visited Oct. 31, 2016).

190. *Id.*

191. *See, e.g.*, Letter from Judy Chu, Rep. Cal. et al., to Janet Napolitano, Sec'y Homeland Sec. (Sept. 24, 2012), http://www.nilc.org/document.html?id=821.

192. *See Prosecutorial Discretion Toolkit*, CATHOLIC LEGAL IMMIGRATION NETWORK, https://cliniclegal.org/resources/prosecutorial-discretion-toolkit (last visited Oct. 31, 2016).

193. Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkoswki, Acting Dir., U.S. Immigration & Customs Enf't, et al. 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion_0.pdf.

194. Alejandro Mayorkas, *Deferred Action for Childhood Arrivals: Who Can Be Considered?*, WHITE HOUSE: BLOG (Aug. 15, 2012, 11:55 AM), http://www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered.

sixteen before June 16, 2007, and were in school or had finished their schooling and were under the age of thirty-one, could be considered for the program, which allows for a work permit and exemption, for the time being, from deportation.[195] Perhaps contributing to the decision to create the program was a letter signed by ninety-six law professors in essence giving the President legal basis for taking the action.[196] As of March 2014, 673,417 people had applied and 553,197 had been approved.[197] In the summer of 2014, the President was poised to expand his exercise of executive authority further, not a moment too soon for some[198] and much to the consternation of others.[199] The broad exercise of executive authority in the immigration area has prompted spirited debate among scholars.[200]

While the image of a schoolhouse in the lobby may be stretching the analogy a bit, the notion that children should be treated differently is

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195. *Id.*

196. Bertrand M. Gutierrez, *Law Professors' Letter May Have Swayed Obama*, WINSTON-SALEM J. (June 26, 2012, 7:49 PM), http://www.journalnow.com/news/local/article_f5df40ee-138f-53d3-aef1-a4d0b0923cf5.html; Letter from Professor Hiroshi Motomura, et al., to Barack Obama, President 4 (May 28, 2012), https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf.

197. Walter Ewing, *The Power of DACA Continues to Grow*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (June 16, 2014), http://immigrationimpact.com/2014/06/16/the-power-of-daca-continues-to-grow.

198. *See Administrative Relief: Immigration Enforcement*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/issues/immigration-enforcement/administrative-relief-immigration-enforcement/ (last visited Oct. 31, 2016).

199. Ryan Lovelace, *Is Obama Above the Law with Summer Amnesty Plan?*, NAT'L REV. (July 29, 2014, 2:58 PM), http://www.nationalreview.com/article/384041/obama-above-law-summer-amnesty-plan-ryan-lovelace.

200. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013) ("The Obama Administration has claimed 'prosecutorial discretion' most aggressively in the area of immigration. The most notable example of this trend was its June 15, 2012 decision not to enforce the removal provisions of the Immigration and Nationality Act .... By taking this step, the Obama Administration effectively wrote into law 'the DREAM Act,' whose passage had failed numerous times." (citations omitted)); Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 60–62 (2013) ("[T]hey miss the mark is at least three ways: 1) contrary to ignoring immigration enforcement, the Obama Administration has executed the immigration laws faithfully and forcefully; 2) far from being a new policy that undercuts statutory law, prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years; and 3) ... it is simply inaccurate to equate limbo status offered with a grant under DACA to the secure status that attaches to those eligible under ... the Dream Act." (citations omitted)).

not new in the immigration arena. In 1982, a divided U.S. Supreme Court ruled that undocumented children in Texas were entitled to public education under the Equal Protection Clause.[201]

In November 2014, the Secretary of the Department of Homeland Security announced both a plan to expand the pool of those eligible to request DACA,[202] and a plan to grant deferred action to the parents of U.S. citizen and legal permanent resident children (a plan referred to as "Deferred Action for Parental Accountability," or "DAPA").[203] Those announcements set off a firestorm of criticism, particularly from a large number of Republican governors, who almost immediately sued to enjoin the programs.[204] A district court judge in Texas enjoined the program, the Fifth Circuit Court of Appeals upheld the injunction in November 2015 (with a vigorous dissent), and the Supreme Court affirmed the judgment by an equally divided court in June of 2016 in the aftermath of Justice Scalia's death.[205] The decision put the program on hold, perhaps permanently.

In our analogy, the question was whether the superintendent of the Immigration Hotel (the President) had the authority to invite a large

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201. Plyler v. Doe, 457 U.S. 202, 230 (1982).

202. *See Executive Actions on Immigration,* U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/immigrationaction#1 (last visited Oct. 31, 2016).

203. Memorandum from Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 3–5 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

204. Josh Gerstein & Seung Min Kim, *Appeals Court Keeps Block on Obama Immigration Actions*, POLITICO (Nov. 9, 2015, 11:20 PM), http://www.politico.com/story/2015/11/obama-immigration-executive-order-supreme-court-215664#ixzz3wPQ2wMaw.

205. Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The entire decision consisted of one sentence: "The judgment is affirmed by an equally divided court." United States v. Texas, 136 S. Ct. 2271, 2271 (2016); Gerstein & Kim, *supra* note 204. The case prompted over fifty *amici curiae*. *United States v. Texas*, SCOTUSBLOG http://www.scotusblog.com/case-files/cases/united-states-v-texas/ (last visited Nov. 3, 2016). SCOTUSBLOG not only provides links to those briefs, but also provided a site for vigorous debate amongst proponents and opponents to the program. *Id.* Plaintiffs in at least three states have subsequently challenged the nationwide reach of the program. Alan Feuer, *Brooklyn Lawsuit Could Affect the Fate of Millions of Immigrants Nationwide*, N.Y. TIMES (Oct. 9, 2016), http://www.nytimes.com/2016/10/10/nyregion/brooklyn-lawsuit-could-affect-the-fate-of-millions-of-immigrants-nationwide.html; *see also* Dorothy Atkins, *Chicago 'Dreamer' Sues Fed Over Texas Immigration Block*, LAW360 (Oct. 12, 2016, 4:37 PM) https://www.law360.com/articles/850648/chicago-dreamer-sues-fed-over-texas-immigration-block; Kevin Penton, *Immigration Program Halt Can't Apply in Calif., Suit Says*, LAW360 (Nov. 3, 2016, 5:59 PM), https://www.law360.com/immigration/articles/859330/immigration-program-halt-can-t-apply-in-calif-suit-says.

number of persons in the hotel basement into the lobby. Another central question was whether the governors had standing to sue in the first place—could they show harm from the actions. President Obama announced the executive actions in November 2014 after efforts at comprehensive immigration reform before Congress had failed that summer.[206] The superintendent claimed that the cooperative board of the Immigration Hotel (i.e., Congress) (1) had over the years given him the authority to take such temporary, if sweeping, actions,[207] and (2) at the same had abdicated its opportunity to take more permanent action.[208]

The Supreme Court's divided decision in *United States v. Texas* ultimately left the question as to the reach of the President's power unanswered. While the DAPA and expanded DACA programs remain enjoined, their future could still be revived not just in the ongoing litigation in the Texas district court but in other courts around the country.

III. HOTEL ROOMS: THE LICENSES OF TEMPORARY VISITORS, STUDENTS, AND WORKERS

> An innkeeper may remove or cause to be removed from a hotel a guest or other person who: refuses or is unable to pay for accommodations or services; while on the premises of the hotel acts in an obviously intoxicated or disorderly manner, destroys or threatens to destroy hotel property, or causes or threatens to cause a disturbance; or violates a rule of the hotel that is clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every guest room.[209]

> A license . . . creates a privilege in favor of the licensee. A license, it has been said, "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful

206. Gerstein & Kim, *supra* note 204.

207. Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., et al. 3–4 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

208. See, for example, *Immigration Battle*, PBS: FRONTLINE (Oct. 20, 2015), http://www.pbs.org/wgbh/frontline/film/immigration-battle, for a documentary film on how the reform process grew, and the collapsed, during the summer of 2015.

209. MASS. GEN. LAWS ch. 140, § 12B (2016).

> which without it, had been unlawful; as, a license . . . to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful."[210]

A. Non-Immigrant Visas as Hotel Room Licenses

Non-immigrant visas are those which do not grant permanent legal resident status in the United States.[211] With a few exceptions, persons applying for such visas must demonstrate "non-immigrant intent."[212] Most of these visa types can be found listed at section 101(a)(15) of the INA.[213] Broadly speaking, those who hold non-immigrant visas can be considered akin to guests in a hotel rather than tenants. And like guests in a hotel, as one stays longer, one may acquire more rights and be more difficult to remove from the hotel.[214]

The notion of immigration status as a license has juridical roots and forms the basis of what has come to be called the "Plenary Power" doctrine. In one of the notorious Chinese Exclusion cases of the late 19th century, *Chae Chan Ping v. United States*, the Supreme Court stated that "[w]hatever license, therefore, Chinese laborers may have

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210. 3 TIFFANY REAL PROP. § 829 (3d ed. 2013) (quoting Thomas v. Sorrell [1673] 124 ER 1098). For a jaunt down history lane, *see Thomas*, [1673] 124 ER 1098.

211. *Visitor Visa*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Feb. 1, 2016).

212. BOSWELL, *supra* note 25, at 107–08. Some people coming to the United States on some types of employment-based, non-immigrant visas who may later try to change status to permanent residence are allowed to have "dual intent." *Id.*

213. Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012). For the purposes of the Immigration Hotel, three non-immigrant visas found at section 101(a)(15) of the INA that Boswell categorizes at "Law Enforcement Related." BOSWELL, *supra* note 25, at 131–33. I have placed on the Floor of Sanctuary. They are government informers, trafficking victims, and crime victims.

214. *See, e.g.*, *Who Is A "Landlord" And Who Is A "Tenant"*, *supra* note 60. In California, if you reside in a hotel, you do not have the rights of a tenant, if you live in a hotel for less than thirty days (and pay hotel tax); you live in a hotel for more than thirty days but haven't paid your bills; or you live in a hotel to which the manager has a right of access and control, where the hotel or motel allows occupancy for periods of fewer than seven days and provides a number of services (like a fireproof safe; a central telephone service; and maid, mail, and food service). *Id.*

> If you live in [such] a unit . . . , you are *not* a tenant; you are a guest. Therefore, you don't have the same rights as a tenant. For example, the proprietor of a hotel can lock out a guest who doesn't pay his or her room charges on time, while a landlord would have to begin formal eviction proceedings to evict a nonpaying tenant.

Id. (footnote omitted).

obtained[] . . . to return to the United States after their departure, is held at the will of the government, revocable at any time, at its [p]leasure."[215] Chae Chan Ping had come to the United States in 1875, had lived here until June 1887, and had traveled to China after obtaining a re-entry permit.[216] More like what would now be called a legal permanent resident,[217] Chae Chan Ping boarded a ship to return to the United States on September 7, 1888.[218] While en route, Congress passed the Scott Act, stripping him and other Chinese people like him, of the right to return to the United States.[219] The Supreme Court upheld the right of Congress to keep him out even though he had over a decade of equities built up in the United States.[220]

But that was not the end of the story. While the Plenary Power doctrine retains great force, there have been cases suggesting that the longer one stays in the United States, the more rights one has to due process notwithstanding having a "revocable license."[221] In 1975, the INS arrested Maria Plasencia, a legal permanent resident for five years, as she tried to re-enter the United States after a weekend visit to Mexico.[222] INS accused Maria and her husband of trying to help a number of Salvadorans enter the United States illegally for money.[223] Maria was put on immigration trial less than twenty-four hours later, without an attorney.[224] While she strenuously tried to defend herself, she was ordered excluded from the United States.[225] She fought her case to the U.S. Supreme Court, which observed that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."[226]

As the notion of a "revocable license" first appeared in a case of a

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215. 130 U.S. 581, 609 (1889).
216. *Id.* at 582.
217. *See infra* Part V.
218. *Chae Chan Ping*, 130 U.S. at 582.
219. Gabriel Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 10 (David A. Martin & Peter H. Schuck, eds., 2005).
220. *Chae Chan Ping*, 130 U.S. at 611.
221. *Id.* at 609.
222. Kevin Johnson, *Maria and Joseph Plasencia's Lost Weekend: The Case of* Landon v. Plasencia, *in* IMMIGRATION STORIES, *supra* note 219, at 221–44.
223. *Id.*
224. *Id.*
225. For a fascinating account of the ordeal, see *id.*
226. Landon v. Plasencia, 459 U.S. 21, 32 (1982).

Chinese resident, Chae Chan Ping, in the 1880s, it might be better suited for discussion in Part V's legal permanent residency apartment floor section.[227] The substantive due process revolution of the twentieth century, evidenced in part by the *Plasencia* case,[228] however, has elevated the rights of long-time residents beyond those of non-immigrants. That is why this Article uses the analogy of a lease for the resident floor and retaining the use of licenses for non-immigrants.

B. Short Term Visitors for Business and Pleasure: Regular Hotel Rooms

Foreign tourists are the quintessential non-immigrant visa holders, and also the quintessential foreign persons who stay in hotels. In order to qualify for either a B-2 visa (visitor for pleasure) or a B-1 visa (business travel), one must be able to prove the purpose of their trip, that they have the means to make the trip, and that they have the intent to depart the United States.[229] Employment in the United States is not permitted under these visas.[230] One-hundred seventy-three million non-immigrant visa holders entered the United States in fiscal year 2013, ninety percent of whom were B-2 and B-1 visitors.[231]

In the immigration context, applicants for non-immigrant visas have sometimes encountered discrimination based on race, class, and national origin at consulates abroad.[232] In the 1990s, U.S. consular officials in Brazil were found to have engaged in illegal practices in a lawsuit in which a State Department employee challenged being fired when he refused to apply discriminatory practices to visa applicants:

> The Consulate's policies establish fraud profiles that are centered around particular nationalities that are deemed inherently suspicious and extremely likely to engage in fraud, Plaintiff was disturbed about these policies, and the administrative record suggests that he attempted to avoid using

227. *See infra* Part V.

228. *See* notes 222–26 and accompanying text.

229. *Visitor Visa*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Nov. 4, 2016).

230. *Id.*

231. KATIE FOREMAN & RANDALL MONGER, OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2013, at 1 (2014) (citation omitted).

232. *See, e.g.*, Olsen v. Albright, 990 F. Supp. 31, 37 (D.D.C. 1997).

> them as he dispatched the duties of his position. In fact, the Court concludes that the Consulate's policies are unlawful and that Plaintiff was justified in refusing to follow them.[233]

As the issuance of visitor visas has sometimes been marred by prejudicial actions on the part of the State Department, so has race and national origin discrimination played a role in the provision of public accommodation in the United States:

> Fifty years ago, segregation in public accommodations—particularly in the South—was the norm. Whether it was in restaurants, bars, movie theaters, buses, hotels, or drinking fountains, African Americans were routinely denied service and relegated in the social realm to second-class citizens.[234]

While the Civil Rights Act of 1964 put an end to legalized discrimination in public accommodations, hotels have discriminated against black patrons in recent cases.[235]

There are some travelers who do not need a visa at all. The VWP allows travelers for business or tourism who would ordinarily need a "B" visa to travel without a visa, so long as both they and their countries of origin meet certain requirements.[236] As of mid-2014, thirty-

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233. *Id.*; *see also id.* at 38 ("Despite the fact that the generalizations and stereotypes based on race and national origin are not used to deny applications outright, their effects are still extremely pernicious. The statements in the manual inculcate visa officers to prejudge certain groups solely on the basis of their nationality or physical appearance. The Consulate's policies instruct visa officers to view members of these groups as far more suspicious and dishonest than applicants of other races and nationalities.").

234. RICHARD JEROME, LONG ROAD TO JUSTICE: THE CIVIL RIGHTS DIVISION AT 50, at 25 (2007), http://www.protectcivilrights.org/pdf/reports/long-road/long-road-to-justice.pdf.

235. *Id.* at 27 (reporting that in 2001, management and employees agreed to stop the practices after a U.S. Civil Rights Division complaint alleged that employees of the Selma Comfort Inn "charged Black guests higher prices than Whites, denied them equal access to hotel services and facilities, and consistently steered them toward the back of the hotel." (citing United States v. Satyam, L.L.C.)). Management and employees agreed to stop the practices. Press Release, Dep't of Justice, Justice Department Settles Race Discrimination Lawsuit Against Selma Comfort Inn (Apr. 4, 2002), https://www.justice.gov/archive/opa/pr/2002/April/02_crt_196.htm.

236. Immigration and Nationality Act § 217, 8 U.S.C. § 1187 (2012); 8 C.F.R. § 217.1 (2016); *Visa Waiver Program,* U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html (last visited Oct. 31, 2016).

> A country must meet various requirements to be considered for designation in the Visa Waiver Program. Requirements include, but are not limited to:

eight countries qualify for the program.[237] While participants do not have to apply for a visa per se, they still must apply to be enrolled in the Electronic System for Travel Authorization.[238] With the privilege of easier travel comes a loss of other protections and opportunities, most notably fewer protections from deportation and no right to seek a change of immigration status after arrival in the United States.[239] The VWP gives us the closest parallel to a license in real property law—the privilege of ease of travel is balanced by few rights to object to removal if you violate status. That those traveling under the VWP can be deported without having the right to see an immigration judge (which is often the case in immigration matters) parallels the revocable nature of the basic license.[240]

C. Other Non-Immigrants: Extended Stay Hotels and Migrant Housing

Many hotel chains now provide rooms for more than a few nights for persons needing longer term but less permanent accommodations.[241] A large number of non-immigrant visas have this same feel. These include educational visas (F, J, and M visas) and family related visas (K and V visas).[242] The letters of the visas refer to their statutory designation

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- enhanced law enforcement and security-related data sharing with the United States;
- issuing e-Passports;
- having a visitor (B) visa refusal rate of less than three percent;
- timely reporting of both blank and issued lost and stolen passports; and
- maintenance of high counterterrorism, law enforcement, border control, and document security standards.

Id. (footnote omitted).

237. *Id.*

238. *Electronic System for Travel Authorization*, U.S. CUSTOMS & BORDER PROT., http://www.cbp.gov/travel/international-visitors/esta (last visited Oct. 31, 2016).

239. 8 C.F.R. § 217.4.

240. *See supra* Section II.B.2.d for summary removal of VWP participants. On the property law front, "[a] license is, as a general rule, revocable at the pleasure of the licensor, and the fact that the license was embodied in an instrument under seal is immaterial in this regard. The fact, moreover, that a consideration was paid for the license has more usually been regarded as not affecting its revocability." 3 TIFFANY REAL PROP., *supra* note 210, § 833 (internal citations omitted).

241. *Extended Stay Hotels*, MARRIOTT, http://www.marriott.com/marriott/temphousing.mi (last visited Oct. 31, 2016).

242. *Directory of Visa Categories*, DEP'T OF STATE, BUREAU OF CONSULAR AFF., https://travel.state.gov/content/visas/en/general/all-visa-categories.html (last visited Oct. 31, 2016).

under section 101(a)(15) of the Immigration and Nationality Act of 1952.[243] For example, an F-1 student visa can last as long as the person maintains their status as a student or by engaging in post-graduation practical training.[244]

Work- or business-related visas cover a wide range of skills and professions, from high specialized workers and migrant farmworkers (H visas) to treaty traders and investors (E visas) to foreign journalists and diplomats (I, A, and G visas) to religious workers (R visas) to superstars in the arts, sciences, education, business, entertainment or athletics (O and P visas).[245]

This list is not exhaustive, but two things are worth noting. First, the visas involve stays longer than straightforward vacations or business trips, making the Extended Stay Hotel image apropos. Second, the range of types of visas also brings up images of where the visa holders actually stay. On the one hand, Daniel Radcliffe, of Harry Potter fame and holder of a P visa,[246] stays at posh hotels at $1000 per night.[247] H-2A migrant farmworkers on the other hand are supposed to receive housing provided by the employer that meets federal standards,[248] a promise not always fulfilled in practice.[249]

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243. *See* Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012).

244. *See id.* § 101(a)(15)(F); 8 C.F.R. § 214.3.

245. For an overview, see BOSWELL, *supra* note 25, at 114–31.

246. Miranda Bryant & David Gardner, *Daniel Radcliffe Turned Away by US Immigration After Visa Problems*, EVENING STANDARD (July 25, 2014), http://www.standard.co.uk/showbiz/celebrity-news/daniel-radcliffe-turned-away-by-us-immigration-after-visa-problems-9628139.html.

247. Shadee Tabasi, *Travel to London Like Daniel Radcliffe*, READYSETTREK (July 23, 2013), http://readysettrek.com/travel-london-daniel-radcliffe/.

248. *H2A Workers*, PINE TREE LEGAL ASSISTANCE, http://www.ptla.org/h2a-workers (last visited Oct. 31, 2016).

249. *See Housing*, NAT'L FARM WORKER MINISTRY, http://nfwm.org/education-center/farm-worker-issues/housing/ (last visited May 19, 2016). In North Carolina, "[s]ubstandard housing conditions are common in migrant farmworker temporary labor camps. The risk of living in a camp with substandard conditions is unevenly distributed among farmworkers, with women, children, indigenous language speakers, workers with fewer than 7 years experience working in US agriculture, and workers without H2A visas having disproportionately high risk of being exposed to substandard conditions." Quirina Vallejos, et al., *Migrant Farmworkers, Housing Conditions Across an Agricultural Season in North Carolina*, 54 AM. J. IND. MED. 533, 543–44 (2011), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3106132/.

IV. THE SANCTUARY FLOOR

A. The Hotel Rwanda and Medieval Sanctuaries

Paul Rusesabagina, the manager of the Milles Colines Hotel in Kigali, Rwanda, turned that luxury hotel into a refuge for nearly a thousand Tutsis and moderate Hutus during that country's genocide in 1994.[250] In our immigration hotel, we have created a similar floor for seeking refuge from being harmed, harm that occurs or could occur both abroad and in the United States. To get to the floor of refuge, its inhabitants must first go through some form of hell.

Because the humanitarian impulses in immigration have been so powerful, this Article represented that impulse with its own floor in the hotel, and calls it the Sanctuary. In property law, the common law has created special rules for places of worship and safety.[251] Historically, places of worship have also been places to where people in the midst of conflict have fled for safety, sometimes with success and sometimes not.[252] The Sanctuary Movement of the 1980s found inspiration in ancient traditions.[253] Religious traditions have a much more checkered history when it comes to violence against women, but domestic violence shelters rightly belong on the sanctuary floor of the immigration hotel.[254] One of the first recognized shelters for women in the United

250. Stefan Lovgren, *"Hotel Rwanda" Portrays Hero Who Fought Genocide*, NAT'L GEOGRAPHIC NEWS (Dec. 9, 2004), http://news.nationalgeographic.com/news/2004/12/1209_041209_hotel_rwanda.html.

251. *See* Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 928–35 (1995).

252. Martin Cuddihy, *Hundreds Killed Seeking Shelter in South Sudan Mosque and Church*, AUSTL. BROAD. CORP. NEWS (Apr. 24, 2014, 7:11 PM), http://www.abc.net.au/news/2014-04-24/hundreds-killed-seeking-shelter-in-south-sudan/5408468; Terry Moran, *Inside the Church Where Thousands Sought Shelter—But Were Instead Slaughtered*, ABC NEWS (Apr. 8, 2014), http://abcnews.go.com/International/video/rwanda-genocide-memorial-20-years-slaughter-23238811; Mohammed Omer, *Hiding in the Shadow of the Pastor in Gaza*, ALJAZEERA (July 24, 2014), http://www.aljazeera.com/news/middleeast/2014/07/hiding-shadow-pastor-gaza-201472351157438628.html.

253. Bezdek, *supra* note 251, at 929–30; *see also* Gavin R. Betzelberger, *Off the Beaten Track, on the Overground Railroad: Central American Refugees and the Organizations that Helped Them*, 11 LEGACY 17, 22–23 (2011), http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1009&context=legacy (describing the start of the Sanctuary Movement's beginning).

254. For a timeline on various religious and secular laws and practices condoning sexual and physical violence against women, see *History of Battered Women's Movement*, IND. COALITION AGAINST DOMESTIC VIOLENCE (Mar. 25, 2009), http://www.icadvinc.org/

States was known as Haven House, opened in Pasadena, California, in 1964.[255]

So who is not on this floor? One might expect to find the religious worker categories of immigrant and non-immigrant visas in the Sanctuary, as there are certainly many religious folks of all nationalities truly working in this field of refugee relief and protection in the United States. But the organizing principle of this floor is *refuge, protection, and safety* for the people on the floor, not the type of work people are doing on the floor.

When I initially conceived of the Hotel, the Sanctuary Floor did not exist; the different categories were slipped either onto the hotel room floor of non-immigrant status, or the apartment floor of residency. Congress and the Executive Branch have developed different types of protective statuses, ranging from those that are temporary in nature (e.g., Temporary Protected Status)[256] right up to permanent legal residency (e.g., Special Immigrant Juvenile Status).[257]

B. Temporary Protected Status and Deferred Enforcement Departure

The Secretary of Homeland Security may designate persons from a country for Temporary Protected Status ("TPS")[258] "due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."[259] Those conditions include "[o]ngoing armed conflict (such as civil war)"; "[a]n environmental disaster (such as earthquake or hurricane), or an epidemic"; or "[o]ther extraordinary and temporary conditions."[260] Persons with TPS may apply for work authorization, but the status is not permanent and is usually granted in increments of twelve to

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what-is-domestic-violence/history-of-battered-womens-movement/.

255. *Id.*

256. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status (last updated July 8, 2016).

257. *Special Immigrant Juveniles (SIJ) Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (last visited Oct. 31, 2016).

258. *See* Immigration and Nationality Act § 244, 8 U.S.C. § 1254(a) (2012); 8 C.F.R. § 244.2 (2016).

259. *Temporary Protected Status*, *supra* note 256.

260. *Id.*

eighteen months.[261] Deferred Enforced Departure ("DED") offers similar temporary protections but is based on the President's inherent authority to conduct foreign policy, whereas TPS has statutory basis.[262] In terms of the Immigration Hotel, the legal protections afforded to holders of TPS and DED are similar to parolees and DACA holders on the Lobby floor,[263] in the sense that they are temporary and do not lead to permanent status. Unlike those other statuses, TPS and DED flow from an assessment of the conditions in the home country that have significantly changed since the people seeking the protection have left those countries.[264]

"Temporary" in some cases of TPS and DED has turned into ten to fifteen years and more for some countries.[265] Some Liberians who fled the civil war in their country during the 1990s, but did not have a sufficiently particularized and individual claim to win asylum, have been in either TPS or DED since then.[266] TPS began in 1991 for Liberians and was changed to DED in 2007.[267] They live their lives in increments of eighteen months, with anxiety increasing as the expiration of their status approaches (and along with it their permits to work), with efforts in Congress to regularize their status thus far being unsuccessful.[268] In our property example, it is as if the agent (the President) for the landlord knows that he has good potential tenants, but is not allowed to give them a long-term lease.

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261. *See id.*

262. *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure (last updated July 14, 2015).

263. *See supra* Part II.

264. *See supra* notes 259–62 and accompanying text.

265. *Deferred Enforced Departure*, *supra* note 262 (noting that the effective date of DED for Liberia was since 2007); *Temporary Protected Status*, *supra* note 256 (noting TPS effective dates for El Salvador (2001), Honduras (1999), and Nicaragua (1999)).

266. DULCE FOSTER ET AL., A HOUSE WITH TWO ROOMS: FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION OF LIBERIA DIASPORA PROJECT 11 (2009).

267. *DED Granted Country - Liberia*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia (last updated Sept. 30, 2016).

268. *Id.* at 13. Haitians in DED status and their advocates were successful in lobbying for permanent resident status. *See Questions and Answers on HRIFA*, AM. IMMIGR. LAW. ASSOC. (May 13, 1999), http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26279%7C20130%7C1820.

C. *Protection from Persecution and Torture: Legal Limbo or Path to Citizenship?*

Asylum and refugee protection is afforded to those who, due to past persecution or a well-founded fear of future persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group, cannot safely return to their countries of origin.[269] An asylee receives such status after applying for it within the United States, while refugees arrive with that status after being interviewed and processed abroad, often in refugee camps.[270] Refugees and asylees have such status indefinitely (so long as it remains unsafe to return home), but they have the right to apply for permanent residence and eventually citizenship.[271] They also have the right to bring immediate family members to the United States.[272]

Similar but less enduring forms of relief are Withholding of Removal and Protection under the Convention Against Torture ("CAT"). Withholding of Removal under the Refugee Convention (referred to as *non-refoulement* in international law) provides protection to those who would face future persecution on account of the five grounds for asylum or refugee status,[273] but are statutorily barred from asylum (such as not filing the application within a year or having committed certain crimes).[274] Receiving Withholding of Removal requires a showing of "clear probability" of persecution (more than fifty percent)[275] versus the lesser "well-founded fear" standard for asylum (often characterized as a ten percent chance).[276] The CAT similarly offers protection for persons

269. Immigration and Nationality Act §§ 101(a)(42), 208–09, 8 U.S.C. §§ 1101(a)(42), 1158–59 (2012); 8 C.F.R. §§ 208–209 (2016).

270. *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/refugees-asylum/asylum (last updated Aug. 6, 2015); *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/refugees-asylum/refugees (last updated May 25, 2016).

271. *See* sources cited *supra* note 270.

272. *Id.*

273. Immigration and Nationality Act § 241(b)(3); U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 33 (entered into force Apr. 22, 1952). The United States is a party to the 1967 Protocol to the Convention, which incorporates the Convention's definitions. United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

274. *See* Immigration and Nationality Act § 208(a)(2), (b)(2). There is a shorter list of bars to withholding as well. *Id.* § 241(b)(3)(B).

275. INS v. Stevic, 467 U.S. 407, 412–13 (1984).

276. INS v. Cardoza-Fonseca, 480 U.S. 421, 439–40 (1987).

in danger of torture or inhuman or degrading treatment.[277] This protection can take the form of Withholding of Removal as well.[278]

Withholding of Removal and CAT protection differ significantly from asylum and refugee status in the Immigration Hotel. Asylees and refugees in essence hold provisional leases leading to the apartments of legal residency and eventually to ownership rights of citizenship. People with Withholding of Removal and CAT relief, while safe from harm, are more like those in the lobby. They do not have the right to bring their families, they cannot adjust status to permanent residency, and if the government finds another country willing to take them (and promise not to send them back to be persecuted or tortured), those persons can be "evicted."[279] In some cases, due to being deemed a security threat or because of past crimes, persons with such status may be subjected to lengthy or even indefinite detention, landing them in the Immigration Hotel's dungeon.[280]

D. Violence Against Women Act, Victims of Crime and Domestic Violence Shelters

The Violence Against Women Act ("VAWA"), originally enacted in 1994, has gradually been expanded to provide protection for victims of domestic violence and crime.[281] Originally intended to allow conditional resident spouses of U.S. citizens and residents to get their green cards without the assistance of their abusive anchor relatives, the benefit has been expanded to victims of domestic violence and crime without formal familial connection to a U.S. citizen or permanent resident.[282] Some VAWA-related visas lead directly to permanent residence, while others are non-immigrant visas which may later be converted to permanent residence.[283] Clients that University of St. Thomas's immigration clinic

277. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); 8 C.F.R. § 208.18 (2016).

278. 8 C.F.R. § 208.18(b)(4).

279. BOSWELL, *supra* note 25, at 99.

280. *Id.* at 98–101.

281. Kaitlin O'Neil, Note, *The 2012 Battle For the Reauthorization of the Violence Against Women Act: Lessons Learned and Questions Left Unanswered*, 35 WOMEN'S RTS. L. REP. 243, 245–46 (2014).

282. *Id.* at 246–49.

283. *Id.*; Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L.J. 429, 440–41 (2013).

has represented have often spent time living in domestic violence shelters. The very direct parallels for the Immigration Hotel are such domestic violence shelters, and historically VAWA has provided funding for such shelters.[284] This room in the Hotel, however, risks shrinking in size, as funding has been reduced:

> Housing for domestic violence victims includes emergency shelters and transitional housing, which are both incredibly significant in assisting victims to escape the cycle of abuse. Nonetheless, despite the importance of providing housing to victims, the 2005 VAWA reauthorization, and the 2011 reauthorization, bill cut housing services funding considerably. Shelters and transition housing resources across the country are unable to meet victims' needs; therefore, a reduction in funding of those resources dramatically widens the existing gap in victims' services.[285]

E. Victims of Human Trafficking—The Safe House

Human trafficking has rightfully garnered national and international attention. Under section 101(a)(15)(T) of the INA, a person who has been the victim of a severe form of human trafficking, has been helpful to law enforcement, and would suffer extreme hardship involving unusual and severe harm upon removal may be given a non-immigrant visa leading to permanent residency.[286] A young woman represented by the University of St. Thomas Clinic in 2003 had been trafficked to the United States by relatives as a domestic servant, and then threatened with deportation when she did not comply with the wishes of her aunt. She became the first person in Minnesota to receive a trafficking visa, a legal safe haven that allowed her to start life over in freedom.

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284. Runge, *supra* note 283, at 441–43.

285. Alyse Faye Haugen, Comment, *When It Rains, It Pours: The Violence Against Women Act's Failure to Provide Shelter from the Storm of Domestic Violence*, 14 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 1035, 1040–41 (2012) (footnotes omitted).

286. Immigration and Nationality Act § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012).

F. Special Immigrant Juvenile Status: The Immigration Children's Shelter

Special Immigrant Juvenile Status ("SIJS") offers permanent residence to unauthorized immigrant children who have declared dependent on a state court and whose reunification with one or both parents is not viable due to abuse, abandonment, or neglect.[287] Such court must also have found it not to be in the best interest of the child to be returned to their home country.[288] SIJS constitutes the children's shelter of the Immigration Hotel. As with orphanages, foster care, kinship care and group homes, the history of SIJS since its inception in the law in 1990 has included high and low points, and has included hard and soft detention.[289]

G. Where's the Homeless Shelter?: From "Not in My Back Yard" to "Not in My Country"

> Give me your tired, your poor, your huddled masses, yearning to breathe free.
> *Emma Lazarus*[290]

There is no homeless shelter in the Immigration Hotel. Most folks are familiar with the phenomenon of "Not in My Back Yard," or NIMBY. In many residential neighborhoods, the prospect of a homeless shelter brings out that impulse.[291] In terms of immigration law, the United States has a firm attitude of "Not in My Country"—there is an explicit ground of inadmissibility for "[a]ny alien who . . . at the time of

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287. *Id.* § 101(a)(27)(J)(i).

288. *Id.* § 101(a)(27)(J)(ii); *see also Special Immigrant Juveniles ("SIJ") Status*, *supra* note 257. SIJS does lead directly to legal permanent residency, and so in some sense this form of status belongs on the "apartment" floor discussed below in Part V.

289. *See* M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U. CAL. DAVIS J. JUV. L. & POL'Y 311, 331–78 (2010); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U. CAL. DAVIS J. JUV. L. & POL'Y 239, 245–50 (2010).

290. EMMA LAZARUS, THE NEW COLOSSUS (1883), *reprinted in* EMMA LAZARUS: SELECTED POEMS 58 (John Hollander ed., 2005).

291. *See, e.g.*, Lydia DePillis, *NIMBY Watch: Anacostia Protesting Homeless Women*, WASH. CITY PAPER: HOUSING COMPLEX BLOG (Aug. 1, 2011, 7:38 PM), http://www.washingtoncitypaper.com/blogs/housingcomplex/2011/08/01/nimby-watch-anacostia-protesting-homeless-women/.

application for admission or adjustment of status, is likely at any time to become a public charge."[292] Exceptions have been carved out for VAWA self-petitioners, U visa recipients, and battered spouses and children[293]—that is, people for whom there already exists another room in the hotel.

Even when policies of the United States contribute directly to the homelessness of people in, say, Mexico, there is no room at this Immigration Hotel for them to lay their head legally. Respected economists have credited the North American Free Trade Agreement with displacing millions of rural Mexican peasants from their land through monoculture agricultural practices.[294] At the same time, U.S. farm subsidies made U.S. corn cheaper than Mexican corn, leading to dramatic increases in exports to Mexico, undercutting local production and contributing to migration off the land.[295] Ironically, "one of the paradoxes of NAFTA, which leaders promised would help Mexico 'export goods, not people,' is that Mexico now 'exports' more people than ever and more of them reside permanently in the United States without documents."[296]

V. LEGAL PERMANENT RESIDENCY: APARTMENTS AND LEASES

"Movin' on Up, to the Eastside, to a Dee-luxe Apartment in the Sky, . . . We Finally Got a Piece of the Pie."[297]

A. Legal Permanent Residency: What's in Your Lease?

Legal permanent residency is akin to a lease on an apartment as opposed to a license in a hotel room. One has certain rights of occupancy and can be evicted if the terms of the lease are violated. In the immigration apartment, the grounds of removal found at section 237 of the INA can broadly be seen as terms of the lease (and therefore as

292. Immigration and Nationality Act § 212(a)(4)(A).

293. *Id.* § 212(a)(4)(E).

294. *See* EDUARDO ZEPEDA ET AL., CARNEGIE ENDOWMENT FOR INT'L PEACE, RETHINKING TRADE POLICY FOR DEVELOPMENT: LESSONS FROM MEXICO UNDER NAFTA 12–13 (2009), http://www.carnegieendowment.org/files/nafta_trade_development.pdf.

295. *Id.*

296. *Id.* at 13.

297. *The Jeffersons Intro Theme Song (Movin on Up)*, YOUTUBE, http://www.youtube.com/watch?v=FHDwRECFL8M (last visited Oct. 31, 2016); *The Jeffersons*, TV LAND, http://www.tvland.com/shows/jeffersons (last visited May 19, 2016).

grounds for eviction).[298] People holding permanent residency lose their status and can be deported, but generally speaking, it is easier for non-immigrants to be deported.[299] As laid out below, getting into certain apartments necessitates that the "tenant" or intending immigrant meet certain requirements based on factors such as family relationship, employment skills or characteristics, or even luck.

B. Family Based Immigration: Rent Control and Chain Migration

In the permanent residency universe, family takes priority. Each year 480,000 visas for permanent residence are set aside for family members (called "beneficiaries") of U.S. citizens and those who already have permanent residence (called "petitioners").[300] "Immediate relatives" (parents, children and spouses of U.S. citizens) get first dibs on those visas.[301] The remaining visas get divvied up by statutorily defined "preferences":"[302]

- First Preference: Unmarried sons and daughters of USCs;
- Second Preference: Spouse and children of LPRs and unmarried sons and daughters of LPRs;
- Third Preference: married sons and daughters of U.S. citizens; and
- Fourth Preference: brothers and sisters of U.S. citizens.[303]

Because annual demand exceeds the number of visas set aside by Congress, an elaborate system of waitlists has been created.[304] One's place in one of the four lines is determined by the date on which the visa petition filed by their U.S. citizen or LPR family member is approved.[305] If the status of the petitioner changes (i.e., a LPR petitioner becomes a U.S. citizen) or status of the beneficiary changes (e.g., the beneficiary marries), the beneficiary might be changed to a

298. Immigration and Nationality Act § 237(b).
299. See, for example, 8 C.F.R. § 217.4(a)(1) (2016), allowing for summary removal of visitors under the Visa Waiver Program.
300. *See* sources cited *supra* notes 6–7; *see also* Immigration and Nationality Act § 201(c).
301. Immigration and Nationality Act § 201(b)(2)(A)(i).
302. *Id.* § 203(a).
303. *Id.* § 203(a)(1)–(4).
304. *See id.* § 203(e)(3).
305. *Id.* § 203(e)(1).

shorter or longer line.[306] Once a priority date is current, the beneficiary only then can ask for the visa, either by way of adjustment of status (if in the United States) or consular processing (if outside of the United States).[307]

Most residential leases allow for the renter to have family members join them in the apartment. In addition to the priorities mentioned above, immigration law likewise also allows for spouses or children of primary beneficiaries to accompany them (or "follow to join" within six months).[308]

Once a beneficiary becomes a legal permanent resident or U.S. citizen, they are transformed into a potential petitioner for other family members.[309] Immigration restrictionists attack this transformation, labeling it "chain migration" and critiquing it as placing too much emphasis on family ties, rather than on other skills or attributes a migrant brings.[310] Proponents of family-based migration argue that the law limits migration to immediate family members, that family-based immigrant income equals that of native-born Americans within a decade of arrival, and that family is at the core of American values.[311]

Having lived in New York City for several years, another property analogy comes to mind: rent control. Rent-controlled apartments occupy a place of legend in New York lore, even though at this point, by one estimation, they account for only two percent of apartments in the city.[312] These apartments are "in a building built before 1947 and have been occupied by the same family since 1971," and "can only be passed down . . . to a family member living in the unit for two years before the

306. For an explanation of how the lines move, see *Change of Preference* VISABULLETIN.COM, http://www.visabulletin.com/change_of_preference.html (last visited Oct. 31, 2016).

307. *Id.*

308. Immigration Act of 1990 § 203(d); 22 C.F.R. § 40.1(a)(1) (2016).

309. *Chain Migration (2002)*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/issue/chain-migration (last visited Oct. 31, 2016).

310. *Id.*; David Grant, *Immigration reform: When is family reunification also 'chain migration'?*, CHRISTIAN SCI. MONITOR (May 6, 2013), http://www.csmonitor.com/USA/DC-Decoder/2013/0506/Immigration-reform-When-is-family-reunification-also-chain-migration.

311. *Dispelling the Myth: "Chain Migration"*, AM. IMMIGR. LAW. ASSOC. (June 5, 2007), http://www.aila.org/content/default.aspx?bc=6755%7C37861%7C25667%7C27899%7C22573.

312. *Rent Regulation*, NAKEDAPARTMENTS.COM, http://www.nakedapartments.com/guides/nyc/renting-in-new-york-city/rent-regulation (last visited Oct. 31, 2016).

existing tenant leaves or passes away."[313] The purpose of rent control was to protect average families from being priced out of the market.[314] It has become quite controversial over the years.[315]

Rent-controlled and rent-stabilized apartments passing from family member to family member over the decades in the New York real estate market provides a fitting analogy for an immigration system in which visas are reserved both for family members, as well as for a range of immigrants bringing different employment-based attributes. How does the nation balance the values trumpeted by Lady Liberty ("bring me your tired, your poor, your huddled massed yearning to breathe free")[316] with the relentless pressures of the free market to attract the most highly qualified and wealthiest immigrants?

C. Employment Based: Build or Buy Your Immigration Hotel

Permanent residence based on employment is available to those foreign workers who "are able to establish that they have unique skills, or are being offered a job in the United States that will not displace a U.S. worker or have an adverse effect on the wages and working conditions of U.S. workers."[317] In a sense, one might look at the employment-based visas as apartments set aside for outstanding individuals, the United States wishes to lure away from other countries, and apartments (jobs) that U.S. workers either do not want or for which they cannot qualify. And one category, the EB-5, essentially allows one to buy his or her very own immigration hotel and acquire permanent residence through sufficient investment.

As with family-based permanent residence, Congress has allotted a fixed number of annual visas (140,000)[318] and assigned those visas to different preference categories.[319] One of those preference categories allows an immigrant to literally build their own hotel as a way to get immigration status in the United States. Before considering that option,

313. *Id.*; *see also* TIMOTHY L. COLLINS, N.Y.C. RENT GUIDELINES BD., AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 84 (2d ed. 2016), http://www.nycrgb.org/html/about/intro/toc.html.

314. COLLINS, *supra* note 313, at 59–60.

315. *See, e.g.*, Manny Fernandez, *Despite Pleas for a Freeze, Stabilized Rents to Go Up*, N.Y. TIMES (June 23, 2009), http://www.nytimes.com/2009/06/24/nyregion/24rent.html.

316. *See* LAZARUS, *supra* note 290, at 58.

317. BOSWELL, *supra* note 25, at 138–39.

318. Immigration and Nationality Act § 201(d)(1)(A), 8 U.S.C. § 1151(d)(1)(A) (2012).

319. *Id.* § 203(a).

a brief listing of the other categories will be presented.

First Preference (EB-1). These visas do not require labor certification, which is described below. There are three subcategories: (1) persons of extraordinary ability in the sciences, arts, education, business, or athletics, demonstrated by national or international acclaim;[320] (2) outstanding researchers and professors with at least three years' experience;[321] and (3) multinational executive or managers who have been employed abroad for a specified period.[322]

Second Preference (EB-2). Such visas are for "qualified immigrants who are members of the professions holding advanced degrees . . . or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services . . . are sought by" a U.S. employer.[323] While labor certification is normally required, waivers can be granted if it is in the national interest, including specifically for doctors willing to serve for five years in an underserved area.[324]

Third Preference (EB-3). Labor Certification. Skilled workers, professionals, and "other workers" (whose positions require two years training) may be granted permanent residence if their prospective employers can acquire a certification from the U.S. Department of Labor that there are insufficient available, qualified, and willing U.S. workers to fill the position, and that the employment will not have an adverse effect on the wages and working conditions of similarly situated U.S. workers.[325] The labor certification process itself is a complex and often time-consuming process.[326]

Fourth Preference (EB-4). Special Immigrants. Boswell lists the main categories of this smorgasbord of visas found at section 203(b)(4) and section 101(a)(27) of the INA as "certain religious workers, Panama Canal Treaty employees, Amerasian children, certain employees of U.S. foreign-service posts abroad, certain retired employees of international organizations admitted to the United States under the G-4

320. *Id.* § 203(b)(1)(A).
321. *Id.* § 203(b)(1)(B)(i)–(ii).
322. *Id.* § 203(b)(1)(C).
323. *Id.* § 203(b)(2)(A).
324. *Id.* § 203(b)(2)(B).
325. *Id.* § 203(b)(3); *see also* BOSWELL, *supra* note 25, at 155, 158.
326. *See* BOSWELL, *supra* note 25, at 158–163.

nonimmigrant visa, and dependents of juvenile courts."[327] While SIJS cases technically do fall into this category, for the purposes of the Immigration Hotel, they conceptually belong on the Sanctuary floor.

Fifth Preference (EB-5). Immigrant Investors. This category allows immigrants who invest in enterprises that provide jobs to U.S. workers to acquire permanent residency.[328]

Build or Buy Your Own Immigration Hotel. Under that EB-5 preference category, an investor who brings at least $1 million into a new commercial enterprise (or the substantial expansion of an existing business) and employs at least ten full-time U.S. workers, can receive conditional residency and eventually legal permanent residency.[329] Congress also has "expressly provided for a reduced investment amount in a rural area or an area of high unemployment in order to spur immigrants to invest in new commercial enterprises that are principally doing business in, and creating jobs in, areas of greatest need."[330] EB-5 investments can also be facilitated by USCIS-designated "regional centers"—essentially enterprises that pool efforts rather than requiring an immigrant investor to start from scratch.[331] One can also substantially expand an existing business, as presumably is being done for the Langford Hotel in downtown Miami, "a $20 million repurposing project that included $10 million in EB-5 funding from Chinese investors, making the hotel the first of its kind to be built with EB-5 money."[332]

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327. *Id.* at 155–56.

328. *See id.* at 156–58.

329. Immigration and Nationality Act § 203(b)(5)(A), (b)(5)(C).

330. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0083, POLICY MEMORANDUM ON EB-5 ADJUDICATIONS POLICY 7 (2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf.

331. *See, e.g.*, Emon Reiser, *The EB-5 Immigrant Investor Program: What Businesses Should Know*, S. FLA. BUS. J. (June 11, 2014, 3:01 PM) http://www.bizjournals.com/southflorida/news/2014/06/11/the-eb-5-immigrant-investor-program-what.html. "Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 330, at 13 (quoting 8 C.F.R. § 204.6(e) (2016)).

332. Reiser, *supra* note 331; *see also* Hannah Sampson, *Old Downtown Bank to Become Boutique Hotel*, MIAMI HERALD (Sept. 20, 2012, 12:00 AM), http://www.miamiherald.com/2012/09/20/3010956/old-downtown-bank-to-become-boutique.html; Felipe Azenha, *Want a Green Card? Buy Your Way into the USA Langford Hotel Coming to Miami*, MIAMI URBANIST (Sept. 3, 2012), http://www.miamiurbanist.com/want-a-green-card-buy-your-way-into-the-usa-langford-

D. *Visa Diversity—Winning the Lottery*

The diversity visa program "makes up to 50,000 immigrant visas available annually, drawn from random selection among all entries to individuals who are from countries with low rates of immigration to the United States."[333] Ninety-thousand 'winners' are selected but only 50,000 who prove eligibility are able to immigrate each year.[334] Millions of people around the world apply.[335] In terms of a property law analogy, public housing for low-income persons has always been a scarce commodity, and many localities have turned to lotteries to allocate Section 8 subsidized housing.[336] Like the visa lottery, the housing lotteries often are not to actually receive housing, but to get onto a waitlist.[337]

E. *LPR Cancellation: Getting a Pass on Violating the Terms of the Lease*

Under section 240A(a) of the Immigration Act of 1952, longstanding green card holders who have been found to have committed a deportable offense can ask an immigration judge to cancel their removal (i.e., allow them to retain their residency status) as an act of discretion.[338] Such a resident must have been a legal permanent resident for at least five years, resided in the United States continuously for at least seven years in some legal status, and not have

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hotel-coming-to-miami/.

333. *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-diversity-immigration-visa-program/green-card-through-diversity-immigrant-visa-program (last updated Feb. 14, 2014).

334. *Id.*

335. Miriam Jordan, *U.S. Visa Program Attracts 11 Million Applicants*, WALL ST. J. (Nov. 6, 2014, 1:23 PM), http://www.wsj.com/articles/u-s-visa-program-attracts-11-million-applicants-1415250362.

336. *See, e.g.*, *Lottery Results*, DENVER HOUSING AUTHORITY, http://www.denverhousing.org/section8/section8lotteryresults/Pages/default.aspx (last visited Oct. 31, 2016).

337. Deborah Wang, *King County Receives Flood of Section 8 Housing Applicants After Four Year Hiatus*, KUOW.ORG (Jan. 29, 2015), http://kuow.org/post/king-county-receives-flood-section-8-housing-applicants-after-four-year-hiatus. In King County, Washington, in 2015, "[i]n the first 18 hours after the process opened, 10,613 people had already applied—four times the number of slots available." *Id.* "[I]n 2011, 25,000 people applied for 2,500 slots." *Id.*

338. Immigration and Nationality Act § 240A(a), 8 U.S.C. § 1229b(a) (2012).

committed an aggravated felony.[339] The parallel would be seeking relief from eviction from an apartment for something short of a material breach of the lease. Most public and government-subsidized housing programs "require material lease violations or good cause for eviction related to the tenant's conduct."[340] McDonough cites as an example the case of *Berry v. Lane*, which held that the

> landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, removed a refrigerator which did not work and replaced it, and the tenants and her children caused de minimis damage to the property.[341]

A person seeking LPR cancellation must not only show proof of the requisite time in the United States, but also show that they deserve "a favorable exercise of discretion."[342] The Board of Immigration Appeals laid out positive and negative factors in *In re C-V-T-*, weighing such things as family ties in the United States, employment history, community service, rehabilitation if the basis for removal is criminal activity, against severity and recentness of immigration violations and other evidence of bad character.[343] An example of a successful LPR cancellation claim in 2012 shared by a law firm involved the following:

> [A]n individual [was] detained in York County Prison who had been a lawful permanent resident since 1986 when he was 7 years old. He had been arrested multiple times but had only one conviction for Carrying Firearms without a License . . . in 2001. He was married to a lawful permanent resident. . . . [Our client] took responsibility for his prior actions, and established his history in the United States and his lack of ties to his home country. . . . [O]ur client . . . testif[ied] about his arrest record and his strong ties to the United States including his family and

339. *Id.* This replaced former section 212(c) relief in 1997. *See* Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 117–18 (2007).

340. McDonough, *supra* note 72, at 841; *see also id.* at 841 n.480 (citing cases).

341. McDonough, *supra* note 72, at 841 n.480 (citing Berry v. Lane, Nos. UD-19806295 02 and UD-1980603900, slip op. at 3–4 (Minn. Dist. Ct. July 22, 1998)).

342. *In re* C-V-T-, 22 I. & N. Dec. 7, 8 (B.I.A. 1998).

343. *Id.* at 11 (citing *In re* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978)).

> employment history and his involvement in the community. We also brought numerous witnesses to his hearing to testify on his behalf if necessary.[344]

F. *Adverse Possession in the Immigration Hotel*

> Generally, one claiming title by adverse possession against the holder of legal title must, by clear and convincing evidence, show actual, clear, definite, positive, notorious, open, continuous, adverse, and exclusive possession of a definite tract under a claim of right for the time prescribed by law. Generally, one seeking to acquire title through adverse possession must comply precisely with the statutory requirements. If any one of the elements necessary to constitute adverse possession is absent, then no title by adverse possession can be found.[345]

The analogs between adverse possession and different forms of immigration relief have been made elsewhere, including a proposal to resolve the situation of unauthorized immigrants in the United States through application of such principles.[346] The purpose in using the analogy is to explain past and current forms of immigration relief.

1. Legalization Programs: Registry and Legalization

What might be termed legalization programs have occurred periodically in the twentieth century, programs by which Congress has granted legal status to large groups of people based largely on when they arrived in the United States.[347] While each individual had to prove membership in the class through an application process, the basic idea, in terms of the hotel imagery, was to allow large numbers of people to come forward and move *en masse* from illegal status in the basement to the legal residence apartment floor. These programs were called

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344. *Getson & Schatz, P.C. Wins LPR Cancellation of Removal Case*, GETSON & SCHATZ (May 6, 2012), http://www.click4immigration.com/Success-Stories/getson-schatz-p-c-wins-lpr-cancellation-of-removal-case/.

345. *Adverse Possession of Lands: General Considerations*, 4 TIFFANY REAL PROP. § 1132 (3d ed.), *available at* Westlaw (database updated Sept. 2015) (citations omitted).

346. Gomez, *supra* note 339, at 121–25.

347. *Registry Files, March 2, 1929–March 31, 1944*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/history-and-genealogy/genealogy/registry-files-march-2-1929-march-31-1944 (last updated Feb. 9, 2016).

Registry (begun in 1929 and periodically updated) and a 1986 law which has come to be known as Legalization or, more pejoratively, amnesty.[348]

Registry remains on the books, but in practice is but a faded memory. Current eligibility is based on "entry prior to January 1, 1972, continuous residence in the [United States] since such entry, good moral character, and that the [person] not be deportable" for terrorist activities, Nazi participation, or certain criminal grounds.[349] Created in 1929 for people who had been in the United States prior to May 1921, Congress periodically advanced the cutoff date to give long-time unauthorized immigrants legal status.[350] Congress last advanced the cutoff date in 1986 to January 1, 1972.[351]

Under the 1986 amnesty, persons who could prove they had entered the United States prior to 1982 and lived here continuously received green cards.[352] In addition, the amnesty covered people who had worked in agriculture "at least ninety days in each of three years."[353] The general amnesty benefited 2.7 million and the special agricultural worker program another 1.1 million.[354]

2. Suspension of Deportation and Non-LPR Cancellation of Removal: Classic Adverse Possession

Unlike the large scale legalizations mentioned above, two other forms of acquiring residency look more like classic adverse possession in property law. In contrast to legalization programs, which allow groups of people to come forward and affirmatively apply for status, Suspension of Deportation and Non-LPR Cancellation of Removal exist

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348. *Id.*

349. Gomez, *supra* note 339, at 119 (footnotes omitted); Immigration and Nationality Act of 1990 § 249, 8 U.S.C. § 1259 (2012).

350. Gomez, *supra* note 339, at 119.

351. 4 CHARLES GORDON ET AL., *Immigration Law and Procedure* § 54.01 (2015). In 1940, the cutoff date was advanced to 1924; in 1958, to 1940; in 1965, to 1948; in 1986, to 1972. *Id.*

352. Gomez, *supra* note 339, at 119–20; Immigration and Nationality Act § 245A.

353. Teresa Watanabe & Anna Gorman, *'86 Amnesty Frames Immigration Debate*, L.A. TIMES (June 3, 2006), http://articles.latimes.com/2006/jun/03/local/me-amnesty3.

354. *Id.*; NANCY RYTINA, U.S. IMMIGRATION & NATURALIZATION SERV., IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001, at 3 (2002), http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf.

for individuals which the government is trying to deport (i.e. "evict") on an individual basis.[355] They are available only as defenses to immigration eviction, rather than something large numbers can simply apply for on their own absent governmental efforts to remove.[356] In the image of the Immigration Hotel, they are like individual elevator rides from the basement. Rather than stopping at the lobby and being escorted out of the building, a person presses the apartment floor button and tries to persuade an immigration judge to allow such an alternative to removal. But as in proving adverse possession cases that process is not an easy one.

Suspension of Removal existed prior to changes in the law in 1996 (and continued to be available to people who were already in deportation proceedings prior to the enactment date of the 1996 law).[357] An immigration judge could grant an otherwise deportable person suspension of deportation if that person has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his or her application, proves that he or she had been of good moral character, and could show that deportation would result in "extreme hardship" to him or herself or to a U.S. citizen or lawful permanent resident spouse, parent, or child.[358] Congress largely replaced Suspension of Deportation with Non-LPR Cancellation of Removal in 1996, making this process even more difficult by increasing the relevant time period of continuous residence to ten years, eliminating hardship to oneself as a basis for relief, and cranking up the hardship to one's U.S. citizen or LPR relative to "exceptional and extremely unusual hardship."[359]

VI. THE CONDO/COOP FLOOR: U.S. CITIZENSHIP

"Nowhere to run ain't got nowhere to go[;] Born in the U.S.A."

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355. *See Immigration Judge Benchbook: Suspension of Deportation*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/immigration-judge-benchbook-revised-suspension-of-deportation (last updated Feb. 5, 2015).

356. *See, e.g.*, *In re* Pilch, 21 I. & N. Dec. 627, 628 (B.I.A. 1996).

357. *Immigration Judge Benchbook: Suspension of Deportation*, *supra* note 355.

358. *Id.* (citing Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 308(b)(7), 110 Stat. 3009); *see also Pilch*, 21 I. & N. Dec. at 629.

359. Gomez, *supra* note 339, at 18 (quoting Immigration Act of 1990 § 240A(b)(1)(D)).

Bruce Springsteen[360]

A. Types of U.S. Citizenship

One becomes a U.S. citizen in three ways: at birth, through naturalization, and through derivation.

By Birth—Most U.S. citizens are born that way. Nearly everyone born in the United States, at least since the Fourteenth Amendment to the Constitution, is a U.S. citizen.[361] This ancient principle is referred to as *jus soli*, or "right of territory," and dates to Roman law.[362] *Jus sanguinis*, or "right of blood," forms the basis for acquiring citizenship through being born abroad to one or both U.S. citizen parents.[363] One might compare this in terms of property to inheriting a home, free of any encumbrances. A U.S.-born citizen faces none of the hurdles or tests that immigrants might face (or historically faced) to naturalize—no oaths of allegiance, no restrictions on ideological beliefs, no racial or health restrictions, no lineage.[364]

That said, periodically there arose efforts to eliminate some forms of birthright citizenship—for example, to write certain populations, such as the children of unauthorized immigrant, out of the collective will and inheritance of the United States by denying birthright citizenship.[365]

By Naturalization and Derivation—Under Article I, Section 8, Clause 4 of the Constitution, Congress has the power to establish rules for naturalization.[366] Normally, one must be an LPR for a requisite

360. *Bruce Springsteen Lyrics: Born in the U.S.A.*, AZ LYRICS, http://www.azlyrics.com/lyrics/brucespringsteen/bornintheusa.html (last visited May 19, 2016).

361. U.S. CONST. amend XIV, § 1 ("All persons born . . . and subject to the jurisdiction" of the United States are citizens). Persons born in the United States to foreign diplomats are not U.S. citizens, as they are not subject to the jurisdiction of the United States, but are considered LPRs. BOSWELL, *supra* note 25, at 195.

362. BOSWELL, *supra* note 25, at 195.

363. *Id.* at 196; IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK ch. 13.I.B (14th ed. 2014).

364. BOSWELL, *supra* note 25, at 195. A constitutional exception to U.S. citizenship based on *jus soli* is that children of foreign diplomats are not U.S. citizens. *Id.*

365. *See, e.g.*, JOHN FEERE, CTR. FOR IMMIGRATION STUDIES, BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: A GLOBAL COMPARISON 1–2 (2010), http://cis.org/sites/cis.org/files/birthright-final.pdf; *Editorial: The 'Birthright Citizenship' Debate*, L.A. TIMES (Oct. 26, 2014, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-birthright-citizenship-20141026-story.html.

366. U.S. CONST. art. I, § 8, cl. 4.

number of years, usually five years (exceptions are three years for a spouse of a USC or VAWA applicants; and one year for some members of the U.S. military), be a person of "good moral character," be able to read and write English, have a fundamental understanding of U.S. government and history, and take an oath or affirmation.[367] Children who are LPRs, under eighteen, and in the legal and physical custody of a naturalizing parent *derive* citizenship from that parent at the moment of naturalization.[368]

B. Condos and Co-ops as Models of Citizenship

Put most simply for our analogical purposes, in a condominium, a person fully owns her living space in a building complex, and then co-owns with others the common areas like lawns and lobbies and other facilities.[369] The rise of condos has come about due to a desire for home ownership in urban and suburban areas, but it brings with it challenges not so different from those facing citizenship—how condos are passed on and transferred to progeny, and how decisions are made about common areas.[370] Cooperatives provide a different model for comparison. Rather than ownership in a specific space, each member has an interest or share in a cooperative association, which in turn owns the building. Membership entitles one to an apartment or house as a result of an occupancy agreement with the association.[371]

In terms of historical views of citizenship, one might compare condo ownerships, with its stronger emphasis on individual rights and independence, to an ancient Roman view of citizenship: "[T]he Roman formulation made the capacity to act on things the central attribute of citizens. Possession of property was evidence of this capacity."[372] In contrast, the cooperative model might be compared to "the Aristotelian tradition, [where] citizens, free from their individual, concrete, material

367. *Who Is Eligible for Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/files/article/chapter4.pdf (last visited May 19, 2016).

368. BOSWELL, *supra* note 25, at 197–200.

369. 2 TIFFANY REAL PROP. § 483.33 (3d ed.), *available at* Westlaw (database updated Sept. 2015).

370. *Id.* § 483.10.

371. *Id.* §483.73. The definition has been shortened, and ellipses removed for purposes of flow.

372. EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 21 (2002).

interests, came together to make decisions on behalf of the general welfare."[373]

There are elements of both individualism and communitarianism in the freedoms, rights, and responsibilities attached to U.S. citizenship. The process of naturalizing might be compared to applying to the condo/co-op board of the U.S. The board (i.e., Congress) authorizes the building staff (i.e., USCIS) to check your background and inquire as to whether or not you have violated your "lease" as a permanent resident. The process of naturalizing often surfaces intentional or inadvertent violations of immigration law that lead not to citizenship but deportation.[374] The language, civics, and oath requirements for naturalization might be akin to condominium agreements, giving rise to a sense not simply of individual entitlement to a legal status, but commitment to a larger community with responsibilities as well as rights. Birthright citizens (through *jus soli* or *jus sanguinis*) inherit their status, however, and do not have to go through any such process.

Earlier in this Article, I compared immigration grounds of inadmissibility to restrictive covenants in residential zoning laws.[375] While the Supreme Court in *Shelley v. Kraemer* outlawed racially motivated restrictive covenants in 1948, restrictive covenants continued to be used even though illegal.[376] For example, in 1952, a Jewish refugee from Austria attempting to purchase a home near a country club in Seattle faced a restrictive covenant as well as open opposition: "the community will not have Jews as residents," declared the head of the Sand Point Country Club.[377] And while the Fair Housing Act of 1968 prohibited "discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex,"[378] allegations of racism and anti-

373. *Id.* at 20.

374. Julia Preston, *Perfectly Legal Immigrants, Until They Applied for Citizenship*, N.Y. TIMES (Apr. 12, 2008), http://www.nytimes.com/2008/04/12/us/12naturalize.html.

375. *See supra* Section I.B.

376. *See* Catherine Silva, *Racial Restrictive Covenants: Enforcing Neighborhood Segregation in Seattle*, UNIV. WASH.: SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT (2009), http://depts.washington.edu/civilr/covenants_report.htm.

377. *Id.*

378. *Id.* (citing *Fair Housing Laws and Presidential Executive Orders*, DEP'T OF HOUSING & URB. DEV., http://www.hud.gov/offices/fheo/FHLaws (last visited Oct. 31, 2016)).

immigrant bias by co-op boards in their decisions as to whom to allow to purchase apartments are not a thing of the past.[379]

In terms of immigration law, the United States maintained such a race-based policy for naturalization for over 150 years.[380] From 1790 to 1870, only free white persons could naturalize.[381] Beginning in 1870, blacks could naturalize.[382] Congress, America's co-op board, allowed "descendants of races indigenous to the Western Hemisphere" in 1940, Chinese in 1943, and Filipinos and Indians (i.e., from South Asia) in 1946.[383] Racial barriers to naturalizing were abolished in 1952.[384]

The oath and the civics and language requirements seem like reasonable requirements on their face. But the history of citizenship and property ownership in the United States since its founding is tied up with exclusion—the exclusion of the poor, women, and people of color, not only from the full rights of citizenship (political, economic, and social), but also property ownership.[385] In terms of the history of U.S. citizenship as it relates to immigration, the limitations on who could become a citizen were determined by who could migrate in the first place. Until 1965, a race-based quota system drove who was allowed into the United States:

> "The law was just unbelievable in its clarity of racism," says Stephen Klineberg, a sociologist at Rice University. "It declared that Northern Europeans are a superior subspecies of the white race. The Nordics were superior to the Alpines, who in turn were superior to the Mediterraneans, and all of them were

379. *See, e.g.*, Oren Yaniv, *Wealthy African Man Files $1 million Lawsuit After Co-op Board Turns Him Down Despite Paying for Apartment in Cash*, DAILY NEWS (Oct. 25, 2012), http://www.nydailynews.com/life-style/real-estate/wealthy-african-man-sues-co-op-board-bizarre-rejection-article-1.1191465.

380. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 45 (10th ed. 1996).

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 39, 42–46.

385. "While republican rhetoric declared that individuals have inherent human rights that transcend specific attributes, whole categories of people were excluded from citizenship and denied fundamental civil, political, and social rights. The major groups left out by the nation's founders were the poor, women, slaves, and Native Americans." GLENN, *supra* note 333, at 24; *see also id.* at 18–55.

superior to the Jews and the Asians."[386]

And while *per se* racial and national origin quotas have been eliminated from the immigration and naturalization laws just as restrictive covenants are no longer allowed, there remain allegations of racially discriminatory practices in the process of naturalization under the guise of anti-terrorism.[387]

And while revocation of naturalization is difficult,[388] courts have treated political and ideological bars to naturalization with the same deference as admissions decisions.[389] But there are limits to congressional power—in 1946, the Supreme Court ruled that naturalization applicants could not be required to take an oath to bear arms to defend the constitution.[390]

VII. THE BASEMENT: UNAUTHORIZED STATUS AND DETENTION

A. Unauthorized Status—The Basement

USCIS estimated that in January 2012, 11.4 million people were living without authorized status in the United States. "Most unauthorized residents either entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave."[391] Fifty-nine percent, or about 6.7 million, entered the United States before 2000.[392] In the immigration hotel, the unauthorized live in the basement. In reality, they often live in substandard housing, afraid to complain for fear of being reported to

386. Jennifer Ludden, *1965 Immigration Law Changed Face of America*, NPR (May 9, 2006, 3:35 PM), http://www.npr.org/templates/story/story.php?storyId=5391395.

387. *See* Press Release, ACLU, Muslim Denied Citizenship Because of Discriminatory Practices in Naturalization Process (June 16, 2010), https://www.aclu.org/immigrants-rights-national-security-religion-belief/muslim-denied-citizenship-because-discriminatory.

388. *See supra* Section I.D.3, at pp. 41–43.

389. *See, e.g.*, Price v. INS, 962 F.2d 836 (9th Cir. 1991), *cert. denied*, 510 U.S. 1040 (1994). The Court upheld denying a decision denying citizenship to an applicant who refused to answer questions about organizational membership. First amendment "protection afforded resident aliens may be limited." *Id.* at 841.

390. Girouard v. United States, 328 U.S. 61, 68–69 (1946).

391. BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 POPULATION ESTIMATES 1 (2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

392. *See id.* at 3.

immigration authorities.[393]

Not only do the unauthorized live in the shadows, often in substandard housing,[394] but they face efforts by elected officials to make it illegal for them to even rent or own real property.[395]

B. *Immigration Detention and the Prison-Industrial Complex: Welcome to the Hotel California*

> Last thing I remember, I was running for the door
> I had to find the passage back to the place I was before
> "Relax," said the night man, "We are programmed to receive.
> You can check-out any time you like, but you can never leave!"
> *The Eagles, Hotel California*[396]

Mass immigration detention in the United States finds a parallel in the mass incarceration criminal justice system. According to Bryan Stevenson of the Equal Justice Initiative, in "1970 there were roughly 350,000 people in our jails and prisons. Today there are more than 2.2 million."[397] Racism, either overt or covert, plays itself out in the criminal justice system in the U.S., with startling higher rates of incarceration for people of color than whites.[398] Profits have driven the

393. *See, e.g.*, Ellen Wulfhorst, *7-Eleven Store Operators Accused of Exploiting Illegal Workers*, REUTERS (June 17, 2013, 2:00 PM), http://www.reuters.com/article/2013/06/17/us-usa-crime-immigrants-idUSBRE95G0XA20130617.

394. In egregious cases, unauthorized immigrants have died in substandard housing. Robert D. McFadden, *Owner Says He Didn't Know 34 Were Living in House That Burned*, N.Y. TIMES (May 3, 1999), http://www.nytimes.com/1999/05/03/nyregion/owner-says-he-didn-t-know-34-were-living-in-house-that-burned.html ("Huntington town officials said . . . that the house that burned [and killed three] . . . had been an illegal death trap for its tenants: . . . illegally subdivided into apartments and occupied by immigrants who could not complain of substandard conditions because they feared being exposed as undocumented aliens.").

395. Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 56–57 (2009).

396. *Eagles Lyrics: "Hotel California"*, AZ LYRICS, http://www.azlyrics.com/lyrics/eagles/hotelcalifornia.html (last visited May 19, 2016).

397. Bryan Stevenson, *Why Are Millions of Americans Locked Up?*, CNN (Mar. 12, 2012), http://www.cnn.com/2012/03/11/opinion/stevenson-justice-prison/; *see also* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 340 (2006).

398. Wende Marshall, *White Supremacy and Mass Incarceration*, AL JAZEERA (Jan. 22, 2013, 9:31 AM), http://www.aljazeera.com/indepth/opinion/2013/01/20131178293916183 6.html.

creation of the prison-industrial complex in ways compared to the era of Jim Crow.[399]

Immigration detention has exploded in numbers over the past two decades, driven by many of the same economic and lobbying forces behind mass criminal incarceration.[400] Some of the very same corporations are involved in the privatization of immigration detention as the privatization of criminal incarceration.[401] Restrictive immigration policies that increase detention rates benefit privatized corrections corporations.[402]

VIII. THE LAUNDRY ROOM AND MAID SERVICE: THE ROLE OF STATES AND LOCALITIES IN REGULATING IMMIGRATION

Any well-functioning hotel needs lots of support staff. The metaphors of the laundry room and maid services can help introduce struggles over how states and localities have attempted to wrest regulation of immigration from the federal government. Employers have also attempted to exploit immigrant workers who have attempted to assert labor rights by threatening to call immigration or actually doing so to prevent organizing.[403]

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399. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); Ray Downs, *Who's Getting Rich Off the Prison-Industrial Complex?*, VICE (May 17, 2013), http://www.vice.com/read/whos-getting-rich-off-the-prison-industrial-complex.

400. DETENTION WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN THE IMMIGRATION DETENTION BUSINESS 1 (May 2011), http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Private%20Prison%20Influence%20Report.pdf; Alissa R. Ackerman & Rich Furman, *The Criminalization of Immigration and the Privatization of the Immigration Detention: Implications for Justice*, 15 CONTEMP. JUST. REV. 251–63 (2013); Ted Robbins, *U.S. Grows an Industrial Complex Along the Border*, NPR (Sept. 12, 2012, 3:38 AM), http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border.

401. *See* sources cited *supra* note 400.

402. GEO Group, a corporation formerly known as Wackenhut, has faced considerable criticism for its operations in this area. *See, e.g.*, Carole Carlson, *GEO Group Eyes Gary for Detention Center*, CHI. TRIB. (Nov. 3, 2015, 6:21 PM), http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-geo-goes-to-gary-st-1104-20151103-story.html; *GEO Group Withdraws Immigration Detention Proposal Under Intense Community Pressure*, NAT'L IMMIGR. JUST. CTR. (Nov. 18, 2015), https://www.immigrantjustice.org/press_releases/geo-group-withdraws-immigration-detention-proposal-under-intense-community-pressure.

403. Paul Harris, *Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation*, THE GUARDIAN (Mar. 28, 2013, 11:03 AM), http://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation.

In 1886, the U.S. Supreme Court heard the case of *Yick Wo v. Hopkins*.[404] San Francisco, under a local ordinance, had ordered the closing of 200 Chinese laundries, while leaving eighty similar but non-Chinese laundries open.[405] The Supreme Court ruled that the equal protection clause of the Fourteenth Amendment applied "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality," and that the Fourteenth Amendment "is not confined to the protection of citizens."[406]

Efforts by states to regulate (i.e., cause unauthorized immigrants to "self-deport") are not confined to the pages of history. The first fifteen years of the new millennium have seen states and localities attempt to make life difficult for unauthorized immigrants by attempting to make it illegal for employers to hire workers and landlords to rent to unauthorized immigrants, permit the police to questions those person they stop about their immigration status, deny drivers and business licenses to immigrants, among other initiatives.[407] In 2000, nine undocumented immigrant hotel workers joined colleagues in a successful effort to unionize the Minneapolis Holiday Inn Express Hotel.[408] After the vote, their employer dropped the dime and reported them to the INS.[409] The Equal Employment Opportunity Commission intervened, resulting in a settlement against the Hotel, but the workers still faced possible deportation.[410]

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404. 118 U.S. 356, 365 (1886).

405. *Id.* at 374.

406. *Id.* at 369.

407. *See, e.g.*, Damien Cave, *On Immigration, the Hard Lines Start to Blur*, N.Y. TIMES (June 20, 2014), http://www.nytimes.com/2014/06/21/us/on-immigration-the-hard-lines-start-to-blur.html. For a comprehensive analysis of state and local laws, see *State and Immigration Law*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT, http://immigrationimpact.com/category/state-and-local-immigration-law/ (last visited May 19, 2016).

408. Timothy Burn, *Illegal Workers at Minneapolis Hotel May Receive Amnesty*, WASH. TIMES, Feb. 3, 2000.

409. *Id.*

410. *Id.* Attorneys for the workers were able to secure two years of deferred action with work permits. *See supra* Section II.C, at pp. 44–47; E-mail from Benjamin Casper, Dir. Ctr. for New Ams, Univ. of Minn. Law Sch., to Virgil Wiebe, Professor of Law, Univ. of St. Thomas Sch. of Law (Jan. 4, 2016, 12:21 CST) (on file with author). Later that year, other immigrant workers threatened to strike during the busy summer convention season in Minneapolis. Terry Fiedler, *Hotel Workers OK Five-Year Contract on Eve of Convention*, MINN. STARTRIB., June 29, 2000; Andrew Haeg, *Hotel Strike a Possibility in Twin Cities*, MINN. PUB. RADIO (June 9, 2000), http://news.minnesota.publicradio.org/features/200006/09_haega_hotel/.

CONCLUSION

The immigration hotel analogy provides a powerful tool to understand how the immigration system works, both in terms of the practical questions of how a person navigates the system and also in terms of policy. Many of the same political, economic, historical, and social factors that drive policies around property also affect immigration. Restrictions based on race and economic status have been central to property ownership in American history; so, too, have they been central to immigration policies.

Courts have often relied on the real property analogy to sort out disputes over immigration—the Supreme Court's early and enduring articulation of the plenary power doctrine found a basis in the notion of non-citizen status being an easily revocable license. When the Supreme Court turned its attention to denaturalization, it created a high standard for the government to take away citizenship. It based that standard directly on what it took to strip property ownership from someone granted land by the government.

At various points in history, efforts have been made to comprehensively reform the immigration system of the United States. Should such an effort be successful, the immigration hotel metaphor will remain useful. Whether the reforms bring renovations, additions of new rooms or floors, even the elimination of rooms, or the creation of moats or walls or increased internal or external security—the image of the immigration hotel is flexible enough to provide a convenient, explanatory tool for the system.