DETRIMENTAL RELIANCE ON DETRIMENTAL RELIANCE:

THE COURTS' CONFLICTING STANDARDS FOR THE RETROACTIVE APPLICATION OF NEW IMMIGRATION LAWS TO PAST ACTS

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A decade ago, the United States Supreme Court held that a newly enacted law that attaches adverse immigration consequences to certain criminal convictions could not be retroactively applied in the case of an immigrant who was convicted of the offense pursuant to a guilty plea before enactment of the new law. Since then, the courts of appeals that have addressed the same issue in the context of an immigrant who was convicted at trial, rather than after a guilty plea, have done so with remarkable divergence. Some courts have held that, unlike immigrants who pled guilty, immigrants who went to trial cannot show that they detrimentally relied on the old law; accordingly, the new law may be applied retroactively. Other courts have rejected the detrimental reliance requirement. In this article, I argue that detrimental reliance, while properly viewed as a *factor* in retroactivity analysis, must not be viewed as a *requirement* for challenging the retroactive application of a new law to past acts.

I. BACKGROUND

Supreme Court case law with respect to retroactive application

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of new laws to past acts in both the criminal and civil contexts is clear. In the criminal context, retroactive application of new penal laws to past crimes, regardless of congressional intent, is flatly prohibited by the *Ex Post Facto* Clause of the Constitution.[1] In the civil context, the Supreme Court has announced a two-step test used in determining whether retroactive application of a newly enacted law to a past act is impermissible. First, courts must "determine whether Congress has expressly prescribed the statute's proper reach."[2] If Congress has expressly stated that the statute shall apply retroactively, then it may permissibly be so applied.[3] Second, absent such express language, "court[s] must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[4] If so, the statute may not be applied retroactively.[5] Thus, in *Landgraf v. USI Film Products*, the case in which the Supreme Court first announced this two-step test, the Court held that Section 102 of the Civil Rights Act of 1991, which created a right to recover compensatory and punitive damages for certain violations of Title VII, could not be applied retroactively to sexual harassment that occurred prior to the enactment of the law.[6] The Court reasoned that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," and that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[7]

The case law with respect to retroactive application of new laws to past acts in the immigration context, however, has not been so clear. Enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") repealed a decades-old discretionary form of relief from removal, commonly referred to as § 212(c) relief, for legal permanent residents ("LPRs") convicted of certain removable crimes.[8] The question then arose whether a lawful

1. Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.").

2. *Id.* at 280.

3. *Id.*

4. *Id.* (emphasis in original).

5. *Id.*

6. *Id.* at 280-86.

7. *Id.* at 265.

8. *See* 8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA, § 304(b), Pub. L. No. 104-208, 110 Stat. at 3009-597 (1996); *In re* Marin, 16 I. & N. Dec. 581, 584-85 (BIA 1978) (explaining that § 212(c) relief permits immigration judges to balance favorable

permanent resident who committed and was convicted of the removable offense *before* IIRIRA went into effect, but who was put into removal proceedings *after* the repeal went into effect, would be barred from applying for § 212(c) relief based on the retroactive application of IIRIRA. In *INS v. St. Cyr*, the United States Supreme Court addressed whether § 212(c) relief should remain available to an LPR who was convicted upon a guilty plea before the repeal.[9] After determining that Congress had not clearly directed that the repeal be applied retroactively, the Supreme Court applied the reasoning of its earlier decision in *Landgraf* and found that "[b]ecause respondent, and other aliens like him, almost certainly relied upon [the] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect."[10] The Court accordingly held that retroactive application of the repeal to the respondent's case was impermissible.[11]

Since the Supreme Court handed down its decision, several of the Courts of Appeals have been confronted with the question of whether retroactive application of the repeal of § 212(c) relief would be similarly impermissible in cases where the immigrant was convicted of the removable offense after trial instead of a guilty plea. They have responded with remarkable divergence. Several courts have held that the repeal of § 212(c) relief could apply retroactively to cases where the immigrant was convicted of the removable offense after trial because the immigrant could not show the type of detrimental reliance on the availability of § 212(c) emphasized by the Supreme Court in *St. Cyr*. Among these Courts of Appeals, there is considerable disagreement as to whether the type of reliance shown must be actual and individualized or simply objectively reasonable.

The First, Second, Fifth, and Seventh Circuit Courts of Appeals, for example, have held that an immigrant must show actual, individualized reliance upon the availability of § 212(c) relief in order to successfully argue that retroactive application of the repeal of § 212(c) relief to his case is impermissible.[12] The Sixth, Ninth, and

factors against adverse factors and grant discretionary relief against deportation to lawful permanent residents).

9. INS v. St. Cyr, 533 U.S. 289 (2001).

10. *Id.* at 325.

11. *Id.* at 326.

12. *See* Nadal-Ginard v. Holder, 558 F.3d 61, 70 n.9 (1st Cir. 2009); Wilson v. Gonzalez, 471 F.3d 111, 117 (2d Cir. 2006) ("[W]e are persuaded that a petitioner who asserts that he is eligible for § 212(c) relief . . . is required to make an individualized showing of reliance."); Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir.

Tenth Circuit Courts of Appeals, on the other hand, require a showing of objectively reasonable reliance; that is to say, a showing that the immigrant merely is a member of a class of immigrants who likely relied on the availability of relief in pleading guilty.[13] The Eleventh Circuit Court of Appeals recently agreed, stating that a showing of detrimental reliance on the old law is necessary to successfully argue against retroactive application of the new provision, but it declined to address whether the reliance shown must be actual or objectively reasonable.[14] Significantly, while these courts have interpreted the *St. Cyr* decision as requiring a showing of reliance, they have not held that pleading guilty to a crime in reliance on the existing state of the law is the *exclusive* way to show reliance. Some courts, for example, have held that an immigrant who waited to file his § 212(c) application "based on the considered and reasonable expectation that he would be permitted to file a stronger application for 212(c) relief at a later time" has shown the necessary reliance required to defeat retroactive application of a provision that stripped § 212(c) relief in the interim.[15] Another court has held that "[a]liens who gave up their right to appeal their aggravated felony

2007) ("[T]his circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application."); Esquivel v. Mukasey, 543 F.3d 919, 922 (7th Cir. 2008) ("[W]e require a showing of specific facts demonstrating actual reliance.").

13. Thaqi v. Jenifer, 377 F.3d 500, 504 n.2 (6th Cir. 2004) ("[U]nder *St. Cyr*, [a] petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose [actions] 'were likely facilitated' by their continued eligibility for § 212(c) relief.") (citations omitted); Hernandez de Anderson v. Gonzales, 497 F.3d 927, 941 (9th Cir. 2007) (holding that an individual demonstrates reliance if it would have been "objectively reasonable" to rely on the continuing availability of relief); Hem v. Maurer, 458 F.3d 1185, 1197 (10th Cir. 2006) ("[I]n none of the recent retroactivity cases . . . did the Supreme Court confer dispositive weight upon the petitioner's actual strategic decisions.").

14. *See* Ferguson v. U.S. Attorney Gen., 563 F.3d 1254, 127 & n.28 (2009).

15. Restrepo v. McElroy, 369 F.3d 627, 634, 638 n.18 (2d Cir. 2004) ("Petitioner's claim that he did not seek 212(c) relief when he could have, because of his expectation that it would be available later, readily fits within the Court's concept of reasonable reliance. But just as we today hold that a guilty plea is not the only kind of reliance that would make the abolition of 212(c) have an impermissible retroactive effect under *Landgraf*, so we wish to make clear that the kind of reliance involved in the instant case is itself not another *exclusive* category of *Landgraf* reliance that applies to aliens. It is just another *example* of reliance.") (emphasis in original); *see also Carranza-De Salinas*, 477 F.3d at 210 ("If . . . Carranza can demonstrate on remand that she affirmatively decided to postpone her § 212(c) application to increase her likelihood of relief, then she has . . . established a reasonable 'reliance interest' in the future availability of § 212(c) relief comparable to that of the applicants in *St. Cyr* and she is entitled to make her application for relief.").

conviction when a successful appeal could have deprived them of § 212(c) eligibility" had similarly shown the type of reliance required to defeat the retroactive repeal of eligibility for relief.[16]

On the other side of the split, the Third and Eighth Circuit Courts of Appeals have held that a showing of reliance is not a requirement to defeat retroactive application of a new law, but rather only one of many considerations in determining whether retroactive application attaches new legal consequences to past acts under *Landgraf*.[17] Accordingly, in those two circuits, § 212(c) remains available to immigrants who were convicted of removable crimes prior to the repeal, regardless of whether they went to trial or entered guilty pleas. To further add to the confusion, the Fourth Circuit Court of Appeals, in one case, agreed with the Third Circuit that a showing of reliance is not required to defeat retroactive application of a new immigration law.[18] But it held in a subsequent case—and without citation to the prior decision—that immigrants who went to trial could not demonstrate the reliance required to successfully challenge retroactive application of the repeal.[19]

Despite this glaring circuit split, the Supreme Court has declined to address the issue in no fewer than sixteen cases.[20] Significantly,

16. *Hem*, 458 F.3d at 1199.

17. *See* Atkinson v. Attorney Gen. of U.S., 479 F.3d 222, 231 (3d Cir. 2007) ("[W]e conclude that reliance is but one consideration in assessing whether a statute attaches new legal consequences to past events. In applying its commonsense, functional judgment as to whether a statute attaches new legal consequences, a court can certainly be *guided by* considerations of fair notice, reasonable reliance, and settled expectations. Nowhere in the Supreme Court's jurisprudence, however, has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry.") (citation omitted); Lovan v. Holder, 574 F.3d 990, 993-94 (8th Cir. 2009) ("Having carefully reviewed these various decisions [from other circuits], we will follow the Third Circuit's decision in *Atkinson*. That court first noted that requiring actual reliance in each case 'runs contrary' to the Supreme Court's retroactivity analysis in *Landgraf*, which was the basis for the decision in *St. Cyr*. Under *Landgraf,* a determination that a statute has an impermissible retroactive effect "is applied across the board.") (citations omitted).

18. *See* Olatunji v. Ashcroft*,* 387 F.3d 383, 388-89 (4th Cir. 2004) ("The government [maintains] that IIRIRA's retroactive application is permissible unless Olatunji can demonstrate that he 'almost certainly relied' upon his ability to take brief trips abroad when he entered his plea. And the government further suggests that it can defeat the presumption against retroactivity merely by notifying aggrieved parties of the adverse consequences of the statutes it seeks to enforce retroactively. Believing that these twin requirements would all but turn the presumption against retroactivity on its head, we hold that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity and that the government's notice is insufficient to overcome the impermissibly retroactive effect of IIRIRA on Olatunji's guilty plea.") (citations omitted).

19. Mbea v. Gonzales, 482 F.3d 276, 281-82 (4th Cir. 2007).

20. *See*, *e.g.*, Guerrero v. Holder, 132 S. Ct. 100 (2011); Canto v. Holder, 131 S. Ct. 85

however, courts of appeals have extended the reliance requirement to immigration cases outside the § 212(c) context, and as explained in further detail below, the Supreme Court is poised to address this requirement in a non-§ 212(c) case in which it has already granted certiorari.[21]

II. THE HISTORIC "PRESUMPTION AGAINST RETROACTIVITY" COUNSELS AGAINST A REQUIRED SHOWING OF DETRIMENTAL RELIANCE

Supreme Court decisions in the civil and criminal contexts, as well as the decision in *St. Cyr*, make clear that reliance, while properly viewed as an *indication* that settled expectations would be upset by retroactive application of a new immigration law to past acts, must not function as a *requirement* for defeating retroactive application.[22] Just as in the civil context, as set forth in *Landgraf*, retroactive application of a new immigration provision that attaches adverse legal consequences to past acts that an immigrant is helpless to undo should be viewed as impermissible, regardless of whether the immigrant went to trial or entered a guilty plea, or whether he can otherwise show detrimental reliance on the old law. Several arguments support this contention.

First, the imposition of a reliance requirement, whether actual or objective, contravenes Supreme Court case law. In *Landgraf*, the Supreme Court determined that a new civil law providing for compensatory and punitive damages for employment discrimination could not be applied retroactively to discrimination that had already

(2010); Jerez-Sanchez v. Holder, 131 S. Ct. 73 (2010); de Johnson v. Holder, 130 S. Ct. 3273 (2010); Molina-De La Villa v. Holder, 130 S. Ct. 1882 (2010); Ferguson v. Holder, 130 S. Ct. 1735 (2010); Cruz-Garcia v. Holder, 129 S. Ct. 2424 (2009); Morgorichev v. Holder, 129 S. Ct. 2424 (2009); Aguilar v. Mukasey, 554 U.S. 918 (2008); Zamora v. Mukasey, 553 U.S. 1004 (2008); Hernandez-Castillo v. Gonzales, 549 U.S. 810 (2006); Thom v. Gonzales, 546 U.S. 828 (2005); Stephens v. Ashcroft, 543 U.S. 1124 (2005); Reyes v. McElroy, 543 U.S. 1057 (2005); Lawrence v. Ashcroft, 540 U.S. 910 (2003); Armendariz-Montoya v. Sonchik, 539 U.S. 902 (2003). The Supreme Court's reluctance to intervene on this issue may be due to the dwindling number of individuals seeking this increasingly antiquated form of relief. *See* Brief for the Respondent in Opposition to Writ of Certiorari at 6, Guerrero v. Holder, 132 S. Ct. 100 (2011) (No. 10-1366), 2011 WL 3488934 at *6 ("Although there is some disagreement in the circuits with respect to [the reliance] question, the disagreement is narrow and the question involves a statutory provision that was repealed more than 14 years ago and is therefore of greatly diminished importance.").

21. *See* Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *cert. granted* 132 S. Ct. 70 (2011).

22. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 325-26 (2001).

occurred.[23] The Court undertook no analysis as to the employer's reliance (or lack thereof) in holding that the new law was impermissible as retroactively applied because the historical "presumption against retroactivity"[24] and "familiar considerations of fair notice, reasonable reliance, and settled expectations"[25] counseled against retroactive application of a new law without clear congressional intent to the contrary. Similarly, in *St. Cyr*, while the Court admittedly focused on the respondent's reliance on the availability of § 212(c) relief and the quid pro quo nature of the plea arrangement, it arguably did so to show that retroactive application of the repeal would "obvious[ly]" upset the respondent's "settled expectations."[26] Indeed, nowhere does the Court assert that reliance must be shown in every case. Far from honoring the traditional "presumption against retroactivity" that the Supreme Court cited in *Landgraf*,[27] courts effectively have turned the presumption on its head: For immigrants, retroactivity is presumed, unless the immigrant can show that he took some step in reliance on the old law.

A Supreme Court decision from earlier this month supports this position. In *Judulang v. Holder*,[28] a non-retroactivity case,[29] the Court struck down the immigration agency's method for determining which classes of crimes made deportable immigrants eligible for § 212(c) relief, reasoning:

> The [agency's] approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls. The result[has] no connection to the goals of the deportation process or the rational operation of the immigration laws.[30]

The Court further stated, "[a] method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses

23. Landgraf v. USI Film Prods., 511 U.S. 244, 280-86 (1994).

24. *Id.* at 272.

25. *Id.* at 270.

26. *See St. Cyr*, 533 U.S. at 324-26.

27. *See supra* note 7 and accompanying text.

28. 132 S. Ct. 476 (2011).

29. The Court rejected Judulang's retroactivity argument in a footnote, reasoning that the agency's prior practice was so unsettled that Judulang could not possibly show that his "settled expectations" were upset. *Id.* at 489 n.12. In contrast, the prior law in the § 212(c) cases described above and in the *Vartelas* case described below was clear.

30. *Id.* at 487.

on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious."[31] The *Judulang* decision makes clear the Supreme Court's continuing commitment to ensure fairness in the administration of § 212(c) relief and its recognition that, though § 212(c) relief is discretionary, any limitations on immigrants' right to seek such relief must not be arbitrary. Whether an immigrant chose to plead guilty to a crime in reliance upon the availability of discretionary relief instead of going to trial similarly is unrelated to that immigrant's "fitness to remain in the country," and the imposition of the reliance requirement should accordingly also be struck down.[32]

Second, the Courts of Appeals' imposition of a reliance requirement creates an anomaly with respect to the traditional placement of immigration cases along the civil/criminal continuum. Although the Supreme Court traditionally has held that immigration proceedings are civil in nature,[33] in light of the liberty interests involved in removal proceedings, the protections afforded to immigrants in some contexts fall somewhere between the protections afforded to civil litigants and those afforded to criminal defendants. For example, while civil litigants are generally not entitled to effective assistance of counsel as a constitutional matter, immigrants in removal proceedings may seek relief based on ineffective assistance of counsel.[34] Similarly, while the exclusionary rule of evidence is generally not applicable in civil proceedings,[35] the Supreme Court has left open the possibility that the exclusionary rule might be applied in immigration cases where the violations were particularly widespread or egregious,[36] and courts have begun

31. *Id.* at 485.

32. *Id.*

33. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).

34. *E.g.*, Nelson v. Boeing Co., 446 F.3d 1118, 1120 (10th Cir. 2006) ("[T]he only context in which courts have recognized a constitutional right to effective assistance of counsel in civil litigation is in immigration cases."); Ponce-Leiva v. Ashcroft, 331 F.3d 369, 381-82 (3d Cir. 2003) ("[A]liens, like criminal defendants and unlike the parties in normal civil disputes, may obtain relief from the ineffective assistance of counsel."); Mejia Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999) (noting that aliens have a right to effective assistance of counsel under the Due Process Clause because deportation proceedings implicate an alien's liberty interest).

35. *See* United States v. Janis. 428 U.S. 433, 447 (1976) ("[T]he Court never has applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state."); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (noting that the Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials").

36. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) ("Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread . . . . [W]e do not deal here with egregious violations of Fourth Amendment or other

applying the rule in such circumstances.[37] Moreover, given the liberty interests implicated by detention or deportation, many scholars argue that at least some immigration proceedings should be treated as criminal rather than civil in nature, or at least somewhere between the criminal/civil divide.[38] Indeed, there is reason to believe that the Supreme Court itself is headed in this direction.[39] Far from treating the retroactivity rule in the immigration context as similar to the rule against *ex post facto* laws in the criminal context, imposing a reliance requirement in immigration cases places upon immigrants a burden not even faced by civil litigants when challenging the retroactive application of a new law.

Third, various policy reasons exist for rejecting the reliance requirement in immigration cases. For example, the reliance requirement forces immigration judges to delve into the facts of what occurred during an immigrant's criminal proceedings in order to determine eligibility for immigration relief, an inquiry that is arguably outside the scope of agency expertise.[40] Indeed, courts and scholars have recognized as much in advocating for the categorical approach to classifying crimes under the immigration statutes.[41] In addition, obvious administrative costs to such an inquiry could be avoided by prohibiting the retroactive application of new immigration

liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.").

37. *See generally* Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May be Going*, 12 SAN DIEGO INT'L L.J. 53 (2010).

38. *See, e.g.,* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 342-51 (2008) (arguing for the application of criminal protections in expulsion proceedings).

39. *See* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1299 (2011) (noting that the Supreme Court's decision in *Padilla v. Kentucky* "marks the beginning of a significant reconceptualization of the nature of deportation toward the realization that it is neither truly civil nor criminal. Rather, deportation is different. It is a unique legal animal that lives in the crease between the civil and criminal labels").

40. *See, e.g., In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (BIA 1996) (stating that asking an immigration judge to look into the facts of a criminal conviction "is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence"); Lennon v. INS, 527 F.2d 187, 194 n.16 (2d Cir. 1975) (explaining that individualized factual inquiries would require administrative agency to "retry the case," which "would pose insurmountable obstacles").

41. *See In re* Pichardo-Sufren, 21 I. &N. Dec. at 335; *Lennon*, 527 F.2d at 194; *see also* Mary Holper, *The New Moral Turpitude Test Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1301-02 (2011) ("There are many prudential reasons to apply the categorical approach, above all because it spares immigration judges a retrial of the criminal case.").

laws without regard to reliance.[42] Moreover, as the Supreme Court recognized in *St. Cyr*, many states require criminal trial judges to adequately advise immigrants of the immigration consequences of their criminal proceedings, and similar ethical rules exist for criminal defense counsel.[43] Recently, the Supreme Court held that a criminal defense attorney provides ineffective assistance of counsel by failing to inform a client that a guilty plea carries a risk of removal.[44] Creating a distinction for retroactivity purposes between those who go to trial and those who plead guilty, even for the same offense, unnecessarily adds a layer of complexity to this already labyrinthine area of the law.

Fourth, there are potential constitutional concerns raised by the imposition of a reliance requirement in retroactivity cases. In *Landgraf*, the Supreme Court acknowledged that "[i]n some cases . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application"[45] and stated that "[r]etroactive imposition of punitive damages would raise a serious constitutional question."[46] Given the harsh consequences associated with removal, particularly in the § 212(c) context where the immigrants at issue are LPRs, retroactive imposition of the repeal also raises serious constitutional questions.[47] Moreover, in the § 212(c) context (as in other immigration contexts), retroactive application might raise equal protection and right to trial by jury concerns. Courts should avoid such concerns by holding impermissible the retroactive application of new immigration provisions that impose adverse legal consequences to past acts that the immigrant is helpless to undo, regardless of the immigrant's ability to show detrimental reliance on the old law.

Finally, even if reliance were properly required, the requirement arguably is being misapplied in the immigration context. In many cases, the operative event for retroactivity analysis will be the commission of the crime, since that is what attaches disabilities

42. *See, e.g.,* Michel v. INS, 206 F.3d 253, 264 (2d Cir. 2000) (emphasizing that the categorical approach "relieves the [immigration agency] of the oppressive administrative burden of scrutinizing the specific conduct giving rise to criminal offenses").

43. INS v. St. Cyr, 533 U.S. 289, 322, n.48 (2001).

44. Padilla v. Kentucky, 130 S. Ct. 1473, 1486-87 (2010).

45. Landgraf v. USI Film Prods., 511 U.S. 244, 268 n.21 (1994).

46. *Id.* at 281.

47. While the Supreme Court historically has held that deportation was not punishment, and therefore that deportation proceedings were civil in nature, scholars have argued to the contrary. *See generally* Markowitz, *supra* note 38. Indeed the Supreme Court's more recent case law gives hope that the Court's position on this issue is shifting. *See generally* Markowitz, *supra* note 39.

under the new provision. Yet, courts, borrowing reasoning from Seventh Circuit Judge Posner, have stated: "It would border on the absurd to argue that these aliens might have decided not to commit [their] crimes . . . had they known that . . . they could not ask for a discretionary waiver of deportation."[48] This reasoning is unconvincing. As one judge so eloquently put it:

> [T]his oft-quoted passage is one that conflicts with my "'sound instincts'" as a judge. If it is, indeed, absurd to suggest that a person contemplating the commission of a crime considers the potential consequences of criminal conduct, then Congress and the Sentencing Commission surely are misguided in their attempts to deter crime through increased sentences. I respectfully suggest that it is far from absurd to believe the prospect of certain deportation, rather than possible deportation, might well deter a significant number of aliens from committing aggravated felonies.[49]

Further, this reasoning does not comply with the Supreme Court's holding in *Landgraf*. If it would "border on the absurd" to argue that immigrants might have decided not to commit crimes had they known they would be unable to apply for § 212(c) relief, it would equally "border on the absurd" to argue that Landgraf's co-worker would not have sexually harassed her had he known that the employer might be subject to compensatory or punitive damages. Yet the Court in *Landgraf* took no such analysis; it simply held that retroactive application of the damages provision to a past act that the employer was helpless to undo would be impermissible because the employer's settled expectations would be upset by such application.[50] No further showing of individualized reliance, whether subjective or otherwise, was required. Moreover, even in cases where the conviction, and not the commission of the crime, is the operative event for retroactivity analysis, it could be argued that immigrants who chose to go to trial instead of pleading guilty relied on the possibility of obtaining § 212(c) relief upon conviction as a worst case scenario in weighing whether or not to risk going to trial. In other words, had they known § 212(c) would not be available to them upon conviction at trial, they may have decided to plead guilty instead to preserve their eligibility for § 212(c) relief. Thus, "familiar considerations of fair notice, reasonable reliance, and settled

48. LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998); *see also* Alvarez-Hernandez v. Acosta, 401 F.3d 327, 333 n.30 (5th Cir. 2005); Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002); Domond v. INS, 244 F.3d 81, 86 (2d Cir. 2001).

49. Thom v. Ashcroft, 369 F.3d 158, 168 n.2 (2d Cir. 2004) (Underhill, J., dissenting) (citing *Landgraf*, 511 U.S. at 270).

50. *Landgraf*, 511 U.S. at 283-86.

expectations" counsel against retroactive application in such cases.[51]

III. *VARTELAS V. HOLDER*: AN OPPORTUNITY

As stated above, the Supreme Court thus far has refused to address the issue of whether or not a showing of detrimental reliance is required when an immigrant challenges the retroactive application of the repeal of § 212(c) relief to his case. However, the Court has recently granted certiorari in an immigration case outside the § 212(c) context that implicates the role of detrimental reliance in determining the retroactive application of new immigration sanctions.[52] Nowhere is the problematic nature of the courts of appeals' imposition of a reliance requirement in immigration cases more clear than in this case.

In *Vartelas v. Holder*, the Second Circuit Court of Appeals examined the retroactive application of an IIRIRA provision which rendered an LPR who previously committed a crime involving moral turpitude inadmissible upon return from travel outside the United States. Panagis Vartelas, a citizen of Greece, has been in the United States since 1979 and has been an LPR since 1989.[53] He has a U.S. citizen wife and two U.S. citizen children.[54] In 1994, after he pled guilty, Vartelas was convicted of conspiracy to make or possess a counterfeit security, and he was sentenced to four months' imprisonment.[55] The crime of which he was convicted is considered a crime involving moral turpitude,[56] although, as stated by Vartelas's immigration judge, Vartelas "was not a major actor in the crime."[57] In 2003, after Vartelas returned to the United States from a week-long trip to Greece, where his elderly parents still reside,[58] he was placed in removal proceedings.[59] At the time he was convicted of his offense, Vartelas had the right to make "brief, innocent, casual foreign excursion[s] that [were] not intended to disrupt his resident

51. *Id.* at 270.

52. *See* Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *cert. granted* 132 S. Ct. 70 (2011). Although Vartelas did apply for, and was denied, § 212(c) relief, his retroactivity argument does not concern his eligibility for that relief. *See id.* at 111.

53. Brief for the Petitioner at 8, Vartelas v. Holder, 132 S.Ct. 70 (2011) (No. 10-1211), 2011 WL 5591818 at *8.

54. *Id.* at 9 & n.1.

55. *Vartelas*, 620 F.3d at 110.

56. *Id.* at 111.

57. Brief for the Petitioner at 10, Vartelas v. Holder, 132 S.Ct. 70 (2011) (No. 10-1211), 2011 WL 5591818 at *10.

58. *Id.*

59. *Vartelas*, 620 F.3d at 111.

alien status" without fear of deportation.[60] However, effective April 1, 1997, IIRIRA and subsequent agency interpretation changed the immigration laws to provide that an LPR who had committed a crime involving moral turpitude and who departed and returned to the United States, regardless of the length of the trip or the LPR's intent in departing, is removable.[61] Accordingly, Vartelas was ordered removed.[62] In challenging his removal, Vartelas argued that the new rule was impermissible as retroactively applied to his case.[63]

The Second Circuit Court of Appeals disagreed. The court held that even though Vartelas had been convicted pursuant to a guilty plea, the new IIRIRA rule could permissibly be applied retroactively to Vartelas's pre-enactment conduct. The court reasoned that because the inadmissibility provision attaches upon *commission* of a crime, rather than *conviction*, Vartelas's decision to plead guilty was irrelevant.[64] Looking then at Vartelas's commission of the crime as the operative event, the court, once again relying on Judge Posner's absurdity argument, stated that "it would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws."[65] The court accordingly held that Vartelas could not show the type of individualized reliance required in that circuit.[66] Vartelas petitioned for review with the Supreme Court, and the Court recently granted certiorari.[67]

In my view, the court's reasoning is flawed for several reasons. First, as set forth above, the court improperly viewed a showing of detrimental reliance as a requirement for successfully challenging the retroactive application of the new rule to Vartelas's past crime. Pursuant to the Supreme Court's decision in *Landgraf*, the first step is to "determine whether Congress has expressly prescribed the

60. *Id*. at 116 (citing Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963)).

61. *Id*. at 116-17 (citing 8 U.S.C. §§ 1101(a)(13)(A), (C)(v); *In re* Collado-Munoz, 21 I. & N. Dec. 1061 (B.I.A.1998)).

62. *Id*. at 111-12.

63. *Id*. at 110.

64. *Id*. at 119-20.

65. *Id*. at 120.

66. *Id*.

67. *See* Petition for Writ of Certiorari, Vartelas v. Holder, 132 S.Ct. 70 (2011) (No. 10-1211), 2011 WL 1321242. The question presented by the case, as set forth in the writ petition, is:

> Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes LPR of his right, under *Rosenberg v. Fleuti,* 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?

Id. at *ii.

statute's proper reach,"[68] and as the Second Circuit Court of Appeals correctly determined, Congress made no such express statement.[69] Pursuant to *Landgraf*'s second step, the new rule clearly "impair[s] rights [Vartelas] possessed when he acted," namely, the right to travel abroad without fear of removal upon return.[70] Thus, the new rule is impermissible as retroactively applied.[71] No showing of detrimental reliance is necessary. Second, even if the court properly required a showing of reliance on the state of the old law, the court was too quick to dismiss the considerations Vartelas undertook in deciding to commit the crime. It is at least possible that the prospect of losing the right to travel or being deemed inadmissible upon return would have deterred Vartelas from committing the crime he committed.[72] Indeed, under the court's reasoning, there is simply nothing Vartelas could have done to preserve the rights he possessed when he acted, an outcome that is clearly at odds with the historic "presumption against retroactivity."[73]

Moreover, in determining that the *commission* of the crime—as opposed to the *conviction* of the crime—is the operative event for retroactivity analysis, the court assumes that the crime was actually committed. That is, the court ignores the widely recognized fact that there are many reasons why someone innocent of a crime might nevertheless choose to plead guilty to it, particularly if there is a risk of false conviction of a more serious crime with more drastic consequences upon trial by jury.[74] An immigrant defendant, for example, might decide to plead guilty to an offense which would offer the possibility of a discretionary waiver from removal, rather than risk being convicted at trial of an offense that makes one statutorily removable without the possibility of a waiver, even if he had not committed the crime in the first place. Yet, under the court's reasoning, even that level of reliance—a level much higher than that of the beneficiaries of the *St. Cyr* holding, many of whom undoubtedly actually committed the crimes to which they pled guilty—would not be sufficient to challenge the retroactive application of a new law that attaches a legal disability upon *commission* of a certain type of crime. The Supreme Court in *St. Cyr*

68. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

69. *Vartelas*, 620 F.3d at 118.

70. *Landgraf*, 511 U.S. at 280.

71. *Id.*

72. *See* Thom v. Ashcroft, 369 F.3d 158, 168 n.2 (2004) (Underhill, J., dissenting).

73. *Landgraf*, 511 U.S. at 272.

74. *See* Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012, 2013 (1992) (stating that innocent defendants may choose to plead guilty rather than go to trial "where they risk vastly greater punishment").

could not have intended such an outcome. Thus, arguably, even if the statutory language points to the *commission* of a crime as the triggering event, and even if a showing of detrimental reliance were properly required, it might make sense to view a plea as evidence of detrimental reliance. In my view, however, the Supreme Court should hold that a showing of detrimental reliance is not required in any event; thus, it need not address this issue.

IV. CONCLUSION

For the reasons set forth above, the Supreme Court should use *Vartelas* as an opportunity to hold that reliance, while permissibly viewed as *sufficient* in demonstrating that an immigrant's settled expectations would be upset by the retroactive application of a new immigration law to past acts, is not *required*. As was the case in *Landgraf*, the mere fact that retroactive application of the new provision would clearly "impair rights" Vartelas "possessed when he acted"[75] should be enough to prohibit such application.

75. *See Landgraf*, 511 U.S. at 280.