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# *Yepes-Prado v. U.S. Immigration and Naturalization Service*: A Measure of Privacy in an Immigration Context

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# CASENOTE

# *YEPES-PRADO v. U.S. IMMIGRATION AND NATURALIZATION SERVICE*: A MEASURE OF PRIVACY IN AN IMMIGRATION CONTEXT

## I. INTRODUCTION

In the context of immigration law,[1] courts generally afford significant deference to administrative discretion.[2] Even constitutional rights are limited in this context.[3] The U.S. Supreme Court, however, has extended procedural due process safeguards to aliens.[4] Therefore, courts will occasionally intervene to pro-

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1. In the immigration context, judicial review is available only after exhaustion of administrative remedies. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 605 (4th ed. 1994) (citing Castaneda-Suarez v. INS, 993 F.2d 142, 144-45 (7th Cir. 1993). Generally, the administrative review process begins with a decision by an Immigration Judge ("IJ") and, in some instances, a decision by an Immigration and Naturalization Service ("INS") officer. *Id.* at 572. The IJ or INS decision may be appealed to the Board of Immigration Appeals (BIA). *Id.* The BIA has the power to review the record *de novo*, "make its own findings and independently determine the legal sufficiency of the evidence." *Id.* at 579 (citing Charlesworth v. INS, 966 F. 2d 1323, 1325 (9th Cir. 1992)). *See also* Hazzard v. INS, 951 F.2d 435, 440 n.4 (1st Cir. 1991); Castillo-Rodríguez v. INS, 929 F.2d 181 (5th Cir. 1991); Córdoba-Chávez v. INS, 946 F.2d 1244 (7th Cir. 1991). The Attorney General ("AG") may review the BIA decision at her own behest or upon request from the BIA or the INS Commissioner. KURZBAN, *supra*, at 583.

The major area of federal judicial review of administrative decisions involves final orders of deportation or exclusion by the BIA. *Id.* at 593. All agency decisions or interpretations based on errors of law are subject to plenary review. *Id.* at 620 (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Federal courts, however, are generally limited to a review of the agency's record and may not decide factual questions *de novo*. *Id.* at 621.

2. *See, e.g.*, INS v. Rios-Pineda, 471 U.S. 443 (1985) (indicating that the Attorney General has discretion to refuse suspension of deportation even when all of the prerequisites are met). In some immigration contexts, the courts use the extremely deferential "rational basis" standard. *See, e.g.*, Achacosa-Sanchez v. INS, 779 F.2d 1260 (7th Cir. 1985). *See also* Heckler v. Chaney, 470 U.S. 821 (1985) (matter not reviewable in federal court because committed to agency discretion); Singh v. Moyer, 867 F.2d 1035 (7th Cir. 1989) (denial of waiver pursuant to § 212(e) committed to agency discretion); Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986) (decision of Attorney General not to deport someone to the country he or she designates is essentially non-reviewable).

3. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (finding *ex post facto* clause inapplicable in deportation); INS v. Lopez Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable in deportation); U.S. v. Verdugo-Urquidez, 110 S.Ct. 1056 (1990) (limiting the application of the fourth amendment). *See also infra* part V.B.

4. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (deciding that an alien's connections to the U.S. need not be "voluntary" before the alien can claim the benefits of the Constitution); Martinez-Benitez v. INS, 956 F.2d 1053 (11th Cir. 1992) (holding that Board of Immigration Appeals acted arbitrarily in denying refugee alien's application for asylum based on his conviction of narcotics offense when it failed to consider facts underlying conviction). *Cf.* Bridges v. Wixon, 326 U.S. 135 (1945). *Bridges* involved an alien who was deported pursuant to the Alien Registration Act, which provided for the deportation of any alien who, since entering the U.S., has

tect the rights of aliens in immigration proceedings. Recently, an immigration judge ("IJ") denied the petition for waiver of deportation[5] to a lawful permanent resident ("LPR").[6] The IJ based his decision primarily on the private consensual sexual conduct of the respondent.[7] The Board of Immigration Appeals ("BIA") found no abuse of discretion and affirmed the lower court's ruling.[8] The U.S. Court of Appeals for the Ninth Circuit,

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been affiliated at any time with an organization that believes in or advocates the overthrow of the Government by force or violence. The Court held the deportation unlawful because it was based on literature published by the alien and utterances made by him. Under these circumstances, stated the Court, the alien's literature and utterances should be protected by the First Amendment because they did not teach or advocate the subversive conduct condemned by this statute, they only revealed a militant advocacy of the cause of trade unionism. *Id.* at 148. *See infra* part V.B.

5. This note primarily concerns § 212(c) of the Immigration and Naturalization Act. 8 U.S.C. §1182(c). Under this section, the Attorney General may grant discretionary relief from deportation or exclusion to lawful permanent residents who meet the provision's seven-year residency requirement and whose statutory positive factors outweigh any negative factors. *E.g.*, Yepes-Prado v. INS, 10 F.3d 1363, 1365 (9th Cir. 1993); *see infra* part III. The distinction between deportable and excludable is whether or not the alien has made an entry into the United States. An alien may be deportable once he is considered to have made an entry into the United States and he may be excludable if he is not considered to have made an entry. For a more complete legal definition of "entry" and the difference between exclusionary and deportation proceedings, see generally KURZBAN, supra note 1, at 23-182. For the applicability of this distinction to 212(c) proceedings, *see infra* note 20 and accompanying text.

The INS regulations first delegate the authority to make section 212(c) decisions to the Executive Office of Immigration Review and the Board of Immigration Appeals ("BIA"). 8 C.F.R. §§ 3.0, 3.1(a)(1), 3.1(d)(1) (1993). The administrative agencies then refer responsibility over 212(c) determinations to Immigration Judges ("IJs") and give appellate jurisdiction over those decisions to the BIA. *Id.* at §3.1(b)(3). *See infra* text accompanying notes 20-23. For the factors an IJ must consider in an application for 212(c) relief, *see infra* text accompanying notes 34-42.

The BIA has the power to review the factual and legal basis of an IJ's 212(c) decision *de novo*. *Yepes-Prado*, 10 F.3d at 1366. When federal jurisdiction exists, the courts must determine the scope of review to be applied in reviewing agency action. KURZBAN, *supra* note 1, at 620. The standard of review for a 212(c) proceeding requires examination of agency fact-finding and a determination of whether or not the findings are supported by substantial evidence. The court must also review the balancing of the equities underlying a 212(c) determination for an abuse of discretion. *Yepes-Prado*, 10 F.3d at 1366. Since the BIA did not engage in a *de novo* review of the IJ's decision in *Yepes-Prado*, the Ninth Circuit reviewed the IJ's decision, rather than reviewing the BIA's determination. *Id.* at 1367.

6. A lawful permanent resident is defined as one who has "been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

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

8. *Id.*

however, vacated the judgment, holding that the IJ abused his discretion by improperly considering such conduct. The Ninth Circuit specifically stated:

> [B]y considering the irrelevant factors of the legal status of Yepes-Prado's relationship with Saavedra and her refusal to marry him, as well as the "illegitimacy" of Yepes-Prado's children, the IJ based his decision on unreasonable and improper factors rather than on legitimate concerns about the administration of the immigration laws.[9]

This note examines the circuit court's decision in *Yepes-Prado v. U.S. Immigration and Naturalization Service*,[10] focusing on the issue of privacy. The court, perhaps for the first time in immigration jurisprudence, analyzes the constitutional right to privacy and applies it to an immigration proceeding. After *Yepes-Prado*, it is the law in the Ninth Circuit that "private sexual conduct between consenting adults" is not a legitimate consideration in a hearing for waiver of deportation.[11] If the Supreme Court reviews and affirms this decision,[12] it would extend this right to privacy beyond the Ninth Circuit to all jurisdictions in the United States. This extension would signify some progress in affording basic rights to immigrants in the United States.

## II. FACTS AND PROCEDURE

The United States Immigration and Naturalization Service admitted Rigoberto Yepes-Prado into the United States as an LPR on November 29, 1974.[13] For the next ten years, Yepes-Prado maintained steady employment and was a law-abiding citizen.[14] In April 1984, however, he was arrested for possession of 14.25 grams of heroin with intent to sell.[15] A California court convicted him on January 15, 1986, and sentenced him to one

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9. *Id.* at 1370.
10. *Id.*
11. *Id.* at 1368.
12. At the time of publication, neither party has petitioned for Supreme Court review. The remand of the case resulted in confusion and delay. *See infra* part VI.
13. Yepes-Prado v. INS, 10 F.3d 1363, 1365 (9th Cir. 1993).
14. *Id.*
15. *Id.* at 1363.

year in the county jail and two years probation.[16] Yepes-Prado served eight months in jail. Thereafter, he was released on probation.[17]

Pursuant to the Immigration and Nationality Act § 241 ("INA"), the Immigration and Naturalization Service ("INS") ordered Yepes-Prado to show cause why he should not be deported given his drug conviction. INA § 241 provides, *inter alia*, that any alien who is convicted of violating any law related to the possession or trafficking of illegal narcotics "shall" be deported.[18] Although Yepes-Prado had a legal right to a hearing to show cause why he should not be deported,[19] this was not a practical option, given his drug conviction. He conceded his deportability, and instead sought discretionary relief under INA § 212(c).[20]

The IJ denied the waiver,[21] primarily because Yepes-Prado is the father of three illegitimate children who continued his sexual relationship with the children's mother without marrying her.[22] On appeal to the BIA, the Board determined that the IJ did not abuse his discretion, despite its finding that Yepes-Prado had "outstanding equities."[23] The Ninth Circuit vacated the judgment and remanded the case,[24] holding that the IJ did abuse his discretion by considering the private sexual conduct of Yepes-Prado as an adverse factor.[25] The Court also determined, as an alternate holding, that the IJ "failed to offer a *reasoned* explanation of why the only adverse factor, the single drug conviction, outweighed all of the equities in Yepes-Prado's favor."[26]

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16. *Id.* at 1365.

17. *Id.* at 1372.

18. 8 U.S.C. § 1251(a)(11) (1988).

19. 8 U.S.C. 1252(b)(1) (1988).

20. 8 U.S.C. § 1182(c) (1988). On its face, the statute applies only to excludable LPRs seeking to re-enter the country, but case law has established that a 212(c) waiver is also available in deportation proceedings. *See, e.g.*, Matter of Silva, 16 I. & N. Dec. 26, No. 2532 (1976). The requirement remains, however, that the grounds for deportation would also make the LPR excludable if he had departed and sought re-entry. Matter of Hernandez-Casillas, 20 I. & N. Dec., No. 3147 (1990). *See supra* note 6.

21. Yepes-Prado v. INS, 10 F.3d 1363, 1365 (9th Cir. 1993).

22. *Id.* at 1367-68.

23. *Id.* at 1365 (presumably quoting to the BIA decision although no citation is provided in the circuit court's opinion).

24. *Id.* at 1373. The circuit court has jurisdiction pursuant to 8 U.S.C. § 1105(a).

25. *Id.* at 1370.

26. Yepes-Prado v. INS, 10 F.3d 1363, 1370 (9th Cir. 1993) (emphasis in origi-

## III. LEGAL BACKGROUND

In 1952, Congress enacted the Immigration and Nationality Act of 1952. INA § 212(c), the provision under which Yepes-Prado sought relief, was part of the 1952 Act. Various amendments and judicial and administrative decisions, however, shaped the waiver provision into what it is today.[27] In its present form, § 212(c) is available as a discretionary waiver of deportation for LPRs in deportation proceedings who meet certain requirements.[28] Among other requirements,[29] the alien cannot be *deported* unless the alien, *for the same reasons*, could also be *excluded* if he was at the border attempting to enter the United States.[30] Furthermore, the LPR must have been domiciled in the U.S. for at least seven years.[31] The most recent legislative change, the Immigration Reform Act of 1990,[32] significantly altered the eligibility requirements for § 212(c) relief, but had no effect on the eligibility of Yepes-Prado.[33]

In *Matter of Marin*, the BIA set forth the factors an IJ shall consider in an application for § 212(c) relief.[34] The adverse factors include:

> the nature and underlying circumstances of the exclusion ground at issue,[35] the presence of additional significant violations of this country's immigration laws, the existence of a

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nal).

27. *See generally*, Carlina Tapia-Ruano, *Recent Developments in 212(c) Cases*, 422 PRACTISING L. INST. 991 (Nov.-Dec. 1991). For a thorough, yet concise, discussion of waiver of deportation under 212(c), see KURZBAN, *supra* note 1, at 560-66.

28. *See generally* Tapia-Ruano, *supra* note 27.

29. Such requirements are outside the scope of this note; however, *see infra* notes 34-38 and accompanying text.

30. *See supra* note 6.

31. *Id.*

32. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (effective Nov. 29, 1990). *See generally* Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L. J. 1401 (1993). Most significantly, 212(c) relief was previously barred for aliens sentenced to five years or more in prison for an aggravated felony; the new provision requires that the alien actually serve the time in prison. The new definition also expanded the definition of aggravated felony. *Id.*

33. Yepes-Prado's crime fits the definition of aggravated felony, but he was not sentenced to the requisite five years.

34. 16 I. & N. Dec. 581 (1978).

35. In the instant case, for example, the IJ must consider Yepes-Prado's heroin conviction.

> criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.[36]

These negative factors are balanced against the respondent's presentation of favorable considerations,[37] including:

> such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).[38]

An alien who makes an outstanding showing of favorable factors "merely satisfies the threshold test for having a favorable exercise of discretion considered in his case; such a showing does not compel that discretion be exercised in his favor."[39] The IJ must go through the process of weighing the relevant factors in each individual case.[40] He cannot undermine the availability of § 212(c) waivers through a blanket denial of such waivers for all drug cases.[41] The determination must be made on a case-by-case basis.[42]

## IV. THE CASE OF *YEPES-PRADO*

The circuit court determined that the IJ made two distinct errors, and it analyzed each error independently.[43] This Note

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36. *Marin*, 16 I. & N. Dec. at 584.
37. *Id.* at 585.
38. *Id.* at 584-85.
39. Matter of Buscemi, 19 I. & N. Dec. 628, 634 (1988).
40. *See* Matter of Edwards, 20 I. & N. Dec., No. 3134, (1990) (denying an application for a waiver of inadmissibility under section 212(c)).
41. *Id.*
42. *Id.*
43. Yepes-Prado v. INS, 10 F.3d 1363, 1370 (9th Cir. 1993).

considers each of the court's holdings separately. The court's first and most important holding extends the right of privacy to § 212(c) hearings by eliminating private sexual conduct as a proper factor for consideration. This holding on its own is sufficient to support the court's decision. The second holding reflects the court's perception that the IJ failed to offer a reasoned explanation for his decision. The court's analysis, however, is incomplete on this alternate holding, since it fails to account for all the factors the IJ considered. The reasoned explanation issue will be discussed first, leaving the more important privacy issue for a more thorough discussion.

### *A. A Reasoned Explanation*

The circuit court held that the IJ "failed to offer a reasoned explanation of why the only adverse factor, the single drug conviction, outweighed all of the equities in Yepes-Prado's favor."[44] The circuit court derives authority for this holding from *Dragon v. INS*,[45] which held that in an abuse of discretion hearing, the IJ must explain which factors he examines and how he reaches a determination on whether to suspend deportation.[46]

The circuit court states that the drug conviction is the "only" adverse factor the IJ considered. If this were true, its holding on this issue would be sound, particularly in light of Congress' decision to allow a case-by-case analysis where drug offenders requesting § 212(c) relief serve less than five years prison time.[47]

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44. *Id.*

45. 748 F.2d 1304 (9th Cir. 1984).

46. The *Yepes-Prado* court interprets *Dragon* to say that in an abuse of discretion hearing, the reviewing court must examine two elements to determine whether the IJ abused his discretion. First, did the IJ "consider expressly all relevant factors presented . . . "; and second, did the IJ "issue a reasoned decision reflecting such deliberation." In determining whether a reasoned decision is present, "the agency must indicate 'how it weighed the factors involved' and 'how it arrived at its conclusion.'" *Yepes-Prado*, 10 F.3d at 1370.

The policy behind this "test" is to avoid decisions being reached in an arbitrary and capricious manner. "Agencies abuse their discretion no less by arriving at plausible decisions in an arbitrary fashion than by reaching unreasonable results." *Id.* (quoting *Israel*, 785 F.2d at 740 n. 1, quoting *San Seup Shin v. INS*, 750 F.2d 122, 124-25 (D.C. Cir. 1984)).

47. Congress in the 1990 Immigration Reform Act, *supra* note 42, specifically made known its intent to weigh drug convictions with less than five year's time served on a case-by-case basis. The Circuit Court in Yepes-Prado points out that:

In the case-by-case analysis the IJ should "consider the relative seriousness of the particular conduct of which the petitioner was convicted."[48] Thus, to the extent that the court faulted the IJ for failing to consider the specific circumstances of Yepes-Prado's drug conviction,[49] it was correct.

The court, however, ignores the fact that the IJ considered, in a reasoned and calculated manner, Yepes-Prado's sexual conduct as an adverse factor. Whether or not the reasons for granting a § 212(c) waiver are proper is a separate issue from whether or not the reasons are given. By ignoring the IJ's consideration of private sexual conduct, the court creates a fiction that the drug conviction is the only adverse factor examined by the IJ and criticizes the IJ for being conclusory. This reasoning is flawed. The court concludes in the first part of the decision[50] that private sexual conduct is not a legitimate factor to be weighed in a § 212(c) waiver hearing. Once the court reaches this conclusion, it eliminates private sexual conduct as a factor in deciding whether the IJ abused his discretion when he weighed the adverse factors.

The court highlights this flaw, stating, "[t]here is no question that the IJ gave significant weight to the fact that Yepes-Prado and the mother of his children, Maria Saavedra, were not married . . . [T]he same is true with respect to the fact that [they] continued to have a sexual relationship out of wedlock."[51]

In failing to acknowledge private sexual conduct as a factor with regard to the abuse of discretion, the court fails to consider that the IJ may have based his decision primarily on this factor

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> Congress could have decided to deny discretionary relief to all persons convicted of serious drug offenses, but it explicitly chose not to do so. Instead, by providing that 212(c) relief will remain available to persons such as Yepes-Prado, who have served less than five years imprisonment on account of a narcotics conviction, Congress demonstrated its intent that the Attorney General should consider these applications on a case-by-case basis, while carefully weighing all pertinent considerations, including the particulars of the petitioner's conduct.

*Yepes-Prado*, 10 F.3d at 1371.

48. Yepes-Prado v. INS, 10 F.3d 1363, 1371 (9th Cir. 1993).

49. The specific circumstances include: (1) Yepes-Prado had no prior criminal record, (2) he was sentenced to one year and served only eight months, (3) there was no evidence that he violated his parole, (4) there was no evidence of subsequent criminal acts, and (5) he attended a rehabilitation program.

50. *See infra* part IV.B.

51. *Yepes-Prado*, 10 F.3d at 1368.

and not the drug conviction. This is evidenced by the IJ's emphasis on Yepes-Prado's behavior.[52]

The court does not address the issue of whether the IJ gave a reasoned explanation of how he weighed the improper factor, private sexual conduct. Assuming, arguendo, that the private sexual conduct is a proper factor to consider, the decision to deny relief would then be an acceptable exercise of discretion. The IJ only needs to give a reasoned explanation of how such conduct outweighed the factors in Yepes-Prado's favor.

### *B. Private Sexual Conduct*

The holding that an IJ should not consider private sexual conduct as a factor in a § 212(c) deportation relief hearing sets an unprecedented standard. At least in the Ninth Circuit, the practicing immigration attorney can now rely on *Yepes-Prado* to prevent an adverse ruling based solely on the private sexual conduct of his client.

The circuit court in *Yepes-Prado* makes creative and efficient use of precedent to justify its decision. In its analysis, the court separates the fact that Yepes-Prado was not married to the mother of his children from the fact that he maintained a sexual relationship out of wedlock.[53] With regard to the illegitimacy of the children, the court cites *Vargas v. INS*[54] for the proposition that the court's explanation must be based on *"legitimate"* concerns.[55] *Vargas*, however, does not define what constitutes a legitimate concern. The court does not cite to any other case for the direct proposition that having illegitimate children is not a legitimate concern.[56]

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52. The circuit court states:

> The IJ complained:
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> > And, he was told by me, last time, to regularize his relationship with a woman, by whom he's had three children and a fourth on the way, and he comes back single.
> >
> > Doesn't the Catholic Church also teach you that you [sic] supposed to be married before you start having children?
> >
> > How come you didn't follow those rules?

*Id.*

53. Yepes-Prado v. INS, 10 F.3d 1363, 1368 (9th Cir. 1993).

54. 831 F.2d 906 (9th Cir 1987).

55. *Yepes-Prado*, 10 F.3d at 1368 (citing Vargas v. INS, 831 F.2d at 909)(emphasis in original).

56. It is not one of the factors set forth in Matter of Marin, 16 I. & N. Dec.

For a closer analogy, the circuit court cites to *Matter of Anrade*.[57] In a concurring opinion in *Anrade*, one member of the BIA stated that an IJ should not consider "factors such as personal living arrangements" in a bond hearing.[58] As mere dicta in a similar immigration context, *Anrade* alone does not provide a very powerful argument. The court strengthens its argument with support from a non-immigration case, *Moore v. City of East Cleveland*.[59] In *Moore*, the Supreme Court held that freedom of choice in marriage and family matters fits within the definition of liberty for purpose of the Due Process Clause.[60] From this case the circuit court concludes that family matters such as the illegitimacy of Yepes-Prado's children are constitutionally protected.[61] Therefore, the IJ erred when he considered the familial situation of Yepes-Prado and the BIA erred when it upheld that decision.

With regard to Yepes-Prado's sexual relationship out of wedlock, the circuit court derives from case law outside the immigration context that "[p]rivate sexual conduct between consenting adults cannot be considered as a negative factor in an INS proceeding . . . absent specific congressional authorization."[62] The court cites *Hampton v. Mow Sun Wong*[63] for the proposition that noncitizens may be subjected to different rules than citizens only where Congress has specifically enacted legislation authorizing such discrimination.[64] *Hampton* involved the

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581 (1978). *See supra* text accompanying notes 34-38.

57. Interim Dec. No. 3037, 1987 WL 108952 (1987).

58. *Id.* at *9.

59. 431 U.S. 494 (1977) (involving a home owner who was convicted in an Ohio court of violating an East Cleveland housing ordinance which limited occupancy of a dwelling unit to members of a single family and recognized as a "family" only a few categories of related individuals).

60. Case law has made it clear that the Fifth Amendment applies to deportable aliens. Plyler v. Doe, 457 U.S. 202 (1982). *See also* Wong Wing v. U.S., 163 U.S. 228 (1896).

61. For a general discussion about contemporary America's changing views on the family and how that affects the legal rights of unmarried couples, see David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J. L. & PUB. POL'Y 117 (1993).

62. Yepes-Prado v. INS, 10 F.3d 1363, 1368 (9th Cir. 1993).

63. 426 U.S. 88 (1976) (holding that Civil Service Commission regulations excluding non-citizens from employment in most federal civil service positions did not satisfy due process requirements where the government could not prove a legitimate basis for presuming that the regulation served its asserted overriding national interest).

64. *Id.*

exclusion of noncitizens from federal civil service jobs.[65] *Hampton* is not directly analogous to the present case because it involves the disparate treatment of non-citizens versus citizens. Here, no such disparate treatment is at issue because citizens are not deportable. *Hampton* is, however, illustrative of the fact that LPRs are entitled to some forms of due process.

The circuit court illustrates the general principle that "private consensual sexual activity is an important aspect of personal identity"[66] through additional case law. The court cites *Eisenstadt v. Baird*[67] and *Carey v. Population Servs. Int'l.*,[68] from the line of cases following *Griswold v. Connecticut*,[69] addressing the constitutionality of state regulation of contraceptives. In *Eisenstadt*, the Supreme Court concluded, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[70] In *Carey*, the Supreme Court reached the conclusion that "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[71]

Since Yepes-Prado is the father of three illegitimate children, it seems disingenuous to argue that his sexual activity is not a matter of childbearing.[72] The *Eisenstadt* decision explicitly extended the right to privacy in matters of childbearing to unmarried individuals.[73] If choice in marriage[74] and family matters[75] are liberty interests for due process analysis, so too must childbearing be a liberty interest.[76] This reasoning gives

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65. *Id.*
66. *Yepes-Prado*, 10 F.3d at 1368.
67. 405 U.S. 438 (1972).
68. 431 U.S. 678 (1977).
69. 381 U.S. 479 (1965).
70. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).
71. *Carey*, 431 U.S. at 687.
72. Not at issue here is the question of whether the holding in this case could be extended to include homosexual activity, since as a practical matter, homosexuality is not a matter of childbearing. The Supreme Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), tends to indicate that such a result is unlikely. *See infra* text accompanying notes 90-94.
73. *Eisenstadt*, 405 U.S. at 453.
74. Zablocki v. Redhail, 434 U.S. 374 (1978).
75. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
76. *See supra* text accompanying notes 59-61.

substantial support to the circuit court's conclusion that an IJ should not inquire into such matters without specific congressional authority.[77]

The circuit court derives further support for its decision from collateral changes to Title 8 of the U.S. Code,[78] from which it infers lack of congressional intent. The Immigration Reform Act of 1990,[79] for example, removes sexual deviancy and polygamy from the grounds for exclusion.[80] These changes indicate, as the court correctly implies, that it is no longer Congress' intention for "private sexual conduct among consenting adults [to] be considered a legitimate basis for making immigration decisions."[81]

## V. ANALYSIS

### *A. Private Sexual Conduct as a Privacy Right*

The circuit court in Yepes-Prado relied heavily on case law outside of the immigration context, particularly the progeny of *Griswold v. Connecticut*.[82] Although the court does not reach the question of whether it would be constitutional for the government to punish private sexual conduct, the court cites these cases for the proposition that inquiry into such activity is subject

77. Yepes-Prado v. INS, 10 F.3d 1363, 1368 (9th Cir. 1993) (citing Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (holding that the Secretary of State did not have authority to promulgate regulations denying passports, to Communists and to persons whom evidence showed were going abroad to further Communist causes, or a regulation giving authority to demand a non-Communist affidavit from a citizen applying for a passport). *See also* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that Civil Service Commission regulations excluding non-citizens from employment in most federal civil service positions did not satisfy due process requirements where the government could not prove a legitimate basis for presuming that the regulation served its asserted overriding national interest).

78. 8 USC § 1, et seq.

79. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (effective Nov. 29, 1990). *See supra* text accompanying notes 32-33.

80. *Yepes-Prado*, 10 F.3d at 1369 (citing Pub. L. No. 101-649, 104 Stat. 4978 (1990) (effective Nov. 29, 1990)). The court also indicates that "[i]n 1981 Congress repealed the statutory subsection that provided that adultery disqualified an applicant from being found to possess good moral character." *Id.* (citing Pub. L. No. 97-116, §2(c), 95 Stat. 1611 (1981) (effective Dec. 29, 1981)).

81. *Id.*

82. 381 U.S. 479 (1965).

to the requirements of due process.[83] The court bases its holding on this due process argument, for had it reached the issue of the constitutional right to privacy, a different result seems likely. The constitutional right to privacy is far from absolute in a wholly domestic context.[84] It is unlikely that the court would extend that right in the context of immigration law further than it has in a domestic context.

There is no affirmative grant of a right to privacy in the U.S. Constitution.[85] The Court in *Griswold* creatively crafts this right from various constitutional provisions.[86] Subsequent decisions expand the right to privacy.[87] It is also clear, however, that the right to privacy is limited in scope,[88] and courts frequently decline to extend it further. One legal analyst comments:

> Since heterosexual fornication and adultery are widely criminalized, and heterosexual sodomy can be criminalized . . . the essence of constitutionally protected sexual privacy may be limited to consenting, private penile-vaginal intercourse between persons married to each other, with or without contraception. That is not very much progress in the quarter of a century since *Griswold*.[89]

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83. Yepes-Prado v. INS, 10 F.3d 1363, 1369 (9th Cir. 1993).

84. *See infra* text accompanying notes 85-101. *See also infra* notes 77-78 and accompanying text.

85. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 389-90 (4th ed. 1991). Nowak and Rotunda, in commenting on Griswold privacy, state: "[t]he justices have selected a group of individual rights which do not have a specific textual basis in the Constitution or its amendments and deemed them to be 'fundamental.'" *Id.* at 390.

86. The Court's analysis included the First, Third, Fourth, Fifth, and Ninth Amendments. LAURENCE H. TRIBE & RALPH S. TYLER, AMERICAN CONSTITUTIONAL LAW § 11.3, at 775 (2d ed. 1988).

One analyst comments: "[Justice] Douglas found that the right of privacy was there in the Constitution all along, created as a penumbra by emanations from specific provisions of the original Bill of Rights . . . . like the spaghetti sauce pitchperson telling us that 'It's in there,' Douglas is claiming that the right of privacy is in the Constitution itself." Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting and Other Stratagems of the Supremes*, 35 ARIZ. L. REV. 503, 520 (1993).

87. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services, 431 U.S. 678 (1977).

88. *See* Millspaugh v. Wabash County Dep't of Pub. Welfare, 746 F. Supp. 832, 848 (N.D. Ind. 1990).

89. Richard Green, *Griswold's Legacy: Fornication and Adultery as Crimes*, 16 OHIO ST. L.J. 545, 549 (1989).

The Court's most notorious opportunity to expand the right of privacy occurred in *Bowers v. Hardwick*,[90] wherein a homosexual plaintiff challenged Georgia's anti-sodomy law. In *Bowers*, the Court held that the statute was constitutional.[91] The Court distinguished the right to privacy protected in *Griswold* and its progeny,[92] indicating that the respondent demonstrated "[n]o connection between family, marriage, or procreation . . . and homosexual activity."[93] This did not, however, indicate by negative implication that there is an absolute right to privacy in family, marriage, and procreation, but only that some right to privacy exists in those limited contexts.[94]

It appears that outside of the marriage bed there is little right to privacy with regard to consensual sexual activity. Although some states repealed statutes that proscribe fornication and adultery, many still have statutes that impose criminal penalties for either or both of these crimes involving private consensual sexual activity.[95] Some states specifically prohibit unlawful cohabitation, which the New Mexico statute defines as "persons who are not married to each other cohabiting together as man and wife."[96] The U.S. Supreme Court has not held that state prohibitions of these activities are unconstitutional. The "crimes" of fornication and cohabitation, however, are directly analogous to the activities which the circuit court in *Yepes-Prado* concluded were improper factors for the IJ to consider in a waiv-

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90. 478 U.S. 186 (1986).

91. The issue of whether the statute is constitutional as applied to heterosexuals who are married was disposed of without resolution. A claim regarding a married couple, John and Mary Doe, was deemed non-justiciable for lack of standing in the District Court because the married plaintiffs had not yet been arrested or charged with a violation of the statute. The Court of Appeals affirmed, and the Does did not appeal the decision to the Supreme Court. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

92. *Bowers*, 478 U.S. at 191. The Court describes the line of cases construed by the circuit court to confer a right of privacy protecting homosexual sodomy, including, *inter alia*, Carey v. Population Services International, 431 U.S. 678 (1977), Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973).

93. *Id.* at 191.

94. *Id.*

95. *See, e.g.*, VA. CODE ANN. § 18.2(344) (Michie 1993); UTAH CODE ANN. § 76(7)(104) (1993); GA. CODE ANN. § 16(6)(19) (1993); S.C. CODE ANN. § 16(15)(60) (Law. Co-op. 1991).

96. N.M. STAT. ANN. § 30(10)(2) (Michie 1993). *See also*, N.D. CENT. CODE § 12.1(20)(10) (1993); MISS. CODE ANN. § 97(29)(1) (1991).

er of deportation hearing.

Issues related to cohabitation and fornication are often considered in child custody cases. In this context, an individual's right to privacy is more limited. In *Jarrett v. Jarrett*,[97] the Illinois Supreme Court held it was proper for the trial court to transfer custody of the children from the mother to the father where the mother cohabitated with her boyfriend, notwithstanding "the absence of any evidence of contemporaneous adverse effect upon the minor children."[98] The court applied a standard of conduct inferred from the state statute proscribing fornication.[99]

In *Parrillo v. Parrillo*,[100] the Rhode Island Supreme Court reached a similar result, although there was no statutory prohibition to fornication in that state. The court in *Parrillo* upheld the trial court's order that the mother "forgo any overnight visitations with [her boyfriend] on those occasions when the children are present."[101] The private sexual conduct restricted by the *Parrillo* court in the child custody context is closely analogous to the conduct which the circuit court in *Yepes-Prado* held that the IJ improperly considered.

There is, of course, a major distinction between child custody cases and deportation hearings. In child custody cases the court's primary concern is to do what is in the best interest of the child. This is not the primary goal in a waiver of deportation hearing. In the deportation context, the primary objective is to make a fair determination about an alien's desirability. During this process there is a balancing of concerns where the interests of the alien's children are weighed as one of many other factors.[102] Where deportation of an alien will have an adverse effect upon his children, therefore, the IJ should give more weight to the children's needs and the existence of a family unit.[103] This would be consistent with the state's interest in

97. 400 N.E.2d 421 (Ill. 1979).

98. *Jarrett*, 400 N.E.2d at 423.

99. The court cites the relevant portion of the statute: "'[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.'" *Id.* at 424 (citing ILL. REV. STAT., ch. 38, par. 11-8 (1977)).

100. 554 A.2d 1043 (R.I. 1989).

101. *Parrillo*, 554 A.2d at 1045.

102. *See supra* text accompanying note 38.

103. Immigration law recognizes this fact in that "[a] family relationship is to be

the welfare of children, even where there is no formal legitimization, as is the situation with Yepes-Prado and his children.

There are other areas of the law that permit governmental intrusion into private sexual conduct. In *Shawgo v. Spradlin*,[104] for example, the Fifth Circuit Court of Appeals upheld a state civil service regulation which penalized police officers who cohabitated or became romantically involved with other officers in the department.[105] *Shawgo* indicates that regulations which restrict private sexual consensual conduct are able to survive federal due process analysis when applied to civil servants.[106]

On policy grounds, one could justify the BIA's holding in *Yepes-Prado* based on the view that the consideration of an activity, when applied to a resident alien who is deportable, should be permissible where substantially similar activity is prohibited for civil servants, most of whom are United States citizens. In *Shawgo*, the court opined that the civil service regulation did not give adequate notice as to exactly what conduct was subject to sanction, but nevertheless found that the regulation did not offend the Constitution.[107] Similarly, there is no statute, regulation, or case law specifically proscribing private consensual sexual activity from which Yepes-Prado could have received notice that private consensual sexual activity is considered in a § 212(c) waiver of deportation hearing. However, the circuit court in *Yepes-Prado* held that the IJ's consideration of such factors was improper.[108]

These non-immigration cases collectively demonstrate that courts may properly consider private consensual sexual conduct in certain restricted and well-defined areas of the law. The holding in *Yepes-Prado* indicates that a hearing for waiver of deportation of a deportable alien is not one of these areas.

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counted as a positive factor in determining whether to grant 212(c) relief." Yepes-Prado v. INS, 10 F.3d 1363, 1370 (9th Cir. 1993).

104. 701 F.2d 470 (5th Cir. 1983), *cert. denied*, 464 U.S. 965 (1983).

105. *Id.*

106. *Id.*

107. *Id.* at 477-79.

108. *Yepes-Prado*, 10 F.3d at 1369.

### *B. The Constitutional Rights of Aliens*

Beyond the jurisdiction of U.S. immigration courts, many of the constitutional rights and privileges which protect United States citizens also apply to aliens.[109] As long ago as 1886, the Supreme Court in *Yick Wo v. Hopkins*[110] stated:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[111]

The *Yick Wo* decision was in a strictly domestic context which has no direct bearing on immigration law, but it is significant because it unequivocally establishes that the constitution affords at least some protection to aliens within the borders of the United States.

More recently, the Court in *Graham v. Richardson*[112] held that a state could not place restrictions on access to welfare for lawful aliens.[113] In *Hampton v. Mow Sun Wong*,[114] the Court opined that "the federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[115] On the same day, the Court handed down its decision in *Mathews v. Diaz*,[116] wherein the Court

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109. *See, e.g.*, Wong Wing v. U.S., 163 U.S. 228 (1896) (holding that Fifth Amendment rights apply to all persons, not only to citizens).

110. 118 U.S. 356 (1886). The Court in Yick Wo struck down a San Francisco ordinance that was constitutional on its face but was being applied in such a manner that it prevented Chinese nationals from operating laundries, while permitting others to operate substantially identical laundries. *Id.*

111. *Id.* at 369. *See also* Wong Wing v. United States, 163 U.S. 228 (1896) (extending constitutional criminal procedure to aliens).

112. 403 U.S. 365 (1971).

113. *Id.*

114. 426 U.S. 88 (1976).

115. *Id.* at 101.

116. 426 U.S. 67 (1976). In *Mathews*, resident aliens challenged the constitution-

stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects *every one* of these persons from deprivation of life, liberty or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[117]

The Court further explains that the United States Constitution does not confer all the advantages of citizenship to aliens, and that "a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other."[118] These constitutional cases indicate that certain provisions of the United States Constitution extend to protect aliens within our borders.[119] Some provisions of the Constitution, however, do not extend to aliens as they would to United States citizens.[120] In the immigration context, Constitutional protection is at its weakest and government interests begin to take on a greater importance.[121]

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ality of the Social Security Act provision which denies eligibility to aliens for enrolment in the Medicare part B supplemental medical insurance program unless they have been admitted for permanent residence and have also resided in the U.S. for five years. *Id.* at 77. While the Supreme Court did uphold this provision, it stated that the Fifth Amendment, as well as the Fourteenth, protects aliens, including those whose presence in the U.S. is unlawful, involuntary or transitional, from deprivation of life, liberty or property without due process of law. *Id.*

117. *Id.* at 77 (citations omitted).

118. *Id.* at 78. The challenged statute not only distinguished between aliens and citizens, but also distinguished between different classes of aliens. The statute, 42 U.S.C. § 1395(2)(B), denied eligibility for Medicare to aliens who have not been admitted for permanent residency and have not met a five year residency requirement. The statute was upheld because the Court determined that the requirements furthered the legitimate state interest of limiting Medicare to individuals who had established sufficient ties to the United States. *Id.*

*See also* Plyler v. Doe, 457 U.S. 202 (1982) (wherein the Court struck down a Texas statute that prevented the children of undocumented aliens from attending public school on equal protection grounds, thereby extending equal protection to undocumented aliens' children).

119. *See, e.g., Mathews*, 426 U.S. at 67.

120. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding *ex post facto* clause inapplicable in deportation); U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that a nonresident alien has no Fourth Amendment right to prevent a search and seizure of property located outside the territory of the United States); Linnas v. INS, 790 F.2d 1024 (2d Cir. 1986) (holding Bill of Attainder clause inapplicable in deportation).

121. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977); Harisiades v. Shaughnessy, 342

### *C. The Right to Privacy in the Immigration Context*

There is a paucity of literature and case law concerning the right to privacy in the immigration context. Apparently, no court ever recognized such a right before the court in *Yepes-Prado* eliminated private sexual conduct as a factor for consideration in a waiver of deportation hearing. The limited constitutional rights that the courts extended to aliens through various judicial decisions do not by their terms extend to immigration.[122] Nor do the rights extended to aliens necessarily include the right of privacy either directly or indirectly through the reasoning of *Griswold*, particularly since some of the constitutional provisions from which the *Griswold* opinion derived the right to privacy do not protect aliens.[123]

There is no case that is directly analogous to the situation in *Yepes-Prado*. The Court in *Fiallo v. Bell*[124] did not consider the privacy issue when holding that the government could discriminate against unwed fathers in determining special preference immigration status. *Matter of Marin*,[125] which enunciated various factors which a court may consider in the determination of whether or not to grant a § 212(c) waiver, did not affirmatively or negatively incorporate privacy considerations. Although the circuit court in *Yepes-Prado* does not purport to create a right to privacy, its holding that an IJ cannot consider private consensual sexual conduct recognizes what is tantamount to a "right" where none existed before.

### *D. How far will* Yepes-Prado *Go?*

Assuming that *Yepes-Prado* is not an illusion, and has, in fact, planted the seed of a right to privacy in immigration, it is

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U.S. 580 (1952).

122. *See supra* notes 117-119 and accompanying text.

123. *See supra* note 119.

124. 430 U.S. 787 (1977) (wherein three sets of unwed natural fathers and their illegitimate offspring brought an action to permanently enjoin the enforcement of those sections of the Immigration and Nationality Act which have the effect of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, from the special preference immigration status accorded a "child" or "parent" of a U.S. citizen or lawful permanent resident).

125. 16 I. & N. Dec. 581 (1978).

unlikely that this seed will grow and mature at a rapid rate. It has taken twenty-nine years for *Griswold* privacy to gain its first foothold in the immigration context, so there is no reason to believe that it will rapidly expand from here. It is also likely that privacy in the immigration context will face considerable resistance from conservative judges in other circuits as well as from the Justices on the Supreme Court. Even within the Ninth Circuit, it is uncertain whether this newly established precedent will be strictly limited to its facts or construed broadly to encompass other areas of private sexual conduct. It is not clear, for example, whether or not this holding would apply to private consensual homosexual activity.[126]

There is some evidence that the BIA is leaning toward the recognition of homosexual rights. In *Matter of Toboso*,[127] the BIA found that the imprisonment for interrogation and medical examination of a homosexual on the grounds that he was gay constitutes persecution on account of membership in a particular social group for political asylum purposes. In *Matter of Tenorio*,[128] an IJ in San Francisco reached a similar decision with regard to a homosexual who was attacked and left for dead by a death squad who used anti-gay epithets while attacking him. These cases do not address the privacy issue directly, but indicate an increased tolerance for homosexuals which could extend the *Yepes-Prado* holding to homosexuals in a waiver of deportation proceeding.

## VI. CONCLUSION

In *Yepes-Prado*, the circuit court relies on precedent in a subtle and effective exercise of judicial activism to create new law. No statute expressly forbids the consideration of private sexual conduct in § 212(c) cases, nor does any previous decision declare that such conduct cannot be considered as legitimate

126. It is not clear whether or not homosexuality would be a factor for the IJ to consider under the Marin standard. It may fit under the category of "other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." Matter of Marin, 16 I. & N. Dec. 581 (1978).

127. No. A23-220-644, slip op. (BIA 1990) (non-precedential decision). The dissent cited Bowers v. Hardwick and argued that the imprisonment constituted an investigation of criminal activity.

128. No. A72-093-558 (IJ 1993).

grounds for denial of a discretionary waiver.

There is no indication at the present time that this case will reach the Supreme Court. If it does, the Court will have the opportunity to extend *Griswold* privacy to immigration. It seems unlikely, however, that the current Court, top heavy with politically conservative Reagan-Bush appointees,[129] will take that course of action. Whether or not that happens, it is likely that some case will eventually reach the Supreme Court on this issue, at which time the Court may overrule the holding in *Yepes-Prado*. For the time being, however, the Ninth Circuit has effectively created a right to privacy with regard to consensual sexual conduct where no right existed before, at least in the context of waiver of deportation hearings.

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129. Although "politically conservative" is usually associated with less government restrictions, the reverse seems to be true in the two particular areas relevant to this discussion: personal freedom and immigration.

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