

Brigham Young University Journal of Public Law

Volume 28 | Issue 1

Article 7

7-1-2013

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Recommended Citation

Jorge Gavilanes, *Mistaking U.S. Citizenship*, 28 BYU J. Pub. L. 257 (2013).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol28/iss1/7>

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Mistaking U.S. Citizenship

I. INTRODUCTION

United States (“U.S.”) citizenship has been closely protected from those who cannot claim it. In fact, the value of citizenship is so strong that the law penalizes any who falsely claim citizenship or the benefits derived from being a citizen. Such penalties are imposed even upon those who have not intentionally claimed citizenship, but merely have mistakenly done so. Ironically, despite these efforts to safeguard U.S. citizenship’s privileges and protections, those who rightfully claim citizenship have been deported as aliens because of mistakes made by those enforcing immigration laws. Such juxtaposition leaves us wondering what the real value of citizenship is.

Generally, any alien who *falsely* represents himself or herself to be a citizen of the U.S. becomes permanently inadmissible.¹ This drastic consequence, however, can occur with a very small mistake. The following story demonstrates how easily an individual can make such a misrepresentation:

I have been a permanent resident for about 10 years. When I decided to apply for US citizenship I realized that I might be ineligible because when applying for my first driver’s license I also became registered to vote. At the time, I did not understand that permanent residents are not allowed to vote. The fact that a governmental official asked me to register (even though at that point my greencard [sic] was my only official ID) and actual issuance of a registration card made me even more ensured [sic] that I am an eligible voter. If I recall correctly, the Election Day was shortly after and I am almost positive that I voted during these elections. However, soon later, when talking with another greencard [sic] holder I was informed that I am not eligible to vote. Since that point on, I never voted and whenever asked if I wish to register I make a point to inform those who ask that as a permanent resident I am not eligible.²

1. 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

2. Anne Parsons, *A Fraudulent Sense of Belonging: The Case for Removing the “False Claim to Citizenship”*, 6 MOD. AM. 4, 4 (Fall 2010).

As illustrated by his statements above, at the time this individual mistakenly registered to vote and then cast his ballot, he was ignorant of the legal consequences of his acts. He did not know that his acts amounted to falsely claiming U.S. citizenship, which could jeopardize his eligibility for naturalization and increased his risk of deportation. This is but one example of the life-altering consequences that can occur whenever a nonimmigrant or permanent resident mistakenly claims citizenship. Ironically, although the consequences are lasting, the mistake is made in a matter of seconds, often without the person realizing its effect.

There is another mistake that has severe consequences, but this mistake undercuts the pedestal of citizenship. Some U.S. agencies have been mistakenly classifying U.S. citizens as being illegally present in the country and then deporting them. What is worse, once U.S. citizens are classified as deported aliens, it may be impossible to have their status corrected, because they will “appear in [Immigration and Customs Enforcement] ledger sheets as a deported alien, not a deported U.S. citizen.”³

Recently, a fifteen-year-old Dallas runaway was deported to Colombia, where she lived for months under a false name.⁴ Her unfortunate circumstance started when she got caught shoplifting at a mall in Houston, Texas.⁵ She had no identification on her and gave the police a false name; the name she gave happened to belong to a Colombian who was in the U.S. illegally.⁶ Her false information led the police to turn her over to immigration officials; it is unclear if the police or immigration officials attempted to confirm her identity through fingerprints or other methods.⁷ Had they done so, her fingerprints would not have matched the person whom she claimed to be because that

3. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 629 (2011).

4. See Jason Trahan, *Dallas Runaway, a U.S. Citizen, Deported to Colombia*, THE DALLAS MORNING NEWS, <http://www.dallasnews.com/news/community-news/oak-cliff/headlines/20120103-dallas-runaway-a-u.s.-citizen-deported-to-colombia.ece> (last visited Nov. 25, 2013).

5. *Id.*

6. *Id.*

7. *Id.*

person had a criminal record with fingerprints on file.⁸ Apparently no inquiry was made into her identity because she was then deported to Colombia.⁹ The girl was reported missing and her name and photo were listed on the website of the National Center for Missing & Exploited Children.¹⁰

While this case is different when compared to some of the other cases discussed later on, it highlights the gaps in a process that is meant to protect U.S. citizens. There were no safeguards in place to protect her, a U.S. citizen, against being deported. It is unsatisfying to know that had this girl truly been kidnapped or taken across the border against her will, immigration officials would have missed the opportunity to correctly determine her identity and perilous circumstances.

When comparing these two types of mistakes, we find that U.S. citizenship has varying levels of worth. On the one hand, U.S. citizenship is a privileged claim that must be protected regardless of the reason; on the other, U.S. citizenship is quickly disregarded, and the protections it affords forgotten. Such stark difference in approach is troubling and establishes conflicting policies. Policy and governmental procedure should ensure that U.S. citizenship's benefits and privileges are *always* protected.

Part II discusses potential pitfalls that would make an individual inadmissible because of the false claim of citizenship, like in voter registration, employment forms, or other possible statements or acts that may lead U.S. officials to believe a claim of citizenship is being made. It will also explain the current possibilities for waivers or exceptions, and the current consequences for individuals found to have "falsely" claimed citizenship.

Part III examines the reason U.S. citizens are being mistakenly deported, its frequency, and effect on those being deported and those left behind.

Finally, Part IV explores how we can learn from these experiences. In addition, it proposes allowances for those who have reasonably made a mistake, and it proposes how current deportation procedures

8. *Id.*

9. *Id.*

10. *Id.*

can be changed to protect U.S. citizens from being deported as “aliens,” contrary to the protections that citizenship should afford.

II. CLAIM TO UNITED STATES CITIZENSHIP

The United States Code (“U.S.C.”) states that “[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter . . . or any other Federal or State law is inadmissible.”¹¹ In order for an alien to receive visas and be eligible to be admitted to the United States, aliens must demonstrate that they have not disqualified themselves by becoming inadmissible.¹² Falsely claiming citizenship becomes relevant when a person applies for a visa, relief from removal, adjustment of status, or naturalization. This is because to qualify for any of the previously mentioned benefits, aliens must demonstrate that they are admissible,¹³ which requires proof that they have not falsely represented themselves to “be [citizens] of the United States for any purpose or benefit.”¹⁴ For non-citizens, it can at times seem like a minefield is laid out ready to turn them into inadmissible aliens. There are several possible mistakes that would make non-citizens inadmissible without opportunities for waivers or exceptions. The following section outlines some of them.

A. Potential False Claims

One potential place where non-citizens might find themselves mistakenly claiming citizenship is by registering to vote. Earlier in U.S. history, non-citizens were able to vote, including in national elections.¹⁵ However, now registering to vote is considered to be a claim of U.S. citizenship by U.S. Citizenship and Immigration Services¹⁶ (the

11. 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

12. *See id.* § 1182(a).

13. *See id.* § 1255(a).

14. *See id.* § 1182(a)(6)(C)(ii)(I).

15. *See* Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000).

16. *See* Christina Murdoch, *Motor Voter Laws: A Potential Trap for Non-citizens*, SCOTT D. POLLOCK & ASSOC’S., P.C. (Dec. 15, 2009, 3:03 PM), <http://www.lawfirm1.com/?p=604>.

government agency that “oversees the lawful immigration to the United States”¹⁷). Thus, non-citizens may lose the opportunity to become U.S. citizens by merely registering to vote. This mistaken claim of citizenship may lead to their deportation.¹⁸

As the story in the introduction depicted, registering to vote has become a simple task that can be done presumably without realizing the consequences of error. In 1993, the National Voter Registration Act was passed requiring states to provide the opportunity to register to vote when individuals applied for or renewed a driver’s license.¹⁹ Including voter registration as part of the application process for obtaining a driver’s license encourages more people to register to vote. For that reason, Department of Motor Vehicles clerks often ask individuals if they would like to register to vote, without actually verifying whether or not they are eligible.²⁰ Being asked by a governmental official whether one would like to register to vote might lead unaware noncitizens to assume they are eligible.²¹

Another possible mistake can come when applying for a job. Every applicant for employment must complete an I-9 Employment Eligibility Verification Form, which is prepared by the Department of Homeland Security to satisfy federal statutory requirements.²² Until recently,²³ the form required everyone to check one of three boxes, “attesting under penalty of perjury that they are either a ‘citizen or national of the United States,’ or a ‘lawful permanent resident’ (and if so, supplying their alien identification number), or an ‘alien authorized to work until ___’ (and if so, providing the expiration date of their work

17. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/aboutus> (last visited Nov. 25, 2013).

18. Parsons, *supra* note 2, at 4.

19. 42 U.S.C. § 1973gg (2012).

20. Parsons, *supra* note 2, at 8.

21. *Id.*

22. *United States v. Garcia-Ochoa*, 607 F.3d 371, 373 (4th Cir. 2010); *See also* 8 U.S.C. § 1324a(B) (2012).

23. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Employers Must Use Revised Form I-9, Employment Eligibility Verification <http://www.uscis.gov/portal/site/uscis/menu-item.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=55b2aca797e63110VgnVCM1000004718190aRCRD&vgnnextoid=7418689005f7e310VgnVCM100000082ca60aRCRD> (last visited Nov. 25, 2013).

authorization).”²⁴

Regrettably, the form led to ambiguity. By checking the box that says “citizen or national of the United States,” it is unclear whether an individual is claiming himself or herself to be a citizen or national. Previously, courts have held that because employers use the form to comply with a statutory requirement that prohibits employing unauthorized aliens, when an alien marks the “citizen or national of the United States” box to falsely represent himself or herself as a citizen he or she is inadmissible.²⁵ Although there must be affirmative evidence that an alien marked the box with the purpose of representing him or herself as a citizen and *not* a national,²⁶ non-citizens, especially those who are not sure of their legal status in the U.S., may misunderstand who is a “national” of the U.S., effectively closing themselves to the opportunity to adjust their status later on.

*Hashmi v. Mukasey*²⁷ illustrates an example of this issue. The case came as a petition to review an order of the Board of Immigration Appeals’ affirming an immigration judge’s denial of an alien’s application for adjustment of status. The judge found that the alien was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) (2012).

Hashmi, a citizen of Pakistan, entered the U.S. on a student visa.²⁸ Two years later, he applied for a job and, when filling out form I-9, he checked the box that indicated he was a “citizen or national of the United States.”²⁹ Later that year he married a U.S. citizen, which led him to apply for an adjustment of status.³⁰

The adjustment of status was denied, as already mentioned, because Hashmi was subject to removal for failing to comply with the conditions of his student visa, which he conceded, and for misrepresenting himself to be a U.S. citizen when he applied for a job.³¹ Hashmi

24. *Garcia-Ochoa*, 607 F.3d at 373–74.

25. See *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008); *Theodros v. Gonzales*, 490 F.3d 396, 402 (5th Cir. 2007); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007).

26. *Rodriguez*, 519 F.3d at 777.

27. *Hashmi v. Mukasey*, 533 F.3d 700 (8th Cir. 2008).

28. *Id.* at 702.

29. *Id.*

30. *Id.*

31. *Id.*

bore the burden of proof to show clearly and beyond a reasonable doubt that he did not falsely claim to be a citizen.³²

Hashmi testified that when he filled out the form he thought “any person legally in the United States was a ‘national of the United States.’”³³ Unfortunately, the term can be easily misunderstood without resorting to the statute. A national is “a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”³⁴ Those who owe permanent allegiance to the U.S. have been limited to residents of American Samoa and Swains Island.³⁵

Because the phrase is disjunctive, it is possible that an alien checking the box has not represented him or herself to be a citizen. Therefore, the significance of the form depends on the “credibility of the alien’s testimony” concerning the intent when checking the box.³⁶ Unfortunately for Hashmi, there was other evidence of him claiming citizenship that questioned his credibility and intent while filling out the form; consequently, the evidence supported the immigration judge’s determination that Hashmi was inadmissible for U.S. citizenship.³⁷

While the former I-9 Form is only one example, there may be other current and future routine forms on which an alien may unintentionally claim U.S. citizenship and claim protected benefits as a result. For this reason, aliens should be conscious of every form they fill out; U.S. citizenship is a highly regarded threshold to many privileges and benefits.

Finally, statements interpreted to be a claim of citizenship may create a need for a judge to clarify and ascertain whether an alien intentionally attempted to receive a “benefit under . . . Federal or State

32. *Id.* at 704.

33. *Id.* at 703.

34. 8 U.S.C. § 1101(a)(22)(2012).

35. *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 n.1 (1976).

36. *Hashmi*, 533 F.3d at 704 (“[T]he government produced evidence that Hashmi falsely told his employer that he was born in Washington state, . . . that he had the right to work,” and that he asserted to be a U.S. citizen on an employer form.).

37. *Id.*

law.”³⁸ The process would delay any adjustment of status, but more significantly it puts the alien at risk of deportation.

Jose Castro, a citizen of Costa Rica, recently found himself in this situation even though he was aware of the risks of falsely claiming U.S. citizenship.³⁹ Castro came to the United States in 1980 as a twenty year-old on a visitor’s visa.⁴⁰ He overstayed his visa, and in 1989 he married Alma Rangel. Rangel would then go on to become a U.S. citizen by naturalization in 1997.⁴¹

Her naturalization led Castro to apply to adjust his status to permanent residence in 2006, nine years after his wife.⁴² During the interview with the Department of Homeland Security, Castro revealed that he had been arrested in 2004 and provided a copy of the police department’s arrest report.⁴³ The report indicated that Castro had resolved the charge, but also listed Castro’s place of birth as “Puerto Rico,” although Castro was actually born in Costa Rica.⁴⁴

That error led DHS to determine Castro had falsely claimed to be a U.S. citizen; therefore, he was inadmissible under 8 U.S.C. §1182(a)(6)(C)(ii), ineligible for adjustment of status, and subject to removal proceedings.⁴⁵ The immigration judge and the Board of Immigration Appeals held that claiming to be born in Puerto Rico was the equivalent of claiming U.S. citizenship, and the appellate court determined that this was not an improper inference or abuse of discretion.⁴⁶

The importance of this case was how the courts determined that U.S. citizenship was claimed during the arrest. The evidence supporting the claim of U.S. citizenship when Castro was arrested came from the personal information he provided to the arresting police officer; the police officer asserted during his testimony that “he spoke Spanish

38. 8 U.S.C. §1182(a)(6)(C)(ii) (2012).

39. *Castro v. Att’y Gen. of the U.S.*, 671 F.3d 356 (3d Cir. 2012).

40. *Id.* at 359.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 359–60.

46. *Id.* at 367.

and that there was no chance he could have misunderstood ‘Costa Rica’ as ‘Puerto Rico.’” Although, a letter later revealed that the officer, in speaking with a Sergeant of the department, mentioned it was possible Castro said “Costa Rico [sic] as apposed [sic] to Puerto Rico.”⁴⁷ Additionally, there were several things that were not filled in the arrest report, like the social security number and the box where it says “U.S. citizen, yes or no.”⁴⁸ The board of appeals relied on “jail arrest card,” which had the question “U.S. Citizen?” marked with a “Y.”⁴⁹ However the officer assigned to the cellblock fills out this card.⁵⁰ Finally, when the police officer was asked during cross-examination if claiming U.S. citizenship would have made a difference in handling the arrest, the officer stated there would be no gain or difference in treatment, meaning that Castro would not receive a direct benefit because of his citizenship status while in jail.⁵¹

Castro testified he said he was born in Costa Rica and offered a reason for the confusion: he explained that during the arrest there were two people in the vehicle, the other individual was Puerto Rican.⁵² As to the jail arrest card, Castro stated that he gave his driver’s license at the jail and did not provide any other information.⁵³ Finally, Castro testified that upon noticing the error in the report, he returned to the police station to make them aware of the mistake because he was about to apply for adjustment of status.⁵⁴ The officer dismissed Castro’s concern saying it “was not a problem,” not understanding the repercussion it could have, as proven by this appeal.⁵⁵

After the evidence presented, the immigration court found Castro to have falsely claimed to be a U.S. citizen in order to stay in the United States.⁵⁶ The simple mistake of listing Castro’s birthplace as

47. *Id.* at 360, 363.

48. *Id.* at 361.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 362.

55. *Id.*

56. *Id.*

Puerto Rico caused Castro, an otherwise eligible alien, to face possible deportation proceedings if he did not leave voluntarily. Either way, he was going to have to leave his family and home after twenty-seven years of living in the United States.

Fortunately for Castro, after the Board of Immigration Review denied his motion to reconsider, the appellate court reviewed the denial of reconsideration and focused on the application of 8 U.S.C. §1182(a)(6)(C)(ii).⁵⁷ The court clarified that the statute “does not render inadmissible every alien who makes a false claim” but rather that the claim must be made “for any purpose or benefit under this chapter . . . or any other Federal or State law.”⁵⁸ The court recognized that the officer testified that Castro would not have received any benefit by claiming U.S. citizenship; furthermore, Castro testified that because of his application to adjust his status he would *not* have made such a claim.⁵⁹ The court further found that the Board of Immigration Review’s conclusion that Castro was trying to evade detection was “built solely on the assumption” that he was undocumented.⁶⁰ The case was remanded for further proceedings based on the court’s finding that the Board of Immigration Appeals “construction of the statute was contrary to law” and that it had “abused its discretion in denying Castro’s motion to reconsider its decision on this ground.”⁶¹

Castro’s story highlights two issues. First, a simple oversight can throw aliens into an uphill battle for their opportunity to remain in the U.S., all while fearing the thought of having to leave everything behind and be sent into the unknown. It is imperative that aliens recognize the gravity of claiming U.S. citizenship and maintain their admissibility by carefully avoiding misinterpretation of their statements. Second, executive agencies must correctly construe statutes. In this case it had to consider both a false claim of U.S. citizenship and a sought benefit defined by the statute. The appellate court carefully explained the different types of benefits an alien may receive, and what is required for the

57. *Id.* at 364.

58. *Id.* at 367.

59. *Id.* at 368.

60. *Id.*

61. *Id.* at 371.

statute to apply. While the review process allows for a fail-safe mechanism to assure aliens of accurate decisions, relying on a court to make the determination lengthens the adjustment of status process and the anxiety experienced, sometimes at the unnecessary risk of deportation.

B. Statutory Waivers and Exceptions

There are few statutory waivers and exceptions that can be used to rectify mistakes, thus correct application of the statute is crucial. Citizenship claims have one very narrow exception⁶² and one discretionary waiver⁶³ that is predicated upon the discretion of the Attorney General.

The one exception available to “[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States”⁶⁴ applies only if each of the following elements are met:

- [1] if each natural [or adoptive] parent of the alien . . . is or was a citizen [by birth or naturalization], [2] the alien permanently resided in the United States prior to attaining the age of 16, and [3] the alien reasonably believed . . . that he or she was a citizen⁶⁵

If the exception applies, then the alien is not inadmissible for the misrepresentation.⁶⁶ This is a very narrowly tailored exception.

A waiver is also available, but only at the discretion of the Attorney General.⁶⁷ The Attorney General may waive the application of the statute if it can be established that the refusal of admission would result in “extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a [Violence Against Women Act] self-petitioner, the alien demonstrates extreme hardship to the alien or the alien’s United States citizen, lawful permanent resident, or qualified alien parent or child.”⁶⁸ In either case, the hardship must be proven to “the satisfaction of the Attorney General,”⁶⁹ without any court having

62. 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (2012).

63. *See id.* § 1182(i).

64. *See id.* § 1182(a)(6)(C)(ii)(I).

65. *See id.* § 1182(a)(6)(C)(ii)(II).

66. *Id.*

67. 8 U.S.C. § 1182(i)(1) (2012).

68. *Id.*

69. *Id.*

jurisdiction to review a decision of the Attorney General regarding the waiver.⁷⁰

The scarcity of waivers or exceptions to the statute gives us insight into how citizenship claims are viewed. U.S. citizenship is an invaluable distinction that is jealously protected; only those who are indeed U.S. citizens may claim its privileges and protections.

III. GOVERNMENT DEPORTING U.S. CITIZENS

As previously noted, U.S. citizenship is an invaluable distinction, and the effects it has over the lifetime of an individual may be unquantifiable because of the opportunities and protections it affords and the allegiance it requires.

One benefit of citizenship is that the government has to follow due process and uphold all Constitutional rights of an individual. One of these rights requires that citizens cannot be classified as aliens, and therefore cannot be subject to deportation proceedings.⁷¹ The government, unfortunately, has previously classified U.S. citizens as aliens and then deported them.

A. Why U.S. Citizens Are Being Deported

U.S. citizens, who are in Immigration and Customs Enforcement (“ICE”) custody, are “impossible to distinguish from noncitizens making false claims to U.S. citizenship.”⁷² Once U.S. citizens are classified as aliens, the road to correcting their status may be impossible because from that moment on the individual will appear as a deported alien.⁷³

False confessions or statements of citizenship when apprehended by ICE or Border Patrol may be a cause of misclassification. A false statement of citizenship may seem suitable when an individual is facing indefinite detention without access to an attorney or family members, and imminent deportation. These confessions resemble closely those

70. *See id.* § 1182(i)(2).

71. *See* 8 C.F.R. § 1240.8(c). (stating that the government bears the burden of proving that an individual is an alien. If the government cannot do so, the individual may not be removed.)

72. Stevens, *supra* note 3, at 629.

73. *Id.*

confessions made in the criminal context, where fear of being stuck in the legal system makes deportation as an alien seem like a better alternative.⁷⁴

Jacqueline Stevens, a political science professor from Northwestern University, recently published an article that discussed the detention and deportation of U.S. citizens. She identified three causes of wrongful deportation of U.S. citizens. First, “the absence of accountability and transparency in immigration law enforcement” fosters a lack of due process protections.⁷⁵ Each time ICE commits some type of negligence, she points out, “it deports the evidence, giving ICE agents a de facto immunity from prosecution for criminal activities.”⁷⁶

Second, “the comingling of criminal with immigration law enforcement” causes wrongful citizen deportation.⁷⁷ To demonstrate her point, she shares David’s story, “a U.S. citizen at birth,” who was interviewed by an immigration agent while in prison “as part of a group flagged as noncitizens.”⁷⁸ David believed he was asked to meet with the agent because of his Hispanic name.⁷⁹ When David met with the immigration representative, David told him he was a U.S. citizen and that it could be verified because his wife had received permanent residency through his citizenship.⁸⁰

Despite these statements, a few months later, David was moved to a maximum-security prison; he was informed that the reason for the move was that he was being deported.⁸¹ The warden of the minimum-

74. Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1309 (2008). (“Contrary to the widespread belief that normal people do not confess to crimes they did not commit, the pages of American history, reaching back to the Salem witch trials of 1692, betray large numbers of men and women who were wrongfully prosecuted, convicted, imprisoned, and sometimes sentenced to death, on the basis of false confessions.”).

75. Stevens, *supra* note 3, at 654. See also Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1. (“Because ICE investigates itself there is no transparency and there is no reform or improvement.”) (internal quotations omitted).

76. Stevens, *supra* note 3, at 654.

77. *Id.* at 655.

78. *Id.* at 663.

79. *Id.* at 664.

80. *Id.* at 664–65.

81. *Id.*

security prison explained that immigration detainers require putting people into “heightened security.”⁸² After serving eight years in prison, David was sent to an ICE detention center where he met with another ICE officer, who finally investigated the papers David submitted.⁸³ The ICE officer immediately determined David was truly a U.S. citizen, wrongly detained by ICE.⁸⁴ However, David still had to meet with a judge.⁸⁵ David’s meeting with the judge was rescheduled three times before the judge finally looked at his case and terminated the deportation order.⁸⁶ Unfortunately, once David was removed from deportation proceedings, the prison did not know what to do with him, so David was sent to county jail.⁸⁷ The jail had not received a charge that would justify holding David and decided to book him as having broken his parole.⁸⁸ David’s story highlights the labyrinth that immigration and criminal proceedings can create when combined against those trying to understand their own circumstances. In the end, David had no idea who was holding him prisoner, ICE or the local department of corrections.

Had ICE fully released David to the department of corrections and accurately stated his citizenship, he would have been eligible for parole years earlier.⁸⁹ Professor Stevens wraps up her second point by explaining why U.S. citizens end up being deported: “[t]he underlying problem was that by collapsing the enforcement of criminal and immigration law, and failing to execute either properly or provide due process protections, the government had led David into a maze laid out according to the logic of Kafka’s Castle and the politic of Hitler’s Nuremberg [sic] laws.”⁹⁰

82. *Id.* at 666.

83. *Id.* at 668.

84. *Id.*

85. *Id.*

86. *Id.* at 669.

87. *Id.* at 670.

88. *Id.* at 671.

89. *Id.* at 673.

90. *Id.* at 671 (footnote omitted) (Stevens explaining that “the 1933 Nuremberg laws were designed to use birth and marriage certificates to strip Jews residing in the German homeland of their citizenship and then banish them as aliens.”); *Id.* at 642 n.128.

Finally, the third point made by Jacqueline Stevens, that the “criminalization of some immigration violations has caused the wrongful arrest and conviction of U.S. citizens who assert their citizenship.”⁹¹

B. Frequency of U.S. Citizens Being Deported

Identifying all of the cases where U.S. citizens have been mistakenly deported is difficult because to identify the problem, the government must, after deportation, identify an individual as a U.S. citizen and clear all prior false statements of citizenship, including the deportation record that referred to the individual as an alien. The challenge for the deported U.S. citizen is getting the government to correct their error while outside the U.S.

The challenge of identifying all those who have been deported restricts the amount of data available, concealing the magnitude and frequency of the issue.⁹² Furthermore, Professor Stevens points out that no scholarly literature presently focuses on the issue, adding to the poor understanding of the problem.⁹³

A recent attempt to estimate the number of U.S. citizens who are detained comes from Professor Steven’s article on the subject.⁹⁴ Her approach combines data captured by an immigrant rights center in southeastern Arizona detention centers and from information requested from ICE under the Freedom of Information Act of 2009.⁹⁵ Because there are individuals who claim U.S. citizenship that end up signing statements indicating they are aliens, identifying the actual number of U.S. citizens who are deported is seemingly an impossible task.

The results from the immigrant rights center show 6,775 detainees in the Eloy Detention Center in southeastern Arizona between 2006 and 2008, and 1,252 detainees from other facilities in the area in

91. *Id.* at 655.

92. *Id.* at 622 n.51.

93. *Id.* at 630.

94. *Id.* at 618.

95. *Id.* at 618–28.

2008.⁹⁶ An adjudicator for the Executive Office for Immigration Review determined that of those detained eighty-two, or one percent, were U.S. citizens.⁹⁷ The eighty-two individuals included “sixty-five U.S. citizens by birth or by automatic operation of law . . . , twenty-eight had acquired citizenship, thirty had derived citizenship, and four were citizens by birth in the United States.”⁹⁸

During the last nine years, ICE has detained almost three million people.⁹⁹ If we assume the one percent holds true across the country, then ICE has detained 28,271 U.S. citizens since 2003. Professor Stevens indicates that there may be thousands more that were actually deported.¹⁰⁰

96. *Id.* at 622.

97. *Id.*

98. *Id.*

99. DHS statistics indicate a total of 2,827,164 individuals were detained under ICE authority between 2003 and 2012. *See* Dep’t of Homeland Security Office of Immigration Statistics, Yearbook of Immigration Enforcement Actions 2003, 148 (2004), <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003ENF.pdf> (231,500 detained); Mary Dougherty, Denise Wilson & Amy Wu, Office of Immigration Statistics, 2004 Immigration Enforcement Actions Ann. Rep. 1 (2005), <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf> (235,247 detained); Mary Dougherty, Denise Wilson & Amy Wu, Office of Immigration Statistics, 2005 Immigration Enforcement Actions Ann.Rep. 1 (2006), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf (238,000 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2006 Immigration Enforcement Actions 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf (257,000 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2007 Immigration Enforcement Actions 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf (311,000 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2008 Immigration Enforcement Actions 4 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (378,582 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2009 Immigration Enforcement Actions 3 (2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf (383,524 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2010 Immigration Enforcement Actions 4 (2011), <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (363,064 detained); Dep’t of Homeland Security Office of Immigration Statistics, 2011 Immigration Enforcement Actions 4 (2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (429,247 detained).

100. Stevens, *supra* note 3, at 631.

These figures are alarming. The simple mistake of misidentifying detainees allows some U.S. citizens to be stripped of all the protections that citizenship promises.

C. *The Effects of Deportation on U.S. Citizens*

The effect of these erroneous detentions impacts not only those falsely stating they aliens, but also their families. While the error is only one percent of all detained individuals, the effect it has on other U.S. citizens is exponential; it not only affects the citizen being deported, but also family members, employers, coworkers, neighbors, community service relationships, etc.

Recently the U.S. government settled the case of Mark Lyttle, a U.S. citizen with mental disabilities who was erroneously detained and then deported to Mexico.¹⁰¹ The settlement came after a favorable ruling by a federal district court in Georgia in March 2012.¹⁰²

For the purposes of the appeal, the court accepted the allegations of Lyttle as true, and detailed them as follows: Mark Lyttle was born in North Carolina, making him a U.S. citizen by birth.¹⁰³ Mark was also of Puerto Rican descent.¹⁰⁴ He was “barely literate . . . suffer[ed] from mental disabilities, including cognitive disorders, and ha[d] spent time in psychiatric hospitals.”¹⁰⁵ Furthermore, he had “difficulty with conceptualization, memory, and visual processing, and he [had] a diminished capacity to comprehend everyday events.”¹⁰⁶ He was also diagnosed with bipolar disorder, which caused seizures; he took medication for both conditions.¹⁰⁷

101. Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, AM. CIVIL LIBERTIES UNION (Oct. 5, 2012, 12:15 PM), <https://www.aclu.org/blog/immigrants-rights/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal>.

102. *Id.*; see also *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012) (holding that key claims against the defendant should not be dismissed).

103. *Lyttle*, 867 F. Supp. 2d at 1269.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

Mark was being treated at a state psychiatric hospital in North Carolina when he “inappropriately touch[ed] a female orderly and [was] arrested.”¹⁰⁸ While serving his sentence of one hundred days at a correctional facility, he was interrogated by two ICE agents.¹⁰⁹ The agents, although aware of Mark’s condition, interviewed Mark and presumed his name to be Jose Thomas, a citizen of Mexico who entered the U.S. illegally at age three.¹¹⁰

When the interview was done, the agents instructed Mark to sign the notes they had taken during the interview, without allowing Mark to review their contents.¹¹¹ They then proceeded to investigate Mark’s history in the U.S. Department of Justice Federal Bureau of Investigation Criminal Justice Information Services Division; the records found showed that Mark was a U.S. citizen and contained no references to Jose Thomas, his presumed real name.¹¹²

Shockingly, ICE still issued a Warrant for Arrest of Alien, which authorized ICE agents to take Mark into custody and remove him as an alien.¹¹³ ICE also issued a Notice of Intent, stating that Mark was a not a U.S. citizen but a citizen of Mexico deportable as an “alien who [was] convicted of an aggravated felony.”¹¹⁴

Ironically, the North Carolina Department of Corrections was ready to release Mark at the end of his sentence, when ICE took custody of Mark and transported him to an ICE detention center in Georgia.¹¹⁵ Throughout this process, Mark continuously declared that he was a U.S. citizen and not a Mexican citizen; furthermore, all the documents requiring his signature were signed with the name of Mark Lyttle and not Jose Thomas, Mark’s supposed real name.¹¹⁶ The lack of oversight led other ICE agents to cross out some of Mark’s answers

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1270.

113. *Id.*

114. *Id.*; see 8 U.S.C. §1227(a)(2)(A)(iii) (2012).

115. *Lyttle*, 867 F. Supp. 2d at 1270.

116. *Id.* at 1270–71.

during interrogations and insert their own.¹¹⁷ In addition, an agent also “coerced and manipulated” Mark into signing an affidavit that falsely stated his nationality and name.¹¹⁸ When Mark went before the immigration judge, Mark did not have the opportunity to present evidence or challenge the allegations made.¹¹⁹ The judge did not include safe guards to ensure Mark received a fair hearing, and ordered Mark be removed to Mexico.¹²⁰

After the removal hearing, an agent performed an additional background search of Mark’s record in North Carolina and Virginia that revealed several references confirming his U.S. citizenship; notwithstanding the results, the agent still issued a Warrant of Removal/Deportation without additional follow-up or referral to a superior.¹²¹ Mark was put on a plane to Hidalgo, Texas, where upon arrival Mark was taken to the “Mexican border, forced to disembark and sent off on foot into Mexico, still wearing the prison-issued jumpsuit [He] did not speak Spanish, was unfamiliar with Mexico, and had only three dollars.”¹²²

What happened to him next is surreal; he would go on to wander Central America for the next 115 days.¹²³ Mark attempted to return to the U.S. eight days later, but because his record showed him as a “prior deported alien” he was processed for removal and sent back to Mexico.¹²⁴ Once back in Mexico, missionaries helped him get to Mexico City so he could find the U.S. embassy.¹²⁵ Unfortunately, Mexican Immigration officials arrested Mark and deported him to Honduras because he could not prove Mexican citizenship.¹²⁶

In Honduras, immigration officials arrested Mark and took him first to an immigration camp and later transferred him to a criminal

117. *Id.* at 1271–72.

118. *Id.* at 1272.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1273.

124. *Id.* at 1272–73.

125. *Id.* at 1273.

126. *Id.*

jail, where the guards physically and mentally abused him.¹²⁷ He was released from prison because of a media campaign exposing the abuse, but he still could not return to the U.S.¹²⁸

After being released from prison, he ended up in Nicaragua, where again he was incarcerated for not being able to provide evidence of his citizenship.¹²⁹ It was not until Mark arrived in Guatemala that he received assistance from a local U.S. embassy.¹³⁰ The embassy employee looked for Mark's siblings, acquired copies of Mark's adoption records, and then issued him a U.S. passport.¹³¹

With a U.S. passport in hand, Mark's family bought him an airplane ticket back home.¹³² However, as Mark passed through customs he was detained and interrogated based on his record identifying him as an alien.¹³³ Like the sword of Damocles, Mark's misidentification as an alien forever hung over him, causing him to be interrogated by ICE agents, who again questioned his claim to U.S. citizenship and his unbelievable story through Central America.¹³⁴ The agents then issued an expedited removal order, without ever verifying Mark's "claims of U.S. citizenship, attempting to locate family, or substantiating the validity of the adoption papers or passport issued by the U.S. embassy in Guatemala."¹³⁵ The order of removal alleged that Mark was not a U.S. citizen, but Mexican, and that he had falsely represented himself to be a U.S. citizen.¹³⁶

Before he was deported again, his family, through an attorney, demanded his release.¹³⁷ He was released just before being flown back to Mexico, due to the insistence of his family, inquiries by a researcher,

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

and phone calls from an ICE agent in Washington, D.C.¹³⁸ A few days later, the Department of Homeland Security filed a motion to terminate the deportation order because “it was determined that [Mark] was not a Mexican citizen and is, in fact, a citizen of the United States.”¹³⁹ The motion was granted, but Mark still continues to suffer the consequences of his ordeal.¹⁴⁰

D. *The Effects of Deportation on the U.S. Government*

Mark is back home, but unfortunately his case is not unique. It does, however, highlight the flaws in a process that should protect U.S. citizens. The American Civil Liberties Union (ACLU) reported Mark’s settlement of the case to be \$175,000 for the suffering endured during his deportation proceedings.¹⁴¹ More than anything, the settlement was recognition of fault, but it would be difficult to say it compensates for the traumatic experience Mark endured—the uncertainty, desperation, and physical abuse.

The ACLU indicates that “[t]he current lack of procedural safeguards, [like the lack of] appointed counsel,” allows U.S. citizens to be detained and deported.¹⁴² Their statement is reminiscent of Professor Stevens’s point that the lack of accountability is a reason we see these violations of constitutional protections.¹⁴³

It is also important to point out that earlier in the same year Mark was deported, “the U.S. House of Representatives Judiciary Committee sponsored a hearing on ICE procedures [regarding] the deportation of U.S. citizens.”¹⁴⁴ That discussion led to a memorandum issued by the Director of the Office of Detention and Removal Operations (“DRO”), James Hayes, regarding “reporting and investigating claims of U.S. citizenship.”¹⁴⁵ This memorandum, known as the Hayes

138. Stevens, *supra* note 3, at 676; see also Bhandari, *supra* note 101.

139. Lyttle, 867 F. Supp. 2d at 1273.

140. *Id.* at 1274.

141. Bhandari, *supra* note 101.

142. *Id.*

143. Stevens, *supra* note 3, at 655–56.

144. Lyttle, 867 F. Supp. 2d at 1271.

145. *Id.* (citing Reply in Support of U.S.’ Motion to Dismiss, Exhibit M, [hereinafter Hayes Memo]).

Memo, sets the following guidelines for:

[ICE] officers who encounter an individual who they have reason to believe is in the United States in violation of law . . . but who claims U.S. citizenship The Field Office Director shall make the appropriate notification to DRO headquarters . . . [and] ensure that all affirmative claims to U.S. citizenship made by any individual encountered within their area of responsibility are appropriately reported and investigated.¹⁴⁶

It further states that the investigation should be a full inquiry of the individual's citizenship, which "may include vital record searches, family interviews, and other appropriate investigative measures."¹⁴⁷ Finally, the memo requires the Field Office Director to consult with the DRO and local Office of Chief Counsel to "determine whether sufficient evidence exists to place that individual into removal proceedings."¹⁴⁸

When U.S. citizens are deported, there are not only constitutional violations but also violations of procedures, as outlined by the Hayes Memo. It hardly seems like the potential risk to all U.S. citizens and the endured hardship to those deported are justly considered. When we consider the toll it takes on individuals and families, ICE and other governmental organizations come out relatively unscathed.

IV. LEARNING FROM MISTAKES

From these two situations we see that on the one hand U.S. citizenship has a protective wall built around it that penalizes those who falsely claim it, but on the other hand, U.S. citizenship claims are quickly dismissed without assuring U.S. citizens benefit from its protection.

A. Additional Exceptions for Citizenship Claims

At this time, any claim to U.S. citizenship that leads to a benefit under the law is viewed as a claim of citizenship that renders the alien

146. *Id.* (quoting Hayes Memo at 1, 2).

147. *Id.* (quoting Hayes Memo at 2).

148. *Id.* (quoting Hayes Memo at 2).

inadmissible according to 8 U.S.C. § 1182 (a)(6)(C)(i). There is very little room for error on the alien's part—an unnoticed misstep precludes any type of adjustment of status and is followed by deportation.

The statute is enacted to protect U.S. citizens from their citizenship being eroded. Nevertheless, it should afford room for mistakes for two reasons: (1) there are such things as reasonable mistakes, and (2) the law affects those who can adjust their status.

First, some claims are made by mistake and without the intent to procure a benefit, like the example of the individual who registered to vote at the time of applying for a driver's license. The statute does not seem to allow for consideration of the intent of an individual, but rather seems to be more akin to strict liability. Within criminal law doctrine, strict liability allows conviction of a criminal defendant in the absence of a culpable state of mind, and it usually "rejects even the reasonable mistake of fact or circumstance material to [a] finding of guilt."¹⁴⁹

Criticisms of strict liability in criminal law apply to this statute as well. Opponents argue that strict liability justifications are inconsistent with theories of punishment.¹⁵⁰ In the case of the individual who mistakenly registered to vote, the individual does not "deserve" to be punished under the retributivist theory of punishment because there was no conscious disregard to violate the law.¹⁵¹ Furthermore, an individual who is not aware of an implied claim on citizenship, whether he or she receives a benefit, cannot be deterred from such act and therefore cannot alter his or her conduct.¹⁵² The statute should therefore be revised to allow room for such cases where an individual was misled or implicitly claimed to be a U.S. citizen without intending to do so. Perhaps, at the very least, the statute may impose a less severe penalty instead of automatic inadmissibility.

Second, the statute should allow for mistakes because the law affects individuals who otherwise would be eligible to adjust their status. Immigration policy has been in the forefront of current political issues,

149. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402, 417 (1993).

150. *Id.* at 425.

151. *Id.* at 426.

152. *Id.* at 427.

with states now seeking new ways to curb illegal immigration.¹⁵³ The statute, rendering aliens inadmissible, is typically enforced at the time an alien seeks to adjust their status. Usually aliens do not apply to adjust their status unless they believe they were eligible to do so (i.e. they believe that they have not committed any wrong under the laws of immigration). On the other hand, those who have violated immigration laws are unlikely to be caught because they would avoid applying for adjustment of status. For example, in the case of Jose Castro, his spouse naturalized after their marriage, he had overstayed his visa, but would not have been found inadmissible until he applied for permanent residency.¹⁵⁴ The statute only affects those who believe they can legalize their status or move to a more permanent position in the U.S.; the statute does not penalize those who are remaining in the country illegally.

An exception should be carefully designed, since an exception must be balanced with the equally important policy of protecting citizenship. Allowing anyone to claim citizenship dilutes its value for everyone who *is* a U.S. citizen. Furthermore, a change to the consequences of falsely claiming citizenship could lead to benefits and privileges being exploited. Additionally, courts may not want to become involved in determining the intentions behind every claim to citizenship.

Nevertheless, the statute should take into consideration “good faith” mistakes. Allowing people like Jose Castro, who through no fault of his own was construed to be claiming U.S. citizenship when a police officer wrote a report incorrectly identifying Castro as being from Puerto Rico.¹⁵⁵ Jose and others like him may be dissuaded from applying to adjust their status for fear of acts beyond their control to render them inadmissible; perhaps some of those would choose to remain in the U.S. illegally rather than risk having a deportation order. Likewise, those who are anticipating adjusting their status, those who can otherwise qualify to do so, will be cautious because they want to remain admissible. Immigrants like Castro would not have claimed to be from Puerto Rico or the U.S. to avoid risking the adjustment to permanent

153. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

154. *Castro v. Att’y Gen. of U.S.*, 671 F.3d 356, 359–60 (3d Cir. 2012).

155. See *id.* at 366–67.

residence.¹⁵⁶ Aliens who are looking to change the permanency of their stay in U.S. or legality will not take the risk of claiming privileges that will make them inadmissible.

As such, citizenship can be protected while still allowing for the consideration of the state of mind of the alien.

B. Procedure Should Protect U.S. Citizens

The government should enact laws against individuals falsely claiming citizenship and the privileges reserved for that distinction, but this is undermined when those who are legitimately U.S. citizens are left with less than its protection.

Deportation of U.S. citizens occurs when they are withheld from the protection of due process. This diminishes citizenship. The wall carefully built to protect all those who possess citizenship is non-existent when they are “mistakenly” classified as aliens. Current deportation laws and regulations mandate the detention and deportation of thousands of people without providing access to attorneys or even administrative hearings.¹⁵⁷ The procedure in place does not provide the necessary protections to avoid deporting U.S. citizens. As we saw in the examples mentioned, the repercussions of deportation are the harsher punishment—the effective banishment due to the near impossibility of correcting the problem. Such banishment strips citizens of all the rights and benefits they should have been afforded as citizens.

The preventative measures in place to protect against wrongful convictions in criminal law are a useful model for immigration law. The law uses procedure to ensure that courts err on the side of acquittal rather than convictions.¹⁵⁸ Procedure calls for “the right to counsel, evidentiary safeguards, and beyond a reasonable doubt standard of proof.”¹⁵⁹

Procedure should call for the government to err on the side of protecting U.S. citizens. While the law “assumes . . . that individuals

156. *Id.* at 362.

157. Stevens, *supra* note 3, at 608–09.

158. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. Rev. 1, 5–6 (2009).

159. *Id.* at 6 n.14.

claiming U.S. citizenship are aliens,"¹⁶⁰ it would be preferable that aliens receive the due process given U.S. citizens than to see U.S. citizens deported with little recourse to return home.

V. CONCLUSION

U.S. citizenship should be regarded equally; instead, it seems like the idea of U.S. citizenship receives higher protection than actual citizens themselves. The statute penalizing individuals for falsely claiming citizenship preserves the idea that citizenship is a right reserved to a few, but why protect a right if it is easily ignored? What is the value of citizenship if citizens are denied basic due process rights?

The more obvious mistake would be to continue ignoring that U.S. citizens are being affected by improper procedure and that aliens who can adjust their status may have *unintentionally* claimed citizenship. In conclusion, extending protections reserved for citizens when citizenship is questioned can allow for lowering, if not routing, the risk of having U.S. citizens deported. Citizenship should be guarded, its value should be preserved, but the law should allow consideration of an applicant's state of mind. It is a delicate balance that may be difficult to achieve, but U.S. citizenship is a distinction that merits such responsibility.

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160. Stevens, *supra* note 3, at 616.

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