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When Time Stands Still: Eliminating Immigration “Death Sentences”

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WHEN TIME STANDS STILL: ELIMINATING IMMIGRATION “DEATH SENTENCES”

Lori A. Nessel*

ABSTRACT

The nation prides itself on the notion of rebirth—the ideal that one can leave their past behind, come to the United States, and seize the opportunities available to advance and remake oneself. Yet, when it comes to immigration law, neither the passage of time nor a life full of positive equities ameliorates past wrongdoing or allows for future opportunities. In the words of the Senate Subcommittee when Congress permanently removed the statute of limitations for deportation from the Immigration and Nationality Act in 1952, “If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time.” Time stands still in significant and detrimental ways throughout our immigration law. An immigrant’s manner of entry into the United States can result in a lifetime bar to due process in removal proceedings, and a finding that an immigrant ever filed a “frivolous” asylum application will bar her from any immigration benefit throughout her life, even if she withdrew the application and procured no benefit through it. Detained noncitizens facing removal are routinely denied bond because of criminal charges that have been filed against them, even absent any finding of guilt. This occurs even if the accuser withdraws their complaint; the very fact that criminal charges were brought signifies danger and results in ongoing detention.

In this Article, I examine a few of these provisions that result in lifetime consequences, as well as the lack of a statute of limitations or laches defense in immigration law. After exploring jurisprudence and legislative history in each of these areas, I analyze the theory behind statutes of limitation and laches defenses in other areas of law to argue for a statute of limitations for deportation proceedings, and for a time limit on penalties that attach to a single bad act, like filing a frivolous asylum application. I also argue that noncitizens should be entitled to the same presumption of innocence as in the criminal justice system with regards to bond determinations. This Article incorporates a broader moral and policy-based argument that after a certain period of time, a noncitizen’s membership in the nation is so

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well-established and meaningful that deportation, or the denial of immigration benefits based on a past bad act, should no longer be possible.

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I. INTRODUCTION

“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to

human affairs."¹

HILARIO Rivas-Melendrez was admitted to the United States as a lawful permanent resident (LPR) in 1970.² Ten years later, at age twenty-one, he was convicted of statutory rape based on a consensual sexual encounter with his seventeen-year-old girlfriend.³ Mr. Rivas-Melendrez then served in the U.S. Navy, married his wife (also an LPR), and fathered four U.S.-citizen children.⁴ In 2009, almost forty years after Mr. Rivas-Melendrez was admitted to the United States, the Department of Homeland Security (DHS) deported him based on this conviction from nearly three decades prior.⁵

Jean Dumas⁶ fled Haiti and sought asylum without a lawyer in the United States in 2002. He was unable to fully present his claim; the immigration judge denied him protection and ruled that his asylum application was frivolous. He remained in the United States, started a family and a business, and raised his U.S.-citizen children. He applied for temporary protected status after the 2010 earthquake in Haiti but was barred because his initial asylum application had been deemed frivolous. He was placed in removal proceedings and had a strong case for relief from removal but was ineligible because of the lifetime bar to immigration relief after a finding that an asylum application was frivolous. After nearly twenty years in the United States, he was deported and separated from his children forever.

Although deeply flawed, the American justice system purports to further policy goals such as rehabilitation and redemption.⁷ The criminal sentencing system involves weighing a bad act against other positive equities in the criminal defendant's life. Clearly, none of this works in a fair way, and a criminal defendant is often treated *de facto* the same way as

1. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

2. *Rivas-Melendrez v. Napolitano*, 689 F.3d 732, 734 (7th Cir. 2012).

3. *See id.* at 734–35.

4. *Id.* at 735.

5. *Id.* at 734–35.

6. This Article uses the pseudonym “Jean Dumas” to respect the privacy of the asylum seeker. A detailed case summary is on file with the author.

7. *See* Joseph R. Biden Jr., *A Proclamation on Second Chance Month, 2021*, WHITE HOUSE (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/31/a-proclamation-on-second-chance-month-2021> [<https://perma.cc/27ML-RD2L>]. Although as critical legal theorists note, the criminal legal system could more accurately be described as one based on punitive and carceral constructs. *See, e.g.*, Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 18–19 (2015) (exploring how “policing and punishment and detention and deportation powerfully shape the U.S. economy and American democracy”). As the authors note,

From the earliest hours of the nation's formation, prison was conceived as a modern intervention and as an Enlightenment ideal for the expression of liberty by the negation of it [C]aptivity . . . was fundamental to American freedom from the beginning. Prison and slavery defined the boundaries of citizenship and, in this sense, were two sides of the same coin.

Id. at 21.

an immigrant facing deportation—as a bad actor that is unworthy of a second chance. But there is increasing concern over the failures of the criminal justice system and a growing movement seeking to ameliorate the barriers to reentry after incarceration.⁸ Yet when it comes to immigration, the fact that someone has violated a civil law by entering without permission or overstaying a visa can result in deportation⁹ at any time. Moreover, an immigrant can commit a crime, complete his or her sentence, have the conviction expunged from his or her record, and still be subject to deportation in the future.¹⁰ This raises deep questions about how immigrants are viewed in our legal regime.

The United States also prides itself on the notion of rebirth—the ideal that one can come to America without anything but seize the opportunities available to advance and remake oneself. Yet when it comes to immigration law, one bad act can never be undone, even though the “bad act” is oftentimes not even criminal.¹¹ In the words of the Senate Judiciary Committee when Congress removed the statute of limitations for deportation from the Immigration and Nationality Act, “If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the [five] years after entry.”¹²

The unforgiving nature of immigration law is well-known.¹³ But the

8. See, e.g., Annelies Goger, David J. Harding & Howard Henderson, *Prisoner Reentry*, in *A BETTER PATH FORWARD FOR CRIMINAL JUSTICE* 72, 72 (Brookings-Am. Enter. Inst. Working Grp. on Crim. Just. Reform ed., 2021), https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward_Brookings-AEI-report.pdf [<https://perma.cc/2ENJ-RLYF>] (“Eliminating racial disparities in our criminal justice system and improving reentry outcomes requires a wholesale rethinking of our orientation toward criminal justice, rather than piecemeal reforms or isolated new programs.” The report calls for “mov[ing] away from a policy framework that focuses on punishment as a tool for controlling risk in favor of a focus on human rights, harm reduction, and the social, political, and economic reintegration of those who have been incarcerated.”)

9. Congress replaced the term “deportation” with “removal” in 1996, see *Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA)* of 1996, Pub. L. No. 104-208, div. C, § 308(e), 110 Stat. 3009–546, 3009–619 to 3009–621 (codified as amended in scattered sections of 8 U.S.C.), although deportability grounds continue to exist in the Immigration and Nationality Act, see 8 U.S.C. § 1227. Because the term “deportation” continues to be widely used and recognized, this Article utilizes it in place of the more formal term “removal.”

10. See 8 U.S.C. § 1101(a)(48)(A) (defining the term “conviction” in the immigration context to be “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”). Convictions that are expunged, “vacated[,] or set aside for rehabilitative purposes . . . or solely for the purpose of avoiding immigration consequences” are still considered convictions for immigration purposes. HILLEL R. SMITH, CONG. RSCH. SERV., R45151, *IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY* 26 (2021) (footnote omitted).

11. See ALISON SISKIN, ANDORRA BRUNO, BLAS NUNEZ-NETO, LISA M. SEGHEITTI & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL33351, *IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES* 8–9 (2006).

12. S. REP. NO. 81-1515, at 389 (1950).

13. See, e.g., John F. Gossart, Jr., *Lady Liberty Blows Out Her Torch: New Immigration Law Is Unforgiving and Far More Restrictive*, 27 U. BALT. L.F. 25, 25 (1997) (the

lack of constitutional protections is often linked to the (mis)characterization of immigration law as civil rather than criminal.¹⁴ Casting immigration law as civil has resulted in a regime in which, despite the dire consequences of deportation, immigrants in removal proceedings lack the right to free counsel and protection against ex post facto laws or cruel and unusual punishment.¹⁵ Although scholars and courts have long questioned the viability of this distinction, particularly in light of the increasing criminalization of immigration law, statutes of limitation are embedded in criminal, civil, and administrative law regimes alike.¹⁶

For example, under 28 U.S.C. § 2462, the general statute of limitations that governs civil penalty enforcement actions, the federal government must file suit “within five years from the date when the claim first accrued” unless otherwise specified by Congress.¹⁷ The doctrine of laches also protects individuals from the inequities that would otherwise occur if a civil claim could be sprung upon them at any time.¹⁸

In contrast, there is no statute of limitations or laches defense in immigration law.¹⁹ The government can, and increasingly does, initiate deportation proceedings against long-time, law-abiding members of society based on actions that occurred long ago.²⁰ This notion of time standing still is woven into other aspects of immigration law as well. For example, an immigrant’s manner of entry into the United States can result in a lifetime bar to due process in removal proceedings,²¹ and a finding that an immigrant ever filed a “frivolous” asylum application will bar her from any immigration benefit throughout her life, even if she withdrew the application and procured no benefit from it.²² Finally, detained noncitizens

former immigration judge describes the 1996 overhaul of the immigration law as “cruel, harsh, insensitive and inflexible”).

14. See, e.g., AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 2 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [<https://perma.cc/R5ZX-ENLL>].

15. See *id.* at 2–3.

16. See 18 U.S.C. § 3282 (statute of limitations for non-capital, criminal offenses); 28 U.S.C. § 2462 (statute of limitations for the enforcement of any civil penalty or forfeiture).

17. 28 U.S.C. § 2462.

18. See *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (first citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667–68, 678 (2014); and then citing 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.3(5), at 89 (2d ed. 1993)).

19. AM. IMMIGR. COUNCIL, *supra* note 14, at 4.

20. See *id.* One notable exception is the statutory provision that limits deportation for a single crime involving moral turpitude to those minor crimes committed within five years of admission to the country. See 8 U.S.C. § 1227(a)(2)(A)(i). This provision provides that “[a]ny alien who—(I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.” *Id.*

21. Immigrants from specified countries are permitted to enter the United States for ninety days without the need for a visa. See 8 U.S.C. § 1187(a). However, they are required to waive any right to challenge their deportation, see *id.* § 1187(b), and courts have held that this waiver of due process applies indefinitely, see *Ferry v. Gonzales*, 457 F.3d 1117, 1128–29 (10th Cir. 2006); *Nose v. Att’y Gen.*, 993 F.2d 75, 78–79 (5th Cir. 1993).

22. See 8 U.S.C. § 1158(d)(6); 8 C.F.R. § 1208.20(a)–(c), (f) (2021).

facing removal are routinely denied bond because of criminal charges that have been filed against them, even absent any finding of guilt.²³ Again, this is true even if the accuser withdraws their complaint; the very fact that criminal charges were brought signifies danger and ongoing detention.²⁴

In this Article, I examine a few of these provisions that result in lifetime consequences, as well as the lack of a statute of limitations or laches defense in immigration law. After exploring jurisprudence and legislative history in each of these areas, I analyze the theory behind statutes of limitations and laches defenses in other areas of law to argue for a statute of limitations for deportation proceedings, and for a time limit on penalties that attach to a single bad act, like filing a frivolous asylum application. I also argue that noncitizens should be entitled to the same presumption of innocence as in the criminal justice system with regards to bond determinations. This Article also incorporates a broader moral and policy-based argument that after a certain period of time, a noncitizen's membership in the nation is so well-established and meaningful that deportation, or the denial of immigration benefits based on a past bad act, should no longer be possible. Indeed, our nation's first immigration laws contained a statute of limitations on deportation, and there are still remnants of prior laches-based defenses sprinkled throughout the area of law. Arguing for a return to a statute of limitations allows for engagement in an important and timely scholarly debate on the meaning of membership and citizenship.

Part II of this Article provides a historical overview of statutes of limitation in immigration law and other areas of civil, criminal, and administrative law. Part III broadens the lens to include other unforgiving aspects of immigration law and practices that result in lifetime consequences for a particular action. Specifically, Part III explores the lifetime bar to immigration benefits if a noncitizen is found to have submitted a frivolous asylum application. It also examines the Visa Waiver Program and its requirement that an applicant permanently waive their due process rights, as well as immigration judges' practice of denying bond to detained noncitizens based on arrests that have not resulted in convictions or charges that were dropped. Part IV analyzes the way in which immigration law's unforgiving approach to past acts is at odds with important societal notions of rehabilitation, and the role of rehabilitation in criminal

23. See IMMIGRANT LEGAL RES. CTR., REPRESENTING CLIENTS IN BOND HEARINGS: AN INTRODUCTORY GUIDE 7 (2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf [<https://perma.cc/DK5T-T5P6>].

24. See reports of this happening routinely with immigration judges in New Jersey (on file with author); see also HAFSA S. MANSOOR & KATHERINE COMLY, SETON HALL UNIV. SCH. OF L., A LONG TIME COMING: HOW THE IMMIGRATION BOND AND DETENTION SYSTEM CREATED TODAY'S COVID-19 TINDERBOX 8–9 (2020), <https://law.shu.edu/docs/publications/clinics/how-immigration-bond-and-detention-system-created-todays-covid-19-tinderbox.pdf> [<https://perma.cc/4HL9-N6PP>]; IMMIGRANT LEGAL RES. CTR., *supra* note 23, at 7 (“Bond determinations are discretionary and the immigration judges can attach significance to arrests even if they did not ultimately result in convictions.”).

sentencing. It also looks at the immigration regime's reliance on temporal considerations in other parts of the statutory scheme. Part IV also employs a critical race lens to examine the ways in which the criminalization of immigrants has led to the widespread detention of immigrants of color. While noting that broader reforms are necessary, Part IV argues that adopting a statute of limitations for deportation would be a significant step in the move to limit the carceral state. Part V argues for adoption of a statute of limitations on deportation and urges reconsideration of the prevailing view that the five-year statute of limitations for civil enforcement actions does not apply to deportation. Arguing that deportation is a punitive sanction for violation of a civil law provision, Part V contends that deportation fits squarely within the existing statute of limitations. However, recognizing that courts have held to the contrary, Part VI ultimately proposes a five-year statute of limitations on deportation if the government has been aware of the noncitizen's unauthorized status. In cases in which the government has been unaware, Part VI proposes a ten-year statute of limitations. Part VII ultimately concludes that length of time and ties to the United States outweigh any government interest in deportation.

II. MEANING AND PURPOSE OF STATUTES OF LIMITATION

Statutes of limitation exist in all areas of domestic law in order to further important procedural, evidentiary, and equity-based norms. In enacting statutes of limitation, Congress was motivated by a "concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared.'"²⁵ As Justice Marshall explained when writing on behalf of a unanimous Court, "The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim."²⁶ Because imposing time limits serves such important policy purposes, only the most serious crimes, such as kidnapping and murder, carry no statute of limitations.²⁷

This strongly held notion that fairness requires some limit on when an action can be brought is woven into the fabric of criminal and civil laws alike. In studying this topic, the Presidential Commission on Immigration and Naturalization traced this bedrock principle back to ancient traditions in the Anglo-American legal system.²⁸

25. *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

26. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980).

27. See CHARLES DOYLE, CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 1–2 (2017).

28. See PRESIDENT'S COMM'N ON IMMIGR. & NATURALIZATION, WHOM WE SHALL WELCOME: REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 197–98 (1953); see also discussion *infra* notes 58–73 and accompanying text.

A. IMMIGRATION LAW HISTORICALLY INCLUDED A STATUTE OF
LIMITATIONS FOR DEPORTATION

Although it may sound far-fetched to suggest that the government should be prevented from initiating deportation proceedings after a certain period of time, U.S. immigration law did in fact include a statute of limitations until 1952.²⁹ In reality, the United States' regulation of its borders progressed from an open borders policy³⁰ to exclusion grounds,³¹ and then to a one-year time limit if the government wanted to deport a noncitizen who should have been excluded initially.³² It was only when the United States initiated deportation as a punishment for post-entry conduct that the period for the government to initiate deportation proceedings was lengthened to three and then five years, and ultimately removed entirely in 1952.³³

As set forth above, Congressional concern with immigration was initially limited to excluding certain persons from entering the country, rather than deporting anyone from within the nation.³⁴ Even when Congress later enacted deportation grounds, its focus was on deporting those who had entered in violation of exclusion grounds (namely contract labor laws).³⁵ Because the deportation was intended to be a remedy for allowing entrance to someone who should have been excluded at the border, the deportation ground contained a one-year statute of limitations.³⁶ In 1917, Congress broadened both the grounds for deportation and the time frame in which proceedings could be initiated.³⁷ Under the Immigration Act of 1917, noncitizens who entered the United States in violation of law were subject to deportation only if proceedings were commenced against them within five years after the improper entry.³⁸ In 1924, Congress once again broadened the grounds for deportation.³⁹ This time, however, Congress did not specify a statute of limitations for the additional deportation grounds.⁴⁰ It was not until 1952 that Congress eliminated all statutes of limitations for deportation.⁴¹

Immigration law has been referred to as a "window into the national

29. See *infra* notes 30, 34–41 and accompanying text.

30. See *Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/early-american-immigration-policies> [<https://perma.cc/D4PW-55JL>] (stating that the United States had open borders for approximately its first 100 years).

31. See *infra* notes 34–35 and accompanying text.

32. See *infra* notes 35–36 and accompanying text.

33. See *infra* notes 37–41 and accompanying text.

34. See Immigration Act of 1882, ch. 376, 22 Stat. 214.

35. See Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566 (directing the return within one year after entry of any immigrant who had landed in violation of the contract labor laws).

36. See *id.*; Immigration Act of 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

37. See Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889.

38. *Id.*

39. Immigration Act of 1924, Pub. L. No. 68-139, § 14, 43 Stat. 153, 162.

40. See *id.*

41. See Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204–08 (codified at 8 U.S.C. § 1231); PRESIDENT'S COMM'N ON IMMIGR. & NATURALIZATION, *supra* note 28, at 198.

psyche.”⁴² The 1952 Immigration and Nationality Act was enacted at the height of the Red Scare, a period of intense fear of communism and of outsiders.⁴³ In light of the climate of fear at the time, it is not surprising that the 1952 Act was restrictive. But even within this climate, President Harry Truman vetoed the bill, warning that it “substitute[ed] totalitarian vengeance for democratic justice.”⁴⁴

Specifically addressing the bill’s revocation of the statute of limitations for deportation, President Truman warned,

Some of the new grounds of deportation which the bill would provide are unnecessarily severe. Defects and mistakes in admission would serve to deport at any time because of the bill’s elimination, retroactively as well as prospectively, of the present humane provision barring deportations on such grounds five years after entry.⁴⁵

Indeed, President Truman was prescient in his warning that the bill’s approach to freezing noncitizens in time and punishing them for past acts would only worsen societal pressures. For example, he warned, “Narcotic drug addicts would be deportable at any time, whether or not the addiction was culpable, and whether or not cured. The threat of deportation would drive the addict into hiding beyond the reach of cure, and the danger to the country from drug addiction would be increased.”⁴⁶

The 1952 Act also retained the national origins quota system; included new harsh provisions for deportation, exclusion, and denaturalization; and curtailed hardship-based relief.⁴⁷ In opposing the legislation, then-Senator John F. Kennedy, referred to the Act as “‘the most blatant piece of discrimination’ in history.”⁴⁸

Notwithstanding President Truman’s opposition, Congress overrode the veto and enacted the Immigration and Nationality Act of 1952.⁴⁹ Removing the statute of limitations for deportation actions was just one way in which Congress acted to tighten the immigration regime.

42. Linda Greenhouse, *Immigration Bill: Looking for Skills and Good English*, N.Y. TIMES (Apr. 10, 1988), <https://www.nytimes.com/1988/04/10/weekinreview/redefining-boundaries-who-may-come-immigration-bill-looking-for-skills-good.html> [<https://perma.cc/72UK-ESDJ>].

43. See *McCarthyism and the Red Scare*, UNIV. OF VA. MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mccarthyism-red-scare> [<https://perma.cc/UPN2-2F27>]; *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> [<https://perma.cc/2GMM-XVTY>].

44. President Harry S. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1952 PUB. PAPERS 441, 445 (June 25, 1952). President Truman noted, “The bill would make it even more difficult to enter our country. Our resident aliens would be more easily separated from homes and families under grounds of deportation, both new and old, which would specifically be made retroactive.” *Id.* at 444.

45. *Id.* at 445.

46. *Id.*

47. See Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163.

48. See 109 CONG. REC. 12,047 (1963).

49. *Vetoed by President Harry S. Truman*, U.S. SENATE, <https://www.senate.gov/legislative/vetoed/TrumanHS.htm> [<https://perma.cc/K53V-3YJV>].

However, as the political climate changed in the 1960s, many of the harshest aspects of the 1952 immigration law were ameliorated. For example, the domestic advancements of the Civil Rights Era seeped into the immigration regime, resulting in Congress's revocation of national origin-based quotas.⁵⁰ The improved domestic economic outlook in the 1980s led Congress to enact the Immigration Reform and Control Act of 1986, allowing for amnesty for millions of undocumented immigrants.⁵¹ On the other hand, the domestic War on Drugs led to multiple pieces of legislation in 1996 aimed at dramatically widening the grounds for deportation and narrowing the avenues for discretionary relief for noncitizens who commit crimes.⁵² Additionally, the 9/11 terrorist attack heightened national security concerns and led to further restrictions in immigration law.⁵³ Over the past twenty-five years, Congress and DHS have criminalized immigration law and practice to such an extent that it bears greater similarity to criminal law than civil law today.⁵⁴ Along with this criminalization, the detention regime has grown exponentially, resulting in a system in which the majority of federal criminal prosecutions are for immigration violations⁵⁵ and approximately 500,000 immigrants are detained per year.⁵⁶ However, notwithstanding the dramatic ebbs and flows

50. Immigration and Nationality Act (INA) of 1965, Pub. L. No. 89-236, sec. 11, §§ 221–22, 79 Stat. 911, 918 (codified as amended at 8 U.S.C. §§ 1201–02).

51. See Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, §§ 201–02, 302–03, 100 Stat. 3359, 3394–3405, 3417–31 (codified as amended in scattered sections of 8, 29, and 42 U.S.C.). This piece of legislation also contained employer sanctions in an effort to decrease the incentive for undocumented migration going forward. See *id.* §§ 101–03, 100 Stat. at 3360–80 (codified as amended in scattered sections of 8, 18, 29, and 42 U.S.C.).

52. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401, 411–14, 421–23, 110 Stat. 1214, 1258–73 (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, §§ 341–53, 110 Stat. 3009–546, 3009–635 to 3009–641 (codified as amended in scattered sections of 8 U.S.C.).

53. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The Act allows for, among other things, the arrest, detention, and deportation of noncitizens who are believed to be members of, have raised funds for, or provided some kind of material support to an organization designated as terrorist by the Secretary of State, or to an organization that is not on the list of terrorist groups but has engaged in some sort of violent activity that would make such organization eligible for inclusion on the Secretary's list. See *id.* §§ 411–12, 115 Stat. at 345–50. Moreover, the Act authorizes the continued detention of noncitizens who have never been convicted of a crime if the Attorney General “certifies” that he has “reasonable grounds to believe” that their release will endanger “the national security of the United States or the safety of the community or any person.” See *id.* at § 411, 115 Stat. at 350–51.

54. See WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBOUT, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 14–19 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf [<https://perma.cc/QZ78-ZCUY>].

55. See AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [<https://perma.cc/YJU7-J4KZ>].

56. *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> [<https://perma.cc/7KNS-ZJ6N>].

of restrictions in the immigration regime along with national security, political, and economic trends, the complete removal of the statute of limitations has remained unaltered since 1952.⁵⁷

Shortly after Congress overrode President Truman's veto and enacted the nation's first comprehensive immigration statute in 1952, the President formed a Commission on Immigration and Naturalization to conduct hearings and assess the new immigration law.⁵⁸ The Commission concluded that "[t]he immigration and nationality law embodies policies and principles that are unwise and injurious to the nation . . . [and] should be reconsidered and revised from beginning to end."⁵⁹ The Commission had particularly harsh criticism for the removal of a statute of limitations from the 1952 Act, noting "[t]hat it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system."⁶⁰ As the Commission pointed out, "[C]riminal prosecutions, except for capital offenses, such as murder and treason, [are required to] be brought within a fixed period of time or not at all."⁶¹

Other than capital offenses, prosecutions for all other federal crimes generally must commence within five years.⁶² This general statute of limitations covers crimes such as bribery, counterfeiting, forgery, extortion, mail fraud, perjury, and robbery.⁶³ However, the five-year general statute of limitations does not apply if another statute provides otherwise.⁶⁴ For example, if the offense involves major fraud against the United States, a seven-year statute of limitations applies.⁶⁵

The Commission further found that, in rescinding the statute of limitations, the 1952 Act created a situation in which a noncitizen "who entered the United States 25 years ago, . . . whose entry involved a purely technical violation," and who had been "immun[e] from deportation for the last

("The average daily population of detained immigrants increased from approximately 7,000 in 1994, to 19,000 in 2001, and to over 50,000 in 2019. After three decades of expansion, the detention system now captures and holds as many as 500,000 immigrants each year."); see also *Immigration Detention and Enforcement*, NAT'L IMMIGRANT JUST. CTR., [https://perma.cc/BF56-D388] ("The Department of Homeland Security (DHS) manages the largest immigration detention system in the world and spends more on immigration enforcement than on all other federal enforcement agencies combined." (citation omitted)).

57. See *infra* notes 77–84 and accompanying text, for a discussion of failed legislative attempts to reintroduce a statute of limitations for deportation.

58. See PRESIDENT'S COMM'N ON IMMIGR. & NATURALIZATION, *supra* note 28, at xi–xii.

59. *Id.* at 263.

60. *Id.* at 197.

61. *Id.*; see also DOYLE, *supra* note 27 ("There is no statute of limitations for federal crimes punishable by death, nor for certain federal crimes of terrorism, nor for certain federal sex offenses. Prosecution for most other federal crimes must begin within five years of the commitment of the offense.").

62. DOYLE, *supra* note 27, at 2 (citing 18 U.S.C. § 3282).

63. See *id.* at 17–25.

64. See *id.* at 2; 18 U.S.C. § 3282.

65. 18 U.S.C. § 1031(f).

20 years,” would now be subject to deportation.⁶⁶ Noting that this threatens the security of many noncitizens and their families, the Commission remarked, “Their immunities have been removed, and they may be torn out of their accustomed places in the communities in which they live, no matter how exemplary their conduct over a long period of years.”⁶⁷ Moreover, “Instead of being a ‘humanitarian’ measure, as the Congressional Conferees on the Act of 1952 characterized it, the new act actually restores the threat of cruel and inhuman punishment for offenses long since forgiven.”⁶⁸

The Commission also noted Congress’s disparate treatment of prosecutions for “aggravated criminal violations of the immigration laws” and “deportation proceedings for such violations—as well as for infractions,” which do not even carry criminal law consequences.⁶⁹ Although “prosecutions for aggravated criminal violations of the immigration laws [at the time, were] subject to a [three]-year statute of limitations,” deportation proceedings brought as a result of a violation or infraction of immigration laws “are governed by no statute of limitations, and may be brought more than 20 or 40 years after a [noncitizen] enter[s] the United States.”⁷⁰ In the words of the Commission,

No one has suggested any sound reason why the purpose of limitations—recognition of the unfairness involved in requiring a person to make a defense long after the event, when it is difficult or impossible to assemble witnesses and evidence—does not apply to immigration matters at least with equal force as to prosecutions for serious crimes.⁷¹

As noted by the Commission, “There is a fundamental public purpose which is served by statutes of limitations for crimes and in civil actions. This is just as important an objective of law enforcement as the avoidance of violation of law.”⁷² Ultimately, the Commission recommended a ten-year statute of limitations, finding that “a period of [ten] years within which proceedings must be brought after the commission of an act for which deportation is provided is ample for the Government to ascertain that a violation ha[s] occurred and to take action against the offender.”⁷³

On April 6, 1953, President Dwight Eisenhower wrote to Senator Arthur Watkins, Chairman of the Immigration Subcommittee of the Senate Judiciary Committee, in connection with proposed hearings.⁷⁴ The President acknowledged that the “existing legislation contains injustices,” including “[d]eportation provisions that permit an alien to be deported at

66. PRESIDENT’S COMM’N ON IMMIGR. & NATURALIZATION, *supra* note 28, at 198.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 101 CONG. REC. S12,287–88 (daily ed. July 30, 1955) (statement of Sen. Arthur Watkins).

any time after entry, irrespective of how long ago he was involved, after entry, in any action or affiliation designated as ‘subversive.’”⁷⁵ The President suggested that “the Committee on the Judiciary [should] investigate these complaints and the other critical comments which ha[d] developed as a result of the operation of the immigration and naturalization law of 1952 with a view to achieving legislation which would be fair and just to all.”⁷⁶

While there have been attempts to impose temporal limitations on deportation over the years, none of them have succeeded. For example, in 1961, Senator Jacob Javits and five other senators proposed a bill aimed at overhauling the Immigration and Nationality Act.⁷⁷ Among its provisions, it contained a ten-year statute of limitations for deportation actions.⁷⁸ In recommending adoption of the bill, the Senate subcommittee noted that ten years is twice as long as the statute of limitations for federal felonies and would provide ample time for the government to take action.⁷⁹ The subcommittee implored Congress to “bear in mind that the national self-interest is best served when the [statutory] restrictions [on immigration] are both sensible and fair in operation, and consistent with our heritage of respect for individual human integrity.”⁸⁰ Unfortunately, the bill never made it out of the Senate Committee on the Judiciary.⁸¹

Sixty years later, in 2021, a bill entitled the New Way Forward Act was introduced in the House of Representatives.⁸² Among its provisions, the bill includes a five-year statute of limitations for removal proceedings based on criminal grounds.⁸³ While a statute of limitations for criminal removal grounds would “[a]dvance racial justice and address obstacles to equal justice in the criminal legal system by limiting deportation for drug convictions and other offenses that result from enforcement that dispro-

75. *Id.* at 12,288.

76. *Id.*

77. *See* S. 551, 87th Cong. (1961).

78. *Id.* § 206 (“No alien shall be deported by reason of any conduct occurring more than ten years prior to the institution of deportation proceedings.”).

79. 109 CONG. REC. S12,052 (daily ed. July 2, 1963).

80. *Id.* at S12,048.

81. *See id.*

82. *See* New Way Forward Act, H.R. 536, 117th Cong. (2021).

83. *Id.* § 201. The bill proposes amending § 239(d) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1229(d), to add the following:

(3)(A) Notwithstanding paragraph (2), any removal proceeding against an alien previously admitted to the United States for being within a class of deportable aliens described in section 237(a)(2), or within a class of inadmissible aliens described in section 212(a)(2), shall not be entertained unless commenced not later than the date that is five years after the date on which the alien became deportable or inadmissible.

(B) This paragraph shall apply to any removal proceeding resulting in an order of removal before the date of the enactment of the New Way Forward Act as if in effect on the date on which the removal proceeding was commenced.

Id.

portionately targets communities of color,”⁸⁴ it would do nothing to ameliorate the harshness imposed by the myriad of other grounds for removal.

III. OTHER WAYS NONCITIZENS ARE FROZEN IN TIME BY IMMIGRATION LAW AND POLICY

A. THE LIFETIME BAR FOR A FRIVOLOUS ASYLUM APPLICATION

It is impossible to overstate the consequences of filing a frivolous asylum application. If deemed frivolous, an asylum application becomes a noncitizen’s defining immutable characteristic and eclipses any future aspirations they might have. The U.S. Court of Appeals for the Third Circuit captured this severity when it stated that a frivolous asylum application amounts to a “death sentence” for an asylum seeker hoping to find permanent, legal residence in the United States.⁸⁵

Congress first enacted this frivolity-based lifetime bar to immigration benefits as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁸⁶ The legislation was motivated by widespread media reporting that immigrants were filing frivolous asylum applications in order to pursue employment authorization and delay their deportation.⁸⁷ But the harshness of the penalty is hard to reconcile with this concern. The frivolousness bar has been described as “[o]ne of the “most extreme provisions” in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,’ and, once imposed, it ‘may not be waived under any circumstances.’”⁸⁸ The Third Circuit implored the immigration judges and the Board of Immigration Appeals (BIA) to “at least consider the consequences of the draconian penalty attached to a finding that the application for asylum is frivolous, particularly where . . . the finding may cause the family structure of the applicant to be permanently ruptured.”⁸⁹

While Congress has evidenced its concern with frivolous applications in other areas of administrative law, it has never imposed the unforgiving

84. *Introducing: New Way Forward Act*, IMMIGRANT JUST. NETWORK [https://perma.cc/5PH8-4CT8].

85. *Luciana v. Att’y Gen. of the U.S.*, 502 F.3d 273, 278 (3d Cir. 2007) (quoting *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005)).

86. Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, sec. 604, § 208(d)(6), 110 Stat. 3009-546, 3009-694 (codified at 8 U.S.C. § 1158(d)(6)).

87. Andrea Rogers, Comment, *Exploitation v. Expulsion: The Use of Expedited Removal in Asylum Cases as an Answer to a Compromised System*, 24 WM. MITCHELL L. REV. 785, 793-97 (1998) (thoroughly documenting the perfect storm of economic and national security concerns that were given wide attention in the media and resulted in congressional action in overhauling the Immigration and Nationality Act).

88. *Luciana*, 502 F.3d at 278 (quoting *Muhanna*, 399 F.3d at 588)); see also E. Lea Johnston, *An Administrative “Death Sentence” for Asylum Seekers: Deprivation of Due Process Under 8 U.S.C. § 1158(d)(6)’s Frivolousness Standard*, 82 WASH. L. REV. 831, 833 (2007) (noting that the frivolousness bar “applies regardless of any future developments in the asylum applicant’s home country or personal life that would otherwise provide a basis for granting immigration benefits”).

89. *Luciana*, 502 F.3d at 284.

penalties that attach when asylum is at issue. For example, pursuant to the U.S. Tax Code, an individual is subject to a \$5,000 penalty for filing a frivolous tax return.⁹⁰ Moreover, tax law specifies that, before the monetary penalty can be levied, the Internal Revenue Service must give the filer notice of the frivolousness finding and thirty days within which to withdraw the submission without any penalty.⁹¹ Similarly, one can seek to withdraw an application for Social Security benefits, and if granted, the application is treated as if it were never made.⁹² In contrast, no such opportunity to withdraw an asylum application upon notice of a frivolousness finding exists in the immigration context.⁹³

Similarly, other areas of civil law contain penalties for filing frivolous claims but do not impose a lifetime bar or preclude the claimant from filing good-faith petitions in the future. For example, under the Civil Rights Act and the Americans with Disabilities Act, frivolous claims may be dismissed, and the plaintiff risks being ordered to pay fees to the defendant.⁹⁴ But bringing such claims does not preclude the plaintiff from bringing legitimate claims in the future.⁹⁵ Many state-level civil court systems similarly require that a party or attorney who is alleged to have filed a frivolous claim be given notice and an opportunity to withdraw the

90. 26 U.S.C. § 6702(a). This provision provides the following:

A person shall pay a penalty of \$5,000 if—

(1) such person files what purports to be a return of a tax imposed by this title but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)—

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

Id.

91. *Id.* § 6702(b)(3) (“If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice, the penalty imposed under paragraph (1) shall not apply with respect to such submission.”).

92. See SOC. SEC. ADMIN., OMB No. 0960-0015, FORM SSA-521: REQUEST FOR WITHDRAWAL OF APPLICATION 1 (2018), <https://www.ssa.gov/forms/ssa-521.pdf> [https://perma.cc/J6JS-KJD2] (“If we approve [the request for withdrawal of your application], the decision we made on your application will have no legal effect.”).

93. See 8 U.S.C. § 1158(d)(6).

94. See 42 U.S.C. § 2000e-5(k) (providing for the award of reasonable attorney’s fees to the prevailing party on a civil rights claim); *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422–23 (2016) (“When a defendant is the prevailing party on a civil rights claim, the Court has held, district courts may award attorney’s fees if the plaintiff’s ‘claim was frivolous, unreasonable, or groundless’ or if ‘the plaintiff continued to litigate after it clearly became so.’” (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978))); 42 U.S.C. § 12145(c) (If the Secretary has “reasonable cause to believe that any relief granted under [the Americans with Disabilities Act] was fraudulently applied for, the Secretary shall . . . cancel such relief” and “take such other action as the Secretary considers appropriate.”).

95. See 42 U.S.C. §§ 12145(c), 2000e-5(k); *CRST*, 578 U.S. at 422–23.

claim before any sanctions are imposed.⁹⁶

As if the draconian penalties that already existed for frivolous asylum applications were not enough, twenty-five years later, as part of the Trump Administration's efforts to dismantle asylum protection, DHS issued a new rule, effective January 11, 2021, which dramatically broadened the definition of what constitutes a frivolous asylum application.⁹⁷ Pursuant to the new rule, a fabrication no longer needs to be "deliberate[]," and the definition of what constitutes a frivolous application now includes an application that "[i]s filed without regard to the merits of the claim" or "[i]s clearly foreclosed by applicable law."⁹⁸ This stands in stark contrast with the way in which frivolity is interpreted in other contexts. Generally, a claim is considered frivolous if "it lacks an arguable basis either in law or in fact."⁹⁹ As courts have held, a frivolous finding is appropriate when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'"¹⁰⁰

In addition to broadening the definition of "frivolous" to potentially include making a claim in an effort to advance the law, the BIA has also held that withdrawing an application "does not preclude a finding that the application [was] frivolous."¹⁰¹ For example, in *X-M-C-*, the BIA held that "the only action required to trigger a frivolousness inquiry is the filing of an asylum application."¹⁰² Once that transpires, neither withdrawing the application nor recanting any false statement precludes a frivolousness finding.¹⁰³

Similarly, in *Kulakchyan v. Holder*, a panel of the Ninth Circuit upheld the BIA's finding that an Armenian national's application for adjustment of status was pretermitted by her previous filing of an asylum application that was found to be frivolous.¹⁰⁴ The panel afforded *Chevron* deference to the BIA's interpretation that 8 U.S.C. § 1158(d)(6) allows a withdrawn

96. For example, in New Jersey, the Frivolous Claims Act (FCA) specifies that when a party files a complaint, or takes a frivolous position in a case, the trial court can shift the costs and fees associated with a response to the party or attorney that submitted the frivolous filing. N.J. STAT. ANN. § 2A:15-59.1.a (West 2021). But before this can happen, the party or attorney accused of making the frivolous filing is given an opportunity to correct their error. N.J. CT. R. 1:4-8(b)(1) (West 2022). The FCA works in conjunction with Rule 1:4-8 of the New Jersey Rules of Court and permits a sanction only if the offending party refuses to withdraw the frivolous pleading after being given a written notice. *See id.* (requiring that an FCA application be made in compliance with the rules for attorney sanction).

97. *See* 8 C.F.R. § 1208.20(c) (2021).

98. *Id.* § 1208.20(a), (c).

99. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

100. *See, e.g., Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting *Neitzke*, 490 U.S. at 327).

101. *X-M-C-*, 25 I. & N. Dec. 322, 322 (B.I.A. 2010).

102. *Id.* at 324.

103. *Id.* at 326.

104. *Kulakchyan v. Holder*, 730 F.3d 993, 995–96 (9th Cir. 2013) (per curiam).

asylum application to sustain a frivolousness finding.¹⁰⁵

The dramatic difference in the way that frivolous applications are treated in the asylum context as compared with other administrative and civil law regimes again raises the question of why there is a presumption of unworthiness that permeates the immigration regime. It is true that the immigration courts are incredibly backlogged,¹⁰⁶ and frivolous asylum applications presumably cause further delay within this system. But the same is true of the Social Security system.¹⁰⁷ There are also countless other checks on asylum claims that may be deemed frivolous. For example, filing a frivolous asylum application no longer allows for immediate employment authorization,¹⁰⁸ as was the case when Congress enacted the lifetime bar to immigration benefits for frivolous asylum applications.¹⁰⁹ Retaining a lifetime bar for asylum applications that are deemed frivolous, along with broadening the standard for frivolity, and holding that withdrawing the claim has no impact, can only be seen as punitive sanctions.

B. VISA WAIVER PROGRAM

Congress first enacted the Visa Waiver Program (VWP) on a pilot basis in 1986,¹¹⁰ and it became a permanent part of the immigration law in 2000.¹¹¹ This program authorizes noncitizens from forty countries to enter the United States for business or tourism for up to ninety days without a visa, in exchange for those countries offering reciprocal privileges to U.S. citizens.¹¹² Although being able to travel without the necessity of a visa has many advantages, the program requires anyone entering through the VWP to permanently forego certain rights and privileges in the United States.¹¹³ For example, if a noncitizen seeks to enter through the VWP

105. *Id.* at 996; *see also* M-S-B-, 26 I. & N. Dec. 872, 872, 879 (B.I.A. 2016) (holding that an untimely asylum application can still be deemed frivolous).

106. The American Immigration Lawyers Association states that the current immigration court backlog includes 1.3 million cases, “with an average wait time exceeding four years” for hearings. *Featured Issue: Immigration Court Backlog and Reprioritization*, AM. IMMIGR. LAWS. ASS’N (June 10, 2021), [<https://perma.cc/9H4V-DSXU>].

107. OFF. OF INSPECTOR GEN., SOC. SEC. ADMIN., A-02-17-50240, FISCAL YEAR 2016 INSPECTOR GENERAL STATEMENT ON THE SOCIAL SECURITY ADMINISTRATION’S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES 3 (2016), [https://oig-files.ssa.gov/audits/full/A-02-17-50240_0.pdf] [<https://perma.cc/2DDJ-7GUX>] (reporting that the Social Security Administration’s “pending hearings backlog grew 59 percent, from 705,367 cases at the end of FY 2010 to 1,122,014 at the end of FY 2016”).

108. *See* 8 C.F.R. § 208.7(a)(1)(ii) (2021) (“An applicant for asylum cannot apply for initial employment authorization earlier than 365 calendar days after the date [U.S. Citizenship and Immigration Services] or the immigration court receives the asylum application.”).

109. *See* ANDORRA BRUNO, CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 12–13 (2019).

110. ABIGAIL F. KOLKER, CONG. RSCH. SERV., RL32221, VISA WAIVER PROGRAM (2021).

111. *See* Visa Waiver Permanent Program Act, Pub. L. No. 106-396, sec. 101, § 217, 114 Stat. 1637, 1637 (2000) (codified at 8 U.S.C. § 1187).

112. 8 U.S.C. § 1187(a)(1)–(2); KOLKER, *supra* note 110.

113. *See* 8 U.S.C. § 1187(b).

and is denied, there is no right to administrative or judicial review.¹¹⁴ Those who are admitted through the VWP lose the right to ever challenge a removal order or claim any form of relief from removal¹¹⁵ (other than asylum, withholding of removal, or relief under the Convention Against Torture).¹¹⁶

Courts have routinely upheld this waiver of due process, regardless of the length of time that a VWP applicant spends in the United States or the equities that accrue over the years. For example, in *Bradley v. Attorney General of the United States*, the VWP applicant was admitted to the United States in 1996 and stayed beyond the permissible ninety days.¹¹⁷ Ten years later, he married a U.S. citizen, and the couple began the process for him to obtain lawful permanent resident status through his wife.¹¹⁸ He was placed in removal proceedings and alleged that he did not knowingly waive his rights when admitted.¹¹⁹ However, the Third Circuit dismissed his challenge, finding that there was no prejudice.¹²⁰ The court reasoned that even assuming his waiver was made without knowledge, if he had known of the consequences of the waiver, his choice would have been to sign and waive his rights to due process or be summarily excluded.¹²¹ In other words, once a VWP applicant agrees to waive their rights in order to be admitted, life stands still at that moment, regardless of the length of time one has been in the United States or the life that one has built.

Clearly, the VWP is intended to be mutually beneficial. The noncitizen is able to avoid the oftentimes lengthy process of seeking a visa and can easily be admitted to the United States for ninety days. In exchange, the United States saves the administrative and fiscal costs associated with removal proceedings if the noncitizen fails to depart after ninety days. However, as with so many immigration provisions, making this waiver of due process rights lifelong is unnecessarily punitive. The lifetime bar to due process is inconsistent with the reality that noncitizens who remain in the United States build lives and establish significant ties, regardless of their manner of entry.

C. DENIAL OF BOND BASED ON WITHDRAWN ALLEGATIONS THAT LED TO CRIMINAL CHARGES

In the context of detained immigrants seeking release on bond, immigration judges routinely deny applications, treating any past criminal act

114. *See id.* § 1187(b)(1).

115. *See id.* § 1187(b)(2).

116. *See* *Ferry v. Gonzales*, 457 F.3d 1117, 1123–25 (10th Cir. 2006).

117. *Bradley v. Att’y Gen. of the U.S.*, 603 F.3d 235, 237 (3d Cir. 2010).

118. *Id.*

119. *Id.* at 238–40.

120. *Id.* at 240–41.

121. *Id.* at 240 (citing *Bayo v. Napolitano*, 593 F.3d 495, 506 (7th Cir. 2010) (en banc)).

or accusation as an indelible marker of danger.¹²² According to the U.S. Supreme Court, “The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”¹²³ But when it comes to judging danger for purposes of bond, immigration judges routinely rely on arrests, even if they did not lead to a conviction.¹²⁴ Moreover, “[b]ecause immigration court hearings, including bond, are administrative proceedings governed by the executive branch, traditional due process safeguards are absent.”¹²⁵ In addition, the Federal Rules of Evidence do not apply in immigration courts.¹²⁶ This means that “hearsay or evidence gathered in unconstitutional questioning, is generally admissible in immigration court.”¹²⁷ This leads to a system in which immigration judges “inquire about and consider pending, unresolved criminal charges and [often] rely on hearsay allegations (including allegations contained in police reports) that did not result in convictions.”¹²⁸

In the analogous criminal bail determination setting, state regulations specify that the judge can only consider the defendant’s criminal history in as much as it contains convictions.¹²⁹ Thus, many state judges are statutorily precluded from considering a defendant’s prior arrests if they did

122. See *supra* notes 23–24 and accompanying discussion in the text; see also John Washington, *ICE Subverting Biden’s Priorities for Detention and Deportation*, THE INTERCEPT (May 7, 2021, 9:59 AM), [https://perma.cc/AC3W-42TS]. “Lauren Major, managing attorney at the American Friends Service Committee in New Jersey,” claims that “at least four of the group’s clients have had requests to be released denied despite the fact that their criminal charges have been dismissed.” Washington, *supra*. Major also specifies that five other clients have had their bond requests “denied based on unproven pending criminal charges against them.” *Id.*

123. *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 241 (1957) (footnote omitted).

124. See, e.g., GABRIELA KAHRL, MICHELLE N. MENDEZ & MAUREEN A. SWEENEY, PRESUMED DANGEROUS: BOND, REPRESENTATION, AND DETENTION IN THE BALTIMORE IMMIGRATION COURT 8–9 (2019), https://cliniclegal.org/file-download/download/public/382 [https://perma.cc/N6BC-LWBV].

125. *Id.* at 3.

126. *Id.*

127. *Id.*

128. *Id.* at 4. Bond hearings before immigration judges are known as custody redetermination hearings and are governed by section 236 of the Immigration and Nationality Act. See Immigration and Nationality Act (INA) of 1952, § 236, 8 U.S.C. § 1226; 8 C.F.R. § 1003.19 (2021). Additional practice guidance is provided by the Immigration Court Practice Manual. See EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST., IMMIGRATION COURT PRACTICE MANUAL (2020), . According to the Manual,

In certain circumstances, an alien detained by the Department of Homeland Security (DHS) can be released from custody upon the payment of bond.

Initially, the bond is set by DHS. Upon the alien’s request, an Immigration Judge may conduct a “bond hearing,” in which the Immigration Judge has the authority to redetermine the amount of bond set by DHS.

Id. at 131–32. Moreover, the Manual states, “If the alien is eligible for bond, the Immigration Judge considers whether the alien’s release would pose a danger to property or persons, whether the alien is likely to appear for further immigration proceedings, and whether the alien is a threat to national security.” *Id.* at 134.

129. See, e.g., N.Y. CRIM. PROC. LAW § 510.30(1)(c) (McKinney 2022) (including “[t]he principal’s criminal conviction record if any” among factors to be considered in setting bail (emphasis added)).

not result in convictions. By allowing immigration judges the discretion to consider a noncitizen's arrests and charges that have been dismissed or withdrawn, the immigration regime freezes the noncitizen in a particular moment of time, regardless of whether that moment even resulted in a conviction.

IV. THE UNFORGIVING NATURE OF IMMIGRATION LAW IS INCONSISTENT WITH THE AMERICAN LEGAL SYSTEM

A. REHABILITATION PLAYS A ROLE IN PUNISHMENT AND SENTENCING WITHIN THE CRIMINAL LEGAL SYSTEM

Rehabilitation has deep historical roots as a purpose behind punishment in the criminal legal context,¹³⁰ although many scholars assert that the true motivating impetus has always been punitive. The idea that punishment serves to rehabilitate dates back to the Bible and the writings of ancient Greece.¹³¹ Rehabilitation was a popular component of the American criminal system until the 1970s when a consensus emerged that it was ineffective in preventing future crime and allowed for too much discretion and inequality in sentencing.¹³² But rehabilitation has resurfaced as a goal in punishment.¹³³ In the words of Professor Edward Rubin, "Rehabilitation is the central premise of the modern prison as an institution; we can no more repudiate it than we can repudiate national defense as the basis for our military forces, or education as the basis for our schools, or health care as the basis for our public hospitals."¹³⁴ When it comes to sentencing goals, we see a "greatly reinvigorated interest in rehabilitative programs, such as drug, mental health, and domestic violence courts, re-entry programs, and a plethora of new community-based and institutional treatment programs."¹³⁵

A review of Supreme Court jurisprudence relating to punishment in the context of the Eighth Amendment also suggests that rehabilitation is reemerging as a significant goal in punishment. In early Eighth Amendment decisions, the Supreme Court did not even mention rehabilitation as a legitimate penological goal.¹³⁶ Rather, the Court focused solely on retribution and deterrence, with an occasional passing reference to incapacitation.¹³⁷ For example, in *Gregg v. Georgia*, the Court stated that "[t]he death penalty is said to serve two principal social purposes: retribu-

130. See Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 265, 269 (2015).

131. *Id.* at 269.

132. *Id.* at 278–81.

133. *Id.* at 265, 289.

134. Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 344 (2001).

135. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 2 (2006).

136. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

137. See, e.g., *id.* at 183 & n.28.

tion and deterrence.”¹³⁸ It was not until 1984 that the Court even recognized rehabilitation as a legitimate penological goal.¹³⁹ And even when rehabilitation was mentioned, the Court failed to engage in analysis as to whether the punishment at issue furthered rehabilitation.¹⁴⁰ For example, in *Ewing v. California*, the plurality mentioned rehabilitation as one of the primary purposes of punishment, but it didn’t analyze whether the punishment at issue—twenty-five years to life imprisonment—served the goal of rehabilitation like it did with respect to the goals of retribution and deterrence.¹⁴¹

It was not until 2010 that the Court really analyzed rehabilitation as a legitimate penological goal.¹⁴² In *Graham v. Florida*, the Court grappled with whether the punishment of life without the possibility of parole was unconstitutional for a nonhomicide crime committed by a juvenile offender.¹⁴³ For the first time, the Court focused its Eighth Amendment analysis on the theory of rehabilitation.¹⁴⁴ According to the Court, giving a juvenile a life-without-the-possibility-of-parole sentence communicates the state’s belief that rehabilitation is impossible.¹⁴⁵ Therefore, the Court concluded that such a punishment could not serve the goal of rehabilitation and was cruel and unusual under the Eighth Amendment.¹⁴⁶ This attention to rehabilitation in the context of the Eighth Amendment was unprecedented, reflecting a new emphasis on rehabilitation as a sentencing goal.

Rehabilitation also plays a significant role in criminal sentencing determinations in other contexts. For example, circuit courts have split as to whether evidence of post-offense rehabilitation can play a role in downward sentencing under the federal guidelines.¹⁴⁷ While the courts are still grappling with the best way to incorporate evidence of rehabilitation into

138. *Id.* at 183; *see also* *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982).

139. *See Spaziano v. Florida*, 468 U.S. 447, 461, 477–78 (1984).

140. *See, e.g., Ewing v. California*, 538 U.S. 11, 25–27, 29–30 (2003). Of course, in the context of the death penalty, rehabilitation cannot be served.

141. *See id.*

142. *See Graham v. Florida*, 560 U.S. 48, 71, 73–75 (2010).

143. *See id.* at 52–53.

144. *See id.* at 73–75.

145. *Id.* at 79.

146. *Id.* at 74.

147. *Compare* *United States v. Thornton*, 846 F.3d 1110, 1118–19 (10th Cir. 2017) (“[T]he court may not lengthen a prison sentence for the purpose of exposing the offender to the rehabilitative benefits of prison.”), *and* *United States v. Vandergrift*, 754 F.3d 1303, 1310 (11th Cir. 2014) (holding that district court erred in considering rehabilitation for sentencing), *with* *United States v. Del Valle-Rodriguez*, 761 F.3d 171, 174–75 (1st Cir. 2014) (stating that rehabilitation may be considered so long as it is not “being relied upon either in deciding whether to incarcerate or in deciding the length of the incarcerative sentence to be imposed”), *and* *United States v. Schonewolf*, 905 F.3d 683, 692 (3d Cir. 2018) (noting that judges may mention rehabilitation during sentence but may not impose or lengthen a sentence “to further a rehabilitative aim”). In *Tapia v. United States*, the Supreme Court held that federal judges are precluded by the Sentencing Reform Act from imposing a sentence in order to further the general rehabilitation of the defendant. 564 U.S. 319, 321, 332 (2011) However, the Court left a potential opening for courts to consider the rehabilitative needs of the defendant when sentencing, and this has led to a circuit split. *See* Marissa A. Booth, Note, *The Road to Recovery: The Third Circuit Recognizes the Im-*

sentencing considerations, an offender's ongoing conduct and life choices clearly provide context for the adjudicator charged with determining the appropriate sentence. This stands in stark contrast to the immigration context where one moment in time casts an indelible mark against the noncitizen.

B. TEMPORAL CONSIDERATIONS PLAY A SIGNIFICANT ROLE IN THE LARGER FRAMEWORK OF U.S. IMMIGRATION LAW

Like other areas of law in the United States, temporality is directly tied to the causes and effects of one's legal immigration status. Time is used as a metric for inclusion and exclusion and permeates many dimensions of immigration law, but is notably absent as a consideration when it comes to initiating deportation proceedings or imposing life-long punishments.¹⁴⁸ The Immigration and Nationality Act relies upon various periods of time for particular reasons, including to gauge membership in the community,¹⁴⁹ the bona fides of a marriage¹⁵⁰ or an investment opportunity,¹⁵¹ or a noncitizen's good moral character.¹⁵² Particular lengths of time are also used to trigger punishments, such as a three- or ten-year bar to admissibility depending on whether the noncitizen was present in the United States without authorization for six months to a year or over a year.¹⁵³ Particular visas that are aimed at training individuals and returning them to impart their knowledge and skills back in their home country also rely on a set two-year period of return to the home country.¹⁵⁴

In these situations, Congress has determined that a particular period of time is necessary to provide a broader window in which to assess a nonci-

portance of Rehabilitative Needs During Sentencing in United States v. Schonewolf, 64 VILL. L. REV. 569, 574 & nn.41–42 (2019).

148. See Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1712–22, 1734–38 (2011).

149. See 8 U.S.C. § 1427(a)(1) (“No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . .”).

150. See *id.* § 1186a(h)(1) (defining “alien spouse” for purposes of the conditional permanent resident provision as “an alien who obtains the status of an alien lawfully admitted for permanent residence . . . by virtue of a marriage which was entered into less than 24 months before the date the alien obtains such status”).

151. See *id.* § 1186b(b)(1) (“In the case of an alien entrepreneur with permanent resident status on a conditional basis under subsection (a), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that—(A) the investment in the commercial enterprise was intended solely as a means of evading the immigration laws of the United States, (B)(i) the alien did not invest, or was not actively in the process of investing . . . then the Attorney General . . . shall terminate the permanent resident status of the alien . . .”).

152. See *id.* § 1427(a)(3).

153. *Id.* § 1182(a)(9)(B)(i). This section provides that a noncitizen who is unlawfully present for more than six months but less than one year and who seeks admission within three years of removal is inadmissible. *Id.* § 1182(a)(9)(B)(i)(I). Likewise, a noncitizen who is unlawfully present for more than one year and who seeks admission within ten years of removal is inadmissible. *Id.* § 1182(a)(9)(B)(i)(II).

154. See *id.* § 1182(e).

tizen or a relationship. For example, if a couple marry and the noncitizen spouse seeks admission to the United States, the immigration status afforded will be tied directly to metrics based on the length of the marriage.¹⁵⁵ If the couple has been married for less than two years at the time that the noncitizen seeks admission, the noncitizen spouse will be limited to conditional status for two years.¹⁵⁶ The two-year time period is intended to ensure that the marriage endures and is not entered into solely for immigration purposes.¹⁵⁷ Rather than being frozen in time at the moment the couple weds, the immigration regime assesses the marriage over the course of the two years after the wedding.¹⁵⁸ If the marriage is still intact after two years, the couple jointly petitions to remove the conditional status, leading to full, permanent residency.¹⁵⁹ This joint petition is supported by two years' worth of proof that the marriage is indeed a bona fide one (e.g., photos, joint bank accounts, a joint lease, letters from friends and family describing the couple's relationship, birth certificates of children born into the marriage).¹⁶⁰

Similarly, when a lawful permanent resident applies for naturalization to become a U.S. citizen, they need to reside in the United States and prove their good moral character over a period of five years, rather than at any moment in time.¹⁶¹ As Professor Stumpf has observed, “[T]ime functions to manage the risk that an intending noncitizen may not measure up to the criteria” to become a U.S. citizen.¹⁶² But requiring that conduct over the span of five years also allows for rehabilitation and redemption, acknowledging that “people may change with the passage of time.”¹⁶³

The length of time in the United States is also used as an essential metric in applications for discretionary relief from removal. For example, a noncitizen who can show that they have resided in the United States for at least ten years without being placed in removal proceedings can seek discretionary relief to remain in the United States.¹⁶⁴ Similarly, a lawful

155. *See id.* § 1186a(h).

156. *See id.* § 1186a(c)(3)(B); *id.* § 1186a(d)(2)(A).

157. *See id.* § 1227(a)(1)(G) (making a noncitizen deportable for having procured documentation or a visa by fraud if “the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years subsequent to any admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated”).

158. *See id.* § 1186a(c)(1), (c)(3)(B), (d)(2)(A).

159. *See id.*

160. *See id.* § 1186a(d)(1); *Removal of Conditional Status-Green Card Based on Marriage: Form I-751*, LUBINER, SCHMIDT & PALUMBO, LLC, <https://www.lslawyers.com/removal-conditional-status.html#:~:text=TO%20remove%20conditional%20status%2C%20the,the%20green%20card%20was%20issued> [https://perma.cc/PA5S-PBJM].

161. *See* 8 U.S.C. § 1427(a).

162. Stumpf, *supra* note 148, at 1713.

163. *Id.* at 1713–14.

164. *See* 8 U.S.C. § 1229b(b)(1) (setting forth cancellation of removal for nonpermanent residents). In addition to requiring at least ten years of continuous presence in the United States, this remedy also requires that the noncitizen's removal would cause “except-

permanent resident can seek discretionary relief from removal if they have been a lawful permanent resident for at least five years.¹⁶⁵ Finally, a discretionary waiver of certain inadmissibility grounds exists for past acts that occurred more than fifteen years ago.¹⁶⁶

These examples illustrate the way that the immigration regime recognizes and incorporates a time-based assessment in various circumstances, rather than focusing in on one moment in time. This stands in stark contrast to the notion, expressed by the Senate subcommittee studying the immigration law at the time that the statute of limitations was removed, that the passage of time has no bearing on a noncitizen's desirability.¹⁶⁷

But when punishment for immigration status violations is at issue, Congress has relied on the length of time that a noncitizen remained without permission in the United States to calculate the corresponding period of exclusion from the nation. For example, if a noncitizen remains in the United States without authorization for over six months to a year, the noncitizen is barred from being readmitted for three years, even if they have a lawful basis for readmission.¹⁶⁸ If that unauthorized period in the United States is more than one year, the bar to readmission is ten years, rather than three.¹⁶⁹ As Professor Juliet Stumpf has commented, time serves as "both a measure and a method of punishment."¹⁷⁰ Rather than use the length of time in the United States as a measure of membership, the longer period of presence in the United States brings about a significantly lengthier period of exclusion.¹⁷¹

The question then is why time is used as a valuable measure in so many aspects of immigration law but deemed irrelevant when most deportation grounds are at issue¹⁷² (as well as the bars for frivolous asylum applications or the permanent waiver of due process when admitted under the VWP, or the indelible stain of criminal charges, even when dismissed or expunged). In the context of the immigration regime, time morphs depending upon the dimension of immigration law that is at issue.¹⁷³ In the context of holding noncitizens accountable for particular past acts, the notion of time is suspended indefinitely.¹⁷⁴ But in other areas of immigra-

tional and extremely unusual hardship" to the applicant's U.S.-citizen or LPR spouse, child or parent. *Id.* § 1229b(b)(1)(D).

165. *See id.* § 1229b(a) (requiring that the individual have "resided in the United States continuously for 7 years after having been admitted in any status" and not have been convicted of an aggravated felony).

166. *See id.* § 1182(h)(1)(A)(i) (giving the Attorney General the discretion to waive particular crime-based inadmissibility grounds, including aggravated felonies in certain circumstances).

167. *See supra* note 12 and accompanying text.

168. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I).

169. *Id.* § 1182(a)(9)(B)(i)(II).

170. Stumpf, *supra* note 148, at 1723.

171. *See id.*

172. *See id.* at 1712–23, 1734.

173. *See id.*

174. *See id.* at 1734–38.

tion law, time is used as both a metric and means of punishment.¹⁷⁵ Sometimes, the immigration law is even measured through a time machine whereby changes in law travel back in time and apply retroactively to deport those whose bad acts didn't even carry deportation consequences when committed.¹⁷⁶

For example, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996.¹⁷⁷ Some of its harshest provisions include instituting three- and ten- year bars respectively to re-admission for anyone who remained in the United States for six months to a year or more than a year without permission and departed;¹⁷⁸ removing judicial review of discretionary immigration decisions;¹⁷⁹ expanding the crime-based deportation grounds;¹⁸⁰ and limiting due process and statutory rights for anyone apprehended at, or near, the border.¹⁸¹ Moreover, Congress explicitly stated that many of the harshest provisions in the new law would apply retroactively.¹⁸² For example, someone could have committed a crime at a time when it carried no immigration consequences, but because Congress made the new deportation grounds retroactive, that person would now face deportation for the past act.¹⁸³ One way in which this played out was that many longtime, lawful permanent residents who left the United States to visit family after IIRIRA found themselves suddenly denied reentry and facing deportation when they presented their green cards at airports upon return, a background check having revealed a past crime that now carried deportation consequences.¹⁸⁴ In the years since 1996, the Supreme Court has ruled in nu-

175. *See id.* at 1712–23.

176. *See generally* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

177. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

178. 8 U.S.C. § 1182(a)(9)(B)(i).

179. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 303, 8 U.S.C. § 1226(e).

180. IIRIRA added four new types of crimes to the aggravated felony definition and lowered certain threshold requirements. *See id.* § 321(a), 8 U.S.C. § 1101(a)(43). For example, before IIRIRA, theft offenses and crimes of violence were aggravated felonies only if the term of imprisonment was five years or more; IIRIRA reduced the term of imprisonment provision to a one-year threshold. *See id.* § 321(a)(3).

181. IIRIRA authorizes immigration enforcement officers, rather than judges, to order the deportation of certain individuals who have been charged with inadmissibility under section 212(a)(6)(c) or section 212(a)(7) of the Immigration and Nationality Act through a process called “expedited removal.” *See id.* § 302(a), 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b) (2021).

182. *See, e.g., id.* § 321(b)–(c), 8 U.S.C. § 1101(a)(43); *see also* *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 318–19 & n.43 (2001), *partially superseded by statute*, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(5)), *as recognized in* *Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020).

183. *See* § 321(b)–(c).

184. *See* Austen Ishii, Note, *There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 *FORDHAM L. REV.* 949, 950–51 (2014); *US: 20 Years of Immigrant Abuses Under 1996 Laws, Arbitrary Detention, Fast-Track Deportation, Family Separation*, *HUM. RTS. WATCH* (Apr. 25, 2016, 8:00 AM) .

merous cases implicating the constitutionality of various provisions of IIRIRA.¹⁸⁵ While the retroactivity of certain provisions has been prohibited by the Court, it has upheld the constitutionality of retroactive deportation grounds as long as Congress makes clear its intent to do so.¹⁸⁶ Thus, not only does time stop when a noncitizen commits an act that makes them deportable, the immigration statute can also travel back further in time to render noncitizens deportable today for acts committed many years ago that were non-deportable at the time of commission.

C. THE CRIMINALIZATION OF IMMIGRANTS

Abolitionist and critical scholars are increasingly shedding light on the ways in which criminal, legal, and other systems disproportionately target people of color.¹⁸⁷ We are called upon to reimagine the carceral state and also the systems that interact with it, like the immigration system. In public discourse, immigrants are cast in extreme terms as either good or bad; victims or villains. Most notably, former President Donald Trump referred to immigrants as “bad hombres”¹⁸⁸ and “rapists and murderers” who needed to be kept out of the country at all costs.¹⁸⁹ Former President Barack Obama also relied on the dichotomy between worthy and unworthy immigrants and focused on deporting “felons, not families.”¹⁹⁰ However, as scholars like César Cuauhtémoc García Hernández have noted, felons also have families whose lives are disrupted when a family member is deported.¹⁹¹

185. For a discussion of some of these cases, see Ishii, *supra* note 184, at 970–75.

186. *See, e.g., St. Cyr*, 533 U.S. at 315–16 (“Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result. ‘Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.’” (citation omitted) (first citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 268 (1988); and then quoting *id.* at 272–273)).

187. *See, e.g.,* NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* 5 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> [<https://perma.cc/7ZWJ-5C48>].

188. *Donald Trump: Deport ‘Bad Hombres’ - Video*, *GUARDIAN* (Oct. 20, 2016, 4:46 PM),

189. Lola Méndez, *Trump Referred to Immigrants as Rapists and Murderers, Again*, *REMEZCLA* (Oct. 16, 2020, 5:57 PM), <https://remezcla.com/culture/trump-referred-immigrants-rapists-murderers-again> [<https://perma.cc/DM8H-PN9A>]; Washington Post Staff, *Donald Trump Announces a Presidential Bid*, *WASH. POST* (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [<https://perma.cc/9AQZ-JR57>] (“When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems . . . They’re bringing drugs. They’re bringing crime. They’re rapists.”).

190. President Barack Obama, *Remarks at Del Sol High School in Las Vegas, Nevada*, (Nov. 21, 2014), in 2014 *PUB. PAPERS* 1512, 1514 (“[W]e’ll keep focusing enforcement resources on actual threats to our security. But that means felons, not families.”).

191. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 103–04 (2019).

Immigration law casts all immigrants as villains, and then makes exceptions for certain discreet groups who are deemed more sympathetic because they are seen as innocent victims. For example, victims of human trafficking or domestic violence have access to particular forms of relief from deportation,¹⁹² whereas the majority of noncitizens facing removal do not have any form of relief.

Although the criminal legal system purportedly includes rehabilitation within its goals, it has become a carceral system seemingly aimed only at punishment. The United States incarcerates more than any nation in the world, with 5% of the world's population and 25% of its prisoners.¹⁹³ The disparate impact of incarceration on the African-American community has been widely studied. As reported by the Sentencing Project in 1995, nearly one in three Black men in the United States “between the ages of twenty and twenty-nine were under [the] control of the criminal justice system, either in prison or jail, on probation, or on parole.”¹⁹⁴ The exponential rise in incarceration of the African-American community is linked to the War on Drugs.¹⁹⁵

The criminalization of immigration law has similarly led to a dramatic rise in detaining immigrants, particularly immigrants of color.¹⁹⁶ The United States now detains approximately 500,000 immigrants per year with over 200 detention centers throughout the nation.¹⁹⁷ Immigrants exist at the intersection of an overly criminalized immigration regime within this broader carceral state project.

192. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, § 107(c), (e), (f), 114 Stat. 1466, 1474–80 (codified in scattered sections of 8 and 22 U.S.C.); Violence Against Women Act of 2000, Pub. L. 106-386, div. B, §§ 1512–13, 114 Stat. 1491, 1533–37 (codified in scattered sections of 8 and 42 U.S.C.). The Trafficking Victims Protection Act (TVPA) of 2000 was enacted to strengthen the ability of law enforcement agencies to investigate and prosecute serious crimes and human trafficking. See Victims of Trafficking and Violence Protection Act § 102(a), 114 Stat. at 1466 (codified at 22 U.S.C. § 7101(a)). In order to do so, the legislation allows for victim protection from deportation in the form of T and U visas. See *id.* § 107(e)(4), 114 Stat. at 1479 (codified at 8 U.S.C. § 1101(a)(15)(T)); Violence Against Women Act § 1513(b), 114 Stat. at 1534–35 (codified at 8 U.S.C. § 1101(a)(15)(U)).

193. Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 74 (2019).

194. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004) (citing THE SENT'G PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995)).

195. *Id.* at 1275. The War on Drugs has resulted in a system in which almost half of the people in federal prison are incarcerated for a drug offense—two-thirds of whom are people of color. DRUG POL'Y ALL., THE DRUG WAR, MASS INCARCERATION AND RACE 2 (2015), https://drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf [<https://perma.cc/DB3J-RRBC>]; MARC MAUER, THE SENT'G PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 1 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf> [<https://perma.cc/9DKD-746Y>].

196. See EWING, MARTÍNEZ & RUMBAUT, *supra* note 54, at 2–4, 13; JULIANA MORGAN-TROSTLE & KEXIN ZHENG, THE STATE OF BLACK IMMIGRANTS 16–18, 24–26 (2022), <https://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf> [<https://perma.cc/F9RN-N8UV>].

197. *Immigration Detention 101*, *supra* note 56.

As criminology scholars have explained, “criminal law and criminal justice institutions increasingly represent only the most visible tentacles of penal power,” with immigration enforcement and detention constituting one of the “more submerged, serpentine forms of punishment that work[s] in legally hybrid and institutionally variegated ways.”¹⁹⁸ This “shadow carceral state” includes “punishment without violation of criminal law and detention without criminal due process,” “ensnar[ing] vulnerable and racially marginalized individuals through mechanisms that, in many ways, simply presume their guilt.”¹⁹⁹

The criminalization of immigrants adversely impacts them in different ways. While crossing the border without authorization had technically been a criminal act, immigrants did not face criminal prosecutions until DHS changed its focus from voluntary repatriations of those apprehended at the border to criminal prosecutions, beginning in 2005.²⁰⁰ At that point, prosecutors began routinely charging immigrants who were apprehended crossing the border without authorization with federal criminal charges prior to initiating deportation proceedings.²⁰¹ This criminalization of immigration violations, and immigrants, is not limited to the southern border. Federal prosecutors also use criminal grounds to convict and detain immigrants who are apprehended during worksite raids and have used false Social Security numbers.²⁰² Today, the vast majority of federal criminal prosecutions in the United States are for immigration

198. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012).

199. *Id.* at 224.

200. See AM. IMMIGR. COUNCIL, *supra* note 55, at 3; *Does Administration Amnesty Harm Our Efforts to Gain and Maintain Operational Control of the Border?: Hearing Before the Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. 18–19 (2011) (statement of Michael J. Fisher, Chief of U.S. Border Patrol).

201. See Beckett & Murakawa, *supra* note 198, at 233. “8 U.S.C. § 1325 makes it a crime to unlawfully enter the United States A first offense is a misdemeanor punishable by a fine, up to six months in prison, or both.” AM. IMMIGR. COUNCIL, *supra* note 55, at 2. “8 U.S.C. § 1326 makes it a crime to unlawfully reenter, attempt to unlawfully reenter, or to be found in the United States after having been deported, ordered removed, or denied admission. This crime is punishable as a felony with a maximum sentence of two years in prison.” *Id.* However, if the individual “was previously removed after having been convicted of certain crimes,” the sentence is enhanced to “up to 10 years for a single felony conviction (other than an aggravated felony conviction) or three misdemeanor convictions involving drugs or crimes against a person, and up to 20 years for an aggravated felony conviction.” *Id.*

202. See Beckett & Murakawa, *supra* note 198, at 233. One of the most high-profile examples of this practice involved a raid by Immigration and Customs Enforcement (ICE) at a meatpacking plant in Postville, Iowa. *Id.* During that raid, ICE apprehended and detained approximately 400 workers in a makeshift detention facility at a cattle fairground. *Id.* Rather than just initiating deportation proceedings against the undocumented workers, ICE charged them all with the crimes of knowingly using false security numbers and aggravated identity theft. *Id.* ICE then pressured the workers to plead guilty to the lesser criminal charge by threatening that a not guilty plea would result in more time in jail awaiting a trial, with deportation still inevitable afterwards. *Id.* As Beckett and Murakawa point out, “[B]y bringing criminal charges to bear on what would otherwise be an administrative matter, authorities weakened the capacity of alleged immigration law violators to contest their criminal as well as their administrative conviction.” *Id.*

violations.²⁰³ While criminalization of vulnerable populations has existed for many years, the wide-scale use of it in the administrative immigration context is unique.

In the context of the criminal justice regime, there is a growing movement aimed at limiting the carceral state and addressing the inequalities inherent in the current system. For example, in 2021, Illinois became the first state to eliminate cash bail payments for jail release.²⁰⁴ A number of states have similarly passed legislation aimed at sentencing reform.²⁰⁵ Specifically with regards to marijuana-based convictions, states have acted to allow for resentencing in certain circumstances.²⁰⁶

Perhaps nowhere have the carceral reform efforts been more dramatic than in the context of juvenile offenders. For example, recent legislative reforms include raising the minimal age for adult prosecutions to eighteen years of age, incorporating alternatives to incarceration, and improving the conditions of confinement.²⁰⁷ But while there is movement to end juvenile incarceration and cash bond requirements and to reform the criminal incarceration system, there has been less progress made in limiting detention in the immigration context. In a positive move, the Biden Administration issued guidelines with articulated priorities for who

203. AM. IMMIGR. COUNCIL, *supra* note 55, at 2. Violations of 8 U.S.C. § 1325 and § 1326 (together) have become “the most prosecuted federal offenses.” *Id.* As of December 2018, 65% of all criminal prosecutions in federal court were for these two immigration entry grounds. *Id.*

204. Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html> [<https://perma.cc/7BWE-342L>]; H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021).

205. For example, California removed the one-year enhancement for prior felonies. *See* CAL. PENAL CODE § 667.5(b) (West 2021). Delaware removed geographic-based sentencing enhancements. *See* S.B. 47, 150th Gen. Assemb., Reg. Sess. (Del. 2019). In the District of Columbia, individuals that committed certain crimes before twenty-five years of age and who served fifteen years of their sentence may now petition for sentencing modification. D.C. CODE § 24-403.03(a)–(b) (West 2022).

206. For example, in California, persons who are currently serving a sentence for a conviction of marijuana offense (for an act now legalized or with a lesser sentence) may petition for resentencing or dismissal. CAL. HEALTH & SAFETY CODE § 11361.8(a) (West 2022). If the person has already completed their sentence, they can now petition for record sealing. *Id.* § 11361.8(c).

207. Pursuant to legislative reform in New York: sixteen- and seventeen-year olds who commit nonviolent crimes receive intervention- and evidence-based treatment; a new “adolescent offender” category exists for sixteen- and seventeen-year olds accused of committing a felony, who will have their cases heard in youth criminal court; and children and adolescents are no longer permitted in adult facilities or jails. Off. for Just. Initiatives, *Raise the Age*, NYCOURTS.GOV, <https://ww2.nycourts.gov/ip/oji/raisetheage.shtml#:~:text=the%20law%20will%20take%20effect,the%20Raise%20the%20Age%20legislation> [<https://perma.cc/JV62-XV82>]. In Georgia, an act to modernize juvenile justice proceedings resulted in several juvenile justice reforms, including limiting offenses eligible for detention, implementing early intervention, and providing alternatives to incarceration. *See* H.B. 242, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014). Virginia entirely removed life without parole sentences for crimes committed before the age of eighteen. *See* H.B. 35, 2020 Gen. Assemb., Reg. Sess. (Va. 2020). Arkansas, Louisiana, and North Dakota limit the use of youth detention for low-risk youth by using screening tools. *See* S.B. 152, 92d Gen. Assemb., Reg. Sess. (Ark. 2019); H.B. 158, 2019 Leg., Reg. Sess. (La. 2019); H.B. 1520, 66th Legis. Assemb., Reg. Sess. (N.D. 2019).

should be subject to detention.²⁰⁸ A few states have also passed legislation prohibiting state-run prisons from contracting with ICE to detain noncitizens facing removal.²⁰⁹ Unfortunately, however, ICE continues to detain the majority of immigrants facing removal, and prison facilities ending contracts in one region just means that the immigrants are moved to facilities further from their families and lawyers.²¹⁰ Immigration detention operates at a federal level, so until there is a change in legislation or policy at that level, the detention regime will continue to grow. Imposing a statute of limitations on deportation and evaluating past acts within the context of the noncitizen's contributions would be a starting point towards reform.

V. MOVING FORWARD: THE CASE FOR A STATUTE OF LIMITATIONS FOR DEPORTATION

A. DEPORTATION AS A PUNITIVE SANCTION WITHIN A CIVIL LAW REGIME

In analyzing the level of constitutional protections that must be afforded to noncitizens in removal proceedings, the Supreme Court has consistently characterized deportation proceedings as civil in nature, rather than criminal.²¹¹ This civil/criminal distinction has significant ramifications in the context of constitutional law. The Court's holding that deportation is not a punishment in the criminal justice sense means that there are fewer constitutional protections.²¹² For example, noncitizens in removal proceedings are not entitled to appointed counsel at no expense if they cannot afford to hire a lawyer.²¹³ Similarly, deportation grounds can be changed retroactively as the Ex Post Facto Clause does not apply.²¹⁴ Noncitizens also cannot prevail in alleging that they are be-

208. See Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Interim Guidance: Civil Immigration Enforcement and Removal Priorities 4–5 (Feb. 18, 2021), .

209. See, e.g., N.J. STAT. ANN. § 30:4-8:16 (West 2021) (prohibiting state and local entities and private correctional facilities from entering into agreements with federal immigration authorities to detain noncitizens).

210. See Emily Ryo & Ian Peacock, *Hundreds of County Jails Detained Immigrants for ICE*, THE CONVERSATION (Feb. 11, 2020, 8:53 AM), <https://theconversation.com/hundreds-of-county-jails-detained-immigrants-for-ice-128601> [<https://perma.cc/TR34-DH54>].

211. *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”); *Fong v. United States*, 149 U.S. 698, 728–29 (1893) (characterizing deportation proceedings as civil in nature).

212. See *Lopez-Mendoza*, 468 U.S. at 1038 (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”).

213. See 8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.” (emphasis added)).

214. See Morawetz, *supra* note 176, at 97–98.

ing punished twice when facing deportation after completing a criminal sentence for a conviction because the Double Jeopardy Clause is inapplicable in civil proceedings.²¹⁵

But for purposes of analyzing whether a statute of limitations should apply to deportation, the inquiry must be different. The question should not be whether the proceedings are civil or criminal in nature but rather whether deportation is a penalty, civil or otherwise. This alternate inquiry is essential because 28 U.S.C. § 2462 imposes a five-year statute of limitations on governmental actions involving civil penalties or forfeitures.²¹⁶

There are many areas of civil law that contain punitive sanctions if the law is violated. For example, state laws authorize liquidated damages and criminal sanctions for an employer who fails to comply with wage and hour laws.²¹⁷ Similarly, Title VII of the Civil Rights Act authorizes punitive damages when an employer intentionally discriminates based on a protected ground.²¹⁸ By analogy, deportation should be viewed as a punitive sanction for violating the civil immigration regulatory scheme. As such, the general five-year statute of limitations set forth at 28 U.S.C. § 2462 should apply.

The Supreme Court has addressed the question of whether a sanction should be considered a penalty for purposes of this five-year statute of limitations in the context of a Securities and Exchange Commission action for disgorgement.²¹⁹ In reversing the appellate court and holding that disgorgement constituted a penalty subject to the five-year statute of limitations, the Court explained,

[W]hether a sanction represents a penalty turns in part on “whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.” . . . [A] pecuniary sanction operates as a penalty only if it is sought “for the purpose of punishment, and to deter others from offending in like manner”—as opposed to compensating

215. See U.S. CONST. amend. V (prohibiting prosecution for substantially same crime); *Lopez-Mendoza*, 468 U.S. at 1038 (stating that deportation is purely civil and not punitive in nature); *United States v. Ursery*, 518 U.S. 267, 287–90, 289 n.3 (1996) (recognizing the presumption that defendants in civil actions are not subject to Double Jeopardy Clause).

216. 28 U.S.C. § 2462.

217. For example, under New Jersey’s Wage Theft Act, employees who prevail in proving their employer owes them wages or engaged in retaliation can recover the wages owed plus liquidated damages in an additional amount equal to up to 200% of the unpaid wages, in addition to reasonable costs and the employee’s attorneys’ fees. N.J. STAT. ANN. § 34:11-4:10 (West 2021). The statute also provides for criminal penalties in certain circumstances. *Id.* § 34:11-58.6.

218. See Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(a)(1) (“In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.”).

219. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1639, 1642 (2017).

a victim for his loss.²²⁰

Moreover, “‘sanctions frequently serve more than one purpose.’ ‘A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.’”²²¹

Deportation proceedings meet all of the criteria set forth in *Kokesh v. SEC* to be considered a penalty subject to the five-year statute of limitations. First, deportation proceedings are brought on behalf of the United States for a bad act deemed to have been perpetrated against the nation.²²² Deportation proceedings do not seek to compensate any particular individual who has been harmed.²²³ Deportation is widely seen to serve a deterrent purpose, analogous to the SEC’s motive in pursuing disgorgement as a penalty.²²⁴ Most significantly, deportation is clearly meant as a punishment, even if immigration proceedings overall are viewed as civil, rather than criminal, proceedings.²²⁵

In *Padilla v. Kentucky*, the Supreme Court explicitly described deportation as a “particularly severe ‘penalty.’”²²⁶ As Justice Stevens noted in authoring the majority opinion, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”²²⁷

Noncitizens have also had some success relying on the past administration’s racist tweets and statements to show a punitive intent to discriminate. For example, in *Ramos v. Nielsen*, the U.S. District Court for the Northern District of California enjoined DHS from implementing or enforcing the determinations to terminate Temporary Protected Status (TPS) for Sudan, Nicaragua, Haiti, and El Salvador while the case continued its way through the legal system.²²⁸ This preliminary injunction was based on the showing that the former administration was motivated by race-based animus in terminating the TPS program for nationals of these countries.²²⁹ But regardless of whether a punitive intent is explicitly stated, Justices have rightly characterized deportation as punishment

220. *Id.* at 1642 (citations omitted) (quoting *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

221. *Id.* at 1645 (citation omitted) (quoting *Austin v. United States*, 509 U.S. 602, 610, 621).

222. *Cf. id.* at 1643.

223. *Cf. id.* at 1644.

224. *Cf. id.* at 1643.

225. *Cf. id.*

226. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong v. United States*, 149 U.S. 698, 740 (1893)).

227. *Id.* at 364 (footnote omitted).

228. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018), *vacated sub nom.*, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); *see also Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1099–1100, 1131–32 (N.D. Cal. 2018) (denying the defendant’s motion to dismiss plaintiff’s equal protection claim based on showing of animus).

229. *Ramos v. Nielsen*, 336 F. Supp. 3d at 1080–81, 1100–01.

since the late 1800s.²³⁰

1. Denaturalization Proceedings

Although the Supreme Court has not ruled on whether the five-year statute of limitations for civil penalties or forfeitures applies to deportation proceedings, district and circuit courts have consistently held that it is inapplicable in the context of denaturalization proceedings. In *United States v. Donkor*, a naturalized U.S. citizen argued that the government should be barred by the five-year statute of limitations from commencing denaturalization proceedings against him.²³¹ In that case, the government initiated denaturalization proceedings because it alleged that Donkor had lied to obtain his citizenship; thus, the denaturalization was aimed at removing a benefit that never should have been awarded.²³² The court agreed with the government that denaturalization was not a punitive remedy but rather an attempt to cure a defect in the original citizenship process.²³³

Similarly, in *United States v. Multani*, the District Court for the Western District of Washington joined with multiple courts who have held that denaturalization is not a civil forfeiture or penalty.²³⁴ As the court explained, “[T]he purpose of the statute is not punitive, but, instead, merely to ‘remedy a past fraud by taking back a benefit to which an alien is not entitled.’ Further, it does not ‘impos[e] a fine, penalty, or sentence of imprisonment—only the revocation of citizenship.’”²³⁵ The court further noted,

[It] ha[d] been unable to locate, a single case applying a state Statute of Limitations to a denaturalization action. Instead, every court that ha[d] addressed the applicability of a Statute of Limitations, albeit most often in the 28 U.S.C. § 2462 context, ha[d] held that Congress’s lack of a Statute of Limitations in 8 U.S.C. § 1451(a) was intended to provide the United States leeway to bring such actions unburdened by a timeliness limitation.²³⁶

In the denaturalization context, the courts’ reasoning focuses on the government not acting to punish, but rather to cure a defect in a benefit that would not have been granted absent willful fraud on the part of the

230. See, e.g., *Fong*, 149 U.S. at 740 (Brewer, J., dissenting) (“Deportation is punishment. It involves—First an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property.”). In the same case, Justice Field described deportation as a “punishment . . . beyond all reason in its severity It is cruel and unusual.” *Id.* at 759 (Field, J., dissenting).

231. *United States v. Donkor*, 507 F. Supp. 3d 423, 426 (E.D.N.Y. 2020).

232. *Id.* at 425–26.

233. *Id.* at 429–30 (“[D]enaturalization is not punitive because its purpose is not to punish the individual but to restore the status quo and regulate the process by which the government extends citizenship.”).

234. See *United States v. Multani*, No. 2:19-cv-01789-BJR, 2021 WL 633638, at *1 (W.D. Wash. Feb. 18, 2021).

235. *Id.* at *5 (second alteration in original) (quoting *United States v. Phathey*, 943 F.3d 1277, 1279, 1281 (9th Cir. 2019)).

236. *Id.* at *3.

applicant. Arguably, the same reasoning could be applied to a noncitizen who used a fraudulent document to enter the country. But noncitizens face deportation after extended periods in the United States for a host of reasons. The vast majority of deportation grounds have nothing to do with remedial measures; rather, they are punishments for post-entry conduct.²³⁷ To give just one example, the multiple criminal deportation grounds aim to remove a noncitizen for engaging in criminal conduct in the United States.²³⁸ These post-entry, conduct-based deportation grounds are not intended to restore the status quo. Rather, they are sanctions intended to punish a wrongdoer and fit squarely within the civil enforcement statute of limitations.

2. *Deportation Proceedings*

Notwithstanding the reality that the government is seeking to punish an individual and foster deterrence of similar conduct for an alleged harm against the nation as a whole, the circuit courts consistently hold that the civil enforcement statute of limitations does not apply in deportation proceedings. For example, in *Restrepo v. Attorney General of United States*, a long-time, lawful permanent resident facing removal as an aggravated felon argued that the government was barred from initiating removal proceedings because approximately ten years had passed since his conviction.²³⁹ He relied on 28 U.S.C. § 2462, which provides that proceedings for the enforcement of “any civil fine, penalty, or forfeiture” must be commenced no later than five years from the date when the claim accrued, except as otherwise provided by law.²⁴⁰ Restrepo argued that the removal proceedings were akin to a penalty or forfeiture action and therefore limited to the five-year period set forth in 28 U.S.C. § 2462.²⁴¹ To support his assertion that deportation is a forfeiture, Restrepo relied on the Supreme Court’s decision in *Fong Haw Tan v. Phelan*.²⁴² In that case, the majority wrote, “[Removal] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.”²⁴³ However, in affirming the BIA’s determination, the Third Circuit relied upon Supreme Court and other Third Circuit jurisprudence holding that deportation is not punishment and held that there was no time limit in which the government had to take action.²⁴⁴ The Third Circuit also relied upon 8

237. See 8 U.S.C. § 1227 (setting forth the myriad of deportability grounds).

238. See *id.* § 1227(a)(2).

239. *Restrepo v. Att’y Gen. of U.S.*, 617 F.3d 787, 789 (3d Cir. 2010).

240. *Id.* at 801 (quoting 28 U.S.C. § 2462).

241. *Id.*

242. *Id.* (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

243. *Id.* (alteration in original) (citing *Fong Haw Tan*, 333 U.S. at 10).

244. *Id.* at 800–02, 802 n.23 (first quoting *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is . . . not [intended] to punish an unlawful entry[.]” (alterations in original)); then quoting *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”); and then quoting *Bufalino v. Immigr. & Naturalization Serv.*, 473 F.2d 728, 739 (3d Cir. 1973) (Adams, C.J., concurring) (noting that “deportation statutes are not penal in nature”)).

U.S.C. § 1229(d) to support its holding that the government is not bound by a statute of limitations when initiating removal proceedings.²⁴⁵

While the court held that the statute could not be interpreted to require a time limitation for deportation proceedings, it pointed out the incongruity in the lack of a statute of limitations in this case.²⁴⁶ However, the court made it clear that this was an issue for the legislature to address.²⁴⁷ The court noted that no reasonable explanation was offered for the government's failure to initiate proceedings against Restrepo "until ten years after his conviction, and eight years after the definition of 'aggravated felony' was amended to include sexual abuse of a minor."²⁴⁸ It concluded,

We find this enforcement history troubling, and it begs the question which we posed to the Attorney General at oral argument, in essence: is it not appropriate to impose some statute of limitations governing the period within which the [U.S. Department of Immigration and Custom Enforcement] may prosecute the removal of aliens convicted of aggravated felonies?²⁴⁹

In *United States ex rel. Poppovich v. Karnuth*, the government began deportation proceedings against a noncitizen based on illegal reentry, and the court noted that the action was not time-barred.²⁵⁰ Without further reasoning, the district court held that there was no statute of limitations on deportation because it did not exist in the 1924 Immigration Act.²⁵¹

3. *Rescission of Adjustment of Status*

Another issue before the courts has been whether the five-year statute of limitations for rescission of adjustment of status applies to deportation proceedings. Pursuant to 8 U.S.C. § 1256(a), the government must act within five years to rescind an improperly granted adjustment of status.²⁵² While there has been some disagreement amongst the circuits as to

245. *Id.* at 801. In the context of encouraging expeditious commencement of removal proceedings, Congress specified that "[n]othing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1229(d)(2).

246. *Restrepo*, 617 F.3d at 801 (noting the court's "discomfiture with the prolonged delay in initiation of removal proceedings").

247. *Id.*

248. *Id.*

249. *Id.*

250. *United States ex rel. Poppovich v. Karnuth*, 25 F. Supp. 883, 883–84 (W.D.N.Y. 1938).

251. *Id.* at 884.

252. 8 U.S.C. § 1256(a) ("If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made.").

whether the limitations period for rescission of adjustment of status also limits deportation proceedings that flow from the same underlying fraud, the majority of circuits have held that the limitation period is solely applicable to rescission of adjustment of status.²⁵³ In *Biggs v. Immigration and Naturalization Service*, the noncitizen argued that the government was barred from removing him because of the five-year limitation on rescission of status.²⁵⁴ The Ninth Circuit rejected this claim, again asserting that there is no statute of limitations for deportation.²⁵⁵ The Eighth Circuit followed suit in *Kim v Holder*.²⁵⁶ However, the Third Circuit took a different approach in *Garcia v. Attorney General of the United States*.²⁵⁷ In that case, the noncitizen had procured lawful permanent resident status through a willful misrepresentation as to the identity of her mother.²⁵⁸ More than five years passed and then Garcia applied for naturalization.²⁵⁹ At that point, the government became aware of the underlying fraud and began deportation proceedings against her.²⁶⁰ The Third Circuit reversed the BIA's determination and held that the same five-year bar that precluded the government from moving to rescind Garcia's lawful permanent residence must also bar the government from initiating deportation proceedings.²⁶¹ The Third Circuit relied on its prior ruling in *Bamidele v. Immigration and Naturalization Service* that, "the running of the limitation period bars the rescission of Bamidele's permanent resident status and, in the absence of the commission of any other offense, thereby bars initiation of deportation proceedings in this case."²⁶² However, in *Malik v. Attorney General of the United States*, the Third Circuit clarified its view that the removal proceedings must be linked to rescission for adjustment of status based on fraud in order for the statute of limitations to apply to both proceedings.²⁶³

Perhaps the incongruity between the significance of statutes of limitation in the criminal context and the complete lack of such statutes of limitation in the immigration context can best be seen in situations where the

253. See *Biggs v. Immigr. & Naturalization Serv.*, 55 F.3d 1398, 1401 (9th Cir. 1995); *Kim v. Holder*, 560 F.3d 833, 837–38 (8th Cir. 2009); *Asika v. Ashcroft*, 362 F.3d 264, 269–271 (4th Cir. 2004).

254. *Biggs*, 55 F.3d at 1401.

255. *Id.*

256. See *Kim*, 560 F.3d at 837–38. The Fourth Circuit has similarly held that the statute of limitations for rescission of adjustment of status is inapplicable to deportation proceedings. See *Asika*, 362 F.3d at 271.

257. *Garcia v. Att'y Gen. of the U.S.*, 553 F.3d 724 (3d Cir. 2009).

258. *Id.* at 726.

259. *Id.*

260. *Id.*

261. *Id.* at 728–29.

262. *Id.* at 726 (quoting *Bamidele v. Immigr. & Naturalization Serv.*, 99 F.3d 557, 563 (3d Cir. 1996)).

263. *Malik v. Att'y Gen. of the U.S.*, 659 F.3d 253, 257 (3d Cir. 2011) ("The import of *Garcia* and *Bamidele* is that the time bar in § 1256(a) applies to both rescission and removal proceedings initiated based on a fraudulent adjustment of status.").

same act gives rise to both deportation and criminal prosecution.²⁶⁴ However, Congress has specified that prosecution for any of these crimes must be brought within a set period of time. For example, if the government wants to prosecute someone for misusing evidence of citizenship or naturalization or if someone uses a false statement in applying for or using a passport, or procuring citizenship unlawfully, it must do so within ten years.²⁶⁵ In contrast, the government can seek to deport a noncitizen for those same acts at any time.

Of course, Congress is free to establish separate statutes of limitations and has arguably chosen to except deportation from the general statute of limitations that otherwise applies to civil enforcement. But seeing how neatly deportation fits within the existing five-year statute of limitations is helpful for thinking about why deportation is treated so differently than other civil enforcement penalties. By refusing to acknowledge the punitive nature of deportation, both the judicial and legislative branches of government have carved out and perpetuated this exceptional treatment for immigrants facing deportation.

B. LACHES-BASED DEFENSES ARE EXTREMELY LIMITED IN IMMIGRATION LAW

Perhaps it could be argued that there are other avenues available for exercising discretion and compassion to ameliorate the harshness and inequities of an unforgiving law. The immigration law used to provide for suspension of deportation for undocumented immigrants facing deportation.²⁶⁶ In order to qualify for this discretionary relief, an immigrant needed to have seven years of continuous presence in the United States and show that their deportation would cause extreme hardship to the alien or to a U.S. citizen or LPR immediate family member.²⁶⁷ But Congress repealed this provision in 1996 and replaced it with a form of relief that is much more stringent.²⁶⁸ Under the new cancellation of removal provision, the immigrant must show that they have been in the United States continuously for at least ten years before the start of removal proceedings.²⁶⁹ The standard for hardship was raised from “extreme” to “exceptional and extremely unusual.”²⁷⁰ Finally, whereas in the prior suspension of deportation provision the hardship could be to the immi-

264. See 8 U.S.C. § 1227(a)(2) (for examples of criminal offenses that give rise to both prosecution and deportation).

265. See 18 U.S.C. § 3291 (“No person shall be prosecuted, tried, or punished for violation of any provision of sections 1423 to 1428, inclusive, of chapter 69 and sections 1541 to 1544, inclusive, of chapter 75 of title 18 of the United States Code, or for conspiracy to violate any of such sections, unless the indictment is found or the information is instituted within ten years after the commission of the offense.”); *id.* §§ 1423–1426, 1542–1544.

266. See 8 C.F.R. § 240.65(a)–(b) (2021).

267. *Id.* § 240.65(b).

268. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 240A, 8 U.S.C. § 1229b.

269. *Id.* § 1229b(b)(1)(A).

270. Compare 8 C.F.R. § 240.65(b)(3) (“extreme hardship”), with 8 U.S.C. § 1229b(b)(1)(D) (“exceptional and extremely unusual hardship”).

grant themselves, now it must be to a qualifying citizen or LPR family member.²⁷¹

For exceptionally deserving cases, there is the possibility of seeking a private bill to avoid deportation.²⁷² This used to be quite common. In fact, “From the 77th session of Congress in 1942 until the 107th session in 2003, 60,601 immigration related private bills were introduced.”²⁷³ But this is no longer the case. Today, private immigration bills are rarely passed.²⁷⁴ Moreover, while it had been common practice for ICE to grant a stay of removal to last throughout the lengthy legislative process, it changed its policy so it is now nearly impossible to obtain a stay of removal that would last while a bill makes its way through Congress.²⁷⁵

Because so many of the prior avenues for exercising discretion have been removed, it is more important to reinstitute a statute of limitations. It would also be consistent with prioritizing government resources as it doesn’t make sense to spend resources deporting immigrants that have already been in the United States for a long period of time.

271. Compare 8 C.F.R. § 240.65(b)(3) (“The alien’s deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”), with 8 U.S.C. § 1229b(b)(1)(D) (requiring that the noncitizen “establish[] that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).

272. See Anna Marie Gallagher, *Remedies of Last Resort: Private Bills and Pardons*, 06-02 IMMIGR. BRIEFINGS 1, 1 (2006).

273. *Id.*

274. *The Legal and Practical Effects of Private Immigration Legislation and Recent Policy Changes*, FED’N OF AM. SCIENTISTS PROJECT ON GOV’T SECRECY (June 6, 2017), [<https://perma.cc/REG8-878W>] (noting that, only a few of the nearly 400 private immigration bills proposed in Congress within the last ten years have been passed).

275. See Letter from Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, to Sen. Charles E. Grassley, Chairman of Comm. on the Judiciary (May 5, 2017), <https://www.durbin.senate.gov/imo/media/doc/ICE%20Response%20to%20Letter%20on%20Private%20Immigration%20Relief%20Bills.pdf> [<https://perma.cc/4AU9-ZAVJ>]. ICE’s new policy sets forth that:

1. ICE will consider and issue a stay of removal only if the Chair of the full Committee or Subcommittee expressly makes a written request that ICE stay the beneficiary’s removal independent of any request for an investigative report. . . .
2. ICE will not grant a beneficiary more than one stay of removal through the private immigration bill process. As such, ICE will not [consider] subsequent requests for a stay of removal from the Chair of the Committee or Subcommittee
3. The duration of a stay of removal will be limited to 6 months. However, the ICE Director, at his or her discretion, can provide a 1-time 90-day extension . . . if specifically requested by the Chair of the Committee or Subcommittee and, if necessary, to accommodate extenuating circumstances.
4. ICE will take appropriate action, including the removal of the alien-beneficiary, in cases where ICE receives derogatory information about an alien-beneficiary after issuing a stay of removal.

Id.

C. AFTER A CERTAIN AMOUNT OF TIME PASSES, THE PUNISHMENT OF DEPORTATION IS NOT PROPORTIONAL TO MOST GROUNDS FOR DEPORTATION

After a certain length of time, the *punishment* of deportation is completely disproportional to the violation of unlawful entry.²⁷⁶ While there are a myriad of deportation grounds, length of time in the United States is one yard stick by which proportionality can be measured. The longer a person lives in the United States, the more disproportional it is to deport them for any one act. The concept of proportionality animates many areas of law. To provide just a few examples, proportionality is used as a guiding principle of constitutional law and “requires that government intrusions on freedoms be justified, that greater intrusions have stronger justifications, and that punishments reflect the relative severity of the offense.”²⁷⁷ In administrative law, the principle of proportionality means that “when the government acts, the means it chooses should be well-adapted to achieve the ends it is pursuing.”²⁷⁸ Proportionality is also a core principle in international law, which specifies that the legality of an action depends on the balance between the objective and the means and methods used as well as the consequences of the action.²⁷⁹ In immigration law, for purposes of asylum adjudication, proportionality is used to determine whether a foreign country’s punishment for a crime is a legitimate prosecution or a pretextual persecutory act.²⁸⁰ If the punishment is disproportional to the criminal act, it is deemed to be persecution and would not subject the applicant to the bar to asylum protection for those with criminal records.²⁸¹

The argument that deportation after a certain length of time is disproportional to the immigration violation is perhaps strongest when the violation is unlawful entry. As Joseph Carens has noted,

As irregular migrants become more and more settled, their membership in society grows in moral importance, and the fact that they settled without authorization becomes correspondingly less relevant. At some point a threshold is crossed, and they acquire a moral claim to have their actual social membership legally recognized.²⁸²

276. See, e.g., JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 12 (2010).

277. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3094, 3104–10 (2015).

278. JUD MATHEWS, PROPORTIONALITY REVIEW IN ADMINISTRATIVE LAW, in COMPARATIVE ADMINISTRATIVE LAW 405, 405 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017).

279. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 391, 407 (1993).

280. See *Asylum Manual*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law> [https://perma.cc/75NR-KAFG].

281. See *id.*

282. CARENS, *supra* note 276, at 18. Carens places great weight on length of time in the country, noting that “[n]othing in my argument denies a government’s moral and legal right to prevent entry in the first place and to deport those who settle without authoriza-

In addition to deportation for an immigration violation or minor crime being disproportional after many years in the United States, it is also immoral. In the criminal justice context, “[m]ost states recognize that the passage of time matters morally, at least for less-serious criminal violations.”²⁸³ “If a person has not been arrested and charged within a specified period (often three to five years), legal authorities” are barred from taking action.²⁸⁴ States have enacted these limitations because:

[I]t is not right to make people live indefinitely with a threat of serious legal consequences hanging over their heads for some long-past action, except for the most serious sorts of offenses. Keeping the threat in place for a long period serves no useful deterrent function and causes great harm to the individual—more than is warranted by the original offense. If we are prepared to let time erode the state’s power to pursue actual crimes, it makes even more sense to let time erode the power of the state to pursue immigration violations, which are not normally treated as crimes and should not be viewed as crimes.²⁸⁵

D. LESSONS FROM AUSTRALIA: A CAUTIONARY TALE

Australia is arguably the only large Western refugee-receiving nation with harsher immigration laws than the United States.²⁸⁶ However, even Australia has a ten-year statute of limitations on deportation of permanent residents with criminal convictions.²⁸⁷ Nevertheless, Australia has increasingly found ways to work around this time limitation. For example, it amended the Immigration Act in 1992 to include a visa cancellation ground.²⁸⁸ This visa cancellation ground was intended to allow a discretionary ability to refuse entry to an immigrant who was deemed to be undesirable (rather than a vehicle for removing residents in Australia).²⁸⁹ However, the provision also allows for cancellation of a previously issued visa if an immigrant were deemed to be of poor moral character.²⁹⁰ “Unlike the criminal deportation power, there [is] no exemption for long-term permanent residents.”²⁹¹ It “was not intended to supplant or circumvent the criminal deportation power.”²⁹² But over time, with the in-

tion, so long as these expulsions take place at a relatively early stage of residence.” *Id.* at 27.

283. Joseph H. Carens, *The Case for Amnesty*, BOS. REV. (June 27, 2012), ; *see also* DOYLE, *supra* note 27, at 25–30.

284. Carens, *supra* note 283; *see also* DOYLE, *supra* note 27, at 25–30.

285. Carens, *supra* note 283.

286. *See* Claire Loughan, *Australia’s Harsh Immigration Policy*, THE DIPLOMAT (Sept. 1, 2019), <https://thediplomat.com/2019/08/australias-harsh-immigration-policy> [https://perma.cc/7KG4-U3Z5].

287. *See* Khanh Hoang & Sudrishti Reich, *Managing Crime Through Migration Law in Australia and the United States: A Comparative Analysis*, 5 COMPAR. MIGRATION STUD. 12 (2017).

288. *Id.*

289. *See id.*

290. *Id.*

291. *Id.*

292. *Id.*

creasing merger of immigration and criminal law, “the executive made a shift in its administration of the two powers: increasingly [relying on] the section 501 character cancellation power . . . to achieve the removal of non-citizens deemed to fail the character test,” and diminishing its use of the criminal deportation power.²⁹³ “The criminal deportation power, with its inbuilt exemption for permanent residents of more than [ten] years residency, is now very rarely used.”²⁹⁴

This suggests that adding a statute of limitations to any one deportability ground might lead to DHS’s use of alternate grounds to deport. For this reason, it’s necessary to have a statute of limitations that applies to deportation, rather than any one deportation ground.

VI. PROPOSALS FOR REFORM

There are different ways of conceptualizing how a statute of limitations for deportation might be implemented, depending upon the primary moral and policy goals to be effectuated. If the goal is to ensure that noncitizens are protected from deportation after having lived in the United States for a particular length of time, then one set statute of limitations could apply to all removal grounds. For example, if the time period were ten years, DHS would be barred from initiating removal proceedings against any noncitizen who had resided in the United States for ten or more years. Under this model, if a noncitizen committed a deportable crime after ten years presence in the United States, they would face criminal punishment for the crime, but the government would not be able to initiate deportation proceedings.²⁹⁵

Critics might characterize an across-the-board statute of limitations as more of an amnesty than a statute of limitations. This model would effectively immunize noncitizens from deportation after a certain number of years, regardless of their conduct, making it unlikely to gain substantial legislative support. While this statute of limitations would effectuate the goal of ensuring that people are able to move on with their lives and not have the prospect of deportation hanging over them, there would be cases where the government was unaware of the person’s unlawful presence. In these cases, the government would not have had an opportunity to initiate removal proceedings earlier, and it could be said that the noncitizen’s surreptitious conduct resulted in an unfair advantage. This could be seen as interfering with the nation’s right to decide who be-

293. *Id.*

294. *Id.*

295. Ten years is the statute of limitations period that was proposed by the President’s Commission in 1953. *See* PRESIDENT’S COMM’N ON IMMIGR. & NATURALIZATION, *supra* note 28, at 198. It is also the time period Congress uses for cancellation of removal, *see* 8 U.S.C. § 1229b(b)(1), and it is the statute of limitations period under the Trafficking Victims Protection Act, *see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 221, 18 U.S.C. § 1595(c)(1). But five years is also used in the Immigration and Nationality Act for rescission of adjustment of status, *see* 8 U.S.C. § 1256(a), and for the civil enforcement statute, *see* 28 U.S.C. § 2462. Reform bills have proposed both five and ten years. *See supra* notes 77–84 and accompanying text.

comes a member of society. If a noncitizen cannot be deported after a certain period of time, some might argue that the noncitizen would be free to break the law in the future without fear of deportation. However, the noncitizen would never be free to break the law without facing criminal penalties. The noncitizen would not be in a more advantageous situation than a citizen. If a noncitizen were to commit a crime after the statute of limitations period had run, they would be subject to the criminal law enforcement regime, just like anyone else.

Also, the ability to remain undetected in the United States has been a metric Congress has utilized in the past. For example, the Immigration Reform and Control Act (IRCA) of 1986 provided an amnesty pathway to permanent residency and citizenship for those noncitizens who had remained undetected for a particular number of years.²⁹⁶ In order to qualify for residency, the noncitizen had to prove that they had resided unlawfully in the United States for at least four years.²⁹⁷ Deferred Action for Childhood Arrivals (DACA)²⁹⁸ and cancellation of removal²⁹⁹ are other examples of ways in which remaining undetected for a certain length of time benefits the noncitizen. Therefore, attaching a statute of limitations to a set number of years that the noncitizen has resided in the United States would be in keeping with past reform efforts and other areas of immigration law.

296. Immigration Reform and Control Act (IRCA) of 1986 § 201, 8 U.S.C. § 1255a(a)(2)(A).

297. *See id.*

298. On June 15, 2012, DHS announced that it would not deport certain undocumented youth who came to the United States as children. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/sites/default/files/publications/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/9ZRQ-7DTD>]. DACA allowed eligible youth and young adults to seek temporary permission to stay in the U.S. called "deferred action." *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA> [<https://perma.cc/LE84-UZHC>]. In order to establish eligibility for DACA, applicants had to show they (1) "[w]ere under 31 years of age as of June 15, 2012;" (2) came to the United States while under the age of sixteen; (3) continuously resided in the United States from June 15, 2007, to June 15, 2012; (4) entered the United States without inspection before June 15, 2012, or had their lawful immigration status expire as of June 15, 2012; (5) "[w]ere physically present in the United States on June 15, 2012, and at the time of making [the] request for consideration of deferred action with [ICE]"; (6) "[we]re currently in school, ha[d] graduated . . . from high school, ha[d] obtained a . . . [GED] certificate, or [had been] honorably discharged" from the Coast Guard or armed forces; and (7) "[had] not been convicted of a felony [offense], significant misdemeanor, or three or more other misdemeanors and d[id] not otherwise pose a threat to national security or public safety." *Id.* A federal district court held the program unlawful in 2021, although an appeal is pending at the time of this Article's publication. *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021) ("DHS violated the APA with the creation of DACA and its continued operation.").

299. Cancellation of removal for nonpermanent residents provides a defense to removal proceedings and permanent residency if an individual can show that they have resided continuously in the U.S. for at least ten years; have good moral character; have not been convicted of certain crimes; and their deportation would cause exceptional and extremely unusual hardship to their LPR or U.S. citizen spouse, child, or parent. 8 U.S.C. § 1229b(b)(1).

However, in order to address some of these concerns, Congress could instead enact two different statute of limitation periods depending upon whether the government was aware, or could have easily become aware, of the noncitizen's deportability. For example, in many cases, the government is fully aware of a noncitizen's deportable status. This situation arises when a noncitizen commits any of a myriad of acts resulting in technical deportability, but the government chooses not to act to commence removal proceedings.³⁰⁰ But in other situations, noncitizens may enter the United States without detection and remain undetected for many years. In these situations, the government has not had an opportunity to decide whether to initiate removal proceedings.

In order to address these concerns, I propose two statutes of limitations. For cases in which the government is aware that the individual is deportable, a five-year statute of limitations would apply. For example, this would apply when an individual has committed a crime that gives rise to deportation grounds or when the law changes retroactively and a past crime would render someone deportable. Another example would be if an individual has falsely claimed U.S. citizenship for a purpose or benefit under the INA.³⁰¹ DHS would have five years from the claim of U.S. citizenship to initiate deportation proceedings. This would also apply to noncitizens who were admitted on visas and overstayed (the majority of the undocumented population).³⁰² Since anyone who was lawfully admitted would have their information entered into the DHS system, DHS would be aware of anyone who overstays a visa and would be on notice of deportability, triggering the five-year statute of limitations. Even if DHS was not actually aware of the individual's deportability status, the doctrine of constructive knowledge could be used to infer knowledge and start the clock for purposes of the statute of limitations.³⁰³

300. Section 1227 sets forth the deportability grounds. Just a few examples of situations in which the government would be aware of a person's deportability include: persons who were lawfully admitted on visas but overstayed their period of authorized stay, 8 U.S.C. § 1227(a)(1)(B); persons who violate the terms of a nonimmigrant visa, *id.*; criminal grounds, *id.* § 1227(a)(2); and drug abusers, *id.* § 1227(a)(2)(B).

301. *See* 8 U.S.C. § 1227(a)(3)(D).

302. Mark Hugo Lopez, Jeffrey S. Passel & D'Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population> [<https://perma.cc/79N7-8AML>].

303. In *United States v. Are*, the district court applied the constructive knowledge doctrine to start the statute of limitations for purposes of a criminal prosecution for being present in the United States after being deported, pursuant to 8 U.S.C. § 1326(a)(2). *United States v. Are*, 431 F. Supp. 2d 842, 843–45 (N.D. Ill. 2006), *rev'd*, 498 F.3d 460, (7th Cir. 2007). Because more than five years had passed from the government's constructive knowledge of the defendant's unlawful presence, the court held that the government was time-barred from bringing an indictment. *Id.* at 846. However, the Seventh Circuit reversed, holding that the provision at issue involved an ongoing violation and therefore the constructive knowledge doctrine was inapplicable. *United States v. Are*, 498 F.3d 460, 466–47 (7th Cir. 2007). As the Seventh Circuit explained, "The 'found in' variation of the § 1326(a)(2) crime is a continuing offense; the statute of limitations generally does not begin to run for continuing offenses until the illegal conduct is terminated." *Id.* at 462. However, as the Seventh Circuit noted, there is a circuit split on this issue. *Id.* at 466 n.2.

In cases in which the government was unaware of the individual's deportability status, the statute of limitations would be ten years. For example, if an individual entered the country without inspection, DHS would have ten years to initiate deportation proceedings based upon that act.³⁰⁴ Having this longer ten-year statute of limitations would address concerns that it would be unfair to the government for a statute of limitations to run while it was unaware of the individual's deportability. By providing for an additional five years in such circumstances, this change would allow more time for the government to become aware of the individual's unlawful status. While there would still be cases in which the government would be unaware and the statute of limitations would run out, this ten-year period attempts to strike the right balance between the government's desire for time and the individual's need for protection from deportation and stability after ten years. If the individual has not done anything to bring attention to themselves in ten years, there is no reason to deport them.

This proposal assumes that the statute of limitations begins to run at the moment the noncitizen enters the country, giving the government five or ten years to discover the unlawful presence and initiate removal proceedings, depending upon the circumstances as set forth above. If the government finds no reason to apprehend the noncitizen in five or ten years respectively, then that demonstrates that the person poses no danger to society and there is no reason to initiate removal proceedings. However, a counterargument might be that this would encourage noncitizens to hide out, making them less likely to seek medical care or report crimes, creating negative societal consequences. Notably however, this situation would be no different than that which currently exists without a statute of limitations.

Among the approaches to analyzing statute of limitations questions in "found in" cases under 8 U.S.C. § 1326(a)(2), the Second Circuit rejected the continuing offense interpretation and adopted a "constructive discovery" rule instead when "the deportee reenters by surreptitious border crossing or using fake documents at the border." *Id.* (citing *United States v. Rivera-Ventura*, 72 F.3d 277, 281-82 (2d Cir. 1995) ("[T]he 'found in' offense is not a continuing offense but where deportee reenters unlawfully, the crime 'is not complete until the authorities . . . know, or with the exercise of diligence typical of law enforcement authorities could have discovered, the illegality of his presence.'")). In contrast, the Third Circuit rejected the continuing offense interpretation in place of "an 'actual discovery' rule for cases in which there is no record of when the deportee reentered." *Id.* (citing *United States v. DiSantillo*, 615 F.2d 128, 137 (3d Cir. 1980) (If "the entry was surreptitious and not through an official port of entry, the alien is 'found' when his presence is first noted by the immigration authorities.")). The Fifth, Eighth, and Eleventh Circuits, without addressing whether the offense is a continuing one, have held that "a previously deported alien is 'found in' the United States when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities." *Id.* (first quoting *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); then citing *United States v. Clarke*, 312 F.3d 1343, 1347-48 (11th Cir. 2002); and then citing *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994)).

304. See 8 U.S.C. § 1182(a)(6).

Immigrants' rights advocates might also have concerns with my proposal, albeit for markedly different reasons. From an advocate's perspective, it's essential to explore the potential for unintended consequences. Along these lines, if DHS knows that it has a five- or ten-year statute of limitations for removal, this could incentivize the agency to more aggressively pursue noncitizens for removal, rather than be barred from acting if an issue arises in the future. But that scenario assumes that DHS has the resources and capacity to remove all noncitizens whose presence is unauthorized. In reality, DHS discretion and prioritization have long been essential tools in immigration enforcement. Notwithstanding that the Trump Administration moved away from this past practice and engaged in heightened numbers of deportations,³⁰⁵ it is not feasible for DHS to initiate removal proceedings against all noncitizens who are not authorized to be in the United States.³⁰⁶ The Biden Administration has issued regulations with clear guidelines as to who to prioritize for removal.³⁰⁷

Advocating for a statute of limitations on deportation is intended to correct an inequity in the law and to bring immigration law more into conformity with the existing statutes of limitations in civil, criminal, and administrative law regimes. It would by no means be a substitute for the desperately needed comprehensive immigration reform. Even if noncitizens were not subject to deportation after a certain number of years, they would still be living without lawful immigration status and thus excluded from the full protection of the law. For example, undocumented immigrants are not entitled to purchase health insurance through the exchange under the Affordable Care Act,³⁰⁸ and they did not qualify for the stimulus payments that helped so many members of the community survive financially through the COVID-19 pandemic.³⁰⁹

Certainly, a more modest proposal would be to attach a statute of limitations to particular deportability grounds. For example, a lawful permanent resident who committed multiple crimes involving moral turpitude would be deportable only if the government initiated deportation proceedings within a particular amount of time.³¹⁰ As a practical matter though, in light of the increasing criminalization of immigration law and

305. John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [https://perma.cc/WG5T-8WXG].

306. See Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Guidelines for the Enforcement of Civil Immigration Law 2 (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [https://perma.cc/R7HP-2RT3].

307. See Johnson Memorandum, *supra* note 208.

308. *Immigrants and the Affordable Care Act (ACA)*, NAT'L IMMIGR. L. CTR. (Jan. 2014), <https://www.nilc.org/issues/health-care/immigrantsher> [https://perma.cc/EMX8-BDPP].

309. See Arijeta Lajka, *Immigrants Without Social Security Numbers Are Not Eligible for Stimulus Checks*, AP NEWS (Mar. 11, 2021), <https://perma.cc/9XZX-9E7J>.

310. Section 1227 presently authorizes deportation for a noncitizen who "is convicted of two or more crimes involving moral turpitude" "at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(ii).

heightened use of detention, noncitizens are now ushered through a seamless path from arrest to deportation.³¹¹

As noted above, the question arises as to what happens to noncitizens who cannot be deported. They would still be without lawful immigration status or full membership in society. As a temporary measure, the government could exercise its existing discretion to allow for deferred action and employment authorization in such cases. But ultimately, adding a statute of limitations back into the immigration law only addresses one aspect of a much larger problem. Comprehensive immigration reform is needed in order to provide lawful immigration status for the millions of noncitizens with long-standing ties to this nation.

With respect to the lifetime bar on immigration benefits for anyone who ever submitted a frivolous asylum application, my proposed reforms would reduce this bar to five years. Barring someone who submitted a fraudulent asylum application from seeking immigration benefits in the future is akin to a penalty and should be governed by the five-year bar for civil penalties or forfeitures. If a person has been found to have submitted a frivolous asylum application, that person would be known to the government, and in all likelihood, deportable. After five years, if DHS hasn't moved to initiate deportation proceedings, the statute of limitations on deportation would attach and the frivolousness bar would be lifted.³¹²

The waiver of due process for individuals that enter through the VWP would also be limited to five years. When an individual is admitted to the United States through the VWP, even though they do not have a visa, their identifying information is entered into DHS's system. For a period of five years after the ninety-day VWP admission ends, the individual would face the bars that attach to those who enter via the VWP. But after five years, if DHS has not moved to deport the individual, they would be in the same situation as someone who entered with a visa and overstayed. Some might argue that doing away with the lifetime ban for due process undermines the VWP system. The idea behind the VWP is that the individual receives the benefit of being able to enter the United States without having to secure a visa in exchange for waiving certain rights. However, this would still be the exchange, just not for a lifetime. For five years, the individual who enters via the VWP has exchanged due process rights for the ease of admission without a visa.

Finally, as for the judges who rely on dismissed charges to deny bond, this should also be limited to five years. Again, if five years have passed

311. *See generally* RANDY CAPPS, MUZAFFAR CHISHTI, JULIA GELATT, JESSICA BOLTER & ARIEL G. RUIZ SOTO, *MIGRATION POL'Y INST., REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP* (2018), <https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport-FINAL-WEB.pfd> [<https://perma.cc/G99R-GF2K>].

312. While addressing the lifetime bar for aggravated felons is beyond the scope of this Article, it is another area that needs to be addressed. Just as there is movement to ameliorate some of the barriers that felons face upon reentry to society, the lifetime bar to reentering the United States once convicted of an aggravated felony should also be ameliorated.

since charges were dismissed, it should bear no weight in terms of determining danger to the community.

VII. CONCLUSION

Statutes of limitations are deeply embedded in our criminal, civil, and administrative legal regimes. Until 1952, a statute of limitations existed under immigration law. At that time, in the midst of the Red Scare and a general climate of fear, Congress overrode President Truman's veto to enact an extremely punitive immigration regime that, *inter alia*, removed the statute of limitations on deportation. Immigration law has become increasingly punitive and criminalized over the years, making the absence of a statute of limitations even more incongruous with other areas of law. Even within the immigration regime, time is used to measure an individual's worthiness for inclusion and the length of enforced periods of exclusion from the nation. It is time to amend the immigration law to restore a statute of limitations and ensure that no one is judged by one lone act plucked from the broader context of family ties and membership in society that comes with the passage of time.

