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Andrew Tae-Hyun Kim
Syracuse University College of Law

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DEPORTATION DEADLINE

ANDREW TAE-HYUN KIM*

ABSTRACT

Deadlines regulate nearly all facets of life. In U.S. law, deadlines control the timeliness of a claim in the forms of statutes of limitations and common law doctrines such as laches. In nearly all areas of the law, whether involving claims brought by private actors or the government, and in both criminal and civil contexts, an expiration date cuts off a plaintiff's right to assert a claim. No such deadline exists, however, for immigration enforcement actions. The U.S. government can deport immigrants for offenses after decades have passed. As a result, millions of long-term, otherwise law-abiding and productive individuals participating and residing in communities across this nation live under an indefinite threat of deportation for conduct that may have happened decades ago. This Article exposes and examines this procedural anomaly between immigration and non-immigration law, which is yet another aspect of U.S. immigration law that makes it exceptional precisely because of the subject it regulates—noncitizens. In this Article, I frame the argument for nuanced deportation deadlines by drawing on comparative insights from other areas of the law, where statutes of limitations represent the legal norm, and import these insights into the immigration enforcement context. I locate the precedent for a deportation deadline in the early immigration statutes enacted at the turn

* Associate Professor of Law, Syracuse University College of Law. J.D. Harvard Law School; B.A. Duke University. For insightful comments and helpful conversations, I thank Rakesh Anand, Roxana Bacon, Todd Berger, Keith Bybee, Shubha Ghosh, Mary Ann Glendon, Lee Ann Lockridge, April Stockfleet, Juliet Stumpf, Rick Su, Heidi Thompson, and participants at the 2017 International Meeting on Law and Society in Mexico City, Mexico. Elizabeth Snyder (Class of 2018) and Shannon McGlew (Class of 2017) provided exceptional research assistance. Finally, I thank the staff of the *Washington University Law Review* for their excellent editorial assistance.

of the century and in the historical remnants of that approach in the traces of mercy that animate the current immigration statute. Finally, I outline how a statute of limitations could be realized in the deportation context, and, in the process, propose time limitations on deportations as an important strategy for integrating long-term undocumented immigrants into U.S. society.

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INTRODUCTION

When Jose Didiel Munoz entered the United States unlawfully from Guatemala with his mother, he was only one year old.[1] He had resided in the United States since then.[2] He attended school here.[3] He graduated from high school.[4] He was otherwise law-abiding.[5] In addition to his mother, his family included a step-father, a half-brother, and a half-sister, all living in the United States.[6] He did not know his biological father in Guatemala, nor any other family there.[7] After his eighteenth birthday, he attempted to bring himself into compliance with the law and applied for asylum.[8] On his application, he stated that he wished that his mother would have filed asylum for him earlier but that he finally wanted to "take care of his situation as an undocumented alien."[9]

The immigration authorities denied his asylum application and began deportation proceedings against him for being an "alien present in the United States without having been admitted or paroled."[10] He did not qualify for any available forms of relief, including cancellation of removal relief. Though he was in the United States for at least ten years and possessed good moral character—the first two prerequisites for cancellation relief—the immigration judge concluded that his removal would not result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident parent, spouse, or child since his mother was not a lawful permanent resident or citizen of the United States.[11] Even though his stepfather was a U.S. citizen, because Jose was eighteen years old at the time that his mother married, his stepfather was not a "parent" within the statutory definition.[12] Thus, the immigration judge ordered his deportation.[13]

Jose's story is not uncommon. Millions of hardworking, tax-paying, otherwise law-abiding long-term residents in the United States live under an indefinite threat of deportation. Immigrants like Jose, who entered

1. Munoz v. Ashcroft, 339 F.3d 950, 953 (9th Cir. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 959.
6. *Id.* at 953.
7. *Id.*
8. *Id*.
9. *Id.*
10. *Id.*; Immigration and Nationality Act of 1952 [hereinafter INA] § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012).
11. *Munoz*, 339 F.3d at 953.
12. *Id.* at 953–54.
13. *Id.* at 954.

without inspection but have since become contributing members of their communities and have spent decades building a life for themselves in the United States, are deportable because their initial entry makes them perpetually unlawfully present. Some immigrants may immigrate lawfully but overstay their visas and become unlawfully present, while others become deportable for the commission of offenses as minor as petty theft. For each of these immigrants, government enforcement can come at any time and in perpetuity because of the lack of a statutory deadline for deportations.

That the federal government has—and should have—the authority to exclude or deport noncitizens from its borders is not legally in question or altogether exceptional. According to the U.S. Supreme Court, Congress's power to exclude or deport noncitizens is inherent in the very notion of a sovereign state.[14] What is exceptional is that the government's legal authority to bring an enforcement claim against an immigrant has no expiration date. There are no time limitations for deportations. In contrast, deadlines exist in almost all areas of law, including actions in contracts, torts, property, criminal law, and administrative law.[15] Deadlines for bringing suit have long been a part of the common law in the form of the laches doctrine that punishes a plaintiff's unreasonable delay.[16] Legislatures routinely pass similar deadlines in the form of statutes of limitations and statutes of repose that specify the time period in which a claim must be brought. If filed even a day beyond the specified time period, otherwise meritorious claims are

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14. In *Chae Chan Ping v. United States*, the Court stated:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

130 U.S. 581, 609 (1889). *See also* Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893) ("The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested."). *But see* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–79 (1987) (critiquing plenary power doctrine by arguing that it developed based on "misplaced reliance on decisions supporting propositions of much greater modesty"); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 18 (2007) (arguing that deportation law should be viewed along more "mainstream constitutional norms," not just as an "adjunct to sovereignty").

15. *See generally Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) (providing broad overview of the law governing limitations actions).

16. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 28 (2d ed. 1948); 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(4) (2d ed. 1993).

rejected. Deadlines exist at both the state and federal levels.[17] Deadlines exist in legal systems around the world and are not peculiar to the U.S. legal system.[18] Deadlines can be traced back to the Romans.[19] They have stood the test of time and will likely be with us in the future.

While such time limitations have come to be more commonly associated with, and gained wider acceptance in, actions between private entities,[20] similar deadlines regulate enforcement actions by the government. The vast majority of criminal prosecutions have an expiration date, even for serious felonies.[21] Similar time limitations exist in civil enforcement proceedings, to which immigration enforcements belong. For example, under 28 U.S.C. § 2462, the general statute of limitations that governs 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.[22] Interpreting this statute in the context of a civil enforcement action brought by the Securities and Exchange Commission against a private party, the U.S. Supreme Court recently constrained that window further by holding that the clock begins to run from the date of the wrongful action, not from the date of discovery.[23] The lack of an end date by which the government must enforce the immigration laws and conclude a deportation action has devastating implications for millions of immigrants who live in perpetual fear without legal status in the United States. They live in liminal legal status and must endure indefinitely the attendant harms that accompany their legal uncertainty.

While scholars like T. Alexander Aleinikoff and Mae Ngai have argued for a statute of limitations for deportations in the popular media,[24] this Article explores the topic in greater depth. Indeed, though scholars have devoted ample attention to the substantive dimensions of deportation law

17. *Developments in the Law: Statutes of Limitations*, *supra* note 15, at 1180, 1191.

18. *Id.* at 1178–79 (discussing the availability of limitations actions in civil law jurisdictions including France, Germany, and Switzerland).

19. *Id.* at 1178.

20. Common examples include a patient's tort claim against a doctor that was filed too late due to delayed discovery of an injury and a delayed claim in a property dispute. *See, e.g.*, Shearin v. Lloyd, 98 S.E.2d 508, 509–10 (N.C. 1957); Smiley v. Thomas, 246 S.W.2d 419, 422 (Ark. 1952).

21. *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 603, 635–36 (1954). The time period is usually one to three years for misdemeanors and longer for felonies. *Id*. Only the most serious crimes, such as murder, have no limitations period. *Id*.

22. 28 U.S.C. § 2462 (2012).

23. Gabelli v. S.E.C., 568 U.S. 442, 453–54 (2013).

24. T. Aleinikoff, *Illegal Employers*, AM. PROSPECT (Dec. 19, 2001), https://perma.cc/73KZ-BVMZ; Mae M. Ngai, *We Need a Deportation Deadline*, WASH. POST (June 14, 2005), https://perma.cc/BTH5-NU7G.

and policy,[25] fewer scholars have focused on this procedural dimension.[26] In this Article, I prioritize this procedural anomaly and its consequences on the lives of undocumented immigrants. In Section I, I place this procedural anomaly in context by examining critical aspects of immigration law that have become unmoored from legal norms. In Section II, drawing on comparative insights from criminal law, tort law, and administrative law, among others, I consider the rationales for time limitations that have been articulated in non-immigration contexts and import them into the immigration deportation context. I conclude that these rationales, including promoting the defendant's repose, reducing the costs of uncertainty, and protecting the integrity of the legal process, apply with equal force to the immigration context. In Section III, I locate the precedent for a deportation deadline in the early immigration statutes enacted at the turn of the century and in the historical remnants of that approach in the traces of mercy that animate the current immigration statute. In Section IV, I outline how a statute of limitations could be realized in the immigration context. I present three real deportation cases involving long-term residents who were deported but could have benefited from the deportation deadline I propose. These three cases, which concern unlawful entry, overstay of a visa, and the commission of a deportable offense, place valid concerns with deportation deadlines in context to allow for a fruitful examination of a range of issues with implementing a deportation deadline: the difficulty of applying a deadline to a surreptitious event, the categorization of unlawful presence as a continuing violation, a worry that deadlines undermine deterrence, and

25. *See, e.g.*, Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301, 1302, 1307 (2011) (identifying the gravity of stakes and liberty interests at issue in deportation proceedings to argue for greater constitutional protections); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1689 (2009) (proposing the introduction of proportionality norms into immigration law to mitigate the harshness of deportations for relatively low value offenses); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006) (showing how discretionary elements of deportation policy can reduce the legal status of lawfully admitted noncitizens); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1167, 1213–14 (2006) (considering the impact of deportations on children's rights and family unity); Jaqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1801, 1823 (2010) (documenting the psychological, social, and economic disruptions that deportations pose for deportees and their families); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 56–57 (2007) (focusing on lawful permanent residents to show the devastating impact of deportation on the deportee, families, and the federal detention system that requires mandatory detention in some cases).

26. *See, e.g.*, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1745–48 (2011) (considering arguments for and against the revival of time limitations on deportability grounds); Maurice A. Roberts, *Grounds of Deportation: Statute of Limitations and Clarification of the Nature of Deportation*, *in* IN DEFENSE OF THE ALIEN 55, 59-60 (1980) (articulating the historical basis for a statute of limitations for deportations).

replacing flexible discretion with firm deadlines. I argue that a nuanced deportation deadline is not only feasible, but should be one, among many, strategies for integrating long-term undocumented immigrants into U.S. society.

I. IMMIGRATION LAW AS CONCEPTUAL OUTLIER

A. Substantive Incongruity

Immigration law is exceptional. At its most basic, immigration law regulates the movement of persons. It concerns the ability of non-U.S. citizens to enter and remain in the United States either temporarily as non-immigrants or permanently as immigrants. Immigration law implicates other areas of the law, including constitutional law, international law, and criminal law. Yet, due to the particular subject it regulates, the application to certain immigrants of customary legal principles in these areas of the law yields exceptional results.[27] As Gerald Neuman has put it, immigrants are "strangers to the Constitution."[28] Immigrants seeking to be admitted into the United States have virtually no rights guaranteed by the U.S. Constitution. Over a century ago, the Supreme Court stated that "[o]ver no conceivable subject is the legislative power of Congress more complete."[29] Since then, the Court has either deferred to Congress or refused altogether to review federal statutes concerning noncitizens for compliance with the Constitution's substantive and procedural requirements under what has become known as the "plenary power doctrine,"[30] even when Congress has relied on classifications that would be constitutionally problematic if applied to citizens, such as race,[31] alienage,[32] gender,[33] and legitimacy.[34]

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27. The following examples are meant to be illustrative, not exhaustive. For a comprehensive study of immigration exceptionalism, see generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (advocating for a model of immigration exceptionalism that considers rights, federalism, and separation of powers dimensions as a whole).

28. *See generally* GERALD L. NEWMAN, STRANGERS TO THE CONSTITUTION—IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (developing the idea of immigrants as "strangers" to the Constitution).

29. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

30. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1–2 (1984).

31. Chae Chan Ping v. United States, 130 U.S. 581, 581–91 (1889) (race and alienage); Fong Yue Ting v. United States, 149 U.S. 698, 698–704 (1893) (same); Ekiu v. United States, 142 U.S. 651, 651–57 (1892) (same).

32. *Chae Chan Ping,* 130 U.S. at 581–91.

33. Fiallo v. Bell, 430 U.S. 787, 791–92 (1977) (gender and legitimacy).

34. *Id.*

Immigration law and policy also violate norms in international law. The international legal obligations of the United States under both the United Nations Convention and Protocol Relating to the Status of Refugees, to which the United States is a signatory, and the 1980 Refugee Act, bar the United States from returning a refugee back to a place of persecution on account of several categories.[35] Yet, in *Sale v. Haitian Centers Council, Inc.*, the Court approved a U.S. executive order that permitted the interdiction of Haitians, many of whom were fleeing persecution, in international waters and returning them back to Haiti in contravention of U.S. treaty obligations and international law.[36]

The same holds true for criminal law and procedure. The intersection between it and immigration law has become so relevant in the last few decades that scholars have coined a new name for it. "Crimmigration"[37] focuses on the emerging trend of importing criminal enforcement techniques into immigration law.[38] With the increased visibility of the undocumented immigrant population within the last two decades, increased attention has been given to the security and safety concerns posed by "illegal immigrants." This prompted Congress to enact a flurry of legislation that has expanded the categories of inadmissibility and deportation-triggering crimes. Of particular importance has been the growing number of crimes deemed to be "aggravated felonies."[39] When first introduced as a deportability ground, the category included only the most serious crimes, such as murder and trafficking of drugs or firearms.[40] Currently, the "aggravated felony" category in immigration law encompasses crimes, like certain theft charges, that would be considered misdemeanors under state criminal law.[41] There is no corollary for this broad grouping in our criminal

35. G.A. Res. 2198 (XXI), 1951 Convention Relating to the Status of Refugees, art. 33(1) (Dec. 14, 1950); Refugee Act of 1980, 8 U.S.C. § 1231 (b)(3)(A) (2012).

36. 509 U.S. 155, 187–88 (1993); Maria Louisa Sepulveda, Note, *Barring Extraterritorial Protection for Haitian Refugees Interdicted on the High Seas:* Sale v. Haitian Centers Council, Inc., 44 CATH. U. L. REV. 321, 331–32 (1995).

37. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

38. *See, e.g.*, Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 324 (2007). *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015) (providing a comprehensive discussion of the salient features and development of crimmigration law).

39. INA § 237(a)(2)(iii), 8 U.S.C. § 1227(a)(2)(iii) (2012).

40. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70.

41. *See* United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1880–81 (2006) (considering the overbroad definition of "aggravated felony" and its harsh consequences).

laws. Yet the classification of an offense as an "aggravated felony" under immigration law yields disproportionately harsh consequences, as it precludes virtually all forms of relief, including cancellation of removal, voluntary departure, adjustment of status, and asylum and withholding of removal.[42] Moreover, with the advent of law enforcement partnership programs like the Priority Enforcement Program, and its predecessor, Secure Communities,[43] in which local, state, and federal enforcement agencies share biometric information of criminal defendants with the immigration enforcement agencies, there has been an increase in the apprehension, detention, and deportation of immigrants for relatively minor crimes, like misdemeanor or low-value theft offenses.[44]

Certainly, the United States must enforce its immigration laws. What many scholars have objected to, however, is the importation of harsh criminal enforcement practices and techniques into immigration law in a manner they see as disproportionate and "asymmetric."[45] While such harsh criminal enforcement practices and techniques have worked their way into immigration law, the procedural protections given to criminal defendants under the Constitution have not. Notwithstanding the increased criminalization of immigration law, the violation of immigration law is a civil offense for which constitutional protections in criminal procedure do not attach.[46] Despite the punitive rationales underlying deportations, the Supreme Court has said that deportations are not punishment.[47] This means that the usual constitutional protections, including the Sixth Amendment's right to counsel and trial by jury, the Fifth Amendment's prohibition against double jeopardy and privilege against self-incrimination, and Article I, Section 10's prohibition against ex post facto laws, do not attach to deportation proceedings.[48]

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42. Chacón, *supra* note 41, at 1845–46; Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30 ARIZ. ATT'Y 15, 31–32 (2004).

43. Secure Communities operated between 2008 and 2014. It was briefly replaced by the Priority Enforcement Program and reactivated in 2017. *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities (last visited Feb. 13, 2017).

44. AM. IMMIGRATION COUNCIL, IMMIGRATION DETAINERS UNDER THE PRIORITY ENFORCEMENT PROGRAM, 1, 4 (Jan. 25, 2017), https://perma.cc/2HZE-SZ6Z; *see also* Ana Gonzalez-Barrera & Jens Manual Krogstad, *U.S. Immigrant Deportations Declined in 2014, but Remain Near Record High*, PEW RES. CTR. (Aug. 31, 2016), https://perma.cc/H4ZA-QFVK (finding the Obama Administration deported 2.4 million unauthorized immigrants from 2009–14, including a record number of 435,000 in 2013).

45. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007).

46. Markovitz, *supra* note 25, at 1302.

47. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

48. Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952).

B. Procedural Incongruity

These substantive distinctions presage an important procedural distinction that makes immigration law comparatively exceptional. In nearly every area of the law, both common and enacted laws impose deadlines by which the person asserting a legal claim against another must file. In the common law, the doctrine of laches has served for centuries as an important defense to an equitable action that bars relief for a plaintiff's unreasonable and excessive delay in asserting a claim.[49] Meaning "lax" in Latin, the concept may have its origins in Roman law.[50] The doctrine appeared in English courts at equity during the seventeenth century, and was imported into American jurisprudence by Justice Story in 1815.[51] Since then, it has become a recognized and accepted affirmative defense played out in a variety of legal areas, including real property, torts, contracts, admiralty law, and international law.

Legislatures routinely enact similar deadlines in the form of statutes of limitations and statutes of repose that specify the time period during which a claim must be brought.[52] Like the doctrine of laches, statutes of limitations can be traced back to Roman law as limitations on actions in property.[53] English law, as early as 1236, also created deadlines governing when real property actions could be filed.[54] In American law, statutes of limitations began to be codified in civil and criminal procedure as early as the nineteenth century.[55] Additionally, each state has general statutes of limitations that regulate almost all areas of the law. The common feature among them is that the statutes impose a fixed time by which a plaintiff must file suit to recover her interest. The time period varies depending on jurisdiction and the nature of the action. For tort claims, such as personal injury cases, the limitations period is usually two to three years.[56] For

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49. Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 BYU L. REV. 917, 942 (1992).

50. Uisdean R. Vass & Xia Chen, *The Admiralty Doctrine of Laches*, 53 LA. L. REV. 495, 497 (1992) (providing a historical account in the context of admiralty law).

51. *Id*.; Brown v. Jones, 4 F. Cas. 404, 406 (C.C.D. Mass. 1815).

52. Heriot, *supra* note 49, at 954.

53. *Developments in the Law: Statutes of Limitations*, *supra* note 15, at 1117.

54. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 81 (2d ed. 1898).

55. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 455 (1997) (discussing California's 1850 Statute and its Code of Civil Procedure of 1872).

56. *See, e.g.*, N.J. STAT. ANN. § 2A:14-2.2 (West 2017) (two years in New Jersey); N.Y. C.P.L.R. § 214 (McKinney 2016) (three years in New York).

property disputes, the limitations period is usually between two[57] to ten[58] years. For actions in contract, the limitations period is usually between five to ten years.[59]

Although statutes of limitations have long been recognized as an important affirmative defense in disputes between two private parties, they have also long been accepted in disputes between a private party and the government. For example, in the criminal context, statutes of limitations impose temporal deadlines on the government to bring an enforcement action against an individual. Except for particular crimes the law considers the most heinous, such as murder,[60] treason,[61] and certain war crimes,[62] the vast majority of criminal prosecutions have an expiration date. For misdemeanors, it is usually one to three years.[63] For felonies, the time period is longer before a prosecutor is no longer permitted to bring charges.[64]

Similar deadlines exist in civil enforcement proceedings brought by the government.[65] In addition to bringing criminal enforcement actions against taxpayers, the Internal Revenue Service (IRS) routinely brings civil penalty assessments for violations of federal tax laws. Important time limits regulate the government's ability to collect taxes and fines, and they vary depending on the severity of the tax offense. For example, the IRS has three years from the date of the tax return to assess taxes.[66] It has ten years from the date of tax liability to collect back taxes.[67] For civil penalty assessments for violation of Title 31's money laundering laws, the IRS has six years to assess a penalty from the date of the transaction that forms the basis of the penalty.[68] In the area of securities enforcement, the Securities and Exchange Commission cannot bring a civil enforcement action against private parties outside of the five-year statute of limitations period.[69] A unanimous U.S.

57. OKLA. STAT. tit. 12, § 93(5) (2016) ("action for the forcible entry and detention or forcible detention only of real property").
58. 9 R.I. GEN. LAWS § 9-1-13 (2016).
59. VA. CODE ANN. § 8.01-246 (2016) (five years in Virginia); 735 ILL. COMP. STAT. 5/13-206 (2014) (ten years in Illinois). *But see* DEL. CODE ANN. tit. 10, § 8106 (three years in Delaware).
60. *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, *supra* note 21, at 652.
61. *Id.*
62. *Id.* at 636 (noting that the Code of Military Justice dispenses with limitation periods for certain crimes incident to war).
63. *Id.* at 635–36.
64. *Id.* at 635.
65. The following examples are meant to be illustrative, not exhaustive.
66. 26 U.S.C. § 6501(a) (2012).
67. 26 U.S.C. § 6502(a)(1) (2012).
68. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 95133.2 (2009).
69. 28 U.S.C. § 2462 (2012).

Supreme Court recently constrained that window further in *Gabelli v. S.E.C.* by holding that the clock begins to run from the date of the wrongful action, not from the date of discovery.[70]

In one central area of immigration law, deadlines are conspicuously absent, as there is no general statute of limitations governing deportations of individuals.[71] This is despite the fact that deportation proceedings are civil enforcement proceedings like certain enforcement proceedings for securities or tax violations.[72] What this means for millions of long-term undocumented immigrants is that they remain under an indefinite threat of deportation, even decades after their commission of a deportable offense.

II. REASONS FOR A LIMITATIONS PERIOD IN THE LAW

In Section II, I analyze the traditional arguments for statutes of limitations that have been articulated in non-immigration contexts. The reasons for having them include the promotion of repose; the reduction in the costs of uncertainty that accompany indefinite liability; the promotion of a plaintiff's diligence, and alternatively, the punishment of a plaintiff's delay; the protection of the integrity of the legal process from litigating stale claims; and the positive effects from the prompt enforcement of the law that a time limitation incentivizes. I import these rationales [73] into the immigration context and argue that these reasons apply with equal force in the immigration enforcement context.

A. Promotion of Repose: Alleviate Hardship to the Defendant

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[74]

We are aware, of course, that statutes of limitation result in hardship

70. 568 U.S. 442, 453–54 (2013).

71. There are several exclusion and deportation statutes that have time limits, but these are the exceptions rather than the rule. *See infra* Section II.B. for a fuller discussion of these time limits.

72. Markovitz, *supra* note 25, at 1302.

73. For a comprehensive articulation, discussion, and synthesis of the various rationales for statutes of limitations, see Ochoa & Wistrich, *supra* note 55, at 460.

74. United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal quotation marks and citation omitted).

> to plaintiffs in some cases. Nevertheless, we must also be cognizant that the statutes are designed to protect defendants . . . from bearing the burden of defending against stale claims regardless of whether liability is eventually established.[75]

An important reason for having a time deadline for enforcing a legal claim is a moral one. Even if the defendant is guilty of a crime or an offense, an indefinite threat of criminal or civil liability is morally problematic in most circumstances. The law, in various contexts and jurisdictions, has recognized that, at some point in time, even highly culpable defendants deserve to be free of civil or criminal liability.[76] After a certain point, all but the most culpable defendants deserve to start with a clean slate, or deserve to be "forgiven," as an indefinite threat of litigation for past conduct is unfair to a defendant. Such moral concerns are all the more heightened if the putative defendant is ultimately not a wrongdoer in the first place.

For some, a time deadline on the enforcement of legal claims can be traced back hundreds of years to the concept of amnesty,[77] when the sovereign, in an act of pardon, forgave transgressions of its subjects periodically, often coinciding with a new event such as the transfer of power from one king to another.[78] The new event literally wiped the slate clean for the wrongdoer. For others, the concept is entrenched in the idea of forgiveness and mercy in the Christian tradition.[79] The idea of forgiving past transgressions for some assumes that the transgressor can change and has reformed his or her ways due to the passage of time. It is on this basis that the transgressor should be forgiven. For still others, the concept of forgiveness is less concerned with time's effect on the transgressor and more with its effect on the forgiver.[80] Forgiving the transgressor does not depend on whether the transgressor has reformed or is even capable of doing so, because the purpose of forgiveness is to free the mind of the forgiver. This exercise of mercy enables the forgiver to move past the wrongdoing.

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75. Steele v. United States, 599 F.2d 823, 828–29 (7th Cir. 1979) (citations omitted).

76. *See, e.g.*, Lien v. Beehner, 453 F. Supp. 604, 605 (N.D.N.Y. 1978) (finding time limitation on plaintiff's medical malpractice cause of action had expired despite public's unawareness that the doctors were government employees, immunizing them from liability after two years under the Federal Tort Claims Act).

77. Ochoa & Wistrich, *supra* note, 55, at 460.

78. *Id.* at n.34.

79. *See generally* ANTHONY BASH, FORGIVENESS AND CHRISTIAN ETHICS (2007) (exploring the various dimensions of forgiveness within the Christian tradition).

80. *See* MARTHA NUSSBAUM, ANGER AND FORGIVENESS 10 (2016).

Although the role of mercy in the law has plenty of critics,[81] the concepts of mercy and forgiveness have long animated immigration law.[82] The immigration reform debates of the last few years concerning potential legalization programs and a path to citizenship for long-term residents who are undocumented have employed the language of mercy, with proponents of such programs stating that past transgressions should be "forgiven" and opponents characterizing them as unlawful "amnesty."[83] Indeed, the moral and humanitarian considerations play a significant role at all stages of the immigration process, from admission to removal.[84] A central value animating U.S. immigration law is the unification of families. As an example, the law allocates the most number of visas for family immigration.[85] "Immediate relatives," a category that includes parents, spouses, and children of U.S. citizens, are exempt from the numerical immigration quota altogether,[86] which means that there is no wait time for U.S. citizens to be united with certain family members.[87] The lack of quotas for certain family members reflects the value that U.S. immigration law places on family unity. Relatedly, the lack of a wait time is a recognition of the pain that accompanies family separation. The United States also admits a limited number of persons for "humanitarian" purposes, giving aid to victims of natural disasters,[88] persecution,[89] human trafficking,[90] and domestic abuse.[91] These programs, while also meeting other non-humanitarian ends, institutionalize and promote at the admissions stage moral values like compassion and the alleviation of suffering.

At the prosecution and removal stages, the moral and humanitarian dimensions of the way immigration law is practiced are even more salient. Because the size of the undocumented immigrant population in the U.S. has outpaced both the government's political will and its resources to deport,

81. *See* Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1591–92 (2014) (drawing attention to the debate among scholars who have expressed that the concept of mercy in the context of criminal law is incongruous with notions of justice).

82. *See generally id.* (comprehensive discussion of the role of mercy in immigration law).

83. *Id.* at 1602.

84. *Id.* at 1570–90.

85. *See* INA § 203(a), 8 U.S.C. § 1153(a) (2012).

86. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

87. There is usually a short administrative wait period of about six months, but there are no quotas or lines. *Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 15, 2017), https://www.uscis.gov/family/family-us-citizens.

88. INA § 244(b)(1)(B)(i), 8 U.S.C. § 1254a(b)(1)(B)(i) (2012).

89. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012) (asylum).

90. INA § 101(a)(15)(T)(i), 8 U.S.C. § 1101(a)(15)(T)(i) (2012) (T visas); INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i) (2012) (U visas).

91. INA § 204(a)(II)(CC)(ccc), 8 U.S.C. § 1154(a)(II)(CC)(ccc) (2012).

the Department of Homeland Security (DHS) must necessarily prioritize the classes of persons on which it focuses its enforcement efforts. Although such decisions are subject to the discretion of each individual officer, the agency has issued guidelines that favorable discretionary authority should be exercised for certain classes of individuals, including minors and elderly individuals; pregnant and nursing women; victims of domestic violence, trafficking, or other serious crimes; individuals who suffer from a serious mental or physical disability; and individuals with serious health conditions.[92] Such priorities and practices can be described as compassionate, or as one scholar put it, "merciful."[93]

Even if DHS decides to pursue enforcement proceedings, favorable discretion for humanitarian reasons can also occur at the adjudication stage, when the noncitizen appears before the immigration judge at a removal proceeding. Here, the noncitizen has usually conceded removability and the primary question becomes whether there is an available form of relief. Congress has authorized the Attorney General, now the Secretary of DHS, to confer various forms of removal relief, and that discretionary authority is exercised by immigration judges.[94] The forms of relief include more limited forms that can defer or delay deportations,[95] as well as more lasting forms that can cancel deportations for noncitizens who have committed deportable offenses. Cancellation of removal is an important lasting form of relief through which Congress has given discretionary authority to immigration judges to allow certain deportable noncitizens to stay in the United States permanently.[96] Immigration judges can cancel removal if removal would result in extreme hardship to certain U.S. citizen or lawful permanent resident family members, and if the person to be removed is deserving of favorable exercise of discretion.[97] It is a humanitarian measure because it acknowledges and seeks to prevent the particular hardship entailed by separation of families.

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92. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to U.S. Immigration & Customs Enforcement (ICE) Personnel (Jun. 17, 2011), https://perma.cc/DAN4-W44K.

93. Tirres, *supra* note 81, at 1578–79. A compassionate exercise of prosecutorial discretion can range from decisions made by individual officers to the more systemic attempt to standardize the discretionary decision-making process, such as the Obama Administration's deferred action programs. There, favorable discretionary authority was exercised for two more classes of individuals—certain children and certain parents of children—for the sake of preserving family unity and humanitarian reasons. *Id.* at 1566, 1578–79, 1581.

94. *See, e.g.*, INA § 240(b), 8 U.S.C. § 1229a(b) (2012).

95. *See* INA § 240B, 8 U.S.C. § 1229c (2012) (voluntary departure).

96. INA §§ 240A, 240B, 8 U.S.C. §§ 1229a, 1229c (2012).

97. INA § 240A(b), 8 U.S.C. § 1229b(b)(1) (2012).

According to Allison Brownell Tirres, these humanitarian dimensions of cancellation of removal relief have their roots in what she calls similar "merciful gestures" in criminal law.[98] For example, the Supreme Court in 1956 equated the remedy of suspension of deportation with "probation or suspension of criminal sentence [that] comes as an act of grace and cannot be demanded as a right,"[99] and courts and scholars have continued to equate deportation relief with concepts of leniency and pardon due to the particular hardships that accompany deportation.[100] Richard Boswell has characterized the various deportation relief measures as "forms of amnesty in all but name,"[101] and Daniel Kanstroom has argued that discretionary forms of deportation relief are the "last repository of mercy in an otherwise merciless system."[102]

Indeed, as I show in Section III of this Article, a statute of limitations on deportations was historically available as an important form of relief[103] precisely because of the particular hardships that accompany deportations. Stated differently, the disruption of a defendant's repose by a late-filing government plaintiff in the immigration context presents particular hardships to, and humanitarian considerations for, an immigrant defendant. The indefinite threat of legal enforcement has particular moral resonance and relevance in the immigration context because civil enforcement means deportation and the separation of families. The disruption of repose can come in one of two ways. The first type concerns the initiation of deportation proceedings long after the commission of the deportable act. Without a limitations period, the time between the deportable act and deportation is theoretically indefinite. A common example would be an immigrant who commits the deportable offense of entry without inspection into the United States, and after decades of building an otherwise law-abiding life in the United States can be deported therefrom.[104] The second type of disruption of repose occurs when a long-term permanent resident, who has spent a majority of his life in the United States, commits an offense that triggers deportation and the government initiates deportation

98. Tirres, *supra* note 81, at 1582.
99. Jay v. Boyd, 351 U.S. 345, 354 (1956) (internal quotation marks and citation omitted).
100. Tirres, *supra* note 81, at 1584.
101. Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 177 (2010).
102. KANSTROOM, *supra* note 14, at 230.
103. *See infra* Section III; *see also* Tirres, *supra* note 81, at 1584.
104. *See, e.g.*, INA § 237(a)(1), 8 U.S.C. § 1227(a)(1) (2012).

proceedings against that person. Both situations are common and have been well documented.[105]

The consequences of such action have been equally well documented.[106] For the individual, it can mean permanent exile from family and friends in the United States.[107] It can mean a return to a country that is foreign, to which the deported immigrant has little to no connection—familial, cultural, linguistic, or otherwise. The devastation from deportations also extends to family, friends, and business interests in the United States. If the deported immigrant is a parent who has children, the children must either follow the parent, be left to the care of extended family, or be placed into foster care. The children of the deported immigrant are often U.S. citizens by virtue of having been born in the United States.[108] According to one report, at least 5100 children are in foster care as a result of deportation or detention of a parent.[109] This places financial burdens on the system, which burdens taxpayers.

In many contexts, the law privileges the stability and value of familial connections. Indeed, the promotion of family reunification is arguably the primary objective of our immigration visa program.[110] In the area of family law, for example, the law protects the establishment of the relationship between a child and an adoptive parent by making revocations of such relationships difficult after the passage of time.[111] The moral argument for promoting repose that undergirds the rationale for statutes of limitations has particular force in the immigration context due to the extraordinary consequence that not having a limitation period entails—separation of families and permanent exile from a life built in the United States.

B. Costs of Uncertainty

"[T]he . . . defendant[] [has an] interest[] . . . in planning for the future

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105. *See, e.g.*, William M. Welch, *Deportations Tear Some Families Apart*, USA TODAY (Dec. 5, 2011), https://perma.cc/P3DJ-6XUE (deportation after unlawful entry); Daniel Kanstroom, *Deportation Laws Destroy Lives*, SALON (July 15, 2012), https://perma.cc/8F9S-CQVT (deportation after having committed a deportable offense).

106. Welch, *supra* note 105; KANSTROOM, *supra* note 105.

107. For some deportability grounds, the wait may be as short as five to ten years, but for removal based on other deportability grounds such as an aggravated felony, the exile is permanent. POST DEPORTATION HUMAN RIGHTS PROJECT, RETURNING TO THE UNITED STATES AFTER DEPORTATION: A GUIDE TO ASSESS YOUR ELIGIBILITY 8 (2014), https://perma.cc/9VUG-UMT8.

108. KANSTROOM, *supra* note 105.

109. Gretchen Gavett, *Study: 5,100 Kids in Foster Care After Parents Deported*, FRONTLINE (Nov. 3, 2011), https://perma.cc/V3ES-UVTV.

110. The most number of visas are available for families. *See* INA § 203, 8 U.S.C. § 1153 (2012).

111. *See, e.g.*, Unwed Father v. Unwed Mother, 379 N.E.2d 467, 471–73 (Ind. App. 1978).

without the uncertainty inherent in potential liability."[112]

"Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."[113]

1. To the Individual: Effects of Living in Liminal Status

The costs of uncertainty on the life of the individual have been documented in a variety of contexts.[114] Individuals are risk-averse, and this characteristic in an uncertain world provides an explanation for many observed phenomena.[115] For example, such uncertainty generates opportunity costs that would be decreased in a more certain world.[116] These opportunity costs in the legal context include the reluctance of the individual facing the threat of lawsuit to engage in a business or personal transaction until the lawsuit is resolved.[117] For this reason, the law has eschewed uncertainty by instituting the various limitations doctrines that allow even highly culpable defendants to be able to plan for their futures by allocating their resources in the most optimal way for long periods of time.[118]

While the costs of uncertainty generated by an impending lawsuit affect all potential defendants, for undocumented immigrants, uncertainty means living under the threat of deportation and the attendant consequences of living a life of fear and hiding in liminal legal status.[119] The particular legal uncertainty experienced by a class of nearly eleven million people in the United States has been the result of years of uneven enforcement, selective

112. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982).

113. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987) (quoting Wilson v. Garcia, 471 U.S. 261, 275 n.34 (1985)).

114. *See, e.g.*, Erzo F.P. Luttmer & Andrew A. Samwick, *The Welfare Cost of Perceived Policy Uncertainty: Evidence from Social Security*, CATO INST. (Apr. 2016), https://perma.cc/37RY-EM2T; *see also* Julie Beck, *How Uncertainty Fuels Anxiety*, ATLANTIC (Mar. 18, 2015), https://perma.cc/MVH7-YQTW.

115. Uri Gneezy, John A List & George Wu, *The Uncertainty Effect: When Risky Prospect is Valued Less than Its Worst Possible Outcome*, 121 Q. J. ECON. 1283, 1283 (2006).

116. Ochoa & Wistrich, *supra* note 55, at 466.

117. *Id.*

118. *Id.*; *see also* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 672 (1986) ("A sound system of rights resolves the claims of ownership early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption.").

119. The idea of legal liminality has been associated with the work of Cecilia Menjívar, who used the concept to describe a kind of legal instability of Salvadoran and Guatemalan immigrants who move between lawful and unlawful statuses. Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1002–03 (2006); *see also* Julia Preston & Jennifer Medina, *Immigrants Who Came to U.S. as Children Fear Deportation Under Trump*, N.Y. TIMES (Nov. 19, 2016), https://www.nytimes.com/2016/11/20/us/immigrants-donald-trump-daca.html?_r=0.

enforcement, and under-enforcement by the U.S. government that sees undocumented immigrants as both unlawful lawbreakers who should be deported and as necessary contributors to the U.S. economy.[120] Beginning as early as the turn of the twentieth century, the United States had a need for a seasonal labor force, and the government complied with demands of employers who preferred the hiring of a temporary, disposable, and largely unauthorized workforce that was not subject to labor law protections.[121] It did so by under-enforcing or selectively enforcing the immigration laws[122] to meet the needs of employers and consumers who wanted lower prices made possible by cheap labor. That practice continues today, and it has contributed to the growth of a large undocumented population. Even if there was the political will to deport every undocumented immigrant, it would be unrealistic to try to remove all undocumented persons in the United States due to diminished resources at the agency.[123]

Moreover, because the decision to enforce is subject to the agency's discretion, and there is little transparency concerning how such decisions are made, it is all the more unpredictable and destabilizing for undocumented immigrants.[124] Operating in a world of scarce resources, DHS must prioritize which cases merit prosecution, and it exercises discretionary authority at each step of the removal process, from prosecution, to adjudication, to the execution of a removal order. Understandably, the government only proceeds on cases it deems to be high priority. For the others, the likelihood of removal is slight, though a change in policy or resources could theoretically lead to removal even for the low-priority cases. But since these decisions are made by agency officials behind closed doors, there is little transparency concerning just how such decisions

120. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2050–51 (2008).

121. *Id.* at 2049–50.

122. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 56–90 (2005).

123. *See* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 610–11 (2013) (discussing agency under-resourcing issue). Immigration and Customs Enforcement's budget for the 2016 fiscal year is $6 billion. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2016 115 (2016), https://perma.cc/MR62-WQTG. The cost to apprehend, detain, and remove 11.3 million persons would require a budget of $114 billion. Philip E. Wolgin, *What Would it Cost to Deport 11.3 Million Unauthorized Immigrants?*, CTR. FOR AM. PROGRESS (Aug. 18, 2015), https://perma.cc/D8HY-7L2Y.

124. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

are made.[125] Moreover, these decisions are judicially unreviewable.[126] As a result, it is difficult to know how such discretion is being exercised, and many scholars have questioned the lack of uniformity in this discretionary decision-making.[127]

Although the government exercises its prosecutorial discretion on low-priority cases usually by inaction, in some cases, the government gives an affirmative grant through a process called deferred action.[128] For deferred-action cases, the legal standard exercised in discretionary decision-making has been more transparent. For example, the agency has published policy statements that offer guidance on the criteria used to separate a high-priority case from a low-priority one.[129] More recently, the Obama Administration's deferred action programs of Deferred Action for Childhood Arrivals (DACA) and Deferred Actions for Parents of Americans (DAPA) are examples where the agency has more clearly articulated the legal standard for decision-making and the necessary criteria for deferred action.[130] But deferred action is not an affirmative grant of relief from removal, as a change in administrative policy or priorities could change what was once a low-priority case to a high-priority one. All this heightens the level of uncertainty for undocumented immigrants.

One consequence of living in a system of laws that triggers uncertainty is the engendering of fear. To be sure, other sudden and unnoticed legal actions can be devastating and destabilizing, including criminal enforcement, an administrative enforcement claim for money damages, or even a tort suit. Defendants in these non-immigration contexts may also live

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125. *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (providing a thorough scholarly treatment of prosecutorial discretion).

126. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999); *see also* Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 397–98 (2000).

127. *See, e.g.*, Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499, 501 (2014).

128. INA § 237(d)(2), 8 U.S.C. § 1227(d)(2) (2012); INA §§ 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (2012); 8 C.F.R. § 274a.12(c)(14) (2016).

129. *See, e.g.*, Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al. 5–6 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. (authorizing prosecutors to defer action where "compelling humanitarian factors" cut against treating the undocumented immigrant as an enforcement priority).

130. DACA and DAPA require that certain children and certain parents of children receive reprieve from deportation. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et. al. 3–4 (Nov. 20, 2014), https://perma.cc/PD24-DHGA; Morton, *supra* note 92; Letter from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to Dick Durban, Senator (Aug. 18, 2011), https://perma.cc/45GG-2XSF.

in fear of an impending lawsuit. Yet, in most circumstances, that fear has an endpoint due to a reasonable deadline for a lawsuit imposed either by the legislature or recognized in the common law. Without a deadline, that fear would be prolonged and indefinite if enforcement or litigation never came.

In addition to the duration of fear, the nature of the fear and its consequences on the daily life of undocumented immigrants is comparatively more burdensome. The consequence of a lawsuit in the immigration context is potential deportation. For most undocumented immigrants, the option of regularizing to a lawful immigrant status is slim to none. One potential option is cancellation of removal, but the statutory requirements for cancellation are onerous, requiring long-term permanent residence[131] for certain permanent and nonpermanent residents, long-term physical presence, good moral character, and proof of exceptional and extremely unusual hardship to U.S. citizen or permanent resident family members upon removal.[132] Those who have committed certain deportable offenses, such as aggravated felonies, are categorically excluded from cancellation relief. Further, only 4000 cancellations are available annually.[133] Asylum and withholding of removal is another option, but this form of relief also has very specific substantive requirements that most individuals cannot meet.[134] Adjustment of status is yet another form of lasting relief, but it is only available to a segment of the undocumented population who were admitted lawfully but became undocumented by overstaying their visas. Adjustment of status is subject to other burdensome requirements as well.[135]

Without a viable means to lawful immigration status, the options are to self-report and face the possibility of a removal proceeding, self-deport, or live in hiding. The first two options come with potential permanent exile from family and community since there is the possibility that the individual would not be able to return to the United States because of a categorical exclusion ground, such as the commission of an aggravated felony,[136] or that the person would have to face a prolonged wait of up to twenty years after the date of departure from the United States before being eligible to be

131. 8 U.S.C. § 1229b (2012) (requiring at least five years of permanent residence and seven years of continuous residence). For an extended discussion of cancellation of removal relief, see *infra* Section III.B.3.

132. INA § 240A, 8 U.S.C. § 1229b (2012).

133. INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (2012).

134. INA §§ 101(a)(42), 208(b)(1)(A); 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A) (2012).

135. INA § 245(a), 8 U.S.C. § 1229(a) (2012) (requiring that the immigrant was "inspected and admitted").

136. Chacón, *supra* note 41, at 1845.

admitted again.[137] As discussed in Section II.A., the devastating and destabilizing impact of permanent exile from family and community—on both the individual and their community and family—is well known and has been documented.[138] What is perhaps less known are the consequences of living in perpetual hiding. The confluence of a government either unwilling or unable to enforce immigration laws, the suddenness of enforcement when it does come, and the lack of a deadline on deportation has created what can be described as a de facto passing regime.[139] Due to the dire consequences associated with deportation, individuals are incentivized to pass. And the government's enforcement policy has been complicit in creating this passing regime.[140]

Although there have recently been high profile cases of undocumented youths coming out of the shadows to tell their stories as part of a broader movement in support of sensible immigration reform,[141] most undocumented immigrants live a life in the shadows.[142] They must continue to "pass" as lawful due to the real fear of deportation if they are discovered or found out, and due to the stigma associated with undocumented status in both our law and culture.[143] Such passing demands affect almost every aspect of an undocumented immigrant's life and have come in the forms of more aggressive enforcement legislation passed by both local and state governments, such as Arizona's State Bill 1070,[144] which spawned several copycat bills by other states across the United States, including Utah, Georgia, Indiana, and Alabama, with more limited laws already having passed in Florida, Oklahoma, Missouri, Colorado, and South Carolina,[145] and several benefits and rights-regulating state and local legislation that have been either proposed or passed to exclude or restrict undocumented

137. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2012).

138. *See, e.g.*, Deborah Sontag, *In a Homeland Far from Home*, N.Y. TIMES MAG. (Nov. 16, 2003), http://www.nytimes.com/2003/11/16/magazine/in-a-homeland-far-from-home.html.

139. Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95, 136–38 (2016).

140. *See* Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 3–5 (2013) (developing the metaphor of undocumented closet in immigration).

141. Jose Antonio Vargas gained public attention for his article *My Life as an Undocumented Immigrant*, in which he detailed his efforts to pass as documented. *See* Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG. (June 22, 2011), http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=0.

142. Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 1 (Nov. 20, 2014) (announcing as a rationale for DAPA and DACA to bring immigrants out of "the shadow of deportation").

143. Kim, *Immigrant Passing, supra* note 139, at 136–38.

144. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

145. Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L. J. 251, 253–55 (2011).

immigrants from a range of conduct necessary to maintain a living, such as public benefits,[146] certain work benefits eligibility,[147] unemployment compensation,[148] financial aid benefits for education,[149] the right to contract,[150] driver's licenses,[151] licenses for certain vocations,[152] and lower tuition rates at universities.[153]

The construction of the "closet" and the demand to pass are evident not only in the law, but also in the culture.[154] This is perhaps most evident in the way the vernacular "illegal aliens" and "illegal immigrants" have become regularized in describing undocumented people, many of whom are long-term residents with significant familial and community ties in the United States. Numerous scholars have pointed out that the law's statutory characterization of noncitizen as "alien" is pejorative, as the concept of "alien" evokes dehumanizing impressions of extraterritoriality.[155] When the word is modified with "illegal," as it often is, the effect is even more devaluing and exclusionary. Moreover, the term "illegal alien" or "illegal immigrant" is incorrect; while the term "illegal" can be used to characterize an act, it is inaccurate to use it to define a state of being. We would not brand a U.S. citizen who commits a civil or criminal act as being an illegal citizen or an illegal permanent resident. Moreover, undocumented immigrants have yet to have their legal status adjudicated. The immigrant may have a lasting

146. IOWA CODE §7E.3 (2016); S.C. CODE ANN. §17-13-170(E)(1) (2014).

147. N.J. STAT. ANN. §§ 44:10-48(a), (b)(3) (West 2016).

148. N.M. STAT. ANN. § 51-1-5(F)(1)-(2) (2015).

149. W. VA. CODE ANN. § 18-22D-2(c)(1) (LexisNexis 2016).

150. ARIZ. REV. STAT. ANN. § 23-212(A) (2016).

151. DEL. CODE. ANN. 21 § 2711(c) (2016); IND. CODE § 9-24-2-3(a)(9) (2016); VA. CODE ANN. § 46.2-328.1(D) (2016).

152. KY. REV. STAT. ANN. §§ 198B.658(1)(b), (2)(b) (West 2016); NEB. REV. STAT. § 38-129(2)(2008).

153. N.H. REV. STAT ANN. § 187-A:16(XXIII) (2016). Some states have sought to protect undocumented immigrants by introducing legislation that provides access to certain benefits. For example, in 2014, the New York state legislature introduced the Home Act that would grant state citizenship to noncitizens who paid taxes and resided in the state for at least three years. S.B. 7879, 237th Leg. Sess. (N.Y. 2014). *See* Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 905–09 (2015) (arguing for the benefits of state citizenship).

154. For a more thorough analysis, see Kim, *Immigrant Passing*, *supra* note 139, at 120–26.

155. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990) (noting the pejorative connotations); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Pena, 76 OR. L. REV. 425, 426 n.4 (1997) (describing the use of "alien" as pejorative that underscores the foreignness); Kevin R. Johnson, "*Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 267 (1997); D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1519 (2013) (examining language in the aggregate to show that "alien" is associated with concepts of criminality, invasion, and otherness).

form of relief that may theoretically enable her to change to a lawful immigrant status.[156] We would not term a defendant who is awaiting trial for a criminal offense a criminal, yet the same logic does not hold for undocumented immigrants.[157] The term "illegal immigrant" is used not only colloquially, but has also been used by persons at all three branches of the federal government, including the president,[158] members of Congress,[159] and judges[160]—the entities most responsible for shaping U.S. immigration law and policy.[161]

The consequences of living in such liminal legal status are many.[162] Due to the fear of being discovered, undocumented immigrants cannot fully integrate into their communities, which has consequences both for the immigrant and the community. The emotional stresses of living in uncertainty and fear manifest in both physical and mental health disorders.[163] Many undocumented immigrants underutilize government services, including public health services. Many do not have access to medical insurance.[164] One of the central barriers to integration into the community is the lack of educational and work opportunities.[165]

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156. I qualify this with "theoretical" because the chances of attaining lawful status for undocumented immigrants, while theoretically possible, are realistically slim due to onerous requirements for some forms of lasting relief, such as cancellation of removal or asylum and withholding of removal. *See, e.g.*, 8 U.S.C. § 1229b (2012); *see also* 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A) (2012).

157. Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004).

158. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (JUN. 16, 2015), https://perma.cc/5UYS-XHB5; Michelle Mark, *Trump Defends DACA Decision: 'Before We Ask What is Fair to Illegal Immigrants, We Must Also Ask What is Fair to American Families*,*'* BUS. INSIDER (Sep. 5, 2017), http://www.businessinsider.com/trump-daca-decision-dreamers-congress-immigration-reform-2017-9.

159. Philip Bump, *How Members of Congress (and Actual Americans) Refer to Immigrants*, WASH. POST (Nov. 21, 2014), https://perma.cc/PJ9B-RTWD. *But see* Will Drabold, *Read Elizabeth Warren's Anti-Trump Speech at the Democratic National Convention*, TIME (July 25, 2016), https://perma.cc/V82X-EB9N.

160. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1566–69 (2011).

161. *But see* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009) (Justice Sotomayor intentionally uses the words "undocumented immigrant" in her opinion); Alisa Wiersema, *Why Justice Sotomayor Chooses Her Words Carefully*, ABC NEWS (Jun. 22, 2014), http://abcnews.go.com/Politics/why-justice-sotomayor-chooses-her-words-carefully/blogEntry?id=24252873&from=related.

162. Menjívar, *supra* note 119, at 1002–03.

163. SAMEER ASHAR ET AL., NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS 14–15 (2015).

164. More than twenty percent of the uninsured or underinsured population in the United States is undocumented, which is a disproportionately high percentage. *See* STEPHEN P. WALLACE ET AL., UCLA CTR. FOR HEALTH POLICY RESEARCH, UNDOCUMENTED AND UNINSURED: BARRIERS TO AFFORDABLE CARE FOR IMMIGRANT POPULATIONS 12 (2013).

165. ASHAR ET AL., *supra* note 163, at 16.

Undocumented immigrants make up 5.1% of the U.S. labor force.[166] The lack of a legal immigrant status means that they have no lawful way to work.[167] The options are either to use fraudulent documents to obtain a social security card and number with which to fill out the federal Form I-9 or hope to obtain employment in positions that do not undergo such verification processes.[168] But with the spread of E-Verify, a federal system used to verify an employee's legal status to work, many undocumented immigrants reported even more difficulty in finding jobs.[169]

Due to the need and preference of many employers for a temporary, disposable, and unauthorized workforce, some employers do undertake the risk of hiring undocumented immigrants in violation of the law.[170] In such an environment, undocumented immigrants work "scared and hard."[171] It is an environment in which employers have much control and power—both actual and perceived—over the undocumented employee.[172] The already existing power differential between employer and employee is amplified when the employer can threaten deportation at any given moment. The implications of this inequality are many. One is that undocumented immigrants are more prone to work abuses and retaliation by fellow employees and employers.[173] Although undocumented immigrants cannot legally work without federal authorization,[174] federal labor laws do offer them some protection. For example, in *Sure-Tan, Inc. v. NLRB*, the Supreme

166. Jens Manuel Krogstad, Jeffrey S. Passel & D'vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (April 27, 2017), https://perma.cc/4GCR-EZQH.

167. In certain instances, the agency has given work authorization to individuals without lawful status. For example, undocumented immigrants granted deferred action may apply for work authorization "if the alien establishes an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14) (2016); Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (Jun. 15, 2012), https://perma.cc/SX6M-KPJQ.

168. Vargas, *supra* note 141 (describing using a photocopy of a fake social security card and checking the box "citizen" on the federal Form I-9 so as to not trigger additional documentation requests for an alien registration number).

169. ASHAR ET AL., *supra* note 163, at 16.

170. Congress has chosen to regulate and enforce the law concerning unauthorized workers not by prosecuting the undocumented immigrant, but by sanctioning employers who hire them. The Immigration Reform and Control Act of 1986 (IRCA) imposes penalties on employers who knowingly hire unauthorized workers. INA § 274A(1)–(6), 8 U.S.C. § 1324(a)(1)–(6) (2012) (listing various penalties).

171. Motomura, *supra* note 120, at 2069.

172. Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 177 (2011).

173. *See, e.g.*, Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347–48 (2001).

174. The Immigration and Nationality Act imposes civil penalties on employees who work without authorization and on employers who knowingly hire them. INA § 274A(1)–(6), 8 U.S.C. § 1324(a)(1)–(6) (2012) (listing various penalties).

Court concluded that undocumented workers whose employers reported them to immigration authorities in retaliation for their union activities can bring suit against their employer under the National Labor Relations Act.[175]

Outside of the employment context, undocumented immigrants can theoretically claim rights under constitutional, statutory, and common law at both the federal and state levels. Undocumented immigrants are protected under the U.S. Constitution, as individual rights are granted to "persons," irrespective of citizenship or legal status.[176] Although the scope of rights claimed for discrimination on the basis of alienage has been tested for documented immigrants who are noncitizens—i.e. those who have been admitted under either permanent or non-permanent status—the U.S. Supreme Court in *Plyler v. Doe* struck down, on Equal Protection grounds, a state statute that denied funding to educate undocumented immigrant children.[177]

Theoretical protection for "persons," however, has little meaning if it cannot be enforced in a court of law. As previously discussed, state and local governments have been particularly proactive in the last decade in passing legislation targeted at undocumented immigrants, ranging from aggressive enforcement measures to legislation negating benefits.[178] These laws have discriminated against undocumented immigrants. While many of these laws have been enjoined, they have been enjoined on preemption grounds in suits brought by the federal government to enforce the violation of the federal government's interest in a uniform immigration policy.[179] There are very few examples of undocumented immigrants bringing suit to fight alleged discrimination by either public or private actors because of fear that through such action they would "out" themselves to immigration authorities. It is the same reason why undocumented immigrant parents fear engaging with their children's teachers at schools, why they are reluctant to use government services, and why they tolerate discrimination and other unlawful conduct by private actors who exploit their vulnerability.

A reasonable statute of limitations on deportation would ease the uncertainty involved in living in perpetual liminal status and begin to ease

175. 467 U.S. 883, 895–96 (1984).

176. U.S. CONST. amend. I; U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. XIV, §1; Plyler v. Doe, 457 U.S. 202, 210 (1982).

177. *Plyler*, 457 U.S. at 230.

178. *See supra* Section II.B.1.

179. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 415–16 (2012) (striking down §§ 3, 5(C), and 6 of S.B. 1070).

the stigma of undocumented status and the attendant harm that passing demands have on identity.[180]

2. To the System

Uncertainty exacts a cost on the system as well as on the individual. The fear of deportation that drives undocumented immigrants further underground poses a barrier to community engagement that hurts not only the individual, but also the community. The indefinite threat of deportation means that undocumented immigrants are less willing to engage and invest in their communities. The lack of willingness to engage in their children's schools not only deprives each individual child, but also ultimately undermines collective efforts to create an educated and informed community. The underutilization of medical services risks the health of not just the individual, but also affects community health. Delaying routine examinations and preventative care can result in future hospitalization for more catastrophic conditions—the costs for which the individual may not be able to pay and which, therefore, may be borne by hospitals, the government, and ultimately by the community of insured individuals.[181] The underutilization of government services for fear of being discovered by law enforcement can limit adequate police and other security measures.[182]

Fear of community engagement means the loss of diversity and the enlivenment of various national heritages that a robust commitment from immigrants can bring to a community. It also may mean the loss of valuable financial revenue from the flight of undocumented immigrants to other states, other countries, or back to their country of origin out of their fear. According to one study, undocumented immigrants contribute an estimated $11.64 billion each year in state and local taxes.[183] They pay on average an

180. Kim, *Immigrant Passing*, *supra* note 139, at 132–40 (analyzing undocumented status as a stigma and the harm to identity posed by demands to convert, pass, or cover).

181. Dayna Bowen Matthew, *Race and Healthcare in America: The Social Psychology of Limiting Healthcare Benefits for Undocumented Immigrants—Moving Beyond Race, Class, and Nativism*, 10 HOUS. J. HEALTH L. & POL'Y 201, 222 (2010). More than twenty percent of the uninsured or underinsured population in the United States is undocumented, which represents a disproportionately high percentage. *See* WALLACE ET AL., *supra* note 164, at 12.

182. ANGELA S. GARCÍA & DAVID G. KEYS, CTR. FOR AM. PROGRESS, LIFE AS AN UNDOCUMENTED IMMIGRANT: HOW RESTRICTIVE LOCAL IMMIGRATION POLICIES AFFECT DAILY LIFE 3–4 (Mar. 2012), https://perma.cc/BV2D-XBUG. Recognizing this need, Congress has provided a way to attain lawful immigrant status for those who assist in the prosecution of human traffickers and of those who commit domestic violence crimes in the form of U visas and T visas. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012).

183. LISA CHRISTENSEN GEE ET AL., INST. ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS' STATE & LOCAL TAX CONTRIBUTIONS 1 (2016).

estimated 8% of their income in state and local taxes, which is higher than the effective tax rate of just 5.4% that the top 1% of taxpayers pay.[184] The same study estimates that granting legal status to all undocumented immigrants as part of comprehensive immigration reform and allowing them to work legally would increase state and local tax contributions by an estimated $2.1 billion per year.[185]

To be sure, the recognition of a time limit on deportation would not in and of itself automatically grant the authority to work or any other form of legal status. A grant of work authorization would be necessary to do that, akin to certain deferred action programs.[186] A reasonable time limitation would simply mean that the government would not likely bring an enforcement action for acts that fall outside the permissible time period under a statute. Undocumented status would continue, unless Congress explicitly provided for lawful status. Nevertheless, a time limitation placed on deportation would reduce uncertainty, which could incentivize undocumented immigrants to invest in their communities. Like certain deferred action programs, it would be a more limited form of relief that may be more politically feasible to implement than proposals for outright legalization or "amnesty."[187]

In addition to the enhanced revenue from an expanded tax base into any community that might incentivize its undocumented immigrant population to stay and invest in that community, another impact of a limitations action is reduced government spending by freeing the government from pursuing enforcement against cases that are time barred and arguably more resource intensive due to staleness of the evidence.[188] Although it is possible that the government might, due to a new time limitation, ramp up enforcement proceedings on more cases, the more likely outcome is fewer net deportations. This would significantly reduce costs, as the costs associated with deportations occur at every stage of the enforcement process from investigation, to possible detention, to adjudication, to potential

184. *Id.*

185. *Id.* at 2.

186. Certain deferred action grantees, such as DACA and DAPA recipients, qualify for work authorization. 8 U.S.C. § 1154(a)(D)(i)(II) (2012) (authorizing qualifying individuals "deferred action and work authorization"); 8 C.F.R. § 274a.12(c)(14) (2016); *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Dec. 22, 2016), https://perma.cc/D4MZ-SD8A.

187. *Cf.* INA § 245(2)(A), 8 U.S.C. § 1255a(2)(A) (2012) (under IRCA, granting road to LPR status under general legalization program and advancing registry date to January 1, 1972).

188. *See* Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 117, 136 (2014) (discussing scarcity of enforcement resources and resource allocation issues posed by deportations).

enforcement of the removal order.[189] Assuming that DHS's resources remain at a constant, the more likely response from the government to a time limitation on deportations would be a necessary prioritization of their enforcement decisions. Prioritizing cases that involve the commission of acts involving serious threats to the security of our communities or actions that do not involve long-term residents would incentivize a more sensible approach to removals and could free up additional resources.[190]

A reduction in uncertainty that comes with a reasonable time limitation on deportations has the additional benefit of promoting rule of law values for the legal system. The functional lack of a remedy for the discrimination against undocumented immigrants by others who exploit their vulnerability, fear of deportation, and liminal legal status harm not only the individual immigrant, but also the legal system. Due to the reasonable fear of disclosing their status to immigration authorities, undocumented immigrants often do not enforce their rights and report unlawful behavior. The statutory scheme governing discrimination is premised on plaintiffs reporting alleged discrimination in a court of law. Without reporting, there is a class of plaintiffs whose rights go unenforced and potential defendants who continue to violate the law. This undermines central assumptions in our legal system, such as the values of deterrence and justice. It also undermines the complicated statutory scheme Congress enacted to remedy unlawful discrimination and the attendant process values that come with asserting one's rights and seeking remedy through such a process.[191] The substantive law goes unenforced, which stunts the development of the law.

C. Promotion of Plaintiff's Diligence / Punish Delay

> "[S]tatutes of limitations . . . stimulate to activity and punish negligence."[192]

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189. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L REV. 137, 143 (2013) (discussing financial costs associated with immigration detentions).

190. *See* Morton, *supra* note 92, at 2–4 (discussing scarcity of resources and need to prioritize removals of immigrants posing known security risks).

191. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (2012); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (stating that reporting discrimination serves the deterrent purpose of Title VII); Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 424 (2011).

192. Neff v. N.Y. Life Ins., Co., 180 P.2d 900, 906 (Cal. 1947) (quoting Wood v. Carpenter, 101 U.S. 132, 139 (1879)) (internal quotation marks omitted).

"The early bird catcheth the worm" is a proverb that was first recorded in John Ray's collection of English proverbs in 1670.[193] In this country, Benjamin Franklin expressed a similar sentiment when he counseled against procrastination stating, "You may delay, but *Time* will not," and "*Lost Time is never found again*."[194] These are just a few among many examples[195] of proverbs expressing a moral sentiment that has become ingrained in our cultural norms and that privileges those who act diligently. The law has a similar maxim: "Equity aids the vigilant, not those who slumber on their rights."[196] Although this concept of diligence begetting success may be related to and/or explained by other rationales for a statute of limitations,[197] the effect of any statute of limitations is to reward prompt action and punish delay.[198] A relatively short statutory limitations period would not only incentivize, but demand quick action underscoring the time intensive process of preparing a case for litigation. For this reason, some have criticized a limitations period as forcing a plaintiff to file suit at a less than optimal time when the case is under-developed, which can interfere with the possibility of a consensual settlement of a dispute before beginning the adversarial process of litigation.[199]

While it is apparent that a statute of limitations promotes diligence by rewarding quick action, another way a statute of limitations promotes diligence is by punishing those who sleep on their rights. The concept of "slumbering"[200] on a right evokes negative connotations of laziness and even impropriety. Indeed, some courts, in describing a plaintiff's lack of timely filing, have used fault language and characterized the plaintiff's behavior as "neglect."[201] It is faulty conduct for which the law takes away

193. JOHN RAY, A COMPLEAT COLLECTION OF ENGLISH PROVERBS 101 (4th ed. 1768), https://archive.org/details/acompleatcollec00raygoog.

194. *Poor Richard Improved, 1758*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://perma.cc/P8AW-7Y4X (last modified June 29, 2017).

195. "Never leave that till tomorrow which you can do today" and "Have you somewhat to do To-morrow, do it To-day" are others. *Id.*

196. JOHN NORTON POMEROY & JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA; ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 418 (4th ed. 1918) (cited in Ochoa & Wistrich, *supra* note 55, at 489); Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

197. For example, the success here may be tied to acting before evidence goes stale, which is often an independent basis for having a statute of limitations.

198. Phillips Petroleum Co. v. Lujan, 4 F.3d 858, 863 (10th Cir. 1993) (concluding that while a statute of limitations may be tolled during a governmental audit, the government "should not be able to postpone litigation due to a lack of efficiency or diligence on its part").

199. Ochoa & Wistrich, *supra* note 55, at 491.

200. POMEROY, *supra* note 196, at § 418.

201. Pashley v. Pac. Elec. Co., 153 P.2d 325, 326 (Cal. 1944) ("The statute of limitations . . . is

the right to sue. In this way, then, the effect of cutting off a substantive right due to a delay in filing can be fairly characterized as punitive, and the language employed by some judges in statute of limitations cases echoes such notions of punishment.[202]

As applied to the deportation context, two central qualifications must be made concerning the reasons why the federal government delays or does not pursue most removal cases. First, a statute of limitations would promote the value of diligence and punish the late-filing government only in those cases where the government has knowledge of the undocumented immigrant. For immigrants who were never admitted in the first place, for example by entering the United States surreptitiously by avoiding a legal point of entry, the federal government would have no record of such persons.[203] For these individuals, a statute of limitations would not promote diligence in deportation actions, nor would it be a way of punishing the government. The government is not unduly delaying, making punishment inappropriate.

Secure Communities, and the short-lived Priority Enforcement Program, is a partnership among local, state, and federal law enforcement agencies that enables the sharing of information among law enforcement agencies through an integrated system.[204] The program is managed by Immigration and Customs Enforcement (ICE) within DHS and enables ICE to identify immigrants with criminal convictions. For example, fingerprints and biometric information taken by local law enforcement is shared with federal authorities including ICE and the FBI, which would enable ICE to begin deportation proceedings against persons who committed crimes deemed to be removal offenses.[205] The biometric information would reveal the legal status of immigrants who had been lawfully admitted at one time, but who violated the terms of their visas by overstaying. It would also expose immigrants who entered without inspection since they would not be found in the system. For immigrants whose information had not been incorporated into the federal immigration system because of entry without inspection, and thus who never became documented in the first place, a program like Secure Communities, or certain deferred action programs like DACA and

intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof.") (citation and internal quotation marks omitted) (cited in Ochoa & Wistrich, *supra* note 55, at 456).

202. Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that statutes of limitations "stimulate to activity and punish negligence"); Fontana Land Co. v. Laughlin, 250 P. 669, 675 (Cal. 1926) (stating that "persons chargeable with negligence would be in a position to defeat the just claims of the vigilant").

203. For a more complete discussion of the discovery problem, see *infra* Section IV.A.1.

204. *Secure Communities*, *supra* note 43; *Priority Enforcement Program*, IMMIGR. & CUSTOMS ENF'T, https://perma.cc/7DY4-5RPV (last visited Aug. 1, 2017).

205. *Secure Communities*, *supra* note 43.

DAPA that seek to uncover similar immigrants who were never documented in the first place by soliciting them to come forward in exchange for work authorization and a temporary reprieve from enforcement,[206] would provide information about a segment of the never-documented immigrant population for which a statute of limitations could incentivize diligence and could be characterized as punishing the government's delay in enforcement.

But even for the once-documented population, the government's delay in enforcement may not necessarily be due to delay for which an imposition of a deportation deadline would achieve its punitive aim. The immigration agencies do not have the resources to remove every undocumented person and must, in a resource-scarce environment, necessarily prioritize their enforcement decisions.[207] If the reasons for the under-enforcement of immigration laws are mostly informed by budgetary constraints imposed by Congress[208] and other necessary priority-setting constraints, then a time limitation on deportation would not necessarily incentivize the agency to act more quickly. Even if the under-enforcement is mostly due to scarce resources, for the decisions concerning a relatively smaller class of persons for whom the government would have knowledge of their unlawful presence and determined that such class of persons should receive deportation priority, a time limit on deportations could incentivize quicker action and serve a punitive purpose for those cases in which the government truly slumbered on its rights.

D. Integrity of the Legal Process / Deterioration of Evidence

> "Limitations statutes . . . are intended to foreclose the potential for inaccuracy and unfairness that stale evidence and dull memories may occasion in an unduly delayed trial."[209]

Decisions made during the legal process must be accurate, fair, and perceived as such by the public. As justification for a statute of limitations,

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206. A federal district court issued a preliminary injunction for DAPA and expanded DACA, which the U.S. Court of Appeals for the Fifth Circuit affirmed. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015). The U.S. Supreme Court, in a 4–4 decision, affirmed the Fifth Circuit, leaving in place the district court's order. United States v. Texas, 136 S.Ct. 2271, 2272 (2016) (per curiam).

207. Morton, *supra* note 92, at 2 (concluding that prioritization and prosecutorial discretion are necessary because "the agency is confronted with more administrative violations than its resources can address").

208. The federal government allotted $8,628,902 for immigration enforcement in fiscal year 2016. Department of Homeland Security Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2495 (2015).

209. United States v. Levine, 658 F.2d 113, 127 (3d Cir. 1981).

many courts have articulated the idea that the legal system should not reach its decisions on the basis of "stale" evidence or entertain claims that could be characterized as "stale."[210] The assumption is that reliance on "stale" evidence could lead to inaccurate fact-finding,[211] which could result in an inaccurate outcome. Whether evidence is prone to deterioration depends on the particulars of each case. Legal claims that rely primarily on documentary evidence are less prone to evidence becoming stale than those that rely on testimonial evidence, though witnesses are important in both types of cases. With the passage of time, there is a greater likelihood that witnesses may not be available, as they may have moved from the place giving rise to the suit or may have died. Even in cases where witnesses can be located and are available, the testimonial evidence may have become "stale" through either the loss of memory of the event or memories that have shifted.[212] The passage of time makes both unavailable and faulty memory more likely, which undermines confidence in the accuracy of the testimonial evidence. The implications of an accurate outcome extend beyond justice to the individual and the promotion of the integrity of the legal process. It can also ultimately save litigation costs, as the necessity for appeals challenging the erroneous decision would decrease.

Although, for the most part, the law assumes that the passage of time undermines the accuracy of fact-finding and thus the outcome, for some claims the passage of time may have the opposite effect and result in a more accurate outcome. For some tort claims in which the discovery of the injury is more difficult because of its latency, early filing by plaintiffs before the full scope of injuries can be discovered could potentially lead to judicial

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210. State ex rel. Condon v. City of Columbia, 528 S.E.2d 408, 413–14 (S.C. 2000) ("Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs."); Handel v. Artukovic, 601 F. Supp. 1421, 1430 (C.D. Cal. 1985) ("Civil statutes of limitation . . . are viewed as a procedural requirement designed to protect against stale claims."); Jones v. Texaco, Inc., 945 F. Supp. 1037, 1041 (S.D. Tex. 1996) ("The purpose of the statutes of limitations is to compel the assertion of claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses.") (quoting Computer Assocs. Int'l, Inc., v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996)); State v. Coleman, 519 A.2d 1201, 1204 (Conn. 1987) ("Limitations statutes . . . are intended to foreclose the potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion in an unduly delayed trial.") (quoting United States v. Levine, 658 F.2d 113, 127 (3d Cir. 1981)); AC & R Insulation Co., Inc. v. Pa. Mfr.'s Ass'n Ins. Co., 993 F. Supp. 2d 539, 548 (D. Md. 2014) ("[A] statute of limitations, at root, is a tool 'to assure fairness from defendants' by protecting them from claims 'so stale as to be unjust.'") (quoting Bertonazzi v. Hillman, 216 A.2d 723, 726 (Md. 1966)).

211. *Coleman*, 519 A.2d at 1204 (drawing the link between stale evidence and inaccurate outcomes); Ochoa & Wistrich, *supra* note 55, at 471.

212. *See generally* SIEGFRIED LUDWIG SPORER ET AL., PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION (1996) (analyzing reliance on eyewitness testimony).

decisions on substantive claims before all the facts have been developed.[213] Haste can also lead to subsequent lawsuits and piecemeal litigation over the same or similar issues, which would waste scarce judicial resources and burden the system with more costs.[214]

In the deportation context, the concerns about stale claims have less force because much of the evidence is documentary.[215] To obtain a visa, noncitizens and applicable sponsors undergo extensive scrutiny on paper. They must submit forms and supporting documentary evidence that detail the noncitizen's biographical information, including information related to health, family status and relationships, education, financial status, resources and assets, criminal history, and work history.[216] The determination of whether "there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws" is made primarily through documentary evidence,[217] as is the government's burden of proving that the alleged commission of the offense is a deportable ground at the removal hearing, as the government usually does not rely on witnesses to establish deportability.[218]

Where witnesses are necessary to prove a claim, the noncitizen is more likely than the government to rely on witnesses. For such claims, staleness concerns would persist. For a noncitizen, establishing the time of entry, lawful or unlawful, would generally prove to be more difficult with the passage of time. Where witnesses would prove most beneficial is at the relief from removal stage. Many noncitizens in removal proceedings concede removability, which means the primary issue becomes the availability of affirmative relief, such as cancellation of removal, adjustment of status, voluntary departure, or asylum.[219] The noncitizen bears the burden of proof in establishing relief from removal.[220] To establish these forms of relief, which are less categorical in inquiry and rely more on discretionary factors, the noncitizen often depends on witnesses to support his or her claim. For example, cancellation of removal relief requires the noncitizen to establish continued physical presence, long term residence,

213. *See, e.g.*, Hagerty v. L. & L. Marine Servs., Inc., 788 F.2d 315, 320 (5th Cir. 1986).

214. *See* Vila v. Inter-Am. Inv., Corp., 596 F. Supp. 2d 28, 30–31 (D.D.C. 2009).

215. *See* INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (2012) (specifying documentation requirements for non-citizens seeking admission).

216. *Id.*

217. 8 C.F.R. § 287.3(b) (2016).

218. INA § 240(c)(3)(A), 8 U.S.C. § 1229a (c)(3)(A) (2012).

219. INA § 240A, 8 U.S.C. § 1229b (2012) (cancellation of removal and adjustment of status); INA § 240B, 8 U.S.C. § 1229c (2012) (voluntary departure); INA § 208, 8 U.S.C. § 1158 (2012) (asylum).

220. INA § 240(a)(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2012).

and "good moral character."[221] To establish continued physical presence or good moral character, the noncitizen may rely on the testimony of others with such knowledge. With the passage of time, it may be more difficult to locate these witnesses. Asylum is another form of removal relief that requires both documentary and testimonial evidence to establish how the noncitizen was persecuted.[222] The passage of time would make it more difficult to locate witnesses, particularly in foreign countries.

E. Effect of Prompt Enforcement on Substantive Law

> "[S]tatutes of limitation may have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."[223]
>
> "[S]tatutes of limitations serve a number of functions including . . . encourag[ing] the prompt enforcement of substantive law."[224]

A time limitation on the period during which legal rights must be enforced would incentivize a rational actor to act more quickly out of fear that the claim would be lost due to delay. Prompt enforcement better furthers the goals of the substantive law. For example, the prompt enforcement of a claim would better serve the deterrence rationale of law than does delayed enforcement. First, enforcement of law has a deterrent effect on the wrongdoer because enforcement leads to costs—financial in the civil context and loss of liberty in the criminal context—that incentivize the wrongdoer to change his or her behavior to avoid such costs. By imposing costs earlier rather than later, the impact of the deterrent effect is arguably greater since the connection between the wrongful conduct and the cost or punishment imposed is fresher in the mind of the wrongdoer. For the same reason, a timely enforcement, rather than a delayed enforcement of the law would better serve a deterrent effect of the law from the perspective of the general public. Second, quicker enforcement of the law may better deter subsequent wrongdoing by shortening the time period between the first act of wrongdoing and any subsequent acts. Stated another way, assuming that the potential effect of enforcement, including punishment,

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221. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2012).
222. INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012).
223. Toussie v. United States, 397 U.S. 112, 115 (1970).
224. Pineda v. Bank of Am., N.A., 241 P.3d 870, 875 (Cal. 2010) (quoting Stockton Citizens for Sensible Planning v. City of Stockton, 227 P.3d 416, 425 (Cal. 2010)) (internal quotation marks omitted).

has deterrent value, the imposition of that effect soon after the first wrongdoing would better enable the deterrence of the second, third, and other subsequent violations.[225] Thus, the strength of the deterrent effect decreases with increased time between the act and enforcement.

If the wrongdoer has not committed another violation long after the first, then punishing the person after a lengthy passage of time would have little deterrent value for that individual, and if the person has committed subsequent violations, then the same deterrent value can be had by punishing more recent violations.[226] Though a short statute of limitations period can spur on a slow plaintiff, if the period is too short, it can also have the opposite effect of cutting off a plaintiff's ability to enforce the substantive law entirely. The deterrent effect that comes not only with early enforcement, but also with enforcement generally, would be lost.

In addition to the positive deterrence effects, the prompt enforcement of the law encourages the development of the law. The law develops, in part, by plaintiffs challenging the violation of it. Each enforcement action shapes the contours of the law and announces to both parties and the general public what constitutes lawful and unlawful behavior. Indeed, the legal system depends on both private parties and the government enforcing our obligations with respect to one another.[227]

In the immigration context, the prompt enforcement of the substantive law is achieved by an enforcement action brought by the government, rather than by a suit between private parties. Though the effect of a statute of limitations on the behavior of a plaintiff or an enforcing party would theoretically be the same by spurring on action prior to the expiration of the time period, in reality, the decision to bring an enforcement action for the government actor involves competing interests and issues unique to public actors. For example, the government, in both criminal and civil enforcement, must use prosecutorial discretion. That discretion is subject to objectives set by the agency and may be subject to the control of the White House.[228] Particularly in the immigration context, due to the budgetary and resource constraints faced by the agency, a statute of limitations may not necessarily encourage the prompt enforcement of immigration laws. Rather, a short enforcement period in some cases may make it more difficult for the government to bring a timely case, which would result in less substantive enforcement of the immigration laws for those cases, and therefore reduce

225. Ochoa & Wistrich, *supra* note 55, at 492.
226. *Id.*
227. *Id.* at 492–93.
228. Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (discussing enforcement priority setting by agency); Morton, *supra* note 92, at 2.

the deterrent effect. But assuming that a limitations period would spur on agency action and incentivize it to prioritize its enforcement decisions, a prompter enforcement of certain cases would better enable the positive deterrent effect of the law.

III. SUPPORT FOR TIME LIMITS IN IMMIGRATION LAW

Under the current law, there is no statutory deadline for deportations. Historically, this was not the case. Before the passage of the Immigration and Nationality Act of 1952,[229] Congress placed important time limits on deportations for certain kinds of conduct. In Section III of this Article, I provide an argument for a statute of limitations rooted in history. By examining the early immigration statutes and the remnants of these approaches in the current law, I argue that precedent exists for a deportation deadline.

A. Historical Antecedents

During the first century of this country's founding, few restrictions were placed on immigration.[230] The need for labor and people to populate a new nation meant barriers to new residents were applied only to persons more likely to impose costs on society than to provide benefits. The Alien and Sedition Acts of 1798 represents the first federal deportation statute.[231] It permitted the President to deport from the United States any "aliens" he deemed to be dangerous to the country.[232] The first statute to exclude persons from being admitted into the United States was passed in 1875, which barred prostitutes and convicts.[233] Next came the first general immigration statute of 1882, which not only imposed a head tax of fifty cents per person, but also excluded "idiots," "lunatics," convicts, and persons likely to become a public charge.[234] The Chinese Exclusion Act of

229. Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (2012)).

230. 1 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE §§ 2.02–2.04 (2011).

231. For a comprehensive history of the antecedents to the modern deportation system, see KANSTROOM, *supra* note 14, at 30.

232. GORDON, MAILMAN, & YALE-LOEHR, *supra* note 230, at §§ 2.02–2.04.

233. *Id.*

234. *Id.*

1882 came next,[235] which was followed by two statutes of 1885 and 1887 excluding certain contract laborers.[236]

It was in 1888 that the first deportation statute was passed since the Alien and Sedition Acts of 1798. Unlike the interim statutes excluding persons from entering the United States, the 1888 statute permitted the removal from the United States of persons who had effected entry and were already in the United States.[237] This statute permitted the government to remove persons who had entered in violation of contract labor laws.[238] By focusing on removing persons who should have been excluded under the 1885 and 1887 exclusion statutes, this deportation statute served as a check on mistakes made in the admissions process and served to enforce the exclusion grounds enacted by Congress. According to Maurice Roberts, this deportation statute served as an "adjunct of the exclusion process" and could be seen as a "delayed exclusion process."[239] Unlike the Alien and Sedition Acts of 1798, which did not have a limitations period but required a finding of dangerousness, the 1888 Act specified a one-year period during which a person could be deported under it on the basis of erroneous admission.[240]

During the first half of the twentieth century, Congress incrementally extended the limitations period by which the United States must deport a noncitizen. Under the Immigration Act of 1907, the U.S. government had three years from the date of the unlawful entry of a noncitizen to deport that person from the country.[241] But like the 1888 Act, the primary purpose was to catch mistakes made at the admission stage and ensure enforcement. It was in the 1910 Act that Congress first enacted a deportation statute with the primary aim of regulating—or punishing according to some commentators—post-entry conduct.[242] For the 1910 Act, the targeted post-entry conduct was prostitution.[243] The Immigration Act of 1917, in addition to expanding the categories of undesirable persons or characteristics that were deemed exclusion grounds,[244] continued the trend of controlling

235. *Id.*
236. *Id.*
237. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565; Roberts, *supra* note 25, at 59–60.
238. Roberts, *supra* note 25, at 59.
239. *Id.*
240. *Id.*
241. Immigration Act of 1907, Pub. L. No. 59-96, ch. 1134, § 20, 34 Stat. 898, 904.
242. Roberts, *supra* note 25, at 59.
243. *Id.*
244. The classes of excluded persons, subject to some exceptions, included: "[a]ll idiots, imbeciles, feeble-minded persons, epileptics, insane persons," "paupers," "mentally or physically defective," "prostitutes," "contract laborers," persons from certain regions within and adjacent to the "Continent of Asia," and persons who have been convicted of or have admitted to committing a crime "involving moral turpitude." Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874, 875–

undesirable post-entry conduct or characteristics either by penalizing new conduct post-entry or by serving as a check on mistakes that were made during the admission process. Its unique feature was that it authorized deportations of certain legal resident aliens who possessed certain undesirable characteristics.[245] For example, anyone who "at the time of entry was a member of one or more of the classes excluded by law" was deportable within the first five years from the date of entry,[246] which was meant to serve as a check on mistakes made during the admission process. Persons who were sentenced to a term of imprisonment of one year or more due to a conviction for a crime involving moral turpitude after entry could be deported within the first five years of entry,[247] a penalty for post-entry conduct. While the statute of limitations for these offenses was five years from the date of the entry or from the date of the conviction for the deportable offense, for certain other post-entry conduct, the Act eliminated the limitations periods. For example, persons sentenced more than once for a crime involving moral turpitude could be deported "at any time after entry."[248]

As the focus of deportation statutes became more on post-entry conduct, rather than on the correction of mistakes made at the admission stage, the statute of limitations period began to gradually increase from one year, to three years, to five. And with the passage of the Immigration and Nationality Act in 1952, which was a codification of the various immigration statutes into one form and still represents the current body of immigration law, Congress did away with time limits altogether.[249] According to the Senate Judiciary Committee, if unlawful entry was a ground for exclusion, then the passage of time would not change that fact and such persons would be as "undesirable at any subsequent time as they are within the 5 years after entry."[250] This statement suggests that deportation was still an "adjunct of the exclusion process,"[251] viewed as a check on the system, and not necessarily as a way to regulate post-entry conduct.

B. Time Limits in Current Immigration Law

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245. KANSTROOM, *supra* note 14, at 133.

246. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874.

247. *Id.*

248. *Id.*; KANSTROOM, *supra* note 14, at 134.

249. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (2012)).

250. S. Rep. No. 81-515, at 389 (1950).

251. Roberts, *supra* note 25, at 55.

1. Deportation and Exclusion Grounds

Although the current version of the Immigration and Nationality Act does not impose a time limit on deportation, vestiges of the prior statutes remain in several sections in the current law. Unlike the prior statutes that limited the time between the commission of a deportable offense and the start of deportation proceedings by the government, the time limits that are imposed under the current law specify the time between the lawful entry or admission and the commission of an act that is deemed to be a deportable offense.[252] For example, under the current INA, an immigrant who becomes a public charge within five years of the date of lawful entry into the United States is deportable,[253] meaning the U.S. government cannot initiate deportation under the public charge ground if more than five years have passed between the immigrant's entry into the United States and the immigrant's becoming a public charge.[254] Similarly, a well-known criminal deportability ground also imposes a time limit for deportations. A noncitizen with any lawful form of residency is deportable if convicted of a crime involving moral turpitude that carries a possible sentence of one year or more, or of two or more crimes of moral turpitude that do not "arise out of a single scheme of criminal misconduct," irrespective of the sentence imposed.[255] Under both of these provisions, removal of the immigrant can occur only if the conviction was within five years of admission to the United States.[256] The five-year time limit also constrains the government from deporting an immigrant who assisted in smuggling another immigrant into the United States.[257]

Relatedly, the INA also imposes time limits on several grounds of inadmissibility that serve to exclude a person from being admitted into the United States. While deportability grounds specify the classes of conduct that allow the government to remove someone who has been admitted, inadmissibility grounds prevent persons from being admitted into the United States in the first place.[258] The grounds of inadmissibility are more stringent than the grounds of deportability because the underlying

252. For a comprehensive discussion of the temporal dimensions in immigration and crimmigration law, see Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, *supra* note 26, at 1722–38.

253. INA § 237(a)(5), 8 U.S.C. § 1227(a)(5) (2012).

254. *Id.*

255. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2012).

256. *Id.*

257. INA § 237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (2012).

258. See INA § 212(a), 8 U.S.C. § 1227(a) (2012) for the various grounds of inadmissibility.

assumption is that it should be more difficult to remove someone who has established greater ties while already in the United States than to exclude someone who wishes to be admitted into the United States. Despite this relatively higher standard of conduct that the law governing admission requires, several grounds of inadmissibility impose a shorter pre-admission time period during which conduct is relevant. For example, the commission of a crime involving moral turpitude will not exclude an immigrant from entry if the act happened when the immigrant was under the age of eighteen or if the act happened more than five years prior to the date admission is sought.[259] Similarly, an immigrant may be excluded for having "engaged in prostitution"[260] or "directly or indirectly procur[ing] or attempt[ing] to procure . . . or to import prostitutes or persons for the purpose of prostitution,"[261] only if those acts occurred within ten years after applying for a visa, admission, or adjustment to lawful permanent resident status.[262] Relatedly, a discretionary waiver under § 212(h) waives several inadmissibility grounds for certain applicants who meet particular requirements if the event took place more than fifteen years before the current application.[263] While traffickers of controlled substances are excluded from admission altogether, immediate family members of such traffickers are not excluded if they can show that they did not obtain any financial or other benefit from the illicit activity within the previous five years.[264]

Time limits also regulate exclusion for security-related grounds. For example, the exclusion ground for prior membership in a totalitarian party has an important exception, which excuses past membership if that membership or affiliation terminated at least two years before the date the admission is sought or five years before, in the case of an immigrant whose membership or affiliation was with the party controlling the totalitarian government as of that date.[265] Finally, prior immigration violations do not make a person inadmissible forever. An immigrant who had been previously removed at the border can be admitted after five years have passed since the removal, or after twenty years in the case of a second or subsequent removal.[266] An immigrant who had effected entry and was ordered removed,

259. INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (2012).
260. INA § 212(a)(2)(D)(i), 8 U.S.C. § 1182(a)(2)(D)(i) (2012).
261. INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii) (2012).
262. *Id.*
263. INA § 212(h)(1)(A)(i), 8 U.S.C. § 1182(h)(1)(A)(i) (2012).
264. INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii) (2012).
265. INA § 212(a)(3)(D)(iii)(I)(a)–(b), 8 U.S.C. § 1182(a)(3)(D)(iii)(I)(a)–(b) (2012).
266. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2012).

or who departed voluntarily while that removal order was outstanding, can be admitted after ten years from the date of the removal or voluntary departure, or after twenty years in the case of a second or subsequent removal.[267] For immigrants who were unlawfully present in the United States for more than 180 days but less than one year and who departed prior to the commencement of removal proceedings, the law enables the person to be admitted three years after the departure.[268] For those who had been unlawfully present for one year or more, the person can be admitted after ten years have passed since the departure.[269]

These examples in the current law underscore two important principles. One, certain actions of both prospective applicants for admission and noncitizen immigrants already residing in the United States are actions that might be described as shortsighted and mistaken, rather than as actions indicative of fundamental character. Two, even if such actions are deemed to be traits of character, such character "flaws" can be—and routinely are—forgiven for purposes of both admission and deportation.[270] They are not everlasting, and the law places important temporal limits on their future effect.

2. Rescission Adjustment of Status

The usual process for obtaining a green card involves an individual application through the consulate in the person's home country.[271] For the individual who is already lawfully in the United States on a temporary or non-immigrant visa, requiring that person to submit the application for a green card abroad poses a burden. To ease that burden, the INA permits an individual to "adjust" or change his or her immigration status to an immigrant or permanent visa without the individual having to leave the United States.[272] If, after a person's immigration status has been adjusted to an immigrant visa, facts come to light that should have resulted in the denial of the adjustment-of-status application, the INA permits a rescission of the adjustment application.[273] But the statute imposes a time limit on this

267. INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) (2012).
268. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2012).
269. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012).
270. I use the term "forgiven" here because admission and exclusion decisions have been characterized as conferral of a privilege, not a right. For a critique of this characterization and advocating a rights framework in the criminal context, see Tirres, *supra* note 81, at 1591–93.
271. *See* INA § 221, 8 U.S.C. § 1201 (2012); INA § 222, 8 U.S.C. § 1202 (2012).
272. INA § 245, 8 U.S.C. § 1255 (2012).
273. INA § 246(a), 8 U.S.C. § 1256(a) (2012).

provision, which permits such rescission only within five years after the person's status has been adjusted.[274]

Although the Third Circuit Court of Appeals has held that the statute of limitations here should extend to deportation proceedings when the sole ground for deportation is the individual's ineligibility for the adjustment,[275] all the other circuits that have confronted this issue have decided that this five-year statute of limitations does not apply to removal proceedings, and cannot be extended outside of the rescission context.[276] The legal arguments in support of such a reading of the relationship between the rescission statute and deportation have concerned the agency's interpretation of the statutory language against extending the statute of limitations in the rescission context into the deportation context and the deference that must be accorded it,[277] all the while acknowledging, to varying degrees, the implications for individuals who have built a life for many years, living otherwise in conformity with the law, but in false reliance on an erroneous adjustment application.[278]

3. Other Forms of Relief from Removal

Other forms of relief from removal that are available under the current law also take into account the length of time the individual has resided in the United States. Perhaps the most important form of lasting relief available to a noncitizen facing deportation is cancellation of removal, which has two parts. The first part is available to lawful permanent residents who have committed a deportable offense.[279] The second part is available to both lawful permanent residents and non-permanent residents who have committed a deportable offense or who have fallen out of status because they let their visas expire, or, in the case of non-permanent residents, who never had valid legal status in the first place.[280] Both forms of cancellation

274. *Id.*

275. Garcia v. Attorney Gen. of the U.S., 553 F.3d 724, 725–26 (3d Cir. 2009).

276. *See, e.g.*, Kim v. Holder, 560 F.3d 833, 834 (8th Cir. 2009); Stolaj v. Holder, 577 F.3d 651, 652 (6th Cir. 2009); Alhuay v. U.S. Attorney Gen., 661 F.3d 534, 537 (11th Cir. 2011); Adams v. Holder, 692 F.3d 91, 93 (2d Cir. 2012); Asika v. Ashcroft, 362 F.3d 264, 265 (4th Cir. 2004); Oloteo v. Immigration & Naturalization Serv., 643 F.2d 679, 680 (9th Cir. 1981).

277. *See, e.g.*, *Kim*, 560 F.3d at 837–38.

278. *Garcia*, 553 F.3d at 725–27. For an argument that the statute of limitations for purposes of rescission should extend to cases where the sole basis for removal is the erroneous adjustment of status, see Liliana Zaragova, Note, *Delimiting Limitations: Does the Immigration and Nationality Act Impose a Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1329–30 (2012).

279. INA § 240A(a), 8 U.S.C. § 1229b(a) (2012).

280. INA § 240A(b), 8 U.S.C. § 1229b(b) (2012).

of removal relief have onerous requirements, including character and extreme hardship requirements and, for section 240A(b) relief, not having committed or been convicted of certain crimes.[281] Both also require continuous and long-term residence in the United States. Section 240A(a) relief requires lawful permanent residence status for not less than five years and continuous residence in the United States for not less than seven years.[282] Section 240A(b) relief requires a longer continuous residence period of not less than ten years.[283] An underlying assumption for cancellation of removal relief is that long-term residence in the United States precludes deportation when certain other conditions are met.[284]

Time limitations regulate other similar forms of lasting relief from deportation. Former section 212(c) of the INA gave noncitizens who were abroad and not under an order of deportation the ability to be admitted at the discretion of the Attorney General despite having been found inadmissible under section 212(a).[285] The relief was soon extended to noncitizens who were not abroad but seeking this form of relief while in the United States.[286] But the relief was available only to those with a lawful domicile of at least seven years in the United States.[287] Although the passage of the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act in 1996 significantly narrowed the scope of section 212(c) relief, the relief is currently available for lawful permanent residents who pleaded guilty to deportable crimes before April 1, 1997 and who have maintained a lawful domicile of at least seven years in the United States.[288] Likewise, another form of lasting relief that is becoming less relevant with the passage of time is registry, which is a discretionary form of relief that confers lawful permanent residence status on noncitizens who meet similar substantial criteria concerning good moral

281. To merit relief under § 240A(a), the noncitizen must not have been convicted of "an aggravated felony." INA § 240A(a), 8 U.S.C. § 1229b(a) (2012). For relief under § 240A(b), it is conviction of any offenses that would make the noncitizen inadmissible or deportable, with additional requirements that the noncitizen be a person of "good moral character" and that the 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." INA § 240A(b)(1)(B)–(C), (D), 8 U.S.C. § 1229b(b)(1)(B)–(C), (D) (2012).

282. INA § 240A(a)(1)–(2), 8 U.S.C. § 1229b(a)(1)–(2) (2012).

283. INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2012).

284. *See* Fong v. Immigration & Naturalization Serv., 308 F.2d 191, 195 (9th Cir. 1962) (concluding that the sole purpose of cancellation of removal relief is to ease the harsh consequences of deportation for long-term residents in the United States).

285. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(31)(c), 66 Stat. 163.

286. Francis v. Immigration & Naturalization Serv., 532 F.2d 268, 273 (2d Cir. 1976).

287. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(31)(c), 66 Stat. 163.

288. 8 C.F.R. § 1003.44 (2016).

character and the absence of serious inadmissibility grounds, in addition to maintaining continuous residence and entering the United States prior to January 1, 1972.[289]

In addition to the more permanent forms of relief, temporary forms of relief from removal also make the length of a person's presence in the country relevant. The Obama Administration's recent executive action programs of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) require a long connection to the country. DACA gives temporary relief from removal to certain undocumented youths who have graduated from high school, obtained a GED, or have been honorably discharged from the Armed Services and who meet other substantive criteria.[290] In 2014, the Obama Administration expanded DACA by eliminating the age requirement.[291] That same memorandum extended relief to certain parents of U.S. citizen and permanent resident children who also meet other substantive criteria.[292] For DACA relief, a necessary criteria is a showing that the child continuously resided in the United States since June 15, 2007, or at least for a five-year period prior to the date of the June 2012 memorandum.[293] For DAPA relief, the parents must have lived in the United States since January 1, 2010, or at least a four-year period prior to the date of the November 2014 memorandum.[294]

These examples, unlike the time limitations present in the moral turpitude statute, do not explicitly impose a limited time period during which the U.S. government can bring enforcement action against the noncitizen. Instead, these forms of relief from removal impose a residence requirement as a criterion to avoid deportation. But the effect is the same nonetheless. Long-term residence in the United States is valued in the current immigration law and functions as a shield from deportation for those who can meet the onerous and discretionary requirements under these limited forms of relief. The privileging of long-term residence in these forms of relief provides a blueprint for a deportation deadline.

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289. INA § 249, 8 U.S.C. § 1259 (2012).

290. The other substantive criteria include not having committed certain crimes that posed a threat to national security or public safety, being at least fifteen years of age at the time of application, and being under the age of thirty. *See* Napolitano, *supra* note 167, at 1.

291. *See* Johnson, *supra* note 130, at 3–4.

292. *Id.* Like DACA, certain characteristics disqualify an individual from relief under DAPA, such as a conviction for certain crimes, national security concerns, and certain immigration violations. *Id.*

293. Napolitano, *supra* note 167, at 1.

294. Johnson, *supra* note 130, at 3–4.

IV. TOWARDS A STATUTE OF LIMITATIONS IN IMMIGRATION ENFORCEMENT

In Sections I to III of this Article, I showed that statutes of limitations inhabit almost all areas of the law, have been a part of immigration law historically, and that the precedent for time limitations exists in the current immigration law. In Section IV, I outline how a statute of limitations could be realized in the immigration context. The three real deportation cases I use to examine and respond to several concerns with deportation deadlines are: (1) Liliana Ramos's entry without inspection, (2) Zunu Zunaid's overstay of a visa, and (3) David Balderrama's commission of a deportable offense. Each case involved the deportation of a long-term resident who would have benefited from the deportation deadline that I propose. These cases help place real concerns with a deportation deadline in context to allow for a fruitful examination of a range of issues with implementing a deportation deadline: the difficulty of applying a deadline to a surreptitious event, the categorization of unlawful presence as a continuing violation, a worry that deadlines undermine deterrence, and replacing flexible discretion with a firm deadline. I argue that a nuanced deportation deadline is not only feasible, but should be one, among many, strategies for integrating long-term undocumented residents into U.S. society.

A. Deportability Due to Unlawful Presence

Liliana Ramos is a Mexican national who unlawfully entered the United States as a teenager twenty-one years ago.[295] During that time, she has raised three U.S.-born children as a single mother after her ex-husband left her seven years ago. She has worked, paid her taxes, and has no criminal record. She applied for asylum, which alerted the authorities to her unlawful presence. When her asylum application was denied, she was deported to Mexico, where she had little familial or cultural connections. Her children cannot join her because she has no income to support them in Mexico.

Long-term residents like Liliana make the most compelling argument for protection from deportation. At the same time, for Liliana, and those like her, to come under the protections of a statute of limitations, there are two hurdles she faces.

295. Welch, *supra* note 105.

1. Accrual v. Discovery Rule

For a statute of limitations defense, the moment the clock begins to run is of paramount importance because setting that moment as early as possible favors the defendant, whereas a later point extends the limitations period during which the late-filing plaintiff can sue. The law generally takes two different approaches to defining the moment the clock begins to run. The first approach is known as the "Accrual Rule," where the clock begins to run when the claim accrues.[296] The claim usually accrues at the moment the defendant commits the injury-causing act.[297] The second approach, known as the "Discovery Rule," starts the clock when the injury is discovered to address the harshness of the accrual rule in situations where the injury and its accrual go undiscovered until the limitations period has passed. Most limitations periods today take the discovery approach in cases ranging from certain medical malpractice cases where the injury remains latent or dormant[298] to claims alleging a late discovery of childhood sexual abuse committed by the defendant.[299] Although what exactly must be discovered is not entirely consistent, usually it is the discovery of facts giving rise to a legal claim, and not necessarily the discovery of the legal claim, that starts the clock.[300] Specifically, the plaintiff must discover the facts giving rise to all the elements of the tort, the injury, and its causal relationship to the defendant.[301] The discovery by the plaintiff is not entirely an objective standard and is subject to a reasonability test.[302]

For Liliana and others like her who entered without inspection, to benefit from a statute of limitations defense, the government's claim must accrue the moment her presence in the country became unlawful. For Liliana, that would be the moment she effected entry unlawfully. Under a reasonable statute of limitations period, unlawful entrants like Liliana would be shielded from deportation, which, in her case, came twenty-one years later. If, however, the government's claim accrues not at the moment of the unlawful crossing, but upon the government's discovery of the immigrant's unlawful status, a statute of limitations would have little to no utility to unlawful entrants.

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296. 1 DAN B. DOBBS, LAW OF TORTS § 217 (3d reprt. 2004).

297. *Id.* (citing RESTATEMENTS § 899, cmt. c.). In the intellectual property context, the Copyright Act, which specifies a three-year statute of limitations period, is another example of an accrual rule, where a claim under it accrues when the infringing act occurs. 17 U.S.C. § 507(b) (2012).

298. *See, e.g.*, Shearin v. Lloyd, 98 S.E.2d 508, 509–10 (N.C. 1957).

299. *See, e.g.*, McCollum v. D'Arcy, 638 A.2d 797, 799–800 (N.H. 1994).

300. DOBBS, *supra* note 296, at § 218.

301. *Id.*; Moll v. Abbott Labs., 506 N.W.2d 816, 824 (Mich. 1993).

302. Mohr v. Commonwealth, 653 N.E.2d 1104, 1109 (Mass. 1995).

For unlawful entrants like Liliana, who become known to the government by self-reporting through the act of filing for a form of relief, or by the commission of a crime or another civil offense that either triggers the government's knowledge of the person's unlawful status or, at the very least, puts the government on constructive notice of the person's unlawful status, under the discovery rule, the statutory period would begin to run on the date of discovery, giving the government ample time to bring enforcement under even a reasonable limitations period.

For unlawful entrants like Liliana who do not commit another offense or who do not otherwise come to the attention of immigration authorities, a statute of limitations would have no utility for such immigrants. The government could not reasonably discover the unlawful presence of an immigrant who took measures to purposely evade the law at the point of entry and, post entry, continues to live in hiding in what one scholar has called the "undocumented closet."[303] In such cases, the discovery rule would enable the government to file within a reasonable time after it has constructive knowledge of the immigrant's unlawful presence.[304]

2. Continuing Violation Problem

For some injuries, the concept of a statute of limitations is unhelpful to the defendant asserting it because of the way the injury is characterized, which affects the accrual date for statutes of limitations purposes. One such example involves the way courts define the continuing violation doctrine in the employment discrimination context. For hostile work environment cases, the continuing violation doctrine defines as an aggregate a series of workplace violations, each of which is not actionable individually. If one alleged action of the defendant that creates the hostile work environment falls within the statutory period and can be characterized as part of the

303. Villazor, *supra* note 140, at 3–5.

304. The utility and relevance of either the accrual rule or the discovery rule is minimal if the reason for the government's lack or delay of enforcement is less that it lacks knowledge of the immigrant's unlawful presence, but more that it is either unable or unwilling to enforce the law. Concerning the former, in a world where immigration agencies lack the resources to deport every undocumented individual, they must prioritize how to spend their limited resources. Concerning the latter, the U.S. government has historically been ambivalent about enforcing its immigration law due to the needs of businesses and labor. While there are periodic and sporadic demonstrations of show of enforcement, the U.S. government has historically deferred to businesses' preference for an inexpensive, temporary, and disposable class of persons who are largely unprotected from labor law, and to consumers' demand for lower prices. NGAI, *supra* note 122, at 56–90. In such a case, the discovery rule, or even the existence of a statute of limitations may not change the behavior of government actors with respect to their immigration enforcement decisions.

employer's unlawful practice, then the plaintiff's claim can proceed.[305] Usually it is the last violation in a series that constitutes the accrual date, which extends the limitations period for the defendant.

For injuries that can be construed to continue indefinitely, a statute of limitations would be of no relevance to the defendant, since theoretically each new injury renews and pushes the accrual date indefinitely into the future until the injury-producing act stops. In medical malpractice cases, a doctor who fails to diagnose or treat the patient after committing an injury-causing act and who remains the attending physician would be an example of a continuing violation, where the limitations period accrues not only at the moment of the injury-causing act, but at each moment the physician fails to treat the patient during her care.[306] Each failure to diagnose and properly treat the patient is seen as a fault that renews the accrual period, until the doctor-patient relationship ends.[307] A similar continuous violation in the environmental torts context occurs when a defendant pollutes the environment but does not take steps to mitigate the damage. Each day the pollution remains unmitigated constitutes a new violation, and the accrual date renews with each day until the defendant mitigates the damage.[308] In some torts contexts, such conduct is described as a "recurring tort."[309]

Unlawful presence in the immigration context is treated as a continuing violation. In *Fernandez-Vargas v. Gonzales*,[310] the U.S. Supreme Court held that a new removal statute could be applied retroactively to an immigrant who had entered unlawfully prior to the statute's enactment.[311] Writing for the majority, Justice Souter clarified that the relevant action that the statute penalizes is not the initial entry or reentry, but the unlawful presence that the immigrant continues by not leaving the United States.[312] Thus, like the unmitigated environmental damage problem, the immigrant's unlawful act, which is the lack of the immigrant's valid immigrant status, continues daily until the unlawful status ends, which coincides with the date the immigrant's status in the United States is terminated since unlawful presence precludes the attainment of lawful status.[313] Stated differently, the

305. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002).
306. DOBBS, *supra* note 296, at § 220.
307. *Id.*
308. *Id.*
309. Hegg v. Hawkeye Tri-County REC, 512 N.W.2d 558, 559 (Iowa 1994).
310. 548 U.S. 30 (2006).
311. *Id.* at 44.
312. *Id.*
313. INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) (2012).

undocumented immigrant's unlawful status never accrues, making the statute of limitations meaningless.

This is the result of unlawful status being currently defined in the INA as a status offense. Under the current statute, an immigrant is deportable if "inadmissible at the time of entry or adjustment of status" or if present in the United States in violation of any law of the United States.[314] Concerning the former, a person is inadmissible for either being or having been "present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General."[315] In another section governing inadmissibility, the INA specifies that a person who was unlawfully present for a period between 180 days to one year and who voluntarily departs prior to the commencement of removal proceedings is inadmissible for three years; whereas, those being unlawfully present in the United States for one year or more are inadmissible to the United States for ten years.[316] Thus, unless Congress moves away from defining unlawful status as a status offense and instead defines it as an act-based offense, a statute of limitations would categorically have no application for Liliana and others like her who are unlawfully present, whether due to unlawful entry or due to the subsequent commission of a deportable offense.

There is precedent for such an approach in criminal law where courts have questioned statutes that criminalize status offenses.[317] For example, the law criminalizes the offense of bail jumping, which one jurisdiction defines as the failure to reappear in court "voluntarily on the required date or voluntarily within thirty days thereafter," after the person has been released upon bail.[318] Though some courts have considered the crime of bail jumping a continuing offense, a New York state court, considering the legislative intent, considered the crime to be completed at the end of the thirty-day period, which represents the accrual date for statute of limitations purposes.[319] While the bail jumper's status might continue as a bail jumper, the act of bail jumping ends upon the expiration of the thirty-day period. This analysis is similar to other crimes such as bigamy or draft dodging, where the status of these acts may continue beyond the date the act was committed, but courts have interpreted the crime not to continue beyond the

314. INA § 237(a)(1)(A)–(B), 8 U.S.C. § 1227(a)(1)(A)–(B) (2012).
315. INA § 212(a)(6)(A)(1), 8 U.S.C. § 1182(a)(6)(A)(1) (2012).
316. INA § 212(a)(9)(B)(i)(I)–(II), 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II) (2012).
317. John M. Murtagh, *Status Offenses and Due Process of Law*, 36 FORDHAM L. REV. 51, 51 (1967).
318. N.Y. PENAL LAW § 215.56 (McKinney 2013).
319. People v. Barnes, 499 N.Y.S.2d 343, 347 (Sup. Ct. 1986).

date of the act. For example, the crime of bigamy is complete when the person enters into the second marriage unlawfully.[320] While the person's status as a bigamist continues until the second marriage is terminated, for statute of limitations purposes, the crime is completed upon the second marriage.[321] Similarly, the U.S. Supreme Court held that while the status of being a draft dodger might continue, it is not a continuing offense because the offense is completed at the point the person fails to register for the draft by the due date.[322]

Conceptually, unlawful presence of an undocumented immigrant is no different than these other crimes that could also be characterized as status offenses, such as bigamy or draft dodging. Like the crime of bigamy where the offense is committed the moment the second marriage happens, unlawful presence can—and should—be defined at the very moment that the person effects entry into the United States by unlawful means, such as a surreptitious border crossing, or the moment the person's valid visa expires.[323]

B. Deportability After Expiration of Lawful Status

Zunu Zunaid came to the United States on a student visa in 1994 to study petroleum engineering.[324] After his student visa expired, he chose to remain in the United States unlawfully for the next fifteen years. During this time, he married a U.S. citizen and obtained a job working at Best Buy, eventually earning a salary of $60,000. He came to the attention of authorities when he was pulled over for a DUI, which began the deportation process that resulted in his removal.

Like Liliana, Zunu is a long-term resident who had maintained his unlawful status for more than ten years. But unlike Liliana, his presence was known or should have been known to U.S. immigration authorities. Presumably, Zunu's biometric information was collected when he was lawfully admitted under a student visa. Zunu, and others like him, who were once lawfully admitted but whose presence became unlawful because of the commission of a subsequent deportable act, such as the overstaying of a

320. People v. Reiser, 269 N.Y.S. 573, 577 (App. Div. 1934).
321. *Id.*
322. Brown v. Ohio, 432 U.S. 161, 172 (1977).
323. The effect of such classification is all the harsher given the lack of a realistic possibility of adjusting to a lawful immigrant status and the limited forms of relief available to undocumented immigrants. For an immigrant who has been unlawfully present in the United States for one year or more, the wait to re-enter the United States legally is ten years. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012).
324. Eli Saslow, *The Other Side of Deportation: An American Struggles to Prepare for Life Without Husband*, WASH. POST (May 24, 2014), https://perma.cc/8CCF-GDV7.

valid visa or the commission of a crime that is a deportable offense, have a more compelling argument for protection under a statute of limitations because the government knew or at least had constructive notice of the immigrant's unlawful status. Under the accrual rule, Zunu's claim would have accrued on the date his student visa expired. Further, if the government knew or reasonably should have known about such individuals, it could not benefit under the discovery rule for its delay in enforcement beyond a reasonable statutory period since the information concerning an immigrant whose visa expires is within the direct possession and control of the government agency.

Zunu appears to have been removed based on his unlawful presence, but had he also committed another deportable offense[325] while he was lawfully present under a valid visa or while he became unlawfully present after his visa had expired, his limitations period would accrue anew upon the commission of the deportable offense. Again, in an instance like this, if the immigration authorities delay beyond a reasonable statutory limitations period, they should not be able to benefit under the discovery rule. Unlike the expiration of a valid visa, the commission of a crime by an immigrant is not information that is within the federal immigration authorities' direct control. Nevertheless, as previously discussed in Section II of this Article, federal immigration agencies have access to the biometric data of all persons who are arrested for crimes through local-federal information-sharing programs like Secure Communities. The biometric information is run against a federal immigration database, and ICE can decide whether to charge the person as removable.[326] The government knows or should know of the potential deportability of the immigrant and should make a timely determination on whether to bring an enforcement action. Even under the discovery rule, a delay in bringing enforcement beyond a reasonable statutory period should mean the loss of the right to deport.

1. Undermining Deterrence

A central function of law is to deter unlawful conduct. The imposition of a deportation deadline may theoretically incentivize greater deterrence by prompting faster action by the government,[327] but realistically a statute of limitations, particularly in the immigration context, may hinder the

325. One conviction for DUI, without other aggravating factors, is not a deportable offense. *See* INA § 237(a), 8 U.S.C. § 1227(a) (2012).

326. *Secure Communities*, *supra* note 43.

327. *See supra* Section II.C.

government's enforcement efforts due to the resource constraints at the agency.[328] If more cases go unenforced due to the application of a statute of limitations, an effect is the erosion of the deterrence function of law. The deterrence rationale has less to do with changing the behavior of the particular immigrant who may get to benefit from the deportation deadline. As shown in Section II of the Article, a deportation deadline promotes other competing values, such as the promotion of repose. Further, the current immigration laws and policies concerning lasting forms of relief from removal recognize that long-term residents may have a claim to continue their stay in the United States even if they are deportable under the law. Rather, the deterrence rationale concerns the future conduct of others who, knowing of a deportation deadline and the resource constraints of the agency, may be incentivized to overstay their visas like Zunu, or to make an unauthorized border crossing like Liliana.

One response to such a concern is to create a deportation deadline of reasonable length. While agreement on the number of years may not be easy to reach, that determination would have to balance the need for deterrence, the humanitarian considerations of removing long-term residents, and the priority-setting objectives of the immigration agencies' enforcement operations. In many respects the current law has already undertaken that balance, as evidenced by an examination of the forms of relief already available to deportable immigrants. A central assumption underpinning the current deportation policy is the recognition of hardship engendered by deportation, and that with the passage of time, an immigrant's attachment—and perhaps the right—to presence in the country grows. As Hiroshi Motomura put it, long-term residents are "Americans in waiting."[329]

This assumption is reflected in the current law's approach to providing lasting forms of relief, which have onerous requirements and which are discretionary. For example, the length of one's residence in the country is a necessary condition for various forms of lasting relief. A permanent resident who is removable but who can establish, among other conditions,[330] continuous residence in the United States for at least seven years can obtain cancellation relief.[331] For non-permanent residents, continuous presence in

328. Kim, *Rethinking Review Standards*, *supra* note 123, at 610–14.

329. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 1, 3 (2006).

330. The other conditions include having been lawfully admitted for permanent residence for not less than five years and not having been convicted of an aggravated felony. INA § 240A(a), 8 U.S.C. § 1229b(a) (2012).

331. *Id.*

the United States for at least ten years, among other conditions,[332] will earn the noncitizen the same relief. Registry is another form of lasting relief reserved for long-term residents who are undocumented.[333] It gives discretionary authority to the Attorney General to give lawful permanent resident status to noncitizens who entered before January 1, 1972, according to the latest amendment, which means that the person must have resided in the United States for at least forty-four years.[334] If the law recognizes a residence of ten years as long enough to shield the person from deportation, then that may also be a reasonable place to start concerning the appropriate duration of time for a statute of limitations for unlawful presence.[335]

Another possible blueprint for a reasonable limitations period is in the calibration Congress already did for the number of years one remains inadmissible from the United States for having committed certain removable offenses. Under the current law, immigrants are prohibited from returning to the United States for a period of time after having been removed or having been unlawfully present. For example, a noncitizen cannot be admitted into the United States for five years after removal, or twenty years if there has been a second or a subsequent removal, or if the removal is due to conviction for an aggravated felony.[336] Unlawful presence is "punished" for three years for a noncitizen who was unlawfully present between 180 days and one year.[337] For those who have been unlawfully present for one year or more, the punishment is ten years.[338] Under this approach, anywhere from three to twenty years would provide a reasonable limit for a statute of limitations on deportations for unlawful presence.

C. Deportability After Commission of a Deportable Offense

David Balderrama, a 68-year-old grandfather, was born in Mexico and migrated to the United States with his wife and infant daughter forty years earlier.[339] He became a lawful permanent resident and had seven more children, one of whom served in the U.S. military and another who was

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332. The other conditions include good moral character, the lack of a conviction for crimes that would make the noncitizen otherwise inadmissible, and no applicable security-related grounds of inadmissibility. INA § 240A(b), 8 U.S.C. § 1229b(b) (2012).

333. INA § 249, 8 U.S.C. § 1259 (2012).

334. In addition to the duration of residence in the United States, registry, like cancellation of removal, requires other conditions, such as good moral character and no security-related inadmissibility grounds. *Id.*

335. *See* Aleinikoff, *supra* note 24 (proposing a ten-year statute of limitations); Roberts, *supra* note 25, at 65 (finding ten years reasonable).

336. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1882(a)(9)(A)(i) (2012).

337. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2012).

338. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012).

339. Kanstroom, *supra* note 105.

studying for a master's degree. David supported his family by working days in a sheet metal factory and by fixing houses at night. One night, after having a few beers with his relatives and friends, he got behind the wheel of his truck and was caught driving drunk. This was his third DUI offense, for which he was convicted and sentenced. Soon thereafter, armed agents showed up at his house and told him that he would be deported for his three DUI convictions.

For David and others like him who become deportable after the commission of a deportable offense, a statute of limitations period would accrue on the date the offense was committed under the accrual rule, and under the discovery rule, it would accrue when the government discovers the deportable act. Here, there is no discovery problem present in cases like Liliana's since the federal government either knows or should know of deportable offenses committed by persons based on the biometric information it possesses through information-sharing programs with local communities like Secure Communities. For most offenses, a reasonable statutory limitations period for bringing enforcement actions in cases like David's makes sense for the reasons I identified in Section II of this Article.

1. Undermining Discretion

One disadvantage of any statutory limitations period is the imposition of a rigid rule and the loss of agency latitude in setting its enforcement priorities. The advantages associated with such an approach include predictability and certainty in outcome due to rules that are less prone to interpretation. From the government's perspective, a bright-line rule is much easier to administer, but clarity and predictability do not necessarily lead to fair outcomes. Although fairness to an individual defendant is an important animating force behind many statutes of limitations,[340] from the perspective of a plaintiff, a bright-line rule limiting the time period for filing a claim raises concerns about equity as the plaintiff loses the right to his or her claim and to have it decided substantively. Moreover, the government, as the plaintiff, raises new fairness concerns since a bright-line rule takes away from the kind of discretionary decision-making that Congress has traditionally entrusted to agencies, including, and particularly over, its enforcement decisions.[341]

In the immigration context, as in other administrative contexts, Congress has given agencies the discretion to set their enforcement priorities. By

340. *See supra* Section II.A.

341. Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.").

drawing a bright-line rule, it would interfere with the agency's determination for why it may want to, or have to, delay in bringing enforcement claims against certain classes of individuals. The decision to undertake enforcement measures is more complicated and sensitive when it is the government agency making such a determination, rather than an individual plaintiff. Often, the government has competing interests and resource allocation issues that are bigger in scale and more complicated than those experienced by an individual plaintiff. That the government currently is not pursuing deportations against certain classes of undocumented immigrants does not mean that it has decided to classify them as low-priority. It may simply be due to resource allocation and constraint issues, and when additional resources are allocated, the government may then exercise its prosecutorial discretion to bring enforcement claims. A statute of limitations would necessarily impinge on that discretion. Moreover, the decision not to enforce may not be due to limited resources, but due to priority-setting done by the current administration, as immigration agencies are executive agencies subject to presidential control.[342] A new administration may have changed or changing priorities not only concerning whether to bring enforcement claims, but also concerning the kinds of cases it would like to prosecute. Unless specified otherwise, a bright-line rule would impinge on the government's discretionary decision-making ability to distinguish among the various classes of deportable offenses that may warrant enforcement. There may be certain offenses the government wishes to prosecute but cannot due to resource constraints, though it may wish to prosecute at a later point in time. A limitations period specified by statute has the potential to treat all deportable offenses equally. These concerns are particularly salient for cases like David's where the immigrant becomes deportable due to the commission of a crime that threatens public safety.

While a limitations period specified by statute has the potential to treat all deportable immigrants equally, it does not mean a blanket claim to amnesty. Thus, it would not necessarily mean that a case like David's is subject to the same statute of limitations period as an immigrant who commits a more serious offense. Congress could still maintain its discretion by varying the limitations period for different deportable offenses, and even exempt certain serious offenses from a limitations period. In criminal law, the more serious the offense, the longer the statute of limitations period,[343]

342. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); STEPHEN G. CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 1 (2008).

343. *The Statute of Limitations in Criminal Law*, *supra* note 21, at 635.

while certain crimes, like murder, have no limitations period at all.[344] Immigration law makes similar distinctions among various offenses. Some offenses subject the individual to longer terms of inadmissibility from the United States.[345] The commission of other deportable offenses means that the individual would be inadmissible indefinitely from the United States. Instead of a blanket statute of limitations, which could undermine the calibrated approach the current law takes with respect to the regulation of deportable offenses,[346] the deportation deadline I propose would have longer limitations periods that accrue after the commission of certain offenses that pose a greater risk to the public safety or to national security. This would strike a fairer balance between maintaining government discretion to enforce certain offenses while also addressing the uncertainty and moral concerns that accompany living under the perpetual threat of deportation.

By following the blueprint already created for limitations statutes in other areas of the law, the application of a statute of limitations to deportations would have the added benefit of creating uniformity both within and outside of immigration law. Although discretionary decision-making can lead to fairer outcomes,[347] it can and has led to arbitrary results from both enforcement actors[348] and adjudicators[349] in the immigration system. Discretionary decision-making can be prone to abuses, particularly in contexts without adequate judicial review like immigration.[350] The clear articulation by the legislature of calibrated deportation deadlines would serve to curb such unbounded discretion and bring greater uniformity to

344. *Id.*

345. *See, e.g.*, INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2012) (three years inadmissibility); INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012) (ten years inadmissibility).

346. *See, e.g.*, INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I); INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II); INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2012).

347 . Dana Leigh Marks, *Let Immigration Judges Be Judges*, HILL (May 9, 2013), http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges (immigration judge advocating for more discretion to order removal relief).

348. *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 668–69, 711, 713 (2015) (exposing the lack of fairness and proportionality when removal decisions are left to the discretion of enforcement actors).

349. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299–305 (2007) (analyzing empirical data finding significant disparities in grant rates among asylum adjudicators); Kim, *Rethinking Review Standards*, *supra* note 123, at 617–23 (discussing bias among immigration judges and agency adjudicators); Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 415 (stating that immigration judges work for the Attorney General, which limits their decisional independence and may compromise their ability to exercise discretion fairly).

350. *See, e.g.*, Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 309–10 (2012).

discretionary decision-making. Importing statutory limitations norms into immigration law would also bring greater procedural uniformity across the law and temper those exceptionalist features of U.S. immigration law.

CONCLUSION

For over eleven million long-term undocumented immigrants in the United States, the metaphor of America as a "melting pot" is fiction. To manage their stigmatized identities, they live a life of hiding and live in indefinite fear of deportation. The implications of living in fear go beyond individual immigrants and deprive both financially and culturally the communities from which they disengage or in which they cannot fully engage. In this Article, I have articulated the support for a statute of limitations on deportations by drawing on comparative insights from other areas of the law that have them. Framed in such a way, the proposal for a deportation deadline is not so radical. Prior immigration statutes that had them and the traces of mercy that animate the current statute's approach to deportation relief provide a blueprint for how a limitations period could be realized in the deportation context. For the law, a reasonable deportation deadline would represent a step towards bringing immigration law's procedural anomaly into compliance with other legal norms. For the undocumented immigrant, a reasonable deportation deadline would represent a step towards providing a more sustainable pathway of integration into American communities.