Penalizing Presence

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Abstract

"Illegals." "Rapists." "Criminals." "Aliens." "Animals." These labels have defined what it means to be an undocumented immigrant in the United States today. Undocumented status as stigma is an overdetermining identity trait that overwrites other identity dimensions and has become entrenched in both legal and cultural norms. Officials at the highest levels of all three branches of the U.S. government continue to employ metaphoric language that conflates undocumented immigrants with illegality, criminality, and extraterritoriality. More recently, the Trump Administration has weaponized such labels to support and normalize shifts in immigration policies.

How did we get here? One answer lies in the current statutory framework that enables this false narrative. The Immigration and Nationality Act penalizes unlawful presence as a deportable offense and potentially bans certain unlawfully present immigrants from reentering the country for three years to permanently. While the law should penalize unlawful acts, such as the surreptitious entry or the visa overstay that produces the unlawful presence, penalizing presence does not punish conduct, but rather the person's state of being. This Article prioritizes this underexamined aspect of U.S. immigration law and uncovers its consequences not only for the lives of immigrants, but also for the law. This Article frames an argument for statutory reform by showing the identity and legal harms stemming from penalizing presence. It argues that this statutory choice stigmatizes and subordinates millions of undocumented immigrants in the United States. It also contends that the harms of penalizing presence extend beyond the person to the law. It shows how penalizing presence has stymied legal efforts to integrate into society the undocumented immigrant population in the United States by incentivizing their further evasion of the law and by thwarting opportunities for imposing a reasonable statute of limitations on deportations. In exposing immigration law's errant departure from established legal norms, the Article moves in a novel direction continuing scholarly discourse on immigration law's exceptionalism.

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Introduction

When Jorge Garcia unlawfully entered the United States from Mexico, he was only 10 years old.[1] He was brought to the United States by his undocumented aunt nearly 30 years ago. He now has a wife and two children, all of whom are U.S. citizens.[2] Until recently,

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1 Niraj Warikoo, *After 30 Years in U.S., Michigan Dad Deported to Mexico*, Detroit Free Press (Jan. 16, 2018, 7:19 PM), https://freep.com/story/news/local/michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/ [https://perma.cc/G2D6-YXGP].

2 *Id.*

he had maintained a typical suburban life in Michigan. He held a steady job as a landscaper and paid his taxes.[3] He had no criminal record—not even a traffic ticket.[4] He was otherwise a law-abiding, long-term resident of this country. Jorge had actively sought legal status, spending nearly $125,000 in legal fees to do so since 2005.[5] Although he was ineligible for relief under Deferred Action for Childhood Arrivals ("DACA"), he had been granted stays of removal for his unlawful presence under the Obama Administration.[6]

On Martin Luther King, Jr. Day of 2018, Jorge was deported to Mexico, a place he left nearly 30 years ago and where he had few familial and cultural connections.[7] Since his deportation more than one year ago, Jorge has tried unsuccessfully for readmission to the United States.[8] Upon deportation, he became inadmissible to the United States for at least ten years.[9] Absent an exercise of discretionary relief, he will have to endure long-term separation from his wife and children.

Jorge's story is not atypical. Millions of hardworking, otherwise law-abiding, long-term residents of the United States live under an indefinite threat of deportation, which can occur decades after the unlawful act. Jorge's deportation was, in part, the result of the current statutory choice to penalize unlawful presence, which the Immigration and Nationality Act ("INA")[10] treats as a deportable offense.[11] A noncitizen who has been unlawfully present for one year or more may be inadmissible to the United States for ten years following deportation.[12] Currently no statutory deadline exists for deportations, which means that the government's power to bring an enforcement claim has no expiration date.[13] In almost no other field of law—both civil and

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3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *See id.*

8 Niraj Warikoo, *Deported 1 Year Ago from Michigan, Jorge Garcia Still Stuck in Mexico*, Detroit Free Press (Jan. 15, 2019, 8:28 PM), https://freep.com/story/news/world/2019/01/15/jorge-garcia-mexico-deportation-michigan-immigrant/2565855002/ [https://perma.cc/62Z6-EDJS].

9 Warikoo, *supra* note 1.

10 Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1101–1537 (2012).

11 INA § 237(a)(1)(A)–(B), 8 U.S.C. § 1227(a)(1)(A)–(B).

12 INA § 212(a)(9)(B)(i)(I)–(II), 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II).

13 INA § 237(a), 8 U.S.C. § 1227(a) (deportation of undocumented persons is not subject to a deadline); Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 Wash. U. L. Rev. 531, 542 (2017).

criminal—does the government's claim to enforcement last in perpetuity.[14]

That the federal government has—and should have—the authority to exclude or deport noncitizens is not legally in doubt or altogether exceptional. According to the U.S. Supreme Court, such authority inheres in the very notion of a sovereign state.[15] The law *should* penalize unlawful acts to deter future violations. But the choice to penalize *presence* is altogether different; it does not penalize the act, but rather the person's state of being. This Article prioritizes this underexamined aspect of U.S. immigration law and uncovers its consequences. It shows how the specification of unlawful presence as the offense, rather than the underlying conduct that produced it, exacts untold harms to both undocumented immigrants and, more broadly, the law.

The statutory choice to penalize a person's being has promoted the stigmatization of undocumented immigrants. It is, I argue, akin to an unconstitutional status offense. In both the legal and cultural realms, undocumented status is a mark of difference that bears "negative attributes and stereotypes about the person's competence and trustworthiness."[16] It operates under the rules of stigma and is an overdetermining attribute that possibly overwrites all other identity

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14 *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW (2017) ("There is no statute of limitations for federal crimes punishable by death, nor for certain federal crimes of terrorism, nor for certain federal sex offenses.").

15 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* Fong Yue Ting v. United States, 149 U.S. 698, 707 (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."); 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."). *But see* 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"); STEPHEN 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.").

16 Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95, 104 (2016–2017); *see* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1–7 (1963).

dimensions.[17] This dominant aspect of undocumented status is apparent in the casual way such persons are labeled as "illegals" or "illegal immigrants,"[18] even though one would not label a U.S. citizen who commits a civil or criminal offense an "illegal citizen."

Undocumented immigrants are often labeled as criminals, even though many came to the United States as children and lacked the agency to violate U.S. immigration law, the violation of which is treated mostly as a civil offense.[19] More recently, the Trump Administration has weaponized such rhetoric to support its sharp shift in enforcement and border policies.[20] The statutory choice to penalize presence perpetuates the false narrative that conflates undocumented immigrants with criminality and, thereby, has a subordinating effect on millions of immigrants living in this country.

The harms from penalizing presence extend beyond the person to the law. This statutory choice has stymied legal efforts to integrate undocumented immigrants into the United States by incentivizing their further evasion of the law and by thwarting opportunities for imposing a reasonable statute of limitations on deportations.[21] Due to the inadmissibility bars ranging from three years to permanent exclusion that accompany a finding of unlawful presence,[22] the rational choice for long-term residents like Jorge—who would seek to preserve family unity rather than face long-term family separation—is to remain undocumented by evading the law.

The statutory focus on presence also frustrates the imposition of a reasonable deadline on deportations. Unlike penalizing a particular act, which has a fixed point from which a statute of limitations period begins to run, defining the offense as presence means that the violation can be construed to continue each day the noncitizen is in the

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17 Kim, *supra* note 16, at 103–06.

18 *See* Betsy Klein & Kevin Liptak, *Trump Ramps Up Rhetoric: Dems Want "Illegal Immigrants" to "Infest Our Country*," CNN (June 19, 2018, 2:45 PM), https://www.cnn.com/2018/06/19/politics/trump-illegal-immigrants-infest/index.html [https://perma.cc/8YXE-LRFP] ("illegal immigrants"); Donald J. Trump (@realDonaldTrump), TWITTER (June 27, 2019, 6:37 PM), https://twitter.com/realDonaldTrump/status/1144419410729242625 [https://perma.cc/RG2V-PE3H] ("illegal aliens"); Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2016, 6:04 AM), https://twitter.com/realDonaldTrump/status/739080401747120128 [https://perma.cc/EY6W-87KJ] ("illegals").

19 Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1120–21 (2017).

20 *See infra* Section III.A.

21 *See* Kim, *supra* note 16, at 536–37.

22 *See infra* notes 40–42 and accompanying text.

United States.[23] Common measures like statutes of limitations have no utility for offenses that are defined as presence because a limitations period would only accrue after the person leaves the country. Immigration law's sanction of unlawful presence, rather than of the underlying act that produced it, is yet another example of its wayward departure from established legal norms. This Article sheds new light on this unexamined aspect of the current statutory approach and frames an argument for its reform.

The Article proceeds in four parts. Part I documents and frames the problem by analyzing the INA's statutory focus on unlawful presence. It place that analysis in a broader historical context to characterize the focus on presence as an anomalous departure from prior approaches. Parts II and III uncover the harmful consequences of penalizing presence for both undocumented immigrants and the law. Part II exposes identity-related harms associated with penalizing presence. Applying Irving Goffman's insights, it analyzes undocumented status as a stigma, an over-determining attribute that overwrites other identity dimensions. Evidence for this argument exists in representations in U.S. culture, where the prevalent use of exclusionary language—both metaphoric and literal—about undocumented immigrants has become deeply entrenched. It then argues that such language has shaped and been shaped by the jurisprudential and statutory landscapes. Part III moves beyond identity-related harms to demonstrate the legal implications of penalizing presence. It shows how the pervasive conflation of the person with notions of illegality and criminality in cultural and statutory rhetoric has translated into actual law and policy. Under that framework, it analyzes salient immigration policy decisions of the Trump Administration, thereby shedding new light on the sharp shift in its enforcement policy, the DACA rescission, and the militarization of the border. Then, it exposes how penalizing presence has harmed legal efforts to integrate the more than 11 million undocumented immigrants in the United States by creating perverse incentives for them to evade the law and by hindering opportunities for imposing a sensible deportation deadline. Part IV argues that penalizing presence deviates from customary legal norms. Using a comparative framework, it shows that in numerous criminal and civil contexts, the law chooses to penalize acts, rather than status or being, to highlight U.S. immigration law's errant turn from legal norms. Employing both legal and policy-based methodologies, it chal-

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23 *See* Audrey J.S. Carrión & Matthew M. Somers, *A Case for the Undocumented Immigrant*, MD. B.J., July 2011, at 31, 32–33.

lenges the claim that immigration violations are "continuing violations" and offers an argument for reforming unlawful presence as an act-based offense to bring immigration law into compliance with other areas of the law. In so doing, the Article advances in a novel direction the scholarly discourse on immigration law's exceptionalism and its departure from customary legal norms.

I. Current Statutory Framework and Historical Antecedents

We need to keep illegals out![24] Every single day, we are finding the illegal alien gang members and predators and throwing them the hell out of here . . . .[25]

—Donald Trump, President of the United States, 2018

I got a big truck, just in case I need to round up criminal illegals and take 'em home myself.[26]

—Brian Kemp, Governor of Georgia, 2018

In 2009, Justice Sotomayor received attention for the words she refused to speak. In *Mohawk Industries, Inc. v. Carpenter*,[27] Justice Sotomayor bucked years of Supreme Court cases that referred to noncitizens without lawful status as "illegal aliens."[28] Without an explanation, she instead used the phrase "undocumented immigrants."[29] When asked why, she replied, "We all break laws . . . I can't say consciously, unconsciously, because most laws require intent . . . . Yet we don't think of ourselves as criminals . . . ."[30] She continued, "It's the label, and labels leave impressions about criminality that's often so negative that we stop thinking about the reasons."[31]

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24 *Donald Trump: 'We Need to Keep Illegals Out*,' Fox News (Aug. 7, 2015), https://video.foxnews.com/v/4404670828001 [https://perma.cc/LB8Q-5T6W].

25 Jane C. Timm, *Fact Check: 7 Things Trump Got Wrong About the Border and Immigration*, NBC News (Nov. 27, 2018, 12:10 PM), https://www.nbcnews.com/politics/politics-news/fact-check-7-things-trump-got-wrong-about-border-immigration-n940516 [https://perma.cc/68Z9-ZM3T] (quoting Trump's speech at a November 26, 2018 rally in Biloxi, Mississippi).

26 Kemp for Governor, *So Conservative*, YouTube (May 9, 2018), https://youtu.be/5Q1cfjh6VfE [https://perma.cc/4YTL-ANRM].

27 558 U.S. 100 (2009).

28 *Id.* at 103.

29 *Id.*

30 *Sonia Sotomayor Discusses Using Word 'Undocumented' in Court Opinion*, ABC News (June 22, 2014), https://abcnews.go.com/ThisWeek/video/sonia-sotomayor-discusses-word-undocumented-court-opinion-24250443 [https://perma.cc/M2HP-G2V3].

31 *Id.*

In both U.S. law and society, metaphoric language that equates undocumented immigrants with unlawfulness abounds. Metaphoric language not only can define, but also can shape understanding, perceptions, and actions, almost unconsciously.[32] The metaphoric use of "illegals" and "illegal alien" does not condemn the act that produced the unlawful status. Rather, it condemns the person. The label defines undocumented immigrants solely by their unlawful status and overwrites other positive identity dimensions. Simply put, it dehumanizes.

The current statutory framework in the United States helps perpetuate this false narrative. Instead of focusing solely on the act that produced the unlawful presence, such as entry without inspection or the overstay of a visa, the INA defines an immigrant's "unlawful presence" as a civil offense.[33] While the INA does define conduct that produces unlawful presence—such as entry without inspection—as criminal,[34] unlawful presence is, in general, independently treated as a civil offense.[35] That part of the INA defines unlawful presence as an "alien [who] is present in the United States after the expiration of the period of stay authorized by the Attorney General[36] or is present in the United States without being admitted or paroled."[37] This definition is significant because "unlawful presence" is a deportable offense. The INA specifies that an immigrant is deportable if "inadmissible at

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32 *See infra* Section II.A. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (showing how metaphors shape and structure perception, understanding, and thought, almost unknowingly).

33 *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45020, A PRIMER ON U.S. IMMIGRATION POLICY 14 (2018).

34 *See infra* Section III.A.3.

35 INS v. Lopez-Mendoza, 468 U.S. 1032, 1054 (1984) (White, J., dissenting) ("It is true that a majority of apprehended aliens elect voluntary departure, while a lesser number go through civil deportation proceedings and a still smaller number are criminally prosecuted.").

36 For noncitizens who overstay their visas, the accrual of unlawful presence usually begins on the departure date noted on Form I-94. For certain students and scholars admitted under "duration of status" whose lawful statuses may have lapsed due to a violation of the terms of the visa, unlawful presence does not accrue until a formal finding of such violation. Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., et al., to Field Leadership 9–10 (May 6, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF [https://perma.cc/X7RB-TSM2]. On August 9, 2018, USCIS issued a new policy, under which unlawful presence would accrue for certain students and scholars on the day they are out of status, not upon a formal finding of such—in effect collapsing the concepts of unlawful status and unlawful presence. Policy Memorandum from U.S. Citizenship & Immigration Servs. 4 (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf. This new policy change has been enjoined by a federal court. Guilford College v. Wolf, No. 1:18CV891, 2020 U.S. Dist. LEXIS 20241, at *3 (M.D.N.C. Feb. 6, 2020).

37 INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (2012).

the time of entry or of adjustment of status" or if present in the United States in violation of any law of the United States.[38] Concerning the former, a person is inadmissible for either being or having been "present in the United States without being admitted or paroled," or "arriv[ing] in the United States at any time or place other than as designated by the Attorney General."[39] In another section governing inadmissibility, the INA specifies that a person who had been unlawfully present for a period of 180 days to one year, but who voluntarily departs prior to the commencement of removal proceedings is inadmissible for three years.[40] Those who were unlawfully present in the United States for one year or more become inadmissible for ten years.[41] Those who have been "unlawfully present . . . for an aggregate period of more than 1 year" and "who enters or attempts to reenter" without being admitted may be excluded permanently.[42]

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[43] and the Antiterrorism and Efficient Death Penalty Act ("AEDPA").[44] IIRIRA changed the INA to allow the removal of immigrants based solely on the fact of their presence, not the circumstances surrounding their entry.[45] Before 1996, the INA defined "[e]xcludable aliens" as "[a]ny alien who at the time of entry or adjustment of status was within one or more of the

38 INA § 237(a)(1)(A)–(B), 8 U.S.C. § 1227(a)(1)(A)–(B).

39 INA § 212(a)(6)(A)(1), 8 U.S.C. § 1182(a)(6)(A)(i).

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

41 INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). There are exceptions for limited categories for both the three- or ten-year inadmissibility bars. INA § 212(a)(9)(B)(iii), 8 U.S.C. § 1182(a)(9)(B)(iii). For example the period of time in which the noncitizen was under the age of 18 does not count toward unlawful presence. INA § 212(a)(9)(B)(iii)(I), 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Neither does the time during which a noncitizen has a bona fide asylum application pending. INA § 212(a)(9)(B)(iii)(II), 8 U.S.C. § 1182(a)(9)(B)(iii)(II). In addition, there are waivers of the three- or ten-year inadmissibility bar that require extreme hardship and a qualifying family member. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). But the noncitizen takes a risk in relying on waivers as they are not guaranteed. First, the grant of a waiver is a discretionary decision. *Id.* Second, the waiver decision is made after the noncitizen leaves the United States. Thus, if the waiver is not granted, then the noncitizen becomes subject to the inadmissibility bars. In limited circumstances, certain immigrant visa applicants who were immediate relatives of U.S. citizens could apply for provisional unlawful presence waivers prior to leaving the United States. 8 C.F.R. § 212.7(e) (2014); Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536 (Jan. 3, 2013). Also, leaving the United States under a grant of advanced parole does not constitute a departure that triggers the inadmissibility bars. 8 C.F.R. § 212.5(f) (2012); Matter of Arrabally and Yerrabelly, 25 I. & N. Dec. 771, 778–79 (B.I.A. 2012).

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

43 Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

44 Pub. L. No. 104-132, 110 Stat. 1214.

45 8 U.S.C. § 1251(a)(1)(A) (1994); IIRIRA § 301(b)(1).

classes of aliens excludable by the law existing at such time."[46] This included "[a]ny alien who entered the United States without inspection."[47] IIRIRA amended this section in two ways. First, it changed the concept of "excludable" alien to "inadmissible" alien.[48] Second, it modified the deportability ground from entering without inspection to "[p]resent in violation of [the] law."[49]

The changes in nomenclature were motivated by Congress's desire to change the concept of "entry" and to counteract what it perceived to be the courts' undue expansion of the entry doctrine. In a pair of cases, the U.S. Supreme Court clarified that when a noncitizen has made a sufficient entry into the United States, constitutional due process protections apply to deportation proceedings, even for those who had entered the country unlawfully.[50] However, those who had not made "entry," but rather were detained at the border, were placed in exclusion proceedings, where fewer constitutional protections were afforded.[51] After a line of U.S. Supreme Court cases that expansively interpreted the entry doctrine in favor of noncitizens, in 1973 the Board of Immigration Appeals clarified that the term "entry" in the INA includes even those entries made surreptitiously and without inspection.[52]

Congress grew frustrated with what it saw as the judicial expansion of the entry doctrine and its protection of immigrants whose presence was unlawful. It saw the expansive view of the entry doctrine as incentivizing surreptitious border crossings and visa overstays.[53] Under the umbrella of antiterrorism, AEDPA reclassified persons suspected of supporting terrorist organizations who were "found in the United States" without authorization as "seeking . . . admission."[54] In effect, it equated those already in the United States—who were enti-

46 8 U.S.C. § 1251(a)(1)(A) (1994).

47 *Id.* § 1251(a)(1)(B).

48 *Id.* § 1251(a)(1)(A); IIRIRA § 301(d)(3).

49 IIRIRA § 301(d)(4).

50 *See* Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953).

51 For example, noncitizens in exclusion proceedings could be placed in what are now called expedited removal proceedings, where the noncitizen is not even afforded a hearing before an immigration judge and is subject solely to the determination of executive officials. *See* Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 173–74 (2006).

52 *See In re* Pierre, 14 I. & N. Dec. 467, 468 (B.I.A. 1973).

53 *See Immigration in the National Interest Act of 1995: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 313 (1995) [hereinafter *INIA Hearing*].

54 AEDPA of 1996, Pub. L. 104-132, § 414(a), 110 Stat. 1214, 1270.

tled to greater constitutional and statutory protections—with initial entrants at the border who were subject to fewer protections. IIRIRA extended this idea to all noncitizens, reclassifying those who were in the United States but had entered without inspection as seeking admission at the border.[55]

This shift in nomenclature had profound consequences.[56] Like initial entrants, noncitizens who had resided in the United States but had entered without inspection, however long ago, were subject to expedited removal procedures.[57] Noncitizens who had lawfully entered the United States but who became undocumented by overstaying their visas were also treated like initial entrants who could be placed into expedited removal.[58] Although the debate concerning visa overstays focused mostly on the need for reliable data, lawmakers acknowledged the problem of visa overstays and the need to address them.[59] The chairperson of the U.S. Commission on Immigration Reform testified before the House Subcommittee that he agreed with the proposition that "deportation [of persons who overstayed their visas] must be a part of our immigration policy."[60] Representative Lamar Smith commented, "The fact that approximately half of the illegal aliens are visa overstayers is not a new phenomenon, though we are just recently becoming aware of the extent of the problem."[61]

Thus, Congress's concern that courts were reading the concept of entry too broadly, thereby incentivizing unlawful border crossings, was an important impetus for the change from penalizing "entry" to "presence." With a Republican-controlled Congress, the solution in 1996 was to do away with the entry doctrine by putting exclusion and

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55 IIRIRA of 1996, Pub. L. 104-208, § 301, 110 Stat. 3009-546, 3009-579.

56 *See id.*

57 *See* H.R. REP. NO. 104-469, at 157 (1996) (explaining that IIRIRA "make[s] it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States"). Under expedited removal, administrative officers, not immigration judges, make swift removal decisions, with fewer procedural protections afforded to the noncitizen. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (distinguishing between a noncitizen seeking admission and those already admitted); Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 214 (1953) (same).

58 *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 15 (1997) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Immigration and Claims).

59 *Foreign Visitors Who Violate the Terms of Their Visas by Remaining in the United States Indefinitely: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 1–2 (1995).

60 *Id.* at 16 (statement of Rep. Lamar Smith, Chairman, Subcomm. on Immigration and Claims).

61 *Id.* at 1.

deportation proceedings under one umbrella of removal proceedings.[62] Congress then reclassified all noncitizens who had entered the country without inspection or overstayed their visas as inadmissible, akin to initial applicants for admission.[63] Through this new admission doctrine, Congress dismantled the courts' entry doctrine. Having reconceptualized the meaning of "entry," Congress targeted unlawful entrants for their "presence."[64]

II. Identity Harms

Part II uncovers the harmful consequences of penalizing presence for undocumented immigrants. Applying Irving Goffman's framework, it analyzes undocumented status as a form of stigma, an overdetermining attribute that may possibly overwrite all other identity dimensions. It locates the evidence for this argument in the United States' cultural landscape, where the use of exclusionary language—both metaphoric and literal—has become deeply entrenched and has both shaped and been shaped by the jurisprudential and statutory landscapes.

A. Undocumented Status as Stigma

Undocumented status operates under the rules of stigma.[65] In his seminal work, Irving Goffman conceptualized a definition and an analytical framework for discussing stigma.[66] Goffman's theory has gained traction among both social scientists and legal scholars.[67] The term stigma refers to a trait or a part of one's identity that brands someone as undesirable, disgraced, and unequal in the society to which the indi-

62 *INIA Hearing*, *supra* note 53, at 24 (prepared statement of T. Alexander Aleinikoff, Executive Associate Comm'r for Programs, U.S. Immigration and Naturalization Service).

63 IIRIRA of 1996, Pub. L. No. 104-208, § 301, 110 Stat. 3009-546, 3009-579.

64 *See Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) [hereinafter *Shortfalls*] (statement of Rep. Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law) (describing inadmissibility bars triggered by unlawful presence).

65 For a more comprehensive analysis of undocumented status as stigma, see Kim, *supra* note 16, at 103–06.

66 Goffman, *supra* note 16, at 1–2.

67 *See, e.g.*, Derek Walsgrove, *Police Yourself: Social Closure and the Internalisation of Stigma*, *in* The Manufacture of Disadvantage 45–46 (Gloria Lee & Ray Loveridge eds., 1987); Spencer E. Cahill & Robin Eggleston, *Reconsidering the Stigma of Physical Disability: Wheelchair Use and Public Kindness*, 36 Soc. Q. 681, 681–83 (1995) (examining stigma of physical disability through the public's perception of wheelchair use); Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 772 (2002) (developing the idea of covering in the context of sexual orientation, among others).

vidual belongs.[68] According to Goffman's tripartite framework, the first type concerns physical deformities, the second character deformities, and the third category includes the stigma of "race, nation, and religion."[69] The common trait shared by all three categories is the community's collective perception that the individual possesses a trait that is abnormal, undesirable, and even subhuman.[70] Precisely on that basis, the individual experiences discrimination.[71] Since Goffman's theoretical contributions, social scientists have amplified his conceptualizations and have applied them to a wide range of conditions, from sexual orientation[72] to physical disabilities,[73] and from cancer[74] to exotic dancing.[75]

Undocumented status fits Goffman's concept of stigma in many important respects, but not all. Unlike many stigmas, undocumented status is not socially visible and can often remain completely hidden from the outsider. Race, however, can serve, and has been used, as a proxy for undocumented status. Although there is no reliable correlation between the two, race has been used as an indicator of undocumented status for a certain segment of the Hispanic population in the United States.[76] For example, Arizona's Senate Bill 1070 gave state officers the authority to ascertain the immigration status of an individual during an arrest or detention upon a reasonable suspicion that the individual was unlawfully present in the United States.[77] This provision was highly controversial and also the subject of critique by lawyers and scholars alike as potentially unconstitutional in application because undocumented status is invisible to the outsider, which meant that state officers would have to rely on race to ascertain the lawfulness of one's status.[78]

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68 GOFFMAN, *supra* note 16, at 5–10.

69 *Id.* at 4.

70 *Id.*

71 *Id.* at 5.

72 *See* Yoshino, *supra* note 67, at 772.

73 *See* Cahill & Eggleston, *supra* note 67, at 681–83.

74 *See* Betsy L. Fife & Eric R. Wright, *The Dimensionality of Stigma: A Comparison of Its Impact on the Self of Persons with HIV/AIDS and Cancer*, 41 J. HEALTH & SOC. BEHAV. 50, 51–63 (2000) (examining the impact of stigma associated with cancer and HIV/AIDS).

75 *See* Jaqueline Lewis, *Learning to Strip: The Socialization Experiences of Exotic Dancers*, 7 CANADIAN J. HUM. SEXUALITY 51, 56–69 (1998) (examining exotic dancing as stigma and the processes to overcome the stigma).

76 Kim, *supra* note 16, at 139.

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

78 *See, e.g.*, Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1752 (2011); Kevin R. Johnson, *A Case Study of Color-Blindness:*

Immutability is another key difference between undocumented status and the conditions identified in Goffman's framework. Undocumented status—unlike certain physical and mental disabilities, race, sex, or sexual orientation—is not a condition with which one is born. It can be acquired, changed, and even lost. It is not innately immutable, nor is it fundamental to one's identity. Yet, while undocumented status is not innately immutable, it may nonetheless be functionally immutable in other respects. For millions of undocumented immigrants who are long-term residents of the United States, regularizing to lawful status is not legally feasible because of the lack of lasting forms of relief available to them.[79]

The two most practical avenues for acquiring an immigrant visa are family-sponsored and employment-sponsored immigration.[80] Thus, those without a familial or employment connection have very limited options for staying in the United States on a more permanent basis. Even those who do have such familial or employment ties to the United States can be removed if they are currently in the United States unlawfully.[81] Upon their departure or removal, these noncitizens may, under IIRIRA, become inadmissible to the United States for three to ten years, absent an exception or a waiver.[82]

In one important respect, undocumented status falls squarely within the stigma framework developed by Goffman and others. Like a stigma, undocumented status is a mark of difference that carries with it negative stereotypes about a person's competence and trustworthiness;[83] these stereotypes become the source of subsequent "other[ing]" and discrimination.[84] Much evidence exists in both the current cultural and legal landscapes that brands immigrants as unde-

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The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform, 2 U.C. IRVINE L. REV. 313, 333 (2012).

79 Susan B. Dussault, *Who Needs DACA or the Dream Act? How the Ordinary Use of Executive Discretion Can Help (Some) Childhood Arrivals Become Citizens*, 22 LEWIS & CLARK L. REV. 441, 444–45 (2018).

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

81 *See generally* INA § 237, 8 U.S.C. § 1227 (providing exceptions to deportability on familial grounds only in limited circumstances).

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

83 *See* Bruce G. Link & Jo C. Phelan, *Labeling and Stigma*, *in* HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 571, 576–77 (Carol S. Aneshensel et al. eds., 2d ed. 2013).

84 Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 367 (2001). Though numerous scholars have amplified and applied Goffman's work on stigma, Bruce G. Link and Jo C. Phelan have undertaken the most serious study of stigma since Goffman. They identify five characteristics of stigma whose convergence leads to stigma. They are: (1) labeling of differences, (2) the connection between the identification of difference and a negative attribute, (3) the process of "other[ing]" that separates certain groups from the majority, (4) status

sirable, disgraced, and exiled from the communities in which they live primarily on the basis of their undocumented status.[85] Many are labeled as criminals, even though they came to the United States as children and thus may have been too young to possess the agency to violate U.S. immigration law, which usually imposes civil, not criminal, penalties.[86] Many are considered perpetual foreigners, even though they are long-term residents of the United States.[87]

Perhaps the most salient evidence of "other[ing]" is the use of the word "illegal" to refer to undocumented immigrants. In both public and legal discourse, "illegal" is not used to describe an act, but rather is used to modify the terms "alien" or "immigrant."[88] Used in such a way, the adjective "illegal" depicts a state of being.[89] Although the term has become normalized in public discourse, its use is all the more striking when contrasted to the reality that U.S. citizens routinely commit civil or criminal violations without being labeled "illegal citizens."

This association of illegality with the person is problematic in significant respects. First, the illegality not only depicts a state of being, but also encompasses the whole being. It is an overdetermining attribute that overwrites other identity dimensions. The distinction between the underlying action that produced the unlawful presence and the person who commits it disappears—the unlawful action defines the person in total. The person becomes dehumanized. Positive traits of character are lost. Illegality is seemingly all that remains.

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loss and discrimination that results from "other[ing]," and (5) the dependence of stigma on power. *See id.*

85 *See infra* Section II.B.

86 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1054 (1984) (White, J., dissenting) ("It is true that a majority of apprehended aliens elect voluntary departure, while a lesser number go through civil deportation proceedings and a still smaller number are criminally prosecuted."); Malia Zimmerman, *Elusive Crime Wave Data Shows Frightening Toll of Illegal Immigrant Criminals*, FOX NEWS (May 3, 2016), https://www.foxnews.com/us/elusive-crime-wave-data-shows-frightening-toll-of-illegal-immigrant-criminals [https://perma.cc/AQJ6-7W4H].

87 *See* Que-Lam Huynh et al., *Perpetual Foreigner in One's Own Land: Potential Implications for Identity and Psychological Adjustment*, 30 J. SOC. & CLINICAL PSYCHOL. 133 (2011).

88 *See, e.g.*, Rich Calder et al., *City Bans Calling Someone an "Illegal Alien" out of Hate*, N.Y. POST (Sept. 26, 2019, 6:55 PM), https://nypost.com/2019/09/26/city-bans-calling-someone-an-illegal-alien-out-of-hate/ [https://perma.cc/8ZC2-PPRU] (quoting Carmelyn Malalis of the Commission on Human Rights, "[i]n the face of *increasingly hostile national rhetoric*, we will do everything in our power to make sure our treasured immigrant communities are able to live with dignity and respect, free of harassment and bias" (emphasis added)).

89 *See* 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 (1996–1997).

The use of illegality also fails to distinguish between the varying degrees of culpability penalized by U.S. immigration law. A noncitizen can become undocumented for a period of unauthorized stay in the United States due to a visa overstay, for example,[90] entering without inspection,[91] or being convicted of a criminal offense.[92] Each of these offenses has a different degree of culpability. Indeed, certain inadmissibility grounds have provisions for a waiver, while others do not. For example, there is no waiver for inadmissibility due to engaging in terrorist activities,[93] whereas there is for misrepresentation of citizenship or admissibility.[94] Equating someone who intentionally commits a serious criminal offense with a student who overstays or otherwise violates the terms of a visa due to a reasonable mistake, and labeling both as "illegal," is inaccurate and misguided.

Not only does the treatment of illegality inaccurately paint with a uniform brush culpability across various forms of inadmissibility and deportability grounds, it also fails to acknowledge the distinctions in culpability within each ground. For several of the inadmissibility categories, Congress has specified exceptions for conduct that would otherwise fall within the scope of the provision. For example, inadmissibility due to falsely claiming citizenship has an exception that exempts false representations based on reasonable mistakes by minors who have a citizen parent in the United States.[95] As another example, entry without parole or admission is an inadmissibility ground under which many undocumented immigrants likely fall.[96] Yet even this provision acknowledges that certain unlawful entries are excused if the noncitizen could petition under the Violence Against Women Act ("VAWA")[97] and establish a substantial connection between the experienced battery or cruelty, and the unlawful entry into the United States.[98]

Even without explicit exceptions, many categories of inadmissibility have statutory waivers that afford immigration judges discretion to waive various inadmissibility grounds. Some waivers set forth spe-

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

91 INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A).

92 INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).

93 *See* INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

94 INA § 212(a)(6)(C)(iii), 8 U.S.C. § 1182(a)(6)(C)(iii).

95 INA § 212(a)(6)(C)(ii)(II), 8 U.S.C. § 1182(a)(6)(C)(ii)(II).

96 INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).

97 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

98 INA § 212(a)(6)(A)(ii)(I)–(III), 8 U.S.C. § 1182(a)(6)(A)(ii)(I)–(III).

cific standards that must be established.[99] The law that dictates the inadmissibility category of unlawful presence after a previous immigration violation gives the Secretary of Homeland Security the discretion to waive inadmissibility for VAWA self-petitioners.[100] The criminal conviction inadmissibility ground[101] specifies discretionary waivers that account for the timing of the offense[102] and for rehabilitation.[103] For other inadmissibility categories, the Secretary of Homeland Security is given even greater discretionary latitude. The unlawful presence ground can be waived for "extreme hardship" to citizen or lawful permanent resident relatives.[104] Similarly, for the inadmissibility ground of smuggling,[105] the Secretary of Homeland Security can grant a waiver for "humanitarian purposes[] to assure family unity,"[106] or "when it is otherwise in the public interest."[107]

The existence of waivers and exceptions shows that calibrations exist across and within inadmissibility and deportability grounds; this challenges the singular notion of "illegals." Collapsing all forms of unlawfulness into one category risks collapsing all undocumented immigrants into one monolithic entity, ignoring the diversity in their identity dimensions.[108]

B. "Alien" Metaphors and the Entrenchment of the Anti-Immigrant Cultural Norm

Metaphoric language that equates undocumented immigrants with unlawfulness pervades both law and society in the United

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99 *See, e.g.*, INA § 212(a)(6)(E)(iii), 8 U.S.C. § 1182 (a)(6)(E)(iii) (for the inadmissibility for smuggling, authorizing waivers "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest").

100 INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii).

101 INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

102 INA § 212(h)(1)(A)(i), 8 U.S.C. § 1182(h)(1)(A)(i) (inadmissibility limited to "activities for which the alien is inadmissible occur[ing] more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status").

103 INA § 212(h)(1)(A)(iii), 8 U.S.C. § 1182(h)(1)(A)(iii).

104 *See, e.g.*, INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (noting the Attorney General may waive removal "if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien").

105 INA § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E).

106 INA § 212(d)(11), 8 U.S.C. § 1182(d)(11).

107 *Id.*

108 *See* Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257, 262 (2014) (discussing how undocumented immigrants are subordinated not only on account of their undocumented status, but also on account of race, national origin, gender, sexual orientation, and similar identity dimensions and experience, what she calls "interlocking/intersecting systems of discrimination").

States.[109] Cognitive linguists have shown how metaphoric language not only can define, but also can structure understanding, perceptions, and actions, almost unconsciously.[110] According to an empirical study of federal court decisions issued after 1965, which represents the birth year of modern immigration law,[111] the word "alien" was the noun most frequently used to describe noncitizens.[112] Keith Cunningham-Parmeter found that 88% of the opinions studied used the word "alien," while only 12% used "immigrant."[113] Courts have justified their word choice by pointing out that "alien" is the statutory term used to describe noncitizens.[114]

Much has been written about the negative associations of the term "alien." Even if the term itself does not denote anything pejorative, in the cultural context in which it is used, the term connotes dehumanizing notions of strangeness and extraterritoriality.[115] Those derogatory implications are magnified by the adjective that most often precedes "alien." In the same empirical study of judicial opinions, the term "illegal" appeared in 69% of the opinions, with "undocumented" appearing at a distant second, in 16% of the cases.[116]

The use of "illegal alien" is not limited to the judiciary and is commonly used by members of the other two branches of government. According to another study, most members of Congress use the term "illegal immigrants," which is followed by "illegals," to describe noncitizens without lawful status in this country.[117] Donald Trump, as both candidate and President, has referred to undocumented immigrants as "illegals," "illegal immigrants," and "illegal aliens."[118] The Department of Justice—led at the time by Attorney General Jeff Sessions—instructed U.S. Attorneys Offices to abandon the term "un-

109 For a more comprehensive discussion, see Kim, *supra* note 16, at 120–26.

110 *See generally* LAKOFF & JOHNSON, *supra* note 32 (showing how metaphors shape and structure perception, understanding, and thought, almost unknowingly).

111 *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 275 (1996).

112 Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1573 (2011).

113 *Id.*

114 *See* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2012).

115 *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).

116 Cunningham-Parmeter, *supra* note 112, at 1573.

117 Philip Bump, *How Members of Congress (and Actual Americans) Refer to Immigrants*, WASH. POST (Nov. 21, 2014, 12:07 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/11/21/how-members-of-congress-and-actual-americans-refer-to-immigrants/?noredirect=on&utm_term=.8c0b7a631271 [https://perma.cc/EL6J-5X3C].

118 *See supra* note 18.

documented" and to use "illegal alien" instead, citing concerns about accuracy and consistency.[119] The argument for consistency, and perhaps accuracy, has some support in that "alien" is the statutory term that distinguishes between citizens and noncitizens in the INA, and the immigration agencies that Congress placed in charge of administering the INA have an interest in promoting consistent usage of terms in the INA.[120] But this argument for consistency and accuracy does not extend to the term "illegal."[121] For much of the noncitizen population, "illegal" is an incorrect description because their lawfulness has yet to be adjudicated.[122] It is akin to calling defendants awaiting trial criminals—it undermines the presumption of innocence and instead presumes guilt before adjudication.[123]

Even if, prior to agency adjudication, a noncitizen has violated U.S. immigration law by entering without inspection or by violating the terms of a visa, and even if during adjudication that noncitizen concedes that he is deportable on the grounds charged, the noncitizen may still have lawful pathways to remain in the United States, from temporary basis to permanent residency, and eventually to citizenship.[124] U.S. immigration law permits various forms of relief that allow for the adjustment to lawful status.[125] These forms of relief are, however, only theoretical: all have onerous conditions and often require the exercise of discretionary judgment.[126] Noncitizens who merit such forms of relief could be described as having committed an "illegal" offense.[127] After adjudication, however, certain noncitizens could also

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119 *See* Tal Kopan, *Justice Department: Use "Illegal Aliens," Not "Undocumented*," CNN (July 24, 2018, 8:12 PM), https://www.cnn.com/2018/07/24/politics/justice-department-illegal-aliens-undocumented/index.html [https://perma.cc/JWX7-8U6J].

120 INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2012).

121 *See* 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).

122 *Id.*

123 *Id.*

124 *See* INA § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b).

125 For example, cancellation of removal allows certain noncitizens who are unlawfully present with continuous presence, good moral character, and hardship to avoid removal and attain permanent residency status. INA § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b). Asylum and withholding of removal provide another important avenue for individuals with a credible fear of persecution on account of specified grounds. INA §§ 101(a)(42)(A), 208(b)(1)(A), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). Other forms of both temporary and more lasting forms of relief exist. *See, e.g.*, INA § 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV); INA § 237(d)(2), 8 U.S.C. § 1227(d)(2); INA § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b) (cancellation of removal); INA § 240B, § 1229c (voluntary departure); INA § 249, 8 U.S.C. § 1259 (registry); 8 C.F.R. § 274a.12(c)(14) (2016) (deferred action).

126 *See* Lyon, *supra* note 121, at 575.

127 *See id.*

theoretically attain permanent-residency status, which would render the "illegal" label inaccurate.[128]

With the pervasive use of "illegal alien" or "illegals" by the very public officials entrusted to write, execute, and interpret the law,[129] it is unsurprising, then, that the same rhetoric has become normalized in describing undocumented immigrants in the public discourse. According to the judicial opinion study, the public's preferred rhetoric used to describe noncitizens without lawful status tracked exactly that of the members of Congress, with "illegal alien" most preferred, followed by "illegals," followed by "undocumented immigrant."[130]

The effect of such rhetoric has been the entrenchment of language that devalues and excludes into the cultural landscape. As cognitive linguists have theorized, once certain metaphoric language becomes embedded into the English language, it shapes the way concepts are understood.[131] The use of "illegal" conflates undocumented status with illegality and criminality, even though one's status has yet to be adjudicated as unlawful, and even though one can become undocumented as the result of a civil, not just a criminal, offense.[132] Through the oft-repeated word "illegal," the concept of undocumented status is transformed in the mind of the listener to criminality, as the metaphor functions to distort reality.[133]

This distortion becomes complete when "illegal" no longer is used as an adjective describing an aspect of a person's character. It does not even describe the commission of conduct that may be attributable to the person, and that may, overtime, become associated with the person's character. Rather, the concept of illegality subsumes the whole person from the start. It does not account for how long ago the unlawful act took place, whether there were mitigating circumstances that might have excused the offense, the number of times the unlawful offense was committed, or the range of culpability underlying the myriad of offenses—both civil and criminal—that could be construed as

128 *E.g.*, INA § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b) (2012) (cancellation of removal).

129 *See* Bump, *supra* note 117.

130 *Id.*; *see also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1838–39 (2007) (attributing the popularity of such phrases to the criminalization of immigration by American lawmakers).

131 *See* LAKOFF & JOHNSON, *supra* note 32.

132 The two most common examples of becoming undocumented are by entering without inspection and by overstaying a visa. *See* Lyon, *supra* note 121, at 581. Both are usually treated as violations of the civil provisions of the INA. INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (entry without inspection); INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (unlawful presence).

133 *See* Cunningham-Parmeter, *supra* note 112, at 1556–59.

"illegal." The concept of immigrant, when defined by the terms "illegal" or "alien," distorts reality, as, according to Cunningham-Parmeter, "immigrant" becomes "alien," which becomes "illegal," which becomes "Mexican."[134]

III. Legal Harms

Part III moves beyond identity-related harms to show how penalizing presence has broader implications for the law. Section III.A. shows how the pervasive conflation of the person with notions of illegality and criminality in the cultural and statutory rhetoric has translated into actual law and policy. Under that framework, it analyzes important immigration policy decisions of the Trump Administration. Then, it exposes how penalizing presence has stymied legal efforts to integrate undocumented immigrants in the United States by incentivizing further evasion of the law and thwarting opportunities for imposing a reasonable statute of limitations on deportations.

A. "Alien" Metaphors and the Trump Administration's Assault on Immigrants

Cultural norms influence legal and policy decisions. In the immigration space, the broader public discourse that has conflated undocumented immigrants with illegality has not only entrenched such norms in U.S. culture, but also has shaped law and policy concerning undocumented immigrants. In the last few years, the exclusionary rhetoric used to describe undocumented immigrants has moved beyond illegality, to criminality and dangerousness. The Trump Administration has weaponized such rhetoric to support and normalize some of its recent immigration policies, such as increased enforcement, the rescission of DACA, and the militarization of the border. This Section shows that a central assumption animating these policies is viewing undocumented immigrants through the overdetermining lens of criminality.

1. Increased Enforcement

Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety.[135]

—Executive Order No. 13,768, 2017

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134 *Id.*

135 Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799 (Jan. 25, 2017).

There are a lot of CRIMINALS in the Caravan.[136]

—Donald Trump, President of the United States, 2018

One of Donald Trump's central campaign promises during the 2016 presidential election was to build a wall to secure the southern border with Mexico.[137] His first public statement on the subject began with a single tweet on August 5, 2014, which read, "SECURE THE BORDER! BUILD A WALL!"[138] From campaign to presidency, Trump's stance on, and key details about, the wall have shifted: its length (700 to 2,000 miles),[139] cost ($4 billion to $20 billion),[140] source of funding (Mexico to U.S. taxpayers),[141] and description (wall to fence).[142] President Trump seemed to retreat from the idea of a physical wall when he suggested that the presence of border patrol officers and additional security measures could serve as substitutes.[143] The idea of the wall, though, has gotten traction in Congress, which allocated nearly $1.6 billion for it and other forms of border security, as part of a $1.3 trillion spending bill.[144] This funding, however, fell short

136 Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:42 PM), https://twitter.com/realdonaldtrump/status/1065359825654169600 [https://perma.cc/6A6Z-4R2E].

137 Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html [https://perma.cc/J67D-L58Z].

138 *Id.*

139 *Id.* Speaking at a campaign rally in Manassas, Virginia, on December 2, 2015, Trump said, "In our case, we need really 1,000 miles. [The border is] 2,000 miles, but some is natural borders, natural barriers which are pretty good, not as good as the wall but pretty good; you know what, let's use it." *Id.* At other times, he has called for just 700 to 900 miles of wall. Ana Campoy, *Trump's Border Wall Keeps Getting Shorter and More Expensive*, QUARTZ (Jan. 5, 2018), https://qz.com/1172972/trumps-border-wall-keeps-getting-shorter-and-more-expensive/ [https://perma.cc/X8Y4-CAN8].

140 Nixon & Qiu, *supra* note 137. At a speech in Dallas in 2015, Trump told the audience, "So, let's say it costs $4 or $5 billion. Our trade deficit with Mexico is $53 billion. So $4 or $5 billion is peanuts." *Id.* Then, in January 2018, the president said in a tweet, "The $20 billion dollar Wall is 'peanuts' compared to what Mexico makes from the U.S. NAFTA is a bad joke!" *Id.*

141 *Id.* In an August 2015 campaign statement, then–candidate Trump said, "Mexico must pay for the wall, and until they do, the United States will, among other things . . . ." *Id.* In a 2017 speech in Philadelphia, Trump then said, "We're working on a tax reform bill that will reduce our trade deficits, increase American exports and will generate revenue from Mexico that will pay for the wall if we decide to go that route." *Id.*

142 *Id.* In an interview with the Christian Broadcast Network in May 2015, Trump said, "Nobody can build a fence like me, David. You know that. I build great buildings all over the world. There's nobody can build a fence—and I would have Mexico pay for it. Believe me." *Id.* Then, in August of that year, Trump tweeted, "Jeb Bush just talked about my border proposal to build a 'fence.' It's not a fence, Jeb, it's a WALL, and there a BIG difference!" *Id.*

143 *Id.*

144 H.R. 1625, 115th Cong. (2018) (enacted).

of the $5 billion President Trump had demanded and which passed in the House; the bill also imposed restrictions on the manner and time of construction.[145] At the time, the U.S. government had just come out of a historic government shutdown over the funding.[146] Although the spending bill avoided a second shutdown, President Trump later declared a national emergency to free up additional funding for the border project.[147] That declaration became quickly embroiled in litigation,[148] facing challenges from states, advocacy groups, and the House of Representatives.[149]

Whether or not the wall becomes a reality, it serves as an apt symbol for the broader shift in immigration-enforcement policy, not only during the Trump presidency, but also since the 9/11 attacks.[150] Frustrated by the federal government stalemate on immigration reform, local governments began enacting criminal ordinances targeted at the undocumented population.[151] Some were antiloitering bills, like the one passed in Suffolk County, New York, aimed at day laborers who stood alongside county roads to solicit work.[152] Others, like one in Prince William County, Virginia, required police officers to check

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145 *See id.*; *see also* Abby Livingston, *Congress Passes $1.3 Trillion Spending Bill that Includes Some Border Wall Funding*, TEX. TRIB. (Mar. 23, 2018), https://www.texastribune.org/2018/03/22/us-house-passes-13-trillion-spending-bill-includes-some-border-wall-fu/ [https://perma.cc/3P9A-3PFQ] (noting construction restrictions).

146 Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/L7SY-3THU].

147 *Id.*

148 *See, e.g.*, Sierra Club v. Trump, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019) (preliminarily enjoining the building of the wall); Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (ordering stay of the district court's injunction pending appeal before the U.S. Court of Appeals for the Ninth Circuit); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 11 (D.D.C. 2019) (dismissing lawsuit for lack of standing).

149 Jacqueline Thomsen, *California, New Mexico Ask Judge to Block Trump from Using Military Funds for Border Wall*, HILL (June 13, 2019, 1:12 PM), https://thehill.com/regulation/court-battles/448399-california-new-mexico-ask-judge-to-block-trump-from-using-military [https://perma.cc/4MZW-JH3Z].

150 MICHELLE MITTELSTADT ET AL., MIGRATION POLICY INST., THROUGH THE PRISM OF NATIONAL SECURITY 1–2 (2011) ("The decade that has unfolded since that Tuesday [September 11] morning in 2001 has witnessed systemic growth in border and interior enforcement, the advent of new visa controls and screening systems, and the rise of state and local actors as players in a policymaking and enforcement province that previously had been almost entirely the purview of the federal government.").

151 Udi Ofer, Legislative Counsel, N.Y. Civil Liberties Union, Proliferation of Local Anti-Immigrant Ordinances in the United States (May 12, 2007).

152 *Id.*

the immigration status of anyone in custody they believed to be in the United States illegally.[153]

State legislatures soon followed and enacted their own enforcement legislation, with Arizona's Senate Bill 1070 being the most well-known example.[154] Its most controversial enforcement provision made it a crime not to have documentation that conveyed a noncitizen's valid immigration status.[155] It authorized state officers to ascertain the immigration status of noncitizens during detention upon a reasonable suspicion that the noncitizen was unlawfully present.[156] This provision has since been challenged in court on the basis that the stated reasonable suspicions would be based primarily on race, which would disproportionately impact Hispanics, including American citizens.[157] While the Supreme Court struck down three sections of Senate Bill 1070 in 2012 on preemption grounds, it left intact the section of the law that permitted stops on reasonable suspicion of unlawful presence.[158]

Arizona Senate Bill 1070 sparked copycat bills in other states—including in Georgia, Utah, Indiana, and Alabama—which added to the directory of preexisting similar legislation in Florida, Missouri, and South Carolina.[159] These laws did not just impose more stringent enforcement measures in the name of security; many were also benefits-regulating legislation that sought to impact the daily lives of undocumented immigrants.[160] Such laws ranged from restrictions on receipt of state and local benefits,[161] to prohibitions on the use of foreign documents for both public and private purposes.[162]

In 2008, the federal government began partnering with state and local law enforcement to carry out its own immigration enforcement

153 Nick Miroff, *Fear Seizes Pr. William Immigrants—Legal and Not*, WASH. POST (July 15, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071401104_pf.html [https://perma.cc/2JXD-M8EJ].

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

155 *Id.*

156 *Id.*

157 United States v. Arizona, 703 F. Supp. 2d 980, 995–97 (D. Ariz. 2010).

158 Arizona v. United States, 567 U.S. 387, 415 (2012) (striking down sections 3, 5C, and 6).

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

160 *See, e.g.*, ALA. CODE § 31-13-7 (LexisNexis 2016) ("An alien who is not lawfully present in the United States and who is not defined as an alien eligible for public benefits under 8 U.S.C.S. § 1621(a) or 8 U.S.C.S. § 1641 shall not receive any state or local public benefits.").

161 *Id.*

162 *See* IND. CODE § 34-28-8.2-2(b) (2016), *enjoined by* Buquer v. City of Indianapolis, No. 1:11–cv–00708–SEB–MJD, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013).

priorities.[163] Even before 2008, the Secure Communities program allowed local, state, and federal governments to share biometric information of persons arrested on criminal charges.[164] When people are booked into jail, their biometric information is run against a federal database maintained by the Department of Homeland Security ("DHS") and Federal Bureau of Investigation ("FBI").[165] If the database indicates that an individual has committed a deportable offense, then U.S. Immigrations and Customs Enforcement ("ICE") can bring removal proceedings against that person.[166] ICE's stated objective is to prioritize the removal of persons who "present the most significant threats to public safety."[167] But with the advent of Secure Communities, immigration enforcement has increased generally, including through the apprehension, detention, and ultimately deportation of noncitizens who have committed relatively minor and low-value misdemeanor offenses.[168]

Though there was a net increase in deportations during the Obama Administration,[169] Secure Communities was changed to the Priority Enforcement Program ("PEP") under the direction of DHS Secretary Jeh Johnson's November 20, 2014 memorandum.[170] Like Secure Communities, PEP was a partnership among local, state, and federal enforcement that enabled sharing of law enforcement information, and the objective was to prioritize enforcement of immigration laws against noncitizens who posed a security risk.[171] A key

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163 *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities [https://perma.cc/J2Y4-7D8R].

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *See* AM. IMMIGRATION COUNCIL, IMMIGRATION DETAINERS UNDER THE PRIORITY ENFORCEMENT PROGRAM 1, 4 (2017); *see also* Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Immigrant Deportations Declined in 2014, but Remain Near Record High*, PEW RES. CTR. (Aug. 31, 2016), http://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high/ [https://perma.cc/7NAN-69PY] (finding the Obama Administration deported 2.4 million unauthorized immigrants from 2009–2014, including a record number of 435,000 in 2013).

169 *See* Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [https://perma.cc/BVG4-8LCU].

170 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. 1–3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/F97V-3MJV].

171 *See Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/pep [https://perma.cc/KV5J-DFWG].

difference was that PEP—under the guidelines articulated in Jeh Johnson's memorandum—more clearly prioritized certain removable offenses, thereby focusing foremost on the most serious threats to public safety.[172]

The Trump Administration abolished the priorities established under PEP and reinstituted Secure Communities.[173] This move reflects a broader push by the Trump Administration to increase enforcement against undocumented immigrants. Trump issued three executive orders in early 2017 aimed at securing the border,[174] maintaining public safety within the border,[175] and preventing the entry of noncitizens who represented concerns for national security.[176]

The final executive order, known mostly for its "travel ban," has received the most scholarly and judicial attention, but the first two and the changes they caused in enforcement priorities have also significantly altered the relationship between undocumented immigrants

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172 *See* Memorandum from Jeh Charles Johnson, *supra* note 170. The first enforcement priority targeted those noncitizens who were considered to be articulated the grounds for enforcement. For example, it prioritized persons who posed a threat to national security (engaging in or suspected of engaging in terrorism), border security (entering without inspection), and public security (conviction for an "aggravated felony" under the INA definition). *See id.* at 3–5. The second priority targeted those who were removable for having committed lower-value misdemeanors or multiple such offenses. *See id.* The third priority concerned noncitizens with a removal order already issued against them. *See id.* Although PEP makes clear that the government has the discretionary authority to exercise its removal power against anyone, even those identified in the priorities, under the exercise of prosecutorial discretion, the likelihood of enforcement against such persons was slim. *See id.*; Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST (Aug. 3, 2015), https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html?noredirect=on [https://perma.cc/7Z7Z-ESBR]. The need for the articulation of enforcement priorities stemmed precisely from the large number of undocumented immigrants in this country relative to the resources available to deport them. *See* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 610–11 (2013) (discussing agency under-resourcing issues); Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to Field Office Dirs. et al. 2–4 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/S4V4-SAFC] (noting scarcity of resources and need to prioritize removals of immigrants posing known security risks). The lack of transparency concerning the government's enforcement priorities meant that millions of undocumented immigrants, many of whom were long-term residents of the United States, lived in a perpetual state of fear, which disincentivized community engagement and drove them further into hiding. *See* Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017, 7:10 AM), https://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html [https://perma.cc/ZP8A-BP6L].

173 *See Priority Enforcement Program*, *supra* note 171; *Secure Communities*, *supra* note 163.

174 Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

175 Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

176 Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

and the law. Executive Order 13,768 changed the priorities under PEP and instituted its own. But its "priorities" seemingly prioritized all undocumented immigrants, giving broad discretion to immigration officers to remove anyone who otherwise poses a risk to public safety or national security.[177] The order does specify various criminal grounds, but makes no distinctions between felonies and misdemeanors, nor does it distinguish between the range of culpable conduct encompassed within the felony and misdemeanor categories.[178] Moreover, the priority for deportability under the varied categories of criminal conduct is not contingent on a conviction or even a charge of criminal conduct.[179] Rather, the mere commission of acts that can "constitute a chargeable criminal offense" is sufficient to receive priority for deportation under the executive order.[180] Thus, if the commission of even a relatively low-value theft offense can theoretically be considered a deportable offense, then it can result in the person's priority removal under this order. By seemingly treating all criminal convictions—and even the commission thereof—the same for purposes of enforcement, the executive order paints with a uniform brush of criminality all undocumented immigrants.[181]

2. *DACA Rescission*

The effect of this [DACA's] executive amnesty . . . contributed to a surge of unaccompanied minors on the southern border that yielded

177 *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

178 *See id.*

179 *See id.*

180 *Id.*

181 The data reflect the broadening of the categories of undocumented immigrants subject to arrest and removal. First, there has been an increase in the number of removals and immigration arrests during the first year of the Trump Administration. During the 2017 fiscal year, removals increased by 37% from the prior fiscal year. U.S. Immigration & Customs Enf't, Fiscal Year 2017 ICE Enforcement and Removal Operations Report 11 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/SNC6-E7QS]. During the same period, arrests of immigrants by ICE officers increased by 42% from the prior fiscal year. *Id.* at 2. Second, the kinds of immigration offenses being targeted have shifted from the prior administration. Of the 143,470 noncitizens arrested during the 2017 fiscal year, 38,000, or 26%, did not have a criminal conviction. *Id.* at 5. During the prior fiscal year, and prior to the change in administrative policy on enforcement, the number of noncitizens arrested who did not have a criminal conviction was 15,000, which represents a 153% increase on arrests of noncitizens without a criminal conviction. *See id.* at 2–3 (stating that of the 110,000 noncitizens arrested in fiscal year 2016, 95,000 had a criminal conviction); Kristen Bialik, *Most Immigrants Arrested by ICE Have Prior Criminal Convictions, a Big Change from 2009*, Pew Res. Ctr. (Feb. 15, 2018), https://www.pewresearch.org/fact-tank/2018/02/15/most-immigrants-arrested-by-ice-have-prior-criminal-convictions-a-big-change-from-2009/ [https://perma.cc/YAP2-MEWT].

terrible humanitarian consequences. It also denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens.[182]

—Jeff B. Sessions, Attorney General, 2017

DACA is a signature program of the Obama Administration designed to bring out from the "shadow of deportation" certain undocumented youths who came to the United States as children.[183] The program was intended to be a more transparent exercise of prosecutorial discretion. Certain states, however, challenged the legal mechanism through which the policy was promulgated, causing it to become embroiled in litigation.[184] Without the political will or the resources to remove more than 11 million undocumented immigrants in the United States, the administration necessarily had to prioritize certain enforcements and removals.[185] Under Jeh Johnson's enforcement-priority memorandum, long-term residents—such as those who came to the United States as children, many of whom did not have the agency to violate U.S. immigration law, and who have since lived otherwise productive lives—would not have been the targets of enforcement under any exercise of prosecutorial discretion.[186]

The decision to single out ex ante a particular population that would merit such protection was significant, and its aim to aid these individuals, conscious. It sought to alleviate the harms associated with living under the daily threat of deportation—or what I have called the harms associated with demands to "pass" as documented.[187] But in another important respect, incentivizing the disclosure of one's immigration status could have a tangible benefit to the government. With the increase in immigration-status disclosures, the government would have more information about a significant population that it had no ability to track previously. Further, disclosure might lead to more per-

182 Jeff Sessions, U.S. Attorney Gen., Remarks on DACA (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca [https://perma.cc/EYP5-QQYM].

183 Barack Obama, U.S. President, Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800 (June 15, 2012), https://www.govinfo.gov/content/pkg/PPP-2012-book1/pdf/PPP-2012-book1-doc-pg800.pdf [https://perma.cc/NMX2-XRRR]; *see* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs. 3–4 (Nov. 20, 2014).

184 *See* Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd per curiam*, 136 S. Ct. 2271, 2272 (2016).

185 *See* Memorandum from Jeh Charles Johnson, *supra* note 183, at 2.

186 *See id.* at 5–6.

187 *See* Kim, *supra* note 16, at 136–38.

manent pathways to undocumented persons' integration into American communities, which would benefit those communities, financially and otherwise.

On September 5, 2017, Attorney General Jeff Sessions declared DACA unconstitutional and announced its rescission.[188] This rescission has been challenged in at least five federal courts across the country, with three district courts issuing nationwide injunctions against the rescission[189] and two refusing to do so.[190] As of this writing, the outcome is pending before the U.S. Supreme Court.[191] In his announcement of the rescission, Sessions portrayed DACA as an example of unlawful executive overreach and cited separation of powers concerns as the reason that the Justice Department could no longer defend it.[192] But the support for, and the assumptions driving, the constitutional arguments was the conflation of undocumented immigrants with illegality and criminality.

First, Sessions characterized DACA as an act of "amnesty" for "mostly-adult illegal aliens."[193] He was incorrect. Although DACA sought to provide reprieve from deportation, that reprieve was limited in duration;[194] it was not a lasting form of relief as the term "amnesty"

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188 Sessions, *supra* note 182; *see* Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/D3LD-YUGW].

189 *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1028, 1049 (N.D. Cal. 2018) (setting aside rescission), *aff'd*, 908 F.3d 476 (9th Cir. 2018); NAACP v. Trump, 315 F. Supp. 3d 457, 474 (D.D.C. 2018) (same), *appeal filed*, No. 18-5243 (D.C. Cir. Aug. 10, 2018); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018) (same), *appeal filed*, No. 18-1985 (2d Cir. July 5, 2018). The U.S. Supreme Court granted petitions for certiorari and consolidated all three cases. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779, 2779 (2019).

190 *See* Casa de Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 779 (D. Md. 2018), *rev'd in part*, 924 F.3d 684, 705 (4th Cir. 2019) (finding DACA rescission to be arbitrary and capricious), *petition for cert. docketed*, No. 18-1469 (May 24, 2019); Texas v. United States, 328 F. Supp. 3d 662, 743 (S.D. Tex. 2018). The Texas opinion was issued by Judge Andrew Hanen, who previously decided the 2015 case of the same name, enjoining implementation of the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program. *Texas*, 328 F. Supp. 3d at 671; Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

191 *Dep't of Homeland Sec.*, 139 S. Ct. at 2779 (granting petition for writ of certiorari).

192 Sessions, *supra* note 182. In his letter to the Acting Secretary Elaine Duke, Sessions emphasized that DACA lacked "proper statutory authority" and was "an unconstitutional exercise of authority by the Executive Branch." Letter from Jeff Sessions, Attorney General, to Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [https://perma.cc/E76P-ZRBR].

193 Sessions, *supra* note 182.

194 *See* Press Release, U.S. Citizenship & Immigration Servs., Secretary Johnson An-

suggests. DACA applicants take calculated risks in exposing their legal statuses to the government in the hopes of receiving the benefits of the infrequently exercised prosecutorial discretion. Theoretically, the government could determine that the noncitizen does not meet the qualifications, and subsequently use that information against the noncitizen to deport him during his initial application or renewal proceedings. Though a guidance document by United States Citizenship and Immigration Services ("USCIS") assures that the applicants' information remains at USCIS—and never reaches ICE—the document provides exceptions to this policy.[195] Further, no guarantee exists for sudden shifts in administrative policy, for example, due to a change in presidential administrations.[196]

Second, the Attorney General's linking of "illegality" to undocumented immigrants is particularly inappropriate when applied to the DACA population. Two required conditions for DACA are that applicants do not "pose a threat to national security or public safety," and that they "[h]ave not been convicted of a felony, a significant misdemeanor, [or] three misdemeanors" of any kind.[197] Thus, the way DACA recipients originally may have become undocumented is by entering without inspection or by overstaying or violating the terms of their visas, which each generally qualify as civil offenses. As they were children at the time of their entries in the United States, they may have lacked the agency to violate U.S. immigration laws. The ascription of "illegality" to members of this group is particularly inaccurate.

Finally, the Attorney General does more than equate the DACA population to illegality by promoting its link to criminality. He reasoned, for example, that the "[f]ailure to enforce the laws in the past has put our nation at risk of crime, violence, and even terrorism."[198] Though the lack of enforcement of immigration laws against noncitizens with convictions for certain crimes would pose a threat to public safety, the exercise of discretionary authority to not enforce those laws temporarily against a certain population of children who have not committed such crimes creates a false link between the DACA population and criminality.

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nounces Process for DACA Renewal (June 4, 2014), https://www.uscis.gov/archive/secretary-johnson-announces-process-daca-renewal [https://perma.cc/5KCW-4U34] (announcing two-year renewable period for deferrals).

195 *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/archive/frequently-asked-questions#evidence [https://perma.cc/8X3F-LU7H].

196 *Id.*

197 *Id.*

198 Sessions, *supra* note 182.

3. *"Zero Tolerance" and Militarization of the Border*

The security of the United States is imperiled by a drastic surge of illegal activity on the southern border . . . . The combination of illegal drugs, dangerous gang activity, and extensive illegal immigration not only threatens our safety but also undermines the rule of law.[199]

—Memorandum on Securing the Southern Border of the United States, April 4, 2018

We have people coming into the country or trying to come in . . . . You wouldn't believe how bad these people are. These aren't people. These are animals.[200]

—Donald Trump, President of the United States, 2018

a. *Criminalizing Undocumented Immigrants*

On April 6, 2018, Attorney General Jeff Sessions notified all U.S. Attorneys Offices along the nation's southern border of a new "zero tolerance" policy for entry without inspection.[201] Entry without inspection is a ground of inadmissibility under the INA and is usually treated as a civil offense. This norm changed when the Attorney General urged the adoption of a new policy to prosecute all cases of unlawful entry as criminal offenses under 8 U.S.C. § 1325(a).[202] What is significant about the "zero tolerance" policy is not necessarily the increase in the number of apprehensions or removals at the border, but rather the shift from what has, in practice, been treated as a civil offense, to a criminal one.

Congress has chosen to criminalize unlawful entry in two significant ways. The first falls under the statute referenced by the Attorney General, which criminalizes unlawful entry of various kinds, including

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199 Memorandum on Securing the Southern Border of the United States, 2018 DAILY COMP. PRES. DOC. 218 (Apr. 4, 2018), https://www.govinfo.gov/content/pkg/DCPD-201800218/pdf/DCPD-201800218.pdf [https://perma.cc/FKQ4-U3YM].

200 Remarks at a Roundtable Discussion on California's Immigration Enforcement Policies, 2018 DAILY COMP. PRES. DOC. 338 (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/ [https://perma.cc/Z86L-MRE5].

201 Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/8DLB-3ZET].

202 *See* INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (2012); *see, e.g.*, INA § 275(a), 8 U.S.C. § 1325(a); INS v. Lopez-Mendoza, 468 U.S. 1032, 1054 (1984) (White, J., dissenting) ("It is true that a majority of apprehended aliens elect voluntary departure, while a lesser number go through civil deportation proceedings and a still smaller number are criminally prosecuted."); Press Release, U.S. Dep't of Justice, *supra* note 201.

those without inspection and through misrepresentation.[203] The second falls under INA § 276, which concerns reentry by a noncitizen who previously had been "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding."[204]

While a noncitizen can technically be criminally charged if apprehended at the border under either of these provisions, the Attorney General's "criminal" label remains inaccurate. Putting aside the broader issue of whether the commission of, or even the conviction for, a crime should ever define the person as "criminal," in many of these instances, the government may choose not to prosecute a noncitizen under the criminal law. It may instead, through the exercise of its prosecutorial discretion, handle the matter under the civil laws governing inadmissibility and deportability.[205] Indeed, the Attorney General's "zero tolerance" policy was remarkable precisely because it reflected a shift from the prior practice that generally treated unlawful entry as grounds for civil inadmissibility.[206]

Another reason why the "criminal" label is inaccurate is that entry without inspection does not always lead to a criminal conviction under INA § 275. A criminal conviction is only possible if the apprehension happened at the border within five years of entry.[207] If the unlawful entry goes undetected, only to come to the attention of law enforcement more than five years from the date of the unlawful entry, the right to prosecute is lost due to the general five-year statute of limitations period governing federal criminal offenses.[208] For convic-

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203 INA § 275(a)(1)–(3), 8 U.S.C. § 1325(a)(1)–(3) (2012).

204 INA § 276(a)(1), 8 U.S.C. § 1326(a)(1). This provision has a civil correlate, as the conduct that falls within its scope is also considered a ground of inadmissibility under § 212(a)(9)(A) of the INA. INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

205 *See* Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 622 (2017) (noting that criminal prosecutions of immigration violations have "skyrocketed" under the Trump administration); *see also* Liam Brennan, *Sessions Is Criminalizing Immigration Violations. That Upends Centuries of History.*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/05/10/sessions-is-criminalizing-immigration-violations-that-upends-centuries-of-history/?utm_term=.6c1121d9cbfb [https://perma.cc/8P36-UB6J].

206 *See* CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 6–8 (2019), https://fas.org/sgp/crs/homesec/R45266.pdf [https://perma.cc/UQ9J-RM6C].

207 18 U.S.C. § 3282(a) (2012).

208 *Id.* ("[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."). For a comprehensive discussion of the criminal grounds associated with unlawful entry, see Brian L. Owsley, *Distinguishing Immigration Violations from*

tions under § 275, the federal government's claims accrue upon the date of unlawful entry.[209] Thus, for long-term undocumented immigrants, whose unlawful entry occurred more than five years before their apprehension, "criminal" is an inaccurate description.

b. Criminalizing Immigrants on the Threshold of Entry

The Trump Administration's continuous association of illegality with undocumented immigrants extends even more broadly, encompassing not just undocumented immigrants, but also immigrants on the *threshold* of entry—and not just those who attempt to enter without inspection. The Administration's border policies have shifted away from a humanitarian lens to a criminal—and, at times, militaristic—lens. The renewed calls for border security and the new "zero tolerance" policy, for example, were responses to the migration of children from Central America who sought to assert their asylum rights as recognized under both U.S. and international law.[210]

In response to the more than 10,000 unaccompanied minors who appeared at the U.S. southern border during the summer of 2014,[211] the Obama Administration "declared a humanitarian crisis and designated the Federal Emergency Management Agency to coordinate the federal response" to assist populations fleeing violence and crimes in their home countries.[212] That response included funding for detention

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Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor, 163 U. PA. L. REV. ONLINE 1, 3–5 (2014).

209 United States v. Williams, 733 F.3d 448, 452–53 (2d Cir. 2013). Unlike INA § 275, the accrual date for convictions under INA § 276, which criminalizes reentry by those who have previously been excluded or deported, begins not on the date of entry, but upon discovery because the offending conduct is not limited to entry, but also encompasses being "found." *Id.*; *see* INA § 276, 8 U.S.C. § 1326 (2012).

210 CONG. RESEARCH SERV., *supra* note 206, at 1.

211 Jerry Markon, *Influx of Unaccompanied Immigrant Children Slowed Again in September*, WASH. POST (Oct. 9, 2004), https://www.washingtonpost.com/news/federal-eye/wp/2014/10/09/influx-of-unaccompanied-immigrant-children-slowed-again-in-september/ [https://perma.cc/4RC5-LGB9].

212 Sural Shah, *The Crisis in Our Own Backyard: United States Response to Unaccompanied Minor Children from Central America*, HARV. PUB. HEALTH REV., Spring 2016, at 1, 3, http://harvardpublichealthreview.org/the-crisis-in-our-own-backyard-united-states-response-to-unaccompanied-minor-children-from-central-america/ [https://perma.cc/DMT7-WPSG]. The population consisted primarily of children from the Central American states of El Salvador, Guatemala, and Honduras. *Id.* at 1. According to a UNHCR study, one of the primary push factors of migration was violent crimes in their home countries, with 66% of children from El Salvador, 44% of the children from Honduras, and 20% of the children from Guatemala mentioning organized crime. *Id.* at 2. Eighty percent of the children interviewed in the study also discussed reuniting with family in the U.S., opportunities for work and education, and the opportunity to help family in their home countries as motivation for the migration. *Id.*

centers to house the children while their claims awaited adjudication, hiring more immigration judges to adjudicate the claims, and increasing the number of border personnel to improve security.[213] The government's response was subject to critiques, but ultimately, the approach was humanitarian.[214]

The shift in the Trump Administration's border policies was marked. It treated the very people fleeing crimes and violence as, themselves, criminal and violent. Perhaps no policy reflects the shift from humanitarian to criminal more fully than the family separation policy at the border.[215] This policy permitted children and adults to be processed on separate tracks, with adults detained pending removal, and children being processed by a nonimmigration agency, the Office of Refugee Resettlement.[216] The policy was somewhat narrowed by a 2015 court order, also known as the *Flores* settlement, which held that migrant children cannot be in detention for longer than 20 days and, generally, should not be separated from their parents.[217]

While this track processing was in place during the Obama Administration, administrative officials exercised their prosecutorial discretion and refrained from separating families during detention.[218] Under Attorney General Sessions's "zero tolerance" policy, border officials could no longer exercise that discretion. From the implementation of the policy in April 2018 until May 31, 2018, DHS reported that close to 2,000 minors were separated from their accompanying

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213 *Id.* at 3–5.

214 Such critiques included the lack of legal representation for children navigating a foreign legal system, the long waits for adjudication of claims that led to lengthy detention, and prolonged separation from family members. *See id.*

215 *See* 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 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/RT5S-KFDX].

216 *About UAC Program*, Off. Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs/about [https://perma.cc/5D9L-5S3S].

217 Sarah Herman Peck & Ben Harrington, Cong. Research Serv., R45297, The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions 9 (2018); *see* Flores v. Barr, No. CV 85-4544-DMG, 2019 U.S. Dist. LEXIS 176113, at *5 (C.D. Cal. Sept. 27, 2019) (upholding Flores settlement), *appeal filed*, No. 19-56326 (9th Cir. Nov. 15, 2019).

218 Brian Naylor, *Fact Check: Are Democrats Responsible for DHS Separating Children from Their Parents?*, NPR (May 29, 2018, 4:02 PM), https://www.npr.org/2018/05/29/615211215/fact-check-are-democrats-responsible-for-dhs-separating-children-from-their-pare [https://perma.cc/A7EP-NRG5] ("[F]ormer President Barack Obama's domestic policy director, Cecilia Muñoz, stated unequivocally that separating children from their parents was not a policy the Obama administration followed.").

adults.[219] The policy's aim was to deter new arrivals of immigrants by punishing those who did arrive to the border in a most cruel way.[220] In that vein, the policy subscribed to a central purpose of criminal law, which not only deters, but also punishes unlawful conduct. In important respects, the family separation policy is an ironic subversion of what has been historically the central purpose of U.S. immigration laws—the reunification of families.[221]

c. Militarizing Immigration Law and the Rhetoric of War

The "zero tolerance" policy, and the rhetoric that has supported it, have moved beyond viewing immigrants through a criminal lens—they now view immigrants through a military lens.[222] President Trump described asylum-seekers from Central America as "[m]any [g]ang [m]embers and some very bad people . . . mixed into the [c]aravan

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219 Tal Kopan, *DHS: 2,000 Children Separated from Parents at Border*, CNN (June 16, 2018, 2:44 AM), https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html [https://perma.cc/5FTR-HXLP] (citing a statement from DHS spokesman Jonathan Hoffman); *see* Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018) (enjoining practice of family separation).

220 *See* David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018, 8:44 PM), https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C [https://perma.cc/8TXN-NZYB].

221 For example, the most number of available visas each year are reserved for family preference categories. *See* INA § 203, 8 U.S.C. § 1153 (2012). While the Administration has publicly retreated from the family separation policy, *see* Executive Order 13,841, 83 Fed. Reg. 29,435 (June 25, 2018), the Administration's attempt to limit the number of asylum seekers arriving at the border has continued through a series of policies, at least one of which has relied on the association of criminality and dangerousness with asylum seekers on the threshold of entry. *See* Addressing Mass Migration Through the Southern Border of the United States, Proclamation No. 9,822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) ("Many entered Mexico unlawfully—some with violence . . . ."); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 755 (9th Cir. 2018) (upholding district court injunction of policy); Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Servs., et al. (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/10_0219_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/58ET-LFXX] (permitting the returning of certain migrants to Mexico while asylum claim pending); Innovation Law Lab. v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019) (allowing Migrant Protection Protocol policy to stand pending appeal); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (barring asylum to most individuals at the southern border who passed through third country in transit to the U.S.); Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019) (staying district court injunction).

222 *See generally* Andrea Scoseria Katz, *The Militarization of Immigration Law: How America's War on Terror Became a War on the Undocumented* (June 14, 2019) (unpublished manuscript) (on file with author) (describing the militarization of immigration policy and institutions since 9/11).

heading to our [s]outhern [b]order."[223] He then warned, "This is an invasion of our [c]ountry and our [m]ilitary is waiting for you!"[224] His reference to invasion evokes the rhetoric of war.

While President Trump's remarks may appear unprecedented, they are not. The link between immigration and war has its foundations in the Constitution itself.[225] Although the federal government has regulated immigration for more than a century, no specific enumerated power gives the federal government that authority.[226] To find a constitutional footing for the federal government's regulation of immigration enforcement, the Supreme Court has located the power in several clauses, including the War Clause,[227] which gives Congress the power to "declare [w]ar."[228] Justice Daniels, in the *Passenger Cases*,[229] recognized that the War Clause may give Congress the authority to regulate "alien enemies" during times of war.[230] Immigration regulation has been linked to a sovereign right that all nation-states possess to define who can enter their borders during times of both war and peace.[231]

The metaphor of immigrants as invaders can be traced back to the 1880s and the Chinese Exclusion Acts,[232] which barred the entry of all Chinese laborers into the United States, even those who already had legal statuses in the United States and who, prior to temporarily

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223 Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 [https://perma.cc/LEY3-E8QR]; *see also* Tom Embury-Dennis, *Trump Says Military Is 'Waiting for' Migrant Caravan After Warning of 'Invasion' Across U.S. Border*, INDEP. (Oct. 29, 2018, 3:53 PM), https://www.independent.co.uk/news/world/americas/trump-migrant-caravan-tweet-mexico-border-tracker-location-honduras-tapanatepec-a8607031.html [https://perma.cc/4N7H-R97L].

224 Trump, *supra* note 223; *see also* Embury-Dennis, *supra* note 223.

225 *See* U.S. CONST. art. I, § 8, cl. 4, 11.

226 *See* U.S. CITIZENSHIP & IMMIGR. SERV., HISTORY OFFICE & LIBRARY, OVERVIEW OF INS HISTORY 3 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf [https://perma.cc/FR8T-7ZZU]; *see also* U.S. CONST. (lacking specific enumeration of immigration power).

227 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). *See generally* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 74, 75, 80 (2002) (connecting the history of immigration policy to periods of war and concerns related to national security).

228 U.S. CONST. art. I, § 8, cl. 11.

229 48 U.S. (7 How.) 283 (1849).

230 *Id.* at 509.

231 *See* Chae Chan Ping v. United States, 130 U.S. 581, 595–607 (1889).

232 Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115, 118 (repealed 1943); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

leaving the nation, had received permission to return.[233] In upholding the constitutionality of the Acts, the Supreme Court referred to the immigration of Chinese laborers as an "Oriental invasion" and a "menace to our civilization."[234] Justice Field continued, "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us."[235] Justice Field went beyond making a figurative comparison between migration and war. He described the migration of civilians—in this case, those lawfully following procedures that existed at the time of their temporary departures from the United States—as necessitating the deployment of the nation's military forces.[236]

The Supreme Court has continued to employ the language of war to characterize immigration, specifically referring to it as an "invasion." In 1975, for example, the Court described illegal immigration from Mexico as a "silent invasion of illegal aliens."[237] The rhetoric of war extends beyond the use of the term "invasion" to include other metaphors that evoke war and battle.[238] For example, the Court has stated, "[W]e leave no 'unprotected spot in the Nation's armor,'"[239] and "[t]he deployment of Border Patrol agents along the border is intended to maximize the effectiveness of the limited number of personnel, with the first line of defense being called the 'line watch.'"[240] In another decision, the Court depicted migration as a "northbound tide of illegal entrants into the United States."[241] The Court has even implied that immigration is a battle that will be won upon the enemy's—meaning the immigrants'—"surrender."[242] Referring to the migration of Haitians seeking asylum under the Special Agricultural Works program, the Court commented, "[M]ost aliens . . . can ensure themselves review [of their asylum claims] in courts of appeals only if they voluntarily surrender themselves for deportation."[243] Finally, reversing an opinion that declared unconstitutional a California law re-

233 *Chae Chan Ping*, 130 U.S. at 595–607.

234 *Id.* at 595.

235 *Id.* at 606.

236 *See id.*

237 United States v. Ortiz, 422 U.S. 891, 904 (1975).

238 Cunningham-Parmeter, *supra* note 112, at 1583.

239 Zadvydas v. Davis, 533 U.S. 678, 695–96 (2001) (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953)).

240 United States v. Brignoni-Ponce, 422 U.S. 873, 907 (1975).

241 City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000).

242 Cunningham-Parmeter, *supra* note 112, at 1583.

243 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

stricting the knowing employment of undocumented workers, the Court stated, "In attempting to protect California's fiscal interests . . . [the statute] is tailored to combat effectively the perceived evils."[244]

The rhetoric of war has extended beyond the judiciary and into popular culture.[245] One empirical study found that the terms most associated with "alien"—the statutory term used to describe noncitizens—are "invasion," "invader," and "enemy."[246] As other scholars have commented, the term "alien" evokes negative connotations of extraterritoriality and otherness.[247]

The media has similarly applied such notions of extraterritoriality and otherness to the immigrant population. One CNN broadcast opened, "Tonight, illegal alien invasion. . . . Mexican President Vicente Fox says he doesn't want to talk immigration."[248] As another example, a Denver Post article wrote, "President Obama apparently doesn't know how bad the illegal alien invasion is . . . . He should send at least 50,000 armed troops to the border to protect the citizens of this country."[249] Such examples put President Trump's depiction of the approaching migrant caravan as an "invasion" into a broader historical context. His rhetoric is a continuation of a century-old approach of describing immigrants and immigration as threats to the viability and livelihood of this country.[250]

What may be unprecedented is the actual—or threatened—deployment of the military to the border.[251] President Trump ordered 2,100 National Guard troops to the border in anticipation of the arri-

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244 De Canas v. Bica, 424 U.S. 351, 357 (1976).

245 D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. Rev. 1517, 1518–20 (studying the corpus of American English from the social and cultural landscapes that included texts or transcripts from television, radio, newspapers, literature, and academic writings).

246 *Id.* at 1519, 1532.

247 *See* Johnson, *supra* note 89, at 272–83 (analyzing the term "alien" and its use in immigration law); Motomura, *supra* note 115, at 547 n.4 (noting pejorative connotations); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. Rev. 1425, 1428 (1995) (arguing that the term "alien" is xenophobic); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 Or. L. Rev. 425, 426 n.4 (1997) (describing use of "alien" as pejorative that highlights foreignness).

248 Núñez, *supra* note 245, at 1533.

249 *Id.*

250 *See, e.g.*, Josh Boak, *AP Fact Check: Trump Plays on Immigration Myths*, PBS (Feb. 8, 2019, 10:44 AM), https://www.pbs.org/newshour/politics/ap-fact-check-trump-plays-on-immigration-myths [https://perma.cc/XS3F-N556] ("President Donald Trump has long railed against immigration as a scourge on the economy and national security.").

251 *See* Tara Copp, *2,100 Mostly Unarmed Guard Troops on Border as Trump Vows to Send More to Stop Migrant Caravan*, Mil. Times (Oct. 23, 2018), https://www.militarytimes.com/news/

val of the migrant caravan and, in April 2018, Secretary of Defense General Mattis authorized up to 4,000 troops be sent to the border states pending the approvals of those states' governors.[252] In October 2018, President Trump, through a tweet, threatened that he would stop the caravan by "bringing out the military for this National Emergency."[253] According to administrative officials, the number of troops contemplated was in the range of 800 to 1,000.[254]

By June 2019, some 5,000 troops had been deployed to the border, with 3,000 active-duty troops supporting the 2,000 National Guard troops previously sent by President Trump.[255] In addition to patrolling, President Trump assigned the troops to such tasks as painting the border wall.[256] President Trump's language thus moves beyond metaphors that imply the militarization of immigration policy. By shifting functions normally handled by civilian border patrol officers to the military, he actually did militarize immigration policy.

B. Creating Perverse Incentives

Penalizing presence created the legal consequence of incentivizing immigrants to continue to evade the law, thereby frustrating efforts to integrate the immigrant population into U.S. polity.[257] Prior to IIRIRA and the advent of the "unlawful presence" category, Congress focused on actions, not being. The INA's earlier formulation defined entry without inspection as grounds for the exclusion of "any immigrant who at the time of application for admission [] not in possession of a valid unexpired immigrant visa [or] border crossing identi-

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your-military/2018/10/23/2000-unarmed-guard-troops-on-border-as-trump-vows-to-send-more-to-stop-migrant-caravan/ [https://perma.cc/6NNX-HD96].

252 *Id.*; Courtney Kube & Julia Ainsley, *Mattis OKs up to 4,000 National Guard Troops for Border*, NBC NEWS (Apr. 7, 2018, 10:16 AM), https://www.nbcnews.com/news/us-news/national-guard-troops-headed-border-friday-night-officials-say-n863526 [https://perma.cc/52JQ-ZFTU].

253 Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 25, 2018, 7:05 AM), https://twitter.com/realdonaldtrump/status/1055414972635926528 [https://perma.cc/9UX3-B3Y2].

254 David Jackson & Alan Gomez, *Trump to Send at Least 800 Troops to Southern Border Ahead of Migrant Caravan*, USA TODAY (Oct. 25, 2018, 3:46 PM), https://www.usatoday.com/story/news/2018/10/25/donald-trump-migrant-caravan-military-troops-mexico-border/1764714002/ [https://perma.cc/C7R5-W67Y].

255 Ryan Pickrell, *Trump Sent US Troops to the Southern Border for a "National Emergency." They're About to Spend the Next Month Painting His Wall.*, BUS. INSIDER (June 6, 2019, 11:01 AM), https://www.businessinsider.com/us-troops-to-spend-a-month-painting-trumps-border-wall-2019-6 [https://perma.cc/WS9G-QKHA].

256 *Id.*

257 *See* THE NAT'L ACADS. OF SCIS., ENG'G, & MED., THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY 8–10 (Mary C. Waters & Marisa Gerstein Pineau eds., 2015).

fication card."[258] For those who had already entered unlawfully, § 241(a)(2) of the INA specified that those who "entered the United States without inspection or at any time or place other than as designated by the Attorney General" were deportable.[259] For overstays of visas, the statute specified as excludable "any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa."[260] And, for those in the United States after the expiration of their visas, the INA specified as deportable "any alien in the United States . . . in violation of this [Act]."[261] An individual who violated the terms of his nonimmigrant visa was subject to deportation for "fail[ing] to maintain the nonimmigrant status in which he was admitted . . . or to comply with the conditions of any such status."[262] These definitions targeted acts, not presence or a state of being.

The shift from penalizing acts to penalizing presence was an effort to address congressional concern about the judicial expansion of the entry doctrine, which was perceived as incentivizing surreptitious border crossings.[263] As part of eradicating the entry doctrine, Congress changed the nomenclature from "entry" to "admission,"[264] and instituted inadmissibility bars.[265] Having abandoned the term "entry," the law came to penalize unlawful entry through the concept of "presence."[266]

This approach was misguided for several reasons. First, penalizing presence is anomalous when compared to the statute's general focus on conduct. Section 212(a) of the INA lists the classes of conduct that make a noncitizen inadmissible from the United States.[267] The range is vast. It spans grounds that relate to health,[268] criminality,[269] terrorism,[270] totalitarianism,[271] public charge,[272] labor,[273] unlawful entry,[274]

258 INA § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1988).
259 INA § 241(a)(2), 8 U.S.C. § 1251(a)(2).
260 INA § 212(a)(20), 8 U.S.C. § 1182(a)(20).
261 INA § 241(a)(2), 8 U.S.C. § 1251(a)(2).
262 INA § 241(a)(9)(A), 8 U.S.C. § 1251(a)(9)(A).
263 *See supra* text accompanying notes 51–64.
264 *See supra* text accompanying notes 51–64.
265 INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (2012).
266 *See supra* note 64 and accompanying text.
267 INA § 212(a), 8 U.S.C. § 1182(a).
268 INA § 212(a)(1), 8 U.S.C. § 1182(a)(1).
269 INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).
270 INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).
271 INA § 212(a)(3)(B), (D), 8 U.S.C. § 1182(a)(3)(B), (D).
272 INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).
273 INA § 212(a)(5), 8 U.S.C. § 1182(a)(5).

improper documentation,[275] ineligibility for citizenship,[276] prior removal,[277] and polygamy.[278] What makes the unlawful-presence inadmissibility designation comparatively anomalous is its focus on status and state of being, rather than on conduct.[279] Other inadmissibility categories identify either particular acts or the underlying act that produced the condition. For example, the criminal inadmissibility grounds focus on the acts that led to convictions for certain crimes.[280] This is also true for security-related inadmissibility grounds, which focus on "engag[ing] in . . . activity" that would pose a security risk.[281] The anomaly even extends beyond the INA to other areas in which U.S. law has eschewed penalizing a person's status or being.[282]

Second, penalizing presence did not achieve its intended aims because it was predicated on a false premise. Congress assumed that under the new law, those already in the United States unlawfully would seek to avoid the inadmissibility bars by leaving the United States and returning with lawful status.[283] That assumption proved inaccurate.[284] Penalizing presence and the long-term inadmissibility bars incentivized hiding and frustrated legal and social efforts to integrate the undocumented immigrant population into society. For many, regu-

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274 INA § 212(a)(6), 8 U.S.C. § 1182(a)(6).

275 INA § 212(a)(7), 8 U.S.C. § 1182(a)(7).

276 INA § 212(a)(8), 8 U.S.C. § 1182(a)(8).

277 INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

278 INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A).

279 In addition to unlawful presence, a few of the categories can similarly be characterized as focusing on being, rather than conduct. For example, under the health-related inadmissibility grounds of § 212(a)(1), a noncitizen is inadmissible for having been "determined . . . to have a communicable disease of public health significance" who lacks immunizations for vaccine-preventable diseases or "to have a physical or mental disorder," though some of these conditions can be read to penalize the underlying action that led to the condition (not receiving a vaccine, for example). INA § 212(a)(1)(A)(i)–(ii), (iii)(I), 8 U.S.C. § 1182(a)(1)(A)(i)–(ii), (iii)(I). Nevertheless, as I explain in Part IV, the specification of unlawful presence as the offense is comparatively more onerous because the status is functionally immutable, and Congress could have chosen to specify the underlying offenses as the harm in a way that Congress did not have the choice for certain health-related conditions.

280 *See* INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) ("any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—").

281 *See* INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

282 *See infra* Part IV.

283 *See Shortfalls*, *supra* note 64, at 32 (statement of Paul W. Virtue, former INS General Counsel and Executive Associate Comm'r) ("As a result, far from curtailing illegal immigration and deterring people from overstaying their visa as intended, IIRIRA's new bars to admissibility are actually contributing to the unprecedented rise in the number of undocumented immigrants.").

284 *See id.*

larizing to lawful status was not possible due to the limited availability of long-term relief.[285] For long-term residents who became otherwise law-abiding members of their communities following their visa overstays or unlawful entries, leaving the United States was not a viable option precisely because that would have triggered the ten-year inadmissibility bar.[286] That the inadmissibility bars did not apply to undocumented immigrants who did not depart the United States further incentivized remaining in the country unlawfully. If, for example, an undocumented immigrant could obtain permanent residence without leaving the United States through mechanisms like adjustment of status, a form of relief with onerous requirements and not generally available to those who entered without inspection,[287] then the rational choice was to remain in the country, evade detection, and establish legal status through employment or family connections. As David Martin has noted, this decision to pursue legal status while in the United States avoided the long-term inadmissibility bar as well as the attendant hardships that accompany such long-term separations of families.[288]

The assumption that most individuals would either self-report to comply with the law or self-deport to avoid the ten-year inadmissibility bar was wrong.[289] Instead, the inadmissibility bar has driven millions of undocumented immigrants further underground to avoid it.[290] Living a life of hiding and legal uncertainty disincentivizes undocumented immigrants from investing in their communities of residence as they may be compelled to move more frequently in order to avoid detection, or out of the fear that, if detected, they will lose their investments.[291] The result: bad outcomes not only for the immigrants, but also for society.

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285 *See* Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current U.S. Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SECURITY 192, 199 (2018).

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

287 INA § 245(a), 8 U.S.C. § 1255(a) (2012).

288 *See* David A. Martin, *Waiting for Solutions*, LEGAL TIMES, May 28, 2001, at 66.

289 *See id.*

290 Fernando Colon-Navarro, *Familia E Inmigración: What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491, 495 (2007).

291 *See* Fernanda Uriegas, *Undocumented Entrepreneurs: How Deportations Could Hurt the U.S. Economy*, FORBES (Mar. 4, 2018, 8:56 AM), https://www.forbes.com/sites/fernandafabian/2018/03/04/undocumented-entrepreneurs-how-deportations-could-hurt-the-u-s-economy/#33b2bbe222ff [https://perma.cc/E73M-ZYMM].

C. *Thwarting a Sensible Deadline on Deportations*

Penalizing presence has also stymied efforts to integrate undocumented immigrants into society by preventing the imposition of a reasonable statute of limitations on deportations.[292] Deadlines regulate almost all aspects of life. The law has deadlines by which plaintiffs must bring their claims and in the forms of statutes of limitations[293] and common law doctrines such as laches.[294] The value of including deadlines into a law's statutory provisions applies whether the claim involves private actors or the government, and in both criminal and civil contexts.[295] Deadlines for bringing claims have long been a part of the common law,[296] and can be traced back to the Romans.[297] They exist in a variety of legal contexts, including torts, contracts, property, criminal law, and administrative law, among others.[298]

Although statutes of limitations have gained wider acceptance in actions between private entities, time limitations nonetheless regulate enforcement actions by the government.[299] In criminal law, except for the most serious felonies, prosecutors must bring the vast majority of charges within a certain time frame.[300] A similar limitation period exists for enforcement actions brought by the government in the civil context.[301] Under 28 U.S.C. § 2462, the federal government has "five years from the date when the claim first accrued" to bring a civil enforcement claim, unless otherwise specified by Congress.[302] The U.S. Supreme Court, applying this statute, has further constrained the government by concluding that the limitations period begins to run, not

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292 For a more comprehensive analysis of an argument for a statutory deadline on deportations, see Kim, *supra* note 13, at 542.

293 *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950).

294 *See id.* at 1184.

295 *See id.* at 1218, 1235–36.

296 *See* 1 DAN B. DOBBS, LAW OF REMEDIES 75–77 (2d ed. 1993); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 71–76 (2d ed. 1948).

297 *See Developments in the Law: Statutes of Limitations*, *supra* note 293, at 1177–78 (providing a broad overview of statute of limitations).

298 *See id.*

299 *See* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 631 (1954).

300 The limitations period for misdemeanors is usually three years, with a longer period for felonies. There are almost no limitations periods for the most serious crimes, such as murder. *Id.* at 635–36.

301 28 U.S.C. § 2462 (2012).

302 *Id.*

from the date of discovery, but from the date the wrongful action was carried out.[303]

No such deadline exists for immigration enforcement actions.[304] Compelling arguments nonetheless exist for a nuanced statutory deadline regime for deportations.[305] First, there is historical precedent for it. Prior immigration statutes had important time limits on deportations for particular categories of conduct.[306] For example, under the Scott Act of 1888,[307] the government had a one-year period to deport a noncitizen who had been admitted erroneously.[308] With the Immigration Act of 1907, the number of years increased to three,[309] and then, under the 1917 Act, to five years for certain post-entry conduct.[310]

Second, although such time limitations disappeared with the Immigration and Nationality Act of 1952,[311] which represents the current body of U.S. immigration law, other traces of the earlier statutes remain.[312] Unlike the prior statutes that regulated the time between the commission of the deportable offense and the government's initiation of the deportation proceeding, the current approach regulates the time between the admission and the commission of certain deportable offenses.[313] For such offenses, a noncitizen can lose her lawful status by committing a deportable offense within five years of her lawful admission.[314] For example, a noncitizen convicted of a crime of moral turpitude can only be deported if that conviction occurred within five

303 Gabelli v. Sec. & Exch. Comm'n, 568 U.S. 442, 453–54 (2013).

304 Kim, *supra* note 13, at 531.

305 *Id.* at 576–88; *see also* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. Rev. 1705, 1745–48 (2011) (arguing that a statute of limitations, despite its downsides, should be adopted for criminal immigration deportations); Mae M. Ngai, *We Need a Deportation Deadline; a Statute of Limitations on Unlawful Entry Would Humanely Address Illegal Immigration.*, Wash. Post, June 14, 2005, at A.21; T. Aleinikoff, *Illegal Employers*, Am. Prospect (Dec. 19, 2001), https://prospect.org/features/illegal-employers/ [https://perma.cc/TN7Y-BUED] (arguing for a limited statute of limitations for deportation).

306 Kim, *supra* note 13, at 567–69.

307 Pub L. No. 50-1064, 25 Stat. 504 (repealed 1943).

308 Maurice A. Roberts, *Grounds of Deportation: Statute of Limitations and Clarification of the Nature of Deportation*, in 3 In Defense of the Alien 55, 58–59 (Austin T. Fragomen, Jr. & Lydio F. Tomasi eds.,1980).

309 Immigration Act of 1907, Pub. L. No. 59-96, § 20, 34 Stat. 898, 904–05.

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

311 Pub. L. No. 82-414, 66 Stat. 163 (1952).

312 Kim, *supra* note 13, at 569.

313 *See, e.g.*, INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012) ("[Crimes of] moral turpitude *committed within five years . . . after the date of admission* . . . .") (emphasis added).

314 *See* INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I)

years of her admission to the United States.[315] Likewise, the government cannot initiate a deportation proceeding against a noncitizen following a public charge if the conduct that gave rise to the charge occurred more than five years after the noncitizen's lawful entry.[316]

Third, the current statute also forgives or forgets certain conduct that serves to exclude a person from being admitted in the first place after the passage of time. For example, engaging in acts of prostitution can exclude a noncitizen from admission if the act happened within ten years of admission.[317] Similarly, prior membership to a totalitarian party is an exclusionary ground that has an important exception based on time.[318] If one's membership to, or affiliation with, such a party terminated between two and five years prior to one's application for admission that membership—depending on the circumstances—cannot be the basis for exclusion.[319]

Finally, both lasting forms of relief from removal—like cancellation of removal—and more temporary forms of relief—like DACA—acknowledge that long-term residence merits relief. For cancellation of removal, long-term residence of five years or more precludes deportation, but only if other conditions are met.[320] To qualify for DACA protection, a noncitizen must show she resided in the United States continuously for at least five years before June 15, 2012.[321]

These examples underscore an important principle that animates immigration law. Certain actions both before and after entry, however wrongful, can be forgiven through discretionary forms of relief, or forgotten through time limitations imposed by law. They are not everlasting offenses, in that the law places important temporal limits on their future effects. These examples in the current statute acknowledge the harsh consequence of deportation for long-term residents and the moral concerns of living under a perpetual threat of deportation.

Nonetheless, the current statute also defines one's unlawful presence as a deportable offense, which hinders the imposition of a deportation deadline. A statute of limitations requires an accrual date from

315 *See* INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I)

316 *See* INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

317 INA § 212(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

318 INA § 212(a)(3)(D)(iii)(I)(a)–(b), 8 U.S.C. § 1182(a)(3)(D)(iii)(I)(a)–(b).

319 *Id.*

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

321 Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/8NP7-GVBY].

which the limitations period begins. If the offense is framed in terms of presence, a limitations period would serve no utility because the claim would never accrue until the noncitizen was removed or was able to adjust to lawful status. There can be no accrual point from which a theoretical statutory deadline could begin to run because it is treated as a continuing violation that restarts with each moment the noncitizen is physically in the United States. The result is the creation and perpetuation of a class made up of millions of long-term residents who, due to their liminal legal existence, must live in daily fear of deportation. The lack of a deportation deadline makes immigration law comparatively exceptional and helps perpetuate the false narrative that the subjects of its regulation are also exceptional.

IV. A Pathway to Reform

Part III articulated the reasons for reform. Part IV provides further support and an argument for a possible pathway forward. In addition to promoting the stigmatization of undocumented immigrants, penalizing presence deviates from established legal norms. Using a comparative framework, it shows that in numerous criminal and civil contexts, the law chooses to focus on actions, rather than a person's status or being, to highlight immigration law's exceptionalism. While certain offenses may be construed to continue beyond the injury-producing act—as the Supreme Court has concluded in two immigration cases—it makes an argument for why unlawful presence violations should not be construed as continuing, and instead promotes an approach to immigration enforcement that is more clearly act-based. Such an approach follows not only the Supreme Court's own precedent for characterizing continuing violations, but also established nonimmigration-based legal principles. In so doing, Part IV advances an argument for reforming unlawful presence that brings both immigrants and immigration law into conformity with established norms.

A. Precedent in the Criminal Context

In its choice to penalize unlawful presence, rather than the underlying act that produced it, immigration law departs from the comparative development in criminal law, which has eschewed classifications of offenses. While the purposes of criminal law and immigration law are not coextensive, the analogy to criminal law is apt because of the

punitive rationales that underpin deportations and the increasing criminalization of immigration law.[322]

A prohibition against status offenses was articulated in the landmark case of *Robinson v. California*,[323] where the U.S. Supreme Court considered the constitutionality of a state statute that made it a crime to "be addicted to the use of narcotics."[324] The Court struck down the statute as unconstitutional under both the Eighth and Fourteenth Amendments because it criminalized the status of being addicted to narcotics, rather than "punish[ing] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration."[325] It considered penalizing the "'status' of narcotic addiction . . . for which the offender may be prosecuted 'at any time before he reforms,'" unconstitutional.[326] Six years later in *Powell v. Texas*,[327] the plaintiff challenged a Texas statute that made it a crime to "be found in a state of intoxication in any public place."[328] Against the plaintiff's argument that the statute amounted to a status offense prohibited by the Eighth and Fourteenth Amendments, the Court distinguished this statute from the one in *Robinson* by noting that the statute in *Powell* criminalized an act that occurred "on a particular occasion."[329] The law thus targeted conduct rather than a continuing status.

Status offenses in the criminal sphere have been subject to constitutional scrutiny because, historically, they have been used to criminalize, and even banish, politically unpopular groups such as the poor and the homeless,[330] and, in particular, the racial minorities within these groups.[331] Status offenses also punish characteristics of an

322 *See generally* Kerwin, *supra* note 285, at 192–204 (explaining how IIRIRA created "the concept of 'criminal alienhood'").

323 370 U.S. 660 (1962).

324 *Id.* at 660–61 (quoting CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972)).

325 *Id.* at 666.

326 *Id.*

327 392 U.S. 514 (1968).

328 *Id.* at 517 (quoting TEX. PENAL CODE art. 477 (1952)).

329 *Id.* at 532.

330 Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 466 (1967) (arguing that vagrancy statutes "have been used as a vehicle of discrimination against minority groups and have been selectively applied with the result that non-resident vagrants have been subjected to punishment, while vagrants with similar personal status, but different 'geographical' characteristics, have been ignored by the authorities"); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 614–15 (1956) (describing vagrancy laws as a "catch-all" for apprehending suspicious persons and characterizing vagrancy laws as "anti-migratory policy").

331 Juvenile status offenses, which are considered civil and therefore do not violate *Robin-*

individual that cannot be changed.[332] The distinction *Robinson* drew between status and conduct created a difficulty by failing to define each concept. Traditionally, status has been defined to mean identity or being, which itself defies an easy definition, while conduct is understood as the act of doing.[333] This distinction becomes blurred, though, when the conduct—which can be criminalized—is also an essential aspect of one's being or identity. Under this statutory framework, status includes performative aspects of one's identity, where "conduct and status are overlapping and mutually constitutive of one another."[334] Laws against sitting or lying in public places and sodomy are examples of the regulation of performative identity.[335]

In two important respects, penalizing unlawful presence is congruous with a status offense. In *Robinson*, the Court emphasized that punishing one's addiction to alcohol makes the person "continuously guilty," which allows the state to prosecute the person "at any time before he reforms."[336] Punishing a condition like alcohol addiction would also make the person "continuously guilty" because of the person's powerlessness over such a chronic condition.[337] Like the person with chronic alcohol addiction, a noncitizen who is penalized for unlawful presence is also powerless to change his condition. Changing the underlying condition would mean attaining lawful status, which is unlikely for most noncitizens due to the lack of available forms of

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son, raise the same concerns. *See* Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 473–74 (2016) (describing juvenile offenses as "a 'civil' rehabilitative alternative to the punitive system" and therefore not subject to *Robinson*'s prohibition against status offenses).

332 *See* Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1167 (2017) (analyzing pregnancy as a status offense that warrants constitutional protections and showing how "perils presented by status offenses are more than mere speculation . . . [and] are rooted in histories of discriminatory application of criminal law against the poor, people with disabilities, and racial minorities").

333 *See, e.g.*, *Powell*, 392 U.S. at 541–42 (Black, J., concurring) (differentiating punishment for "mere status of being" from "actual behavior").

334 Ocen, *supra* note 332, at 1186; *see also* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 387 (1994) (noting the convergence between status and conduct).

335 Ocen, *supra* note 332, at 1186; *cf.* Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ 159, 162 (1996) (critiquing the criminalization of "virtually any performative gesture, verbal or bodily"); *cf.* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1741 (1993) (describing the distinction between conduct and status as "systematically incoherent").

336 Robinson v. California, 370 U.S. 660, 666 (1962) (quoting CAL. HEALTH & SAFETY § 11721 (repealed 1972)).

337 *See id.* at 666–67.

relief.[338] The likely result is deportation.[339] For long-term residents, the long-term separation from families caused by their deportations would be untenable and morally problematic. Further, the lack of a statutory deadline on deportations means that a noncitizen who is penalized for unlawful presence would be "continuously guilty" and subject to prosecution "at any time before he reforms."[340]

In addition to continuing culpability, unlawful presence resembles a status offense in its focus on penalizing status, rather than an act, as an essential element of the offense.[341] For a statute to survive constitutional scrutiny, it must not punish status and it also must require the prosecution to prove commission or omission of an act.[342] Courts have declined to extend the holding of *Robinson* in some instances where the statute could be read to punish status, such as being "found in a state of intoxication" in public.[343] In the immigration context, a statute that criminalized a previously deported person from being "found in" the United States survived a constitutional challenge under the Eighth Amendment because the offense required the noncitizen to commit the act of entering the United States following a deportation.[344]

In numerous other contexts, though, courts and legislatures have eschewed definitions of criminal offenses that focus on status or being. For example, in *Kennedy v. Mendoza-Martinez*,[345] the U.S. Supreme Court considered a draft-dodging statute. The law stripped U.S. nationals of citizenship for "[d]eparting from or remaining outside of the

338 *See* Kari Hong, *How to End "Illegal Immigration,"* 33 MD. J. INT'L L. 244, 254 (2018) ("[T]here is no singular line or means to obtain legal status . . . . Some people are presented the solved cube based on random lucky factor such as falling in love with the right citizen, being from a country with a strained relationship with the United States, or having a needed skill.").

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

340 *Robinson*, 370 U.S. at 666–67.

341 *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (2012) (describing unlawful presence as being "present in the United States after the expiration of the period of stay authorized by the Attorney General"); Ocen, *supra* note 332, at 1167 (describing status offenses as targeting "an aspect of personal identity as an essential element of the crime" that is "beyond an individual's ability to control").

342 *Robinson*, 370 U.S. at 666.

343 Powell v. Texas, 392 U.S. 514, 533–35 (1968) ("[T]here is a substantial definitional distinction between a 'status,' as in *Robinson*, and a 'condition,' which is said to be involved in this case . . . . We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics . . . suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.").

344 United States v. Ayala, 35 F.3d 423, 425–26 (9th Cir. 1994) (quoting 8 U.S.C. § 1326(a)).

345 372 U.S. 144 (1963).

jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."[346] There, Mendoza-Martinez was ordered to be deported upon his loss of U.S. citizenship, which was his punishment for fleeing to Mexico to avoid obligatory military service during World War II.[347] Because the statute imposed a punishment without due process, the Court held that the statute was unconstitutional.[348] In its opinion, the Court clarified that Mendoza-Martinez was not charged with a continuing violation.[349] Rather, he was convicted under the statute for his action "on or about November 15, 1942," that "he did knowingly evade service," and that "he did knowingly depart from the United States . . . for the purpose of evading service."[350] The Court clarified that the state's conviction focused on his act of avoiding military service.[351]

In another case, the Supreme Court held that the crime of failing to register for the draft was not a continuing offense. In *Toussie v. United States*,[352] the Court considered a criminal charge brought against an American citizen who failed to register for the draft as required by law between the ages of 18 and 26.[353] Because the government failed to bring charges until after his 26th birthday, Toussie argued that the charges were brought beyond the five-year limitations period.[354] Rejecting the government's argument that the crime continued to be committed each day that Toussie did not register, the Court clarified that registration in this context was "thought of as a single, instantaneous act to be performed at a given time," and that the "failure to register at that time was a completed criminal offense."[355] The Court distinguished the failure to register from an offense like conspiracy, which the Court held continued as long as conspirators engaged in overt acts in furtherance of the plot.[356]

The same logic applies in the bail-jumping context. The law criminalizes the offense of bail jumping, which one jurisdiction defines

346 *Id.* at 146 n.1 (quoting INA § 349(a)(10), 8 U.S.C. § 1481(a)(10) (1952)).
347 *Kennedy*, 372 U.S. at 147–48.
348 *Id.* at 165–66.
349 *Id.* at 157–58.
350 *Id.*
351 *Id.* at 147.
352 397 U.S. 112 (1970).
353 *Id.* at 113.
354 *Id.* at 113–14.
355 *Id.* at 117.
356 *Id.* at 122.

as the failure to appear in court "personally on the required date or voluntarily within thirty days thereafter."[357] In one New York state case, the defendant failed to appear in court and, upon apprehension, was charged with jumping bail even though the five-year statute of limitations period had already passed.[358] The relevant statute penalized a person who "has been released from custody or allowed to remain at liberty . . . upon condition that he will subsequently appear personally in connection with a charge against him . . . and when he does not appear personally on the required date or voluntarily within thirty days thereafter."[359] The government argued that bail jumping was a continuing offense.[360] In dismissing both the government's argument and the charge, the court distinguished between acts and status.[361] The statute exclusively criminalizing the former.[362] The court then analogized bail jumping to the act of draft dodging: "[W]hile the draft dodger remains a drafter dodger . . . the respective crimes are complete as of the specific dates [30 days after the defendant fails to appear in court]."[363]

Finally, in the family law context, a New York statute states, "A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse."[364] In interpreting this statute, a New York court defined bigamy as the act of entering into a second marriage.[365] Although the status of being a "bigamist" might continue after the act of entering into a second marriage, the court defined the offense as completed the moment the second marriage happened; the continuous cohabitation subsequent to the second marriage did not render the initial violation continuous.[366] That approach consistently

357 N.Y. PENAL LAW § 215.56 (McKinney 2013).

358 People v. Barnes, 499 N.Y.S.2d 343, 344 (N.Y. Sup. Ct. 1986).

359 N.Y. PENAL LAW § 215.56 (McKinney 2013).

360 *Barnes*, 499 N.Y.S.2d at 344.

361 *Id.* at 345.

362 *Id*.

363 *Barnes*, 499 N.Y.S.2d at 346. Although the Second Circuit affirmed the court's approach in another case, some circuits treat bail jumping as a continuing offense. *See* Sullivan v. LaPlante, 175 F. App'x 484, 484 (2d Cir. 2006). For example, in the Tenth Circuit, the court held that failure to appear was a continuing offense because there was no applicable statute of limitations. United States v. Martinez, 890 F.2d 1088, 1092 (10th Cir. 1989).

364 N.Y. PENAL LAW § 255.15 (McKinney 2013).

365 People v. Hess, 146 N.Y.S.2d 210, 211 (N.Y. App. Div. 1955).

366 *Id.* at 211.

has been followed in the majority of the jurisdictions that criminalize bigamy.[367]

These cases affirm the law's reluctance to condemn, across a spectrum of legal fields, the status or condition of a person. Collectively, these cases determined that their statutes' chargeable offenses were completed upon commission of certain specific actions. While the status associated with the crime might continue beyond the act giving rise to the crime, status itself was not chargeable. This approach is particularly appropriate in the criminal context where concerns about the stigma that stems from criminal convictions, and its effects on the individual's reputation and identity, are particularly salient.[368] Although some level of stigma does—and perhaps should—attach to criminal convictions in order to deter future crimes, a focus on the underlying acts, rather than the person's being, helps avoid the problems of overstigmatization.[369]

Because unlawful presence is a civil violation,[370] *Robinson* and its progeny do not control in the immigration context. The rationales for focusing on acts, rather than being, however, remain forceful and relevant. Undocumented immigrants experience stigma on account of their undocumented status.[371] Moreover, an important rationale undergirding the prohibition against status-based offenses in the criminal context is the punitive nature of crimes. In the *Robinson* line of cases, status offenses violated the Eighth Amendment's prohibition against cruel and unusual punishment.[372]

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367 *See, e.g.*, Pitts v. State, 95 S.E. 706, 707 (Ga. 1918) ("The crime of bigamy is completed when any married person, knowing that the lawful husband or wife is still in life, takes unto himself or herself another husband or wife . . . . Subsequent cohabitation does not enter into it, and does not make such offense a continuing one."), *superseded by statute*, GA CODE ANN. § 16-6-20 (West 2019); Commonwealth v. Seiders, 11 A.3d 495, 498 (Pa. 2010) ("[T]he 'gravamen' of the offense of bigamy is the entry into the second marriage . . . [as] the crime is completed at the time of the second marriage . . . [for] bigamy is not a continuing offense.").

368 *See* Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 124–25 (2007) (finding "strong evidence for a causal relationship" between incarceration and poor health); *see also* David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1312–14 (2009) (describing the employment-based and relationship-based harms related to criminal conviction).

369 *See* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 536 (1996) (identifying deterrence as an outcome of conviction-related stigma); *see also* Ocen, *supra* note 332, at 1221 (arguing that "status-based treatment reinforces" stigmatization and marginalization).

370 *See supra* note 132 and accompanying text.

371 *See supra* Part II.

372 Robinson v. California, 370 U.S. 660, 666 (1962).

While the Supreme Court has held that deportations are not punishment, such that certain constitutional protections afforded to criminal defendants do not attach to immigrants in deportation proceedings,[373] the punitive nature of deportations has been well documented. In the last few decades, the convergence of immigration law and criminal law has grown, so much so that scholars have coined a new name for it: "crimmigration."[374] Crimmigration scholars have shown the emerging trend of importing criminal-enforcement techniques into immigration law.[375] In immigration law, the result has been the broadening of criminal-related deportability grounds,[376] more aggressive enforcement priorities,[377] and the advent of law enforcement partnership programs like Secure Communities.[378] At the same time, the importation of the ameliorative aspects of criminal law, such as the procedural protections given to criminal defendants under the Constitution, have not been applied to immigration proceedings.[379] As Stephen Legomsky has argued, the importation of criminal enforcement practices and techniques into the immigration space has been disproportionate and "asymmetric."[380]

The Supreme Court has acknowledged that "deportation is a drastic measure and at times the equivalent of banishment or exile."[381] For much of the unlawfully present population this banishment or exile is long-term when deportation is based on unlawful-presence

373 Arizona v. United States, 567 U.S. 387, 407 (2012); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

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

375 *See* 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 an overview of the salient features and developments in crimmigration law).

376 Of particular note has been the expansion of crimes deemed to be "aggravated felon[ies]," which when first introduced included only the most serious crimes such as murder and drug and arms trafficking. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70. Now, the category encompasses crimes like certain theft charges that would be considered under state criminal law misdemeanors, not felonies. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012); 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 (2007) (showing the overbroad definition of "aggravated felony" and its harsh consequences).

377 *See supra* Section III.A.1.

378 *Secure Communities*, *supra* note 163.

379 *See* Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 473 (2007).

380 *Id.* at 472.

381 Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

grounds.[382] The consequences of such banishment are drastic and morally problematic, particularly when the deportation is of long-term residents, many of whom have spent decades building their lives in the United States, or when it involves the separation of families.[383] These are the same consequences faced by criminal defendants upon their incarcerations.[384]

Deportation and criminal punishment also share a common purpose. In criminal law scholarship, two dominant theories justify punishment: utilitarianism and retributivism.[385] Utilitarianism is concerned with weighing the benefits of punishment with the costs.[386] Retributivism, on the other hand, focuses on punishment as penance for the harm caused.[387] Important facets of utilitarianism are the incapacitation of the wrongdoer and the idea that punishing a particular individual will deter potential offenders from violating the law in the future.[388] Likewise, an important justification for deportation is the incapacitation of the wrongdoer by removing the person from the country, which would have a deterrent effect on future violations of the law.[389] Indeed, deterrence was a motivating drive for the changes made to the unlawful presence doctrine.[390]

Even the Supreme Court has acknowledged the convergence between immigration and criminal law. In *Padilla v. Kentucky*,[391] the Court recognized the serious consequences of deportation by holding that criminal defense attorneys must advise noncitizens about immigration consequences of guilty pleas.[392] In extending the scope of the Sixth Amendment's right to counsel to include adequate notification of a noncitizen's immigration consequences, the Court noted that the penalty of deportation is "intimately related to the criminal pro-

382 *See* INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (2012).

383 *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1898 (2000).

384 *See* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 641 (2012).

385 *See* Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 817 (2007).

386 *See id.* at 852.

387 *See id.* at 818.

388 *See id.* at 817–18.

389 Reyes, *supra* note 384, at 684.

390 H.R. REP. NO. 104-469, at 1 (1996).

391 559 U.S. 356 (2010).

392 *Id.* at 365–66.

cess."[393] As one scholar has argued, deportation is akin to criminal punishment because it affects a person's physical liberty.[394]

B. Precedent in the Civil Context

While imperfect, a useful comparison to unlawful presence in a nonimmigration, civil context is tort law's trespass to land.[395] Trespass to land is the intentional interference with another's possessory interest in land.[396] The analogy to the immigration context is particularly apt because the paradigmatic example of trespass to land involves the intentional entry of a person and, like unlawful presence, targets the presence of the person who may interfere with the possessory interests of the owner.[397]

Trespass to land involves (1) intentionally entering, or causing direct and tangible entry, (2) upon the land in possession of another, (3) without privilege or consent.[398] As the first two elements show, the focus is on intentional entry, which is shown simply by acting with purpose or desire to enter or knowing with a substantial certainty that actions will result in an entry.[399] The concept of intentional entry not only covers the initial act of unprivileged entry, but also extends to the choice of remaining upon the land after the privilege to be there has expired.[400] Thus, even if the initial entry was at one time privileged,

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393 *Id.* at 365.

394 Stumpf, *supra* note 374, at 390.

395 Environmental nuisance cases offer another useful comparator. Courts employ a similar framework for analyzing nuisance cases and, for purposes of classifying an injury as permanent or continuing, treat nuisance and trespass identically. Hoery v. United States, 64 P.3d 214, 218–19 (Colo. 2003) (concluding that permanent trespasses or nuisances arise in "unique factual situations—primarily in the context of irrigation ditches and railway lines—where the trespass or nuisance would and should continue indefinitely"); Christian v. Atl. Richfield Co., 358 P.3d 131, 140 (Mont. 2015) ("When we refer to a continuing nuisance or trespass for purposes of the continuing tort doctrine, we are actually referring to a temporary nuisance or trespass.").

396 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 49 (2d ed. 2011).

397 Trespass to land can also involve entry not by the person but by a thing that the person causes to enter the land of another. *Id.* The classic variation of the paradigmatic example is a defendant who drives cattle onto the land of another. Yet another example of trespass to land can occur by causing the entry of an object that does the damage, like pollution or water.

398 DOBBS ET AL., *supra* note 396, at § 49.

399 Terre Aux Boeufs Land Co. v. J. R. Gray Barge Co., 803 So. 2d 86, 96 (La. Ct. App. 2001) (finding that liability for trespass requires "some intentional act"); Hayes v. Carrigan, 94 N.E.3d 1091, 1095 (Ohio Ct. App. 2017) (dismissing as insufficient a claim for trespass where plant overgrowth was not intentional); Grundy v. Brack Family Tr., 213 P.3d 619, 625 (Wash. Ct. App. 2009).

400 *See* Davis v. Westphal, 405 P.3d 73, 82 (Mont. 2017) ("A civil trespass encompasses both the initial unauthorized entry upon the property of another *and* the subsequent failure to cease or abate the intrusion."); Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 912

remaining on the land of another becomes tortious once that privilege has been withdrawn.[401] Whether or not one's presence was ever privileged, the law focuses on the act of either entering or remaining as the basis for the tort. It treats each act as a completed violation of the law: the initial unprivileged entry or, in the case where the entry was privileged but consent withdrawn, the choice to remain. The defendant is liable for the act and the subsequent effects that stem from the act.[402]

Tort law's focus on acts is all the more apparent in the way some courts classify injuries for the purpose of statutes of limitations and calculations of damages. Because trespass is defined as completed the moment the unlawful entry is made or the occupant chooses to remain, the statute of limitations begins to run at the time of the trespass.[403] In these cases, the injury or trespass is classified as permanent even though the harm it caused continues.[404] Thus, if the trespasser chooses to ignore the landowner's withdrawal of consent to enter, and remains indefinitely, the trespass would be classified as permanent and the limitations period would accrue from the first act of unprivileged entry.[405]

(Tex. 2013) (finding holdover tenant that remained in possession of property for six years after its lease ended liable for trespass).

401 *Coinmach*, 417 S.W.3d at 922.

402 Hogg v. Chevron USA, Inc., 45 So. 3d 991, 1006 (La. 2010) (finding that the "ill effect" of continued presence of leaked gasoline on plaintiff's property constituted a single cause of action for trespass).

403 Starrh & Starrh Cotton Growers v. Aera Energy LLC, 63 Cal. Rptr. 3d 165, 170 (Cal. Ct. App. 2007) ("A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry."); Breiggar Props. v. H.E. Davis & Sons, Inc., 52 P.3d 1133, 1135 (Utah 2002) ("Once an *act* of trespass has occurred, the statute of limitations begins to run."); TLP, LLC v. Cent. Tel. Co. of Va., 93 Va. Cir. 275, 278–79 (Va. Cir. Ct. 2016).

404 As Section IV.C more fully discusses, the cases are not clear about the basis for classifying an injury as permanent or continuing. One metric is whether the invasion can be terminated or abated. DOBBS ET AL, *supra* note 396, at § 57. Another factor considers the public policy implications of the classification. *Id.* Some jurisdictions have adopted the approach that the "unprivileged remaining on land in another's possession" is a continuing trespass. City of Providence v. Doe, 21 A.3d 315, 320 (R.I. 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 158 cmt. m (AM. LAW INST. 1965)). However, other courts have limited the approach taken in the Restatements as it relates to statutes of limitations or damage purposes. For example, the Supreme Court of Virginia in *Forest Lakes Community Ass'n v. United Land Corp. of America* considered as permanent a trespass involving the migration of sediments onto an adjoining property, even though it would have satisfied the Restatements definition of a continuing trespass. 795 S.E.2d 875, 882 (Va. 2017).

405 *See Starrh*, 63 Cal. Rptr. 3d at 170; *see also* Hoery v. United States, 64 P.3d 214, 219

Tort law's damages-calculation framework further reflects this perspective. A plaintiff's injury from the defendant's trespass is measured as her land's diminished value that results from the initial act of trespass.[406] For trespasses that can be classified as permanent, once the plaintiff collects damages for the initial invasion, the defendant is no longer liable for further damages arising from that invasion, even if the invasion persists or continues.[407] The classification of the violation is permanent upon the initial act. In effect, a trespass's "permanent" classification shifts a limited interest in land from the plaintiff to the defendant through a forced sale.[408] The defendant now has the right to continue the trespass on plaintiff's land through this damages rule, which forces the defendant to purchase a limited interest in plaintiff's land.[409] But even for certain continuing trespasses, recovery is limited to the damages sustained during the statutory limitations period. For trespasses classified as modified continuing torts, which typically occurs when the plaintiff seeks to recover for "the mere consequences or effects of misconduct occurring long ago," courts limit recovery to damages sustained during the limitation period.[410] For example, the Supreme Court of Washington has held that the pressure that exerted dirt, which damaged the plaintiff's retaining wall, constituted a continuing trespass and limited recovery to damages occurring three years prior to the filing of the law suit, which represented the statute of limitations period, through to the time of trial.[411] Such an approach for

(Colo. 2003) (defining permanent trespass as a situation "where the trespass or nuisance would and should continue indefinitely"); *Breiggar*, 52 P.3d at 1136; *Forest Lakes*, 795 S.E.2d at 882 (holding that an indefinitely continuing injury raises only one cause of action).

406 *Starrh*, 63 Cal. Rptr. 3d at 170; Mel Foster Co. Props. v. Am. Oil Co., 427 N.W.2d 171, 176 (Iowa 1988).

407 Devenish v. Phillips, 743 So. 2d 492, 494 (Ala. Civ. App. 1999) (finding that damages for permanent trespass with continuing harm were only recoverable in one, single action); Long v. State, 904 N.W.2d 502, 518 (S.D. 2017) ("[A] condemning authority obtains the right to continually damage the property when permanent damages are awarded . . . ."); *see also Long*, 904 N.W.2d at 519 (finding that res judicata prohibits future claims for damages following an award of permanent damages).

408 DOBBS ET AL., *supra* note 396, at § 57; *see also* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (allowing plaintiff to recover permanent damages for "servitude" created by defendant's nuisance).

409 *See Boomer*, 257 N.E.2d at 875; *see also Starrh*, 63 Cal. Rptr. 3d at 174 (reasoning that decision to declare trespass permanent would give defendant "the ability to continue" contaminating groundwater).

410 Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 282 (2007–2008).

411 Woldson v. Woodhead, 149 P.3d 361, 363–64 (Wash. 2006); *see also* United States v. Hess, 194 F.3d 1164, 1177 (10th Cir. 1999) ("In trespass cases, where the statute of limitations has expired with respect to the original trespass, but the trespass is continuing, we and other

limiting damages to the length of the statute of limitations period has been adopted outside of the trespass context.[412] For instance, the U.S. Supreme Court has held that damages resulting from sustained copyright violations are limited to infringements that occurred within the Copyright Act's three-year statute of limitations period.[413]

As applied to the immigration context, unlawful entry or the violation of a visa's terms would be considered the invasion or injury, akin to the initial entry onto land or to remaining on land after consent had been withdrawn.[414] Similarly, any damage that results from the trespass would be limited to the damage caused by the initial act of unlawfulness and any effects stemming therefrom.[415] Under this theory, the government's recovery for damages would be limited to the initial act giving rise to the unlawful presence.[416] Even if the presence of the person persists, it would be considered the same injury traced back to the initial unlawful entry or overstay.[417] To the extent that the government could claim subsequent effects from the initial invasion of the property right, those effects would be taken into account when the damage for the initial invasion of the right was calculated.[418] Under this trespass theory, the government would not be able to claim further damages for the same invasion once the noncitizen has "paid" for the damage caused by the initial entry or overstay.[419]

Likewise, for statute-of-limitation purposes, the act of becoming unlawfully present—whether through initial entry or visa overstay—would represent the accrual date from which the limitations period would run. This is based on the violation of a trespass to land, the damages of which are limited to the initial act that gave rise to the

courts have calculated the limitation period back from the time the complaint was filed, rather than forward from the date of the original trespass, or where applicable, back to the reasonable discovery date." (footnote omitted)).

412 *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 671 (2014).

413 *Id.* at 671 ("Under the [Copyright] Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is insulated from liability for earlier infringements of the same work.").

414 *See* Breiggar Props. v. H.E. Davis & Sons, 52 P.3d 1133, 1136 (Utah 2002).

415 *See* Cassel-Hess v. Hoffer, 44 A.3d 80, 86 (Pa. Super. Ct. 2012).

416 In the immigration context, the relevant remedy is deportation. Although this remedy differs from money damages, *see* discussion of remediation *infra* Section IV.C.2, limiting liability can nonetheless serve an important purpose. By limiting a noncitizen's liability for unlawful presence, that individual may qualify for a waiver of inadmissibility under the INA, see discussion of INA *supra* text accompanying notes 33–42, or relief from deportation.

417 *See Breiggar Props.*, 52 P.3d at 1135.

418 *See* Starrh & Starrh Cotton Growers v. Aera Energy LLC, 63 Cal. Rptr. 3d 165, 170 (Cal. Ct. App. 2007).

419 *See id.*

underlying cause of action.[420] Such arguments can be used to challenge the current statutory scheme in U.S. immigration law that allows the government, through the inadmissibility bars, to claim further "damages" for the effects of the initial violation.

C. Reforming Unlawful Presence

Precedent from both criminal law and tort law offers a framework for reforming immigration law's concept of unlawful presence: one that would focus on acts, rather than on status or being. Both identity-related and legal harms that stem from penalizing presence provide compelling arguments for statutory reform.[421] Penalizing presence stigmatizes and subordinates millions of long-term residents in the United States. Penalizing presence hinders legal efforts to integrate the undocumented immigrant population. The long-term inadmissibility bars that accompany the offense incentivize hiding and drive immigrants further underground.[422] The focus on presence also thwarts opportunities to impose a reasonable statute of limitations on deportations. In these significant respects, immigration law departs from customary legal norms.

Section IV.C. addresses the argument that some offenses are not completed with the injury-producing act, but rather continue until the injury-producing act stops. In a pair of immigration cases, the Supreme Court has implied in dicta that unlawful entry may constitute a continuing violation. Applying both legal and policy methodologies, it offers an argument against that position to show why unlawful presence violations should not continue beyond the initial injury-producing act and to promote a clearer act-based approach to immigration offenses.

1. Unlawful Presence as a Continuing Violation?

Certain offenses are construed as continuing beyond the initial injury-producing act. Even some trespasses to land can be treated as continuing violations that are not completed at the time of the initial invasion.[423] There is little conceptual clarity or agreement on when

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420 *See* Cassel-Hess v. Hoffer, 44 A.3d 80, 86 (Pa. Super. Ct. 2012); *see also Starrh*, 63 Cal. Rptr. 3d at 170 ("The cause of action accrues and the statute of limitations begins to run at the time of entry."); *Breiggar Props.*, 52 P.3d at 1135 ("[I]n classifying a trespass as permanent or continuing, we look solely to the *act* constituting the trespass, and not to the *harm* resulting from the act.").

421 *See supra* Parts II–III.

422 *See supra* note 288 and accompanying text.

423 DOBBS ET AL., *supra* note 396, at § 57.

courts do, or should, classify an injury as continuing.[424] This doctrine extends beyond the trespass to land context. In the context of employment discrimination, the doctrine defines the injury as a series of workplace violations in the aggregate, rather than distinct, individual violations.[425] The same is true in the environmental-nuisance context. If an environmental risk remains unabated, each new day is considered a new injury.[426] Thus, classifying an injury as continuing obviates the utility of a statute of limitations because the new injury pushes the accrual day indefinitely into the future until the injury-producing act stops.[427] In the alternative, the statute of limitations might be viewed as tolled during the aggregated period of harassment or discrimination.[428]

In the immigration context, the Supreme Court has yet to directly address the question of whether unlawful presence under § 212 of the INA is a continuing violation. The Court, however, has implied as much in dicta when interpreting other sections of the INA. First, in *Fernandez-Vargas v. Gonzales*,[429] the 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.[430] That statute specified:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and . . . the alien is not eligible and may not apply for any relief under [the Act], and the alien shall be removed under the prior order at any time after the reentry.[431]

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424 *See* Elad Peled, *Rethinking the Continuous Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 OHIO N.U. L. REV. 343, 346 (2014).

425 *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002).

426 *See* DOBBS ET AL., *supra* note 396, at § 51.

427 *See* Hegg v. Hawkeye Tri-County Rec, 512 N.W.2d 558, 560 (Iowa 1994) (per curiam) (describing the injury-producing conduct as a "recurring" tort).

428 *See Morgan*, 536 U.S. at 122. In addition to these contexts, certain injuries have been classified as continuing in other legal contexts. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971) (antitrust); Palmer v. Bd. of Educ., 46 F.3d 682, 685 (7th Cir. 1995) (civil rights violations under § 1983); Taylor v. Meirick, 712 F.2d 1112, 1119 (7th Cir. 1983) (copyright); Milliken v. City of S. Pasadena, 158 Cal. Rptr. 409, 412 (Cal. Ct. App. 1979) (false arrest and imprisonment); R.D.H. Commc'ns, Ltd. v. Winston, 700 A.2d 766, 771–73 (D.C. 1997) (legal malpractice); Giovine v. Giovine, 663 A.2d 109, 114–15 (N.J. Super. Ct. App. Div. 1995) (domestic violence and battered woman's syndrome).

429 548 U.S. 30, 44 (2006).

430 *See id.* at 44.

431 INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (Supp. III 1994).

The Court clarified that even though the noncitizen defendant entered unlawfully prior to the statute's enactment, the noncitizen's conduct fell under the law's scope because what the statute specified was not the unlawful entry, but rather the decision to remain in the United States after the statute's enactment.[432] Justice Souter, writing for the majority, further clarified that the statute did not target the reentry, but rather, it "establishes a process to remove him 'under the prior order at any time after the reentry.'"[433] Thus, the post-entry choice to unlawfully remain in the United States is the conduct that the statute targets.[434] Notably, the Court emphasized the purpose of INA § 241(a)(5) was "to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country."[435] The opinion has since been interpreted to construe unlawful presence as a "continuing violation," though in important respects, it was not actually interpreting the inadmissibility category of unlawful presence under INA § 212(a)(6) and (a)(9).[436]

Second, in *INS v. Lopez-Mendoza*,[437] the Supreme Court concluded that a deportation law's purpose was "not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."[438] There, the Court declined to apply the exclusionary rule in a deportation proceeding and, in doing so, permitted the use of prior admissions of unlawful presence made to law enforcement officers in the context of an arrest.[439] In the process, Justice O'Connor explained that the application of the exclusionary rule would be inappropriate because the result "would require the courts to close their eyes to ongoing violations of the law."[440] Justice O'Connor noted two violations of the criminal law. First, INA § 262 and § 266 required a noncitizen to register and be fingerprinted, the failure of which was a misdemeanor.[441] Second, INA § 275 penalized entry without inspection.[442]

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432 *Fernandez-Vargas*, 548 U.S. at 45–46.

433 *Id.* at 44.

434 *Id.*

435 *Id.*

436 *See, e.g.*, Denise Gitsham, *Developments in the Judicial Branch: The Recent Decision:* Fernandez-Vargas v. Gonzales, 20 GEO. IMMIGR. L.J. 721, 723 (2006).

437 468 U.S. 1032 (1984).

438 *Id.* at 1039.

439 *Id.* at 1040.

440 *Id.* at 1046.

441 INA, §§ 262, 266, 8 U.S.C. §§ 1302, 1306 (1982).

442 INA § 275, 8 U.S.C. § 1325.

The Court characterized the first violation—failure to register and be fingerprinted—as a continuing violation because the violation was ongoing and thus remained unremedied:

> The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[443]

If released, the individual would "immediately resume [his] commission of a crime through [his] continuing, unlawful presence in this country."[444] The Court supported its holding by analogizing what it saw as a continuing violation of the statute to the trespass context: "[p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained . . . ."[445] Implicit in this comparison to unremedied trespass is the argument that unremedied acts of violations of the immigration laws that lead to unlawful presence should be characterized as continuing violations.

Like the statute at issue in *Fernandez-Vargas*, the statute in *Lopez-Mendoza* did not directly target "unlawful presence." Rather, it imposed a "duty . . . to apply for registration and to be fingerprinted" for those who are 14 years or older and who "remain[] in the United States for thirty days or longer."[446] What the statute criminalized was the conduct of not registering and being fingerprinted within 30 days, not unlawful presence generally.[447] While the noncitizen violated the law by not meeting the condition within 30 days, the violation was not "ongoing" or "continuing" in the sense that there was a five-year statute of limitations for federal criminal conduct.[448] Crimes are construed as completed upon the commission of the act—here, the failure to register within 30 days.[449] In the criminal context, even if the statute could be construed to be a continuing offense, numerous courts have

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443 *Lopez-Mendoza*, 468 U.S. at 1047.

444 *Id.* at 1050.

445 *Id.* at 1046.

446 INA § 262, 8 U.S.C. § 1302(a).

447 *See id.*

448 *See* 18 U.S.C. § 3282(a) (2012) ("[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

449 *See supra* Section IV.A.

interpreted status-based crimes as not continuing beyond the date of the act.[450]

The Court in *Lopez-Mendoza* acknowledged as much in its discussion of the second statute that the noncitizen violated: criminal entry without inspection.[451] There, the Court emphasized that the noncitizen could theoretically be prosecuted for his entry without inspection on an independent basis: "continuing ground[ ] for deportation."[452] But because the applicable limitations period was five years, the grounds for deportation only "continued" if criminal prosecution was brought in time.[453] For this offense, the Court declined to decide whether remaining in the country after unlawfully entering continued the violation or whether the crime was completed upon moment of unlawful entry.[454] A reasonable reading of the statute favors the latter because the law's statutory language targets the act of entry, not the act of continuing to remain unlawfully.[455]

Courts in the immigration context have shown their reluctance to define statutory language that could be construed to encompass continuing violation as such. In *United States v. DiSantillo*,[456] an immigrant was charged under a criminal statute that defined the offense as, in part, "enter[ing], attempt[ing] to enter, or is at any time found in[] the United States."[457] The Third Circuit concluded that, for purposes of the offense of "enter[ing]" or "attempt[ing] to enter," the crime was complete, and thus the statute of limitations began, the moment the noncitizen entered or attempted to enter the nation.[458] The court further clarified that the addition of the phrase, "found in[] the United States" did not make the offense a continuing violation of the law; the noncitizen was "found" when his or her presence was discovered by immigration authorities at which point the crime was complete.[459]

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450 *See supra* Section IV.A.

451 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984).

452 *Id.*

453 *See* 18 U.S.C. § 3282(a) (2012).

454 *Lopez-Mendoza*, 468 U.S. at 1047 n.3.

455 INA § 275, 8 U.S.C. § 1325 (1982).

456 615 F.2d 128 (3d Cir. 1980).

457 *Id.* at 129 n.1 (quoting 8 U.S.C. § 1326(2)).

458 *Id.* at 134–36.

459 *Id.* at 135–37. The Third Circuit's interpretation of the statute is a departure from other courts that have construed the same language as a targeting a continuing offense. *See* United States v. Alvarado-Soto, 120 F. Supp. 848, 850 (S.D. Cal. 1954) (concluding that a "plain reading" of the statute's "found in" provision shows Congress intended to target "illegal presence" as the offense); United States v. Bruno, 328 F. Supp. 815, 825 (W.D. Mo. 1971) (applying *Alvarado-Soto* to hold that the statute of limitations did not run under the same statute of conviction "so long as the alien was present in the United States").

Similarly, in *United States v. Rincon-Jimenez*,[460] the Ninth Circuit considered a statute that defined the offense of "eluding 'examination or inspection by immigration officers.'"[461] The court rejected the government's argument that the offense was continuing, stating that Congress contemplated "examinations or inspections" to occur "at the time of entry, a fixed point in time" and that the offense was "consummated at the time an alien gains entry through an unlawful point and does not submit to these examinations."[462]

Finally, in *United States v. Cores*,[463] the Supreme Court considered the question of whether a statute that criminalized "[a]ny alien crewman who willfully remains in the United States" after the expiration of their conditional permit described a continuing violation.[464] While the majority chose to characterize the violation as continuing, Justice Douglas, in dissent, argued that "the crime [was] completed" the moment that the conditional permit expired.[465]

2. Towards an Act-Based Approach to Immigration Offenses

While there is little conceptual clarity on when courts do, or should, classify an injury as continuing,[466] there are two broad frameworks to which courts often turn. The first framework focuses on the aspects of the claim that could be framed as continuing, while the second is concerned with whether treating a claim as continuing serves broader policy goals, like those associated with statutes of limitations.[467] The second framework best balances the protection of the plaintiff's interests with the promotion of efficient and accurate decision making.[468] Nonetheless, both frameworks provide further support that unlawful presence should not be characterized as a continuing violation.

An example of the first framework is the test articulated by the Supreme Court in the employment discrimination context. In *United Airlines, Inc. v. Evans*,[469] the Court drew a distinction between con-

460 595 F.2d 1192 (9th Cir. 1979).

461 *Id.* at 1193 (quoting 8 U.S.C. § 1325).

462 *Id.* at 1193–94.

463 356 U.S. 405 (1958).

464 *Id.* at 405–06 n.1 (quoting 8 U.S.C. § 1282(c)).

465 *Id.* at 411 (Douglas, J., dissenting).

466 *See* Peled, *supra* note 424, at 346.

467 Graham, *supra* note 410, at 284.

468 *See* Kim, *supra* note 13, at 585.

469 431 U.S. 553 (1977), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

duct and its effects, concluding that an injury should be construed as continuing for statute-of-limitations purposes when the unlawful conduct continues beyond the initial action, but not because the mere effects of that conduct continue.[470] The Court reaffirmed this distinction in *Ledbetter v. Goodyear Tire & Rubber Co.*,[471] its most recent pronouncement on the scope of continuing violations.[472] There, in a pay discrimination context, the Court rejected the late-filing plaintiff's argument that the initial discriminatory decision, which fell outside of the limitations period, renewed with each discriminatory paycheck.[473] The plaintiff tried to cast her pay discrimination injury as continuing, with each unequal paycheck constituting a new claim with a new limitations period.[474]

The Court disagreed and characterized the paychecks as mere effects of the initial act or acts where the decision to discriminate was made.[475] Justice Alito, writing for the majority, clarified that for purposes of the Equal Employment Opportunity Commission charging period in the statute, a new "discrete unlawful practice" has to take place.[476] If the subsequent injuries could be construed as the effects of the original injury-producing action, no new violation occurred.[477]

Under this acts-versus-effects framework,[478] unlawful presence cannot be construed as a continuing violation because unlawful presence is merely the effect stemming from the initial act of entry without inspection or visa overstay. The choice to overstay a visa would be treated as the unlawful act, while the subsequent lack of lawful status in the United States would be the effect flowing therefrom.[479] As in

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470 *United Airlines*, 431 U.S. at 558–60.

471 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

472 *Ledbetter*, 550 U.S. at 625–26, 628. The Court's approach to continuing violations remains valid after the Lilly Ledbetter Fair Pay Act of 2009. *See* Green v. Brennan, 136 S. Ct. 1769, 1785 n.3 (2016) (Alito, J., concurring) (The Act "abrogated *Ledbetter*'s precise holding" but "did not disturb the reasoning of the precedents on which *Ledbetter* was based"); *see also* Slorp v. Lerner, Sampson & Rothfuss, 587 F. App'x 249, 259 n.6 (6th Cir. 2014) ("[The] statute does not disturb *Ledbetter*'s interpretation of the continuing-violation doctrine more generally.").

473 *Ledbetter*, 550 U.S. at 624–25, 628.

474 *Id.*

475 *Id.* at 628–29.

476 *Id.*

477 *Id.* at 628.

478 *See id.*

479 To be sure, the choice to remain unlawfully present necessarily involves continued conduct, such as working, getting an education, or driving a car. However, even the *Ledbetter* Court acknowledged that some conduct may occur after the initial, wrongful act, without giving rise to a continuing violation. *Id.* at 628. There, the Court distinguished between the "intentionally dis-

the context of permanent trespass, the effects that stem from the initial act cannot be meaningfully separated from the initial act. There is no new and independent violation that afflicts a new injury on the plaintiff.[480] While the act of remaining can be viewed as a new unlawful act—and not merely an effect from the decision to enter unlawfully or to overstay a visa—if the apparent inaction of the plaintiff not to remedy the initial violation is classified as a continuing violation, then every unlawful act could be characterized as such.[481] This outcome obviates the purpose of a statute of limitations.

Moreover, the current inadmissibility ground does not target the act of remaining, but rather "presence."[482] Congress can choose to penalize the harms that flow from being unlawfully present, but it should specify actions that are different in kind, and not just the mere effects of the initial unlawful act.

Application of the second framework leads to the same conclusion. When the defendant's actions and the nature of the plaintiff's injury do not conclusively call for treating the particular injury as continuing, courts look to broader considerations of policy and fairness.[483] Such policy-focused methodology concerns the effects of classifying an injury as continuing for both the defendant and plaintiff.[484] Often courts employing such methodology focus not only on the equity concerns of both plaintiff and defendant, but also on the efficiency and accuracy rationales to the system that undergird statutes of limitations. Although there is a statute of limitations for the criminal offense of unlawful entry,[485] no such time limitations exist in the civil context for the two most common ways immigrants become undocumented: entry without inspection and visa overstays.[486]

Compelling arguments nonetheless exist for a statutory deadline on deportations. Statutes of limitation represent the legal norm, and there is precedent for such limitations periods in early adaptations of U.S. immigration statutes and in the lingering traces of mercy that ani-

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criminatory" or violative act giving rise to liability and "subsequent nondiscriminatory" or non-violative acts insufficient to trigger a new offense. *Id.* As applied to unlawful presence, the initial act of entering without inspection or overstaying a visa represents the violative act, whereas the actions occurring thereafter represent merely subsequent non-violative conduct.

480 *See* Graham, *supra* note 410, at 286–87.

481 *Id.* at 285.

482 *See supra* note 33 and accompanying text.

483 *See* Graham, *supra* note 410, at 284.

484 *Id.* at 291.

485 INA § 275, 8 U.S.C. §§ 1325, 3282(a) (2012).

486 *See supra* note 13 and accompanying text.

mate the current immigration statute.[487] I have argued elsewhere that the costs of not having statutes of limitations are simply too high.[488]

Even if a statutory deadline does not currently exist, the broader principles of equity and efficiency that underlie limitations actions can provide guidance on how to classify certain offenses in the immigration space. An important equitable concern raised by classifying certain immigration-related violations as continuing is the perpetual hardship to the defendant.[489] At a certain point, even the most culpable defendants deserve to be free of civil or criminal liability.[490] This is because an indefinite threat of liability is morally problematic in most circumstances and should thus be reserved for only the most heinous offenses. The consequence of classifying an offense as continuing in the immigration context means that there can be no repose for the defendant who must live under a perpetual threat of enforcement, which in this context is deportation. In other civil contexts, the consequence is injunctive action or the payment of monetary damages,[491] both of which are arguably less onerous. Remediation of the initial violation in the immigration context, on the other hand, means possible permanent exile from family and friends for immigrants who have been long-term residents of the United States.[492]

Without remediation as a viable option for most, the rational choice is to live a life of hiding, which exacts the harms of uncertainty. While the costs of uncertainty generated by an impending lawsuit affect all potential defendants, uncertainty for undocumented immigrants—whose initial violations have been classified as continuing—means living under the indefinite threat of deportation and the attendant consequences of living a life of fear and hiding in liminal legal status.[493] The costs of uncertainty are not limited to just the lives of immigrant defendants; they also extend to the legal system as a whole. The fear that drives immigrants into hiding deprives the community in

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487 *See* Kim, *supra* note 13, at 568–69.

488 *Id.* at 576–88.

489 *See supra* Section III.B.

490 *See, e.g.*, Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978) ("[C]ourts . . . are virtually unanimous in holding that, strong equitable considerations notwithstanding, the two-year limitation period [of the statute at issue] *cannot* be tolled or waived." (emphasis added)).

491 *See, e.g.*, *id.* at 605 (seeking damages in the amount of $150,000).

492 Daniel Kanstroom, *Deportation Laws Destroy Lives*, SALON (July 15, 2012, 8:00 PM), https://www.salon.com/2012/07/15/how_can_they_do_this_to_us/ [https://perma.cc/99GV-7NMK].

493 *See* Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1002–03 (2006) (describing a kind of legal instability of Savadoran and Guatemalan immigrants who move between lawful and unlawful legal statuses).

which they reside of diversity and the enlivenment of various cultural commitments, and of the loss of state and local tax revenue.[494]

An additional concern with classifying an offense as continuing in the immigration context is the potential deterioration of evidence and its effect on the integrity of the legal process.[495] Arguments about the staleness of evidence in immigration proceedings have some force because much of the evidence to establish one's lawful presence is documentary.[496] In removal proceedings, the government bears the burden of proving that the noncitizen is removable.[497] Staleness concerns persist where witnesses are necessary to prove a claim.[498] For a noncitizen, witnesses may, for example, be necessary to establish the date of entry. Access to such witnesses, as well as the accuracy of their recollections, become more difficult with the passage of time.[499]

Arguably, concerns about the staleness of evidence would be less pronounced when entry without inspection and visa overstays are classified as continuing violations because the injury would be measured not from the initial unlawful act—which in most cases would lie outside of the theoretical limitations period—but from each day the noncitizen remains unlawfully in the United States. This would obviate an opportunity for the imposition of a statutory deadline on plaintiff's claim.[500] But even here, staleness concerns persist in cases where courts allow the plaintiff to rely on the factual circumstances surrounding the initial injury—evidence that, again, would theoretically be outside of the limitations period.[501]

Moreover, stale evidence may be necessary and relevant for determining adequate forms of relief. In many cases, noncitizens concede removability. As a result, one of the primary issues at removal

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494 Lisa Christensen Gee et al., Inst. on Taxation & Econ. Policy, Undocumented Immigrants' State & Local Tax Contributions 1 (2016).

495 *See, e.g.*, United States v. Levine, 658 F.2d 113, 127 (3d Cir. 1981) ("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 . . . . '[I]t is the delay before trial, not the trial itself, that offends against the constitutional guarantee,' [to a speedy trial]." (footnote omitted) (quoting United States v. MacDonald, 435 U.S. 851, 861 (1978))).

496 *See* INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (2012) (specifying documentation requirements for noncitizens seeking admission).

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

498 *See* Kim, *supra* note 13, at 564–65 (discussing staleness concerns).

499 *See id.*

500 *Cf.* Taylor v. Meirick, 712 F.2d 1112, 1119 (7th Cir. 1983) ("Some of the evidence, at least, will be fresh" because "Meirick's infringement was a continuing wrong.").

501 *See id.* at 1119 (classifying copyright infringement as continuing and permitting consideration of infringement that occurred outside of the limitations period).

hearings is whether discretionary forms of relief are available.[502] To establish grounds for cancellation of their removals, noncitizens depend on witness testimony concerning continued physical presence, long-term residency, and "good moral character."[503] To establish grounds for asylum or the withholding of removal, the noncitizen must present documentary and testimonial evidence to establish whether she has a credible fear of persecution—the passage of time would make it more difficult to locate witnesses, particularly in foreign countries.[504]

Finally, in the unremediated torts context, courts are more likely to treat trespass as continuing, rather than permanent, if the harm can be reasonably removed by the defendant. This incentivizes remedial action by the wrongdoer. In addition to incentivizing remedial action, the continuing-violation classification has historically led to more efficient bargaining between parties to resolve the dispute informally as they occurred between neighbors and damage costs were relatively modest.[505] Although remedial action in the immigration context is theoretically possible, the significance of the consequences that attach to remediation makes it realistically a poor comparison to the oft-analogized trespass context. In the trespass context, the penalties are injunctive relief and monetary damages that incentivize remedial action. Although monetary damages can be significant for trespass actions, if the purpose of a continuing violation classification is to incentivize bargaining between parties, the damage amounts must be reasonable enough to enable such bargaining.[506] Moreover, the continuing classification depends on the capacity for remediation.[507]

In the context of U.S. immigration law, remediation means deportation. Remediation thus requires reporting to the government and ending one's unlawful presence in the hopes of adjusting to lawful status. Though various forms of relief exist, the likelihood of regularizing to lawful-immigrant status is low for many noncitizens due to onerous statutory requirements and categorical exclusions,[508] and to the rela-

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502 *Cf.* Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 598–99 (2012) (noting that "[b]ecause neither asylum officer nor immigration judge decisions are publicly available," courts' claims that "discretionary denials of asylum claims [are] rare" are unsubstantiated and likely inaccurate).

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

504 INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B).

505 *See* Graham, *supra* note 410, at 308.

506 *Id.*

507 Mangini v. Aerojet-Gen. Corp., 912 P.2d 1220, 1226 (Cal. 1996).

508 *See, e.g.*, INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012) (for asylum and withholding of removal, requiring persecution on account of five specified grounds); INA § 208(b)(1)(A), 8

tive lack of discretion that immigration adjudicators possess in order to provide reasonable forms of relief.[509] Unlike the trespass context, there is no option for a payment of a sum of money that serves to compensate the plaintiff for the wrong. The form of relief that comes close to monetary compensation is the adjustment of one's status, which only occurs upon payment of a significant fee to the government.[510] But adjustment of status is available to only a small segment of the undocumented population—those who have been "inspected and admitted or paroled," are otherwise admissible, and, subject to a few exceptions, have maintained continuous lawful status since entry.[511]

The relationship between the plaintiff and defendant also differs fundamentally in the immigration context, where the government holds all the enforcement power, which it can exercise in perpetuity. The law treats certain trespasses as continuing because recovery by the plaintiff cannot be excessive.[512] Under this methodological framework, the recovery for the government in the immigration context would be too big if the law treated entry without inspection and visa overstays as continuing beyond the initial violation. These arguments, as well as precedent rooted in varied legal contexts in both criminal and civil law, instruct against penalizing status or being present indefinitely. They instead compel a pathway towards an act-based approach to immigration offenses.

Conclusion

The issue of how to integrate into society the more than 11 million undocumented immigrants in the United States poses a significant challenge to this country. For a country as ethnically and culturally diverse as ours, the fear that the nation is on the precipice of fractur-

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U.S.C. § 1158(b)(1)(A) (same); INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (for cancellation of removal, requiring long term physical presence, good moral character, and proof of exceptional and extremely unusual hardship to U.S. citizen or permanent family members upon removal).

509 Paul Grussendorf, Opinion, *Immigration Judges Need Discretion*, SFGATE (Apr. 11, 2013, 5:52 PM), https://www.sfgate.com/opinion/openforum/article/Immigration-judges-need-discretion-4428406.php [https://perma.cc/G3TA-ZES2].

510 INA § 245(a), 8 U.S.C. § 1255(a) (2012); *Form I-485, Application to Register Permanent Residence or Adjust Status*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/i-485 [https://perma.cc/F4DW-TH6E] (a minimum fee of $1225 for most applicants, $1,140 for the form I-485 and $85 for biometrics).

511 INA § 245(a), 8 U.S.C. § 1255(a) (2012); INA § 245(c), 8 U.S.C. § 1255(c).

512 *See generally* Dan D. Dobbs, *Trespass to Land in North Carolina Part II – Remedies for Trespass*, 47 N.C. L. Rev. 334 (1969) (detailing remedies available for the offense of continuing trespass).

ing into separate, indivisible spaces is real. Unfortunately, recent discourse on immigration has devolved into the use of labels that devalue and demean. "Illegals." "Rapists." "Animals." Such labels have come to define what it means to be an undocumented immigrant living in the United States today.

This Article has shown how the current statutory scheme helps perpetuate this false narrative. The costs of doing so are too high. Penalizing presence stigmatizes and subordinates millions of long-term residents in the United States. Penalizing presence hinders legal efforts to integrate the undocumented immigrant population by driving them further underground and by thwarting the possibilities of establishing reasonable deadlines to pursue deportations. Penalizing presence means that one act, completed decades ago, can subject a person to an indefinite threat of deportation and potential long-term separation from family. This Article has framed an argument for reforming the concept of unlawful presence to instead focus on acts. For the law, reforming unlawful presence would represent a step towards bringing immigration law into compliance with established legal norms. For the undocumented immigrant, reforming unlawful presence would represent a step towards a more sustainable pathway of integration into American communities.