DOING TIME: CRIMMIGRATION LAW AND THE PERILS OF HASTE

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Crimmigration law wastes one of the law's most valuable tools: time. It eschews the temporal gauges that criminal law and immigration law rely on to evaluate who should be included or expelled from society. Instead, crimmigration law narrows the decision whether to exclude or expel the noncitizen from the nation to a single moment in time: the moment of the crime that makes the noncitizen eligible for deportation or incarceration for an immigration-related offense. This extraordinary focus on the moment of the crime conflicts with the fundamental notion of the individual as a collection of many moments composing our experiences, relationships, and circumstances. It frames out circumstances, conduct, experiences, or relationships that tell a different story about the individual, closing off the potential for redemption and disregarding the collateral effects on the people and communities with ties to the noncitizen.

This Article critiques crimmigration law's uniquely cabined approach to the temporal aspects of decisions about membership. It explores how crimmigration law wastes the potential for time to usefully evaluate a noncitizen's connection to the community, the advisability of expulsion, and the potential for inclusion. By establishing permanent expulsion as the default consequence, crimmigration law ignores the potential for reintroduction into the community that criminal sentencing and relief from deportation contemplate. Instead, it combines and heightens the exclusionary power of criminal and immigration law. Focus on that moment has the effect of flattening the hierarchy of immigration status—from permanent resident to unauthorized migrant—that has traditionally informed the level of constitutional and statutory rights granted to individual noncitizens. The Article explores solutions to this temporal stasis, examining the benefits and costs of resurrecting a statute of limitations for crimmigration law.

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"If all time is eternally present all time is unredeemable."[1]

INTRODUCTION

Jose Padilla came to the United States in the 1960s from Honduras. He served in the Vietnam War, became a lawful permanent resident, settled in California with his family, and became a licensed commercial truck driver.[2] In 2001, he was arrested for transporting in his tractor-trailer over half a ton of marijuana.[3] It was his first offense.[4] He pleaded guilty to marijuana trafficking and received a sentence of five years plus an additional five years probation.[5] Before Padilla agreed to the plea, his defense counsel told Padilla that he did not have to worry about any immigration consequences because he had been in the country for so long.[6]

1. T.S. ELIOT, *Burnt Norton*, *in* COLLECTED POEMS 1909–1935 (1936).
2. Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010); Brief of Petitioner at 8, *Padilla*, 130 S. Ct. 1473 (No. 08-651).
3. *Padilla*, 130 S. Ct. at 1477; Brief of Respondent at 1, *Padilla*, 130 S. Ct. 1473 (No. 08-651).
4. Brief of Petitioner, *supra* note 2, at 9.
5. *Id.* at 10.
6. *Padilla*, 130 S. Ct. at 1478.

Padilla's lawyer was wrong. According to the U.S. Supreme Court, Padilla's offense triggered the removal ground for drug trafficking, and likely also the ground for commission of an "aggravated felony" under the immigration laws.[7] Upon entry of the plea, Padilla became deportable, ineligible for any relief from deportation, forever barred from reentering the United States, and ineligible for naturalization.[8]

There are two points in time when a noncitizen can avoid being convicted for a crime that immigration law classifies as an aggravated felony. The first, of course, is when a noncitizen decides whether to commit the crime. The second is at the plea bargain stage, when there is an opportunity for defense counsel to negotiate with prosecutors about the crime with which to charge the defendant. If noncitizens are unaware of the immigration consequences of the crime, or are mistakenly told there are none, they may agree to penalties that are far harsher than they anticipated.[9] For long-term residents like Padilla, the consequences can be life-shattering.

The Supreme Court agreed with Padilla that his attorney may have provided ineffective assistance. The Court held that criminal defense counsel have a duty when advising about a plea to inform a noncitizen of the immigration consequences of the plea if it is clear that the crime may constitute a basis for deportation.[10] The significance of this duty, the Court suggested, is that defense counsel could "bargain creatively" for a different charge that does not carry deportation consequences in exchange for a ready guilty plea,[11] or perhaps a longer sentence.

This is a curious position for the Court to take. One could view this discussion in *Padilla* as a moment in which the Court is encouraging defense counsel, in collaboration with prosecutors, to make an end-run around the immigration consequences of criminal convictions. The Court's opinion presses the central players in the criminal justice system, alone and without the formal participation of immigration law administrators, to take steps to avoid immigration law consequences. *Padilla* could be characterized as endorsing efforts of attorneys in the criminal justice system to avoid outcomes that

7. *Id.* at 1483 (citing 8 U.S.C. § 1227(a)(2)(B)(i)); Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1401 (2011) (analyzing the criminal charge and concluding that it fell under the "aggravated felony" deportability ground).

8. *See infra* notes 144–167 (describing these consequences of conviction of an "aggravated felony").

9. *Padilla*, 130 S. Ct. at 1483.

10. *Id.*

11. *Id.* at 1486.

Congress actively crafted to increase deportation of noncitizens convicted of crimes.[12]

What could drive a relatively constrained Supreme Court, one not known to favor criminal defendants, convicted noncitizens, or defense counsel for that matter, to make this seemingly Congress-defying move? The answer lies in *Padilla*'s explicit inclusion of immigration consequences in the unstructured negotiating space of the plea bargain, allowing for consideration of mitigating circumstances such as length of residence or associations with the United States and its people. As this Article describes, these considerations, originating in moments outside of the crime itself, tend to be off-limits to immigration officials making deportation decisions. *Padilla* is a creative approach to an intractable problem: the automatic nature of immigration consequences of many criminal convictions. The Supreme Court's bold move calls for a closer look at the legal framework that creates these outcomes: crimmigration law, or the intersection of criminal and immigration law.[13]

Criminal law and immigration law play different roles: the former regulating conduct within a community, and the latter governing the entry and expulsion of individuals across borders. Criminal law and immigration law have in common that they serve as systems both for excluding individuals from the community and for determining when individuals may join (or rejoin) society.[14]

Immigration law uses time as a tool to decide who is a citizen or may become one; who may obtain or keep lawful immigration status; who should

12. *See infra* notes 98–109, 157–163 and accompanying text (describing the passage of laws expanding the crime-based deportability grounds and severely restricting relief from deportation).

13. *See generally* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (exploring the way in which criminal justice norms are imported into civil removal proceedings and relaxed procedural norms of immigration proceedings are imported into the criminal justice system); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (discussing the importation of criminal justice norms into the domain of immigration, which originally stems from a theory of civil regulation). *See also* Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008) (discussing how immigration status affects the way Fourth Amendment doctrines of consent, reasonable expectation of privacy, stops, and administrative searches are applied to deny privacy protection); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2004) (describing how immigrant detention after September 11 was used primarily as a law enforcement tool, with immigration enforcement as a secondary goal); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing that the states have inherent authority to arrest aliens for violations of criminal and civil immigration law).

14. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999) (describing ex-offenders and permanent residents as societal outsiders); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (applying membership theory to map the exclusionary effects of the criminalization of immigration law).

be sanctioned for transgressions of immigration law, and how these decisions might be implemented. In deciding whether to deport a noncitizen, immigration law generally takes into account events and relationships beyond those underlying the deportability ground. For example, an immigration judge may look beyond proof that a noncitizen overstayed a visa to examine the noncitizen's close family ties or circumstances raising humanitarian concerns, circumstances that stem from a period before or after the conduct triggering deportability.[15]

Criminal law's graduated sentencing scheme similarly relies on temporal gauges. Sentencing takes into account events occurring before and after the crime, identifying and evaluating mitigating circumstances and determining whether and when the defendant will rejoin U.S. society.[16]

The thesis of this Article is that crimmigration law is wasting precious time. Crimmigration law eschews the temporal gauges that criminal and immigration law rely on. It combines criminal bars to lawful reentry into the United States with a high (and sometimes certain) probability of deportation. As such, the law privileges the moment of the crime as the determining factor for often-permanent expulsion. Crimmigration law frequently disregards the events and relationships that otherwise factor into decisions to waive deportation. By establishing permanent expulsion as the touchstone consequence, it similarly ignores the future question of reintroduction into the community that is inherent in criminal sentencing.[17] Thus, the recent trend toward harsher and more punitive ways of intermeshing immigration and criminal law represents a decision to expel noncitizens from U.S. society that is analogous to a life sentence—but one imposed ex ante by the legislature rather than ex post by judges with discretion to assess the temporally infused circumstances before them.

Crimmigration law combines and heightens the exclusionary power of criminal and immigration law.[18] It differs from both civil immigration law and

15. *See infra* notes 63–74 and accompanying text (describing the events and relationships that are relevant to relief from removal in ordinary cases).

16. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010) (allowing courts to consider in criminal sentencing "any information concerning the background, character and conduct of the defendant").

17. *See* Michelle Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33 (2011) (documenting the transition since the 1990s in inmate rehabilitation from academic programs to "reentry-related life skills programs"); *cf.* Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY (Charles J. Ogletree, Jr. & Austin Sarat eds.) (forthcoming 2011) (manuscript at 4), *available at* http://papers. ssrn.com/sol3/papers.cfm?abstract_id=1845904 ("[T]he American carceral system, although perhaps rhetorically motivated by more familiar penological goals like retribution and deterrence, is in practice designed to mark certain undesirables as social deviants and consign them to lives beyond the boundaries of mainstream society.").

18. *See* Demleitner, *supra* note 14, at 158 (noting that access to state resources and the political process is denied to criminal offenders and noncitizens in a similar manner); Stumpf, *supra* note 14, at

criminal law in an important respect: the use of time. Crimmigration law narrows the decision whether to shut the noncitizen out of the national community to a single moment in time: the moment of the crime that triggers the potential for deportation or incarceration for an immigration-related offense.[19]

Three mechanisms enable this multifaceted exclusion from the territorial and social mainstream of U.S. society. First, by expanding the types of crimes that constitute deportability grounds, crimmigration law excludes noncitizens by removing them beyond the geographic national boundaries.[20] At the same time, by expanding the types of migration-related conduct that constitute a crime,[21] crimmigration law excludes noncitizens from U.S. society through incarceration and deportation,[22] or through a plea bargain that includes deportation.[23]

Second, by creating enforcement processes that provide fewer procedural protections for noncitizens than for citizens, crimmigration law excludes noncitizens from equal access to the criminal justice system.[24] Finally, by expanding the role of state and local criminal justice actors and legislators, crimmigration law reduces the discretion to withhold deportation that federal immigration authorities and criminal sentencing judges have traditionally held.[25]

409–13 (discussing the use of criminal and immigration law as means of sovereign expression of retribution and moral condemnation).

19. The crime, then, may be the crime leading to the noncitizen's arrest, the crime charged by the prosecutor at trial, or the crime to which the noncitizen pleaded after negotiation with the prosecutor.

20. *See* Stumpf, *supra* note 14, at 382–84 (describing the proliferation of crime-based deportability grounds); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722–25 (2009) (same). Stephen Legomsky describes this as the second "port of entry" through which the criminal enforcement model has entered immigration law. Legomsky, *supra* note 13, at 482–86.

21. *See* Stumpf, *supra* note 20, at 1721–22 (describing the evolution of expanded criminal penalties in the immigration law arena).

22. *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1837–39 (2011) (analyzing the close relationship between criminal and civil outcomes in immigration cases, and noting that "[e]specially if removal will not require a formal proceeding or order, the federal government may see civil immigration removal in any given case as the preferred, efficient alternative to criminal penalties"); Stumpf, *supra* note 14, at 407–08 (describing the exclusionary nature of criminalizing immigration-related conduct).

23. This is Professor Legomsky's first "port of entry" through which the criminal enforcement model enters immigration law. *See* Legomsky, *supra* note 13, at 476–82; *see also* Stumpf, *supra* note 14, at 402–03 (describing the criminalization of immigration law as an exclusionary force).

24. *See infra* notes 113, 119 and accompanying text.

25. The role of discretion in immigration law has been incisively explored by several scholars. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 165–66 (2006) [hereinafter Kanstroom, *Better Part of Valor*] ("Discretion has been so deeply intertwined with statutory immigration law for more than fifty

With these expansive exclusionary mechanisms, combined with a constricted approach to time, crimmigration law conflicts with the basic notion of the individual as a collection of many moments composing our experiences, relationships, and circumstances. That sharp focus on the moment of the crime as the basis for expulsion from U.S. society exempts from consideration any events occurring prior to or after that crime. It frames out any post-crime circumstances, conduct, experiences, or relationships that tell a different story about the individual, closing off the potential for redemption and disregarding the collateral effects on the people and communities surrounding the noncitizen. Focusing on that moment has the effect of flattening the hierarchy of immigration status—from permanent resident to temporary visitor to undocumented migrant—that has traditionally informed the level of constitutional and statutory rights granted to individual noncitizens.[26]

Part I of this Article describes the ways in which citizenship and immigration law rely on temporal yardsticks to evaluate whether to admit an individual as a member of U.S. society, either as a U.S. citizen or favored noncitizen. Part II identifies and maps the divergent ways that enforcement of immigration and criminal law use time in their separate spheres.

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years that much of the whole enterprise could fairly be described as a fabric of discretion. This is particularly true of deportation law."); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 709 (1997) [hereinafter Kanstroom, *Surrounding the Hole in the Doughnut*] (describing U.S. immigration law in practice as a "fabric of discretion and judicial deference"); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1754 (2010) (describing the statutory discretionary authority of executive branch officials to allow noncitizen parents to remain in the United States based on the interests of their U.S. citizen children); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006) (describing deportation "as a rule-governed sanction with enforcement discretion"); *see also* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611–32 (2009) (discussing the different types of diversions that result in decreased access to the civil immigration adjudication system); Legomsky, *supra* note 13, at 474 (discussing how outcomes are generally harsher and less flexible if decided under a criminal justice model rather than a civil regulatory model); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1649 (2010) (explaining that "the principal question in most removal proceedings is whether the immigrant should receive some sort of discretionary relief"); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1133 (2002) (advocating, in light of the practical overlap of the criminal justice and immigration bureaucracies, a return to the discretion that sentencing judges formerly held to determine whether to deport or withhold deportation of noncitizen defendants).

26. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 9 (2006) (describing a common view of noncitizens as "outsiders until shown otherwise," and articulating a more inclusive and unique status for lawful immigrants); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 92–109 (describing a graduated categorical approach to noncitizens' rights); *see also* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (explaining that the strength of due process protections may vary depending upon a noncitizen's immigration status).

Part III analyzes the way that modern crimmigration law narrows the focus of the exclusion decision to the moment of the crime. Evaluating only the moment of the crime means that immigration status, close relationships to U.S. residents, and other circumstances become irrelevant to determining whether to exclude the noncitizen.

Part IV critiques the current approach and seeks ways to launch crimmigration law into the flow of time. Among other approaches, it explores whether the temporal inadequacies of crimmigration law might find resolution in a statute of limitations. Finally, the Conclusion provides a brief reflection on the perils of haste in crimmigration law.

I. TIME AND BELONGING

Understanding how crimmigration law constricts to a single moment in time the decision to exclude a noncitizen requires a look at the role of time in choosing who belongs in the community. U.S. immigration and citizenship law relies heavily on temporal clues to determine whether to embrace an individual's desire to join the U.S. community. This Subpart describes how U.S. law uses measurements of time to determine membership levels, beginning with the most robust level of membership: citizenship.

A. Making Citizens in Time

Naturalization and *jus sanguinis*[27] birthright citizenship, two forms of legislated citizenship, most clearly use time as a way to screen whom to include in the U.S. community and whom to exclude from it.[28] One of the functions that time plays in naturalization is to mark out a period during which the candidate establishes the fundamentals of loyalty to the nation and deepens her connection to the United States, punctuated by a screening process in the form of the naturalization procedure.

To naturalize, most noncitizens must have continuously resided in the United States for three to five years in permanent resident status. For all of that time, they must maintain good moral character and remain "attached to

27. *Jus sanguinis* is citizenship inherited from one's parents. *See infra* note 38.

28. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 136 (2006) (noting that "territorial birthright citizenship rules are, as much as rules allocating citizenship by blood or descent, fundamentally exclusionary").

the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[29]

The five-year period of residency and good moral character is a probationary period, a quarantine in permanent resident status.[30] Its span provides time for the noncitizen to exhibit the statutory symptoms of ineligibility for naturalization.[31] It makes time for moral failure to occur: to tell lies under oath, commit crimes, take regularly to drink or to illicit gambling.[32] In that way, time functions to manage the risk that an intending noncitizen may not measure up to the criteria that the naturalization laws establish for passage to citizenship.[33]

Time plays a redemptive role in naturalization law by channeling the discretion the naturalization examiner exercises when evaluating whether the applicant has demonstrated five years of good moral character. The good moral character inquiry traditionally considers conduct and circumstances that span the five-year time period and even beyond, to the life history of the individual. The examiner must weigh conduct demonstrating a lack of good moral

29. Immigration & Nationality Act (INA) § 316(a) (2006) (setting out a five-year residency requirement for permanent residents prior to naturalization); *id.* § 319(a) (shortening the residency period to three years for spouses of U.S. citizens); *id.* § 328 (waiving the residency requirement for noncitizens who served honorably in the armed forces for an aggregate period of one year); *see also* Schneiderman v. United States, 320 U.S. 118, 131–59 (1943) (plumbing the meaning of the residency requirement, and concluding that it required "behavior for a period of five years as a man attached to [the Constitution's] principles and well disposed to the good order and happiness of the United States"); Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL'Y REV. 335, 350–61 (2009) (describing the history of the good moral character requirement).

30. *See* Foley v. Connelie, 435 U.S. 291, 294 n.3 (1978) ("The alien's status is, at least for a time, beyond his control since Congress has imposed durational residency requirements for the attainment of citizenship." (citing 8 U.S.C. § 1427(a) (1976))); Nyquist v. Mauclet, 432 U.S. 1, 19 (1977) (Rehnquist, J., dissenting) (noting of the five-year residency period that "[n]othing except time can remove [the resident alien] from his identified status as an 'alien' and from whatever associated disabilities the statute might place on one occupying that status").

31. INA § 316(a).

32. *See id.* § 101(f). The statute allows the immigration official to consider conduct occurring outside the five-year statutory period. *See id.* § 316(e) ("In determining whether the applicant has sustained the burden of establishing good moral character . . . the Attorney General shall not be limited to the applicant's conduct during the five years preceding the filing of the application, but may take into consideration . . . the applicant's conduct and acts at any time prior to that period.").

33. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 818 (2007) (exploring "the system that the state uses to select those in the immigrant pool whom it considers desirable to add to the country's population and eventually to the citizenry"); *id.* at 826 ("Noncitizens then remain for a probationary period of, say, five years. At the end of the period, the person is evaluated. If the noncitizen has steady, productive work, has learned English, has not committed any crimes, and otherwise has behaved herself, she is given the option to remain and naturalize . . . ."); *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 17 (1984) (suggesting that the "idea of sovereignty, so elusive in our domestic constitutional structure, may come closest to being reified and recognizable when a unified national government deploys its laws against one who is plausibly seen as an outsider—as, quite literally, alien").

character, such as failure to pay child support or federal income taxes, or the past commission of certain types of crimes,[34] against the positive aspects of the applicant's case. The law forbids denials that are based solely on negative equities that occurred outside the statutory period.[35] This approach acknowledges that people may change with the passage of time. It makes time for rehabilitation, for citizenship applicants to redeem themselves for past bad acts.[36]

Naturalization is only one of the portals to citizenship that employs time to gauge eligibility for membership. *Jus sanguinis* citizenship, in which U.S. citizenship is inherited from citizen parents, combines blood ties[37] with a temporal measure. Here, it is the parents' time that matters. Individuals born on foreign soil have U.S. citizenship at birth if their U.S. citizen parents resided for some period of time in the United States or its territories.[38] For example, a child born abroad may inherit U.S. citizenship from a U.S. citizen married to an alien,[39] but only if, prior to the child's birth, the U.S. citizen parent was physically present in the United States (or U.S. possession) for a total of five years, at least two of which were after the age of fourteen.[40]

These time measurements perform two functions. First, because the *jus sanguinis* inheritance of citizenship, if left unconstrained, allows for perpetual

34. The current version of the good moral character requirement contains several mandatory bars to a finding of good moral character, including one based on commission of an "aggravated felony." *See* INA § 101(f); 8 C.F.R. § 316.10(b) (2006); Naturalization Requirements, INS Interp. Ltr. § 316.1(g) [hereinafter INS Interp. Ltr.]. Part III discusses these. *See infra* notes 164–165 and accompanying text.

35. *See* 8 C.F.R. § 316.10(b); INS Interp. Ltr., *supra* note 34, § 316.1(f) (noting that Congress meant "to make provision for the reformation and eventual naturalization of persons who were guilty of past misconduct"); *see also* Gilbert, *supra* note 29, at 355 n.113.

36. *See* United States v. Hovsepian, 422 F.3d 883, 886 (9th Cir. 2005) (explaining that Congress meant to allow for rehabilitation); *see also* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. (forthcoming 2012) (manuscript at 16), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799524 (tracing the history of the good moral character requirement, and noting that a "backward-focused[ ] conception of good moral character [results] in the archaic and uncompromising view that people are beyond redemption").

37. It is technically inaccurate to characterize the relationship as a "blood tie" because the Act includes adopted children in defining the relationship between parent and child for immigration and citizenship purposes. *See* INA § 320 (setting out the requirement for automatic citizenship, including for adopted children); *id.* § 101(b)(1)(E)–(G) (defining when an adoptee is considered a "child" under the Act).

38. *Id.* §§ 301, 309.

39. I use "alien" here in its technical sense to distinguish foreign nationals from U.S. citizens or nationals. *See, e.g.*, *id.* § 301(d) (defining birthright citizenship for a child of a U.S. citizen and a U.S. national as distinct from a child of a U.S. citizen and an alien).

40. *Id.* § 301(g); *see* Nguyen v. INS, 533 U.S. 53, 59–60 (2001) (interpreting the statutory *jus sanguinis* provisions for birthright citizenship when only one parent is a U.S. citizen). To bequeath U.S. citizenship to a child born abroad, at least one of two married U.S. citizen parents must have resided in the United States (or its possessions) prior to the child's birth. *See* INA § 301(c).

transmission of citizenship, these statutes provide a generational endpoint.[41] Second, the restrictions on *jus sanguinis* citizenship ensure that a U.S. citizen parent has had some period of time to connect with the nation, to provide an "assurance of emotional commitment to the United States"[42] in order to pass citizenship on to a child born abroad.[43] Perhaps, along with U.S. citizenship, the child will inherit that connection.[44]

In contrast, *jus soli* citizenship is based on birth on national soil. Here, geography is at least as significant as time.[45] *Jus soli* relies on a single moment in time—the moment of birth—to determine citizenship.[46] That a moment in time and space determines the acquisition of citizenship seems, at first, serendipitous. However, the narrowing of the relevant time period to that moment broadens the scope of membership and reduces (while not eliminating) government control over the acquisition of citizenship.

The constricted role of time here has two significant results. First, it prevents a future harm: the "reemergence of a hereditary caste of subordinated denizens."[47] Second, it keeps post-birth majoritarian preferences from affecting

41. *See* Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 203–04 (2010) (noting that many nations have rules qualifying the indefinite reach of *jus sanguinis*, and providing as an example "a rule that denies citizenship to the child of a citizen born outside of the country of his citizenship who has not availed himself of the protection of his country of citizenship by a certain age (or a combination of age and time after the birth of the child in question)").

42. *See* Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 250 (1994).

43. *See id.*; *see also* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 45 (6th ed. 2008). U.S. citizenship law used to require a more direct connection between the child and the country by revoking birthright citizenship for children who failed to reside in the United States or establish extended physical presence for a defined period. *See id.*; *see also* Nationality Act of 1940, §§ 314, 503; 8 U.S.C. § 714 (now 8 U.S.C. § 1432) (repealed 2000).

44. *See Nguyen*, 533 U.S. at 64–65 (articulating as an "important governmental interest" restraints on *jus sanguinis* citizenship that are meant to ensure the opportunity to develop "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States").

45. *Cf.* Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 112 (2006) (explaining that "jus soli citizenship . . . not only legally recognize[s] family ties and the multi-generational nature of immigration, but also endorse[s] the general relevance of time").

46. *See* U.S. CONST. amend. XIV ("All persons born . . . in the United States . . . are citizens of the United States . . . ."). That moment in time can be critical. In a parallel form of acquired citizenship, such as derivative citizenship through the naturalization of a parent, the upper age limit provides a temporal cap. *See* 8 U.S.C. § 1432 (repealed 2000). For a particularly poignant example of this, see *Duarte-Ceri v. Holder*, 630 F.3d 83 (2010) (holding that the exact moment of birth is relevant to determine whether a child whose mother was naturalized on his eighteenth birthday could acquire citizenship before the age of eighteen).

47. *See* Neuman, *supra* note 42, at 248 & n.21; *see also* Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485, 491–92 (1987) (explaining that the Fourteenth Amendment's Citizenship Clause was meant to prevent the creation of "an hereditary caste of voteless denizens, vulnerable to expulsion and exploitation").

the distribution of citizenship.[48] Depending on the level of border control, *jus soli* citizenship also reserves constitutional citizenship for those whose parents the government has allowed to enter or at least has not removed.[49] At bottom, however, the narrow focus on a moment in time for *jus soli* citizenship expands the portal to citizenship, reducing the influence of majoritarian politics and government discretion on the decision whether an individual may join the inner circle of membership in the United States.

Thus, the temporal requirements of presence and residence in citizenship law function to foster connection and emotional commitment to the United States. For naturalization, the waiting time to fulfill permanent resident status and the good moral character requirement theoretically mitigates the risk that an individual's character will later fall short. *Jus soli* rules narrow the role of time in conferring citizenship to an instant of innocence, the moment of birth, when reducing the influence of the political branches in citizenship decisions is paramount.

B. The Temporal Structure of Immigration Law Hierarchies

In contrast to the citizenship framework, in which time operates to imbue individuals with a common membership status, the role of time in immigration law is to construct hierarchies of membership status.[50] Time delineates immigration status, from permanent resident to tourist, outlining for each the benefits of membership. Lawful permanent residents of the United States have permission to remain for an indefinite period of time.[51] For temporary visa holders, the validity of the visa is indistinguishable from the length of time the noncitizen is authorized to remain in the United States.[52] Overstaying the visa means a noncitizen is out of time in the United States,[53] unauthorized

48. *See* Neuman, *supra* note 42, at 248.

49. *See id.* ("From the republican perspective, the constitutional *jus soli* principle exacts a high price by inducing the creation of loopholes in the immigration laws and by limiting the power of majoritarian politics over the distribution of citizenship.").

50. *See* BOSNIAK, *supra* note 28, at 75; Martin, *supra* note 26, at 107 (describing a graduated hierarchical approach to noncitizens' rights).

51. That permission is revocable. *See, e.g.*, INA § 237(a)(2) (2006) (listing crime-based deportability grounds).

52. *See id.* § 222(g)(1) (declaring that when "an alien who has been admitted on the basis of a nonimmigrant visa . . . remain[s] in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay"); *see also id.* § 101(a)(15)(H) (authorizing the temporary admission of nonimmigrant professionals, agricultural workers, and seasonal employees, among others); *id.* § 101(a)(15)(L) (authorizing the temporary admission of nonimmigrant managers, executives, and specialists).

53. *Id.* § 222(g).

even if still physically present. Absent relief from deportation, unlawfully present migrants have no time.[54]

The role of time in this hierarchy is especially apparent when noncitizens seek to adjust their status to lawful permanent residence without leaving the country for consular processing. The law draws distinctions between those who entered with explicit government authorization and those who did not, and uses time to distinguish them. For those who entered the United States without an immigration official's imprimatur, Congress eliminated eligibility for adjustment of status, grandfathering only noncitizens whose family-based petitions and employment-related applications were filed at the turn of the twenty-first century.[55] In this way, access to adjustment of status for noncitizens who entered without an immigration official's inspection has narrowed to a small window of history.

As a result, and in conjunction with bars to reentering the United States imposed on noncitizens who were present without authorization for longer than one year, undocumented migrants may have no realistic avenue to regularizing their status.[56] In combination, these temporal limitations emphasize the wide separation between classes of noncitizens, distinguished by the lawfulness of their entry.

In sum, within the immigration-status hierarchy, time acts as a reward, a measure of value. If a noncitizen's position on the rung of the hierarchy is a result of connection to members of the national community (for family-based admissions)[57] or of economic, cultural, or intellectual desirability (for employment-based admissions),[58] then the time allotted for lawful presence rewards those who have formed greater connections or who have more value, in some

54. *See id.* §§ 212(a)(6), 237(a)(1)(B) (defining unlawful presence and its consequences). In fact, one of the advantages to receiving a grant of voluntary departure rather than forced removal is the grant of a period after the removal hearing to put one's affairs in order. *See id.* § 240B (authorizing grants of voluntary departure and allowing for up to 120 days to leave).

55. *Id.* § 245(i)(1)(B) (requiring the filing prior to April 30, 2001, of a family-based petition under section 204 or a labor certification application under section 212(a)(5) on behalf of a noncitizen who entered without inspection); *see id.* § 245(i)(1)(C) (imposing additional time-based criteria).

56. *See id.* § 212(a)(9)(B) (setting out bars to reentering the United States based on periods of unlawful presence, and stating that an unlawfully present noncitizen who "has been unlawfully present in the United States for one year or more, and who again seeks admission within [ten] years of the date of such alien's departure or removal from the United States, is inadmissible"). The government may grant a waiver of this bar to reentry, but only for spouses, sons, and daughters of U.S. citizens or permanent residents, and only upon a showing that refusing to admit the noncitizen "would result in extreme hardship to the citizen or lawfully resident spouse or parent." *Id.* § 212(a)(9)(B)(v).

57. *See id.* § 203(a) (defining preferences for family-based immigration).

58. *See id.* § 203(b)(1)(A)(i) (defining first-preference immigrants to include those with "extraordinary ability in the sciences, arts, education, business, or athletics").

sense, to the nation.[59] Immigration law is concerned with whether to admit or expel noncitizens, but it is concerned at least as much with how long they can stay and how soon they must leave.

C. The Role of Time in Creating and Legalizing Permanent Residents

Time is a benefit in immigration law; it is also a gauge of membership and a tool for managing risk. These roles become more apparent when noncitizens shift from one immigration status to another through marriage and through relief from deportation, ascending the immigration status hierarchy. Here, temporal criteria manage the risk of admitting the wrong noncitizen to permanent resident status, and measure the level of affiliation with the United States. I will take up two ways in which time fulfills these functions: through conditional permanent resident status via marriage to a U.S. citizen or permanent resident, and in the criteria for statutory relief through cancellation of removal.

1. Conditioning Residency on Time

Time-based measurements are central to regulating immigration based on marriage. When a newly married heterosexual couple seeks lawful permanent residence status for one spouse on the basis of marriage to the U.S. citizen or lawful permanent resident partner, immigration law alerts to the possibility of marriage fraud.[60] The temporal proximity of the marriage to the request for lawful permanent resident status triggers its own temporal requirement: the imposition of a two-year condition on the grant of permanent residence.[61] If, within that two-year period, the marriage fails or the agency determines that the marriage was entered into for the purpose of obtaining immigration status, the agency may revoke the grant of immigration status.[62]

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59. The employment-based admissions criteria are particularly explicit in requiring proof of value to the nation. *See, e.g.*, *id.* § 203(b) (assigning preference to aliens with extraordinary ability to "substantially benefit prospectively the United States" and those with exceptional ability to "substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States").

60. *See id.* § 216(b)(1)(A) (requiring a determination of whether a marriage entered into less than two years before the marriage-based admission "was entered into for the purpose of procuring an alien's admission as an immigrant" or "has been judicially annulled or terminated, other than through the death of a spouse"). The marriages of same-sex spouses have not been recognized for purposes of immigrant admissions. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) (holding that federal immigration law governed the definition of marriage and that, even if the state or locality where the marriage took place recognized same-sex marriage, federal law did not).

61. *See* INA § 216(g)(1).

62. *See id.* §§ 216(a)(1), 216(b)(1)(A).

Time does most of the work to regulate the risk of marriage fraud. The proximity of the marriage date to the date that the spouse becomes a permanent immigrant is exclusively what raises the legal doubt that the marriage is bona fide. Time defines the limits of that suspicion, restricting the agency's duty to doubt the marriage's validity (absent other reasons for suspicion) to a twenty-four-month period after the marriage. Finally, time is the solution, marking out a two-year period of probation—conditional residence—after which the immigrant attains permanent resident status.

2. Cancellation of Removal and Time

Cancellation of removal is a form of relief from deportation that expunges deportability grounds and bestows lawful permanent resident status.[63] Measures of time, combined with immigration status and other criteria, determine whether cancellation applies to maintain or elevate the noncitizen to the status of a lawful permanent resident.

Noncitizens who have been permanent residents for at least five years and have resided continuously in the United States for seven years since their admission may be eligible for cancellation of removal.[64] Non-permanent residents who request cancellation both to avoid removal and to attain permanent resident status have a more stringent time-based requirement of ten years of continuous physical presence in the United States.[65]

The temporal requirement of residence or physical presence reflects the reality that over time individuals invest themselves in the lives they establish. Absent reasons to think otherwise, longer residence or presence in the United States means that the individual has made a greater investment in remaining there, as demonstrated through relationships, property, employment, or community.[66] Cancellation of removal allows the noncitizen to assert that

63. *Id.* § 240A.

64. *See id.* § 240A(a) (setting out those two requirements, and also barring from eligibility for cancellation of removal permanent residents convicted of an "aggravated felony").

65. *Id.* § 240A(b) (also requiring that the noncitizen have a close relative who is a U.S. citizen or permanent resident and proof that removal will cause "extreme hardship" to that relative; barring from eligibility those convicted of any criminal deportability ground under § 237(a)(2)).

66. *See id.*; *see also* In re C-V-T-, 22 I. & N. Dec. 7, 9–11 (B.I.A. 1998) (holding that discretionary review requires a balancing of social and humane considerations (including family ties within the United States, lengthy residence in this country, particularly when it began at a young age, evidence of hardship to the noncitizen and family resulting from deportation, service in the armed forces, a history of employment, property or business ties, value and service to the community, and rehabilitation if a criminal record exists) with adverse factors (including the nature and underlying circumstances of the grounds of removal at issue, additional significant violations of the immigration laws, and the recency of any criminal record and its nature and seriousness) (relying on Matter of Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978))).

investment as a barrier to removal and a basis for permanent status. It calls on the government to justify deprivation of that investment when it is sufficiently deep.[67]

For noncitizens without permanent resident status, the longer requirement of physical presence in the United States stands in for the enduring immigration status that permanent residence represents. Whether viewed as a formal recognition of a functionally permanent status[68] (an acknowledgement of the noncitizen's investment or importance in the lives of U.S. community members),[69] or as a probationary period that tests compliance with legal or moral norms,[70] a grant of cancellation of removal uses the longer period of physical presence to substitute for the lack of a formal rung on the immigration status hierarchy.

3. Time as Affiliation

The role of time in making citizens and permanent residents and in choosing who deserves relief from deportation[71] is closely connected to a set of legal and moral arguments about immigrant rights characterized as "immigration as affiliation."[72] When noncitizens form ties in the United States based on family, work, or community, an argument arises that this affiliation with the country creates legal and moral traction that calls out for recognition through stable immigration status or citizenship.[73]

Pathways to admission as an immigrant or to relief from deportation rely on these arguments. The invocation of time periods, such as time spent within the borders or time associated with a U.S. citizen spouse, child, or parent, is a way of expressing the dimensions of that affiliation, of approximating its strength and quality. Looked at another way, when the government has consented to any period during which noncitizens can be present in the country, the natural

67. *See* Bridges v. Wixon, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of 'all that makes life worth living.'" (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922))).

68. *See* MOTOMURA, *supra* note 26, at 88–90.

69. *Id.*

70. *See* Cox & Posner, *supra* note 33, at 826 (arguing that ex post, rather than ex ante, screening of immigrants will increase the chances that the state is admitting desirable immigrants to citizenship by virtue of the information gathered during the noncitizen's residence).

71. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2048–49, 2085–86, 2089 (2008) (describing forms of relief like cancellation of removal and refugee status as forms of legalization of undocumented immigrants).

72. MOTOMURA, *supra* note 26, at 10–11.

73. *Id.* at 11; Motomura, *supra* note 45, at 113 ("[T]he recognition of ties that develop over time—the essence of what I have called immigration as affiliation—is a persuasive basis for both *jus soli* and discretionary relief from removal, even if these two aspects of immigration and citizenship law benefit noncitizens who have violated the conditions of admission or were never admitted at all.").

consequence of that admission will be the formation of ties within the community. Having created the conditions for that consequence, the government should be held to have assumed a risk that noncitizens will form ties within the country. Those ties, viewed as a measure of affiliation with the United States, resist blithe decisions to deport noncitizens.

With respect to relief from deportation for noncitizens who entered without authorization, the affiliation argument asserts that the government has simply failed to act to displace unlawfully present noncitizens from the community for too long a time. The more time it takes the government to deport a noncitizen, the stronger the affiliation argument becomes.[74]

D. Narrative in Decisions About Belonging

Time matters in these decisions about admission to national membership for another reason. Decisions about whether a noncitizen failed to conform to the formal mandates of immigration law tend to turn on the stories of the noncitizens' lives, and the lives of those intertwined with the noncitizen. In immigration law, decisions about membership necessarily come down to narratives.[75] And narratives rely on timelines. The challenge of properly calibrating the way that immigration law includes noncitizens lies, in part, in defining the beginning and ending point of the relevant timelines.

Timelines can frame in or frame out narrative components. Depending on how the law defines the relevant timeline, some stories cannot be told, while others may expand. As examples, restricting naturalization to those who have been lawful permanent residents for a period of years frames out the narratives of other noncitizens about why they might deserve citizenship as much or more. By using the noncitizen's life history to inform the question of whether a past transgression still stains the individual's moral fiber, naturalization law

74. *See* Motomura, *supra* note 71, at 2084–85 (describing "immigration as affiliation" as a "way to assess equality or membership claims").

75. *See* JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 11 (2002) (explaining law as a tradition that "forges procedures for keeping the stories of plaintiffs and defendants within recognized bounds"); *see, e.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (describing the role of narrative in U.S. Supreme Court opinions); Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2097 (1989) ("Drawing the boundaries of legal stories closely around the particular event at issue may exclude much of the evidence that outsiders may find necessary to explain their points of view."); *see also* Steve J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63, 83–84 (2010) (describing why narrative, in concert with logical reasoning, improves legal decisionmaking).

attunes itself to larger narratives of morality and redemption. By defining cancellation of removal with reference to how long the noncitizen has been in the United States or when an immigrant petition was filed, the law frames out the life stories of noncitizens who have been in the United States for less than seven years and who arrived after the turn of the century.

II. THE SIGNIFICANCE OF TIME IN ENFORCING IMMIGRATION AND CRIMINAL LAW

A. Enforcing Immigration Law Through Time

Measures of time matter in immigration law not just when the government chooses whom to include within the national membership, but also when it enforces those choices. Here, time is used in ways that pull in opposite directions.

In contrast to the use of time as a measure of affiliation, in immigration enforcement time matters to legal and moral arguments about when noncitizens deserve to be deported or how heavily they should be sanctioned. A ready example is the deportation of noncitizens who have stayed longer than the time allotted on their visa.[76] This justification for deportation based on a visa overstay evokes contract law, in that the failure to conform to the time limit on the visa acts as a breach of a term of the immigration contract.[77] Using a contract analogy, deportation becomes a specific remedy.

Time also has a hand in determining how heavily noncitizens will be sanctioned for violating immigration law. A noncitizen unlawfully present in the United States for more than six months is barred for three years from reentering the United States.[78] Unlawful presence for more than one year invokes a ten-year bar to reentry.[79] These bars are triggered at the time the noncitizen leaves the country, and operate to exclude noncitizens who seek to reenter lawfully. Thus, the bars to reentry come into effect when the noncitizen has the strongest claim to entry—when there is a lawful basis for immigration based on family ties or employment.[80]

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76. *See* INA § 237(a)(1)(A) (2006) (defining "[i]nadmissible aliens"); § 237(a)(1)(B) (defining aliens "[p]resent in violation of law").

77. *See* MOTOMURA, *supra* note 26, at 15–16 (describing a contractual theory of immigration).

78. INA § 212(a)(9)(B)(i)(I).

79. *Id.* § 212(a)(9)(B)(i)(II).

80. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 51 (2005) ("[T]hese provisions completely prevent otherwise eligible immigrants from obtaining legal permanent resident status: the laws bar adjustment of status within the United States and bar the reentry of applicants who leave.").

The bars to reentry highlight two significant ways in which enforcement of immigration law uses time as a legal construct. First, instead of using time present in the country as a measure of affiliation, acquisition of family or work ties, or social value, a longer period of unlawful presence becomes a measure of how much exclusion the noncitizen deserves. Second, the severity of the sanction is measured in units of time: three years of exclusion for the lesser transgression, ten years for the greater transgression. Time becomes both a measure and a method of punishment.[81] It is the measure of how much punishment the government will impose, and the method of imposing it.

B. Enforcing Criminal Law Through Time

Punishment is the bailiwick of criminal law. Temporal considerations play a part in determinations of guilt in criminal law, and have a powerful role in structuring criminal punishment. Exploring the role of time in criminal law requires examining both the question of guilt and the consequences of a conviction.

In determining guilt, criminal law tends to focus on a single moment in time: the moment of the crime. This moment, or the collection of moments surrounding the criminalized event, is the central concern of players in the criminal justice system—police, prosecutors, defense counsel, judge and jury. What happened before, during, and after the crime is the focal point for legal determinations about whom law enforcement may arrest, what charges are initially brought, and what evidence will be gathered and evaluated. Even when criminal law permits the introduction of evidence with no temporal nexus to the crime, such as prior uncharged crimes to support a pattern of domestic violence or to establish the defendant's modus operandi, that evidence relates to what happened during the period in which the crime occurred.[82]

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81. Stumpf, *supra* note 20, at 1720 (describing the bars to reentry as an immigration sanction). The connection to punishment is especially apparent when the bar to reentry is based on criminal deportability grounds. *See* Jennifer M. Chacón, *Unsecure Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1881 (2007) ("Because the aggravated felony definition is so broad, non-citizens are removed for relatively minor offenses, and suffer harsh consequences, such as life-long bars to reentry.").

82. Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 55–62 (2000) (evaluating the pros and cons of evidence of prior uncharged crimes in domestic violence cases); Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 445 (2011) ("Prior crimes may be admissible . . . to show 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" (quoting FED. R. EVID. 404(b))).

A criminal trial is often treated as the reconstruction of a moment in history and the moments connected to it.[83] Evidence, issues, and narratives outside of that moment are usually excluded.[84] Unlike immigration law, affiliation plays almost no role in the question of criminal guilt. Whether a defendant has married, has landed a job, or has had good moral character at other moments in time is usually not relevant to whether that defendant committed the crime,[85] though it may affect the outcome of a plea bargain.[86]

Once guilt is established, time becomes central to criminal punishment. Criminal sentencing, by its nature, measures the level of exclusion by the length of incarceration or probation.[87] At the same time, sentencing looks ahead to the end of the sentence, the moment of return.[88] Like immigration law, affiliation plays some role in federal sentencing in that family and community ties

83. *See* Miguel A. Mendez, Crawford v. Washington*: A Critique*, 57 STAN. L. REV. 569, 569 (2004) (explaining that the role of jurors in a criminal trial is "to reconstruct a historical event from the evidence presented by the parties"); Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 187 (2004) (describing modern Confrontation Clause jurisprudence as assuming that a criminal trial "is both a historical reconstruction of some past event and a search for historical truth").

84. *E.g.*, FED. R. EVID. 404 (generally excluding character evidence, including evidence of other crimes, wrongs, or acts introduced to prove character); *see also* Scheppele, *supra* note 75, at 2095–96 (describing a Supreme Court opinion that took a "wide-angle" approach to review of criminal law issues, leading to a different conclusion from the more bounded approach of the trial and appellate courts). One exception to the exclusion at the guilt phase of issues outside of the moment of the crime is the suspension of criminal proceedings when a defendant becomes insane after the commission of the crime. *See, e.g.*, 18 U.S.C. § 4241 (2006) (providing for suspension of criminal proceedings if the court finds that "the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense").

85. *Cf.* DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LIEB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 85–90 (2009) (exploring the role of family ties in criminal law doctrines, such as adultery, bigamy, nonpayment of child support, omissions liability, and parental responsibility laws, and proposing a voluntariness framework to replace family status benefits or burdens); *see also* Douglas A. Berman, *Digging Deeper Into, and Thinking Better About, the Interplay of Families and Criminal Justice*, 13 NEW CRIM. L. REV. 119, 123 (2010) (drawing distinctions between "good" and "bad" family relationships in the context of the criminal justice system); Naomi Cahn, *Protect and Preserve?*, 13 NEW CRIM. L. REV. 127, 137 (2010) (proposing a presumption in favor of considering family ties in criminal law doctrines if the crime involved an abuse of trust).

86. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2483–84 (2004) (evaluating the effects of factors outside of the risk of trial that influence the outcomes of plea bargains, and noting as an example that "particular prosecutors and courts are sympathetic to downward departures for single mothers with toddlers but not to departures based on health or aberrant behavior").

87. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 178 (2001) (describing the modern prison as "a kind of a reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety").

88. *See id.* at 34–35 (characterizing the rehabilitative penological model as focused on preparing the offender for reentry into society); *cf. id.* at 174–78 (mapping the ways in which postsentence return to the community has become less a reintegration and more a "closely monitored terrain, a supervised space, lacking much of the liberty that one associates with 'normal life'").

are relevant to "the nature, extent, place of service, or other incidents of an appropriate sentence."[89]

The timescape shifts, however, when it comes to determining the length of the sentence. Under the Federal Sentencing Guidelines and in cases where mandatory minimum sentences apply, these affiliative ties play no part in determining the term of the sentence, narrowing the focal point to the moments surrounding the crime.[90] Beyond the slice of criminal cases that are in federal court or that have mandatory minimums, the discretion of sentencing judges allows room for arguments about factors originating before or after the moment of the crime, such as the affiliative ties of employment or family.[91]

Like incarceration, probation is meted out in temporal doses. Probation carries the risk of conversion to incarceration if the defendant fails to comply with its terms.[92] Likewise, parole (where it still exists) acts as an intermediate point between incarceration and reentry into the community, and is often similarly defined through measures of time.[93] Parole boards evaluate narratives about events occurring before and after the moment of the crime: the evidence

89. 28 U.S.C. § 994(d) (2006).

90. Federal criminal law asserts the "general inappropriateness" of considering "family ties and responsibilities" in setting a term of imprisonment. *Id.* § 994(e); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (1995). This reluctance to consider family ties in criminal punishment has been soundly critiqued. *See* Placido G. Gomez, *The Struggle Against Unwarranted Uniformity: The Evolution of Federal Sentencing Departures Based on Extraordinary Family Circumstances—The Case of Low-Level Drug Offenders*, 21 T. MARSHALL L. REV. 77, 90–93 (1995) (recommending alternatives to incarceration for low-level drug offenders with extraordinary family responsibilities); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 178 (1996) (generally critiquing the Guidelines' approach, and stating that "[i]n certain cases, in view of the necessity of maintaining family stability in environments where father role models are few and far between, downward departures from the Guidelines and a search for alternatives to incarceration are a necessity for male defendants"); Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 301 (suggesting that "the decision to grant a downward departure for family responsibilities turns on the need of the defendant's dependents").

91. *See, e.g.*, Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1480–88 (1997) (describing Minnesota's sentencing framework, in which "[d]ownward 'dispositional' departures" arrived at by sentencing judges who considered "the support of . . . friends and/or family" as well as other temporally dynamic factors are "all but invulnerable on appeal").

92. *See* 18 U.S.C. § 3561(c) (1996) (defining lengths of terms of probation); *id.* § 3565(a)(2), (b) (providing for revocation of probation and resentencing in the event of violation of a condition of probation). *See generally Probation*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 734 (2008) (describing probation practices generally).

93. Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497–504 (2008) ("In states with [modern] mandatory parole systems, release decisions are usually preordained by statute as a fixed percentage of an inmate's determinate term with some credit for good time served.").

of remorse and rehabilitation, and the quality of community ties formed before incarceration.[94]

Probation and parole bear some resemblance to the period of residency required before naturalization, with a common element of risk management and reward. In theory at least, good behavior during probation and parole, like the good moral character requirement for naturalization, firms the pathway to inclusion for the offender and the permanent resident seeking to naturalize. Transgressions during the period of probation, parole, or the residency period incur a return to exclusion through further criminal punishment or denial of citizenship status and possibly removal proceedings.

III. THE SIGNIFICANCE OF TIME IN CRIMMIGRATION LAW

What happens to the role of time when criminal law and immigration law intersect?[95] This Part explores how crimmigration law has constricted the scope of time when determining whether to expel a noncitizen from the United States. It begins by mapping the points at which criminal and immigration law connect, in the realm of crimmigration law. It then analyzes the way that crimmigration law reduces the temporal scope of the exclusion decision to a single moment.

A. The Contours of Crimmigration Law

Criminal and immigration law intersect both formally and functionally, magnifying the government's exclusionary power.[96] This exclusion manifests in four ways. First, criminal and immigration law combine to expand the

94. *E.g.*, CAL. CODE REGS. tit. 15, § 2402(d) (describing considerations for suitability for release on parole, including stable social history, signs of remorse, and plans for the future). *See generally Parole*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 797 (2008) (describing parole practices generally).

95. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (acknowledging that "removal proceedings are civil in nature," but explaining that "deportation is nevertheless intimately related to the criminal process" because U.S. law "has enmeshed criminal convictions and the penalty of deportation for nearly a century" so that it has become "'most difficult' to divorce the penalty from the conviction in the deportation context" (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982), *abrogated by Padilla*, 130 S. Ct. 1473)).

96. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (critiquing formalist approaches to crimmigration law, and offering a functional analysis based in criminal scholarship). *See generally* Jennifer Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (describing the role of immigration courts in this development).

circumstances under which the government imposes immigration consequences for crimes, including expulsion, detention, or incarceration.[97]

Over the past two decades, Congress has steadily expanded the scope of criminal conduct that underlies the exclusion and deportability grounds.[98] As an example, deportation based on commission of an "aggravated felony"[99] has expanded from for the original three grounds—murder, drug trafficking, and firearms trafficking[100]—to an alphabet soup of crimes of lesser gravity.[101] Congress has similarly expanded the variety of crimes involving controlled substances that have come to carry immigration consequences in addition to criminal punishment.[102] In contrast to the limited list of illicit drugs[103] that John Lennon navigated in the 1970s when seeking U.S. residence,[104] currently

97. Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1061–73 (2002) (describing the use of immigration law in the criminal justice system); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890–91 (2000) (tracing the merging of immigration law and criminal justice); Legomsky, *supra* note 13, at 475–500 (enumerating the ports of entry of the criminalization of immigration law); *id.* at 482–86; Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82–85 (2005).

98. Legomsky, *supra* note 13, at 482–86; *see also* Stumpf, *supra* note 14, at 407–08 (describing the exclusionary nature of criminalizing immigration-related conduct); Stumpf, *supra* note 20, at 1721–22 (describing the evolution of expanded criminal penalties in the immigration law arena).

99. INA § 237(a)(2)(A)(iii) (2006) (classifying commission of an aggravated felony as a deportability ground).

100. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (establishing the "aggravated felony" ground for deportation).

101. *See* INA § 101(a)(43) (listing from "(A)" to "(U)" various offenses that constitute aggravated felonies, including false use of a U.S. passport, obstruction of justice, perjury, and some gambling offenses). The expansion of this ground came about through an accumulation of legislative acts. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)) (including bribery of a witness, certain gambling offenses, counterfeiting, forgery, obstruction of justice, offenses related to skipping bail, perjury, prostitution, and vehicle trafficking); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–22 (incorporating nonviolent crimes, including fraud, tax evasion, theft, and trafficking in fraudulent documents); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (expanding the definition of "aggravated felony" to include "any crime of violence").

102. *See* INA § 237(a)(2)(B) (establishing almost any conviction relating to a controlled substance as a deportability ground).

103. The inadmissibility ground that the U.S. Immigration and Naturalization Service asserted against Lennon targeted "any alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marihuana [sic]." Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975) (citing INA § 212(a)(23)).

104. *See id.*; *see also* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 170–71 (2008) (describing John Lennon's pathway to permanent residence based on his status as an exceptional artist despite a past conviction for possession of cannabis resin).

almost any conviction under any law "relating to a controlled substance" is grounds for exclusion[105] and deportation.[106]

Second, legislatures have increasingly defined immigration-related conduct as criminal. Federal sanctions for immigration law violations have shifted over time from relying mostly on the formally civil sanction of deportation to incorporate criminal punishment as well.[107] The Immigration and Nationality Act and the federal criminal code burgeon with recently created crimes and harsher sanctions for immigration law violations.[108] The sanctions scheme for immigration violations now often imposes deportation following incarceration,[109] either as the result of the criminal justice and immigration courts working in tandem, or through a plea bargain that imposes deportation as part of a sentencing package.[110] Ingrid Eagly, in her article for this Symposium, documents the many ways that Arizona has drafted and interpreted state criminal statutes to criminalize immigration-related conduct.[111] As federal and state legislatures increasingly define immigration-related

105. *See* INA § 212(a)(2)(A)(i)(II) (setting out the drug inadmissibility ground). Congress added this broadly crafted provision in 1986. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207–47.

106. *See* INA § 237(a)(2)(B)(i). The only exception is for "a single offense involving possession for one's own use of 30 grams or less of marijuana." *Id.* A separate ground of deportability targets drug abusers and addicts. *See id.* § 237(a)(2)(B)(ii).

107. *See* Stumpf, *supra* note 20, at 1721 ("Traditionally, violating an immigration law resulted in a civil proceeding to determine whether the noncitizen was subject to removal from the United States. Now, many immigration violations result in removal and also carry criminal penalties, and criminal prosecution has . . . become a vehicle for immigration enforcement prior to removal.").

108. *See, e.g.*, 8 U.S.C. § 1253 (2006) (criminalizing failing to cooperate in executing one's own removal order); 18 U.S.C. § 1015(e) (2006) (creating the crime of falsely claiming citizenship to obtain a federal or state benefit or unlawful employment); 18 U.S.C. § 1015(f) (criminalizing noncitizen voting in federal elections); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C., tit. I, § 108, 110 Stat. 3009-546, 3009-557 (codified at 18 U.S.C. § 758) (criminalizing fleeing an immigration checkpoint at excessive speed); Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(3), 104 Stat. 4978, 4994 (codified at 8 U.S.C. § 1325) (criminalizing the establishment of a commercial enterprise for the purpose of evading immigration laws); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101 (a)(1), 100 Stat. 3359, 3360 (codified at 8 U.S.C. § 1324a) (criminalizing the pattern or practice of knowingly hiring undocumented workers); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2, 100 Stat. 3537, 3537–41 (codified as amended in scattered sections of 8 U.S.C.) (criminalizing evading immigration laws through marriage); *see also* Stumpf, *supra* note 20, at 1721 (describing a "host of new immigration crimes" and sanctions).

109. In fact, immigration law allows deportation in the absence of actual time served, looking to the length of the sentence regardless of whether that sentence was suspended. *See* INA § 101(a)(48)(B) (defining "term of imprisonment" or "sentence" to include "the period of incarceration . . . ordered by a court . . . regardless of any suspension of the . . . sentence").

110. *See* Eagly, *supra* note 96, at 1321–25 (describing the significance of the plea bargain in functionally analyzing the intersections of criminal and immigration law).

111. *See generally* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

conduct as criminal,[112] more crimes come to exist that can be committed only by noncitizens.

Third, immigration-enforcement strategies draw heavily from criminal law enforcement, including the use of criminal databases, increased use of investigative tools, arrests, seizures, prosecutorial approaches, and reliance on subfederal police forces. This borrowing from criminal approaches has transformed the enforcement of immigration law into a system with civil administrative elements that rub up against criminal enforcement elements.[113]

Finally, crimmigration law tends toward removing adjudicative discretion not to exclude or deport.[114] In place of the formalized discretion traditionally held by institutional actors such as immigration authorities and criminal sentencing judges, decisions whether to exclude noncitizens from belonging in U.S. society are increasingly made by Congress on a categorical level or by prosecutors, police officers, or Border Patrol agents.[115]

The relationship between criminal law and immigration law has become so intertwined that they switch roles. Decisions to exclude or expel are made within criminal justice institutions through criminal law actors, while the actors, functions, and institutions in the criminal justice system have shifted so that immigration objectives drive the criminal prosecution.[116] Prosecutors regularly include waivers of immigration rights in criminal plea bargains.[117] The practice of some prison officials who send to ICE (Immigration and Customs Enforcement) the identities of inmates who report themselves to be of foreign birth is an example of a criminal institution initiating the apparatus of deportation.[118] Fast-track adjudication of immigration-related criminal charges has married immigration sanctions to a criminal plea-taking process of questionable constitutionality due to its truncated nature and the practice of taking multiple pleas simultaneously.[119] In sum, crimmigration law expands its own circumference through the creation of new crimes, the expansion of criminal

112. Motomura, *supra* note 22.

113. *Id.* at 1837, 1838 (noting that "[t]he [criminal–civil] line is permeable in practice" and that when "federal prosecutors threaten to bring criminal charges for an immigration violation, they use the threat as a bargaining chip that is often directed toward civil removal, not criminal conviction").

114. *See* sources cited *supra* note 25; *see also* Chacón, *supra* note 96, at 1598–1620 (describing the rights and remedies gaps in immigration adjudication).

115. *See generally* Eagly, *supra* note 96.

116. *Id.* at 1288, 1300–37 ("Instead of institutional autonomy of the criminal and administrative aspects of controlling immigration, the criminal justice system has been restructured to allow for agency control and promotion of immigration objectives within the criminal prosecution.").

117. *Id.* at 1331.

118. *See id.* at 1353.

119. *See id.* at 1321–29 (citing United States v. Roblero-Solis, 588 F.3d 692, 693–94 (9th Cir. 2009) (holding that the fast-track proceedings violated federal criminal procedural rules)).

deportability grounds, the greater use of criminal enforcement tools and strategies, and the use of both the criminal justice and immigration law systems to prioritize immigration-related goals.[120]

B. The Significance of Time for Traditional Criminal Removal Grounds

Prior to the growth of crimmigration law, traditional crime-based removal grounds reflected considerations similar to those with which pure immigration law and criminal law are concerned. Two longstanding criminal grounds for removal illustrate this. The removal grounds for "crimes involving moral turpitude"[121] and for prostitution[122] measure the temporal distance from specified moments, among other factors, to evaluate whether to remove the noncitizen. A single crime that would otherwise qualify as involving moral turpitude will not lead to exclusion if at least five years have passed between the juvenile commission of the crime and the date the noncitizen seeks admission to the United States.[123] Nor will it count as a deportability ground if the noncitizen committed the crime more than five years after admission.[124] Likewise, prostitution that occurs more than ten years after applying for a visa, admission, or

120. *See* Chacón, *supra* note 96, at 1571–98 (describing the increased role of federal immigration agents and state and local law enforcement and the ways in which criminal law is used as a form of migration control).

121. INA § 212(a)(2)(A)(i)(I) (2006) (defining as an inadmissibility ground either a conviction for or the admission of "acts which constitute the essential elements of . . . a crime involving moral turpitude"); *id.* § 237(a)(2)(A)(i) (defining as a deportability ground conviction "of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . convict[ion] of a crime for which a sentence of one year or longer may be imposed").

122. *Id.* § 212(a)(2)(D) (setting out an inadmissibility ground for prostitution); *see also* DANIEL KANSTROOM, DEPORTATION NATION 124–26 (2007) (documenting the history of the prostitution exclusion and its role in creating postentry social control deportation laws); *id.* at 125–26 (describing the elimination of a three-year statute of limitations on exclusion based on prostitution as a landmark in opening the way to pure postentry deportation grounds unconnected to the moment of entry); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 693–94 (2005) (examining the depiction of Chinese women as prostitutes as an impetus for their exclusion via the Page Act, which was passed to prevent Chinese immigrants from establishing families on the west coast of the United States).

123. *See* INA § 237(a)(2)(A); *id.* § 212(a)(2)(A)(ii) (creating an exception to exclusion based on crimes involving moral turpitude when "the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States").

124. *Id.* § 237(a)(2)(A)(i) (limiting deportation for a single crime involving moral turpitude to crimes "committed within five years . . . after the date of admission" and "for which a sentence of one year or longer may be imposed").

adjustment to lawful permanent resident status may be a concern for the criminal justice system, but no longer results in removal.[125]

These longstanding removal grounds also rely on criminal statutes and sentencing decisions that use time to measure the relative moral impact of a crime category. The severity of the punishment for a crime informs whether the crime involves moral turpitude for purposes of removal.[126] A crime involving moral turpitude will not become grounds for removal if its maximum penalty does not exceed a year's imprisonment and the judge imposed a sentence of less than six months.[127] In essence, federal immigration law largely relies on state criminal justice actors, such as legislatures and judges, to exempt certain crimes from the harshness of removal.[128]

Recidivism, however, turns out to be significantly less forgivable. The deportability ground for convictions for more than one crime involving moral turpitude has no petty offense exception or other temporal bookend.[129] Exclusion for multiple convictions is broader, invoking inadmissibility for more crimes.[130] However, it contains a temporal limitation based on the severity

125. *Id.* § 212(a)(2)(D) (excluding any noncitizen who "has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status" or who "directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution").

126. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1959–60 (2000) (noting that relying on the length of the sentence to determine relief from deportation is an improvement over the current system but is insufficient for a just determination).

127. INA § 212(a)(2)(A)(ii)(II) (limiting exclusion for a crime involving moral turpitude if "the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)"); *see also id.* § 237(a)(2)(A)(i) (limiting eligibility for the deportability ground to crimes in which the maximum sentence is at least one year).

128. *See* Kate Barth, *Defining "Sexual Abuse of a Minor" in Immigration Law: Finding a Place for Uniformity, Fairness, and Feminism*, 8 SEATTLE J. FOR SOC. JUST. 857, 873 (2010) (noting that "federal immigration law is dependent on a traditional arena of state sovereignty" identified as "standards of public morality," and positing that by "depending on state standards of criminal conduct to define deportability, the government is allowing individual states to determine which noncitizens stay and which are expelled").

129. *See* INA § 237(a)(2)(A)(ii) (establishing a deportability ground for "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial").

130. *See id.* § 212(a)(2)(B) (excluding noncitizens "convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more").

of the punishment, applying only when the aggregate sentence is five years or more.[131]

Why are the removal grounds for multiple criminal convictions so much harsher than for single crimes involving moral turpitude? Like the three-strikes laws mandating harsher sentences for a triad of crimes,[132] greater removal consequences for multiple criminal convictions may simply be another way of expressing condemnation for confirmed rulebreakers.[133]

An alternative approach, however, employs time to manage the risks of immigration. Removal grounds for multiple criminal convictions act as a secondary screening mechanism.[134] The broader inadmissibility grounds manage the risk that a noncitizen may commit another crime after admission. At the same time they mitigate the countervailing risk of erroneously excluding otherwise desirable noncitizens by exempting minor crimes resulting in light sentences.[135] Similarly, the deportability ground for multiple criminal convictions allows the government to screen for desirability using the later-acquired information about noncitizens' criminal conduct, and remove on the basis of that later conduct.[136]

The deportability ground for multiple criminal convictions creates a series of these temporal screening checkpoints. Unlike the inadmissibility ground, which allows for exclusion "regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct,"[137] multiple convictions trigger the deportability ground only if the crimes did not "aris[e] out of a single scheme of criminal misconduct."[138] Requiring different schemes of criminal misconduct effectively mandates a separation in time between the offenses. Some noncitizens with multiple convictions will not be deported because their offenses occurred simultaneously or arose from the same conduct. Viewed as a screening mechanism, using multiple criminal schemes as

131. *Id.*

132. *See* Ewing v. California, 538 U.S. 11 (2003) (upholding California's three-strikes law against an Eighth Amendment challenge).

133. *See* MOTOMURA, *supra* note 26, at 54–57 (describing violation of criminal laws as a form of breach of contract); Schuck, *supra* note 33, at 26 (stating that deportation "reflects judgments, essentially indistinguishable from those that the criminal law routinely makes, concerning the moral worth of individual conduct").

134. *See* Cox & Posner, *supra* note 33, at 819–20.

135. *See id.* at 826 (suggesting that some noncitizens who have committed crimes nevertheless may be highly desirable).

136. *See id.* at 817 (noting that "the United States treats a criminal record as an important indication that a person is of an undesired type"); *id.* at 826–27 (describing the grounds for removal after entry as an "ex post" screening system).

137. INA § 212(a)(2)(B) (2006).

138. *Id.* § 237(a)(2)(A)(ii).

a deportability ground gives the government a third temporally defined piece of information with which to evaluate whether to continue the noncitizen's presence in the United States: the initial admission and the two distinct moments of criminal conduct.[139]

Finally, time stands in as a measure of rehabilitation and a basis for forgiving these traditional criminal removal grounds.[140] Section 212(h) of the Act permits waiver of grounds of inadmissibility based on crimes involving moral turpitude, multiple criminal convictions if the aggregate sentence was five years or more, and prostitution, among other grounds.[141] The waiver's statutory thresholds have two time-inflected criteria. The first allows the agency to exercise discretion to grant the waiver if more than fifteen years have passed between the occurrence of the crime and the date of the noncitizen's application seeking admission or adjustment to permanent resident status.[142] Here, time is a proxy for rehabilitation, exempting crimes committed in the distant past. From another perspective, if the criminal removal grounds exist to manage the risk of allowing an undesirable migrant to enter or remain, the length of time since the crime occurred indicates that the risk of future criminal conduct is acceptably low.

The second provision allows the agency to consider a waiver when removal "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter" of the noncitizen.[143] In effect, this provision takes into account events and circumstances outside of the temporal focal point of the crime. It looks to the past to the creation of a close relationship with a U.S. resident, and to the future to evaluate the effect of two parallel future universes, one in which removal takes place and one in which it does not. These temporal considerations become bound up in the evaluation of the level of affiliation that the noncitizen has with the United States, as measured by the past and future of close family relationships.

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139. *See* Cox & Posner, *supra* note 33, at 826–27 (describing in temporal terms the advantages to the government of postentry screening of noncitizens for desirability).

140. *See* INA § 212(h).

141. Section 212(h) also waives grounds of removal based on a single offense of simple possession of thirty grams or less of marijuana, commercial vice activities, and serious criminal offenses involving a grant of immunity. *Id.* It does not waive removal grounds based on murder, torture, drug crimes, or aggravated felonies committed by lawful permanent residents. *Id.*

142. *Id.* § 212(h)(1)(A)(i) (allowing waiver when, inter alia, "the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status"). The noncitizen must also be "rehabilitated" and show that admission would not be "contrary to the national welfare, safety, or security of the United States." *Id.*

143. *Id.* § 212(h)(1)(B).

C. Modern Crimmigration Law and Temporal Stasis

The advent of crimmigration law has ushered in a category of criminal removal grounds that herald a completely different approach to the significance of time in decisions about whether a noncitizen may enter or remain in the United States. This more recent approach to criminal removal grounds is marked by the stripping away of almost all of the temporal nuances of the more traditional grounds. The most salient examples are the removal grounds for aggravated felonies[144] and for drug offenses.[145] These offenses, it turns out, are infinitely unforgivable. Once the statutory thresholds are passed, the removal ground survives as long as the noncitizen does.

Congress created the deportability ground for an "aggravated felony" in 1988.[146] At that time it included only murder, drug trafficking, and firearm trafficking.[147] It has since expanded to include twenty categories of crimes including forms of prostitution, passport fraud, and perjury, among others.[148] The "aggravated felony" has become an infamous misnomer, encompassing crimes that are neither severe nor felonies, and existing as a category apart from criminal law with no counterpart to any term or definition in criminal law.[149]

These modern criminal removal grounds are marked by the near absence of time as a measure of either affiliation or desert. The relevance of time to the decision about whether to exclude the noncitizen is narrowed to a single moment: the moment of the crime.

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144. *Id.* § 237(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"). Aggravated felonies are defined in list form in the definitional section of the INA. *See id.* § 101(a)(43).

145. *Id.* § 212(a)(2)(A)(i)(II) (declaring that "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" is a ground of inadmissibility); *id.* § 237(a)(2)(B)(i) (declaring deportable "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana"); *id.* § 237(a)(2)(B)(ii) (declaring deportable "[a]ny alien who is, or at any time after admission has been, a drug abuser or addict"); *see also id.* § 212(a)(2)(C) (rendering inadmissible any noncitizen who "is or has been an illicit trafficker in any controlled substance . . . or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance . . . or endeavored to do so").

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

147. *Id.* (defining the "aggravated felony" deportability ground to include crimes of murder, drug trafficking, and firearms trafficking); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 to -628 (amending the definition of "aggravated felony" to include a substantial list of crime categories).

148. *See* INA § 101(a)(43); *see also* Stumpf, *supra* note 20, at 1685 n.4 (laying out the legislative evolution of the aggravated felony ground).

149. *See, e.g.*, Stumpf, *supra* note 20, at 1723.

Defining the "crime" and its "moment" for purposes of removal is itself a challenge. At its most straightforward, the moment of the crime is the period in which criminal activity occurred that results in a conviction making the noncitizen eligible for removal. Alternatively, the relevant moment may be fictional. As examples, a conviction that triggers removal may result from defense counsel's successful negotiation of a favorable charge for a lesser crime. Innocent defendants may plead guilty to crimes they did not commit, or defendants may plead nolo contendere, which permits a conviction without a determination of whether the defendant committed the crime.[150] The moment of the crime may also be defined through prosecutorial discretion, such as when a prosecutor decides to charge a misdemeanor when the facts would support a felony charge.[151] In those circumstances, the crime that forms the basis of the charge and conviction may never have actually occurred, or the charge may not wholly reflect the underlying facts.[152] Finally, the relevant moment may be divorced entirely from the criminal justice process. Immigration law permits removal based on an immigration official's belief or determination that a crime occurred.[153]

150. Under federal law, there must be some factual basis for a conviction based on a plea. FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."). A nolo contendere plea, however, requires no factual basis. United States v. Mancinas-Flores, 588 F.3d 677, 682 (9th Cir. 2009) (stating that "a defendant pleading nolo contendere takes no position on whether he committed the elements of the offense, and the court therefore has no reason to examine whether, in fact, he did" (citation omitted)).

151. Federal prosecutors are limited in their discretion to charge a lesser crime. *See* Memorandum From John Ashcroft, Att'y Gen. of the U.S., to All Federal Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (requiring federal prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case").

152. Even when there has been a conviction, evaluating whether the crime makes the noncitizen eligible for removal can require lengthy analysis. The Attorney General's opinion in *In re Silva-Trevino* set out a three-step process to determine whether a noncitizen's prior conviction constitutes a crime involving moral turpitude. 24 I. & N. Dec. 687 (2008). The process requires immigration judges to: (1) evaluate "whether an alien's prior offense is one that categorically involves moral turpitude" by determining "whether there is a 'realistic probability, not a theoretical possibility,' that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude;" "(2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence" beyond the record of conviction that the judge determines is "necessary or appropriate" to resolve the moral turpitude question. *Id.* at 689–90, 704 (citations omitted); *see also* Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 333–38, 340 (2011) (evaluating and critiquing the approach, and analyzing a circuit split over whether to follow *Silva-Trevino*'s analysis).

153. *See, e.g.*, INA § 212(a)(2)(A)(i) (declaring that any alien "who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral

Whether these moments are real or constructed, they assume a significance that is far greater in modern crime-based removal decisions than in traditional criminal and immigration contexts because of the way the law constricts the focus of the removal decision to that moment. Crimmigration law tends to eschew consideration of events and circumstances outside the period of time defined by the crime, regardless of whether eligibility for removal hinges on the conviction, allows the decisionmaker to look behind the conviction to consider evidence about the underlying facts, or allows for removal in the absence of a conviction.

The experience of Qing Hong Wu, who immigrated lawfully to the United States from China at the age of five, is illustrative of this extreme focus on the moment of the crime. In 1995, Wu was convicted of two robberies at the age of fifteen. He was released from a juvenile reformatory after three years for good behavior, took a job as a data-entry clerk at a national company, and worked his way up to become a vice president.[154] Nearly fifteen years after his crimes, he applied for naturalization on the basis of his marriage to a U.S. citizen. After he truthfully disclosed his convictions on his naturalization application, ICE detained him and initiated removal proceedings.[155]

Wu's robbery convictions constituted aggravated felonies.[156] If a noncitizen has committed an aggravated felony or a drug crime, most forms of relief from deportation are unavailable.[157] Cancellation of removal, asylum, and withholding of removal are largely out of reach for noncitizens who have committed a crime categorized as either a controlled-substance offense or an

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turpitude or relating to a controlled substance is inadmissible); *id.* §§ 212(a)(2)(C), (H)-(I), 237(a)(2)(F) (stating that any alien who an immigration official "knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder" in, or a knowing familial beneficiary of, controlled substance trafficking, significant trafficking in persons, or money laundering is inadmissible).

154. Nina Bernstein, *After Governor's Pardon, Citizenship for Chinese Immigrant*, N.Y. TIMES, May 28, 2010, http://cityroom.blogs.nytimes.com/2010/05/28/after-governors-pardon-citizenship-for-chinese-immigrant/ [hereinafter Bernstein, *Governor's Pardon*]; Nina Bernstein, *Judge Keeps His Word to Immigrant Who Kept His*, N.Y. TIMES, Feb. 19, 2010, at A1.

155. Bernstein, *Governor's Pardon*, *supra* note 154; *see also* Lapp, *supra* note 36, at 28–30 (describing Wu's story and critiquing the connection between naturalization and removal).

156. *See* INA § 101(a)(43)(G) (defining as an aggravated felony a theft offense for which the term of imprisonment is at least one year).

157. *See* Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents From the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 62 (2007) ("[A] lawful permanent resident 'convicted of an aggravated felony is automatically subject to removal, and no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation.'" (quoting United States v. Couto, 311 F.3d 179, 189–90 (2d Cir. 2002))); Stumpf, *supra* note 20, at 1723 ("[C]onviction of any of the listed crimes almost invariably results in removal from the United States.").

aggravated felony.[158] Aggravated felonies also bar two other forms of relief: adjustment of status and voluntary departure.[159] Section 212(h) waives a drug crime only if it is for possession of less than thirty grams of marijuana,[160] and is completely unavailable to lawful permanent residents who have committed aggravated felonies.[161]

As a result, Wu's deportation was all but inevitable. Only the extraordinary remedy of the New York governor's pardon halted Wu's removal and cleared his pathway to citizenship.[162]

Moreover, Wu's removal would likely have been permanent. A noncitizen who commits an aggravated felony is subject to a lifetime bar to

158. *See* Lonegan, *supra* note 157, at 61 & n.41. For cancellation of removal, see INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006) (barring cancellation of removal for permanent residents convicted of an aggravated felony); *id.* § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (barring cancellation of removal for nonpermanent residents convicted of any crime-based removal grounds, including aggravated felony and controlled substance grounds); Morawetz, *supra* note 104, at 182–83 (explaining that, for inadmissibility grounds, "cancellation is barred across the board for any conviction related to drugs, and is barred for any admission of a drug violation within the past ten years other than a one time possession of marijuana, even though removal would cause 'exceptional and extremely unusual hardship' to a citizen or [lawful permanent resident] family member"). Cancellation of removal is available for a drug offense only for long-term permanent residents who meet the five-year residency and seven-year presence requirements. INA § 240A(a). Commission of an offense, however, makes it harder to establish those temporal requirements because it stops the clock. *Id.* § 240A(d)(1); Morawetz, *supra* note 126, at 1941 (explaining that, under the cancellation of removal provisions, "[d]uring an immigrant's first seven years of residence, any crime that makes the person deportable [including 'simple possession of drugs'] stops the clock for counting continuous residence and therefore bars the person from relief from deportation, even if the conviction is for a crime that would not otherwise bar relief"). For asylum and withholding of removal, see INA § 208(b)(2)(A)(ii), (B)(i) (barring asylum for aggravated felony convictions); *id.* § 241(b)(3)(B) (barring restriction on removal for aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least five years). Asylum and withholding of removal are not explicitly barred as defenses to deportability based on a drug offense under INA § 237(a)(2)(B)(i), but other authority has diminished considerably the application of asylum and withholding to the controlled substance deportability grounds. *See* In re Y-L, A-G-, R-S-R, 23 I. & N. Dec. 270, 274 (B.I.A. 2002) (establishing that any conviction for drug trafficking is presumptively a "particularly serious crime," making the convicted noncitizen ineligible for asylum), *overruled on other grounds by* Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004); *see also* Morawetz, *supra* note 126, at 1956 (noting that because the aggravated felony definition for drug trafficking borrows from federal criminal law, "a drug sale or two drug possession convictions may constitute an aggravated felony").

159. *See* INA § 245(a) (adjustment of status); *id.* § 240B(a)(1) (voluntary departure).

160. *Id.* § 245(a); *see also* Morawetz, *supra* note 104, at 170 ("[F]or a wide array of drug offenses, there is no available waiver, irrespective of the length of time since the offense or the extreme hardship that will be sustained by immediate family members."). Even a pardon will not waive inadmissibility or deportability grounds based on drug crimes. Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 265, 267–68 (2010).

161. INA § 212(h).

162. Bernstein, *Governor's Pardon*, *supra* note 154.

reentering the United States.[163] Unlike the other bars to reentry, it is not the length of unlawful presence that determines the severity of the immigration consequence for aggravated felonies and drug offenses. Rather, the crime is the basis for long-term exclusion, and it triggers the longest bar. The permanent nature of the bar to reentry places any reason for lawful reentry in an enduring stasis.

The temporal stasis that marks modern criminal deportability grounds also closes the door to citizenship. An applicant for citizenship like Wu cannot establish the requisite five years of good moral character prior to naturalization if "'at any time' he has been convicted of an aggravated felony."[164] As with deportation, the inquiry into the permanent resident's history of good moral character freezes at the point in time when the conviction occurred. The collection of moments composing the rest of that five-year history fade from relevance once the determination is made that the noncitizen committed an aggravated felony after November 29, 1990.[165] The moment of commission becomes the permanent resident's permanent moral character.

IV. WASTING TIME, SAVING TIME

This final Part explores how crimmigration law wastes the potential for time to usefully evaluate connection to the community, desert, and the potential for inclusion. It then explores solutions, including the expansion of discretion not to deport and the resurrection of a statute of limitations for deportation.

A. Wasting Time

The trend in crimmigration law toward per se consequences for certain crimes and convictions wastes time. Time performs critical functions in immigration law and criminal law. It manages the risk of future transgressions. It

163. INA § 212(a)(9)(A)(i) (declaring inadmissible any noncitizen ordered removed or who departed under a removal order and again seeks admission "at any time in the case of an alien convicted of an aggravated felony").

164. *Id.* §§ 101(f)(8), 316(a)(3); *see also* Fowlin v. Monica, 221 F. App'x 147, 151–52 (3d Cir. 2007) (interpreting the INA to preclude establishment of good moral character for aggravated felons convicted after the date of enactment, and declaring that "conviction of an aggravated felony after that date *in and of itself* disqualified" the noncitizen).

165. *See* Lapp, *supra* note 36, at 18 (stating that Congress established in 1990 a categorical conclusion that naturalization applicants convicted of an aggravated felony after November 29, 1990, cannot establish good moral character, and characterizing the legislation as "substituting a *per se* conclusion regarding the applicant's moral character that survived indefinitely" (citing Immigration Act of 1990, Pub. L. No. 101-649, § 509)).

allows for prior undetected violations to surface, measures and exacts punishment, and marks out the moment when the violator may rejoin the community after a criminal sentence or a bar to reentering the country. It measures affiliation with the U.S. community through waiting periods for immigration status and relief from deportation.

Crimmigration law wastes these temporal powers when it quick-freezes the decision to exclude or deport by taking account only of the moment of the crime. The consequence of labeling a crime an aggravated felony or a drug offense is that, for the most part, any events and circumstances that happened before or after the moment of the crime become irrelevant.[166] Past events become irrelevant that in other areas of immigration law carry status-changing significance: marriage to a U.S. citizen, being a parent or child of a U.S. citizen, successful integration with and contribution to the community. For lawful permanent residents, the past contains an often hard-won authorization to settle in the United States and reside indefinitely, to invest oneself in the physical, social, and cultural framework of the nation. For those without authorization to be in the United States, the past may contain the establishment of a life—outside of the law but nonetheless irrevocably a part of the lived history of the individual.

Future events likewise become irrelevant. When asylum and withholding of deportation are no longer available as defenses, the likelihood that the noncitizen will suffer persecution if returned to the country of origin loses legal force. For those outside the border who are barred from reentry, crimmigration law deflates the significance of the potential for future events such as marriage to a U.S. citizen, connection with the lives of children and other family members still within the borders,[167] or an offer of employment that would otherwise constitute a basis for lawful status.

This approach is inconsistent with foundational underpinnings of both criminal and immigration law. The criminal justice system aspires to visit similar punishments upon individuals who commit similar crimes. Yet, when a citizen and a noncitizen commit the same crime and receive the same penalty from the criminal justice system, the noncitizen experiences the additional imposition of the immigration sanction—deportation.

166. Morawetz, *supra* note 126, at 1959 ("[T]he sanction of deportation is regularly and automatically meted out on the presumption that the label of a crime is all we need to know about a person before entering an order of banishment."); *see supra* note 158 (describing the narrow extent of access to relief from deportability grounds for drug offenses).

167. *See* Motomura, *supra* note 45, at 113 ("Disregarding time in immigration and citizenship law means, among other things, disregarding the family.").

A foundation of immigration law has been a membership structure that privileges certain migrants with higher-level immigration status (such as permanent resident status) and provides more robust protections (such as cancellation of removal) to the higher-level members. Modern crimmigration law, by setting aside the relevance of time, rocks the established hierarchy of immigration status reflected in the concentric circles of belonging sketched around citizenship, permanent resident status, temporary authorization, and unlawful presence. The membership hierarchy accordions. By rendering irrelevant those moments in time before and after the moment of the crime, affiliation and acquisition of a stake in the country have no weight. Without the forms of relief that account for length of association with the United States, a long-term lawful permanent resident can be deported as easily as a tourist for the same conduct.

In fact, the modern crimmigration law approach turns the membership hierarchy on its head. Permanent exclusion and bars to citizenship sanction more heavily those most harmed by it: the lawful permanent resident rather than the tourist. Section 212(h) singles out lawful permanent residents to categorically deny them relief from deportation based on the aggravated felony ground.[168] This similarly upends the membership hierarchy because it makes permanent residents more vulnerable to deportation than any other category of noncitizens.

Three justifications arise for these departures from the underpinnings of criminal and immigration law. The first is that deportation is best seen as a distinct supplement to criminal punishment, especially when applied to lawful permanent residents. It sanctions a noncitizen's violation of the rules of a society in which they are guests and deters other noncitizens from similar rulebreaking.[169]

This rationale, however, falls short in justifying deportation as a penalty that is analytically distinct from criminal punishment. Supplementing the criminal sanction could, in theory, be accomplished using immigration status as

168. The waiver under INA section 212(h) for some of the criminal removal grounds is more limited for lawful permanent residents than for other noncitizens. *See* INA § 212(h) (prohibiting the grant of a waiver to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States").

169. MOTOMURA, *supra* note 26, at 30, 36–37 (paraphrasing the Court's view of immigrants in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), as "guests to be let in, but only on the condition that they are easily evicted"); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 723–24 (1893) (holding that immigrants do not acquire "any right . . . to be and remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn, whenever, in its opinion, the public welfare might require it").

a criminal sentencing factor and dispensing with deportation. There must, then, be something else that justifies the difference that alienage makes in imposing the additional sanction of deportation.[170]

A second justification is that deportation protects the community from future transgressions by removing those who committed them.[171] It holds out a promise of avoiding the human and financial cost of future crimes and the expense of the criminal justice system. This justification, however, overlaps with one of the central purposes of criminal punishment, which is to incapacitate the offender from further criminal activity (at least for the duration of the confinement).[172]

This second justification, like the first, seems indistinct from criminal law precepts. A rationale for this approach may be that incapacitation is more important for noncitizens because the absence of citizenship signals a lower level of knowledge of criminal law and lesser investment in obedience to those laws and to the order they bring to U.S. society. There is, however, no evidence of that lesser commitment, and some evidence that noncitizens are less likely to commit crimes than native-born U.S. citizens.[173]

Another common justification pursues a contract analogy: that upon entry to the United States, noncitizens agreed to certain terms and conditions including obedience to criminal laws, and deportation is merely the consequence for breaching those terms.[174] This justification is vulnerable to several critiques, including whether the relationship between a sovereign nation and a noncitizen within that nation's territory is aptly analogized to a contract between individuals or corporations, whether the provisions of the contract are

170. *See generally* BOSNIAK, *supra* note 28, at 37–39 (noting the simultaneously important and insignificant role alienage plays in the exercise of governmental power and the correlated tension between the government's legitimate interest in regulating immigration and the strict constraints placed on ensuring equality).

171. *See* Andrew David Kennedy, Note, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1849 (2007) ("Expedited removals [based on 'aggravated felony' grounds] . . . appear less like punishments and more like actions to deport dangerous aggravated felons quickly for public safety concerns.").

172. *E.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 17, 26 (2005); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 209.

173. Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men*, IMMIGR. POL'Y CTR. 14 (2007), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf ("[D]ata from the census and other sources show that for every ethnic group, without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated and the least acculturated.").

174. *See* MOTOMURA, *supra* note 26, at 57–62 (describing and critiquing the contract analogy).

insufficiently defined, and whether the contract analogy is inapt at the intersection of criminal and immigration law.

Finally, per se rules promise efficiency. They reduce the issues that require adjudication by limiting them to the period encompassed by the criminal conduct. As a result, they streamline administrative processes by using the crime as a measure of the noncitizen's value.[175]

These justifications lose force as time goes on. The guest, welcomed or at least tolerated for long enough, eventually accrues residence.[176] Incapacitating the noncitizen to protect the community from the offender makes less sense once significant time has passed during which no other crime has occurred. That is, the scope and terms of the contract may evolve over time.

The idea that automatic removal wastes time may seem counterintuitive. Speed is a virtue, however, unless it is haste. One frame for this question is whether it saves time or wastes it to accelerate the exclusion of a noncitizen from U.S. membership through consideration of anything beyond the crime. That in turn depends on whether speed will not unduly sacrifice the accuracy and fairness of the outcome.

If expedited, temporally constrained decisionmaking excludes noncitizens whom a broader temporal measure would include, then the process is prone to err on the side of exclusion. If those exclusion errors are likely to happen often, or to cause significant costs to the noncitizen, to other individuals or to national interests in stable workplaces and communities, then the streamlining may not be worth it. Those mistakes exact particularly high costs when they fall on noncitizens with deep stakes in remaining in the United States, returning to it, or joining the ranks of the citizenry.

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175. This promise of efficiency can be met only if the law can relatively accurately predict who will reoffend and if the outcomes of the criminal justice system relatively accurately reflect the actual crime committed. Those contingencies, however, are questionable given the realities of the plea bargaining system in criminal law, which creates incentives for defendants to plead to crimes they did not commit in exchange for a negotiated consequence and avoiding trial. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 223–46 (2007) (assessing features of the criminal justice system that put pressure on the accused to plea bargain); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2298–99 (2006) (arguing that the availability of plea bargaining can allow a prosecutor to obtain a guilty plea in virtually any case).

176. Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 117–20 (2007) (explaining that granting amnesty to immigrants based on long-term residency in a manner similar to that of granting ownership of land by adverse possession has a historical basis in U.S. immigration law); *see also* Joseph H. Carens, *The Case for Amnesty*, BOS. REV. (May 2009), http://bostonreview.net/BR34.3/carens.php (arguing that lengthy residence incorporates aliens into society as members, making deportation societally undesirable, and describing systems for amnesty based on long-term residence in the United Kingdom and France, as well as similar discretion-based historical practices in the United States).

Moreover, ignoring or constraining time may make those errors particularly likely or unnecessarily harsh. Confining the temporal scope of the exclusion inquiry makes sense only if the crime is the sole evidence of the value of the noncitizen's continued presence in the United States. For example, one could conceive of drawing lines that impose per se immigration consequences on new arrivals who have committed violent crimes or crimes that are otherwise particularly egregious.[177]

The better course, however, is to allow the full dimension of time to play a role in most cases. Crimmigration law should not be exempt from the reliance on time evident in every other major aspect of immigration law, from admission to deportation relief to naturalization. Nor should it depart from the nature of criminal sentencing that, with the exception of the harshest of punishments, looks ahead to the moment of return to society.

B. Saving Time

Crimmigration law, like its relatives, immigration and criminal law, should look both forward and backward, beyond the moment of the crime, to engage the fullness of circumstance. This requires unfreezing the stasis within crimmigration law and bringing to bear on the deportation decision the powerful tools that time provides. Engaging time in this way allows for evaluation of whether noncitizens truly merit the panoply of penalties[178] that current law applies, especially deportation. It also makes time for redemption.[179]

The major proposals to mitigate the harshness of post-1996 tend to fall into three categories that take distinct approaches to crimmigration law. The purpose of this Subpart is to evaluate how these proposals impact the unique and temporally static nature of crimmigration law.

One such approach is to expand relief from deportation to apply more broadly to criminal deportability grounds. These proposals tend to lean either toward a categorical approach or a discretionary one. The categorical approach would expand the statutory definition of relief to require consideration of

177. Even this approach will not capture all violent offenders. Those offenders convicted of crimes considered egregious enough to impose a life sentence will be exempt from the immigration consequence of removal (and the bars to reentry) because the law requires immigration officials to refrain from removing noncitizens who have not completed their sentences. INA § 241(a)(4)(A) (2006).

178. *See* Stumpf, *supra* note 20, at 1720–25 (describing the variety of penalties that crimmigration law imposes).

179. *See* Lapp, *supra* note 36, at 50–55 ("[T]he possibility of redemption can be a powerful incentive for individuals to expend the effort needed to achieve rehabilitation.").

circumstances beyond the criminal deportability ground.[180] The discretionary approach would expand the authority of adjudicators to avoid a deportation outcome by permitting the deportation adjudicator to consider other circumstances as a matter of administrative discretion.[181] This discretion would reside either in the immigration judge presiding over a removal proceeding or in the federal or state judge imposing the sentence for the crime, as Margaret Taylor and Ron Wright have proposed.[182]

While this expansion of discretion would ease the temporal stasis in the deportation decision, it is only a partial solution. It relocates the decision that leads to deportation from the moment of arrest, as Hiroshi Motomura argues in his article in this symposium,[183] to the later sentencing proceeding or still-later immigration proceeding. It assumes, therefore, that a criminal trial or immigration removal proceeding will actually occur. Due to the availability of

180. *See, e.g.*, Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1675 (2009) ("To enable immigration judges and the BIA to make . . . individualized determinations, the Attorney General would need greater authority to grant cancellation of removal, similar to the INA section 212(c) regime."); *see also* BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 70–87 (2006) (describing the deportation of lawful permanent residents after the repeal of relief from deportation under INA § 212(c)); Sarah Koteen Barr, Comment, *C Is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725 (2008) (advocating an expansive approach to section 212(c) adjudication).

181. Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CALIF. L. REV. CIRCUIT 1, 20 (2011) (recommending that Congress "consider replacing the artificial category of 'aggravated felony' with a fact-based inquiry by the immigration judge that weighs the equities, such as length of residence, family ties, and rehabilitation, to determine whether deportation is warranted"); Neuman, *supra* note 25, at 621 ("Discretion permits adjudicators to engage in individualized decision making, considering the full complexity of an applicant's situation rather than reducing it to a checklist of standard factors."); *see* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 571, 589 (2011) (critiquing the standardlessness of current administrative discretion and the lack of authority that immigration judges have to exercise discretion to prevent deportation); Neuman, *supra* note 25, at 623–24 ("Discretion delegated by statute can also be exercised through reasonably designed regulations that identify categories of cases in which relief is warranted or unwarranted. It is well known, however, that the immigration authorities have been extremely reluctant to narrow their discretion to deny relief by regulation."); *see also* Kanstroom, *Better Part of Valor*, *supra* note 25, at 165–66 ("Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion. This is particularly true of deportation law."). *See generally* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 25, at 709 (describing U.S. immigration law in practice as a "fabric of discretion and judicial deference").

182. Taylor & Wright, *supra* note 25, at 1143 (proposing to locate deportation determinations within the judicial sentencing power).

183. Motomura, *supra* note 22, at 1842 (concluding that arrest is the most significant exercise of discretion in immigration enforcement).

expedited removal without a hearing,[184] among other reasons, immigration officials may simply bypass this expanded discretion.[185]

A second approach is to avert the present consequences of crimmigration law. In *Padilla v. Kentucky*,[186] the Supreme Court suggested that defense counsel might avoid the deportability ground by structuring the plea bargain to charge a crime that did not lead to automatic deportation, perhaps in exchange for a longer sentence.[187] Like the proposal to place deportation discretion in the sentencing judge, this approach looks outside of the immigration proceeding to the criminal justice system to mitigate the effects of crimmigration law.[188] By forcing awareness of immigration consequences into the plea bargain, *Padilla* creates a space within that relatively unconstrained negotiation to consider circumstances outside of the moment of the crime. That conversation between prosecutor and defense counsel has the potential to lead to a negotiated outcome that accounts both for the severity of the offense, recidivism, and circumstances that might mitigate a decision to deport—circumstances that immigration law forbids an immigration judge from considering when determining whether to grant relief.

The third approach is perhaps the most direct response to the freezing of time in crimmigration law, and the most categorical. It would employ a well-established resolution to the challenge of applying law in the face of the passage of time. On both sides of the criminal–civil divide, statutes and common law place time limitations on the pursuit of stale claims, through

184. *See* INA § 235(b) (2006).

185. *See* Eagly, *supra* note 96, at 1330–31 (describing how, as a functional matter, the criminal proceeding often leads directly to deportation, bypassing the immigration judge, and in the absence of authority for the sentencing judge to prevent it).

186. 130 S. Ct. 1473 (2010).

187. *Id.* at 1486 ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."); *see also* Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 HOW. L.J. 693, 697 (2011).

188. Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 36 (2010) (predicting that *Padilla* will place defense counsel in the role of advising clients about a spectrum of collateral consequences to criminal plea bargains); Peter L. Markowitz, *Deportation Is Different*, U. PA. J. CONST. L. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666788 (predicting that *Padilla* will herald a significant reconceptualization of the nature of deportation); *cf.* Brown, *supra* note 7, at 1402 (explaining that "Mr. Padilla's case is an example of one in which no amount of creative negotiation between well-informed attorneys is likely to yield a disposition that avoids triggering automatic deportation").

statutes of limitations, statutes of repose, and laches.[189] Perhaps it is time to revive the notion of a time limit on deportability grounds.[190]

Statutes of limitations on deportation historically protected noncitizens from sanctions for stale crimes already punished, and modern immigration law retains some of this protection.[191] The traditional criminal deportability grounds such as crimes of moral turpitude and prostitution already rely on time-based limitations on immigration consequences for criminal conduct. Congress has exempted from removal noncitizens who commit a single crime involving moral turpitude that occurs more than five years after the date of admission and those with prostitution offenses that occur more than ten years after applying for a visa, admission, or adjustment to lawful permanent resident status.[192]

These grounds tie deportability to the length of time since admission. They limit the deportation of noncitizens rooted by time and familiarity to this country. They acknowledge the temporally sensitive status of a juvenile offender, and recognize the significance of a crime-free time span prior to a noncitizen seeking admission or a change in immigration status.[193] Similar temporal limitations are also at play in relief from deportation, namely, the seven and ten years of physical presence that are prerequisites for eligibility[194] for cancellation of removal.

In addition to a limit based on the date of admission, a statute of limitations would key the limitations clock to the date of the conviction.[195] This approach is well-founded in the traditional inadmissibility ground for crimes

189. A statute of limitations bars a lawsuit at the end of a specified period that begins running upon the accrual of the claim. *E.g.*, Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 DEF. COUNS. J. 180, 181 (2006). A statute of repose, in contrast, accrues from the time the event occurred. *Id.* at 183–84. Laches is equitable tolling created in common law and governed by judicial discretion. *Id.* at 183. This Article uses the term "statute of limitations" to invoke the concept of a time limit that is common to all three.

190. Family, *supra* note 181, at 558 (noting that "the substantive law often provides no statute of limitations on immigration violations" and that "there is no statute of limitations on removability based on an aggravated felony conviction"); *see also* ALEINIKOFF ET AL., *supra* note 43, at 771–74 (citing T. Alexander Aleinikoff, *Illegal Employers*, AM. PROSPECT, Dec. 4, 2000, http://prospect.org/cs/articles?article=illegal_employers (proposing a ten-year statute of limitations for unauthorized migrants); Mae M. Ngai, *We Need a Deportation Deadline*, WASH. POST, June 14, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301460.html (setting out the arguments on either side of this proposal)).

191. KANSTROOM, *supra* note 122, at 125–26 (documenting the rise of postentry social control laws and the gradual disappearance by 1910 of temporal limitations on deportation after entry).

192. *See supra* notes 121–124 (describing statutory exceptions to crimes involving moral turpitude and prostitution).

193. *See supra* notes 121–124 and accompanying text.

194. *See supra* notes 64–65 and accompanying text.

195. *See* ALEINIKOFF ET AL., *supra* note 43, at 771–73.

involving moral turpitude. A crime that would otherwise qualify as involving moral turpitude will fall outside that category if at least five years have passed since the commission of the crime, the noncitizen was less than eighteen years of age at the time of commission, and it is the only such offense.[196]

Tying the statute of limitations to the date of conviction has the advantage of making time for and recognizing redemption, and of accounting for youthfulness at the time of the crime. It also mitigates the sticky problem of retroactive application of criminal deportability grounds that apply to crimes that were not deportable offenses at the time they were committed.[197] Finally, tying the limitations period to the conviction rather than the date of admission would reach the population of noncitizens who were never admitted, but who over time have acquired the family ties or employment skills that would otherwise make them admissible. That could be significant given the comparatively restrictive inadmissibility scheme of contemporary immigration law.[198]

A statute of limitations, and its siblings—the statute of repose and laches—have distinct downsides. They represent a risk that a noncitizen, undeported, may commit a later crime. They add a layer of complexity to the deportation decision. They also have the downside of many categorical rules in that they interpose a bright line between those to whom a criminal deportability ground applies and those to whom it does not, based on the passage of a specified date.

Nevertheless, placing temporal limitations on criminal deportability grounds keeps faith with the rest of immigration law—naturalization, marriage, relief—in using time as an indicator of a noncitizen's value to the national community and to her immediate relationships. Moreover, a statute of limitations

196. *See supra* notes 121–125 (describing statutory exceptions to crimes involving moral turpitude and prostitution).

197. *See* INS v. St. Cyr, 533 U.S. 289, 323, 326 (2001) (holding that in the absence of a clear statement from Congress, INA § 212(c) relief "remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect" because "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial"); *see also* Maurice Y. Hew, Jr., *The Moment of Perception Triggers the Plea for Purposes of the* St. Cyr *Analysis or the Section 212(c) Waiver, Not the Plea of Guilty or the Judgment of Conviction*, 38 U. MEM. L. REV. 799, 802 (2008) (pointing out that agency regulation and cases interpreting *St. Cyr* generated "at least four different retroactivity dates: (1) the date of the commission of the criminal offense; (2) the date of the plea agreement; (3) the date of the plea of guilty; and (4) the date of the judgment of conviction"). I am grateful to Hiroshi Motomura for pointing out this issue.

198. *See* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 325 (1956) (arguing that "[a] statute of limitations is particularly necessary in our immigration law because of the difficulty of establishing a legal entry ten, twenty, or even thirty years after the event"); *see also* KANSTROOM, *supra* note 122, at 124–26 (documenting a history of the evolution of increased restrictions on entry).

for criminal deportability grounds, like the conditional residence period for new marriages, uses time as a tool to resolve the difficult balance between protecting the community from crime, and protecting it from the harms of unnecessary deportation.

CONCLUSION

We are the sum total of the moments we live. It is in those moments that we continually create who we are, what we do, and with whom we form relationships. Through time, we aspire, learn from experience, come to know and understand others. Even as we are shaped by the choices we have made and the events that have occurred in our past, time propels us unerringly toward the future.

When the law seeks to freeze time, to firmly fix the relationship between an individual and the law by means of a past moment, it is bound to err. In using the moment of the crime as a temporal focal point, crimmigration law places no value on the life that every individual creates in every moment: those moments of time in motion in which people enact their lives and form and live out their "most tender connections."[199] Crimmigration law picks out one of those moments in the history of the relationship between the individual and the State, and invests it with the power to determine the entire value of the noncitizen's physical, social, economic, and cultural presence in the United States. The result is to continually remind the noncitizen, upon every encounter with a criminal or immigration official and at every step along the immigration hierarchy, that the law defines that noncitizen as the offender, forever reliving the moment of the crime.

199. MOTOMURA, *supra* note 26, at 99 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740, 743 (1893) (Brewer, J., dissenting); *id.* at 749 (Field, J., dissenting)).