Limiting the Use of the Categorical Approach and Setting a Statute of Limitations for Deportation

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The United States relies, in part, on certain criminal convictions to determine which noncitizens are deportable. The specific types of criminal convictions subjecting an individual to deportation proceedings are found in the Immigration and Nationality Act (INA). However, the INA only lists categories and types of crimes that trigger deportation. It is the courts' responsibility to compare the state criminal statute grounding the conviction with the list provided under the INA. This process is done using the "categorical approach," which allows courts to make a comparison and determine if a state criminal conviction matches a crime listed in the INA, subjecting a noncitizen to deportation proceedings. This approach is complicated and, at times, arbitrary. The results are particularly harsh considering a lack of a statute of limitations for deportation proceedings, which often results in deportation proceedings commencing decades after a conviction. This Note addresses the problems underling the use of the categorical approach and suggests establishing a statute of limitations to limit the consequences of late deportation proceedings on noncitizens, their families, and the courts.

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INTRODUCTION

The United States has a large immigrant population that has tripled since the 1970s.[1] About 77% of the immigrant population is in the country legally, while almost a quarter are unauthorized immigrants.[2] The federal government alone possesses the unrestrained power to deport unauthorized immigrants.[3] Moreover, the Immigration and Nationality Act (INA) authorizes the United States Attorney General to deport noncitizens who have a criminal conviction.[4] The term *noncitizen* describes a broad group of people comprised of "undocumented" individuals, individuals who entered the country without inspection, and individuals who are lawfully admitted such as lawful permanent residents.[5]

As the population of unauthorized immigrants increases, so does the number of deportations. The government deported approximately 337,000 immigrants in 2018, an increase from the prior year.[6] In 2019, under the Trump Administration, the number of migrant apprehensions at the United States-Mexican border rose to a total of 851,508 apprehensions and reached their

1. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ (stating that the Pew Research Center regularly publishes statistical portraits of the United States' foreign-born population and that immigrants today account for 13.7% of the United States population, nearly triple the share in 1970).

2. Jeffrey S. Passel & D'Vera Cohn, *Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/ (noting that in 2017, 23% of the 45.6 million foreign-born residents in the United States were unauthorized immigrants).

3. The Constitution empowers Congress to establish "an uniform Rule of Naturalization." U.S. CONST. art. I, § 8. However, the Constitution does not mention admission or deportation of noncitizens from the United States. Instead, the Supreme Court determined that the power to exclude foreigners was an "incident of sovereignty belonging to the government of the United States" that could not be "restrained on behalf of any one." The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

4. *See* Lopez v. Gonzales, 549 U.S. 47, 50 (2006) (explaining that under the INA, a person convicted of an aggravated felony is deportable and not eligible for cancellation of removal or for asylum); Moncrieffe v. Holder, 569 U.S. 184, 187 (2013) ("The INA allows the Government to deport various classes of noncitizens, such as those who overstay their visas, and those who are convicted of certain crimes while in the United States, including drug offenses."); *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009); Nelson Vargas-Padilla, *The Immigration Consequences of Criminal Conduct*, 3 CRIM. L. BRIEF 24, 27–32 (2007) (listing criminal grounds for inadmissibility and deportation).

5. When using the term *noncitizen*, immigration authorities refer to "undocumented" individuals: those who entered the country without inspection, as well as those who were lawfully admitted, including nonimmigrants and lawful permanent residents. *See* 8 U.S.C. §§ 1101(a)(3), 1227(a)(2)(A)(iii) (describing noncitizens or nationals as aliens and outlining grounds for exclusion or removal of noncitizens); *see also Moncrieffe*, 569 U.S. at 187 (listing noncitizens to include individuals "who overstay their visas"); *Lopez*, 549 U.S. at 50 (explaining that under the INA, a person convicted of an aggravated felony is deportable and not eligible for cancellation of removal or for asylum); Chacón, *supra* note 4, at 137; Vargas-Padilla, *supra* note 4, at 27–32 (listing criminal grounds for inadmissibility and deportation).

6. Budiman, *supra* note 1 (providing that the Obama administration deported about three million immigrants during his presidency, a higher number than under the Bush administration, and that deportation under the Trump administration was at its lowest since 2006).

highest level in 2021 with a total of 1,659,206 apprehensions.[7] In 2021, the Biden Administration announced its intention to focus on removing noncitizens who pose a threat to national security, have committed aggravated felonies, and who recently crossed the border.[8] Neither administration mentioned a time limit on deportations. Despite how much time has elapsed since a migrant's conviction, any migrant with an aggravated felony can be deported at any time.

Currently, immigration courts are facing a backlog of close to two million deportation cases.[9] These pending cases are classified as civil cases under immigration law, because the removal of a noncitizen is a civil function.[10] However, immigration authorities rely in part on state criminal convictions to determine which noncitizens are subject to this civil function.[11] While there are many grounds for deportation,[12] the list of criminal offenses for which a noncitizen can be deported has continued to expand over the years.[13]

7. John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/.

8. *See* Exec. Order No. 13993, 86 Fed. Reg. 6825, 7051 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/FR-2021-01-25.pdf; Memorandum from David Pekoske, Acting Sec'y, to Troy Miller, Tae Johnson & Tracey Renaud (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf; Associated Press, *Biden Administration Reverts to Targeted Immigration Enforcement*, NBC NEWS (Feb. 19, 2021, 5:08 AM), https://www.nbcnews.com/politics/immigration/biden-administration-reverts-targeted-immigration-enforcement-n1258318 ("Under Biden, ICE would primarily apprehend and remove people who pose a threat to national security, committed crimes designated as 'aggravated' felonies or recently crossed the border.").

9. *Backlog of Pending Cases in Immigration Courts as of March 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited July 31, 2022) (providing a visual chart of the number of backlog cases and showing a significant increase over the years, but particularly between 2019–2021).

10. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . .").

11. *See* 8 U.S.C. § 1227(a)(2)(A)–(F) (listing the types of crimes that trigger deportation).

12. Our current immigration system provides many categories of conduct that can trigger deportation. These categories continue to expand and are known as "grounds for deportation." *See id.* § 1227(a). Section 1227(a)(1)–(6) divides deportation grounds into six broad categories: (1) any noncitizen who violates their visa or adjustment of status; (2) any noncitizen convicted of a criminal offense listed under this section; (3) any noncitizen who fails to reregister or who falsifies documents; (4) any noncitizen who puts the safety of the country at risk; (5) any noncitizen who becomes "a public charge from causes not affirmatively shown to have arisen since entry"; (6) and any noncitizen who has voted in a federal state or at the local level. Each category includes further grounds for deportation. *Id.* For instance, the criminal ground for deportation consists of six subsections enumerating specific types of crimes that can render an individual deportable. *Id.* § 1227(a)(2)(A)–(F).

13. *See id.* § 1101(a)(43) (listing more than twenty categories of aggravated felonies that trigger deportation or render a noncitizen inadmissible in addition other deportable crimes, such as those that fall under crimes of moral turpitude); *see also id.* §§ 1182, 1227.

The use of criminal convictions as grounds for deportation has been referred to as *crime-based deportation*.[14] Under a crime-based deportation approach, immigration authorities cannot deport an individual for *any* conviction; rather, only criminal convictions specified in the INA can trigger conviction-based grounds for deportation. The list of crimes has been extensively broadened, and, as a result, crime-based deportation has grown dramatically.[15] Between 1908 and 1986, only less than 7% of all deportations per year were due to a crime-related reason, meaning that the noncitizens had a criminal conviction that subjected them to deportation.[16] However, as a result of INA's expanded crime list, by the early 1990s, crime-based deportations increased by about 50%.[17]

As a practical matter, courts determine which noncitizens with convictions are subject to deportation using the "categorical approach."[18] This approach requires courts to compare the elements of a state conviction to the elements of the offenses enumerated in the INA and determine if they match.[19] If the elements match, the government can initiate deportation proceedings against the individual based on the conviction.[20] Although this brief explanation of the categorical approach paints a picture of simplicity, in application, the categorical approach is unclear and presents several issues. First, comparing the state crime with the enumerated crime proves to be more than a simple matching task when

14. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 486 n.79 (2007) (using "crime-related removals" to mean "cases in which criminal convictions were the actual grounds for removal").

15. Deportations of noncitizens for a drug offense, for example, increased by 22% from 2007 to 2012. HUM. RTS. WATCH, A PRICE TOO HIGH: U.S. FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES 5 (2015), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses (providing several accounts of individuals deported for drug convictions); *see also* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1660 (2009).

16. *See* Torrie Hester, *"Protection, Not Punishment": Legislative and Judicial Formation of U.S. Deportation Policy, 1882-1904*, 30 J. AM. ETHNIC HIST. 11, 30 (2010) [hereinafter Hester, *Protection, Not Punishment*] (stating that between 1882 and 1904, the U.S. government only deported a few hundred immigrants annually); *see also* Banks, *supra* note 15 ("[P]ost-entry crime related deportations have accounted for more than 20% of all deportations, and they accounted for at least 50% of all deportations in 1993, 1994, and 1995.").

17. Banks, *supra* note 15.

18. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 763 (2021) (explaining that "this Court has told judges to employ a 'modified' categorical approach" to determine if a conviction triggers deportation); Moncrieffe v. Holder, 569 U.S. 184, 190 (2013) (stating that the courts "generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA" for deportation purposes); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (quoting Kawashima v. Holder, 565 U.S. 478, 483 (2012)) (same); United States v. Davis, 139 S. Ct. 2319, 2326 (2019) (same).

19. *See Pereida*, 141 S. Ct. at 763; *Moncrieffe*, 569 U.S. at 190; *Esquivel-Quintana*, 137 S. Ct. at 1568 (quoting *Kawashima*, 565 U.S. at 483); *Davis*, 139 S. Ct. at 2326 (same).

20. *See* 8 U.S.C. § 1227(a)(2)(A)–(F) (providing a list of the types of crimes for which a noncitizen can be deported).

applied to divisible statutes.[21] Second, there is no time limit for when the categorical approach can be applied.[22]

The INA was enacted to revise all immigration laws but lacks a statute of limitations for deportation.[23] The government can potentially initiate deportation proceedings any time after a conviction is final, but individuals are not always deported immediately after conviction.[24] In some instances, deportation proceedings initiate after the individual has served the entire sentence, which can be, for example, a year to thirty years after a conviction.[25] The lack of a statute of limitations imposes challenges for noncitizens facing deportation, United States citizens with noncitizen family members, and for the country as a whole.

This Note discusses major issues of crime-based deportation, focusing particularly on the gap between a conviction that triggers deportation and the initiation of deportation proceedings. Part I discusses a brief history of the United States' power to deport, which was not always clearly delineated. Part II explains how courts use the categorical approach to determine which noncitizens are deportable, and Part III addresses the problems imposed by crime-based deportation. Finally, Part IV suggests imposing a statute of limitations on deportation as a possible solution.

I. THE HISTORICAL POWER TO DEPORT NONCITIZENS

In 1789, the United States passed the Alien and Sedition laws, its first deportation legislation.[26] Under these laws, the President had the power to order the deportation of individuals who posed a danger "to the peace and safety of

21. A divisible statute is one that lists multiple crimes in one single statute or lists multiple elements of one crime in a single statute. *See Pereida*, 141 S. Ct. at 762–63. This is different from having a list of alternative means of committing one single crime. *See id.* at 757 (stating that a Nebraska statute is divisible because it is "setting forth multiple crimes"); Mathis v. United States, 579 U.S. 500, 505 (2016) (defining a divisible statute as one that "may list elements in the alternative, and thereby define multiple crimes," and stating that divisible statutes make "the comparison of elements harder" and more complicated); Descamps v. United States, 570 U.S. 254, 260 (2013) (same); Marrero v. United States, 570 U.S. 929, 929 (2013) (same); United States v. Townsend, 897 F.3d 66, 73 (2d Cir. 2018) (same). A divisible statute requires the use of the modified categorical approach. *Pereida*, 141 S. Ct. at 763 (quoting *Mathis*, 579 U.S. at 517) ("To determine exactly which offense in a divisible statute an individual committed, this Court has told judges to employ a 'modified' categorical approach, 'review[ing] the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction.'").

22. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (providing that "Any alien who . . . is convicted of a crime involving moral turpitude within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission" can be deported if convicted for an enumerated crime); *id.* § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude . . . is deportable.").

23. *See id.* § 1227(a)(2)(A)(i)–(ii).

24. *See id.*

25. *See id.*

26. Howard L. Bevis, *The Deportation of Aliens*, 68 U. PA. L. REV. 97, 104 (1920).

the country" or who were suspected of treason.[27] However, the Act expired two years after its enactment, and the Supreme Court never assessed its constitutionality.[28] Thus, between the expiration of the Alien and Sedition laws and the Act of 1892, which compelled all Chinese laborers in the United States to obtain a certificate to prove legal presence, the Court only officially recognized the federal government's power to forbid or allow the entrance of immigrants into the United States.[29] In *Nishimura Ekiu v. United States*, however, the Supreme Court finally established that all sovereign nations have the power to admit or exclude immigrants, reasoning that such power is inherent to sovereignty and essential to self-preservation.[30]

A. DEPORTATION AS THE NATION-STATE'S POWER OF SELF-PROTECTION

While the Court's decision in *Nishimura Ekiu* established the power to admit or exclude immigrants, it did not mention deportation explicitly,[31] and some of the first immigration laws focused solely on deporting individuals who were illegally present in the United States.[32] Congress enacted some of its first set of exclusion policies in the late 1800s.[33] The Chinese Exclusion Act of 1882, for example, exclusively applied to Chinese laborers entering the United States

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27. *Id.*

28. *Id.*

29. *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (sustaining Congress's plenary power to regulate admission or exclusion of noncitizens); Galvan v. Press, 347 U.S. 522, 531 (1954) (noting that Congress is exclusively entrusted with creating policies pertaining to noncitizen admission and residency); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (stating that Congress possesses "plenary power" over noncitizen admission and "complete and absolute power" over immigration matters).

30. 142 U.S. 651, 659 (1892). There, the Court held that the Immigration Act of 1891 was constitutional, stating:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

Id. at 659. Thus, the Court found that a decision to refuse entrance to a citizen of Japan was lawful, because the Naturalization Clause grants the federal government the power to forbid entrance to foreigners. *Id.*; U.S. CONST. art. I, § 8, cl. 4; *see also* Korab v. Fink, 797 F.3d 572, 574 (9th Cir. 2014) ("Congress has plenary power to regulate immigration and the conditions on which aliens remain in the United States . . . ."); State v. Sarrabea, 157 So. 3d 1, 8 (La. App. 3 Cir. 5/1/13) (explaining that the U.S. Supreme Court has found that the "federal government has extensively dealt with the complex rules, regulations, and requirements relating to immigration and alien status").

31. Hester, *Protection, Not Punishment*, *supra* note 16 ("Before 1882, the U.S. government did not have the power to deport anyone. [It was only] [w]ith the racist policy of [the] Chinese Exclusion [Act] in 1882 [that] the federal government began constructing the first of two deportation tracks.").

32. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943); Geary Act, ch. 60, 27 Stat. 25 (1892) (repealed 1943).

33. *See* TORRIE HESTER, DEPORTATION: THE ORIGINS OF U.S. POLICY 7–8 (2017) [hereinafter HESTER, DEPORTATION] (providing a description of the Chinese Exclusion Act as one of the first policies for deportation); Torrie Hester, *Deportability and the Carceral State*, 102 J. AM. HIST. 141, 142 (2015) (stating that the Chinese Exclusion Act of 1882 was "[t]he first law used to deport an immigrant from the United States" and was "an unmasked racial project of the nineteenth-century").

for work, and thus any Chinese laborer who left the United States and failed to return before the Act's passage was deemed to be unlawfully present.[34] In 1892, Congress extended the Chinese Exclusion Act by passing the Geary Act, which added new requirements for Chinese residents who were already living in the United States.[35] One of the new requirements included registering and carrying a "Certificate of Residence,"[36] which proved that an individual entered the country legally and was allowed to remain in the United States.[37] Chinese residents who did not carry registration were subject to detention and deportation.[38] The Geary Act, unlike the Chinese Exclusion Act of 1882, actually provided a deportation provision for Chinese laborers already present in the United States.[39] It was also the first law to demonstrate that Congress believed it possessed the power to deport.

Despite the Geary Act's deportation provision, the government's power to deport was not affirmed until the next year in the Supreme Court's 1893 decision *Fong Yue Ting v. United States*.[40] There, three Chinese residents challenged the deportation provision of the Geary Act, questioning whether the federal government in fact possessed the power to deport individuals from the United States in the way it possessed the power to exclude and admit them.[41] The Supreme Court upheld the federal government's power to deport, explaining that deportation was part of a nation-state's powers of self-protection.[42]

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34. The Chinese Exclusion Act deemed any Chinese laborer who left the United States and did not return before the passage of the Act unlawfully present in the country. *See* § 1, 22 Stat. at 59.

35. Geary Act § 2, 27 Stat. at 25 ("That any Chinese person or person of Chinese Descent, when convicted and adjudged under any of said laws to be not lawfully entitled to remain in the United States, shall be removed from the United States to China . . . .").

36. *See id.* § 6 ("[A]ll Chinese laborers within the limits of the United States . . . who are entitled to remain in the United States, [must] apply . . . within one year after the passage of this act, for a certificate of residence, . . . and any Chinese laborer . . . who shall neglect, fail or refuse to comply . . . shall be deemed and adjudged to be unlawfully within the United States . . . .").

37. *Id.*

38. *See id.* (stating that individuals without the certificate are to be "taken before a United States judge, whose duty it shall be to order that [they] be deported from the United States").

39. With the Chinese Exclusion Act of 1882, the government could turn back individuals who were successful in arriving to the United States. However, the Act did not provide a deportation provision for individuals present in the United States. The Geary Act allowed the Government to deport individuals already living in the United Sates who did not comply with the Act. *See* Hester, *Protection, Not Punishment*, *supra* note 16, at 12.

40. 149 U.S. 698, 731–32 (1893). The three men who challenged the Geary Act's deportation provision were Fong Yue Ting and Wong Quan, who had each lived in the United States for more than ten years, and Lee Joe, who had lived in the United States for more than fifteen years. *Id.* at 698; HESTER, DEPORTATION, *supra* note 33, at 10 (describing the three individuals in this case and the periods of time each individual spent in the United States).

41. *Fong Yue Ting*, 149 U.S. at 732–32.

42. *Id.* at 707 ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

The type of deportation discussed under the Geary Act and the Supreme Court's decisions at the time dealt solely with unlawful presence in the United States as the basis for deportation.[43]

B. FROM ILLEGAL PRESENCE TO CRIMINAL ACTIVITY

By the early 1900s, the focus for deportation had changed. Rather than regulating illegal entry, the focus shifted to regulating behavior of noncitizens already present in the United States.[44] Under the Immigration Act of 1918, Congress made individuals deportable on political grounds for the first time, specifically targeting "anarchists" and those who opposed the United States government.[45] Congress later enacted the Immigration Act of 1917, its first criminal, retroactive removal statute,[46] which provided that any alien with a conviction for a crime involving moral turpitude (CIMT) with a sentence of one year or more was subject to deportation.[47] The Act itself, however, still provided a safe harbor: sentencing judges could make a recommendation to the Secretary of Labor against deportation of a noncitizen with a CIMT conviction.[48] This was

43. The Scott Act was concerned with laborers who did not remain in the country after the passage of the Act. *See* ch. 1064, § 1, 25 Stat. 504 (1888) (repealed 1943). The Geary Act dealt with Chinese residents who failed to register, or show proof that they were in the country legally by obtaining a certificate of residence. *See* ch. 60, 27 Stat. 25 (1892) (repealed 1943). *Fong Yue Ting* focused on whether the individuals were legally present in the United States. *See* 149 U.S. at 731.

44. Marc Edward Jácome, *Deportation in the United States: A Historical Analysis and Recommendations*, 12 MICH. J. PUB. AFFS. 22, 25 (2015) ("Beginning in the 20th century, deportation acquired a new function. Instead of simply regulating illegal entry, the United States used deportation in order to regulate behavior among immigrants who were already within the United States' borders.").

45. *See* Immigration Act of 1918, Pub. L. No. 65-221, 40 Stat. 1012 (1918); *see also* Hester, *Protection, Not Punishment*, *supra* note 16, at 25 (describing Turner v. Williams, 194 U.S. 279 (1904), where "Turner was one of the first people affected by the antianarchist provision of the Immigration Act of 1903" after organizing workers and giving a speech in New York).

46. By making the Immigration Act of 1917 a retroactive statute, Congress attempted to make anyone with a conviction for a CIMT subject to deportation if they were sentenced to more than one year of imprisonment, even if the crime was committed before the passing of the Act. Thus, anyone who would not have been subject to deportation before the Act now could be as soon as the Act took effect.

47. *See* Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874 (1917) (codified at 8 U.S.C. § 155(a)) ("[A]ny alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant . . . be taken into custody and deported . . . ."); *see also* HESTER, DEPORTATION, *supra* note 33, at 180 (stating that CIMTs subjected an individual to deportation when the crimes were committed on United States soil).

48. *See* Immigration Act of 1917 § 19 ("[T]he provision . . . respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply . . . if . . . [a] judge . . . make[s] a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act . . . .").

known as issuing a "Judicial Recommendation Against Deportation" (JRAD).[49] Issuing a JRAD provided judges with a legal avenue to avoid unjust deportations based on their knowledge of the circumstances of the crime and the noncitizen's actions.[50] JRADs also allowed judges to take individual experiences into consideration.[51] If the judge believed deportation was an extreme consequence for the crime or that the noncitizen had presented evidence of mitigating circumstances, the judge could recommend that deportation be suspended.[52] These "recommendations" were more than a simple suggestion to the immigration authorities—they were binding.[53] Once the sentencing judge issued a JRAD, the CIMT conviction could not be used as the basis for deportation.[54]

In 1952, Congress enacted the Immigration and Nationality Act with the purpose of revising laws relating to immigration, naturalization, and nationality.[55] Like the Immigration Act of 1917, the INA included convictions for CIMTs as the predominant ground for crime-based deportation.[56] The INA also repealed the JRAD provision, and no similar discretionary relief was substituted in its place.[57] However, the INA established other defenses that individuals could raise to avoid deportation such as waivers under INA section 212(c) and section 212(h).[58] Thus, despite the cessation of some types of

49. JRADs were seen by judges, prosecutors, defendants, and defense counsel as a way to ameliorate criminal punishment and did not "hinge on the complexities of immigration law." Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1145 (2002). However, noncitizen defendants used this as an avenue to avoid deportation. *See id.* at 1146.

50. Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. 36, 38 (2015); *see also* Taylor & Wright, *supra* note 49 (stating that JRADs hinged on "considerations such as the defendant's criminal record, evidence of rehabilitation, and ties to the community").

51. *See* Taylor & Wright, *supra* note 49, at 1145.

52. Cade, *supra* note 50, at 45.

53. *See* Immigration Act of 1917 § 19, 39 Stat. at 890 (1917); *see also* People v. Ping Cheung, 718 N.Y.S.2d 578, 580 (N.Y. Sup. Ct. 2000) (noting that the "State Judge had the absolute power to prevent [a] defendant's deportation"); Cade, *supra* note 50 (stating that JRADs were "considered binding on federal executive officials" and were recognized by the United States Supreme Court as giving "sentencing judges a powerful tool to avoid unjust deportations").

54. *See* Taylor & Wright, *supra* note 49, at 1143–44 ("[JRADs] were binding on the INS, so that the moral turpitude conviction could not be used as a basis for deportation . . . [but also] did not disturb the INS's authority to deport . . . on other grounds.").

55. Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–1537) (establishing that the purpose of the Act is to "revise the laws relating to immigration, naturalization, and nationality; and for other purposes").

56. Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2085 (2017) (stating that "[t]he INA identified a limited number of crimes" that triggered deportation).

57. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (1990) (eliminating JRADs and providing that the amendments made "apply to convictions entered before, on, or after" the date of enactment).

58. Noncitizens could apply for suspension of deportation even after the JRAD was eliminated. There were two avenues: INA section 212(c) or section 212(h). *See* KATHY BRADLY, ELIGIBILITY FOR RELIEF: WAIVERS UNDER INA § 212(H) 1 (2019), https://www.ilrc.org/sites/default/files/resources/waivers_under_212h_dec

discretionary relief, deportation was not always immediate. Moreover, before further amendments to the INA by Congress, an enumerated criminal conviction was merely the first step in determining whether an individual could be deported; a noncitizen or the court itself could establish that the noncitizen was eligible for relief, and if eligibility was established, deportation would not be based on the criminal conviction.[59]

In the 1980s, mounting fear of noncitizens with criminal convictions determined the future of deportation, causing Congress to change the laws so that CIMTs were no longer the only crimes triggering deportation. In 1986, Congress enacted the Anti-Drug Abuse Act, which created the first list of so-called aggravated felony crimes that would subject noncitizens to deportation.[60] The aggravated felony category included the most serious crimes such as murder, rape, and firearm and drug trafficking offenses.[61] While individuals were always subject to deportation for crimes that fell within the "aggravated felony" category, in practice, categorizing crimes as aggravated felonies accelerated removal proceedings, limited waivers for relief, and limited the relief available. Congress continued to focus on criminal convictions, passing two additional reforms in 1996: The Antiterrorism and Effective Death Penalty Act (AEDP)[62] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[63] Both Acts expanded the category of crimes that triggered immediate

_2019-final.pdf. Section 212(c), for example, provided a waiver for certain lawful permanent residents who were rendered deportable due to a criminal conviction upon reentry into the United States. This waiver prevented deportation if the individual qualified and the court approved the waiver. Section 212(h) provided cancellation of removal due to criminal convictions for any noncitizen regardless of immigration status and could be applied for multiple times. *See* Bradly, *supra* note 58. These forms of relief were later eliminated as discussed below when the federal government decided to make eradicating criminal activity a top priority in the late 1990s. *See infra* notes 60–63 and accompanying text.

59. *But see* Hong, *supra* note 56, at 2085 (stating that "[t]he INA identified a limited number of crimes" that triggered deportation).

60. *See* Anti-Drug Abuse Act of 1988, ch. 4, sec. 7341, § 1101(a)(43), 102 Stat. 4181, 4469–70 (1988) (amending the INA by adding § 101(a)(43), which defines an aggravated felony to include murder, any drug trafficking crime, and any illicit trafficking in any firearms or destructive devices); *see also id.* § 7343(a) (providing for the mandatory detention of noncitizens convicted of aggravated felonies).

61. *See id.* § 1101(a)(43)(A)–(C).

62. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1268 (1996).

63. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997). The IIRIRA attaches collateral consequences such as potential and actual deportation if the person has a prior conviction. *Id.* §§ 321–334, 341–353. Before this Act, "the BIA considered a wide range of equitable factors, including the seriousness of the offense, evidence of rehabilitation or recidivism, and the impact of deportation on the family." *See* Tyson v. Holder, 670 F.3d 1015, 1017 (9th Cir. 2012); *see also* Hong, *supra* note 56, at 2073–74 (stating that prior to the IIRIRA, immigration law graded crimes depending on the criminal sentence for that crime, meaning that a minor crime had a shorter sentence and did not necessarily have immigration consequences). After Congress enacted IIRIRA, the definition of a conviction qualifies nearly every adjudication as a conviction. *See* Hong, *supra* note 56, at 2074. Thus, even unsupervised probation remained a

deportation. The IIRIRA specifically expanded the number of crimes that constituted aggravated felonies to more than twenty and included nonviolent misdemeanor crimes[64] that did not fall within the common use of the term "aggravated," such as shoplifting and drug possession.[65]

Besides expanding the number of crimes that triggered deportation, the reforms were less forgiving than the early Acts. The reforms of the 1980s eliminated any safeguards that were already set in place, such as JRADs and waivers, subjecting noncitizens with criminal convictions to immediate deportation.[66] For instance, instead of the individualized determinations allowed under the Immigration Act of 1917, the IIRIRA only focused on the categories of crimes by attaching consequences based on the potential length of the sentence regardless of individual circumstances.[67] These reforms also applied retroactively, meaning that noncitizens convicted of aggravated felonies before the enactment of the AEDP and IIRIRA could face deportation, even when deportation was not a consequence at the time of the conviction.[68]

Today, the INA continues to be a significant step for determining which noncitizens with criminal convictions are subject to deportation, and immigration authorities continue to "increasingly handle[] migration control

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conviction for immigration purposes, even if the lower courts dismissed the conviction through expungement. *Id.* at 2074 n.15 (quoting Rex B. Wingerter, *Consequences of Criminal Convictions*, 37 MD. BAR J. 20, 24 (2004)).

64. *See* Hong, *supra* note 56, at 2074–75 (explaining that under the IIRIRA, a "student who urinates in public, who is convicted of a misdemeanor public indecency crime, and whose conviction is expunged under state law will be treated identically to a child molester who willfully preys on children in public" because under this Act both are charged with a "sex offense"); *see also* United States v. Christopher, 239 F.3d 1191, 1192 (11th Cir. 2001) (providing an example of an individual who was ordered removable as an "aggravated felon" under the INA definition for committing a misdemeanor shoplifting offense).

65. *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (defining aggravated felonies and listing twenty-one different categories of crimes that fall within that definition); *see also* Hong, *supra* note 56, at 2086–87 (explaining that "[t]he term 'aggravated felony' is a misnomer," as the term does not only apply to violent offenses or "the worst of the worst," but also encompasses non-violent drug offenses, misdemeanors, and convictions which have been expunged or vacated).

66. Before the 1996 amendments to the immigration law, noncitizens could apply for suspension of deportation under sections 212(c) and 212(h) of the INA, and judges could issue JRADs that were binding. *See* HUM. RTS. WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 25 (2007), https://www.hrw.org/reports/2007/us0707/5.htm. These forms of relief were eliminated, and no other defenses to deportation were set in place. *See id.*; *see also* Jácome, *supra* note 44, at 26 (stating that judicial safeguards prior to 1996 were few, but under the new AEDP and IIRIRA, those were "virtually eliminated").

67. *See* Arias v. Lynch, 834 F.3d 823, 833 (7th Cir. 2016) (Posner, J., concurring) (explaining that the distinction between crimes that are considered crimes of moral turpitude and those that are not is arbitrary, as the list that does not trigger deportation includes crimes that are just as serious as those that do); United States v. Graham, 169 F.3d 787, 788 (3d Cir. 1999) ("This case required [the court] to determine whether a misdemeanor can be an 'aggravated felony' under a provision of federal law even if it is not, technically speaking, a felony at all.").

68. *See supra* notes 62–63.

through the criminal justice system."[69] The INA has been revised several times, and each time the number and types of crimes that can trigger deportation continue to increase.[70] Thus, it is important to understand how the INA is divided, and which types of crimes it includes as crimes that trigger deportation.

C. CRIMES THAT TRIGGER DEPORTATION UNDER THE IMMIGRATION & NATIONALITY ACT

The INA is divided into five titles. Title I describes the general provisions, including a list of definitions.[71] The Title II, which this Note addresses, focuses on immigration, and specifically discusses topics such as allocating immigrant visas, asylum, refugee status adjustment, and deportable aliens.[72] Titles III, IV, and V of the INA focus on nationality and naturalization, refugee assistance, and alien terrorist removal procedures, respectively.[73]

Specifically, Title II of the INA includes a "Deportable Aliens" section that is divided into a total of six different grounds for subjecting a noncitizen to deportation.[74] One of those subsections, 8 U.S.C. § 1227(a)(2), specifically addresses the categories of crimes that trigger deportation.[75] It includes six major categories: general crimes, controlled substances crimes, certain firearm offenses, crimes of domestic violence, trafficking, and miscellaneous crimes.[76] The "general crimes" section is further divided into subcategories, including

69. Chacón, *supra* note 4, at 137. Congress has passed legislation since the 1980s that "subject[ed] . . . acts associated with migration to criminal penalties . . . ." *Id.* As Jennifer M. Chacón explains, these acts "included the hiring of unauthorized noncitizen workers . . . and marriage fraud," and these acts were also associated with criminal penalties. *Id.* Between the 1980s and 1990s, Congress added illegal reentry provisions, and in 2000, penalties were again raised for other offenses such as trafficking in persons. *Id.* at 137–38. Additionally, the government uses state convictions that match the crimes enumerated under the INA to determine whether a specific crime subjects an individual to deportation. *See id.* at 138–39. "[I]t is the government's burden to prove by clear and convincing evidence that [a noncitizen] is deportable" under section 237 of the INA. Vargas-Padilla, *supra* note 4, at 27.

70. *See Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act (last visited July 31, 2022) ("The Immigration and Nationality Act (INA) was enacted in 1952. The INA collected many provisions and reorganized the structure of immigration law. The INA has been amended many times over the years and contains many of the most important provisions of immigration law.").

71. *See* 8 U.S.C. §§ 1101–1105a.

72. *See id.* §§ 1151–1160, 1181–1189, 1201–1204, 1221–1231, 1252–1260, 1281–1288, 1301–1306, 1321–1330, 1351–1363a.

73. *See id.* §§ 1401–1409, 1421–1431, 1433, 1435–1455, 1457–1458, 1481, 1483, 1488–1489, 1501–1504, 1521–1524, 1531–1537.

74. *See id.* § 1227(a)(1)–(6) (dividing the grounds for deportation into inadmissible aliens at the time of entry, criminal offenses, failure to register and falsification of documents, security and related grounds, public charge, and unlawful voters).

75. *Id.* §§ 1227(a)(2), 1228 (providing for the expedited removal of noncitizens who have committed an aggravated felony).

76. *See id.* § 1227(a)(2)(A)–(F).

CIMTs, multiple criminal convictions, and aggravated felonies.[77] While § 1227(a)(2) provides a broad category of crimes, it does not provide a list of state crimes that fall under those categories.[78] Additionally, § 1227(a)(2) includes terms such as "CIMT" and "aggravated felonies," neither of which is defined under the INA.[79]

Specifically, the term "CIMT" has been used as grounds for exclusion since 1891[80] and remains part of the INA, but Congress left the term undefined.[81] Courts have interpreted this absence of a statutory definition as a purposeful, congressional conferral of interpretive deference to the judiciary.[82] Courts

77. *See id.* § 1227(a)(2)(A)(i)–(vi) (listing crimes of moral turpitude, multiple criminal convictions, aggravated felony, high speed flight, failure to register as a sex offender, and a section about waivers).

78. *See id.* § 1227.

79. The meaning of "moral turpitude," for example, "falls well short of clarity." Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009). "Indeed, as has been noted before, 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase." *Id.* Similarly, the term "aggravated felony" is defined by including a host of offenses. 8 U.S.C. § 1101(a)(43). Among that list are crimes such as drug trafficking, which is itself defined in a separate statute, basically creating a chain of definitions rather than one clear definition that is easily accessible and not up for interpretation. *See id.*; 18 U.S.C. § 924(c)(2); *see also* CONG. RSCH. SERV., IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 3 (2009), https://sgp.fas.org/crs/homesec/R45151.pdf.

80. *See* Act of March 3, 1891, 26 Stat. 1084 (1891); *compare* Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 887, 889 (1917) (codified at 8 U.S.C. § 155(a)) ("[A]ny alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude . . . ."), *with* 8 U.S.C. § 1227(a)(2)(A)(i) (stating that a noncitizen who is "convicted of a crime involving moral turpitude . . . is deportable"); *see also* Jordan v. De George, 341 U.S. 223, 229 n.14 (1951) (noting that the Act of March 3, 1891, "directed the exclusion" of individuals who commit CIMTs); CONG. RSCH. SERV., *supra* note 79 ("Immigration law has used the term 'moral turpitude' in its criminal grounds for exclusion since 1891.").

81. Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996) ("The INS Act does not define moral turpitude, and legislative history does not reveal Congress' intent."); Cabral v. INS, 15 F.3d 193, 195 (1st Cir. 1994) ("Congress left the term 'crime involving moral turpitude' to future administrative and judicial interpretation."); *see also* Arias v. Lynch, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring) ("Why Congress chose the term 'moral turpitude' to describe crimes that should bar aliens is unclear because there was no attempt to explain it either in the statute itself or in the legislative history."). The term moral turpitude first appeared in *Brooker v. Coffin*. 5 Johns. 188, 191 (N.Y. Sup. Ct. 1809) (stating that prostitution and other disorderly conduct offenses were not crimes of moral turpitude but failing to provide a definition of the term).

82. In the immigration context, agency interpretation comes from immigration judges in removal proceedings with administrative review by the Board of Immigration Appeals (BIA). *Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last visited July 31, 2022) ("The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws."). The Supreme Court has stated that "Congress knowingly conceived [the term] in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied." *Jordan*, 341 U.S. at 233 (Jackson, J., dissenting). However, despite this flaw, Congress did not state what meaning the term was to carry. Further, relying on a dictionary definition is not helpful, the Court indicated, finding that "we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral." *See Jordan*, 341 U.S. at 234 (Jackson, J., dissenting); *see also* Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995) (stating that Congress left the meaning of the phrase "to future administrative and judicial interpretation"); Estrada-Rodriguez v. Lynch, 825 F.3d 397, 403 (8th Cir. 2016) ("The INA does not define the phrase 'crime involving moral turpitude.'"); Marmolejo-Campos v. Holder,

generally interpret a CIMT as an "act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man."[83] A CIMT can also be defined as a crime that is inherently wrong or morally objectionable.[84] This definition is flawed, because society's views on morally objectionable crimes will change over time. Thus, a crime that is not currently deemed a crime of moral turpitude can later be labeled as such, and crimes that were once held as acts of moral turpitude might not carry the same societal weight through time.[85]

Further, "aggravated felonies" also trigger deportation, yet the INA fails to provide a firm definition.[86] Under the INA, a noncitizen convicted of an "aggravated felony" is not only deportable but also barred from discretionary relief against deportation.[87] Congress knew that the term lacked a firm definition and, to unify contradictory interpretations, it has subjected the term to several amendments. In 1988, under the Anti-Drug Abuse Act, Congress seemingly defined "aggravated felony" by listing specific crimes that qualified as such, such as murder, narcotics, and firearm trafficking.[88] However, providing a list of the types of crimes that qualify as aggravated felonies does not provide a definition of "aggravated felony." Congress then modified the bounds of what an "aggravated felony" is in the Immigration Act of 1990, by basing the term on the sentence imposed for committing a crime.[89] For example, any crime of

558 F.3d 903, 910 (9th Cir. 2009) (defining crimes of moral turpitude as involving "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." Unsatisfied with the definition, and "without more specific guidance from the Board," the Ninth Circuit has "relied on [its] own generalized definition.").

83. *See* Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264 (2001) (citing definition of the phrase "moral turpitude" from Black's Law Dictionary); *see also* City of Seattle v. Jones, 475 P.2d 790, 794 (1970) ("Prostitution is unquestionably a crime involving moral turpitude . . . [I]t is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general.").

84. *See* Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001) (quoting Matter of Danesh, 19 I. & N. Dec. 669, 670 (BIA 1988)); Matter of Perez-Contreras, 20 I. & N. Dec. 615, 617–18 (BIA 1992); Matter of Flores, 17 I. & N. Dec. 225, 227 (BIA 1980).

85. *See* Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 313 n.1 (2011) ("[P]remeditated murder is a CIMT because it necessarily includes an aspect of moral culpability; passing a bad check, however, is not if intent to defraud is not a required element.").

86. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

87. *See id.* § 1229b(a)(3), (b)(1)(C); *see also* Moncrieffe v. Holder, 569 U.S. 184, 187 (2013) ("The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case.").

88. *See* Anti-Drug Abuse Act of 1988, ch. 4, sec. 7342, § 1101(a)(43), 102 Stat. 4181, 4469–70 (1988).

89. Immigration Act of 1990, tit. 5, sec. 501, § 1101(a)(43), 104 Stat. 4978, 5048 (1990) ("[I]nserting after 'such title,' the following: 'any offense described in section 1956 of title 18, United States Code (relating to

violence for which a term of imprisonment imposed is at least five years counted as a "aggravated felony," but not if the same crime imposed an imprisonment term of less than five years.[90] Again, that only created a category of crimes, not a definition. The term was addressed once more under the Immigration and Nationality Technical Correction Act of 1994, expanding the list of aggravated felonies to include theft and fraud.[91] Each time this term was "defined," Congress only added categories or additional types of crimes to a list but failed to provide an actual definition.

The INA continues to "define" what an aggravated felony is by providing a string of definitions for aggravated felony crimes but fails to provide one clear definition that courts can use without referencing other categories of crimes. For instance, 8 U.S.C. § 1101(a)(43) defines "aggravated felony" by including a list of crimes; crimes such as drug trafficking are included in that list, and in turn, "drug trafficking" is further defined in a separate statute.[92] This creates a chain of definitions that the courts must follow before determining whether a conviction is an aggravated felony. Additionally, some of the aggravated felonies outlined in the INA do not comport with the common understanding of "aggravated." A crime being "aggravated" implies it involves violence, death, or severe harm. However, many crimes that might not sound "aggravated" to most people, including non-violent crimes such as shoplifting,[93] theft,[94] and money laundering,[95] are nevertheless "aggravated crimes" under the INA. Thus, the definition of "aggravated felony" for purposes of deportation and immigration proceedings has been expanded so far that now an aggravated felony does not actually have to be an "aggravated" crime.[96]

Because of a lack of clear definitions, an expanding list of crimes, and the lack of a defined list of state crimes that trigger deportation, courts have turned to the categorical approach to determine which state convictions trigger a noncitizen's deportation.

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laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years.'").

90. *Id*.

91. Immigration and Nationality Technical Corrections Act of 1994, tit. II, sec. 222, § 1101(a)(43), 108 Stat. 4305, 4321–22 (1994) (adding white collar crimes to the definition of aggravated felony).

92. *See supra* note 79 and accompanying text (noting the lack of clear definitions for CIMTs and aggravated felonies).

93. *Contra supra* notes 62–63.

94. 8 U.S.C. § 1101(a)(43)(G), (M).

95. *Id.* § 1101(a)(43)(D).

96. *See supra* notes 90–92 and accompanying text.

II. THE CATEGORICAL APPROACH: MATCHING STATE CRIMES WITH ENUMERATED CRIMES

The categorical approach has a long pedigree in the history of United States immigration law.[97] Although it is predominantly used in criminal law and sentencing, it is also used in several areas of immigration law,[98] playing a significant role in determining which state convictions trigger federal sanctions like deportation.[99] A state crime triggers deportation when it matches the crimes enumerated in the INA.[100]

Federal courts adopted the categorical approach in an effort to have a standardized method to categorize convictions for deportation purposes.[101] However, courts adopted the categorical approach to fit a system in which states have the freedom of choosing to define what counts as a crime within their boundaries.[102] The fact that each state makes its own decisions for its legal system makes it difficult and unlikely that there will be uniformity in the federal deportation consequences of a state conviction. This leads to disparity in deportations: two individuals from different states can commit the same offense,

97. Congress has prescribed the use of the categorical approach for over a century. Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISC. 132, 136 (2019); *see* Moncrieffe v. Holder, 569 U.S. 184, 191 (2013). Its use became more prominent after Congress enacted the Armed Career Criminal Act of 1984, the IIRIRA, and similar statutes requiring agencies to consider conviction and not an individual's conduct to determine whether the crime qualifies as a "violent" or "aggravated" felony, and which, in immigration cases, triggers deportation. Jain & Warren, *supra* note 97, at 136–37; *see* Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1780 (2020) ("The sweeping federalization of criminal law throughout the 1980s and 1990s produced many federal statutes that subscribed to this design, which explains why the reach of the categorical approach is quite vast and 'seems to be always enlarging its territory.'").

98. The categorical approach, for example, is also applied under the Armed Career Criminal Act of 1984 (ACCA), which determines sentencing enhancements and federal statutory grounds for imposing longer sentences. *See* 18 U.S.C. § 924(e)(1) (providing that any person who violates this section and has three previous convictions for a "violent felony" or a "serious drug offense" is subject to a mandatory minimum of not less than fifteen years). The ACCA was enacted in an effort to stop "so called 'career criminals.'" Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 201 (2019).

99. *See Moncrieffe*, 569 U.S. at 190 ("[The Court] generally employ[s] a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA."); United States v. Harris, 844 F.3d 1260, 1268–69 n.9 (10th Cir. 2017) (noting that the culpable conduct must fit the federal definition of the crime); *see also* Jain & Warren, *supra* note 97, at 136 ("With few exceptions, they make such determinations using the 'categorical approach,' meaning that they analyze each crime as defined by law instead of considering an individual's actual conduct.").

100. *See* Shular v. United States, 140 S. Ct. 779, 783 (2020) (stating that courts inquire "whether the elements of the offense of conviction match those of the generic crime"); Mathis v. United States, 579 U.S. 500, 504 (2016) (stating that the categorical approach "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of [a] generic [offense]"); Descamps v. United States, 570 U.S. 254, 257 (2013) (explaining that courts determine a match by comparing the elements of the crime of conviction "with the elements of the 'generic' crime").

101. Rebecca Sharpless, *Finally, a True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1280 (2017).

102. *Id.* at 1280–81.

but one statute, whether accidentally or purposefully, provides more protection when the elements of the conviction are analyzed at the federal level.

Thus, the categorical approach has failed to create nationwide uniformity as Congress and the courts intended, and it is unlikely to do so.[103] The result of this dissimilitude is that in some instances, a noncitizen with a conviction for an enumerated crime might be subject to deportation in one state but not in another simply because different states have defined the elements of that crime differently than Congress did in the INA.[104] Nevertheless, the categorical approach serves as a bridge between state convictions and the crimes listed under the INA for crime-based deportation purposes.

A. APPLICATION OF THE CATEGORICAL APPROACH

Step one of the categorical approach involves comparing the state conviction with the federal crimes enumerated under the INA.[105] Unless federal case law already exists about the particular nature of a conviction, courts will usually first determine the modern generic definition of a listed offense.[106] By "generic definition" of the enumerated crime, courts mean that the "offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison."[107] Courts then decide whether the statute of conviction accords with the federal definition of that particular offense.[108] Because the INA does not provide a specific category of crimes, each offense is "viewed in the abstract," and the federal definition

103. *See Mathis*, 579 U.S. at 538 (Alito, J., dissenting) (acknowledging that the majority decision disqualifies burglary in some jurisdictions even though "Congress indisputably wanted burglary to count" for all states); United States v. Chapman, 866 F.3d 129, 137 (3d Cir. 2017) ("[T]he categorical approach is often an impediment to uniformity."); Evans, *supra* note 97, at 1774 (arguing that the categorical approach's reliance on state criminal elements has proven instead to be "an impediment to uniformity" and consistently results in disparities); Sharpless, *supra* note 101, at 1280 (stating that the diversity created by state criminal laws makes it impractical for federal deportation laws to cross-reference specific criminal state laws).

104. *See Mathis*, 579 U.S. at 538 (Alito, J., dissenting) (noting that the majority found that not all burglary convictions will count depending on the state for the categorical approach to be applied).

105. *See id*. at 504 ("[When] apply[ing] . . . the categorical approach . . . [courts] focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case."); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1570 (2017) (relying on "[t]he structure of the INA, a related federal statute, and evidence from state criminal codes" to determine what the generic elements are); *see also* Lopez v. Gonzales, 549 U.S. 47, 48 (2006).

106. Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); *see also* Lopez-Chavez v. Garland, 991 F.3d 960, 966 (8th Cir. 2021) (citing *Moncrieffe*, 569 U.S. at 190).

107. *Lopez-Chavez*, 991 F.3d at 966 (citing *Moncrieffe*, 569 U.S. at 190).

108. *See* Taylor v. United States, 495 U.S. 575, 599–600 (1990); Nijhawan v. Holder, 557 U.S. 29, 36–37 (2009); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–86 (2007). Additionally, the INA includes a long list of offenses that trigger deportation; the list includes more than twenty different types and categories of crimes. *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (defining aggravated felonies and listing twenty-one different categories of crimes that fall within that definition); U.S. SENT'G COMM'N, PRIMER: CATEGORICAL APPROACH 17–18 (2017), https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Categorical_Approach.pdf.

"serves as a point of comparison."[109] If the nature of the state offense as defined by its corresponding statute shares the elements of the federal offense, the state crime is a "match."[110] A state offense categorically matches the generic federal offense only if the state conviction "necessarily" involves facts for a crime listed in the INA.[111] A noncitizen's conduct leading to conviction is irrelevant because courts only focus on the state conviction's requirements, not the individual's conduct.[112] In making this comparison, courts fail to consider the specific facts of cases.[113]

The Supreme Court has held on multiple occasions that judges must consider as part of step one a presumption that a state conviction rests upon the least of the acts criminalized under a state statute, at which point a court can determine "whether that conduct would fall within the federal definition of the crime."[114] If the elements of the state crime are the "same as, or narrower than, those of" the federal crime described by Congress, then deportation is triggered.[115] If the elements of a conviction are broader, meaning that they reach conduct beyond that of the generic offense, then the conviction cannot serve as a deportation trigger[116] because the statute may prohibit more than the conduct indicated by the title of the state statute.[117]

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109. *Moncrieffe*, 569 U.S. at 190 ("[O]ffenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison."); *see also Lopez-Chavez*, 991 F.3d at 966 (citing *Moncrieffe*, 569 U.S. at 190).

110. Courts will compare the state offense to the federal offense listed in 8 U.S.C. § 1101(43)(G), (M).

111. *Moncrieffe*, 569 U.S. at 190; Shepard v. United States, 544 U.S. 13, 24 (2005) (stating that a court must determine whether the plea had "necessarily" rested on the fact identifying the burglary as generic).

112. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 768 (2021) (Breyer, J., dissenting) ("The categorical approach requires courts to 'loo[k] only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions.'") (quoting *Taylor*, 495 U.S. at 600); Descamps v. United States, 570 U.S. 254, 263 (2013) ("[The modified approach] retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's."); *Moncrieffe*, 569 U.S. at 190 (stating that when applying the modified categorical approach, courts ask what offense the person was convicted of, not the acts the person committed).

113. *See* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)); Mellouli v. Lynch, 575 U.S. 798, 805 (2015); *Moncrieffe*, 569 U.S. at 190–91.

114. *Esquivel-Quintana*, 137 S. Ct. at 1568.

115. *Descamps*, 570 U.S. at 254; *see also Moncrieffe*, 569 U.S. at 190 ("[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily' involved . . . facts equating to [the] generic [federal offense].") (quoting *Shepard*, 544 U.S. at 24); *Esquivel-Quintana*, 137 S. Ct. at 1568 ("Petitioner's state conviction is thus an 'aggravated felony' under the INA only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor.").

116. *Esquivel-Quintana*, 137 S. Ct. at 1568.

117. *See* Mathis v. United States, 579 U.S. 500, 504 (2016); *Taylor*, 495 U.S. at 590 (1990) (stating states' labels for "burglary" do not control in federal sentencing enhancement context); United States ex rel. Valenti v. Karmuth, 1 F. Supp. 370, 375–76 (N.D.N.Y. 1932) ("[T]he question of moral turpitude is not determined by the name of the crime, but by the nature of the crime as defined in the statute and alleged in the indictment."); *see also* Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 993 (2008) ("[W]hen determining whether a particular crime falls

When the comparison between a state conviction and a federal offense involves a statute that sets out a single set of elements to define a single crime, applying the categorical approach is straightforward. In such cases, courts simply line up the elements of the state conviction with those of the generic offense.[118] However, not all statutes set out a single set of elements for a single crime, and applying the categorical approach is not always straightforward. Some state statutes are "divisible," meaning that a single statute lists several elements in the alternative and accordingly defines multiple crimes.[119] Divisible statutes include more elements than those enumerated by Congress, making the statute broader than the generic offense. In that case, the categorical approach requires courts to choose the correct category of crime to determine which crimes trigger deportation—and it is not always a simple task.[120]

B. DIVISIBLE STATUTES AND THE MODIFIED CATEGORICAL APPROACH

In cases involving divisible statutes, the Supreme Court has approved the "modified categorical approach."[121] Unlike the original categorical approach in which courts are exclusively focused on the elements of the state offense, the modified approach requires that a sentencing court take into consideration documents such as jury instructions, plea agreements, and colloquies.[122] These documents are meant to help the court "determine what crime and with what

within a ground of deportation or inadmissibility[,] . . . [s]tate definitions and labels do not control."); U.S. SENT'G COMM'N, *supra* note 108.

118. *Mathis*, 579 U.S. at 504.

119. *Id.* at 505.

120. Chambers v. United States, 555 U.S. 122, 126 (2009) ("This categorical approach requires courts to choose the right category. And sometimes the choice is not obvious. The nature of the behavior that likely underlies a statutory phrase matters in this respect. Where Massachusetts, for example, placed within a single, separately numbered statutory section (entitled 'Breaking and entering at night,' Mass. Gen. Laws Ann., ch. 266, § 16 (West 2008)) burglary of a 'building, ship, vessel or vehicle,' this Court found that the behavior underlying, say, breaking into a building differs so significantly from the behavior underlying, say, breaking into a vehicle that . . . a sentencing court must treat the two as different crimes.").

121. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 763 (2021) ("To determine exactly which offense in a divisible statute an individual committed, this Court has told judges to employ a 'modified' categorical approach."); *Mathis*, 579 U.S. at 505 (noting that when dealing with the issues of a divisible statute, "this Court approved the 'modified categorical approach' for use with statutes having multiple alternative elements"); Descamps v. United States, 570 U.S. 254, 257 (2013) (explaining that the court "approved a variant" of the categorical approach known as the modified categorical approach "when a prior conviction is for violating a so-called 'divisible statute'"); Shepard v. United States, 544 U.S. 13, 16 (2005) (establishing the narrow class of additional documents the court is permitted to consult when using the modified categorical approach to determine the elements of the prior conviction).

122. *See Pereida*, 141 S. Ct. at 763 (explaining that judges can consult "a limited class of documents" when using the modified categorical approach); *Descamps*, 570 U.S. at 257 ("[T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction."); United States v. Moncrieffe, 167 F. Supp. 3d 383, 407 (E.D.N.Y. 2016) (stating that when applying the modified categorical approach, "a court may refer to 'other documents' and need not 'limit [itself] to the elements of the crime'") (citations omitted).

elements of that crime a defendant was convicted."[123] This additional step is necessary to complete before the court can make the comparison between the state statute for the conviction and the federal offense.

However, this modified version can be applied only when the state statute of conviction treats all conduct as conforming to alternative elements or as bases for different crimes.[124] This is different from treating the conduct as alternative means of committing one crime. For instance, the Iowa burglary statute covers more conduct than generic burglary because it includes a "range of places" where burglary can be committed: "any building, structure, [or] land, water or air vehicle."[125] "The generic offense [simply] requires unlawful entry into a 'building or other structure.'"[126] The Supreme Court found that the statute defined one crime, burglary, while specifying multiple means of fulfilling its locational element, some of which actually satisfy the generic definition.[127] When a statute is written to include alternative elements rather than alternative means of committing one crime, then the convicting court can consult the record to see if it elucidates whether the conviction is for a generic offense.[128] Looking at the record would also be necessary because the court would first have to determine under which locational element the individual was convicted under at the state level before making a match with the locational element of generic burglary.[129]

The Iowa burglary statute, however, is not the only statute that is "divisible," or that covers more crimes and elements than those enumerated by Congress.[130] Looking at the case record for guidance presents problems of its

123. *Pereida*, 141 S. Ct. at 763.

124. *See Mathis*, 579 U.S. at 506 (stating that when a statute "enumerates various factual means of committing a single element," the categorical approach must be applied); Taylor v. United States, 495 U.S. 575, 602 (1990) (explaining that when a "burglary statute[] includes entry of an automobile as well as a building" (i.e., multiple elements), the court uses the modified categorical approach and other indictment information).

125. *Mathis*, 579 U.S. at 507 (citing IOWA CODE § 702.12 (2013)).

126. *Id.*; *see Taylor*, 495 U.S. at 598 ("[T]he generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.").

127. *Mathis*, 579 U.S. at 507 ("Iowa's burglary statute . . . covers more conduct than generic burglary does. The generic offense requires unlawful entry into a 'building or other structure.' Iowa's statute, by contrast, reaches a broader range of places: 'any building, structure, [or] land, water, or air vehicle.' And those listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element . . . .").

128. *See id.*

129. *See id.* at 517 (stating that when the listed items are elements or means of committing an offense, "the court should . . . review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime").

130. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 763 (2021) (describing Nebraska's statute, NEB. REV. STAT. § 28-608 (2008), as "divisible because it states no fewer than four separate offenses"); United States v.

own because courts do not always accurately identify a divisible statute. Thus, the use of the modified categorical approach contributes to disparities in who is deported despite its flexibility over the original categorical approach.

C. PROBLEMS BEHIND THE USE OF THE MODIFIED CATEGORICAL APPROACH

Courts adopted the categorical approach to avoid arbitrary decisions that occur when courts use extrinsic evidence, such as evidence of the person's conduct.[131] With the modified categorical approach, courts are no longer only looking at the elements of a criminal statute; the modified categorical approach requires an analysis of other court documents that can lead to additional facts underlying a conviction.[132] To avoid the danger of arbitrary decisions, the documents courts could reference are limited to specified documents, such as the indictment.[133] Again, this limitation reflects an effort to avoid arbitrary decisions.

Nevertheless, after the Supreme Court's decision in *Pereida v. Wilkinson*, the list of documents available for courts to review expanded.[134] Expanding the list of documents available for review does not further the reason for using the categorical approach: to limit reliance on information outside the state statute, the crime as listed under the INA, and the actual offense committed. Further, the deportation of a noncitizen becomes a question of whether the noncitizen is

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Castleman, 572 U.S. 157, 169 (2014) (stating that Tennessee's domestic assault statute is a divisible statute); Lazo v. Wilkinson, 989 F.3d. 705, 710 (9th Cir. 2021) (holding that section 11350 of the California Health and Safety Code is a divisible statute and that the modified categorical approach applies because it is a statute that defines multiple alternative offenses); United States v. Oliver, 987 F.3d. 794, 807 (8th Cir. 2021) ("[C]oncluding that 720 ILL. COMP. STAT. 570/401 is divisible, as its 'structure shows that different drug types and quantities have different punishments.'"); United States v. Ward, 972 F.3d. 364, 376–77 (4th Cir. 2020) (stating that because the Virginia drug statute is a divisible statute, the court will use the modified categorical approach); *see also* Descamps v. United States, 570 U.S. 254, 272 (2013) (dealing with burglary conviction as a divisible statute); Syed v. Barr, 969 F.3d. 1012, 1018 n.3 (9th Cir. 2020) (holding that section 288.3(a) of the California Penal Code is a divisible statute).

131. *See* Jain & Warren, *supra* note 97, at 139 ("Using a categorical approach instead of a case-specific approach (reviewing the facts of long-past conduct) remains efficient: It avoids serious practical challenges inherent in examining stale records of conviction, which are often difficult to find and inconclusive when available. These practical challenges would also precipitate unfair and arbitrary results.").

132. *See* Shepard v. United States, 544 U.S. 13, 16 (2005) (establishing the narrow class of additional documents the court is permitted to consult when using the modified categorical approach to determine the elements of the prior conviction).

133. *See id.*; *Mathis*, 579 U.S. at 505 (listing the limited class of documents the courts are allowed to reference when applying the modified categorical approach); *Descamps*, 570 U.S. at 257 (providing jury instructions as one example of the limited class of documents the courts can reference in applying the categorical approach).

134. *See Pereida*, 141 S. Ct. at 774 (Breyer, J., dissenting). In his dissent, Justice Breyer points out that the majority references a list of documents that is much broader than what the Court has previously permitted in the modified categorical approach. *Id.* at 774. Some of those documents include an official record of judgment and conviction, a court's docket entry indicating the existence of a conviction, court minutes of a transcript in which the court takes notice of the existence of a conviction and an official abstract of a record of conviction indicating the charge or section of law violated as well as any other document or record attesting the conviction. *Id.*

attempting to obtain relief against deportation or whether the government initiates deportation proceedings because of a criminal conviction.

1. Pereida v. Wilkinson

In order for immigration authorities to initiate deportation proceedings against a noncitizen because of a criminal conviction, courts must first determine that the conviction falls within the crimes enumerated in the INA.[135] Similarly, when a noncitizen attempts to establish that they are eligible for discretionary relief against deportation such as cancellation of removal, courts must first establish whether a criminal conviction bars the noncitizen from relief.[136] For both inquiries, the categorical approach is necessary. The major difference in both procedures is that in a crime-based deportation, the government bears the burden of proving that a conviction falls within the enumerated crimes.[137] When the noncitizen seeks discretionary relief, on the other hand, the burden falls on the noncitizen to establish that their criminal conviction is not for an enumerated crime.[138] A noncitizen is subject to deportation and barred from discretionary relief if the government proves that the noncitizen was convicted for an enumerated crime.[139] Again, under both procedures a court must first determine whether or not the individual has been convicted of an enumerated crime. In *Pereida v. Wilkinson*, however, the Supreme Court did not apply the categorical approach.

Clemente Avelino Pereida faced deportation proceedings for unlawfully entering the United States.[140] Pereida was convicted under Nebraska law for attempted criminal impersonation, and he needed to show that his conviction was not a CIMT to obtain discretionary relief.[141] Part of Pereida's burden

135. *See* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

136. *See* 8 U.S.C. § 1229a(c)(4)(A) ("An alien applying for relief or protection from removal has the burden of proof to establish" that he qualifies for discretionary relief); *id.* § 1229b(b)(1)(C) (a noncitizen must show that they have not been convicted of a CIMT that disqualifies them from obtaining discretionary relief); *see also* Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010) (establishing that in order to determine whether an individual is eligible to seek cancellation of removal or waiver of inadmissibility, courts must first decide whether the individual has been convicted of an aggravated felony; in doing so, courts apply the categorical approach).

137. *See* 8 U.S.C. §§ 1229a(c)(3), 1227(a)(2)(A)(i); *see also Pereida*, 141 S. Ct. at 761 (stating that in deportation proceedings for a criminal conviction, the government bears the burden of establishing that the noncitizen has been convicted for a CIMT but when seeking discretionary relief, the burden flips).

138. *See* 8 U.S.C. §§ 1229a(c)(4)(A), 1229b(b)(1)(C); *Carachuri-Rosendo*, 560 U.S. 563.

139. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C); *Moncrieffe*, 569 U.S. at 187.

140. *Pereida*, 141 S. Ct. at 758.

141. *Id.* at 759–60. A noncitizen deemed to be unlawfully present and under deportation order, can still apply for cancellation of removal to avoid deportation. *See* 8 U.S.C. § 1229b(b)(1).

included showing that he met four requirements,[142] one of which includes establishing that he had not been convicted of a CIMT.[143]

At the time of Pereida's conviction, the Nebraska statute for criminal impersonation included four subsections describing different crimes, three of which included CIMTs.[144] Only one of the four subsections, the prohibition against carrying on a business without a license, did not count as a CIMT.[145] Thus, the Nebraska statute was a divisible statute calling for the application of the modified categorical approach to determine whether Pereida's conviction was for a subsection involving a CIMT. None of the documents that the Eighth Circuit could access to make its determination provided any indication of the subsection of the conviction.[146]

If Pereida had been under deportation proceedings because of his criminal conviction, the Eighth Circuit would have applied the modified categorical approach. Upon reviewing the limited class of documents that the government

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142. The INA lists four specific requirements to qualify for cancellation or removal, requiring that the noncitizen satisfy one of the following conditions:

> (A) [the noncitizen] has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. §§ 1229b(b)(1)(A)–(D), 1227(a)(A)(i) (stating that an individual convicted of a CIMT is deportable); *id.* § 1229a(c)(4)(A) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien—satisfies the applicable eligibility requirements . . . .").

143. *See id.* § 1229b(b)(1)(C).

144. NEB. REV. STAT. § 28-608 (2008) (since amended and moved to NEB. REV. STAT. ANN. § 28-638 (LexisNexis 2022)). The statute at the time of Pereida's conviction provided a person committed criminal impersonation under the following conditions:

> (a) [The person] [a]ssumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization of another and with the intent to deceive or harm another: (i) Obtains or records personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of personal identifying information for the purpose of obtaining credit, money or any other thing of value.

Id.; *see also Pereida*, 141 S. Ct. at 759 (describing the Nebraska statute).

145. § 28-608(1)(c); *see also Pereida*, 141 S. Ct. at 760 (stating that carrying on a business without a proper license was not a CIMT because "[t]he immigration judge thought this crime likely did not require fraudulent conduct").

146. *Pereida*, 141 S. Ct. at 760.

presented in Pereida's case, the Eighth Circuit would have been unable to determine that the conviction was for a CIMT because the documents were silent on the subsection for the conviction. In that case, immigration authorities could not initiate deportation proceedings against Pereida based on his criminal conviction. In Pereida's case however, the Supreme Court did not apply the categorical approach.

Instead, the Court stated it first needed to know the actual offense, treating the conviction as a matter of fact.[147] Further, because determining the actual conviction was a matter of fact, the Court was not required to use the categorical approach.[148] Thus, the Court required Pereida to provide extrinsic evidence outside the limited set of documents under the modified categorical approach.[149]

The *Pereida* decision presents a few difficulties and contradictions. First, it creates a disparity in who is to be deported. If another noncitizen in the same position as Pereida were under deportation proceedings due to a criminal conviction rather than illegal entry, the result would be different. Pereida would be deported for illegal entry because he could not obtain discretionary relief without establishing that his conviction was not for a CIMT, which requires the use of extrinsic evidence more expansive than what is allowed under the categorical approach. However, the noncitizen on deportation proceedings based on a criminal conviction would not face deportation for that same conviction because the government bears the burden of establishing that the conviction is for a CIMT, and a court would be unable to determine that the conviction is for a CIMT based on the limited class of documents allowed under the categorical approach. An inability to make this determination means that immigration authorities could not use the criminal conviction as the basis for deportation.

Second, the *Pereida* decision contradicts the limitations under the modified categorical approach that were established to reduce arbitrary results. This decision is contradictory because it allows a noncitizen to present evidence that goes outside the realm of documents the court is allowed to review in the first place. Specifically, Pereida could present any document to show that his conviction was not a CIMT, including documents outside what the modified categorical approach prescribes. However, allowing additional evidence blurs the two questions the modified categorical approach attempts to keep separate: (1) how did the defendant behave in a particular occasion, and (2) what behavior does the statute prohibit?[150] The categorical approach focuses on the second

147. *Id*. at 762–63 (stating that determining Pereida's crime of conviction is a factual inquiry and sometimes that "inquiry can take on a special prominence when it comes to 'divisible' statutes," but first, the court must know the crime committed).

148. *Id*. at 763.

149. *Id*. (stating that Pereida refused to produce any evidence about his crime of conviction even after the government had already presented the limited class of documents allowed under the categorical approach).

150. *See id.* at 769 (Breyer, J., dissenting).

question, but the Court in *Pereida* focused on the first. There, specifically, the Court was not looking at what the Nebraska statute prohibited, but at Pereida's actual actions leading to the conviction of attempted criminal impersonation.[151] This ruling authorizes courts to investigate other matters, such as the defendant's behavior,[152] going against the purpose of the categorical approach. This decision, as the dissent highlighted, also adds to existing issues of crime-based deportation.

III. PROBLEMS POSED BY CRIME-BASED DEPORTATION

A. LACK OF TIME RESTRICTIONS

Besides the complexity of applying the categorical approach and the potential disparities created by *Pereida*, crime-based deportation poses another major problem: the lack of time restrictions for deportation.[153] For many noncitizens, deportation proceedings are not initiated immediately. It can often take many years before immigration authorities deport a noncitizen based on an enumerated crime.[154]

In *Tyson v. Holder*, a noncitizen was convicted of an aggravated felony when she was in her twenties.[155] However, the aggravated felony did not trigger deportation until she was fifty-three years old, almost thirty years later.[156] Many undocumented individuals with past convictions face a similar reality. This means that many noncitizens have lived in the United States for decades after

151. *Id*. at 760 ("Pereida [was charged] with using a fraudulent social security card to obtain employment, and while that evidence would 'seem to support a finding that the crime underlying [Pereida's] attempt offense involved fraud or deceit,'" the record did not indicate that he was in fact convicted of violating a subsection that required fraud or deceit (citation omitted)).

152. *See id.* at 761 (considering that ambiguity about a conviction for a CIMT "would seem to defeat an assertion of 'good moral character'" and that "it is hard to see how the same ambiguity could *help* an alien when it comes to closely related eligibility requirement at issue").

153. *See* INS v. St. Cyr, 533 U.S. 289, 296 (2001) (noting that a person convicted for an aggravated felony is deportable "without regard to how long ago they were committed"); *see also* THE PRES.'S COMM'N ON IMMIGR. & NATURALIZ., WHOM WE SHALL WELCOME 194 (1953) (providing an example of an individual who "came to the United States in 1921, at the age of 16. Within 5 years after his entry, he was involved in an automobile accident which resulted in the death of a child. He was convicted of manslaughter, served a sentence, and was paroled. More than 5 years later he was ordered deported").

154. *See* United States v. Gill, 748 F.3d 491, 494 (2d Cir. 2014) (stating that a 1989 conviction did not trigger deportation until 1991); Tyson v. Holder, 670 F.3d 1015, 1016–17 (9th Cir. 2012) (describing that Tyson was born in 1952 and was convicted of an aggravated felony in 1980, but deportation proceedings did not start until about thirty-two years later); Mattis v. Reno, 212 F.3d 31, 34 (1st Cir. 2000) (noting that an individual committed a crime in 1991 and another in 1992, yet the INS did not initiate deportation proceedings until 1997); People v. Totari, 4 Cal. Rptr. 3d 613, 614–15 (Cal. Ct. App. 2003) (describing that an individual pled guilty to charges in 1985 and was deported for the conviction in 1998, thirteen years later).

155. *Tyson*, 670 F.3d at 1016–17.

156. *Id.* The court ultimately held that the conviction could not subject Tyson to deportation because the statute involved an impermissible retroactive statute; however, not all noncitizens face similar results. *Id.* at 1022.

their conviction before immigration authorities commence deportation proceedings.[157] As a result, deportation without a time limit creates hardships for noncitizens, United States citizens, and the nation as a whole.

B. HARDSHIP ON THE NONCITIZEN FACING DEPORTATION

Despite initial reliance on criminal records and the criminal justice system, courts label deportation as a civil proceeding simply because immigration law is civil law.[158] However, in many ways, this "civil" procedure resembles a criminal sentence[159] because, like many criminal sentences, deportation often involves confinement.[160] Many noncitizens are placed in immigration facilities to await deportation and are not allowed to leave, depriving them of their physical liberty and access to their families.[161] A criminal sentence, however, guarantees the right to a trial, as no person may be deprived of life, liberty or property without due process of law.[162] Yet noncitizens in deportation proceedings are not entitled to that protection nor the right to appointed counsel, because deportation is treated as a civil proceeding despite the fact that deportation is often a harsher

157. *See* THE PRES.'S COMM'N ON IMMIGR. & NATURALIZ., *supra* note 153, at 194 (providing several examples of individuals with convictions who are not deported until years later, stating that the few examples provided "could be multiplied indefinitely," and adding that in each example, "courts publicly criticized the unreasonable harshness of the [INA]").

158. *See* Fong Yue Ting v. United States, 149 U.S. 698, 729, 730 (1893) (holding that deportation proceedings before the court had all the elements of a civil case and were "in no proper sense a trial and sentence for a crime or offense," but rather "the ascertainment by appropriate and lawful means" of whether a noncitizen could remain in the United States); Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment[,]" and that deportation "is simply a refusal by the Government to harbor persons whom it does not want[;] [t]he coincidence of the local penal law with the policy of Congress is an accident . . . ."); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1651 (2009) (stating that since 1983, when the Supreme Court decided *Fong Yue Ting v. United States*, deportation has been considered a civil tool and a remedial measure rather than punishment).

159. In his dissent, Justice Brewer argues that "[d]eportation is punishment. It involves—First, an arrest, a deprival of liberty; and second, a removal from home, from family, from business, from property. . . . Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel." *Fong Yue Ting*, 149 U.S at 740 (Brewer, J., dissenting).

160. *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management (last visited July 31, 2022) ("Non-U.S. citizens who are apprehended and determined to need custodial supervision are placed in detention facilities.").

161. *See, e.g.*, Daniella Silva, *Michigan Father Deported to Mexico After Living in the U.S. for Three Decades*, NBC NEWS (Jan. 16, 2018, 4:57 PM), https://www.nbcnews.com/news/us-news/michigan-father-deported-mexico-after-living-u-s-three-decades-n838211 (describing the experience of a noncitizen deported after spending three decades in the United States, leaving behind his wife and children); Alexandra Villareal, *Left Behind: Families Face Uncertain Future When Fathers Are Deported*, THE GUARDIAN (Nov. 9, 2018, 6:00 PM), https://www.theguardian.com/us-news/2018/nov/09/women-deportations-family-ice (describing families left behind by male figures in the family); Miriam Jordan, *'Why Did You Leave Me?' The Migrant Children Left Behind as Parents Are Deported*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/us/migrant-families-deportations.html.

162. *See Fong Yue Ting*, 149 U.S at 741 (Brewer, J., dissenting).

punishment than the initial criminal sentence served, the fine paid, or the community service completed for the conviction.

Additionally, during the decades-long gap between a noncitizen's conviction and deportation, an individual may have started a family, bought a house, paid taxes, and accumulated other positive equities and integrated positively with the surrounding community. About 62% of noncitizens facing deportation have lived in the United States for ten years or more.[163] In many instances, if a noncitizen has entered the United States years before their conviction, the noncitizen has potentially spent more of their lifetime in this country than in their country of origin. However, despite any equities accumulated in the United States, such as economic contributions and raising a family of United States citizens, the individual is still subject to deportation. When immigration authorities take too long before initiating deportation proceedings, deportation can serve as double punishment for noncitizens who have already served their criminal sentence.

The dissent in *Pereida* makes this clear by explaining that this decision might deprive some noncitizen defendants of the benefits of their negotiated plea deals.[164] Even when a plea deal involves pleading a crime that does not carry a deportation consequence, it may not actually confer that protection decades later. This is especially true in jurisdictions that destroy misdemeanor records within a few years. When records are destroyed, even if the plea deal was beneficial, its proof will not exist. Further, even if the record remains available, the record may omit key information that is crucial in carrying the burden of proof for discretionary relief when establishing that the conviction or the plea deal was for a crime that does not trigger deportation. When deportation is triggered years later due to a lack of time restrictions, it may be impossible to meet the burden of proof, precluding any potential relief. While the majority in *Pereida* dismisses this concern because it did not specifically apply to Pereida's case, this concern is a real issue for other noncitizens who may be left without a defense against immigration consequences at the time of their conviction.[165]

C. HARDSHIP ON UNITED STATES CITIZENS

Deportation not only imposes hardship on the noncitizen, but on United States citizens as well. Roughly 4.1 million United States citizens under the age

163. Robert Warren & Donald Kerwin, *Mass Deportations Would Impoverish US Families and Create Immense Social Costs*, 5 J. MIGRATION & HUM. SEC. 1, 2 (2017) (stating that a 47% decrease in household income because of deportation would "plunge millions of US families into poverty").

164. Pereida v. Wilkinson, 141 S. Ct. 754, 775–76 (2021) (describing that the majority's approach may "deprive some defendants of the benefits of their negotiated plea deals" and explaining that "in many lower criminal courts, misdemeanor convictions are not on the record").

165. *Id.* at 766 (stating that record-keeping issues do not "attend *this* case").

of eighteen lived with at least one undocumented parent,[166] and at least half a million United States citizens' children have experienced the deportation of at least one parent.[167] The separation United States citizens suffer due to deportation leads to long-term health and development issues, including experiencing negative educational outcomes such as a decrease in school enrollment and an increase in school absences.[168] For instance, within six months or less of an immigration arrest of a parent, about two-thirds of children experience changes in eating and sleeping habits.[169] Furthermore, when noncitizens who have lived in the United States for more than ten years are deported, their family attachments are needlessly broken.

The deportation of one family member is a hardship for an entire family, especially when the noncitizen is the head of the household. Their deportation reduces the median household income from about $41,300 to $22,000, a 47% drop.[170] This leaves families scrambling to secure employment to increase household income. It also reduces the amount of financial support available for the citizen children and spouses whom noncitizens are forced to leave behind.[171]

D. HARDSHIPS IMPOSED ON THE NATION AND THE IMMIGRATION COURT SYSTEM

The hardships imposed by deportation are not limited to emotional and financial hardship suffered by United States citizens; deportation also has

166. *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement (analyzing 2009–2013 U.S. census data); *see also* RANDY CAPPS, MICHAEL FIX & JIE ZONG, A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS 11 (Jan. 2016), https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf; *Estimates of Undocumented and Eligible-to-Naturalize Populations by State*, CTR. FOR MIGRATION STUD., http://data.cmsny.org (last visited July 31, 2022); Silva Mathema, *Why All Americans Should Care About What Happens to Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Mar. 16, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/ (stating that more than 5.9 million citizen children live with at least one family member who is unauthorized, and showing that California, Texas and Nevada are the top three states that will be most likely to be affected by deportation, as these states have the highest percentage of United-States-born citizens with at least one unauthorized family member living with them).

167. AM. IMMIGR. COUNCIL, *supra* note 166 (analyzing immigration and customs enforcement data between 2011 and 2013).

168. *Pereida*, 141 S. Ct. at 775–76; *see also* AJAY CHAUDRY, RANDY CAPPS, JUAN MANUEL PEDROZA, ROSA MARIA CASTAÑEDA, ROBERT SANTOS & MOLLY M. SCOTT, FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 53 (Feb. 2010), https://www.urban.org/research/publication/facing-our-future/view/full_report (stating that parent-child separations pose serious risks to a child's safety, economic security, wellbeing, and long-term development).

169. *See* CHAUDRY ET AL., *supra* note 168, at ix.

170. Warren & Kerwin, *supra* note 163, at 2 (stating that a 47% decrease in household income because of deportation would "plunge millions of U.S. families into poverty").

171. *Id.* at 6 (stating that losing the financial support of the noncitizen parent would reduce the amount of financial support available for United-States-born children by a total of $118 billion).

national implications. Between 2000 and 2009, noncitizens' total contribution to the national economy was $718 billion, roughly $71.8 billion per year.[172] Furthermore, mass deportation would imperil a significant portion of the 1.2 million mortgages in the United States that are held by households with undocumented noncitizens.[173] Additionally, deportation in large numbers—like those seen under the Trump Administration—could potentially lead to a reduction in total gross domestic product by 1.4%, which is the equivalent of $236 billion.[174]

Applying the categorical approach also means more work for the courts. While it makes sense to apply this approach when deportation proceedings shortly follow a conviction, it does not work when the conviction is dated. The number of deportation cases has increased over the past few years, especially during the Trump Administration and the COVID-19 pandemic. As of the end of January 2020, immigration courts had a backlog of cases just shy of 1.1 million, which is almost double the backlog of the past three years.[175] During the 2021 fiscal year, that number increased.[176] It is an understatement to say that the immigration courts are overwhelmed. With a backlog of this magnitude, and an immigration system that is not suited to handle this many cases, it is almost impossible for judges to address each case appropriately.[177]

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172. Alvaro Lima, *Contributions of Immigrant Labor to the American Economy*, BOS. REDEVELOP. AUTH., http://www.bostonplans.org/getattachment/7d1d6048-3c6d-49bb-9384-8714710023f8; *see also New Data Shows Immigrants Contributed $920 Million to Longview's GDP in 2017*, NEW AM. ECON. (May 12, 2020), https://www.newamericaneconomy.org/press-release/new-data-shows-immigrants-contributed-920-million-to-longviews-gdp-in-2017/ (focusing on a study by the New American Economy in partnership with the Longview Chamber of Commerce which shows that in 2017 in Longview, Texas, immigrants contributed $920 million to the GDP of the city, of which $46.9 million was federal taxes and $29 million was state and local taxes).

173. Warren & Kerwin, *supra* note 163, at 6 (stating that about 23% of the 5.3 million households that have undocumented residents have mortgages and removing the income earners would exacerbate rates of foreclosure among Latinos); *see also* Jacob S. Rugh & Matthew Hall, *Deporting the American Dream: Immigration Enforcement & Latino Foreclosures*, 3 SOCIO. SCI. 1053, 1066 (2016) (suggesting that the surge in Latino deportations in the mid-2000s exacerbated the rates of foreclosures among Latino homeowners).

174. *See* RYAN EDWARDS & FRANCESC ORTEGA, THE ECONOMIC IMPACTS OF REMOVING UNAUTHORIZED IMMIGRANT WORKERS: AN INDUSTRY- AND STATE-LEVEL ANALYSIS 11 (2016), https://www.americanprogress.org/article/the-economic-impacts-of-removing-unauthorized-immigrant-workers/ (referring to "$236 billion in 2013 dollars").

175. *Hearing on "The State of Judicial Independence and Due Process in U.S. Immigration Courts" Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges); *see also Backlog of Pending Cases in Immigration Courts as of February 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php [http://web.archive.org/web/20210413003219/https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php] (showing that the number of cases pending in 2020 was 1,262,765 and increased to 1,299,239 in the 2021 fiscal year). Additionally, losses from a mass deportation policy grow over time. EDWARDS & ORTEGA, *supra* note 174, at 16.

176. *See* TRAC IMMIGR., *supra* note 175.

177. *See* Tabaddor, *supra* note 175 (emphasizing that an immigration court system located within a law enforcement agency "frustrates the ability to properly address the backlog or the appropriated funds").

Additionally, the average time pending cases wait in immigration courts has slowly increased over the years.[178] The average waiting time in 1998 was approximately 324 days, and until 2011 the average waiting time remained under 500 days.[179] Over the next ten years, that number has increased dramatically, with 2021 having the longest waiting period of 811 days.[180] Because of the COVID-19 pandemic, these numbers have continued to increase or at least remain at the current rate.[181] Adding cases where immigration authorities did not timely commence deportation proceedings only increases the burden on the immigration court system. Further, when courts are focused on fact-intensive questioning of the conviction, it defies the purpose of the categorical approach, taking more of the court's time and contributing to the delays.[182]

IV. SOLUTIONS: ESTABLISHING A STATUTE OF LIMITATIONS

Currently, a crime-based deportation approach authorized under the INA and facilitated by the categorical approach has not proven to be timely. When dealing with divisible statutes, courts have difficulty determining whether a fact is an element or a means of committing a crime. Thus, courts can incidentally fail to properly identify a divisible statute.[183] An untimely application of the categorical approach unjustly expands the opportunity to deport. Not only does late deportation cause hardship to the individual, but also to the family who relies on the noncitizen. Late deportation also contributes to the backlog of the immigration courts, causing a negative effect on our legal system.

While the use of the categorical approach allows immigration authorities to comply with the INA and other immigration statutes, its use is not appropriate when initiating deportation proceedings years later. When applied immediately after a conviction, it should also be applied regardless of which party has the

178. *See Average Time Pending Cases Have Been Waiting in Immigration Courts as of March* 2022, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

179. *Id.*

180. *Id.* (demonstrating that in 2020, pending cases were in waiting for an average of 811 days while in 2021, that number increased to 934 average days).

181. *See Immigration Court Completions Remain at Historic Lows Through July 2020*, TRAC IMMIGR. (Aug. 20, 2020), https://trac.syr.edu/immigration/reports/620/ (stating that "[f]or the Court's current active backlog of 1,233,307 immigrants waiting for their cases to be heard, canceled hearings due to COVID-19 are increasing hearing delays for months and often years to come[,]" and providing a visual that shows that in July 2020, only 5,960 cases were completed compared to January 2020, when 42,045 cases were completed).

182. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 775 (2021) (Breyer, J., dissenting) (internal quotation marks omitted) (pointing out that this decision "will result in precisely the practical difficulties and potential unfairness that Congress intended to avoid by adopting a categorical approach," especially when asking "immigration judges in each case to determine the circumstances underlying a state conviction," as that would "burden a system in which large numbers of cases [are resolved by] immigration judges and front line immigration officers, often years after the convictions").

183. *See id.* at 776 ("It sometimes can be challenging to determine whether a fact is an element or a means (and so whether a statute is divisible or not).").

burden of proof, and the exact subsection a noncitizen was convicted of should not be construed as a question of fact to avoid the issues raised in *Pereida.* However, cases in which the government waited too long before initiating deportation proceedings should be low priority and no longer part of courts' dockets. Deportation needs to be limited by a statute of limitations to avoid the hardships caused by long gaps between conviction and deportation and to encourage timely application of the law.

A. STATUTES OF LIMITATIONS ARE A NORMAL PART OF OUR LEGAL SYSTEM

Statutes of limitations bar claims after a specified period of time.[184] The purpose of a statute of limitations is to require diligent application of the law, to provide finality and predictability, and ensure that claims are brought while evidence is available.[185] All states have criminal and civil statutes of limitations. For example, in California, the statute of limitations for bringing criminal charges against an individual ranges from one year for misdemeanors to six years for felony offenses.[186] Only major capital crimes in California can be prosecuted at any time.[187] For civil suits, individuals must bring a personal injury, wrongful death, assault, or battery claim within two years.[188]

At the federal level, the United States also has statutes of limitations for criminal and civil matters. Most federal crimes have a statute of limitations of five years, while other more severe crimes such as those in violation of Title

184. *See Statute of Limitations*, BLACK'S LAW DICTIONARY 1707 (11th ed. 2019) ("A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued"; "[a] statute establishing a time limit for prosecuting a crime, based on the date when the offense occurred.").

185. *Id.* ("The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."); *see also* Owens v. Okure, 448 U.S. 235, 240 (1989) (stating that predictability is the primary goal of statutes of limitations); United States v. Marion, 404 U.S. 307, 322 (1971) (explaining that in criminal settings, "statutes [of limitations] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced"); Toussie v. United States, 397 U.S. 112, 114–15 (1970) ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts . . . Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."); United States v. Morgan, 922 F.2d 1495, 1500 (10th Cir. 1991) ("Criminal statutes of limitations, in particular, are to be liberally interpreted in favor of the defendant.").

186. *See, e.g.*, CAL. PENAL CODE §§ 800, 802(a) (Deering 2022).

187. For some crimes, such as offenses punishable by death or life imprisonment without parole, or for embezzlement of public money, there is no statute of limitations and an action can be commenced at any time. *See id.* § 799(a).

188. CAL. CIV. PROC. CODE § 335.1 (Deering 2022) ("Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.").

31's money laundering laws have longer statutes of limitations.[189] At the civil level, the Internal Revenue Service can bring civil penalties for violations of the federal tax laws under a ten-year statute of limitations.[190] This ten-year period limits the government's ability to collect taxes and fines within that time period; otherwise, the government's opportunity to collect is lost.[191]

Based on the Supreme Court's unanimous decision in *Gabelli v. SEC*,[192] the clock for the statute of limitations at the federal level starts ticking from the date of the wrongful conviction.[193] If the government does not act within that statute of limitations, not only is its opportunity to recover and collect lost, but also the individual who committed the crime is no longer required to pay his debt. This prevents the government from attempting to collect at an unreasonably long time after the violation. A statute of limitations in this sense is reasonable and avoids holding individuals responsible decades later. Additionally, a statute of limitations prevents tax law violators from living with the uncertainty of whether the IRS would ever come after them. Without a statute of limitations, any debt, punishment, or lawsuit can be enforced at any point in time.[194]

1. Immigration Law Is an Exception

Although statutes of limitations are familiar in our state and federal legal systems, they are no longer present in immigration law. Under the Immigration Act of 1917, noncitizens who entered the United States unlawfully were subject to deportation only if expulsion proceedings were initiated within five years of the improper entry.[195] That restriction was repealed in the 1952 amendments to the Immigration Act of 1917, and a statute of limitations has not been re-established since.[196] In fact, after the amendments, the Commission on

189. *See* 18 U.S.C.S. §§ 3282, 3295 (LexisNexis 2022) (arson has a statute of limitations of ten years); *see also* 26 U.S.C.S. § 7201 (LexisNexis 2022) (federal tax evasion has a statute of limitations of six years); *id.* § 7203 (failure to file a tax return with the IRS has a statute of limitations of six years); Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV 31, 541 (2017).

190. Kim, *supra* note 189.

191. *Id.*

192. 568 U.S. 442, 454 (2013).

193. Kim, *supra* note 189, at 541–42 (stating that the statute of limitations starts ticking at the time of the wrongful act, not at the time of discovery of the wrongful act).

194. Justice Marshall explains that "[i]n expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." Adams v. Woods, 6 U.S. 336, 342 (1805).

195. THE PRES.'S COMM'N ON IMMIGR. & NATURALIZ., *supra* note 153, at 197.

196. *Id*. at 197–98 ("An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation. That Act threatens the security of many aliens and their families.").

Immigration and Naturalization unsuccessfully recommended that the 1952 amendments should include a similar such provision barring deportation proceedings that commenced more than ten years after a violation.[197] Deportation as a civil procedure is not restrained by a statute of limitations,[198] despite the fact that other civil procedures do have statutes of limitations.

The purpose of providing finality and encouraging early application of the law should also apply to immigration law. When a crime can come back years later to haunt noncitizens through deportation, noncitizens are not allowed closure, and when immigration authorities do not act timely, the goals of providing finality and predictability are absent. Further, after a long gap between conviction and deportation, the case goes stale and important evidence becomes unavailable or destroyed by local court systems.[199] The absence of a statute of limitations does not facilitate the prompt commencement of deportation proceedings and only provides a disincentive for immigration authorities to act immediately.[200] Thus, a statute of limitations on deportation can help address some of the major issues resulting from the late application of the categorical approach for deportation purposes and align immigration law with other areas of the law.

B. BENEFITS OF SETTING A STATUTE OF LIMITATIONS

Building a statute of limitations into deportation proceedings protects the individual from uncertainty and further punishment.[201] Limiting when a noncitizen is deported is similar to limiting when the government can collect

197. *Id*. at 198 (specifically recommending that the ten-year statute of limitations available in the 1917 Act be reestablished under the 1952 Act).

198. Costa v. INS, 233 F.3d 31, 38 (1st Cir. 2000) ("There is no set time either for initiating a deportation proceeding . . . [T]he INS has virtually unfettered discretion in such respects."); Biggs v. INS, 55 F.3d 1398, 1401 (9th Cir. 1995) ("Deportation in fact has no statute of limitations."); S----, 9 I&N 548, 553 (1962) ("Consequently, an alien who upon entry acquires the status of an alien lawfully admitted for permanent residence is nevertheless subject to deportation at any future time . . . .").

199. For example, in the California court system, misdemeanor records are destroyed as soon as two years or as late as seventy-five years, depending on the charge. *See* CAL. GOV'T CODE § 68152 (c)(5)–(9) (Deering 2022). This is an issue, because if a person needs to prove that the conviction was not for a deportable offense—the INA lists misdemeanors as "aggravated felonies" that trigger deportation—when dealing with a divisible statute, this information would not be available, further complicating the determination of whether or not the person can be deported due to a conviction.

200. *See* Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 211 (2008) (explaining that there are several policy reasons for setting a statute of limitations in general. "First, they facilitate the prompt filing of claims. The rationale is that those with valid claims will not hesitate to assert them."). Although Redman is speaking in the setting of Nazi-looted art, the policy reasons for statutes of limitations apply in deportation cases as well as in other areas of the law. *See* Warren & Kerwin, *supra* note 163, at 7.

201. THE PRES.'S COMM'N ON IMMIGR. & NATURALIZ., *supra* note 153, at 198 ("That [1952] Act threatens the security of many aliens and their families. Their immunities have been removed, and they may be torn out of their accustomed places in the communities in which they live, no matter how exemplary their conduct over a long period of years.").

from a tax-law violator. If the government does not act within that statute of limitations, it should lose its opportunity to deport, and the noncitizen who committed a crime years ago should get closure.[202]

A statute of limitations would also reduce the burden on the courts. Currently, the number of unresolved deportation cases is at more than one million and continues to increase.[203] While it is unlikely that immigration cases will halt, the courts do not need to be overwhelmed by old cases where the gap between a conviction and deportation is too long. A statute of limitations would allow many old cases to be completely removed from a court's docket, allowing courts to focus on more recent cases. This will ensure the resolution of cases and prevent noncitizens who have built lives in the United States to later be uprooted. Finally, applying the categorical approach to recent cases where a noncitizen applies for discretionary relief will allow courts to spend less time dealing with "factual questions," as was the case in *Pereida*, when courts and noncitizens are likely to still have access to their case information and documents.

C. ESTABLISHING A STATUTE OF LIMITATIONS

The federal government might argue that creating a statute of limitations under the INA would be difficult because of the different types of crimes listed as "aggravated felonies," and the different sentences imposed for each type of crime. However, the government can rely on states' statutes of limitations, as well at its own statute of limitations, for guidance to determine an average.

1. Using State Statutes of Limitations as Guidance

While looking at each state's statute of limitations to file criminal charges might provide guidance, it can be problematic. If the average statute of limitations for a CIMT was four years across all fifty states, the federal government could simply limit its power to deport because of a CIMT conviction to four years. It would be unreasonable for the federal government to establish a statute of limitations that allows deportation for CIMTs twenty years after the conviction if a state itself is not willing to prosecute a conviction after, for example, four years. Further, the statutes of limitations for prosecuting crimes vary among states. For example, for most serious felony sex crimes, a total of

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

203. *See supra* notes 178–81 and accompanying text (providing data on the number of unresolved cases in immigration courts and the more than 500-day waiting time for open cases before they are resolved); *see also Immigration Court Completions Remain at Historic Lows Through July 2020*, TRAC IMMIGR. (Aug. 20, 2020), https://trac.syr.edu/immigration/reports/620/ (stating that "the Court's current active backlog" of cases pending a hearing have had hearings canceled due to COVID-19 and the number of cases continues to increase).

twenty-nine states have a statute of limitations of more than twenty-one years.[204] Another eight states and the District of Columbia have a statute of limitations between eleven and twenty years for the same crimes,[205] and thirteen states have a statute of limitations of less than ten years.[206] It would be complicated to rely on each state's statute of limitations alone, as some individuals could avoid deportation in one state, but not in others with longer statutes. Like with reliance on criminal convictions for the categorical approach, this would only contribute to the arbitrary deportation of noncitizens.

Nevertheless, the reliance on state convictions as a ground for deportation is undeniable. To avoid contributing to the lack of uniformity,[207] the federal government could take the average statute of limitations for one type or category of crime across all fifty states. While taking an average might result in a federal statute of limitations that is longer than that of some states, it will establish a clear limitation on deportation. This way, the use of the state criminal statute for deportation purposes can go hand-in-hand with the application of a deportation restriction. For example, if the statute of limitations for deportation based on burglary convictions is five years, the government will only have five years after a conviction to initiate deportation proceedings. Additionally, since immigration authorities already rely on state convictions,[208] the first step before the categorical approach is to look at the average statute of limitations established and determine whether the case is stale. This can additionally serve as a check on the government, preventing it from creating unreasonably long statutes of limitations that do not match with a state's willingness to prosecute. Thus, if the government seeks to use states' statutes of limitations as guidance, it should look at calculating an average for each category of crime and establishing one single statute for each category. The statute of limitations should begin to run as soon as a noncitizen is convicted.

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204. The following states have a statute of limitations of more than twenty-one years: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *See State by State Guide on Statutes of Limitations*, RAINN, https://www.rainn.org/state-state-guide-statutes-limitations (last visited July 31, 2022) (providing the statute of limitations for most serious sex offenses per state).

205. *Id.* The following states have a statute of limitations of eleven to twenty years: Colorado, D.C., Georgia, Massachusetts, Ohio, Oklahoma, Oregon, Pennsylvania, and Tennessee. *Id.*

206. *Id.* The following states have a statute of limitations of ten years or less: Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Texas, and Washington. *Id.*

207. By lack of uniformity, I refer to the fact that many convictions under the INA can lead to deportation simply because of the length of the sentence imposed. For instance, a misdemeanor that qualifies as a deportable offense under the INA due to a one-year sentence might lead to deportation in some states, but not in others, such as California, because California might have a 264-day sentence for that misdemeanor as opposed to a one-year sentence.

208. *See* CONG. RSCH. SERV., *supra* note 79, at 3, 27.

2. Using Federal Statutes of Limitations as Guidance

In seeking a simpler method of establishing a statute of limitations for deportation proceedings, the government could simply mirror its own statute of limitations. First, if deportation continues to be treated as a civil proceeding, the government can align deportation with other civil proceedings by establishing a similar statute of limitations. For example, the IRS typically has three years to conduct audits for tax filings.[209] That statute of limitations increases to six years if the person substantially underestimates their income on their tax return,[210] and the IRS only has ten years to collect any pending debts.[211] If the statute of limitations has run, the debt is forgiven.

For deportation purposes, the federal government could adopt a similar scheme based on the severity of the categories of crimes. However, crimes that immigration authorities may define as "severe" may become a misnomer, similar to "aggravated felony."[212] For instance, if a misdemeanor such as shoplifting is included in a category of crimes that the government chooses to label as "severe," there is a risk that a minor criminal conviction will continue to produce harsh consequences. Perhaps, instead of leaving the structure of a statute of limitations to rely on labels, the government should create one single statute for all crimes. Such a statute would function similarly to the one for collecting tax debt. If the IRS forgives debt after not acting within ten years, it is also possible to forgive deportation proceedings, as both proceedings are considered civil proceedings and could be treated similarly. However, although a fixed statute of limitations for all crimes is practicable as it establishes a clear time for deportation, a ten-year statute of limitations like that for the IRS is not timely enough. Ten years allows noncitizens to build a life in the United States and would continue to present the same hardships as not having a statute of limitations. Thus, if it establishes a fixed statute of limitations, the government should adopt the five-year statute of limitations found in the Immigration Act of 1917 and expand it to crime-based deportation, not just unlawful entry. This way, essentially all crimes are treated the same and would also align with statutes of limitations for federal crimes.

The government might argue that establishing one statute of limitations would allow the worst criminals to remain in the United States. However, the government can then turn to its own statutes of limitations for federal crimes for

209. Robert W. Wood, *IRS Can Audit for Three Years, Six, or Forever: Here's How to Tell*, ABA (Aug. 15, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/08/06_wood/.

210. *Id*. (stating that a substantial underestimate of income is typically 25% of gross income, thus, the individual can be audited up to six years after reporting taxes).

211. *See 5.1.19 Collection Statute Expiration*, IRS (Feb. 7, 2020), https://www.irs.gov/irm/part5/irm_05-001-019.

212. *See* Hong, *supra* note 56, at 2086–87 (explaining why an "aggravated" felony is considered a misnomer in the context of the INA).

guidance. The majority of federal crimes are also governed by a general five-year statute of limitations.[213] The safety measure that the government provides when dealing with the most severe crimes, such as crimes against the government, is providing either a longer statute of limitations or none at all.[214] In adopting a similar scheme for a deportation statute of limitations, the government can limit crime-based deportation to five years for most crimes, while extending the time to deport individuals who pose a threat to national security for convictions involving terrorism or treason. If the federal government is not willing to prosecute most federal crimes after five years, it should not deport individuals for a state crime after more than five years have lapsed.

Additionally, the government should also take recidivism, or the tendency of a convicted noncitizen to reoffend into account. For example, in 2005 over 76.9% of state drug offenders released from state prison were rearrested within five years.[215] If the likelihood of reoffending is much lower after five years, the government cannot be justified in adopting a significantly longer statute of limitations. This is particularly important when the purpose of deportation is to avoid further crimes committed by noncitizens. Further, if a noncitizen does reoffend before the statute of limitations has run, the government could bypass the statute of limitations and deport an individual shortly after the statute of limitations has run. This is reasonable considering that the noncitizen has reoffended, demonstrating a likelihood to reoffend.

Even considering recidivism, there is a possibility that the government will not commence deportation proceedings until decades later. For instance, imagine that a noncitizen commits a drug-trafficking crime in 1994 and then a second one in 1998, but deportation proceedings are not initiated until 2021, twenty-three years later. At this point, again, the individual has relied on the fact that he was not immediately deported; has not committed a crime since; and, for all intents and purposes, has become an exemplary citizen. The government should again consider recidivism, but also examine the amount of time that has elapsed, along with the equities the individual has accumulated throughout the twenty-three years in which he has lived crime-free. Because twenty-three years have elapsed without the individual committing another crime, it is unlikely they will commit a third.[216] Further, equities such as time spent in the United States,

213. CHARLES DOYLE, CONG. RSCH. SERV., STATUTE OF LIMITATIONS IN FEDERAL CRIMINAL CASES: AN OVERVIEW 3 (2017).

214. *Id*. at 3–4; *see also* 18 U.S.C. § 844(f)(1) (governing the use of fire or explosives to commit a federal offense and burning or bombing of a federal property); *id.* § 3293 (governing mail and wire fraud and RICO among other offenses); *id.* § 3281 ("An indictment for any offense punishable by death may be found at any time without limitation.").

215. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL DRUG TRAFFICKING OFFENDERS 3 (2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf.

216. *See* Hong, *supra* note 56, at 2120 (providing data on recidivism for drug-trafficking offenses).

family and community ties, education, permanent employment, and compliance with tax laws could all indicate that the individual is completely rehabilitated, integrated into society, and should no longer be deported.

It is important that the government set a reasonable statute of limitations. Setting a statute of limitations of more than ten years would effectively be the same as not having a statute of limitations at all. Therefore, reinstituting the five-year statute of limitations of the Immigration Act of 1917 is a reasonable starting point. Alternatively, the government should follow the average statute of limitations for each category of crimes listed in the INA. Finally, the clock should start ticking immediately after the noncitizen is convicted.

CONCLUSION

States are unlikely to change their statutes to create uniformity for immigration purposes, and the government is unlikely to abandon the categorical approach. Therefore, a statute of limitations is necessary to avoid the harsh reality of late deportation proceedings. The INA has been amended multiple times, with new categories included and without a clear definition for the category of crimes enumerated.[217] This creates confusion, misnomers, and detrimental reliance by noncitizens when terms such as "aggravated felonies" do not match the common understanding of the term or are not in fact "aggravated" or even felonies.[218]

The categorical approach is difficult to apply consistently and clearly in cases involving divisible statutes, creating enforcement problems and disparities in who is to be deported. This application should therefore be limited to cases in which deportation proceedings are timely and initiated shortly after a conviction. Establishing a statute of limitations would allow individuals who were not timely deported to live in peace without the constant fear of deportation looming over their families. It will provide closure and stability. It could also reduce burdens on the courts by removing many cases from courts' dockets. Additionally, a statute of limitations would prevent retroactive laws from creating an unintended effect. If a statute of limitations is set, the government must only consider how much time has elapsed since the time of the conviction and when deportation proceedings are initiated before deciding whether the categorial approach should be applied.

This solution would render the categorical approach unavailable in many deportation determinations. This would reduce courts' caseloads, as the determination of whether the statute of limitations has elapsed can be easily

217. *See supra* notes 80–81 and accompanying text (describing the lack of definitions or CIMT and aggravated felonies).

218. *See* Hong, *supra* note 56, at 2086–87 (explaining why an "aggravated" felony is considered a misnomer in the context of the INA).

determined administratively once the statutes of limitations are established. Additionally, it would reduce the number of individuals in deportation facilities. In 2016, the average cost of deportation including apprehension, detention and processing was $10,854 per deportee.[219] In contrast, the lifetime contributions of a noncitizen are estimated to be $65,292.[220] Thus, limiting the use of the categorical approach through a statute of limitations would reduce the burdens imposed on the country by late deportation and allow noncitizens to continue their contribution to the United States economy.

219. STEVEN A. CAMAROTA, DEPORTATION VS. THE COSTS OF LETTING ILLEGAL IMMIGRANTS STAY 1 (2017), https://cis.org/Report/Deportation-vs-Cost-Letting-Illegal-Immigrants-Stay ("In April of [2017], ICE reported that the average cost of a deportation, also referred to as a removal, was $10,854 in FY 2016, including apprehension, detention, and processing.").

220. The 2016 NAS study "projected the lifetime fiscal impact (taxes paid minus services used) of immigrants by education." *Id.* at 4. "Costs or benefits in the future are discounted or reduced based on how long from now they occur." *Id.* The study found the following:

> [T]he fiscal balance (whether a net drain or benefit) an immigrant creates two years after arrival is reduced by about 6 percent. After 10 years, the amount is reduced by about 26 percent and at 20 years the discount is 45 percent. This means events that occur further in the future have a smaller impact on the total cost or benefit. Comparing the net present value fiscal costs illegal immigrants create to the costs of removal can be seen as reasonable because a removal has to be paid for up front while the fiscal drain accrues over time. By using a NPV it makes the costs of removal comparable to the lifetime costs illegal immigrants create.

Id. at 6.