RELIEF AND STATUTES OF LIMITATION FOR DEPORTABLE NONCITIZENS UNDER ASIAN EXCLUSION, 1882-1948

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Reading *Deported Americans* is like watching a horror movie; it is all too easy to anticipate the terror coming. But it is no fantasy; this nightmare is real life. The book is the story of good people, many with close connections to the United States, deported without mercy or individual consideration. Sometimes, although not always, they are deported for trivial misdeeds which might well have been fixable had some legal assistance or fair process been available. Conviction of an offense meeting the absurdly expansive statutory definition of "aggravated felony"—the crime need be neither aggravated nor a felony [1]—renders a noncitizen categorically ineligible for most forms of relief.[2] Accordingly, families are torn apart, careers ruined, children crushed, sometimes in ways not foreseen by the drafters of the laws, and often for no tangible benefit to the United States except the grim satisfaction of seeing laws enforced without reflection or judgment. Like virtue, torture, it appears, is its own reward.

From the perspective of the affected individuals, the stories are reminiscent of literary depictions of people who experienced sudden, dramatic, and unexpected changes in status, such as law dean and university

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1. DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 7:23 (2020) ("The scope of the statute is now so broad that conduct which might not sound 'aggravated' to a criminal defense practitioner will nevertheless incur harsh consequences under the immigration laws. A state misdemeanor conviction of simple assault or petty theft, in which the court imposes a one-year suspended jail sentence and places the noncitizen defendant on probation constitutes an 'aggravated felony' under this definition. Several courts have held or suggested that the classification of an offense as a misdemeanor under state law does not automatically exclude it from the category of an 'aggravated felony.'").

2. *See* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 2:56 (2018) ("A conviction for an 'aggravated felony' leads to some of the most harsh, swift, and summary immigration consequences.").

president Gregory H. Williams, who in his book *Life on the Color Line*[3] describes being a phenotypical White person who discovered when he was twelve years old that he was, in Jim Crow Indiana, considered Black. Mark Twain's *The Tragedy of Pudd'nhead Wilson*[4] is a switched-at-birth tragicomedy of nearly identical infants, one of whom has a proverbial drop of Black blood.

As a matter of history, the book is also a grim reminder of fear of sudden, forcible displacement that people of color in the United States have often had to live with. Free African Americans were vulnerable under the pre-Thirteenth Amendment fugitive slave law[5] and thereafter under a corrupt Jim Crow criminal justice system.[6] Under Chinese Exclusion and later Asian Exclusion laws, from 1882 to 1952, Asian race standing alone constituted probable cause for arrest and deportation,[7] including Asians who claimed to be U.S. citizens.[8] In the 1930s and the 1950s, Mexican Americans, citizens, lawful residents, and unauthorized migrants were deported from the United States, some through legitimate legal process, and many not.[9] In the modern era, the Supreme Court has held that under the Fourth Amendment, "[t]he likelihood that any given person of Mexican ancestry is an alien is high

3. GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1996).

4. MARK TWAIN, THE TRAGEDY OF PUDD'NHEAD WILSON (1894), https://www.gutenberg.org/files/102/102-h/102-h.htm.

5. *See* Paul Finkelman, *Human Liberty, Property in Human Beings, and the Pennsylvania Supreme Court*, 53 DUQ. L. REV. 453, 477-78 (2015) ("[T]he states had no power to interfere in the return of fugitive slaves, even to prevent the kidnapping of their own citizens."); Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1029 (1997) ("[T]he fact that blacks were unable to defend themselves at summary fugitive slave hearings by testifying or entering evidence in their behalf gave rise to the practice of kidnapping blacks and selling them into slavery.").

6. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

7. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) ("Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation."); Wong Chun v. United States, 170 F. 182, 184 (9th Cir. 1909) ("Section 3 of the act of May 5, 1892, 27 Stat. 25, provides as follows: 'That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.'").

8. Morrison v. California, 291 U.S. 82, 89 (1934) ("A Chinaman by race resisted deportation on the ground that, though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities." (citing Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902))).

9. Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019) (discussing "Mexican Repatriation" and "Operation Wetback").

enough to make Mexican appearance a relevant factor" in making a forcible stop to investigate immigration status.[10] In addition, in the twenty-first century, U.S. citizens, mostly and apparently non-White, are regularly detained and sometimes deported through casual and biased procedures.[11]

While, say, White Latter Day Saints, pacifists, and Communists sometimes had to fear detention or worse, so too did Latter Day Saints, pacifists, and Communists of color. I am unaware of any example of a law or legal practice under which White race, standing alone, constituted grounds for arrest or expulsion. A common feature of these policies is that they result from choices a majority White government inflicted on others, knowing that they would not be applied to White people.[12] While in a technical sense, White immigrants are subject to the immigration laws, the risk of deportation itself,[13] like the risk of arbitrary arrest and exile of U.S. citizens, is associated with non-Whiteness.[14]

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10. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

11. *See, e.g.*, Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2017 (2013) ("Yet race remains profoundly present in the adjudication of contemporary citizenship claims. The vast majority of recent cases that have come to light regarding deportations of citizens have involved individuals deported to Latin America and the Caribbean, and in particular to Mexico."); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 682 (2011) (noting "the presumption of U.S. citizenship on the part of those born abroad to U.S.-born parents who seem White, and the presumption of foreign citizenship for similarly situated children of U.S. parents who are racialized as non-White"); *see also* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 777 (2015) ("ICE issued 834 detainers against U.S. citizens between FY 2008 and FY 2012, which led to U.S. citizens being held in custody for longer than they would have otherwise because ICE erroneously believed they had violated immigration laws."); David J. Bier, *U.S. Citizens Targeted by ICE*, CATO INST.: IMMIGR. RSCH. & POL'Y BRIEF (Aug. 29, 2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf; ACLU FLA., CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY 2 (2019), https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf; LAURA BINGHAM, OPEN SOC'Y JUST. INITIATIVE, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES (2019), https://www.justiceinitiative.org/publications/unmaking-americans. For reports from the Northwestern Deportation Research Clinic, see *US Citizens Detained and Deported*, BUFFETT INST. FOR GLOBAL AFFAIRS, https://deportation-research.buffett.northwestern.edu/us-citizens/index.html (last visited Feb. 5, 2021).

12. *See* Juan F. Perea, *Immigration Policy as a Defense of White Nationhood*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSPS. 1, 4-5 (2020).

13. Fourteen nations had more than 500 of their citizens deported from the United States in 2018. They constituted 250,363 of the 261,523 people removed from the United States in 2018. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, IMMIGRATION ENFORCEMENT: ARRESTS, DETENTIONS, AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS 110-15 (2019). They were, in descending order: Mexico, Guatemala, Honduras, El Salvador, the Dominican Republic, Brazil, Ecuador, Colombia, Nicaragua, India, Jamaica, Haiti, China, and Peru. *Id.*

14. Other scholars, of course, have noted the race-based nature of deportation under U.S. immigration law. *See, e.g.*, Juan F. Perea, On the Management of Non-Whites: Deportation and

The book makes the reader cry out for a solution: Why is there not some relief available for deserving noncitizens? Why is there not a statute of limitations on deportation? Congress could decide that it is unduly harsh to deport people brought here below a certain age who have lived here for a set period, or those who have lived here for a particular period of time or percentage of their lives.[15] After all, the law does not banish U.S. citizens no matter how egregious their offenses may be. Commentators have proposed limitations periods.[16] At various times, federal immigration law has provided for periods of limitation.[17]

Exclusion as Techniques of White Supremacy (Feb. 25, 2020) (unpublished manuscript), https://ssrn.com/abstract=3544349; Margaret D. Stock, *American Birthright Citizenship Rules and the Exclusion of "Outsiders" from the Political Community*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 179 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2016).

15. A statute could provide:

> The following classes of noncitizens shall not be subject to removal:
>
> (1) A person who arrived in the United States before age 18 and has lived in the United States for four or more years
>
> (2) A person who has lived in the United States for 12 or more years.

Even such a statute might not be a perfect solution, because wherever the line is drawn, there will likely be compelling cases falling just short of the safe harbor.

16. One commentator Will Maslow argued:

> The same considerations that forbid deportation after five years in the six situations described above should be extended to the remaining twelve. The alien who has passed rigorous financial, physical, mental, moral, and security tests in obtaining a visa, and who has entered the country without fraud and after inspection should be entitled to live permanently and securely in the United States. It is therefore recommended that no post-entry offense or condition should be a ground for deportation unless committed within five years of the alien's entry.
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> An alien who obtains entry by fraud or who steals across a border, thus evading inspection, is in a different category. A five year statute of limitations would place a premium on his ability to conceal himself during this period. In a sense, he would thus acquire an advantage over those who wait many years for visas in small quota countries. But even an illegal entrant is entitled to some period of limitations. The statute of limitations for such serious federal crimes as robbery, extortion, counterfeiting, forgery, or bribery is five years and the period of limitation for civil fraud actions by the federal government is six years. It is therefore proposed that the statute of limitations for fraudulent entries should be ten years and for every other deportable offense, five years.

Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 325-27 (1956) (emphasis omitted) (footnotes omitted).

17. As Professor Andrew Tae-Hyun Kim explained:

> During the first half of the twentieth century, Congress incrementally extended the limitations period by which the United States must deport a noncitizen. Under the Immigration Act of 1907, the U.S. government had three years from the date of the unlawful entry of a noncitizen to deport that person from the country . . . . The Immigration Act of 1917, in addition to expanding the categories of undesirable persons or characteristics that were deemed exclusion grounds, continued the trend of controlling undesirable post-entry conduct or characteristics either by penalizing new conduct post-entry or by serving as a check on mistakes that were made during the admission process. Its unique feature was that it authorized deportations of certain legal resident aliens who possessed certain undesirable characteristics. For example, anyone who "at the time of entry was a member of one or more of the classes excluded by law" was deportable within the first five years from the date of entry, which was meant to serve as a check on mistakes made during the admission process. Persons who were

The unfortunate answer to this question is that periods of limitation and other forms of relief have been, like the substantive immigration laws themselves, tainted by race and biased toward Whites. That is, it appears that individual, case by case consideration has been historically granted preferentially to the White race and denied to others.

The point is illustrated by a brief examination of the development of provisions for relief and limitation in U.S. immigration law at the height of Chinese and Asian Exclusion, 1882 to 1948. Congress regulated citizenship early on, providing in the Naturalization Act of 1790 that the benefits of the law were restricted to "free white persons."[18] However, there was no systematic federal regulation of immigration until 1882.[19]

Once federal immigration regulation became more vigorous, it affected immigrants of all races. However, exclusion or deportation of White immigrants was generally based on individual misconduct or disqualification, while race-based exclusion was generally categorical.[20] In addition, Congress created statutes of limitation and opportunities for relief that were often restricted by race. In the first half of the twentieth century, a clear pattern appeared. With each new immigration law, Congress tightened Asian exclusion.[21] Congress added additional grounds for exclusion or deportation of White immigrants but often with a race-restricted waiver or relief provision.[22] Thus, even for Whites who have earned deportation, there is still the opportunity for case-by-case leniency and consideration of individual circumstances.

> sentenced to a term of imprisonment of one year or more due to a conviction for a crime involving moral turpitude after entry could be deported within the first five years of entry, a penalty for post-entry conduct. While the statute of limitations for these offenses was five years from the date of the entry or from the date of the conviction for the deportable offense, for certain other post-entry conduct, the Act eliminated the limitations periods. For example, persons sentenced more than once for a crime involving moral turpitude could be deported "at any time after entry."
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> As the focus of deportation statutes became more on post-entry conduct, rather than on the correction of mistakes made at the admission stage, the statute of limitations period began to gradually increase from one year, to three years, to five. And with the passage of the Immigration and Nationality Act in 1952, which was a codification of the various immigration statutes into one form and still represents the current body of immigration law, Congress did away with time limits altogether.

Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 568-69 (2017) (footnotes omitted).

18. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103.

19. Roger Daniels, *United States Policy Towards Asian Immigrants: Contemporary Developments in Historical Perspective*, 48 INT'L J. 310 (1993).

20. *See infra* text accompanying notes 40-46.

21. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 ILL. L. REV. 1359 (2008).

22. *See id.*

In 1882, Congress passed the Chinese Exclusion Act; it would remain in force until 1943.[23] Courts were apparently unanimous that "[n]o lapse of time will bar an action for deportation under the Chinese Exclusion Act."[24] Accordingly, the law authorized deportation no matter how long an allegedly unauthorized Chinese person had been in the United States. However, the Chinese Exclusion Act required judicial procedures before deportation could be ordered.[25]

Recognizing the harshness of deporting long-time U.S. residents, the Immigration Act of 1907 created a statute of limitations for deportation of noncitizens who had been excludable at the time of entry. The Act allowed administrative deportation of immigrants but only if proceedings were initiated "within the period of three years after landing or entry therein."[26] The 1907 law also enhanced racial restriction in addition to its other restrictive features; it operationalized the Gentlemen's Agreement excluding Japanese laborers by prohibiting immigration to the United States of Japanese people with passports issued for travel to other countries.[27]

The 1907 Act did not extend the protection of a statute of limitation to Chinese people. The Supreme Court held that after 1907, with respect to Chinese alleged to have entered unlawfully, the government could elect to proceed at any time under the judicial procedures of the Chinese Exclusion Act, or within three years after entry under summary executive procedures generally applicable to non-citizens.[28]

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23. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

24. Mar Yen Wing v. United States, 72 F.2d 158, 159 (9th Cir. 1934) (quoting Ah Lin v. United States, 20 F.2d 107, 109 (1st Cir. 1927)).

25. Ng Fung Ho v. White, 259 U.S. 276, 279 (1922) ("Deportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings; that is, upon a warrant issued by a justice, judge, or commissioner of a United States court upon a complaint and returnable before such court, or a justice, judge, or commissioner thereof. From an order of deportation entered by a commissioner an appeal is provided to the District Court, and from there to the Circuit Court of Appeals." (citing *In re* United States, 194 U.S. 194 (1904))); United States v. Woo Jan, 245 U.S. 552, 557-58 (1918).

26. Immigration Act of 1907, ch. 1134, § 21, 34 Stat. 898, 905.

27. *See id.* § 1, 34 Stat. at 898. ("[W]henever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States . . . ."); *see generally* Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409 (2014).

28. Wong Chung v. United States, 244 F. 410, 411 (9th Cir. 1917) ("[I]t is well established that the government may proceed under either the special Chinese Exclusion Acts or the General Immigration Act within three years from the wrongful entry of the Chinese person, or under the

The Immigration Act of 1917 extended the time limit for summary deportation of inadmissible noncitizens to "five years after entry."[29] The 1917 Act is recognized as a landmark, dramatically expanding grounds for deportation of otherwise lawful residents. As Daniel Kanstroom explained:

> The essential pieces of the modern regime of deportation for post-entry criminal conduct were contained in the 1917 Immigration Act. Unlike any prior law, the 1917 act included a list of otherwise legal resident aliens who were to be "taken into custody and deported." It also radically changed prior law by requiring deportation after entry for a wide variety of reasons and in permitting deportation without time limitation for certain types of cases.[30]

The Chinese Exclusion Act applied to Chinese people; the Gentlemen's Agreement to Japanese immigrants. The 1917 Act also added the first systematic Asian Exclusion provision to U.S. law. It deemed inadmissible natives of all of continental Asia[31] and carried forward the Gentlemen's Agreement excluding Japanese migrants.[32] Nevertheless, Asians other than Chinese whose race made their entry into the United States unlawful could claim protection of the five-year statute of limitation.[33]

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special Exclusion Acts alone, if more than three years have elapsed since the entry." (citing United States v. Wong You, 223 U.S. 67, 69-70 (1912))); Moy Wing Sun v. Prentis, 234 F. 24, 28 (7th Cir. 1916) ("Sections 20 and 21 of the Immigration Act provide for deportation only where the entry was within three years of the arrest, and concluding as we do that this record affords no basis for finding that this petitioner entered the United States within three years before his arrest, his deportation under the Immigration Act is unauthorized."); United States *ex rel.* Ng. Sam v. Redfern, 210 F. 548, 550 (E.D. La. 1914) ("Under ordinary circumstances, where the record shows clearly an alien is unlawfully in the country, but the warrant of deportation is defective, the Department of Labor should doubtless be afforded an opportunity of correcting its mistake, but in this case there would seem to be no good reason for so doing as the men can be rearrested under the provisions of the Chinese exclusion laws. And in that event they will have an opportunity of a trial in court, where they may be represented by counsel in fact as well as in theory, and will have compulsory process to obtain witnesses in their own behalf.").

29. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

30. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 133 (2007) (footnotes omitted).

31. § 3, 39 Stat. at 876.

32. *See id.* § 3, 39 Stat. at 878.

33. Weedin v. Okada, 2 F.2d 321, 322 (9th Cir. 1924) ("[W]e are of opinion that the appellee did not enter the United States unlawfully within five years prior to the attempted deportation . . . ."); *Ex parte* Bunji Une, 41 F.2d 239, 239 (S.D. Cal. 1930) ("The grounds upon which the petition is based may be reduced to two: First, that the evidence shows conclusively that petitioner entered the United States prior to July 1, 1924, and, five years having elapsed before the warrant was issued, he is not subject to deportation; and, second, that he was not accorded a full and fair hearing."). In many other cases, courts alluded to the limitation period, but found the proceeding timely. *See* Ng Fung Ho v. White, 259 U.S. 276, 278 (1922) ("Each petitioner had entered the United States before May 1, 1917, the effective date of the General Immigration Act of February 5, 1917, and within five years of the commencement of the deportation proceedings."); *Ex parte* Masamichi Ikeda, 68 F.2d 276, 277 (9th Cir. 1933) ("If appellant did in fact enter the

Notably, the 1917 law also created the "judicial recommendation against deportation" (JRAD) which allowed a noncitizen convicted of a crime in the United States to avoid deportation.[34] Thus, the expanded grounds for deportation in the 1917 Act were partially matched with a method of avoiding it.[35] The JRAD appears to have been racially unrestricted.[36]

The 1917 law contained another waiver provision for residents returning from an overseas trip: "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe."[37] This was the so-called "Seventh Proviso," based on its position in the Act; it was later incorporated as Section 212(c) of the Immigration and Nationality Act of 1952.[38] The Seventh Proviso operated to grant relief to people who could not be deported, because, say, the statute of limitations had run, but had subjected themselves to another test of their right to be in the U.S. by leaving and trying to return. The Seventh Proviso, at first, did not appear to be racially restricted.

The Immigration Act of 1924[39] may well be the most racist, bigoted, anti-Semitic, and anti-Catholic statute in U.S. history. It created the national origins quota system, discriminating against Southern and Eastern

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United States on April 15, 1923, as he alleges, it is conceded that he would not be subject to deportation because of the expiration of the five-year limitation fixed in the Immigration Act of 1917 for such action." (citation omitted)); Woo Shing v. United States, 282 F. 498, 499 (6th Cir. 1922) ("Each of the appellants (all of whom are Chinese persons) entered or re-entered the United States previous to the effective date of the Immigration Act of 1917. In each case the deportation proceedings were begun within five years after such entry or re-entry."); Akira Ono v. United States, 267 F. 359, 363 (9th Cir. 1920) ("Belonging, as the appellant clearly did, to a class, to wit, that of unskilled laborers, denied the right of entry into the United States by virtue of the Act of February 20, 1907, and the presidential proclamations promulgated under and pursuant thereto that have been set out, he was by the express provision of section 19 of the Act of February 5, 1917 (39 Stat. 874, 889 (Comp.St.Ann.Supp. 1919, Sec. 4289 1/4jj)), subject to deportation at any time within five years from the time of his entry.").

34. § 19, 39 Stat. at 890 ("[N]or shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act . . . .").

35. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

36. *Cf.* Wong Yow v. Weedin, 33 F.2d 377, 379 (9th Cir. 1929) (suggesting JRAD would have been available had noncitizen been convicted in the United States).

37. § 3, 39 Stat. at 878; Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, IMMIGR. BRIEFINGS, Feb. 2014 at 1, 14-02 Immigr. Briefings 1 (Westlaw).

38. Francis v. INS, 532 F.2d 268, 270-71 (2d Cir. 1976). Section 212(c) was repealed in 1996, but not retroactively. INS v. St. Cyr, 533 U.S. 289 (2001).

39. Immigration Act of 1924, ch. 190, 43 Stat. 153.

Europeans.[40] The 1924 Act also perfected the Asian Exclusion laws by excluding all noncitizens who were racially "ineligible to citizenship."[41] Because Asians could not naturalize under the 1790 law as amended, they were, with few exceptions, excluded as immigrants.[42] The Act eliminated the five-year limitations period for deportation of people who were not entitled to enter.[43] Accordingly, the five-year statute of limitation for Asians other than Chinese was unavailable to those arriving after the 1924 law came into force.[44]

However, in 1929 Congress created the remedy of "registry" for residents unable to prove lawful entry but who had arrived in the United States before June 3, 1921.[45] Congress racially restricted registry when they created it in 1929, making it available to "any alien not ineligible to citizenship."[46]

The 1924 Act did not explicitly repeal or amend the Seventh Proviso of the 1917 Act. However, immigration authorities concluded that the 1924 Act

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40. George Shepherd, *When Should A Person's Name Be Removed from A Monument? A Proposed Standard and Its Application to the Yerkes National Primate Research Center,* 51 U. TOL. L. REV. 249, 270-75 (2020) (proposing removal of the name of Robert Yerkes, a eugenicist, from a university building, arguing "[h]e was instrumental in gaining the passage of the restrictive Immigration Act of 1924, which led to the deaths of hundreds of thousands of innocent people in Nazi death camps").

41. § 13(c), 43 Stat. at 162.

42. *See id.*

43. Philippides v. Day, 283 U.S. 48, 49-50 (1931) ("Section 34 of the act of 1917 provides that 'any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, . . . be taken into custody' and upon the conditions there stated shall be deported. It may be assumed that under this statute the time within which a seaman can be arrested for deportation is limited to three years from the date of entry. But by the Immigration Act of May 26, 1924, 'Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act, or regulations made thereunder,' is to be deported in the same manner as provided for in §§ 19, 20, of the Immigration Act of 1917 . . . . It is obvious that the petitioner, whether he entered rightfully or wrongfully, remained in the United States longer than he was permitted to by the law. He deserted after the act of 1924 was in effect." (citations omitted))

44. *See Ex parte* Yoshinobu Magami, 47 F.2d 946, 947 (S.D. Cal. 1931) ("Petitioner is a Japanese person and a subject of Japan. He entered the United States on August 10, 1924, unlawfully, and has since remained in the country. He was arrested by the immigration officers about July 29, 1930, under the charge that he was an alien, ineligible to citizenship, not exempt, and that his presence in the United States was in violation of the Immigration Act of 1924. After hearing had, a warrant of deportation was duly issued." (citation omitted))

45. Registry Act of 1929, ch. 536, §§ 1-3, 45 Stat. 1512, 1512-13.

46. *Id.* § 1(a), 45 Stat. 1512-13; *see also* Act of June 7, 1934, ch. 429, 48 Stat. 926; Nationality Act of 1940, ch. 876, § 328(b), 54 Stat. 1137, 1152.

rendered the Seventh Proviso inapplicable to Asians,[47] and the Ninth Circuit agreed, at least as to those seeking to reenter after the 1924 Act came into force.[48] The apparent rationale was that a person who, say, entered with a criminal conviction years before but had not reoffended (thus creating a fresh ground for deportation) might be said to have moved beyond the disqualification. But when a person of a forbidden race reentered, they still possessed the same prohibited characteristic in precisely the same way; it was incurable by moral rehabilitation, improvement of health, finances, or political views, or any period of good behavior.[49]

A recurring question involved sailors who came without authorization before the 1924 law, and therefore had the protection of the statute of limitations but were alleged to have departed from the United States and returned after the 1924 Act came into effect. Some cases held that return after a trip was a new entry, at least if during the voyage the sailor landed in a foreign port or changed ships, subjecting a sailor to exclusion under the 1924 law.[50] But in 1947, the Supreme Court held that a sailor on an American vessel who was briefly in Cuba after his ship was torpedoed was

47. *See Ex parte* Yee Gee, 17 F.2d 653, 655 (N.D. Cal. 1927) (noting position of immigration authorities that Seventh Proviso "cannot be invoked in favor of persons excluded under the Chinese Exclusion Act").

48. Sumio Madokoro v. Del Guercio, 160 F.2d 164, 166 (9th Cir. 1947) ("It is unnecessary for us to determine whether the Act of 1924 repealed as to all aliens Section 3 of the Act of February 5, 1917, above stated, since it is clear that the 1924 Act repealed Section 3 of the 1917 Act so far as it applied to aliens ineligible to citizenship.").

49. *See* Nagle v. Naoichi Misho, 33 F.2d 470 (9th Cir. 1929). The Ninth Circuit rendered the Seventh Proviso inapplicable, stating:

> With this exception so far as appellee is concerned, he is confronted with the same prohibition upon his re-entry as he would have been had he presented himself for entry for the first time. In *Lapina v. Williams*, this proposition was thus stated: "Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903 sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country."

Id. at 472 (citations omitted).

50. *E.g.*, Taguchi v. Carr, 62 F.2d 307, 308 (9th Cir. 1932) ("Appellant strenuously insists that he had no intention of landing on foreign soil; that he was compelled to do so because of the storm and collision above referred to; and that therefore he is not subject to deportation. This situation might well appeal to us if we had any discretion in the matter, but we have none; and the sole question is whether or not appellant comes within the provisions of the immigration laws.").

not making a new entry upon his return.[51] Asian sailors enjoyed the benefit of that ruling.[52]

In 1940, Congress created another racially restricted form of relief, suspension of deportation. The statute as amended in 1940 granted the attorney general discretion to "suspend deportation of [an] alien if not racially inadmissible or ineligible to naturalization" based on economic effects that deportation would impose on citizens or lawful residents.[53]

Congress ended Chinese Exclusion in 1943,[54] and allowed Filipinos and Indians[55] to naturalize in 1946. But these relaxations were fairly clearly war measures encouraging or rewarding co-belligerents rather than civil rights breakthroughs.

In 1948, there was a noticeable change in the attitude of all three branches of the U.S. government toward racial discrimination. The Supreme Court prohibited enforcement of racially restrictive covenants in residential deeds in *Shelley v. Kraemer*.[56] It also invalidated discrimination against Asian American landowners and fishers based on their, or their parents', ineligibility to citizenship.[57] Among other actions, President Truman began desegregation of the Armed Forces.[58]

For its part, in 1948 Congress extended the remedy of suspension of deportation created in 1940 to a noncitizen ineligible for naturalization if "such ineligibility is solely by reason of his race."[59] This was one of the

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51. The facts of the case are as follows:

> Petitioner is a Mexican citizen who made legal entry into this country in 1923 and resided here continuously until 1942. In June of that year, when this nation was engaged in hostilities with Germany and Japan, he shipped out of Los Angeles on an intercoastal voyage to New York City as a member of the crew of an American merchant ship. The ship was torpedoed after passing through the Panama Canal on its way to New York City. Petitioner was rescued and taken to Havana, Cuba, where he was taken care of by the American Consul for about one week. On July 19, 1942, he was returned to the United States through Miami, Florida, and thereafter continued to serve as a seaman in the merchant fleet of this nation.

Delgadillo v. Carmichael, 332 U.S. 388, 389-90 (1947).

52. *E.g.*, Yukio Chai v. Bonham, 165 F.2d 207, 208 (9th Cir. 1947) (granting relief to "a Japanese national" in a deportation action brought in 1942 for when his Alaska-based ship "made an unscheduled stop of three hours at Victoria, British Columbia" in 1934 and "at the time of the alleged entry in 1934 . . . was an alien ineligible to citizenship").

53. Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672; *see* 8 U.S.C. § 1229b (current law granting Attorney General discretionary authority to cancel removal of noncitizen).

54. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

55. Act of July 2, 1946, ch. 534, §1, 60 Stat. 416.

56. 334 U.S. 1 (1948).

57. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating California's prohibition on granting commercial fisher licenses to aliens ineligible to citizenship); Oyama v. California, 332 U.S. 633, 640 (1948) (invalidating portion of California's anti-Japanese land law).

58. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

59. Act of July 1, 1948, ch. 783, 62 Stat. 1206. Noncitizens who declined to serve in the U.S. military were also ineligible. *Id.*

earliest racially ameliorative actions in the immigration domain not driven or justified by war. To the contrary, Japanese nationals, perhaps the major racial group benefitted by the 1948 law, had been citizens of an enemy nation during the war.

The Immigration and Nationality Act of 1952 made all races eligible for naturalization.[60] While it continued the racist national origins quota system and capped worldwide Asian immigration by race in a way applicable to no other races, since 1952 statutes of limitation and relief provisions have been available, or unavailable, equally to noncitizens regardless of race, ancestry or descent.[61]

Famously, the racial demographics of the immigration stream changed after the end of the national origins quota system and Asian Exclusion in 1965. The United States has prospered because of it, even though some are troubled by the fear or actuality of "taco trucks on every corner"[62] and other alleged cultural risks.[63] From being overwhelmingly European, the immigration stream changed. On a race-neutral basis, without affirmative action, set-asides or quotas, the people who qualified based on either family connections to Americans or job skills have been overwhelmingly people of color from the Third World.[64]

As the immigrant stream diversified, opportunities for individual relief to prevent deportation have been reduced or eliminated. Congress abolished the JRAD in 1990.[65] In 1996, Congress repealed INA § 212(c) (the successor to the Seventh Proviso) and "modified relief previously known as suspension of deportation . . . by creating the more restrictive cancellation of removal relief."[66] Congress created registry in 1929 and updated it in 1940, 1958,

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60. Immigration and Nationality Act of 1952, ch. 477, § 311, 66 Stat. 163, 239.

61. *See* 8 U.S.C. §1427.

62. *See* Eric Franklin Amarante, *The Unsung Latino Entrepreneurs of Appalachia*, 120 W. VA. L. REV. 773, 783 (2018) (describing controversial remarks by a member of Latinos for Trump).

63. There is a continuing contention that the United States is better off with White immigrants. Thus, University of Pennsylvania Law Professor, Amy Wax contended:

> Europe and the First World, to which the United States belongs, remain mostly white for now; and the Third World, although mixed, contains a lot of non-white people. Embracing cultural distance, cultural distance nationalism, means, in effect, taking the position that our country will be better off with more whites and fewer non-whites.

Here's What Amy Wax Really Said About Immigration, FEDERALIST (July 26, 2019), https://thefederalist.com/2019/07/26/heres-amy-wax-really-said-immigration (Transcript of Professor Amy Wax's Speech).

64. OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 6-11 (2014), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2013_0.pdf

65. Taylor & Wright, *supra* note 35, at 1150-51.

66. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 292 n.66 (1997).

1965, and 1986[67] by advancing the date before which an applicant had to show residence in the United States; that is, only once in the half-century since immigration was made race neutral. Registry currently offers lawful status to those who entered prior to January 1, 1972,[68] more than two generations, compared to the eight-year window in the original law. Private bills in Congress were a possible mechanism for relief, but the remedy is now essentially defunct.[69]

This summary hardly covers every detail of the changes in immigration law and relief mechanisms. But in broad strokes, it is clear that when most immigrants were White, and thus when most people subject to deportation were White, relief was much more readily available than it is today. Now that the racial demographics have changed, the grounds for deportation have become increasingly broad, and the opportunities for avoiding deportation increasingly elusive.

If this understanding of the history of U.S. immigration law is right, then there is an explanation for the absence of a mechanism to prevent the deportation of people who have lived substantial portions of their lives in the United States. The pattern takes place over a period of too many decades to suggest that it is a conspiracy or a policy; it cannot be attributed to a handful of individuals or advocates. But from 1882 to today, there has been a spirit in the air. U.S. immigration law that is willing to consider the situations of Whites on a case-by-case basis but draws rigid lines in rules affecting members of other groups.

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67. Gerald L. Neuman, *Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society*, 36 HOFSTRA L. REV. 1335, 1336 n.5 (2008).

68. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 201, 203, 302, 100 Stat. 3359, 3394, 3405, 3417 (codified as amended in scattered sections of 8 U.S.C.).

69. 1 Nat'l Immigr. Project, Nat'l Law. Guild, Immigr. Law and Defense § 8:53, Westlaw (database updated Sept. 2020) ("Between 1942 and early 2006, 60,601 private bills were introduced. Of these, 6,798 (i.e., 8.91%) were enacted as law. As of July 2017, the last time that a private bill became law was in 2012." (citation omitted)).