DEPORTATION IS DIFFERENT

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Over one hundred years ago, the Supreme Court emphatically declared that deportation proceedings are civil, not criminal, in nature. As a result, none of the nearly 400,000 individuals who were deported last year enjoyed any of the constitutional protections afforded to criminal defendants under the Sixth or Eighth Amendments. Among those 400,000 were numerous detained juveniles and mentally ill individuals who, as a result of the civil designation, were forced to navigate the labyrinth of immigration law alone, without appointed counsel. Others were lawful permanent residents who had pled guilty to minor offenses upon the correct advice of counsel that they could not be deported—only to have Congress, unbound by the criminal prohibition against ex post facto *laws, retroactively changed the law and subject them to deportation. The dichotomy between the gravity of the liberty interest at stake in these proceedings—a lifetime of exile from homes and families in the United States—and the relative dearth of procedural protections afforded respondents, has always been intuitively unjust to many. However, over the past twenty years, as immigration and criminal law have become intertwined as never before, the intuitive sense of many has matured into a scholarly movement exploring the criminalization of immigration law. This movement has taken aim at the incoherence of deportation's civil designation.*

Until recently, there was little reason to think the Supreme Court would wade into the waters of the resurgent debate over the nature of deportation proceedings. In Padilla v. Kentucky, *130 S.Ct. 1473 (2010), however, the Court surprised almost everyone as it went to great length to chronicle the criminalization of immigration law and ultimately concluded that deportation is "uniquely difficult to classify." The immediate impact of the* Padilla *decision is the critical recognition that criminal defendants have a right to be advised by their attorneys if a plea they are contemplating will result in deportation. However, I argue, that in time* Padilla *may come to stand for something much more significant in immigration jurisprudence. When we read* Padilla *in the context of the Supreme Court's evolving immigration jurisprudence, there is good reason to believe that it is a critical pivot point for the Court.* Padilla *marks the beginning of a significant reconceptualization of the nature of deportation toward the realization that it is neither truly civil nor criminal. Rather, deportation is different. It is a unique legal animal that lives in the crease between the civil and criminal labels. This Article explores the evolving arch of Supreme Court jurisprudence regarding the quasi-criminal nature of deportation proceedings and articulates a principled mechanism to define the scope of the rights afforded to individuals facing deportation under this new framework.*

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INTRODUCTION

In 1977, the Supreme Court famously declared that "death is . . . different"[1]—signaling that death penalty prosecutions stand alone as a unique category of adjudications that require a set of rules

1 Gardner v. Florida, 430 U.S. 349, 357–58 (1977) ("[Death] is different in both its severity and its finality.").

all their own. In 2010, the Supreme Court took a significant step toward, once again, carving out a class of adjudications that defy common categorization, as it endorsed the argument that "deportation is different."[2] The Court's holding in *Padilla v. Kentucky* marked a remarkable[3] and sensible expansion of an individual's right to be advised by her criminal defense attorneys if she is contemplating a plea that could subject her to deportation.[4] However, the impact of this narrow holding could, in time, pale in comparison to *Padilla's* impact on our conception of deportation. I argue in this article that in the immediate aftermath of the *Padilla* decision, commentators have failed to appreciate the way the decision appears to signal the beginning of a dramatic pivot away from precedent regarding the "purely civil"[5] nature of deportation proceedings. While the *Padilla* Court continued to give lip service to its prior jurisprudence declaring deportation "civil," it qualified this categorization as "nevertheless intimately related to the criminal process" and ultimately concluded deportation is "uniquely difficult to classify."[6] What emerges from this discussion is the realization that deportation does not fit neatly into the civil or criminal box, but rather that it lives in the netherworld in between. This modern, more refined, and, ultimately, more persuasive understanding of deportation will both allow courts to reconcile previously incoherent doctrine and plot a course for the more robust judicial protection of the rights of immigrants facing deportation.

It is difficult to understate the import of the civil or criminal label for immigrants facing deportation. The stakes in deportation proceedings are grave. Lawful immigrants can face life sentences of banishment from their homes, families, and livelihoods in the United States and can potentially be sent to countries they have not visited since childhood, where they: have no family, do not speak the lan-

2 Brief of Petitioner at 54, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 1497552; *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1480–82 (2010) ("Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.").

3 The decision was remarkable because it adopted the position of a few outlier courts against the great weight of authority holding that defense counsel had no affirmative duty to advise client of the immigration consequences of contemplated dispositions. *See infra* notes 116–20 and accompanying text.

4 *Padilla*, 130 S. Ct. at 1486–87.

5 INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (emphasizing the civil designation of removal proceedings); Li Sing v. United States, 180 U.S. 486 (1901) (same); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (same).

6 *Padilla*, 130 S. Ct. at 1481–82.

guage, and can face serious persecution or death.[7] Notwithstanding the gravity of the liberty deprivation at issue, as a result of the civil label currently applied to deportation proceedings, poor immigrants have no right to appointed counsel (despite the notorious complexity of immigration law);[8] immigrants have no protection against retroactive changes in the law (they can plead guilty to minor offenses based upon the correct advice of counsel that they will not be deported and the next day Congress can change the rules);[9] immigrants have no right to have their proceedings in any particular venue (instead the government can whisk immigrants away into detention thousands of miles away from their home where they lack access to the counsel, evidence, and witnesses they need to prevail in their removal proceeding);[10] and immigrants can be deported for the most minor offenses, such as turnstile jumping or shoplifting candy (without any constitutional limit on the disproportionate punishment).[11] The

7 *See* Bridges v. Wixon, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of all that makes life worth living." (internal quotation marks omitted)); *see also* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation] may result result also in loss of both property and life; or of all that makes life worth living."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008) (discussing the serious deprivation of liberty that accompanies deportation).

8 *See* discussion *infra* Part I.C; *see also* Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing removal proceedings as a "labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike").

9 *See ex post facto* cases cited *infra* note 68.

10 *See* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 556–58 (2009) ("DHS regularly transfers detainees to faraway remote detention facilities, often making multiple transfers for a single detainee, without regard to whether the detainee has obtained counsel in his current location. . . . Motions to change venue to return a client to a facility in a jurisdiction where she has previously obtained counsel are frequently denied."); *see also* DORA SCHRIRO, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION: OVERVIEW AND RECOMMENDATIONS 6 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf ("Although the majority of arrestees are placed in facilities in the field office where they are arrested, significant detention shortages exist. . . . When this occurs, arrestees are transferred to areas where there are surplus beds.").

11 *See* 8 U.S.C. § 1227(a)(2)(A) (2006) (providing for the deportation of individuals convicted of crimes involving moral turpitude); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (holding that Eighth Amendment protection against cruel and unusual punishment is inapplicable in removal proceedings because they are civil); Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (classifying turnstile jumping in the New York City subway system leading to a "theft of services" misdemeanor conviction as a "crime of moral turpitude," subject to deportation (internal quotation marks omitted)); Ablett v. Brownell, 240 F.2d 625, 630 (D.C. Cir. 1957) ("[P]etty theft [is] a crime which does involve moral turpitude within the meaning of the immigration laws."); *In re* Scarpulla, 15 I. & N. Dec. 139, 140–41 (1974) ("It is well settled that theft or larceny, whether grand or petty,

Court has noted that such rules "bristle[] with severities" but has nevertheless held that the civil label mandates such outcomes.[12]

The *Padilla* case arose in the context of a long-term lawful permanent resident who had been arrested in Kentucky with a large quantity of marijuana and pled guilty, allegedly in reliance upon his attorney's affirmative misadvice that the plea would not lead to his deportation. In reality, the plea subjected Mr. Padilla to mandatory deportation. The overwhelming majority of state and lower federal courts had held that, under the Sixth Amendment, defense attorneys have no obligation to advise their criminal defense clients regarding the "collateral" immigration consequences of a contemplated plea but that the delivery of affirmative misadvice is ineffective assistance of counsel.[13] The Kentucky Supreme Court went in a different direction and held that even affirmative misadvice did not violate the Sixth Amendment because "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel" and, therefore, it held "that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief."[14]

In its decision, the United States Supreme Court first went to considerable lengths to chronicle the evolution of deportation over the course of the twentieth century and concluded that deportation has become a dramatically more frequent and automatic result of criminal convictions.[15] The Court then considered the Kentucky Supreme Court's reliance upon the collateral consequences doctrine. That doctrine, which was developed in the context of the Fifth Amendment, dictates that in order for a defendant to knowingly and intelligently waive her right to trial in accordance with due process, she must be informed of the direct, but not the collateral consequences, of her plea.[16] The issue of whether a consequence is direct or collateral is closely related to whether the consequence is a form of crimi-

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has always been held to involve moral turpitude."). *See generally* Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. (forthcoming 2011) (discussing the need for constitutional proportionality analysis in immigration removal proceedings).

12 Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952); *see also infra* note 57.

13 *See, e.g.*, Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985); People v. Correa, 485 N.E.2d 307, 312 (Ill. 1985); Morales v. Texas, 910 S.W.2d 642, 646 (Tex. Ct. App. 1995); *see also infra* notes 116–20 and accompanying text.

14 Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), *rev'd*, 130 S. Ct. 1473 (2010).

15 Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

16 *See* discussion *infra* notes 154–66.

nal punishment or not.[17] It is in this context that the *Padilla* Court came to grapple with the difficult task of attempting to categorize the nature of deportation. Ultimately, the Court avoided holding squarely on the issue by instead concluding that the "collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland*[18] claim concerning the specific risk of deportation."[19] In its discussion of the collateral consequences doctrine, however, the Court, for the first time in over a century, chimed in on the forgotten debate about the criminal or civil nature of deportation. In so doing, it recognized the "unique nature of deportation," and because deportation is now "an automatic result for a broad class of noncitizen offenders," the Court declared it "'most difficult' to divorce the penalty from the conviction in the deportation context."[20] Eventually, the Court went on to hold on other grounds that the Sixth Amendment guarantee of effective assistance includes an affirmative obligation to warn defendants of the deportation consequences of a contemplated plea.[21]

Prior to *Padilla*, the first and last reasoned consideration of the civil or criminal nature of deportation proceedings by the Supreme Court came in 1893 in the *Fong Yue Ting v. United States* decision.[22] In that case, the Court considered whether three Chinese residents of the United States were entitled to criminal procedural protections when facing deportation for failing to comply with a registration law requiring "one credible white witness."[23] A divided Court held that criminal constitutional protections "have no application" in deportation proceedings.[24] The Court's reasoning in *Fong Yue Ting* rested on an extra-constitutional inherent powers theory that has since been discredited by scholars[25] and by the Court itself.[26] Nevertheless, in the

17 *Id.*

18 *See* Strickland v. Washington, 466 U.S. 668 (1984) (establishing the controlling two-part test for evaluating ineffective assistance of counsel claims).

19 *Padilla*, 130 S. Ct. at 1482.

20 *Id.* at 1481.

21 *Id.* at 1483 ("[W]hen the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear."). *See infra* notes 137–139 and accompanying text.

22 149 U.S. 698 (1893); *cf.* Chae Chan Ping, 130 U.S. 581 (1889) (treating exclusion—not deportation—proceedings as civil).

23 *Fong Yue Ting*, 149 U.S. at 699.

24 *Id.* at 730.

25 *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 19–20 (1996) (explaining that the notion that "the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates"); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990) (summarizing the "withering criticism" of the inherent powers theory); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS,

century since *Fong Yue Ting*, the federal courts have declined every opportunity and urging to reexamine the nature of removal proceedings[27]—until now.

In contrast, scholars have been calling for a reexamination of the nature of deportation for some time and with increasing frequency since the dramatic expansion of criminal deportation grounds in 1996.[28] A handful of scholars have specifically urged that removal

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AND FUNDAMENTAL LAW 121 ("Thus, the external sovereignty argument for unlimited power over immigration was flawed to begin with and carries even less persuasive force today."); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 21 (1998) (noting the pervasive critique of the extra-constitutional theory of immigration law that "[m]any have commented upon its persistence and almost all have vigorously condemned it"); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 253 (2002) ("But the Court's doctrinal justifications for the holdings ultimately are unsatisfying as an explanation for the resort to inherent powers. . . . International law simply had nothing to say about the extent to which domestic law might constrain governmental power."); *see also* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 152 (2002); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–76 (1990).

26 *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted . . . ."); Reid v. Covert, 354 U.S. 1, 5–6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source." (footnote omitted)); Markowitz, *supra* note 7, at 316–20 (discussing the Supreme Court's growing unease with theories of extra-constitutional power); *see also* discussion *infra* Part I.B.

27 *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Yepes-Prado v. INS, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993); Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978); United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926); *see also* ALEINIKOFF, *supra* note 25, at 153; Markowitz, *supra* note 7, at 316–20. *But see* United States v. Soueiti, 154 F.3d 1018, 1019 (9th Cir. 1998) (asserting that deportation is not a civil action but rather a criminal punishment when it is ordered, pursuant to 8 U.S.C. § 1228(c)(1), by a federal judge sentencing a defendant for a criminal conviction).

28 *See, e.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 116 (1999) ("Despite one hundred years of case law consistently holding that deportation is not punishment, criticism of this conclusion has been ample throughout court opinions as well as scholarly articles."); Austin T. Fragomen, Jr., *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34–35 (1978) (arguing that "deportation proceedings should be deemed criminal or quasi-criminal" (internal quotation marks omitted)); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893–94 (2000) (noting that, under various criminal law theories, "deportation of long-term lawful permanent residents for post-entry criminal conduct seems in most respects to be a form of punishment"); Stephen H. Legomsky, *The New Path of Immi-*

proceedings straddle the civil-criminal divide with some removal proceedings akin to criminal proceedings and others akin to civil proceedings.[29] And others have urged that removal be treated as quasi-criminal.[30] Now, for the first time in American history, the Court has begun to align itself with these commentators, suggesting that depor-

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gration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 WASH. & LEE L. REV. 469, 471 (2007) ("The underlying theories of deportation increasingly resemble those of criminal punishment."); Lisa Mendel, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 207 (2000) (asking for a renewed critique of the Supreme Court's view that deportation is not punishment due to Congressional legislation in 1996 that greatly expanded the grounds on which past crimes rendered lawful permanent residents deportable); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313 (2000) ("It is this refusal to give serious consideration to the family rights at stake that makes deportation look much more like punishment . . . ."); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 32 (2003) ("This article argues that immigration removal proceedings are truly criminal in nature."); Gregory L. Ryan, *Distinguishing* Fong Yue Ting: *Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation Under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY'S L.J. 989, 1010–12 (1997) (concluding that deportation under the Antiterrorism and Effective Death Penalty Act qualifies as punishment under the judicial definition established in *Trop v. Dulles*, 356 U.S. 86 (1958)); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 261–73 (2004) (tracing jurisprudence and legal theories supporting the contention that deportation is punishment); Ethan Venner Torrey, *"The Dignity of Crimes": Judicial Removal of Aliens and the Civil-Criminal Distinction*, 32 COLUM. J.L. & SOC. PROBS. 187, 188–91, 206 (1999) (proposing that because two hundred years of case law defines deportation as civil, not criminal, U.S. Attorneys should clarify in plea agreements that their prosecutions do not involve deportation, which is instead a civil sanction wielded by the INS.); *see also Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1386 (1983) ("[T]he categorization of deportation as a civil rather than criminal proceeding has been severly criticized . . . ."). *See generally* Markowitz, *supra* note 7, at 289 (exploring "the tension between the firmly established civil label and the contrary [criminal-like] experience of people subject to removal proceedings").

29 *See generally* Kanstroom, *supra* note 28, at 1893–98 (drawing a line between civil-like deportation laws that follow the border control model and criminal-like deportation laws that follow the social control model); Markowitz, *supra* note 7, at 290–91 (distinguishing between "exclusion proceedings" that are civil in nature and "explusion proceedings" that are criminal in nature).

30 *See, e.g.*, Bleichmar, *supra* note 28, at 160–63 (suggesting quasi-criminal treatment of deportation); Fragomen, Jr., *supra* note 27, at 34–35 (arguing that deportation proceedings should be deemed criminal or quasi-criminal); Pauw, *supra* note 27, at 316–17 ("There is a middle ground of 'quasi-criminal' cases in which some, but not all, of the constitutional safeguards apply."); Pinzon, *supra* note 28, at 32 ("[R]emoval proceedings are more criminal in nature . . . ."); Salinas, *supra* note 28, at 261–73 (arguing that certain retroactive statutes, albeit civil in nature, can have such punitive consequences that they should be constitutionally prohibited); Torrey, *supra* note 28, at 191 (asserting that criminal prosecutors' power over deportation undermines the characterization of deportation as civil).

tation (but perhaps not exclusion)[31] may fall in the crease between civil and criminal proceedings. The import of the *Padilla* Court's characterizations comes into view when we consider it in contrast to prior precedent and in the context of other evidence of the Court's increasing discomfort with the civil label and its harsh application.[32]

In this Article, I endeavor to do two things. First, I argue that there is reason to be hopeful, that in the incrementalist modality of Supreme Court jurisprudence, *Padilla* represents the first step—the camel's nose under the tent—toward a full repudiation of *Fong Yue Ting*. Second, I develop a framework courts could use to evaluate the rights of respondents under the *Padilla* conception of deportation. In regard to this latter endeavor, I argue that the unique nature of deportation would require a method of assessing rights that borrows from both the hard floor constitutional rights model, used in criminal proceedings, and the balancing model, *Mathews v. Eldridge*[33] analysis, used in civil proceedings. This framework would require courts to first determine whether the interests protected by a given criminal procedure right are meaningfully at play in deportation proceedings. If so, the heart of the analysis will turn upon consideration of the nature of the deportation proceedings at issue and whether such proceedings warrant hard floor criminal-type protections. In order to make this determination, courts must consider whether the level of

31 All formal proceedings by which the United States seeks to expel a noncitizen from within the United States or exclude her from lawful admission are now characterized as "removal proceedings." *See* 8 U.S.C. § 1229a (2006). For the majority of our history, however, we recognized that exclusion proceedings (seeking to prevent lawful admission) and deportation proceeding (seeking to expel someone lawfully admitted) were two distinct animals. *See* 8 U.S.C. § 1252(b) (repealed 1996). I utilize this distinction in the Article because, as discussed *infra* Part IV, I suspect that the Court's discussion of the nature of removal proceedings at issue in *Padilla* was significantly affected by the fact that the proceedings sought to expel a person previously admitted by the United States as a lawful permanent resident. Accordingly, I restrict my discussion to deportation proceedings because I believe the line between deportation and exclusion proceedings was, properly, critical to the Court's analysis. That is to say, I think the Court may have conceived of the nature of the removal quite differently if it involved a noncitizen apprehended at the border who had no prior contact with the United States. *See* Markowitz, *supra* note 7, at 329 ("The application of the modern test provides compelling support for the bifurcated approach: exclusion is civil and expulsion is criminal.").

32 *See* discussion *infra* notes 83–99. *See generally* Legomsky, *supra* note 28, at 469 (positing that immigration law's absorption of criminal justice norms "has produced a deportation regime so substantively harsh and inflexible that too often the penalties are cruelly disproportionate to the transgressions"); Juliet Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264, 264 (2006) ("Using removal as a baseline penalty robs the law of any capacity for adjustment to fit the seriousness of the immigration violation or its consequences for the individual and others.").

33 424 U.S. 319 (1976).

bias against the relevant class of respondents and the liberty interest at stake are analogous to those factors in criminal proceedings. Finally, careful consideration of the practical ways in which the individual right operates in deportation proceedings will be necessary to determine the scope of the right to be applied, which may well differ from the scope of the right in pure criminal proceedings.

The article will proceed in four parts: (i) a brief review of pre-*Padilla* jurisprudence regarding the nature of deportation proceedings; (ii) an in-depth analysis of the *Padilla* case itself; (iii) an exploration of the long-term impact of *Padilla* and why it should be understood as a potentially critical pivot point in immigration jurisprudence; and (iv) an articulation of a framework by which courts could make principled determinations regarding the nature and scope of respondents' rights under *Padilla*'s conception of deportation. I hasten to emphasize that I do not endeavor, in this piece, to defend or critique the Court's characterization of deportation—just to describe it, help to understand its import, and aide the Court's forthcoming jurisprudence. I have previously laid out my own judgment that deportation straddles the civil-criminal divide, which comports in large part, but not fully, with the evolving conception of deportation I see foreshadowed in the *Padilla* decision.[34]

I. PRE-*PADILLA* JURISPRUDENCE REGARDING THE NATURE OF DEPORTATION

A. The Origin of the Civil Label

The origin of the civil label and the historic treatment of deportation's precursors have been meticulously detailed elsewhere by myself and others.[35] A brief review is, however, necessary to place the *Padilla* decision in context. At the time of the framing of the Constitution, there was no animal known as "deportation" in American law. The earliest precursor to modern deportation was banishment, which dates back to ancient times and was widely used as a form of criminal punishment for citizens and noncitizens alike.[36] In common law England, the government unquestionably possessed the power to both

34 Markowitz, *supra* note 7.

35 *See generally* Bleichmar, *supra* note 28; Cleveland, *supra* note 25, at 253; Markowitz, *supra* note 7.

36 William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459–61 (1998) (citing examples of banishment as a criminal punishment in various societies dating back to 2285 B.C.).

exclude and expel noncitizens.[37] Legal historians agree that the former power, to exclude or prevent entry, could be exercised by the king alone without any criminal process.[38] In regard to the power to expel noncitizens from within England, there is some disagreement, as a theoretical matter, as to whether the power could be exercised through civil administrative fiat or solely through the criminal process.[39] As a practical matter, however, the historical record demonstrates that expulsion was exercised exclusively as a common form of criminal punishment in England (imposed on both citizens and noncitizens) as early as the thirteenth century.[40] Such criminal expulsions first took the form of "abjuration of the realm"[41] and later as "transportation,"[42] primarily to the American colonies.

Similarly, the American colonies never utilized any civil method to expel noncitizens and the only method by which citizens or noncitizens were removed from the colonies was through the criminal punishment of banishment. Accordingly, the dominant historical models—common law England and the American colonies—which likely shaped the framers' view of deportation, were exclusively and expli-

37 *See* Markowitz, *supra* note 7, at 320–22.

38 1 WILLIAM BLACKSTONE, COMMENTARIES *259–60 ("[Foreigners] are under the king's protection; though liable to be sent home whenever the king sees occasion.").

39 *See id.*; W. F. Craies, *The Right of Aliens to Enter British Territory*, 6 L. Q. REV. 27, 35 (1890) ("England was a complete asylum to the foreigner who did not offend against its laws . . . ."); *On the Alien Bill*, 42 EDINBURGH REV. 99, 100, 114 (1825) (arguing that "expulsion" is a "punishment on conviction in a court of justice, for certain offenses, where a natural-born subject might be left to work out his penalty at home" and that the "punishment" must be subject to the "severe and odious necessity of criminal law"). Notably, the text of the Magna Carta itself provides some support for this view insofar as it guarantees that "No Freeman [s]hall be . . . exiled, . . . but by the lawful judgment of his peers, or by the law of the land." MAGNA CARTA, cl. 39 (1215), *reprinted in* A HISTORY AND DEFENCE OF MAGNA CHARTA (1769).

40 *See* Markowitz, *supra* note 7, at 322.

41 Abjuration of the realm, a type of banishment whereby a criminal defendant could escape prosecution by seeking the assistance of clergy, confessing, and promising to voluntarily leave the realm and not return upon pain of death, became a common form of criminal punishment in England as early as the thirteenth century. *See* William F. Craies, *The Compulsion of Subjects to Leave the Realm*, 6 L. Q. REV. 388, 390, 393–96 (1890); *see also* Snider, *supra* note 36, at 461 (explaining the widespread use of abjuration in England between the thirteenth and sixteenth centuries).

42 Transportation was a form of criminal punishment whereby convicts would be sentenced to indentured servitude in or banished to the colonies. Between 1718 and the end of transportation to the Americas in 1775, one quarter of all British immigrants to America, or approximately fifty thousand people, were sent as a result of being sentenced to transportation as punishment for a crime. The prevalence of this phenomenon was not lost on the colonists, who grew increasingly displeased with the practice. In 1775, with the outbreak of the American Revolution, transportation to America came to an abrupt halt. *See* Bleichmar, *supra* note 28, at 124–29 (detailing the history of the transportation system and the Transportation Act of 1718).

citly criminal in nature. For the first century after the founding of the United States, the regulation of immigration was largely left to the states.[43] During this period as well, deportation was utilized only as punishment for serious crimes.[44]

Throughout the majority of the nineteenth century the source and nature of the federal government's authority to regulate immigration was the source of much debate.[45] The Supreme Court's first significant discussion of the nature of the power did not come until 1889 in its decision in *Chae Chan Ping v. United States*, commonly known as the Chinese Exclusion Case.[46] The case has, in time, come to symbolize one of the worst episodes in Supreme Court jurisprudence, alongside cases like *Dred Scott v. Sandford*[47] and *Plessy v. Ferguson*,[48] because of the explicit racism and xenophobia exhibited in the decision.[49] However, the characterization of the immigration power announced in *Chae Chan Ping* still forms the basis of the modern

43 *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (reviewing the state immigration laws during this period); *see also* EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 389, 396–404 (1981). One notable exception was the Alien Act of 1798, which purported to grant the President the power to expel noncitizens without criminal process. *See* Cleveland, *supra* note 25, at 87–98 (discussing the Alien Act and controversy surrounding the power that it granted). This power, however, expired two years later and was never exercised. Moreover, contemporary and modern commentators alike widely agree that this aspect of the Act was unconstitutional. *See id.* at 98 (quoting then-Vice President John C. Calhoun in 1832 as "assert[ing] that the unconstitutionality of the [Act] was 'settled'"); Fong Yue Ting v. United States, 149 U.S. 698, 750 (1893) (Field, J., dissenting) (stating that the short-lived Act was "the subject of universal condemnation"); *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 53–60 (1996) (discussing the debate); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 32 n.146 (2010). *But see* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 79–83 (2002) (arguing that the Act was a "proper implementation of congressional war power").

44 Neuman, *supra* note 43, at 1841, 1844.

45 Earlier immigration cases arose as challenges to state attempts to regulate immigration, and, in those cases, the Court located the federal power over immigration as derived principally from the Foreign Commerce Clause. *See, e.g.*, Edye v. Robertson, 112 U.S. 580 (1884); Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of New York, 92 U.S. 259 (1875); Smith v. Turner, 48 U.S. 283 (1849). *See generally* Cleveland, *supra* at note 25, at 106–12, 123–34 (noting the ascendancy of the Commerce Clause in federal courts' acknowledgement of immigration as an exclusive federal power).

46 130 U.S. 581 (1889).

47 60 U.S. 393 (1856).

48 163 U.S. 537 (1896).

49 *See Chae Chan Ping*, 130 U.S. at 606 (characterizing Chinese immigration as "foreign . . . encroachment" through "vast hordes of [the foreign nation's] people crowding in upon us"); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting) (referring to "the obnoxious Chinese").

Court's conception of the nature of deportation—or at least its pre-*Padilla* conception. *Chae Chan Ping* was not a deportation case, but rather a case about the power of the United States to exclude or prevent the entry of foreign nationals. It was in this context that the Supreme Court first articulated the "inherent powers theory" in the immigration realm, which dictates that the immigration power is derived not from any particular constitutional provision but is instead a power incident to the nature of sovereignty and thus not subject to the Constitution's limits relevant to criminal proceedings.[50] It was not at all clear from *Chae Chan Ping* whether this conception of the immigration power also applied to deportation of noncitizens already present in the United States.[51]

However, in 1893, the Court's decision in *Fong Yue Ting*, for the first time explicitly applied the inherent powers theory and the civil label to the deportation context.[52] *Fong Yue Ting* involved three Chinese nationals who challenged the constitutionality of the statutes under which they were ordered to be deported because, they claimed, the statutes subjected them to the criminal punishment of deportation without affording them the applicable constitutional protection. The Court held that the power to expel and the power to exclude were "in truth but parts of one and the same power"[53] and thus the power to deport was also inherent in the nature of sovereignty and the criminal constitutional protections, including the "right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, ha[d] no application."[54]

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50 *See Chae Chan Ping*, 130 U.S. at 606. The Court did not explicitly characterize the exclusion proceedings as civil but its refusal to even address the criminal procedure claim is strong evidence that it conceived of exclusion as a civil proceeding. The criminal constitutional rights at issue in *Chae Chan Ping* was the prohibition against *ex post facto* law. Chae Chan Ping had left the United States with a valid reentry permit and, while in transit to return, Congress passed a new act purporting to annul the reentry permits of Chinese nationals.

51 Indeed in the years immediately following *Chae Chan Ping* the Court issued several decisions which suggested that its analysis may apply only to exclusion and not expulsion cases. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (characterizing Congress's immigration power as pertaining to "[t]he supervision of the admission of aliens into the United States" and stating that it is a "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"); Lau Ow Bew v. United States, 144 U.S. 47, 62 (1892) (suggesting a limitation on Congress's power to regulate persons already admitted to the United States as permanent residents).

52 *Fong Yue Ting*, 149 U.S. at 730.

53 *Id.* at 713.

54 *Id.* at 730.

However, unlike *Chae Chan Ping*, which had been unanimous, *Fong Yue Ting* divided the Court with three justices, including Justice Field, the author of *Chae Chan Ping*, dissenting. The dissents argued that the majority failed to appreciate the historically distinct status of denizens, the precursors to modern permanent residents,[55] and the historic distinctions between the power to exclude, which was civil, and the power to expel, which was criminal.[56] In the hundred-plus years between *Fong Yue Ting* and *Padilla*, the Court repeatedly reaffirmed, or at minimum relied upon, the holding that deportation is civil, and, while it at times displayed some discomfort with application of the label, it never once substantively reexamined the civil or criminal nature of deportation.[57]

B. *The Demise of the Inherent Powers Theory—The Rationale Behind the Civil Label Is Abandoned but the Holding Remains*

In the mid-twentieth century in two cases,[58] the Court re-examined the "inherent powers theory," which underlied the civil label and resoundingly repudiated it.[59] First in *Reid v. Covert*, the Court held that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accor-

55 *Id.* at 736–38 (Brewer, J., dissenting).

56 *Id.* at 755–57 (Field, J., dissenting); *see also* discussion *supra* notes 36–44 and accompanying text.

57 *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (calling the civil designation of deportation "debatable" but refusing to reconsider this settled aspect of law); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (displaying discomfort with the civil label by noting that expulsion is a "drastic measure"); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (referring to the "high and momentous" stakes in expulsion proceedings); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (characterizing the impact of an expulsion order as a "great hardship"); Johannessen v. United States, 225 U.S. 227, 242 (1912) (relying in part on the civil label to permit the retroactive application of a law providing for the cancellation of fraudulently obtained naturalization certificates); Lem Moon Sing v. United States, 158 U.S. 538, 546–47 (1895) (relying in part on the civil label to uphold jurisdiction-stripping provisions that insulated executive action in the immigration arena from judicial review).

58 Afroyim v. Rusk, 387 U.S. 253 (1967); Reid v. Covert, 354 U.S. 1 (1957).

59 *See generally* Cleveland, *supra* note 25, at 131 (discussing the inherent powers doctrine as "a source of authority inherent in international law and sovereignty"); Markowitz, *supra* note 7, at 309–20 (discussing the inherent powers theory, from which the power to exclude or expel citizens is derived). In time, the inherent powers theory has come to be associated most directly with the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). While *Curtiss-Wright* continues to be cited approvingly regarding the deference courts owe in foreign affairs, there is no good Supreme Court case law relying upon the inherent powers holding in *Curtiss-Wright*.

dance with all the limitations imposed by the Constitution."[60] In *Afroyim v. Rusk*, a case involving the power of Congress to expatriate citizens who vote in foreign elections, the Court drove the point home further by emphatically explaining that the United States does not have

> any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot . . . be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. . . . Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.[61]

Notwithstanding the Court's repudiation of the rationale behind the civil label, it continued to apply the label after *Reid* and *Afroyim*.[62] Moreover, the Court never expressed any alternative rationale for the civil label and thus, after rejecting the inherent powers theory, has left the civil designation of deportation without any articulated justification.[63]

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60 354 U.S. at 5–6 (plurality opinion) (footnote omitted). The *Reid* Court held that court-martial jurisdiction could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas in times of peace, for capital offenses. While the decision in *Reid* was a four-vote plurality opinion, Justice Harlan filed a separate concurring opinion adding a fifth vote rejecting the inherent powers theory. *Id.* at 66 (Harlan, J. concurring) ("The powers of Congress, unlike those of the English Parliament, are constitutionally circumscribed. Under the Constitution[,] Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers.").

61 *Afroyim*, 387 U.S. at 257.

62 *See, e.g.*, United States v. Balsys, 524 U.S. 666, 671 (1998) (noting that the "risk that [a resident alien's] testimony might subject him to deportation is not a sufficient ground for asserting [the Fifth Amendment] privilege [against self-incrimination], given the civil character of a deportation proceeding"); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (describing deportation proceedings as "purely civil" actions); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) ("And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application."); Conteh v. Gonzalez, 461 F.3d 45, 55 (1st Cir. 2006) (declining "the invitation to transplant the categorical approach root and branch—without any modification whatever—into the civil removal context").

63 The inherent powers theory has reared its head again, at least in name, in the context of recent Bush administration robust articulations of the President's power in war and national security matters. *See generally* Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 588 (2010) (characterizing the Bush position as a sloppy mixture of the unitary and inherent power models); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2484–85 (2006) (recognizing that modern scholars advance various permutations of the inherent powers theory and describing the Bush administration's internal memos as "[t]he most recent executive branch defense of the inherent power theory"). However, these recent resurrections of the inherent powers rhetoric are, in fact, of an entirely different nature than the theory

C. *Doctrinal Incoherence—The Civil Label's Tension with Application of Criminal Doctrine*

While the Court, even in *Padilla*, continues to utilize the civil label to describe deportation proceedings, increasingly that label is in tension with the application of criminal, or quasi-criminal, doctrine in deportation proceedings. Much has been written in recent years about the asymmetric incorporation of criminal justice norms in deportation proceedings.[64] The majority of this writing has focused on

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articulated in *Fong Yue Tung* and *Chae Chan Ping* and rejected in *Reid* and *Afroyim*. In this context the executive branch has attempted to develop a broad theory of the powers inherent in the Article II explicit grants of power to the President. *See, e.g.*, Brief for Petitioner at 14, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) ("First, the President's inherent powers as Commander in Chief are substantially more robust than recognized by the court of appeals."); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Part V, 31–39 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogation memo20020801.pdf (arguing that any statute that would interfere with the President's ability to interrogate enemy combatants would impermissibly encroach on the President's Commander-in-Chief powers and would therefore be unconstitutional); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to the President (Sept. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm (grounding an assertion that the President enjoys unenumerated executive powers in the Vesting Clause, stating that "the enumeration in Article II marks the points at which several traditional executive powers were diluted or reallocated. Any *other*, unenumerated executive powers, however, were conveyed to the President by the Vesting Clause" (emphasis in original)). With the arguable exception of one sentence in one brief, the Bush administration's inherent powers claims did not involve claims of powers inherent in the nature of sovereignty derived from some extra-constitutional source. *See* Brief for Petitioner at 11, Tenet v. Doe, 544 U.S. 1 (2005) (No. 03-1395) ("The government's ability to carry out [intelligence] operations is essential to national security and is an inherent attribute of national sovereignty."). Critically, even the more limited articulation of the inherent powers theory has been rejected by the Supreme Court. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 ("[A] state of war is not a blank check for the President . . . . [And the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake."). Moreover, the Obama administration has largely abandoned reliance on the Bush administration's inherent powers theory. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, 3–8, *In re* Guantanamo Bay Detainee Litigation, 706 F. Supp. 2d 120 (D.D.C. 2010) (No. 08-442) (arguing the administration's detention authority based on the Authorization for the Use of Military Force); *see also* Brief for Respondent in Opposition at 17–18, Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008) (No. 08-368) (relying on statutory authority for detention).

64 *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth And Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (exploring the procedural deficiencies of the current system and offering proposals to address the problem); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (attempting to theorize criminal prosecutions of offenses related to migration); Legomsky, *supra* note 28, at 255 (concluding that the Court should not give special deference to Congress in immigration cases); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM.

the incorporation of what Professor Legomsky calls criminal "enforcement norms" into deportation proceedings in contrast to the lack of any corresponding incorporation of criminal "adjudication norms."[65] The criminal enforcement norms that have come to dominate immigration law include the increased criminalization of immigration violations, the increased immigration consequences of even minor criminal violations, the use of preventative detention, and the increased role of traditional criminal justice actors, such as local police, in immigration enforcement.[66] In contrast, the criminal adjudicatory norms that have yet to be incorporated into deportation proceedings include basic procedural protections such as the right to appointed counsel,[67] the prohibition on *ex post facto* laws,[68] protections

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REG. 639, 640 (2004) ("[W]ell-accepted historical matrices are increasingly inadequate to address the complex issues raised by various U.S. government practices in the so-called 'war on terrorism.'"); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005) (tracing the relationship between criminal punishment and immigration law); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616–20 (2003) (describing the criminalization of immigration law); Pauw, *supra* note 28, at 307 (noting that constitutional safeguards that traditionally apply in the context of criminal prosecution should apply alike in immigration cases); Pinzon, *supra* note 28; Dinesh Shenoy & Salima Oines Khakoo, *One Strike and You're Out! The Crumbling Distinction Between the Criminal and the Civil for Immigrants in the Twenty-First Century*, 35 WM. MITCHELL L. REV. 135, 148–51 (2008) (explaining that "criminal proceedings are undertaken with the desired immigration outcome in mind"); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) ("The merger of [criminal law and immigration law] in both substance and procedure has created parallel systems in which immigration law and the criminal justice system are merely nominally separate."); *see also* Thomas Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 18–19 (1990) (discussing the oddity of the lack of constitutional protections afforded to noncitizens in deportation proceedings in contrast to the rather robust constitutional protections afforded to noncitizens in other realms, such as criminal proceedings).

65 *See* Legomsky, *supra* note 28, at 473–75.

66 *Id.* at 482–86 (discussing increased immigration consequences of crimes); Stumpf, *supra* note 64, at 386 ("Between 1908 and 1980, there were approximately 56,000 immigrants deported based on criminal convictions. In 2004 alone, there were more than 88,000 such deportations."); *id.* at 378 (tracing the convergence of criminal and immigration law, in which "[i]mmigration violations previously handled as civil matters are increasingly addressed as criminal offenses").

67 Debeatham v. Holder, 602 F.3d 481, 485 (2d Cir. 2010) ("Because immigration proceedings are of a civil rather than criminal nature, aliens in removal proceedings 'enjoy[ ] no specific right to counsel' under the Sixth Amendment to the Constitution." (quoting Jian Yun Zheng v. U.S. Dep't of Justice, 409 F.3d 43, 46 (2d Cir. 2005))); Lopez-Vega v. Holder, 336 F. App'x 622, 626 (9th Cir. 2009) ("[W]e have never extended a Sixth Amendment right to counsel to immigration proceedings."); Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004) ("It is well-settled that, while there is no Sixth Amendment right to counsel, aliens have a statutory right to counsel at their own expense . . . ." (citation omitted)); Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) ("[T]here is no Sixth

against double jeopardy,[69] and the right to trial by jury.[70] This asymmetry has contributed to what Professor Stumpf aptly dubbed the "crimmigration crisis."[71]

Amendment right to counsel in deportation hearings . . . ."); Mustata v. U.S. Dept. of Justice, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999) ("[I]t is clear that the Sixth Amendment does not apply to civil deportation proceedings."); Castaneda-Suarez v. INS, 993 F.2d 142, 144 (7th Cir. 1993) ("Deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment."); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988) ("Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.").

68 *See* Marcello v. Bonds, 349 U.S. 302, 314 (1955) (holding that retroactive application of new grounds for deportation did not violate the *ex post facto* clause); Galvan v. Press, 347 U.S. 522, 531 (1954) ("[I]t has been the unbroken rule of this Court that [the *ex post facto* clause] has no application to deportation."); Harisiades v. Shaughnessy, 342 U.S. 580, 594–96 (1952) (stating that the constitutional prohibition on *ex post facto* laws does not apply to laws affecting deportation); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (stating that "[t]he prohibition of *ex post facto* laws in Article I, § 9, has no application" to deportation); Fong Yue Ting v. United States, 149 U.S. 698, 722–24 (1893) (rejecting an argument that a law that subjected a Chinese citizen to removal retroactively was unconstitutional as an *ex post facto* law); Perez v. Elwood, 294 F.3d 552, 557 (3d Cir. 2002) (stating that an argument derived from the Ex Post Facto Clause is not available to petitioner "because deportation statutes are civil in nature"); United States v. Koziel, 954 F.2d 831, 834 (2d Cir. 1992) ("A long and unwavering line of authority has established that statutes retroactively setting criteria for deportation do not violate the *ex post facto* provision."); United States v. Bodre, 948 F.2d 28, 33 (1st Cir. 1991) ("The *ex post facto* clause has been unswervingly held as inapplicable to matters of deportation."); Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982) ("The prohibition against ex post facto laws and bills of attainder does not apply to deportation statutes.").

69 United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) ("Because deportation proceedings are civil and not criminal in nature, they cannot form the basis for a double jeopardy claim . . . ."); *accord* Figuereo-Sanchez v. U.S. Att'y Gen., 382 F. App'x 211, 213 (3d Cir. 2010) ("To the extent that Figuereo-Sanchez is claiming a violation of double jeopardy by arguing that he is being punished twice for his criminal offense, his claim lacks merit because a deportation proceeding is a purely civil action and the purpose of deporation is not to punish past transgressions." (internal quotations marks omitted)); United States v. Danson, 115 F. App'x 486, 488 (2d Cir. 2004) ("It is settled law that deporation is a civil proceeding and is not considered a criminal punishment, regardless of its harsh consequences."); De La Teja v. United States, 321 F.3d 1357, 1364–65 (11th Cir. 2003) (stating that the double jeopardy clause applies only to proceedings that are criminal in nature); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (denying petitioner's double jeopardy argument due to the classification of deportation as a civil procedure).

70 Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (explaining that proceedings to enforce immigration regulations are not criminal prosecutions and therefore "may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question"); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (finding that the constitutional right of trial by jury has no application to deportation); *Fong Yue Ting*, 149 U.S. at 730 (same).

71 Stumpf, *supra* note 64, at 377.

While this asymmetry and evidence of the paltry level of justice afforded to respondents in deportation proceedings is disturbing, it is not necessarily a marker of doctrinal incoherence. That is to say, in theory, there is nothing necessarily inconsistent about a civil regime which shares some attributes with the criminal process but which does not trigger the Constitution's criminal procedural protections.[72] In fact, the incoherence comes from exactly the opposite phenomenon: courts' adherence to the civil label and simultaneous application of distinctly and uniquely criminal procedural norms. While the literature has tended to focus on the criminal rights that have not been applied to deportation proceedings—and many of the most critical rights have not[73]—it is in some ways more surprising to observe the many criminal doctrinal strands that have taken root in purportedly civil deportation proceedings. The doctrinal spheres where this can be seen most clearly are: the right to effective assistance of counsel, the rule of lenity, the void for vagueness doctrine and the application of the exclusionary rule. To be clear, and as discussed below,

72 Legomsky, *supra* note 28, at 472 ("[T]he courts have uniformly insisted that deportation is not punishment and that, therefore, the criminal procedural safeguards do not apply in deportation proceedings. Those and similar principles remain untouched by the gradual importation of criminal justice norms into immigration law. As a result, the criminal justice model has had no discernible benefits for immigrants.").

73 *See id.*, at 499–500, 515–16 (listing the rights afforded to criminal defendants that have been rejected to individuals facing deportation proceedings, including double jeopardy, *Miranda* warnings, the privilege against self-incrimination, trial by jury, restrictions on bills of attainder, the prohibition of *ex post facto* laws, the Sixth Amendment right to appointed counsel, the ban on cruel and unusual punishment, the requirement of proof beyond reasonable doubt, and the bar on hearsay evidence); discussion *supra* notes 67–69. *See, e.g.*, United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) (noting that involuntary confessions are admissible at deportation hearing); *Fong Yue Ting*, 149 U.S. at 730 (stating that the Eight Amendment does not restrict deportation because it is not punishment); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (same); Bustos-Torres v. INS, 898 F.2d 1053, 1056–57 (5th Cir. 1990) (refusing to recognize the right to confront an accuser and bar hearsay evidence at a deportation hearing and stating generally that the Federal Rules of Evidence have no application); Linnas v. INS, 790 F.2d 1024, 1029–30 (2d Cir. 1986) (upholding mandatory deportation of Nazi war criminals because deportation does not fall into the category of legislative punishment, a prerequisite for finding a bill of attainder); Vides-Vides v. INS, 783 F.2d 1463, 1469–70 (9th Cir. 1986) (finding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); Navia-Duran v. INS, 568 F.2d 803, 808 (1st Cir. 1977) (allowing admission of statements made without *Miranda* warnings); Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975) (same); *Oliver*, 517 F.2d at 428 (refusing to apply double jeopardy to a civil deportation proceeding and finding that the Eighth Amendment does not restrict deportation because it is not punishment); Chavez-Raya v. INS, 519 F.2d 397, 399–401 (7th Cir. 1975) (allowing admission of statements made without *Miranda* warnings); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975) (finding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975) (same).

not all of these areas of law operate in precisely the same way in deportation proceedings as they do in criminal proceedings. Indeed, in some instances, courts go through significant jurisprudential gymnastics to make them apply at all, but this is precisely the point. The way courts twist themselves in knots, using legal fiction heaped upon legal fiction, to make the criminal square pegs fit in the civil round holes is the best evidence of the doctrinal incoherence that currently exists in courts' treatment of the nature of deportation proceedings.

The right to effective assistance of counsel in criminal proceedings is, of course, derived from the Sixth Amendment's explicit proscription.[74] Since the Sixth Amendment is applicable only to criminal proceedings, it generally follows that there is no right to effective counsel in civil proceedings.[75] As we would expect, the civil label of deportation proceedings has led courts to generally reject claims that respondents are entitled to appointed counsel in deportation proceedings.[76] However, counterintuitively, the Attorney General, the

74 U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions," a defendant shall have the right to "the Assistance of Counsel for his defense"); Mickens v. Taylor, 535 U.S. 162, 166 (2002) ("[A]ssistance which is ineffective in preserving fairness [in a criminal trial] does not meet the constitutional mandate [of the Sixth Amendment] . . . ." (citing Strickland v. Washington, 466 U.S. 668, 685–86 (1984))).

75 Absent a governmental obligation to supply counsel in civil cases, a client is bound by the actions of his or her attorney. *See* United States v. Boyle, 469 U.S. 241, 249–50 (1985) (holding that a taxpayer was not excused from filing late by reasonable reliance on the attorney handling the tax matter); Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962) (finding "no merit to the contention that dismissal of petitioner's [negligence] claim because of his counsel's unexcused conduct imposes an unjust penalty on the client"); Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) ("There is no constitutional or statutory right for an indigent to have counsel appointed in a civil case [alleging violations of the Fourteenth Amendment against police officers]. It of course follows there is no constitutional or statutory right to effective assistance of counsel in a civil case."(internal citation omitted)).

76 *See, e.g.*, *Vides-Vides*, 783 F.2d at 1469–70 (holding no Sixth Amendment right to appointed counsel at government expense in deportation proceedings); *Gasca-Kraft*, 522 F.2d at 152 (same); *Burquez*, 513 F.2d at 755 (same). By statute, noncitizens in deportation proceedings do have the right to be represented by counsel, but not at the expense of the government. *See* 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2006). However, at least one Court of Appeals has recognized at least a potential, though as of yet still theoretical, right to appointed counsel in deportation proceedings under the due process clause. Aguilera-Enriquez v. INS, 516 F.2d 565, 568–69 n.3 (6th Cir. 1975) (noting that "[w]here an unrepresented indigent would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise 'fundamental fairness' would be violated" and adopting a case-by-case approach to the issue of government-funded counsel); *see also* Kovac v. INS, 407 F.2d 102, 103, 108 n.11 (9th Cir. 1969) (noting that lack of representation may support a finding that the Board of Immigration Appeals ("BIA") abused its discretion in deporting an alien); United States v. Zimmerman, 94 F. Supp. 22, 25 (E.D. Pa. 1950) ("Informing a prisoner with total resources of $30.00, a stranger in a strange land with a complete lack

Board of Immigration Appeals ("BIA"), and the majority of circuits have recognized a right to effective assistance of counsel in deportation proceedings[77] and have frequently reversed deportation orders or granted motions to reopen proceedings based on ineffective assistance.[78] The right to effective assistance in "civil" deportation proceedings is couched in the rhetoric of the due process clause: "Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that

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of knowledge of the language of that country, that he had the right to counsel is almost an empty gesture."). *See generally* Irving A. Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130, 132 (1976); Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289, 290 (1975), *available at* http://lawreview.law.ucdavis.edu/issues/Vol08/DavisVol08_Black.pdf; Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings:* Matter of Compean *and the Fundamental Fairness Doctrine*, 22 FLA. J. INT'L L. 65, 73–74 (2010); Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875, 883 (1961); William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L. L.J. 177 (1970); Pauw, *supra* note 28, at 340; Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1660–63 (1997); David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019 (1988).

77 *See, e.g.*, Fadiga v. U.S. Att'y Gen., 488 F.3d 142, 155 (3d Cir. 2007) (recognizing a claim of ineffective assistance of counsel in removal proceedings); Sako v. Gonzales, 434 F.3d 857, 863–64 (6th Cir. 2006) (same); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2004) (same); Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001) (same); Saakian v. INS, 252 F.3d 21, 24–25 (1st Cir. 2001) (same); Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992) (same); *In re* Compean (*Compean II*), 25 I. & N. Dec. 1, 1–3 (2009) (same); *In re* Lozada, 19 I. & N. Dec. 637, 637–40 (1988), *aff'd* 857 F.2d 10, 13 (1st Cir. 1988); *see also In re* Bassel Nabih Assaad, 23 I. & N. Dec. 553, 558 (2003) ("[S]ince [*In re*] *Lozada* was decided 15 years ago, the circuit courts have consistently continued to recognize that despite having no right to appointed counsel in an immigration hearing, a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case."). *But see* Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008) (holding that any ineffectiveness of privately retained counsel cannot be imputed to the government to establish a Fifth Amendment violation); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) ("[T]here is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding. Removal proceedings are civil; there is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel. To the extent Rafiyev's counsel was ineffective, the federal government was not accountable for her substandard performance; it is imputed to the client." (citations omitted)).

78 *See, e.g.*, Aris v. Mukasey, 517 F.3d 595, 597 (2d Cir. 2008) (granting petition for review based on ineffective assistance of counsel); *Fadiga*, 488 F.3d at 144–45 (same); Sanchez v. Keisler, 505 F.3d 641, 642–43 (7th Cir. 2007) (same); Mai v. Gonzales, 473 F.3d 162, 163 (5th Cir. 2006) (same); Osei v. INS, 305 F.3d 1205, 1206–07 (10th Cir. 2002) (same); *Saakian*, 252 F.3d at 23 (same); Castillo-Perez v. INS, 212 F.3d 518, 521 (9th Cir. 2000) (same); *In re* N-K- & V-S-, 21 I. & N. Dec. 879, 881–82 (1997) (granting motion to reopen based on claim of ineffective assistance); *In re* Grijalva-Barrera, 21 I. & N. Dec. 472, 473–74 (1996) (finding that ineffective assistance of counsel may amount to "exceptional circumstances" in the context of a motion to reopen an in absentia removal order).

the alien was prevented from reasonably presenting his case."[79] However, in practice, it functions similarly to the facially lower standard of "reasonable performance" required under the Sixth Amendment.[80] The oddity of a right to effective assistance, without the corresponding right to any assistance at all, is perhaps the clearest example of doctrinal incoherence in the courts' treatment of the nature of removal proceedings.

The Court's application of the traditionally criminal void for vagueness and rule of lenity doctrines to "civil" deportation proceedings are additional examples of doctrinal incoherence. Under the void for vagueness doctrine, a penal statute must be written with sufficient definiteness as to give a person of ordinary intelligence fair notice that her contemplated conduct is forbidden.[81] As the D.C. Circuit has explained:

> In the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them.[82]

However, in *Jordan v. De George*, the Supreme Court applied the criminal vagueness doctrine to examine the constitutionality of a deporta-

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79 *In re Lozada*, 19 I. & N. Dec. at 638.

80 *Accord* Bell v. Cone, 535 U.S. 685, 698 (2002) ("[A] defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotations omitted)); Kimmelman v. Morrison, 477 U.S. 365, 381–82 (1986) (discussing the strong presumption of reasonableness of counsel's performance required by *Strickland* and noting that, "*Strickland*'s standard, although by no means insurmountable, is highly demanding"); *cf.* Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation marks omitted)); *id.* at 690 ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

81 Palmer v. City of Euclid, 402 U.S. 544, 544–46 (1971) (holding that an ordinance that gave insufficient notice to the average person of what constituted a violation was void); United States v. Harriss, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."); Boyce Motor Lines v. United States, 342 U. S. 337, 340 (1952) ("A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties . . . ."); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

82 United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987).

tion statute for persons convicted of "crime[s] involving moral turpitude."[83] The Court explicitly recognized the incongruence of applying the criminal doctrine to these civil proceedings but explained that "[d]espite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case" because of the "grave nature of deportation."[84] Ultimately, the Court concluded that the phrase was not unconstitutionally vague.[85] Recently in *Arriaga v. Mukasey*, the Second Circuit explained that the "'void for vagueness' doctrine is chiefly applied to criminal legislation. Laws with civil consequences receive less exacting vagueness scrutiny" but that the Supreme Court assessed the deportation provision "as if it imposed a criminal penalty."[86]

Similarly, in *Fong Haw Tan v. Phelan*,[87] the Court applied the "rule of lenity"—commonly, though not exclusively,[88] associated with criminal proceedings—to deportation proceedings. The case required the Court to interpret the meaning of a statutory provision that provided for the deportation of individuals who had been convicted of a crime involving moral turpitude "more than once."[89] The Court again reasoned that "deportation is a drastic measure and at times the equivalent of banishment or exile" and held that "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[90] Since *Phelan*, the Supreme Court has repeatedly applied the principle that courts should construe ambiguous immigration statutes favorably to noncitizens.[91]

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83 341 U.S. 223, 229 (1951).

84 *Id.* at 231.

85 *Id.* at 232; *see also* Boutilier v. INS, 387 U.S. 118, 123–24 (1967).

86 521 F.3d 219, 222–23 (2d Cir. 2008).

87 333 U.S. 6 (1948).

88 *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (applying rule of lenity to cases involving Native Americans) (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973)); Choate v. Trapp, 224 U.S. 665, 675 (1912) (same).

89 *Fong Haw Tan*, 333 U.S at 7.

90 *Id.* at 10. *See generally* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN L. REV. 479, 491–92 (2007) (describing the "immigration rule of lenity"); Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 372–73 (2007) (stating that the rule of lenity was "[d]esigned by the Court to protect a vulnerable minority").

91 *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 (2001) (analyzing the rule of lenity alongside the general "presumption against retroactive application of ambiguous statutory provisions" to determine that Congress had not fully considered the costs and benefits of applying a statute to pre-enactment convictions); INS v. Elias-Zacarias, 502 U.S. 478, 487–88 (1992) (Stevens, J., dissenting) (quoting the Court's decisions directing courts to apply the rule

The increasingly frequent application of the criminal exclusionary rule is yet another example of the courts importing uniquely criminal doctrine into purportedly civil deportation proceedings. The familiar rule in a criminal proceeding is that evidence obtained as a result of an unlawful search or seizure will be suppressed if the link between the evidence and the unlawful conduct is not too attenuated.[92] In contrast, evidence obtained in violation of the Fourth Amendment is admissible in civil proceedings.[93] In *Lopez-Mendoza*, the Supreme Court specifically considered whether the exclusionary rule should operate in deportation proceedings.[94] In a 5–4 opinion written by Justice O'Connor, the Supreme Court held that the exclusionary rule does not ordinarily apply to "civil deportation hearing[s]."[95] Howev-

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of lenity in the immigration context); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); INS v. Errico, 385 U.S. 214, 225 (1966) (weighing the humanitarian values of keeping families together with the statutory language at issue to determine that the statute should be read in favor of the alien); Costello v. INS, 376 U.S. 120, 128–29 (1964) (determining that under § 241(a)(4) of the Immigration and Nationality Act, an alien who committed crimes while a naturalized citizen could not be deported after being denaturalized); Bonetti v. Rogers, 356 U.S. 691, 699 (1958) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." (internal quotation marks omitted)); *see also* Okeke v. Gonzales, 407 F.3d 585, 596–97 (3d Cir. 2005) (applying the rule of lenity in reaching a favorable statutory interpretation for the noncitizen); Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004) (same); Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003) (acknowledging the presumption of favoring an alien when a statutory clause is ambiguous, but concluding that the clause in question was not ambiguous); Jobson v. Ashcroft, 326 F.3d 367, 376 (2d Cir. 2003) (stating that the immigration rule of lenity requires the narrowest meaning that may be adopted); De Osorio v. INS, 10 F.3d 1034, 1043 (4th Cir. 1993) (acknowledging the presumption of leniency but ruling against the noncitizen). *See generally* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 520–23 (2003) (describing the Supreme Court's creation of the immigration rule of lenity and its broad application in lower courts); *cf. In re* Harutunian, 14 I. & N. Dec. 583, 588–89 (1974) (holding that the rule of lenity does not apply to statutory provisions applicable to exclusion).

92 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) (citing Wong Sun v. United States, 371 U.S. 471 (1963)) (referring to the rule); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the exclusion rule applies in criminal prosecutions in state courts as well as federal courts).

93 *See* United States v. Janis, 428 U.S. 433, 447 (1976) ("[T]he Court never has applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state."). However, there is case law demonstrating that, in fact, the exclusionary rule was previously employed in removal proceedings. *See, e.g., In re* Garcia, 17 I. & N. Dec. 319, 321 (1980) (terminating proceedings where the government's sole evidence supporting removability was suppressed).

94 *Lopez-Mendoza*, 468 U.S. at 1034.

95 *Id. But see* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV 1109, 1116–22, 1140–46 (2008) (arguing that the purely civil nature of deportation

er, the Court suggested that the exclusionary rule may be available if the Fourth Amendment violations by immigration authorities are "widespread" or "egregious."[96] Since *Lopez-Mendoza*, the BIA and circuit courts have expanded on Justice O'Connor's egregiousness standard, opening the door to application of the exclusionary rule in deportation proceedings.[97] And indeed, suppression motions, while still the exception, are becoming an increasingly frequent feature of deportation proceedings.[98] Again, the purported burden on respon-

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proceedings was an underpinning of Justice O'Connor's opinion and that the corrosion of the understanding of deportation proceedings as civil in recent years warrants a reconsideration of *Lopez-Mendoza*).

96 *Lopez-Mendoza*, 468 U.S. at 1050–51.

97 *See* United States v. Oscar-Torres, 507 F.3d 224, 227 n.1, 228–30 (4th Cir. 2007) (finding suppression of evidence related to the defendant's identity to be appropriate on other grounds); Almeida-Amaral v. Gonzales, 461 F.3d 231, 234–36 (2d Cir. 2006) (applying the egregiousness standard in a deportation hearing but finding no violation); United States v. Bowley, 435 F.3d 426, 430–31 (3d Cir. 2006) (noting that suppression of a defendant's immigration file in a prosecution for illegal re-entry may be appropriate in cases of egregious Fourth Amendment violations); United States v. Olivares-Rangel, 458 F.3d 1104, 1106, 1111 (10th Cir. 2006) (holding that *Lopez-Mendoza* does not prevent the suppression of all identity-related evidence); Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22–23 (1st Cir. 2004) (considering an argument based on the egregiousness standard in a deportation hearing but ultimately finding no violation); Miguel v. INS, 359 F.3d 408, 411 & n.3 (6th Cir. 2004) (declining to reach the applicability of the exclusionary rule because the immigration judge did not rely on any of the evidence seized); Martinez-Camargo v. INS, 282 F.3d 487, 492–93 (7th Cir. 2002) (declining to reach the issue of egregiousness because the investigatory stop was reasonable based on the totality of the circumstances); Orhorhaghe v. INS, 38 F.3d 488, 492–93, 504 (9th Cir. 1994) (finding that immigration agents committed egregious violations by seizing Orhorhaghe outside of his apartment and conducting a warrantless search based on his Nigerian sounding name); *In re* Velasquez, 19 I. & N. Dec. 377, 380 (1986) (affirming a denial of a motion for suppression because the exclusionary rule does not apply in deportation proceedings); *In re* Benitez, 19 I. & N. Dec. 173, 175 (1984) (acknowledging that the exclusionary rule is not applicable in deportation proceedings and finding the record sufficient to support deportation even without the contested evidence). *But see* United States v. Farias-Gonzalez, 556 F.3d 1181, 1185–86 (11th Cir. 2009) (determining that *Lopez-Mendoza* does not control); United States v. Guevara-Martinez, 262 F.3d 751, 753–54 (8th Cir. 2001) (electing not to apply *Lopez-Mendoza*); Velasquez-Tabir v. INS, 127 F.3d 456, 459 (5th Cir. 1997) (assuming that in deportation proceedings the exclusionary rule does not exclude evidence obtained in violation of the Fourth Amendment).

98 BESS CHIU, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 14 (2009), *available at* http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentEdit&ucmd=UserDisplay&userid=84&contentid=11652&folderid=2246 ("Since 2006, there has been a nine-fold increase in the filing of suppression motions, a twenty-two-fold increase in suppression motions related to home raids, and a five-fold increase in the grant rate of suppression motions."); *see also* Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 527 (2011) (noting that U.S. courts of appeals have allowed suppression motions for egregious violations of the Fourth Amendment and advocating for more suppression).

dents seeking suppression in "civil" deportation proceedings (egregious violation) is, on its face, higher than the burden on criminal defendants (mere violation). However, as a practical matter the types of violations that ultimately result in suppression are frequently not so dissimilar.[99] So, once again, we see a uniquely criminal law doctrine creeping into the "civil" deportation realm.[100]

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99 *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008) (citing studies demonstrating that less than 1.3% of suppression motions are successful); Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 470–73 (2010) (explaining that "[e]ven if the police were to commit egregious misconduct and violate a suspect's constitutional rights, the probability that the evidence would be suppressed (p) is still very low" and that "the odds are overwhelming that the suppression hearing will be unsuccessful"). *See generally* U.S. COMPTROLLER GEN., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B-171019, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 9–11 (1979) (citing data reflecting the use and success rate of suppression motions in criminal proceedings); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 8 AM. B. FOUND. RES. J. 611, 660 (1983) (analyzing the GAO study); Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585, 596 (1983) (distinguishing success rates for motions to suppress based on the type of evidence).

100 There are additional examples of doctrinal drift from criminal law into deportation law. For example, the Fifth Amendment provides a privilege against self-incrimination in "any criminal case." Therefore, since deportation proceedings are considered civil, as a technical matter, immigrants cannot refuse to answer questions simply because the answers will lead to their deportation. Indeed, when immigrants refuse to answer such questions the law permits a negative inference to be drawn from their silence. However, as a practical matter, immigrants are protected in much the same way as criminal defendants because courts have routinely held that the negative inference from silence is not sufficient to sustain the government's burden in a deportation proceeding. *See generally* United States v. Balsys, 524 U.S. 666, 692 n.18 (1998) (recognizing that silence cannot be used to substantiate a deportation claim); Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 603 (1990) (explaining that the privilege against self-incrimination can be asserted in deportation proceedings in spite of their characterization as civil). *But see* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) (explaining that an alien's "failure to claim that he was a citizen and his refusal to testify" about his citizenship "had a tendency to prove that he was an alien"). The burden of proof applied is yet another example. In general, the default standard of proof in civil cases is a preponderance of the evidence. *See* Grogan v. Garner, 498 U.S. 278, 286 (1991). However, the Supreme Court has required an intermediate standard of proof in deportation cases between the civil preponderance standard and the requirement of proof beyond a reasonable doubt in criminal cases. *See* Woodby v. INS, 385 U.S. 276, 277 (1966) ("[I]t is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, *unequivocal*, and convincing evidence." (emphasis added)); *see also* Addington v. Texas, 441 U.S. 418, 424 (1979) ("The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,' is less commonly used, but nonetheless 'is no stranger to the civil law.' One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputa-

The modern Court, at least until *Padilla*, has been steadfast in describing deportation proceedings as "purely civil" actions.[101] Indeed, in many cases where respondents have attempted to assert rights commonly associated with criminal proceedings, courts have rejected the claim out of hand, based solely on the civil label without any further analysis.[102] It is, however, difficult to reconcile these cases with the contrasting phenomenon of the regular importation of certain criminal doctrinal strands into this purportedly purely civil realm. In effect, the current state of the pre-*Padilla* doctrine was that deportation is purely and exclusively civil . . . except when it isn't. When we examine this doctrinal incoherence in the historical context of deportation precursors, which were explicitly recognized as criminal penalties,[103] and in light of the Court's repudiation of its only articulated justification for the civil label[104]—the inherent powers theory—what is revealed is the confused and indefensible state of the current jurisprudence regarding the nature of deportation.

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tion tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases." (citations omitted)); *id.* at 432 (holding that a standard above preponderance of the evidence is necessary for civil commitment cases, though the term "unequivocal" is not constitutionally required in that context); *cf. In re* Winship, 397 U.S. 358, 364–65 (1970) (requiring proof beyond a reasonable doubt in civil juvenile delinquency proceedings).

101 *Lopez-Mendoza*, 468 U.S. at 1038.

102 *See* Conteh v. Gonzales, 461 F.3d 45, 55 (1st Cir. 2006) (declining "the invitation to transplant the categorical approach root and branch—without any modification whatever—into the civil removal context"); Csekinek v. INS, 391 F.3d 819, 824 (6th Cir. 2004) (rejecting *ex post facto* argument because "[t]he Supreme Court has specifically held that immigration and deportation proceedings are civil, and not criminal, in nature"); *Bilokumsky*, 263 U.S. at 157 ("And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application"); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) ("[D]eportation is not criminal punishment."); *Balsys*, 524 U.S. at 671 ("[R]isk that [resident alien's] testimony might subject him to deportation is not a sufficient ground for asserting the privilege, given the civil character of a deportation proceeding."); United States v. Bodre, 948 F.2d 28, 33 (1st Cir. 1991) (relying on the civil label in rejecting an *ex post facto* claim); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) ("[P]etitioner's contentions that her deportation constitutes the infliction of double jeopardy and is a cruel and unusual punishment fail, among other reasons, under the principle so clear to judges, however difficult it may be for laymen to comprehend, that deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." (internal quotation marks omitted)); Scheidemann v. INS, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996) ("[T]he prohibition against *ex post facto* laws does not apply to deportation proceedings, which are purely civil . . . ." (internal quotation marks omitted)).

103 *See* discussion *supra* notes 36–44 (reviewing the role of deportation at common law and in the American colonies).

104 *See* discussion *supra* Part I.B (reviewing the demise of the inherent powers theory).

II. *PADILLA*: A CLOSE READING.

It was in the context of this tangled jurisprudence regarding the nature of deportation that the Court considered the case of *Padilla*.[105] The central issue in *Padilla* did not, however, necessarily require any examination of the civil or criminal nature of deportation proceedings. Padilla was a native of Honduras, an honorably discharged veteran of the United States Army, and had been a lawful permanent resident of the United States for over forty years by the time his case reached the Supreme Court.[106] In 2001, the tractor trailer Padilla was driving was stopped by police for a safety inspection, and he, thereafter, allegedly consented to a search of his vehicle.[107] The search revealed several styrofoam boxes containing approximately 1033 pounds of marijuana.[108] Padilla was charged with, *inter alia*, trafficking in marijuana and ultimately pled guilty in return for a sentence of ten years, with five years to be served and five years to be probated.[109] However, Padilla alleges that he only pled guilty in reliance upon his attorney's affirmative misadvice that he "did not have to worry about immigration status since he had been in the country so long."[110]

In fact, Padilla's conviction was an aggravated felony[111] subjecting him to mandatory detention and deportation.[112] In 2004, two years after his conviction, Padilla filed a pro se post-conviction motion seeking to withdraw his plea, asserting that he had received ineffective assistance of counsel, to wit: being affirmatively misadvised about the immigration consequences of his plea agreement.[113] The trial court denied the motion but was reversed by the Kentucky Court of

105 130 S. Ct. 1473 (2010).

106 *Id.* at 1477.

107 Brief of Respondent at 2, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2473880.

108 *Id.* at 3.

109 *Id.* at 3–4.

110 *Padilla*, 130 S. Ct. at 1478 (internal quotation marks omitted).

111 *See* 8 U.S.C. § 1101(a)(43)(B) (2006) (defining drug trafficking as an aggravated felony).

112 Conviction of an "aggravated felony," defined in 8 U.S.C. § 1101(a)(43) (2006), includes a broad range of offenses including drug trafficking crimes, though ironically convictions need not be either aggravated or felonies to be classified as "aggravated felonies." Aggravated felons are ineligible for "cancellation of removal," the primary form of discretionary relief available to longtime residents, and therefore noncitizens like Padilla who commit aggravated felonies are subject to mandatory deportation. *See* 8 U.S.C. § 1229b(a)(3) (2006) (excluding aliens who have been convicted of an aggravated felony from a class whose removal the Attorney General may cancel). Section 236(c) of the INA, 8 U.S.C. § 1226(c) (2006), provides for the mandatory immigration detention of a large class of noncitizens who are subject to criminal convictions. This includes all aggravated felons upon their release from criminal custody.

113 Brief of Petitioner at 11, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

Appeals.[114] Ultimately, a divided Kentucky Supreme Court held that since deportation was a collateral, not direct, consequence of the criminal conviction, even affirmative misadvise did not violate the Sixth Amendment because "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," and therefore it held "that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief."[115] The issue before the Supreme Court centered on the scope of the Sixth Amendment right to counsel in a traditional criminal proceeding and thus did not necessarily require consideration of the criminal or civil nature of deportation proceedings.

The Supreme Court granted certiorari, presumably, because of the division of lower court authority regarding the consequences of a criminal defense attorney's misadvice or failure to advise a defendant about the immigration consequences of a contemplated plea agreement. The large majority of courts to consider the issue, including ten federal circuits and seventeen states, had held that a criminal defense attorney's failure to advise her clients of the immigration consequences of a contemplated plea agreement is not ineffective assistance.[116] Three state courts had held to the contrary that, in at least

114 *Id.* at 11–12.

115 Kentucky v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), *rev'd*, 130 S. Ct. 1473 (2010).

116 *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327, 334 (5th Cir. 2008); Yong Wong Park v. United States, 222 F. App'x 82 (2d Cir. 2007); Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004), *cert. denied*, 543 U.S. 1034 (2004); United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003); Gumangan v. United States, 254 F.3d 701, 706 (8th Cir. 2001); United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941, 945 (7th Cir. 1989), *superseded by statute*, Pub. L. No. 101-649, tit. V, § 505(b), 104 Stat. 5050, and *cert. denied*, 493 U.S. 1059 (1990); United States v. Yearwood, 863 F.2d 6, 8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985); Oyekoya v. State, 558 So. 2d 990, 991 (Ala. Crim. App. 1989); Tafoya v. State, 500 P.2d 247, 251 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1973); State v. Rosas, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); Major v. State, 814 So. 2d 424, 431 (Fla. 2002); Williams v. Duffy, 513 S.E.2d 212, 214 (Ga. 1999); People v. Huante, 571 N.E.2d 736, 741 (Ill. 1991); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002); Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005); State v. Montalban, 810 So. 2d 1106, 1110 (La. 2002); Alanis v. State, 583 N.W.2d 573, 579 (Minn. 1998); State v. Zarate, 651 N.W.2d 215, 224 (Neb. 2002); Barajas v. State, 991 P.2d 474, 476 (Nev. 1999); State v. Dalman, 520 N.W.2d 860, 864 (N.D. 1994); Commonwealth v. Frometa, 555 A.2d 92, 93–94 (Pa. 1989); Nikolaev v. Weber, 705 N.W.2d 72, 77 (S.D. 2005); State v. McFadden, 884 P.2d 1303, 1305 (Utah Ct. App. 1994); *see also* Brief of Criminal and Immigration Law Professors et al. as Amici Curiae Supporting Petitioner at 10–12, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 4933628 (discussing the issue of whether or not counsel's nonadvice or misadvice about deportation violates the Sixth Amendment).

some situations, defense attorneys have an affirmative obligation to advise clients about immigration consequences.[117] On the issue of affirmative misadvice, the great weight of authority went in the opposite direction, with seventeen jurisdictions holding that misadvice about immigration consequences was ineffective assistance of counsel[118] and only one jurisdiction joining Kentucky to hold to the contrary.[119] The Supreme Court had not commented directly on the issue in the past though it had once suggested in dicta that, in light of the gravity of the consequence of deportation, defense attorneys should advise clients about immigration consequences.[120]

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117 *See* People v. Pozo, 746 P.2d 523, 527 (Colo. 1987) (holding that if a lawyer had enough information to believe the client was a noncitizen, effective assistance would require advising about collateral immigration consequences), *rev'd on other grounds*, 746 P.2d 523 (Colo. 1987) (en banc); State v. Paredez, 101 P.3d 799, 805 (N.M. 2004) (holding that an attorney must determine the defendant's immigration status and specifically advise the defendant of the immigration consequences of pleading guilty); *see also* State v. Creary, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb. 26, 2004) (explaining that while defense lawyers ordinarily need not advise clients of collateral consequences including deportation, "an evolving sense of the lawyer's duty indicates that such information should be given when it appears critical to the defendant's situation" and finding that a lawyer's failure to advise a client whom he knew to be interested in deportation consequences can be ineffective); *cf.* Williams v. State, 641 N.E.2d 44, 49 (Ind. App. 1994) (reaching same result on state constitutional grounds); Gonzalez v. State, 134 P.3d 955, 958–59 (Or. 2006) (same). *See generally* Brief of Criminal and Immigration Law Professors et al. as Amici Curiae, *supra* note 116, at 12–13 (discussing the "evolving understandings of justice" as reflected by state court decisions that criminal defense lawyers must advise at least some noncitizen clients of the immigration consequences of conviction).

118 *See, e.g.*, United States v. Kwan, 407 F.3d 1005, 1016–18 (9th Cir. 2005); United States v. Couto, 311 F.3d 179, 187–88 (2d Cir. 2002); Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979); Djioev v. State, No. A-9158, 2006 WL 361540, at *2–3 (Alaska Ct. App. Feb. 15, 2006); Alguno v. State, 892 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 2005); Rollins v. State, 591 S.E.2d 796, 799 (Ga. 2004); People v. Correa, 485 N.E.2d 307, 311 (Ill. 1985); Rubio v. State, 194 P.3d 1224, 1232 (Nev. 2008); State v. Garcia, 727 A.2d 97, 101 (N.J. Super. Ct. App. Div. 1999); *Creary*, 2004 WL 351878, at *2; King v. State, No. M2006-02745-CCA-R3-CD, 2007 WL 3052854 (Tenn. Crim. App. Sept. 4, 2007); State v. Rojas-Martinez, 125 P.3d 930, 934–35 (Utah 2005); Commonwealth v. Tahmas, Nos. 105254, 105255, 2005 WL 2249587 (Va. Cir. Ct. July 26, 2005); Valle v. State, 132 P.3d 181, 184 (Wyo. 2006); *see also In re* Resendiz, 19 P.3d 1171, 1177 (Cal. 2001) (stating that failing to advise or providing misadvice may be ineffective); People v. McDonald, 745 N.Y.S.2d 276, 280–81 (N.Y. App. Div. 2002) (same), *aff'd*, 802 N.E.2d 131 (N.Y. 2003).

119 *See* United States v. Sambro, 454 F.2d 918, 921 (D.C. Cir. 1971) (en banc) (holding that the appellant "was not unfairly or unjustly treated" when trial judge refused to allow the appellant to withdraw his plea of guilty at the time he appeared for sentencing).

120 *See* INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001) ("Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance."). *See generally* Hill v. Lockhart, 474 U.S. 52, 57 (1985) (applying the *Strickland* standard to plea agreements).

Before the Supreme Court, Kentucky relied primarily on the argument that deportation is a collateral consequence of a criminal conviction and on the great weight of authority holding that defense attorneys, like courts, are under no obligation to advise clients of collateral consequence, including deportation.[121] Kentucky argued that there is no principled distinction between deportation and other collateral consequences and warned of the slippery slope of ever increasing obligations of defense counsel.[122] Padilla and his supporting *amici* made three primary arguments: (1) because of dramatic changes in immigration law over the past twenty years, making deportation a virtually automatic and certain result of many convictions, it is now a direct, not collateral, consequence;[123] (2) "deportation is different"—even if deportation is a not a direct consequence it is a unique collateral consequence because of its gravity and its close relationship to the criminal conviction;[124] and (3) the collateral consequences doctrine is inapposite because it governs the Court's obligation to insure that a plea is knowing and intelligent, but the Sixth Amendment requirement of effective assistance of counsel is not so limited.[125]

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121 Brief of Respondent, *supra* note 107, at 18 ("Given the breadth and diversity of the consequences noted, placing a duty on defense counsel to be aware and advise a defendant of any likely collateral consequences would be overly burdensome and wholly impractical.").

122 *Id.* at 40 ("Attempting to treat deportation differently than other collateral matters will open the Pandora's box of collateral matters that will have to be addressed individually by the courts, thereby further overburdening an overtaxed judicial system."); *see also* Brief for United States as Amicus Curiae Supporting Affirmance at 18, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2509223 ("[D]efense attorneys would be forced to investigate and answer complex legal questions in which they have little or no expertise or experience.").

123 Brief of Criminal and Immigration Law Professors et al. as Amici Curiae, *supra* note 116, at 10, 18 ("Deportation is no longer a collateral consequence of conviction, as statutory changes over the last two decades have made it automatic upon conviction of certain crimes, with no discretionary relief. . . . Deportation is thus a direct rather than a collateral consequence of an aggravated-felony conviction."); Brief of Petitioner, *supra* note 113, at 3 ("Because of recent amendments to the Immigration and Nationality Act, a great number of criminal convictions now lead to the dire and inevitable consequence of deportation.").

124 Brief of Petitioner, *supra* note 113, at 51 ("Immigration consequences for persons convicted are so severe in nature and so immediately and deeply interwoven with the criminal prosecution and sentence that effective assistance of counsel must extend to protecting the accused against such consequences.").

125 *Id.* at 18–50 (arguing that the origin and rationale of the collateral consequences rule are inapposite to ineffective-assistance claims and that, in fact, they run afoul of *Strickland*); Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae Supporting Petitioner at 26, *Padilla*, 130 S. Ct. 1473 (No. 08-651) ("The Sixth Amendment does not support a more rigid or formalistic conception of the attorney's duties at the plea stage."). In the alternative, Padilla made the additional argument that even if no affirmative advice is required under the Sixth Amendment, misadvice still renders a con-

Notably, for our purposes, the parties and amicus briefs were rife with discussions of the nature of removal proceedings. For his part, Padilla argued "one can no longer draw distinct lines between criminal and immigration consequences."[126] *Amici*, criminal and immigration law professors argued that "[s]tatutory changes have broken down the walls between criminal and immigration proceedings . . . ."[127] Similarly, *amicus* Constitutional Accountability Center argued that "the line between penal and immigration consequences has been blurred . . . ."[128] Kentucky's argument relied to an even greater extent on assertions about the nature of removal proceedings. It argued that the "right to 'counsel for his defence' contemplates a criminal prosecution, not a civil proceeding," that the "criminal sentencing court has no authority or control over civil consequences arising from a criminal conviction," and that, therefore, "the constitutional standard focuses on attorney competence in criminal cases, not civil or administrative cases."[129]

In its decision, the Court first spent considerable time chronicling the way immigration law has "changed dramatically over the last 90 years" such that the "'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[130] The Court noted that for more than a century after the nation's founding, there were no immigration bars related to criminal convictions and that "radical changes" in 1917 (two decades after the civil label was attached to deportation) led to the first American law providing for the deportation of people convicted of crimes after entry.[131] The Court also noted that, for the majority of the twentieth century, criminal sentencing judges were empowered under the Immigration and Nationality Act ("INA") to enter binding judicial "recommendations" against deportation ("JRAD") at the time they handed down criminal sentences, and that, therefore, mandatory deportation was not a feature of our immigration laws.[132] In regard to

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viction constitutionally infirm. *See* Brief of Petitioner, *supra* note 113, at 55–60. This was the position endorsed by the Solicitor General in her amicus brief. Brief for United States as Amicus Curiae, *supra* note 122, at 25 ("[M]isadvice on immigration consequences can rise to the level of deficient performance under *Strickland*.").

126 Brief of Petitioner, *supra* note 113, at 53.

127 Brief of Criminal and Immigration Law Professors et al. as Amici Curiae, *supra* note 116.

128 Brief of Constitutional Accountability Ctr. as Amicus Curiae Supporting Petitioner at 15, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

129 Brief of Respondent, *supra* note 107, at 9, 39–40, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

130 *Padilla*, 130 S. Ct. at 1478 (citation omitted).

131 *Id.* at 1478–79.

132 *Id.* at 1479–80.

JRAD, the Court spoke approvingly of a Second Circuit decision recognizing a JRAD as "'part of the sentencing' process."[133] In light of the dramatic changes in deportation law over the twentieth century, the Court concluded that "deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants . . . ."[134]

In Part II of its decision, the critical portion for our purposes, the Court considered the parties' arguments regarding the direct or collateral nature of immigration consequences. In so doing, the Court waded into the forgotten debate about the civil or criminal nature of deportation. It began by acknowledging the long line of precedent characterizing deportation as civil but critically felt the need to qualify the label: "We have long recognized that deportation is a particularly severe 'penalty,' but it is not, *in a strict sense*, a criminal sanction. Although removal proceedings are civil in nature, *deportation is nevertheless intimately related to the criminal process.*"[135] The Court recognized that over the last century:

> Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context.[136]

The Court, therefore, concluded that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence."[137]

Ultimately, this entire discussion is dicta because the Court resolved the case by adopting Padilla's argument that the "collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[138] Instead the Court looked to *Strickland*'s reasonableness standard and adopted the minority position of lower courts: that defense counsel has an affirmative duty to investigate and advise noncitizen clients of the potential immigration consequences of a contemplated disposition—both silence and affirmative misadvice are constitutionally deficient.[139]

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133 *Id.* at 1480 (citing Janvier v. United States, 793 F.2d 449 (2d Cir 1986)).

134 *Id.* at 1481.

135 *Id.* at 1483 (emphasis added) (citations omitted).

136 *Id.* (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)) (citation omitted).

137 *Id.*

138 *Id.*

139 *Id.* at 1483. When the law is clear about the deportation consequences for a client, as was the situation in Padilla's case, the Court said that it is the criminal defense attorney's

The holding of *Padilla* will require a healthy transformation of the defense bar's vision of its role and responsibility and will considerably improve the measure of justice afforded to noncitizen defendants in our criminal justice system. However, as I argue below, the Court's discussion of the nature of removal proceedings and its ultimate conclusion that deportation is different, insofar as it cannot be classified as either a direct or collateral consequence—a proxy for the criminal and civil labels[140]—could be the most important legacy of the *Padilla* decision.

III. *PADILLA* AS A CRITICAL PIVOT POINT IN IMMIGRATION JURISPRUDENCE

In the incrementalist modality of Supreme Court jurisprudence, the *Padilla* Court's conclusion that deportation is "uniquely difficult to classify as either a direct or a collateral consequence"[141] could, in time, come to be understood as the beginning of a radical restructuring of the Court's conception of the civil or criminal nature of deportation. If the Court continues in this direction, *Padilla* will be understood as a pivot point in the Court's immigration jurisprudence—marking the first time in over a century that the Court has substantively considered the civil or criminal nature of deportation. As discussed below, there is good reason to be hopeful that an about-face is coming from the rule laid out in *Fong Yue Ting*: that deportation proceedings are purely civil in nature.[142] While ultimately dicta, Justice Stevens spent approximately half of the decision explaining how much has changed in immigration law since *Fong Yue Ting* and how these changes impact the nature of deportation. What Justice Stevens

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clear "duty to give correct advice." *Id.* However, when the law is unclear or not straightforward, as the Court acknowledged is often the case, a criminal defense attorney only has to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* In a concurrence joined by Chief Justice Roberts, Justice Alito took the middle-ground approach largely adopted by a majority of lower courts, arguing that a defense attorney's duty is to: "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney." *Id.* at 1496 (Alito, J., concurring). Justice Scalia's dissent, joined by Justice Thomas, would have adopted Kentucky's extreme position and held that even affirmative misadvice regarding immigration consequences does not constitute ineffective assistance. *Id.* at 1500 (Scalia, J., dissenting) ("Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.").

140 *See* discussion *infra* Part III.A.

141 *Padilla*, 130 S. Ct. at 1482.

142 *See* Fong Yue Ting v. United States, 149 U.S. 698 (1983).

describes is just the sort of change that can justify overruling long standing but outdated precedent. Instead, *Padilla* suggests that the Court is moving toward a recognition that "deportation is different"—it lives in the netherworld between civil and criminal proceedings, not truly belonging to either.

To attempt to predict the approaching arch of Supreme Court jurisprudence is, some would say, a fool's errand, and all would probably agree is, at minimum, a difficult task and an imprecise art. And indeed there has been, for some time, no shortage of lower courts,[143] dissenting judges,[144] or scholars[145] prodding the Court to reconsider its

143 *See, e.g.*, Fadiga v. U.S. Att'y Gen., 488 F.3d 142, 157 n.23 (3d Cir. 2007) (noting that although the Sixth Amendment does not apply, "we cannot treat immigration proceedings like everyday civil proceedings . . . because unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings." (internal quotation marks omitted)); Stroe v. INS, 256 F.3d 498, 505 (7th Cir. 2001) (Wood, J. concurring) ("[T]here are many areas of federal law where [the criminal and civil] distinction becomes blurred. Habeas corpus is one, civil forfeitures in conjunction with criminal prosecutions is another, and immigration cases may well be a third."); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960) (stating that deportation proceedings implicate "an especially critical and fundamental individual right"); *Ex parte* Chin Loy You, 223 F. 833, 838 (D. Mass. 1915) ("To make the defendant's substantial rights in a matter involving personal liberty [such as deportation proceedings] depend on whether the proceeding be called 'criminal' or 'civil' seems to me unsound.").

144 *See, e.g.*, United States v. Spector, 343 U.S. 169, 178 (1952) (Jackson, J., dissenting) ("Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended."); Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) ("Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while."); *Fong Yue Ting*, 149 U.S. at 737–38 (Brewer, J., dissenting) ("Banishment may be resorted to as punishment for crime, but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.").

145 *See, e.g.*, Kanstroom, *supra* note 28, at 1931–35 (discussing the problematic lack of a comprehensive theoretical approach in the field of immigration law in general and deportation law in particular); Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 113–16 (2007) (noting the reasons to consider deportation proceedings as criminal proceedings rather than as civil proceedings); Legomsky, *supra* note 28, at 512 ("The now prolific case law dismissing deportation as civil rather than criminal or otherwise punitive is long on citation of precedent and short on independent reasoning."); Markowitz, *supra* note 7, at 327–41 (discussing the need to create a new model for explaining the boundary between civil and criminal proceedings and the Supreme Court's response to this need); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1780, 1786 (2010) ("There are many obstacles that stand between the status quo and a just immigration policy."); Pauw,

conception of deportation proceedings. What then provides hope that the Court will now be moved to action? A close reading of the language used by the Court in *Padilla* and its contrast with other recent Supreme Court pronouncements, an examination of trends in the Supreme Court's immigration jurisprudence, a survey of public perception linking criminal and immigration law, and the opportunity to remedy the incoherent state of doctrine, together, I argue, provide good reason to believe change is coming.

A. *Putting* Padilla*'s Pronouncements in Context: Contrasting Past Supreme Court Statements and Understanding the Link Between the Civil-Criminal and the Collateral-Direct Divides*

To many, the Court's description of the intimate link between deportation and criminal law will seem completely unsurprising. Indeed, these concepts generally mirror public perception.[146] However, to students of the Court's immigration jurisprudence, it was startling (and refreshing) to read these common sense pronouncements because of how sharply they contrast with prior Supreme Court statements. In *Lopez-Mendoza*, for example, Justice O'Connor emphatically declared that a "deportation proceeding is a *purely civil action* . . . ."[147] This language echoes early statements calling deportation "*exclusively*" and "*only*"[148] civil and noting that the Court has "*consistently* classified [deportation] as a civil rather than a criminal procedure."[149] Justice

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supra note 28, at 319–45 (asserting the need for the execessive punishment inflicted by deportation to be limited by the same constitutional provisions that are applied in other contexts); Stumpf, *supra* note 32 (proposing "a new approach to immigration sanctions based on the graduated penalty system in the criminal realm"); Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 82–89 (2010) (discussing removal as a criminal sanction and assessing whether it is an effective and appropriate punishment for crime).

146 *See* discussion *infra* Part III.I.C.

147 INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (emphasis added).

148 *Spector*, 343 U.S. at 178–79 (Jackson, J., dissenting) (emphasis added) (describing Supreme Court precedent).

149 *Harisiades*, 342 U.S. at 594 (emphasis added). There was a period in the mid-twentieth century when the Supreme Court did exhibit some unease with the civil label's application to deportation proceedings. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 98 (1958) (characterizing the rule that deportation is not penal as "highly fictional"); Galvan v. Press, 347 U.S. 522, 530–31 (1954) (explaining that if the Court were "writing on a clean slate . . . it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation"); *Harisiades*, 342 U.S. at 594 (characterizing the civil designation of deportation "debatable"); Jordan v. De George, 341 U.S. 223, 231 (1951) (describing the "grave nature of deportation"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (describing deportation as a "drastic measure"); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (drawing attention to the "high and momentous" stakes in deportation proceedings); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("That

O'Connor's oft-quoted pronouncement about the "purely" civil nature of deportation has, for a quarter century, been understood by lower courts as a clear signal not to venture into the criminal-civil debate.[150] As the Ninth Circuit explained:

> [W]hether an alien will be removed is still up to the INS. There is a process to go through, and it is wholly independent of the court imposing sentence. The Supreme Court has made this clear by describing deportation as a 'purely civil action' separate and distinct from a criminal proceeding. Removal is not part of the sentence; future immigration consequences do not bear on the 'range of the defendant's punishment' imposed by the court, and deportation is not punishment for the crime.[151]

We would expect that the *Padilla* Court's conclusion that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty"[152] should alter the Ninth Circuit's, and other courts', understanding of the nature of deportation.

However, despite its musing about the civil or criminal nature of deportation, the Court's ultimate conclusion was, on its face, about the facially distinct direct or collateral designation—"Deportation . . . is . . . uniquely difficult to classify as either a direct or a collateral consequence."[153] To understand the import of this statement for the civil-criminal debate, we must understand something about the connection between these two doctrinal strands—the civil-criminal divide and the collateral consequences doctrine. Because of the intimate connection between the two doctrines, and indeed because the *Padilla* Court made this connection explicit, we can understand the Court's inability to classify deportation as direct or collateral as a proxy for—or at minimum strongly suggesting—a simi-

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deportation is a penalty—at times a most serious one—cannot be doubted."); *see also* Markowitz, *supra* note 7, at 298–307 (discussing the evolution of Supreme Court jurisprudence regarding the civil label).

150 *See, e.g.*, Csekinek v. INS, 391 F.3d 819, 824 (6th Cir. 2004) (referring to deportation proceedings as civil rather than criminal in nature, in light of Supreme Court holdings); Cadet v. Bulger, 377 F.3d 1173, 1196 (11th Cir. 2004); Denko v. INS, 351 F.3d 717, 723 (6th Cir. 2003); De La Teja v. United States, 321 F.3d 1357, 1364 (11th Cir. 2003); United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002); United States v. Drummond, 240 F.3d 1333, 1336 n.3 (11th Cir. 2001); United States v. Avila-Gonzalez, No. 98-1391, 1999 WL 1037572, at *2 (10th Cir. Nov. 16, 1999); Scheidemann v. INS, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996); Sene v. INS, No. 95-3104, 1996 WL 667906, at *1 (4th Cir. Nov. 19, 1996); United States v. Bodre, 948 F.2d 28, 31–32 (1st Cir. 1991); Maldonado-Perez v. INS, 865 F.2d 328, 332 (D.C. Cir. 1989).

151 *Amador-Leal*, 276 F.3d at 516 (citations omitted) (quoting *Lopez-Mendoza*, 468 U.S. at 1038).

152 Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

153 *Id.* at 1482.

lar conclusion that deportation is neither purely civil, nor purely criminal, in nature.

The collateral consequences doctrine is a creation of the lower courts attempting to define the scope of the Supreme Court's pronouncement that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."[154] As the Third Circuit explained:

> It has been stated broadly that out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. But the pertinent question is: what consequences? To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from the federal penitentiaries.[155]

Accordingly, lower courts developed the rule that, before a defendant pleads guilty to a crime, he must first be appraised of the direct, but not the collateral, consequences of his plea in order to ensure that he knowingly and voluntarily waived his rights in accordance with due process.[156]

The case commonly cited as the origin of the doctrine is *United States v. Parrino*,[157] which specifically considered whether a defendant must be warned that a guilty plea could subject him to deportation. In *Parrino* the Second Circuit determined, without discussion, that deportation is a "collateral consequence of conviction" and, with substantial discussion, concluded that "the finality of a conviction on a plea of guilty" does not depend "upon a contemporaneous realization by the defendant of the collateral consequences thereof."[158] The collateral consequences doctrine has since been adopted by every other circuit court of appeals.[159]

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154 Kercheval v. United States, 274 U.S. 220, 223 (1927).

155 United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (citation omitted).

156 Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (reiterating the "long-standing rule in this as well as other circuits that the trial judge when accepting a plea of guilty is not bound to inquire whether a defendant is aware of the collateral effects of his plea"); *Cariola*, 323 F.2d at 186 ("[T]he factual situations which have occasioned the [plea of guilty] afford no basis for holding that the finality of a conviction depends upon a contemporaneous realization by the defendant of the collateral consequences of his plea."); *see also* FED. R. CRIM. P. 11(b)(1) (codifying the rule).

157 212 F.2d 919 (2d Cir. 1954).

158 *Id.* at 921–22.

159 *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004); Duke v. Cockrell, 292 F.3d 414, 417 (5th Cir. 2002); United States v. Hurlich, 293 F.3d 1223, 1230–31 (10th Cir. 2002); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988); United States v. Montoya, 891 F.2d 1273, 1292–93 (7th Cir. 1989);

While the Supreme Court has never itself explicitly adopted the doctrine, its statement in *Brady v. United States* that "[t]he standard as to the voluntariness of guilty pleas must be essentially that . . . '[a] plea of guilty entered by one fully aware of the direct consequences,'"[160] has been interpreted by some lower courts as an affirmance of the collateral consequences doctrine.[161] The Supreme Court has never, however, articulated any standard to distinguish collateral from direct consequences and, in fact, in *Padilla* recognized divergent standards employed by the lower courts for that purpose.[162] One thing that all courts seem to agree upon, however, is the close link between the determination of whether a consequence is collateral and whether it is civil.[163] The link is so close, in fact, that some

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Holmes v. United States, 876 F.2d 1545, 1549 (11th Cir. 1989); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988); George v. Black, 732 F.2d 108, 110 (8th Cir. 1984); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365–66 (4th Cir. 1973); United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971).

160 Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

161 *See, e.g.*, *Sambro*, 454 F.2d at 922 ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences.").

162 Padilla v. Kentucky, 130 S. Ct. 1473, 1481 n.8 (2010) ("There is some disagreement among the courts over how to distinguish between direct and collateral consequences."); *id.* at 1487 (Alito, J., concurring) (acknowledging that "the line between 'direct' and 'collateral' consequences is not always clear"). *Compare, Cuthrell*, 475 F.2d at 1366 ("The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."), *with Torrey*, 842 F.2d at 236 ("[T]he determination that a particular consequence is 'collateral' . . . rest[s] on the fact that it was in the hands of another government agency or in the hands of the defendant himself."), *and* United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000) ("However 'automatically' Gonzalez's deportation—or administrative detention—might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a collateral consequence thereof.").

163 *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 687 (2006) ("[A]ppellate courts . . . hold that neither defense attorneys nor trial courts are required to inform defendants of these consequences as part of the guilty plea or sentencing process. As a result, the non-criminal nature of these consequences separates them from the *criminal* punishment imposed upon the defendant."); Sweeney, *supra* note 145, at 52 (stating that courts have generally found defendants "to be entitled to the constitutional protections of criminal proceedings only when they have found a consequence of conviction to be punitive (rather than remedial) in nature and the direct (rather than collateral) consequence of the conviction"); *see also* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 194 (2009) (arguing that the Supreme Court should breach the distinction between direct and collateral); Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 146 (2008) (finding that collateral consequences are often discussed in courtrooms but to a

courts treat them as a singular inquiry.[164] Even when courts purport to impose some other standard, such standards are almost always, in practice, mere proxies for the civil label.[165] Thus, courts tend to use the term "collateral consequence" as synonymous with "civil consequence" and, practically, there is rarely any daylight between the two determinations.[166] The *Padilla* Court itself conflates the discussion of the criminal-civil nature of deportation with the collateral-direct de-

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widely varying and uncertain extent); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 689 (2008) (describing the framework applied by the lower courts in determining whether a consequence is direct or collateral).

164 *See, e.g.*, United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) (holding that deportation is a collateral consequence because it "is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding."); *Cuthrell*, 475 F.2d at 1367 (holding that post-conviction civil commitment is collateral because it is "not imposed in the nature of punishment; it results from a civil, not a criminal proceeding"); Mitschke v. State, 129 S.W.3d 130 (Tex. Crim. App. 2004) (holding that even automatic consequences are collateral if they are "remedial and civil rather than punitive").

165 *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327, 336 (5th Cir. 2008) (stating the rule "limit[ing] the direct consequences of a guilty plea to the immediate and automatic consequences of that plea" and yet holding that "*regardless of certainty*, deportation is a collateral consequence of a guilty plea" (emphasis added) (citation omitted) (internal quotation marks omitted)); United States v. Amador-Leal, 276 F.3d 511, 515–16 (9th Cir. 2002) (formulating the inquiry into whether "the consequence is contingent upon action taken by an individual or individuals other than the sentencing court" but also relying on the Supreme Court's statements that deportation is a purely civil action that is not punishment for a crime); *Gonzalez*, 202 F.3d at 27 (inquiring whether the consequence is imposed by an agency "beyond the control and responsibility" of the court in which that conviction was entered, which because of double jeopardy limits means only civil consequence can be collateral).

166 *See generally* United States v. Ward, 448 U.S. 242, 248–49 (1980) (explaining that a proceeding is criminal if the legislature designates it as such, or, if labeled by the legislature as civil, it will nonetheless be deemed criminal if the penalty is so punitive in nature as to overcome the legislature's intent); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (setting forth the following factors to evaluate the punitive nature of a proceeding: (1) "[w]hether the sanction involves an affirmative disability or restraint[;]" (2) "whether it has historically been regarded as punishment[;]" (3) "whether it comes into play only upon finding of *scienter*[;]" (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence[;]" (5) "whether the behavior to which it applies is already a crime[;]" (6) "whether an alternative purpose to which it may rationally be connected is assignable for it[;]" and (7) "whether it appears excessive in relation to the alternative purpose assigned"); Markowitz, *supra* note 7, at 327–32 (applying the modern civil-criminal divide test to deportation). There are a few minor exceptions to this rule but they do not alter the analysis significantly. *See, e.g.*, *Amador-Leal*, 276 F.3d at 516 (reemphasizing the connection between the collateral consequences doctrine and the criminal-civil divide by explaining that the statutes at issue in *Littlejohn*, unlike the statutes governing deportation, are part of the criminal code); United States v. Littlejohn, 224 F.3d 960, 966 (9th Cir. 2000) (holding that the civil sanction of ineligibility for federal benefits—such as food stamps and social security—was a direct consequence because "these sections automatically affect the range of [the defendant's] punishment").

signation, moving back and forth between discussing the two without distinction.[167] Thus, when we evaluate the Court's pronouncements in *Padilla* against this backdrop regarding the collateral consequences doctrine and contrast the pronouncements with prior statements of the Court declaring the "purely" civil nature of deportation, the import and significance of the decision for our understanding of the fundamental nature of deportation begins to come into view.

B. *Trends in the Supreme Court's Immigration Jurisprudence: Crescendoing Discomfort with the Asymmetric Incorporation of Criminal Norms*

Notwithstanding the dramatic statements in *Padilla* and the sharp divergence from prior Supreme Court characterizations of deportation, the Court's discussion remains dicta and such singular statements in dicta are not alone sufficient to indicate a sea of change in immigration jurisprudence. However, when viewed together with other significant trends in Supreme Court immigration jurisprudence, a clearer picture of the forthcoming evolution of the Court's conception of deportation comes into focus. Specifically, a review of the immigration cases decided by the Court over the last two decades reveals a surprising trend that, together with *Padilla*, evince the Court's crescendoing discomfort with the asymmetric incorporation of criminal justice norms into deportation proceedings and thus gives us further reason to believe the Court may be prepared to reconceptualize the nature of deportation proceedings.

The Rehnquist and Roberts Courts have been described as the most conservative Supreme Courts in the history of the United States.[168] Empirical data bears out these characterizations.[169] The

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167 *See Padilla*, 130 S. Ct. at 1481 (acknowledging the difficulty of applying the direct-collateral distinction to deportation).

168 *See, e.g.*, Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMMENT. 405, 405 (2004) ("The Rehnquist Court is widely believed to be the most conservative Court in recent memory. Especially in the legal academy, the Rehnquist Court has a reputation as being conservative in its politics, originalist in its interpretive commitments, and suspicious of the New Deal."); Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507, 565 (2007) ("[F]ew can deny that [the Roberts Court] is one of the most conservative Courts in modern history.").

169 *See, e.g.*, William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 782 tbl.3 (2009) (ranking Justices Thomas, Rehnquist, Scalia, Roberts, Alito, O'Connor, and Kennedy as among the ten most conservative justices to serve since 1937); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html (analyzing data from multiple empirical studies and databases that track Supreme Court voting and reporting that "the Roberts [C]ourt has staked out territory to the right of the

Rehnquist and Roberts Courts have, in general, been hostile to civil liberties and civil rights claims and, in particular, to the rights of politically disfavored groups.[170] Accordingly, one would expect that claims advancing immigrants' rights would not have fared well before these conservative courts. To the contrary, however, the Court has often surprised everyone by handing down unexpected and resounding victories on behalf of immigrants.[171] Moreover, many of these victories were lopsided wins, with immigrants garnering significant support from the Court's conservative voting block.[172]

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two conservative [C]ourts that immediately preceded it"). *See generally* Lee Esptein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database*, N.W. L. (Jan. 26, 2010), http://epstein.law.northwestern.edu/research/justicesdata.html (providing raw data on individual Justices' voting patterns).

170 *See* Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions Via Analogous* Bivens *Actions*, 110 COLUM. L. REV. 1294, 1329 (2010) (noting the "sharp curtailment in the national interpretation and application of civil liberties" under the Burger and Rehnquist Courts); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1076 (2010) (arguing that recent Courts have "afforded vast discretion to law enforcement" in ways that have "exacerbated problems with racial profiling"); Landes & Posner, *supra* note 169 (indicating the high conservative voting rates of the majorities of the Rehquist and Roberts Courts on civil liberties cases); Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 163 (2005) (finding that the Rehnquist Court handed down conservative decisions rejecting individual claims in the majority of civil liberties cases).

171 *See, e.g.*, *Padilla*, 130 S. Ct. at 1477 (rejecting the well-established majority view that failure to advise regarding immigration consequences of a conviction does not constitute ineffective assistance of counsel in violation of the Sixth Amendment); Lopez v. Gonzales, 549 U.S. 47, 59–60 (2006) (adopting the minority view of the circuits to hold that state felony drug offenses are not necessarily aggravated felonies under immigration law); INS v. St. Cyr, 533 U.S. 289, 324–26 (2001) (refusing to apply retroactivity to numerous statutory provisions stripping immigration judges of discretion to grant relief and federal courts of judicial review over deportation orders, despite contrary agency interpretations); Zadvydas v. Davis, 533 U.S. 678, 700–02 (2001) (adopting the minority position of lower courts to hold that immigration officials may not indefinitely detain an immigrant ordered deported).

172 *See, e.g.*, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (holding unanimously in favor of the immigrant, with Justices Alito and Thomas concurring in the judgment); *Padilla*, 130 S. Ct. at 1477, 1487 (resolving the decision 7–2 in favor of the immigrant, with the concurrence also adopting the minority position that counsel has a duty to advise but framing that duty to advise more narrowly than the Court); Kucana v. Holder, 130 S. Ct. 827, 830 (2010) (finding unanimously in favor of the immigrant, with Justice Alito concurring in the judgment); Nken v. Holder, 129 S. Ct. 1749, 1753, 1762 (2009) (deciding the question 7–2, and reflecting clear concern over the quality of justice in removal proceedings and the error-correcting role played by federal courts); Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888, 1894 (2009) (holding unanimously in favor of the immigrant, with Justices Scalia and Thomas and Justice Alito separately concurring in part and in the judgment; the Justices were unanimously troubled by the aggressive interpretation of the immigration-related criminal statute at issue); *Lopez*, 549 U.S. at 50, 60 (resolving

In order to systematically evaluate the Court's approach to immigration cases, I reviewed all immigration cases decided by both the Rehnquist and Roberts Courts.[173] To hone in on the level of the

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the decision 8–1, with Justice Thomas dissenting); Leocal v. Ashcroft, 543 U.S. 1, 3 (2004) (holding unanimously in favor of the immigrant).

173 I defined immigration cases as direct appeals from removal orders and appeals of habeas petitions related to the detention of respondents in removal proceedings. There were twenty-five such cases. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2589 (2010) (win, determining that defendant's second Texas offense of simple drug possession was not "aggravated felony," so as to preclude cancellation of removal, where second conviction was not based on fact of prior conviction); Kucana v. Holder, 130 S. Ct. 827 (2010) (win, finding that provision of the Illegal Immigrantion Reform and Immigrant Responsibility Act ("IIRIRA"), limiting court's authority to review any action of the Attorney General the authority for which was specified under the Act to be within his discretion, did not apply to preclude judicial review of the BIA order); Negusie v. Holder, 129 S. Ct. 1159, 1163 (2009) (win, pointing out that the BIA must interpret the statute barring an alien from obtaining refugee status while at the same time considering whether an alien is compelled to assist in persecution); Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (loss, holding that clear and convincing evidence supported finding that the loss resulting from defendant's offenses was greater than $10,000); *Nken*, 129 S. Ct. 1749 (win, ruling that traditional stay factors governed a court of appeals' authority to stay an alien's removal pending judicial review, as opposed to the more demanding standard of the INA); Dada v. Mukasey, 554 U.S. 1 (2008) (win, holding that an alien must be permitted an opportunity to withdraw a motion for voluntary departure, provided that such a request is made before the expiration of the departure period); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 194 (2007) (loss, finding that a "theft offense," for which alien may be removed, includes the crime of "aiding and abetting," a theft offense); Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006) (loss, holding that the INA provision for reinstatement of removal orders against aliens illegally re-entering the United States also applied to aliens who re-entered the United States before IIRIRA effective date); *Lopez*, 549 U.S. 47 (win, determining that an alien was not disqualified from discretionary cancellation of removal for conduct that is a felony under state law but only a misdemeanor under the federal Controlled Substances Act); Clark v. Martinez, 543 U.S. 371 (2005) (win, finding that the INA time limit, for how long the government may detain aliens who have been found removable or who have been deemed inadmissible, can be stretched to that reasonably necessary to effect removal); Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) (loss, ruling that Somalia's inability to consent in advance to alien's removal did not preclude his removal to Somalia as country of his birth); *Leocal*, 543 U.S. at 10–12 (win, holding that abrogating alien's conviction for driving under the influence of alcohol ("DUI") and causing serious bodily injury in an accident in violation of Florida law was not a "crime of violence" and therefore was not an "aggravated felony" warranting deportation); Demore v. Kim, 538 U.S. 510 (2003) (loss, deciding that the detention of an alien pursuant to no-bail provision of INA did not violate his due process rights under the Fifth Amendment because Congress was justifiably concerned that deportable criminal aliens who were not detained would continue to engage in criminal activities and fail to appear for their removal hearings); Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001) (loss, upholding statute making it more difficult for children who are born abroad and out of wedlock to one United States parent to claim citizenship through that parent if the citizen parent was the father); Calcano-Martinez v. INS, 533 U.S. 348 (2001) (loss, determining that Court of Appeals lacked jurisdiction for review of final orders of removal, but jurisdiction-stripping provision of IIRIRA did not preclude aliens, who had been found removable based on their prior aggravated felony convictions, from filing habeas petitions in district court);

Court's discomfort with the lack of criminal protection afforded to

St. Cyr, 533 U.S. at 289 (win, holding that Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA did not deprive the Court of jurisdiction to review alien's habeas petition, and provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to alien who pled guilty to sale of controlled substance prior to statutes' enactment); *Zadvydas*, 533 U.S. at (win, finding that (1) INA's post-removal-period detention provision contains implicit reasonableness limitation; (2) federal habeas statute grants federal courts authority to decide whether given post-removal-period detention is statutorily authorized; and (3) presumptive limit to reasonable duration of post-removal-period detention is six months); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (loss, deciding that statute making alien who has committed serious nonpolitical crime ineligible for withholding of deportation on ground that he would be subject to persecution did not require balancing alien's criminal acts against the risk of persecution he would face if returned to his home country); INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996) (loss, finding that the Attorney General could consider acts of fraud committed by an alien in connection with his entry into the United States when deciding whether to grant a discretionary waiver of deportation); Stone v. INS, 514 U.S. 386 (1995) (loss, holding that a timely motion for reconsideration of a BIA decision does not toll the running of the ninety-day period for review of final deportation orders); Reno v. Flores, 507 U.S. 292 (1993) (loss, ruling that a regulation permitting detained juvenile aliens to be released only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances, does not facially violate substantive due process); INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (loss, determining that a guerrilla organization's attempt to conscript a Guatemalan native into its military forces did not necessarily constitute "persecution on account of political opinion" within meaning of statute permitting asylum if alien is unable or unwilling to return to home); Ardestani v. INS, 502 U.S. 129 (1991) (loss, holding that administrative deportation proceedings are not adversary adjudications under section for which the EAJA waives sovereign immunity and authorizes award of attorney fees and costs); INS v. Abudu, 485 U.S. 94 (1988) (loss, finding that the abuse of discretion standard applies to the review of a BIA decision denying a motion to reopen deportation proceedings on ground that alien had not reasonably explained his failure to assert his asylum claim at outset); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (win, holding that in order to show "well-founded fear of persecution," an alien seeking asylum need not prove that it is "more likely than not" that he or she will be persecuted in his or her own country). The value of the findings set forth below, *see infra* notes 176–91 and accompanying text, are obviously limited by the relatively modest sample size of the study but this comprehensive review of the Rehnquist and Roberts Courts immigration jurisprudence is the best available data for the purpose. Ironically, this definition does not capture the *Padilla* case itself. In addition to the *Padilla* cases, there are a handful criminal-type appeals and affirmative lawsuits that are potentially also relevant to the analysis. As discussed *infra* notes 176, 183, 185, the inclusion or exclusion of these cases does not affect the analysis. *See Padilla*, 130 S. Ct. at 1486 (presenting a criminal-type appeal related to deportation); United States v. Denedo, 129 S. Ct. 2213 (2009) (same); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (defining exclusive jurisdiction clause of IIRIRA, illustrating an affirmative lawsuit related to deportation); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding the President's power to order Coast Guard to repatriate undocumented aliens intercepted on the high seas, exemplifying an affirmative lawsuit about immigration enforcement policy); INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183 (1991) (upholding the Attorney General's broad powers, exemplifying another affirmative lawsuit related to deportation); United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (presenting a criminal-type appeal related to deportation).

immigrants, I then compared the win rate of immigrants to the win rate of criminal defendants. I chose this comparison because criminal defendants are a likewise politically disfavored class of litigants, but there is, of course, no asymmetry insofar as criminal enforcement norms are utilized but constitutional criminal protections are also afforded. Admittedly, the comparison remains a somewhat blunt instrument to assess the Court's discomfort with the current characterization of removal proceedings. But this data is used here only to round out the picture—to supplement the analysis of the plain language in *Padilla* and the other factors set forth below.[174]

Absent the lack of asymmetry in deportation proceedings, one would expect to find relatively similar treatment of criminal defendants and immigrants facing deportation from the conservative Rehnquist and Roberts Courts.[175] In fact, we find that immigrants fared significantly better than criminal defendants with immigrants prevailing in 48%[176] of immigration cases and criminal defendants prevailing only 40%[177] of the time. While this disparity is significant,

174 *See* discussion *infra* Part III.A, I.C–I.D.

175 One could challenge this assumption and hypothesize that the disparate win rate discussed below, *see* discussion *infra* notes 176–91, are in fact attributable to other factors including, for example, the greater political disfavor accorded to criminal defendants. However, such explanations do little to explain the trend in immigrant win rate discussed *infra* notes 176–91.

176 Immigrants prevailed in twelve of the twenty-five cases. *See* discussion *supra* note 173. If we include the criminal-type appeals, this percentage raises to 53% (15/28), and if we include the affirmative lawsuits related to deportation proceedings as well, the percentage remains unchanged at 48% (15/31).

177 Defendants won 157 of 394 cases before the Rehnquist and Roberts Courts. *See* Christopher E. Smith, *Criminal Justice and the 1995–96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 4 (1996) (finding a defendant win rate of 35%); Christopher E. Smith, *Criminal Justice and the 1996–97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 29, 33 (1997) (finding a defendant win rate of 30%); Christopher E. Smith, *Criminal Justice and the 1997–98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443, 445 (1999) (finding a defendant win rate of 37%); Christopher E. Smith, *Criminal Justice and the 1998–99 U. S. Supreme Court Term*, 9 WIDENER J. PUB. L. 23, 28 (1999) (finding a defendant win rate of 41%); Christopher E. Smith, *Criminal Justice and the 1999–2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1, 4 (2001) (finding a defendant win rate of 39%); Christopher E. Smith & Steven B. Dow, *Criminal Justice and the 2000–2001 U.S. Supreme Court Term*, 79 U. DET. MERCY L. REV. 189, 193 (2002) (finding a defendant win rate of 40%); Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMPORARY CRIM. JUSTICE 161, 170 (2003) (aggregating the results of the preceding studies); Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2001–02 United States Supreme Court Term*, 2003 MICH. ST. L. REV. 413, 417 (2003) (finding a defendant win rate of 33%); Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002–2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859, 863–64 (2004) (finding a defendant win rate of 36%); Christopher E. Smith, Michael McCall & Madhavi McCall, *Criminal Justice and the 2003–2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 127 (2005) (finding a defendant win rate of 46%); Christopher E. Smith, Michael McCall & Madhavi McCall, *Criminal Justice*

it is not alone extraordinary and is potentially explained by factors other than the asymmetric incorporation of criminal justice norms in deportation proceedings.[178]

However, the most important finding is not the overall win rate but rather the dramatic trend over time. Over the life of the Rehnquist and Roberts Court we have seen the steady growth of the crimmigration crisis.[179] As Professor Legomsky describes it, "[s]tarting approximately twenty years ago, and accelerating today, a clear trend has come to define modern immigration law. Sometimes dubbed 'criminalization,' the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation."[180] Accordingly, to the extent that this asymmetry is reflected in the win rate of immigrants, we would expect to see the immigrant win rate rising together with the increasing criminalization of immigration law. This is precisely the trend revealed by the data while, in contrast, criminal defendants' win rates stayed relatively stagnant.

While there have been a number of significant events marking the increased criminalization of immigration law, all pale in comparison to the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[181] Accordingly, I organized the da-

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and the 2004–2005 United States Supreme Court Term, 36 U. MEM. L. REV. 951, 957 (2006) (finding a defendant win rate of 47%); Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2005–2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495, 499 (2007) (finding a defendant win rate of 43%); Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2006–2007 United States Supreme Court Term*, 76 U.M.K.C. L. REV. 993, 995–96 (2008) (finding a defendant win rate of 36%); Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court's 2007–2008 Term*, 36 S.U. L. REV. 33, 38 (2008) (finding a defendant win rate of 50%); Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court's 2008–2009 Term*, 29 MISS. C. L. REV. 1, 3–4 (2010) (finding a defendant win rate of 39%). Data for the 2009 term is not yet available and thus has not been included.

178 *See* discussion *supra* note 175.

179 *See generally* Stumpf, *supra* note 64 (discussing the criminalization of immigration law, or "crimmigration law").

180 Legomsky, *supra* note 28, at 469.

181 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 304, 110 Stat. 3009-590 (codified as amended at 8 U.S.C. § 1229a (2006)). *See* Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 988 (2002) (stating that under IIRIRA, "immigration penalties for criminality have been greatly enhanced, contributing to the criminalization of immigration law"); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (outlining the effects of the IIRIRA on lawful permanent U.S. residents); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (1997) ("Both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and [IIRIRA] added to the laundry list of 'aggravated felonies,' which effective-

ta into three periods: (1) Rehnquist Court pre-IIRIRA immigration cases; (2) Rehnquist Court post-IIRIRA immigration cases; and (3) Roberts Court immigration cases.[182] The change in immigrant win rate over these periods is dramatic. During the Rehnquist Court pre-IIRIRA period, before the explosion in the criminalization of immigration law, immigrants won only 14% of the time.[183] This, interestingly, was well below the criminal defendant win rate of 33% for the same period.[184] Since IIRIRA, however, along with the dramatic criminalization of immigration law, immigrants' win rate drastically increased to 61%,[185] well above the 41% win rate for criminal defendants during that same period.[186] When we parse the post-IIRIRA rate even further we see that the upward trend in immigrant wins continued as the criminalization of immigration law continued post-IIRIRA.[187] While immigrants won an impressive 57%[188] of their cases

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ly preclude non-U.S. citizens from eligibility for almost every form of immigration relief.").

182 The Rehnquist Court pre-IIRIRA immigration cases include all immigration cases, defined *supra* note 173, decided by the Court between the 1987–88 term and the 1996–97 term. The Rehnquist Court post-IIRIRA immigration cases include all immigration cases decided by the Court between the 1997–98 and the 2004–05 term. The Roberts Court immigration cases include all immigration cases decided by the Court from the 2005–06 term through the present.

183 Immigrants prevailed in only one of the seven cases heard during this period. *See* discussion *supra* note 173. If we include the criminal-type appeals, this percentage raises to 25% (2/8), and if we include the affirmative lawsuits related to deportation proceedings as well, immigrants won 20% (2/10) of the time. *See id.*

184 *See Criminal Justice and the 1995–96 U.S. Supreme Court Term*, *supra* note 177 (finding a defendant win rate of 34.6%); *Criminal Justice and the 1996–97 U.S. Supreme Court Term*, *supra* note 177 (finding a defendant win rate of 30%). Unfortunately, the available data for the pre-IIRIRA Rehnquist Court's criminal justices cases are limited to only two terms (1995–96 and 1996–97). Accordingly, the data for this period is very incomplete, which could explain why this is the only period that shows any significant deviation from the 40% win rate that criminal defendants enjoyed during all other periods considered.

185 Immigrants prevailed in eleven of the eighteen cases heard during this period. *See* cases cited *supra* note 173. If we include the criminal-type appeals, this percentage rises to 65% (13/20), and if we include the affirmative lawsuits related to deportation proceedings as well, immigrants won 62% (13/21) of the time.

186 Post-IIRIRA defendants won 140 of 342 cases. *See* sources cited *supra* note 177.

187 Significant post-IIRIRA events include: increased use of local police to enforce immigration laws, *see, e.g.*, 8 U.S.C. § 1357(g) (2006) (authorizing agreements with states and localities to deputize non-federal agents to perform the functions of federal immigration enforcement officials); increased use of criminal enforcement tactics in enforcing civil immigration law violations, such as SWAT-style home raids, *see* CHIU ET AL., *supra* note 98, at 1–6 (analyzing the constitutional violations occurring during home raids by the U.S. Immigration and Customs Enforcement agency ("ICE")); a program whereby civil immigration information was entered into the FBI's principal criminal database, *see* Complaint at 1, Nat'l Council of La Raza v. Ashcroft, 468 F. Supp. 2d 429 (E.D.N.Y. 2007) (No. 03-CV-6324) (alleging on personal knowledge that government agencies have, without lawful authority, begun entering civil immigration information into the FBI's principal crime

during the Rehnquist Court post-IIRIRA period,[189] their win rate continued to increase thereafter with immigrants prevailing in 63%[190] of cases before the Roberts Court. When viewed in comparison to criminal defendants, who only prevailed 43% of the time before the Roberts Court, the immigrant win rate is startling.[191] It is also notable that, over these periods, while immigrants' fortunes were improving the Court overall was moving consistently to the right.[192] Ultimately, what the data reveals is that not only have immigrants fared relatively well overall before these conservative Courts, as compared to criminal defendants, but that immigrants' fortunes made dramatic and consistent gains tracking the dramatic and consistent criminalization of immigration law.[193] The correlating crescendoing trends, when

database); the "Secure Communities" program, in which information from state and local police bookings is electronically forwarded to federal immigration enforcement officials, *see* Complaint at 6–9, Nat'l Day Laborer Organizing Network v. Immigration & Customs Enforcement, No. 10-CV-3488 (S.D.N.Y. Apr. 27, 2010), *available at* http://ccrjustice.org/files/SC_Complaint_REAL_FINAL.pdf (critiquing the implementation and reliability of the Secure Communities program); and the large-scale use of preventive detention, *see, e.g.*, Legomsky, *supra* note 28, at 489–94 (considering the accelerated use of preventative detention in immigration proceedings).

188 Immigrants prevailed in four of the seven cases heard during this period. There were no relevant criminal-type appeals during this period, and if we include the affirmative lawsuits related to deportation proceedings immigrants won 50% (4/8) of the time.

189 This is compared with an approximately 40% victory rate for criminal defendants. *See, e.g., Criminal Justice and the 1997–98 U.S. Supreme Court Term, supra* note 177; *Criminal Justice and the 1998–99 United States Supreme Court Term, supra* note 177; *Criminal Justice and the 1999–2000 U.S. Supreme Court Term, supra* note 177; *Criminal Justice and the 2000–2001 U.S. Supreme Court Term, supra* note 177; *Criminal Justice and the 2001–02 United States Supreme Court Term, supra* note 177; *Criminal Justice and the 2002–2003 United States Supreme Court Term, supra* note 177; *Criminal Justice and the 2003–2004 United States Supreme Court Term, supra* note 177; *Criminal Justice and the 2004–2005 United States Supreme Court Term, supra* note 177.

190 Immigrants prevailed in seven of the eleven cases heard during this period. If we include the criminal-type appeals, this percentage raises to 69% (9/13), and there were no cases involving affirmative lawsuits related to deportation proceedings during this period.

191 During the Roberts Court, defendants won 48 of 113 cases. *See Criminal Justice and the 2005–2006 United States Supreme Court Term, supra* note 177 (finding a defendant win rate of 43%); *Criminal Justice and the 2006–2007 United States Supreme Court Term, supra* note 177 (finding a defendant win rate of 36%); *Criminal Justice and the U.S. Supreme Court's 2007–2008 Term, supra* note 177 (finding a defendant win rate of 50%); *Criminal Justice and the U.S. Supreme Court's 2008–2009 Term, supra* note 177 (finding a defendant win rate of 39%). Data for the 2009 term is not yet available and thus has not been included.

192 *See* sources cited *supra* note 169 (illustrating the Supreme Court's drift towards more conservative views).

193 There are, of course, other factors that could have contributed to immigrants' rising fortunes, such as over-reaching in enforcement efforts and an increasingly well-organized immigration bar. However, while this data alone does not tell a conclusive story, read together with the language in *Padilla* and the other indicia set forth below, *see* discussion *in-*

viewed together with the *Padilla* decision, are significant additional evidence that the Court has grown uncomfortable with the asymmetry that the civil label has created in deportation proceedings.[194]

C. *Public Perception Regarding the Link Between Criminal and Deportable Offenses*

The Supreme Court is sometimes referred to as an anti-democratic institution.[195] Indeed, some understand the primary purpose of the Supreme Court as a check on the otherwise democratic nature of the government.[196] Accordingly, it may seem counter-intuitive to look at public perception as an indicia of where the Supreme Court is likely to go next. However, recent scholarship examining the role of popular opinion on Supreme Court decision-making has led some to conclude that over time the Supreme Court has gone from "being an institution intended to check the popular will to one that frequently confirms it."[197]

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fra Part III.C, it gives us good reason to believe the Court has grown uncomfortable with the current state of affairs in deportation cases.

194 Others have suggested that the Court's tortured reasoning in some immigration cases or its stretching to import criminal norms, *see* discussion *infra* Part III.D, is further evidence of the Court's discomfort with the current state of the doctrine. *See, e.g.*, Motomura, *supra* note 25, at 564–76 (offering a thorough explanation of how courts' discomfort with their inability to apply standard constitutional scrutiny to removal cases has led them to use "phantom" constitutional norms to render purportedly subconstitutional decisions in favor of respondents); Slocum, *supra* note 91, at 522 (arguing that the Supreme Court has created the immigration rule of lenity to offset the Court's extreme reluctance to consider constitutional challenges to immigration statutes).

195 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986) ("The root difficulty is that judicial review is a countermajoritarian force in our system."); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532–33 (1998) ("These attacks on the legitimacy of judgment in a democracy have left their mark . . . on the public understanding of the judicial role and on the Supreme Court's understanding of its own role."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 972 (2000) (discussing the expectation that "the law operates in a world separate and apart from that of politics" and "disdain [at] the notion of judges rendering decisions under the threat of political retribution").

196 *See* BICKEL, *supra* note 195, at 16 ("Marshall . . . spoke of enforcing, on behalf of 'the people,' the limits that they have ordained for the institutions of a limited government."); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1208–09 (1984) (discussing the controversy over whether judicial activism is appropriate in a democratic society).

197 BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 4 (2009); *See also* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 17 (1998) (arguing that in order to fully understand the choices Justices make, we must take into account the social context in which they operate); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 468

Indeed, as Professor Barry Friedman recently chronicled:

> Supreme Court decisions tend to converge with the considered judgment of the American people . . . . On issue after contentious issue . . . the Supreme Court has rendered decisions that . . . find support in the latest Gallop Poll . . . . The Court will get ahead of the American people on some issues . . . . On others . . . it will lag behind. But over time . . . the Court and the public will come into basic alliance with each other.[198]

This is so, Professor Friedman argues, because after President Roosevelt's plan to pack the Court and other pivotal episodes in the Court's history, modern "[J]ustices recognize the fragility of their position" and thus "hew rather closely to the mainstream of popular judgment."[199]

Accordingly, public perception regarding the civil or criminal nature of deportation is at least one factor we should look to in considering the likelihood that the Court will move forward and solidify the *Padilla* conception of deportation. Like *Padilla*, public perception increasingly and unambiguously conflates deportable offenses and crimes. This is true on both sides of the ideological spectrum—whether it is the liberal who is shocked to learn that detained immigrants do not receive appointed lawyers or the conservative talk show caller who declares all "illegal immigrants are criminals."[200] Indeed,

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(1997) ("[T]he Court's decisions generally, but not invariably coincide with the public's preferences."); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1273 (2004) ("The work of judges happens as much in the opinions as in the votes."); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1018 (2004) ("To [some], the Supreme Court's dependence upon other institutions to give force to its rulings creates a need to remain attentive to the changing course of popular attitudes." (citation omitted)); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87–88 (1993) (outlining several scholars' theories on Supreme Court decisions and popular will).

198 FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 197, at 14–15.

199 *Id.* at 14.

200 *See, e.g.*, Jim Garrett, *Illegal Immigrants Are Criminals*, ASBURY PARK PRESS, July 22, 2010, (on file with the *University of Pennsylvania Journal of Constitutional Law*) (equating immigration violators and criminals); *Illegal Immigrants Are Criminals*, CHI. TRIB., Mar. 19, 2010, http://articles.chicagotribune.com/2010-03-19/news/chi-100319loeffler_briefs_1_criminals-reign-alien ("I cannot find 'undocumented' in my dictionary. This is [a] euphemism for illegal alien. In my dictionary illegal means criminal."); Jaynee Germond, *Illegal Means Criminal*, JAYNEE GERMOND FOR US CONGRESS (Sept. 27, 2009), http://jayneegermondforcongress.blogspot.com/2009/09/illegal-means-criminal.html ("What is so difficult about the concept of illegal immigration[?] Illegal means criminal . . . . Why aren't these known criminals deported immediately?"); *Illegal Immigration Is a Crime*, FED'N FOR AM. IMMIGR. REFORM (Mar. 2005), http://www.fairus.org/site/News2?page=NewsArticle&*id*=16663&security=1601&news_iv_ctrl=1007 (labeling "aliens who flagrantly violate our nation's laws by unlawfully crossing U.S. borders and visa "overstayers" as "illegal immigrants" and noting that "[b]oth types of illegal immigrants are

Americans increasingly view undocumented immigrants in particular, and immigrants in general, as criminals.[201] This is so even though deportation proceedings continue to enjoy the formal "civil label" and even though the great weight of empirical evidence demonstrates that immigrants are less prone to criminal activity than native-born populations.[202] It is the immigration violations themselves that are perceived as criminal. Accordingly, a decision by the Supreme Court explicitly holding that deportation proceedings are quasi-criminal, as *Padilla* suggests, would, in Professor Freidman's words, bring "the Court and the public . . . into basic alliance with each other."[203]

D. The Opportunity to Make Sense of an Incoherent Doctrine

A final reason to believe that the Court may now be ready to rethink the nature of removal proceedings is that such reconceptualization is the only way to rescue the modern immigration jurisprudence from its confused and indefensible current state. As discussed supra Part 0, the rationale for the civil label—the "inherent powers theory"—has long ago been repudiated by the Court, and no alternative justification has been substituted.[204] Meanwhile, uniquely criminal law doctrinal strands increasingly weave their way into these purportedly "purely civil proceedings."[205] Only the principle of stare decisis remains to justify the civil label and, at some point, stare decisis is not enough.

The discussion in *Padilla* of the nature of deportation, viewed in contrast to past Supreme Court pronouncements and in the context

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deportable under [the] Immigration and Nationality Act Section 237(a)(1)(B)"). *See generally* M. Kathleen Dingerman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 367 (2010) ("[Immigrants] who are detained and deported from the United States are perceived as not only 'undocumented laborers' but 'criminal aliens.'").

201 Legomsky, *supra* note 28, at 503–04 ("Although the vast bulk of immigration to the United States occurs through legal channels, the public thinks the opposite is true." (footnote omitted)).

202 RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGR. POL'Y CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 3 (2007), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf ("[In 2000] about three-fourths (73 percent) of Americans believed that immigration is causally related to more crime . . . . But this perception is not supported empirically . . . . [I]t is refuted by the preponderance of scientific evidence. Both contemporary and historical data . . . have shown repeatedly that immigration actually is associated with *lower* crime rates.").

203 FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 197, at 15.

204 *See* discussion *supra* Part I.B.

205 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *see also* discussion *supra* Part I.C.

of the other evidence of the Court's increasing discomfort with the asymmetric criminalization of immigration law, and the public's growing perception conflating the two realms, gives us good reason to believe that what we are seeing in *Padilla* is a turning point in the Court's conception of deportation. *Padilla* represents the first step, a significant step, toward a sea of change that will allow the Court to be explicit about what is already apparent from the case law: deportation is neither purely civil nor is it purely criminal. Deportation lies in the space between the two realms. This understanding will help make sense of the partial incorporation of criminal doctrinal strands that we already have seen and, more importantly, will require the Court to grapple with the hard question of what other types of criminal protections should be afforded to respondents in deportation proceedings. As this conception of "deportation as different" comes to prominence, no longer will courts be able to escape engaging the hard question by simple reference to the civil label. Some criminal protections will apply and some will not, but it will take more than a citation to *Fong Yue Ting* to resolve the matter. Below I offer an analytic framework to aid courts in making principled determinations of what criminal-type protections to apply under this new conception of deportation.

IV. HOW TO EVALUATE THE RIGHTS OF RESPONDENTS UNDER *PADILLA*'S CONCEPTION OF DEPORTATION

Courts have a clear constitutional mechanism for evaluating the rights of criminal defendants[206] and a well-developed line of cases to determine the rights of litigants in the civil contexts.[207] One potentially daunting obstacle to the full and explicit acceptance of *Padilla*'s new conception of deportation will be the lack of any recognized mechanism to evaluate the rights of respondents in proceedings that are neither civil nor criminal. We can start from the premise that, consistent with the conception of deportation as straddling the civil-criminal divide, in some instances criminal-type protections will attach and in some instances they will not. I hope herein to begin a conversation in the scholarship aimed at aiding future judicial efforts to conceptualize a way forward. Developing a complete framework to

206 *See* U.S. CONST. amend. V; U.S. CONST. amend. VI.

207 Mathews v. Eldridge, 424 U.S. 319, 323 (1976); *see also* Wilkinson v. Austin, 545 U.S. 209, 213 (2005); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); Connecticut v. Doehr, 501 U.S. 1, 4 (1991); Bowen v. City of New York, 476 U.S. 467, 469 (1986); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

evaluate the rights of respondents in quasi-criminal deportation proceedings will be a complex task and is beyond the scope of what can be achieved here. Instead, I seek to lay out some basic principles that can be used to begin the discussion and support judicial efforts in the wake of *Padilla*.

First it is important to recognize that, as a practical matter, there is ample precedent for selective incorporation of criminal rights into non-criminal proceedings. Beyond the examples from the immigration realm already discussed,[208] the Court has applied some rights commonly associated with criminal proceedings to non-criminal proceedings, including juvenile delinquency proceedings,[209] parental termination proceedings,[210] civil commitment proceedings,[211] some parole revocation proceedings,[212] and court martial proceedings.[213] Moreover, there is significant scholarly support for the Court's suggestion that deportation is quasi-criminal.[214] But the fact that it has been done in the past and that scholars have validated the Court's evolving conception of deportation does not resolve the central problem of how to decide which criminal protections apply and in what form.

In order to develop a principled method of analysis it is useful to begin by investigating the contrasting nature of the criminal and civil methods for assessing rights. In the civil realm, we have the intuitively appealing *Mathews* balancing test.[215] It seems eminently logical to simply weigh

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208 *See supra* notes 72–73 and accompanying text.

209 *In re* Gault, 387 U.S. 1, 30–31, 61 (1967) (applying criminal protection against self incrimination to juvenile proceedings to determine delinquency).

210 M.L.B. v. S.L.J., 519 U.S. 102, 123 (1996) ("When deprivation of parental status is at stake, however, counsel is sometimes part of the process that is due.").

211 Addington v. Texas, 441 U.S. 418, 432–33 (1979) (finding that a determination of appellant's mental illness and dangerousness to himself and others must be proven by more than the common civil preponderance of the evidence standard).

212 Morrissey v. Brewer, 408 U.S. 471, 484–85, 488–89 (1972) (holding that petitioner facing civil parole revocation is entitled to some aspects of the traditionally criminal rights to venue in location of the arrest and violation, the right to speedy preliminary adjudication, and the right to confront a witness).

213 *See* United States v. Denedo, 129 S. Ct. 2213, 2222 (2009) (permitting a collateral attack based on the Sixth Amendment right to effective assistance of counsel to proceed where judgment of conviction was entered by a court-martial); *see also* Middendorf v. Henry, 425 U.S. 25, 33 (1976) (noting that "[t]he question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved" and avoiding the ultimate constitutional question).

214 *See, e.g.*, Bleichmar, *supra* note 28; Fragomen, *supra* note 27; Kanstroom, *supra* note 28; Pauw, *supra* note 28; Pinzon, *supra* note 28; Salinas, *supra* note 28; Torrey, *supra* note 28; *Developments in the Law: Immigration Policy and the Rights of Aliens*, *supra* note 28.

215 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[216]

In the criminal realm, of course, we generally use a different model to evaluate defendants' rights. In the criminal realm, the applicable rights operate, in most instances,[217] as a hard floor that apply categorically to defendants regardless of the gravity of punishment, the cost to the state,[218] or how important the right is to ensure a "correct" outcome in the given case.[219] In a criminal case, for example, the Sixth Amendment guarantees the same hard floor right to appointed counsel to any indigent defendant subject to imprisonment, regardless of whether the potential term of imprisonment is one day or one hundred years.[220] Every criminal defendant has the right to be tried in the venue in which the alleged crime occurred regardless of the convenience or inconvenience to the state.[221] Even with judicially

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216 *Id.*

217 There are, of course, exceptions to this rule. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357–58, 361 (1977) (holding that a sentencing judge cannot impose the death sentence on the basis of a confidential presentence report on the grounds that capital punishment is "different in kind" from other forms of criminal punishment); *see also* Scott v. Illinois, 440 U.S. 367, 374 (1979) (establishing that the right to appointed counsel applies only if the sentencing court imposes a term of imprisonment).

218 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime . . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries . . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

219 *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423–24 (1979); *In re* Winship, 397 U.S. 358, 372 (1970); Chapman v. California, 386 U.S. 18, 22 (1967); Josephine Ross, *What's Reliability Got to Do with the Confrontation Clause After* Crawford?, 14 WIDENER L. REV. 383, 389 (2009). *See generally* Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1100 (2003).

220 *Scott*, 440 U.S. at 374 (holding that "no indigent criminal defendant [may] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense").

221 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

created criminal rights, we generally see the same hard floor model being applied. For example, any criminal defendant has the right to have their inculpatory statement suppressed if it was the product of custodial interrogation without *Miranda* warning, regardless of whether he or she faces minor misdemeanor or serious felony charges.[222]

We must then understand the rationale behind the different approaches utilized in civil and criminal cases. Why, for example, do we not simply dispense with the hard floor model altogether and evaluate the rights of criminal defendants using the *Mathews* balancing test? Or put another way, in the context of deportation, maybe the problem is not the civil approach but rather that the courts have just done a bad job applying the *Mathews* test in deportation cases. Maybe the courts have just underestimated the gravity of deportation and given too much weight to the potential cost to the state of greater protections. Maybe the Supreme Court can just recalibrate the *Mathews* balance. Maybe, but I think not. In fact, the Supreme Court has given extraordinary lip service to the gravity of deportation, calling it "a savage penalty"[223] and "'the equivalent of banishment or exile'"[224] that may result in the loss of "all that makes life worth living."[225] I think there is something more fundamentally wrong with applying a balancing test to deportation, at least as the initial inquiry.

The Constitution is, of course, the simple but unsatisfying answer as to why we use the hard floor model in the criminal realm. It is unsatisfying because it begs the question of why the Framers decided to utilize the hard floor model of rights in criminal proceedings.[226] Why should a person accused of turnstile jumping, facing the prospect of a day in jail (or less), receive the same full panoply of rights as a person accused of rape, facing years in prison? The hard floor model is, at times, extremely inefficient insofar as it sometimes uses a sledge

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shall have been committed . . . ."); Johnston v. United States, 351 U.S. 215, 220–21 (1956) ("This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime . . . ."); United States v. Anderson, 328 U.S. 699, 704–05 (1946) ("The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed.").

222 Miranda v. Arizona, 384 U.S. 436 (1966).

223 Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).

224 Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–391 (1947)).

225 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

226 Moreover, even judicially created criminal rights tend to utilize the hard floor model rather than a sliding scale model or balancing. *See* discussion *supra* notes 218–22 and accompanying text. There are, admittedly, rare examples of hard floor civil rights as well. *See, e.g.*, U.S. CONST. amend. VII (granting a limited right to jury trial).

hammer of protections when a fly swatter would do. The balancing test would allow a court to look at the individual circumstances, the gravity of the potential penalty, the risk of error in the case, and the cost of various protections to the state, and make a more refined individualized determination of what justice requires.

But the Framers found such individualized determinations unacceptable in the criminal context, and with good reason. The reason can be found in the concept of rule utilitarianism. The premise of rule utilitarianism is that in some instances we can maximize human well-being by application of static rules rather than through individualized determinations.[227] This can be so because bias can prevent us from making accurate calculations of the optimal course of action in individual cases[228] or because we recognize there will always be, regardless of bias, some error rate in our calculations, and the gravity of error in one direction is such that it is optimal to create a fixed rule skewed in favor of avoiding such grave errors.[229]

These are precisely the dynamics at play that justify the hard floor model of rights in criminal law. We are concerned that we cannot trust courts, on a regular basis, to strike an optimum balance because of two types of bias: bias against politically disfavored criminal defendants and bias in favor of criminal justice actors (prosecutors and police) who are regular collaborators with the court in the administration of justice.[230] Moreover, our system makes a very conscious decision to skew the error rate in favor of wrongful acquittals, rather than wrongful convictions,[231] in recognition of the gravity of the loss of physical liberty that can result in criminal cases and the severe social stigma associated with a criminal conviction.[232]

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227 R.M. HARE, ESSAYS ON POLITICAL MORALITY ch. 7–8 (1989); J.J.C. SMART, AN OUTLINE OF A SYSTEM OF UTILITARIAN ETHICS 42–57 (1972); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV., 3, 3–32.

228 SMART, *supra* note 227, at 43; GEORGE EDWARD MOORE, PRINCIPIA ETHICA 162 (1971).

229 *Id.*

230 *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423–24 (1979). *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165 (2003).

231 It has been a familiar axiom of criminal justice since at least the time of Blackstone that it is "better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

232 *See* Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting "the opprobrium and stigma of a criminal conviction"); Rutledge v. United States, 517 U.S. 292, 302 (1996) (referring to "the societal stigma accompanying any criminal conviction"); Scott v. Illinios, 440 U.S.

Accordingly, when assessing whether (and how) a particular right should apply in the deportation context, I propose, a three-step method of inquiry. "Step One" must be to determine whether the values a criminal right seeks to protect are at issue in comparable ways in the deportation context and thus whether the right applies at all in deportation proceedings. "Step Two," assuming the right applies, is to determine whether the right is to be applied in a category of deportation proceedings requiring criminal-style hard floor rights or a category where the civil-style balancing model is more appropriate. "Step Three" would be to determine the parameters of the right to be applied under whichever model is employed.

Under "Step One," there will be some criminal rights that simply do not warrant any application to the deportation context. This inquiry will turn primarily on the nature of the right and its practical application to deportation proceedings. For example, the right to a speedy trial is a core criminal right that serves to insure that criminal defendants are provided the opportunity to test the state's evidence at trial before witnesses' memories are faded and to ensure that the specter of a criminal charge, and the reputational harm associated with such a charge, does not hang indefinitely over the accused's head. In non-detained deportation proceedings, the respondents' interest is almost always served by prolonging the removal proceedings. In deportation proceedings, the factual issues that require evidentiary hearings often turn on the positive equities in a respondent's life, not on some particular events on the single day of an alleged offense, as in criminal proceedings. More time before trial allows respondents to continue to develop positive equities such as work history, community involvement, educational achievement, family ties, and so on. Accordingly, the interests served by the speedy trial right are simply not at play in the deportation proceedings for non-detained respondents and thus do not apply. You can imagine a similarly odd fit between the right to grand jury indictment and deportation and thus we would expect that this right, too, simply would not apply.

Most criminal rights, however, will have some relevant application to some deportation proceedings, and thus the critical inquiry will be "Step Two": to determine whether the right is to be applied in a category of deportation proceedings requiring a criminal hard floor

367, 372–73 (1979) (affirming that "incarceration [i]s so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant ha[s] been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule").

model or the civil balancing model. Unlike "Step One," this determination will, in most instances, turn on the nature of the respondent or the nature of the proceedings, not the nature of the right. The court would have to determine whether the factors that justify a hard floor—(1) bias against a politically disfavored group; (2) bias in favor of state enforcement actors who are regular collaborators with the court in the administration of justice; (3) gravity of potential loss of liberty; and (4) gravity of social stigma associated with a negative outcome in the proceedings—are present in degrees comparable to criminal proceedings. If they are, courts should utilize the hard floor model because we can expect a static rule to ultimately maximize human well-being.[233] If they are not, courts can resort to traditional civil balancing analysis, because we can expect an individualized determination to more likely produce, on whole, desirable outcomes.

Some of these factors will be consistent across all deportation proceedings. For example, all noncitizens are disenfranchised and subject to some level of social animus in modern America.[234] Likewise, we would expect to see a relatively consistent institutional bias of courts, particularly immigration courts, in favor of their fellow actors in the immigration enforcement scheme. Moreover, any deportation will involve a significant restraint on liberty—the forced relocation beyond our national boundary. However, these baseline commonalities, I would propose, are not alone sufficient to trigger bias and disproportionate harm sufficient to make all deportation proceedings analogous to criminal proceedings such as to justify consistent application of hard floor rules. Imagine, for example, an individual who enters the United States as a business traveler from an economically strong visa-waiver country and a week later receives a notice that he is to appear for a deportation hearing because some technical defect

233 Though the floor may not be identical to the floor in criminal proceedings. *See infra* notes 242–45 and accompanying text.

234 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 161–62 (1980) ("Aliens cannot vote in any state, which means that any representation they receive will be exclusively 'virtual.' That fact should at the very least require an unusually strong showing of a favorable environment for empathy, something that is lacking here. Hostility toward 'foreigners' is a time-honored American tradition. Moreover, our legislatures are composed almost entirely of citizens who have always been such. Neither, finally, is the exaggerated stereotyping to which that situation lends itself ameliorated by any substantial degree of social intercourse between recent immigrants and those who make the laws."); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1264–66 ("Noncitizens barred from formal political participation are especially vulnerable to the whims of the majority . . . . Today's immigrants . . . suffer disfavor in the political process not only because of their immigration status, but also because of their race.").

was discovered with his entry documents, and he is forced thereby to cut his business trip short. It would be hard to characterize such a respondent as politically disfavored in any significant way. A shortened business trip is hardly a liberty deprivation comparable to criminal incarceration, and it is doubtful that significant stigma would attach to this scenario, here or in the visitor's home country.

But in other circumstances, the nature of the respondent or the nature of the proceedings could well alter the analysis in ways that would require application of a hard floor model. Take Padilla himself as an example. In regard to the nature of the respondent, Padilla was a lawful permanent resident of the United States for over forty years, a veteran of the United States Army, and lived with his family in the United States. It is not difficult to conceive of how such factors change the analysis regarding the gravity of the liberty interest at stake in the deportation proceedings. In regard to the nature of the proceedings, Padilla was subject to mandatory detention, forced to fight his case while incarcerated, and the sole charge against him was the result of a criminal conviction. So, for Padilla, in addition to ultimate deportation, we see a physical deprivation of liberty equivalent to criminal incarceration,[235] a stigma both here and in Honduras related to criminal deportees that equals and may even surpass the stigma associated with many criminal convictions,[236] and membership in a group that garners almost unrivaled political disfavor—"criminal aliens."[237] Thus, in many ways Padilla presented the easiest scenario

235 SCHRIRO, *supra* note 10, at 4 ("As a matter of law, Immigration Detention is unlike Criminal Incarceration. Yet Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities. With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control. Likewise, ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.").

236 *See* Markowitz, *supra* note 7, at 351 ("[T]here is already significant social stigma associated with being deported and immigrants facing deportation are among the most politically marginalized groups in American society.").

237 ICE aggressively promotes the specter of "criminal aliens" as a nationwide threat to community safety through press releases and marketing materials. *See, e.g.*, Press Release, U.S. Immigration & Customs Enforcement, 87 Convicted Criminal Aliens and Fugitives Arrested in ICE Enforcement Surges, (July 28, 2010), *available at* http://www.ice.gov/news/releases/1007/100728richmond.htm; U.S. Immigration & Customs Enforcement, Secure Communities Brochure (Jan. 2010), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf ("ICE is improving

to argue in favor of application of criminal style protections—a long term legal permanent resident ("LPR"), with U.S. citizen family, facing detained removal proceedings and automatic deportation as a direct result of a criminal conviction. The *Padilla* Court's analysis seems to place particular weight on the nexus between the criminal conviction and the deportation proceedings.[238] I have suggested elsewhere that the status of the respondent as a lawful permanent resident should be the overriding factor.[239] Others have suggested that detention is the critical issue.[240] Which of these, or other characteristics, would alone be sufficient to justify a rule utilitarian approach, or which combination is necessary, is a difficult question I do not seek to resolve here.

Assuming, however, that we have a right that applies ("Step One") and a type of proceeding and/or respondent that justifies application of a hard floor rule ("Step Two"), "Step Three" is to determine precisely the rule to be applied.[241] When civil-type balancing is appropriate, traditional *Mathews* analysis will suffice. For hard floor rights, this will require courts to make categorical determinations regarding the nature and scope of the right which will create optimal results across the class of respondents or proceedings to which it applies.[242] We should not assume that the rule will operate in precisely the same way, with the same hard floor, as in criminal proceedings.

Take for example, the right to appointed counsel—the criminal right most coveted by immigrants in removal proceedings. If the category to which the hard floor is being applied is respondents facing criminal removal charges, one could well argue that counsel should be appointed to all indigent respondents just as it is in criminal proceedings, for reasons discussed below. However, if the hard floor is

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public safety by working to better identify, detain and ultimately remove dangerous criminal aliens from your community.").

238 Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("[D]eportation is nevertheless intimately related to the criminal process.").

239 Markowitz, *supra* note 7, at 315 ("[T]he most important critiques of the inherent powers theory are those driven by an analysis based upon . . . the special status of permanent residents.").

240 Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 138–49 (2008).

241 Of course, if "Step Two" dictates that a balancing model should be employed then courts would revert to traditional *Mathews* analysis.

242 Some may view this categorical determination as just a balancing exercise of another type. Indeed, even when hard floor rights are utilized, some balancing will be required in defining the scope of that right. However, having such balancing occur for broad classes of respondents on an appellate level specifically guided by the factors set forth in step two—potential bias and the gravity of the liberty interest—will better insure appropriate protections than leaving trial level courts to make individualized *Mathews*-type judgments.

being applied instead to all detained immigrants, one could imagine the Court defining a different scope of right to appointed counsel in order to obtain that optimum balance of outcomes across all proceedings. Removal proceedings generally require immigration judges to potentially make three determinations: (1) is a respondent removable as charged; (2) is the respondent eligible for relief; and (3) does the respondent warrant relief as a matter of discretion. In the case of people facing removal charges based on criminal charges, the first two issues often involve extraordinarily complicated legal issues regarding the way federal immigration law maps onto the criminal code of a given state. Accordingly, on balance, if you are going to apply a right to appointed counsel, it makes good sense to do so at the outset of the proceeding for people with criminal removal charges.

The large majority of non-criminal deportation proceedings, however, involve much simpler deportability determinations: whether someone entered the country illegally or whether they have stayed beyond the period authorized upon admission.[243] For many respondents facing such charges, the truth is that there is little that an attorney would be able to do to aid them in their case. If they overstayed their visa and are ineligible for relief, in the large majority of cases, it is unlikely an attorney would be able to alter the outcome of a proceeding. If, however, a court deems them prima facie eligible for some form of relief, the success rates of applicants on applications for relief vary dramatically depending on whether they are or are not represented.[244] Accordingly, it may be that in non-criminal removal cases the hard floor right to appointed counsel applies only to respondents who are prima facie eligible for relief. In the alternative, because of the high percentage of deportation proceedings in which the outcome would not be altered by appointed counsel,[245] perhaps

243 *See Individuals Charged in Immigration Court with Only Immigration Violations FY 1992–2006*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/reports/178/include/only_immigration_charges.html (last visited May 11, 2011) (indicating that nearly 65% of all individuals charged with removal for immigration violations were charged with entry without inspection).

244 *See, e.g.*, Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternate Practices*, *in* STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232 (2004), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf. The United States Commission on International Religious Freedom found that in expedited removal cases, where many of the applicants are in detention, unrepresented respondents succeeded only 2% of the time, while those with counsel succeeded 25% of the time. *Id.* at 239.

245 This is an attribute that distinguishes deportation proceedings from criminal proceedings. Since the vast majority of criminal proceedings are resolved through plea bargain-

the Court would define the scope of the right as: the right to be screened for appointment by an impartial entity to determine whether there is a legal issue or factual hearing likely, which would warrant appointment of counsel in a given case. I do not mean to suggest that any of these are the optimal or likely outcome. I only intend to demonstrate how, even if the Court determines it should apply a hard floor model, we cannot assume the right will operate in precisely the same way as in criminal proceedings.

This three step inquiry—(1) Does the right apply meaningfully in deportation proceedings? (2) Does the nature of the proceedings and the respondent warrant a hard floor model? and (3) What is the scope of the hard floor right to be applied?—is a mechanism by which courts can begin to make principled determination under the *Padilla* conception of deportation regarding which criminal rights should apply in deportation proceeding and how to apply them.

CONCLUSION

We stand at the doorstep of a significant, even radical, reconceptualization of the nature of deportation, and *Padilla* is the foot in that door. Commentators have been knocking for decades, decrying the incoherent state of the current conception of deportation as purely civil and arguing against the formalist reasoning that has denied immigrants a level of procedural protection commensurate with the gravity of deportation proceedings.[246] Whether the Court will ultimately step through the door and overrule *Fong Yue Ting* and whole-

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ing, attorneys add significant value—because of their expertise in plea negotiation—even in those cases where no substantive legal issues or factual hearings are likely. In contrast, deportation proceedings are rarely resolved through plea agreement. *But cf.* 8 U.S.C. § 1229a(d) (2006) ("The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) . . . [which] shall constitute a conclusive determination of the alien's removability from the United States."); Jayashri Srikantiah & Karen Tumlin, Nat'l Immigration Law Ctr., *Backgrounder: Stipulated Removal, available at* http://www.nilc.org/immlawpolicy/removpsds/stipulated-removal-bkgrndr-2008-11.pdf (discussing "due process concerns about the use of the stipulated removal program [and] the program's staggering expansion over the past five years"); Legomsky, *supra* note 28, at 494–95 (discussing how "[c]riminal-style plea bargaining has seeped into" immigration law in situations where "[p]olice and prosecutors grant permission to remain at least temporarily in the United States rather than initiate removal proceedings, in exchange for the willingness of a minor player to cooperate in securing the convictions of those who played more major roles" and also in the asylum context, through "a growing practice among some immigration judges to offer applicants withholding of removal in exchange for withdrawing their applications for asylum").

246 *See supra* notes 29–30 and accompanying text.

heartedly adopt the *Padilla* conception of deportation as straddling the civil-criminal divide is, of course, impossible to predict.

The stakes could not be higher for immigrants facing deportation, including, for example, the right to appointed counsel, the protections against disproportionate punishment, assurance that the rules of the game cannot be changed retroactively, and an end to the regular practice of detaining immigrants for their deportation proceedings in remote locations thousands of miles away from their homes in the United States. By every objective measure, deportation has never before been such a pervasive feature of American society and never before been so connected to the criminal process.[247] As the laws targeting immigrants for deportation grow harsher by the year and as criminal and immigration law continue to become ever more entangled, the dissonance with civil label has reached a crescendo. Until *Padilla*, there was little reason to be hopeful that the Court was ready to address the growing incoherence. *Padilla* gives us reason to hope.

247 Julia Preston, *Administration Spares Students in Deportations*, N.Y. TIMES, Aug. 8 2010, at A1, A12 (noting that the Obama administration deported a record 389,834 people in fiscal year 2009 and has deported a record 142,526 immigrants convicted of crimes in the between October 2009 and August 2010). ICE's budget for fiscal year 2010 was $5.7 billion, which represents a 60% increase in funding since fiscal year 2005. *Compare ICE Budget Fact Sheet: Fiscal Year 2010*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/news/library/factsheets/#Chief Financial Officer-Management and Budget (last visited May 11, 2011), *with ICE Budget Fact Sheet: Fiscal Year 2005*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/doclib/news/library/factsheets/pdf/2005budgetfactsheet.pdf. ICE's detention capacity has ballooned from 7500 beds in 1995 to over 30,000 today, *see* SCHRIRO, *supra* note 10, at 2, and for the first time in U.S. history, a full 50% of respondents in deportation proceedings were detained in fiscal year 2009, up from under 30% just four years ago. EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2009 STATISTICAL YEAR BOOK fig. 23 (Mar. 2010), *available at* http://www.justice.gov/eoir/statspub/fy09syb.pdf.