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”—signaling that death penalty prosecutions stand alone as a unique category of adjudications that require a set of rules

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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.” The Court’s holding in Padilla v. Kentucky marked a remarkable 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. 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” 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.” 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-

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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.\textsuperscript{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);\textsuperscript{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);\textsuperscript{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);\textsuperscript{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).\textsuperscript{11} The

\textsuperscript{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 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).

\textsuperscript{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”).

\textsuperscript{9} See ex post facto cases cited infra note 68.

\textsuperscript{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 SCHIRRO, 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.”).

\textsuperscript{11} See 8 U.S.C. § 1227(a)(2)(A) (2006) (providing for the deportation of individuals convicted of crimes involving moral turpitude); Briseño 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.\textsuperscript{12}

The \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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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\begin{itemize}
\item[]{\textsuperscript{12} Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952); see also infra note 57.}
\item[]{\textsuperscript{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.}
\item[]{\textsuperscript{14} Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), rev’d, 130 S. Ct. 1473 (2010).}
\item[]{\textsuperscript{15} Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).}
\item[]{\textsuperscript{16} See discussion infra notes 154–66.}
\end{itemize}
nal punishment or not.\textsuperscript{17} It is in this context that the \textit{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 \textit{Strickland}\textsuperscript{18} claim concerning the specific risk of deportation.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{21}

Prior to \textit{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 \textit{Fong Yue Ting v. United States} decision.\textsuperscript{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.”\textsuperscript{23} A divided Court held that criminal constitutional protections “have no application” in deportation proceedings.\textsuperscript{24} The Court’s reasoning in \textit{Fong Yue Ting} rested on an extra-constitutional inherent powers theory that has since been discredited by scholars\textsuperscript{25} and by the Court itself.\textsuperscript{26} Nevertheless, in the

\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{19} \textit{Padilla}, 130 S. Ct. at 1482.
\item \textsuperscript{20} \textit{Id.} at 1481.
\item \textsuperscript{21} \textit{Id.} at 1483 (“[W]hen the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.”). \textit{See infra} notes 137–139 and accompanying text.
\item \textsuperscript{22} 149 U.S. 698 (1893); cf. Chae Chan Ping, 130 U.S. 581 (1889) (treating exclusion—not deportation—proceedings as civil).
\item \textsuperscript{23} \textit{Fong Yue Ting}, 149 U.S. at 699.
\item \textsuperscript{24} \textit{Id.} at 730.
\item \textsuperscript{25} \textit{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—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. A handful of scholars have specifically urged that removal...
proceedings straddle the civil-criminal divide with some removal proceedings akin to criminal proceedings and others akin to civil proceedings. And others have urged that removal be treated as quasi-criminal. Now, for the first time in American history, the Court has begun to align itself with these commentators, suggesting that depor-

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 “expulsion 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).
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(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.”).

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

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34 Markowitz, supra note 7.
35 See generally Bleichmar, supra note 28; Cleveland, supra note 25, at 253; Markowitz, supra note 7.
exclude and expel noncitizens. Legal historians agree that the former power, to exclude or prevent entry, could be exercised by the king alone without any criminal process. 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. 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. Such criminal expulsions first took the form of “abjuration of the realm” and later as “transportation,” 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-
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. During this period as well, deportation was utilized only as punishment for serious crimes.

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. 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. The case has, in time, come to symbolize one of the worst episodes in Supreme Court jurisprudence, alongside cases like Dred Scott v. Sandford and Plessy v. Ferguson, because of the explicit racism and xenophobia exhibited in the decision. However, the characterization of the immigration power announced in Chae Chan Ping still forms the basis of the modern

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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); Clay 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, 745 (1895) (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 pre-
vent the entry of foreign nationals. It was in this context that the Su-
preme Court first articulated the “inherent powers theory” in the
immigration realm, which dictates that the immigration power is de-
rived 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 immi-
gration 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 Chi-
nese 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
departure 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 sove-
reignty and the criminal constitutional protections, including the
“right of trial by jury, and prohibiting unreasonable searches and sei-
zures, and cruel and unusual punishments, ha[d] no application.”\(^{54}\)

\(^{50}\) See Chae Chan Ping, 130 U.S. at 606. The Court did not explicitly characterize the exclu-
sion 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 consti-
tutional 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 tran-
sit to return, Congress passed a new act purporting to annul the reentry permits of Chi-
nese nationals.

\(^{51}\) Indeed in the years immediately following Chae Chan Ping the Court issued several deci-
sions which suggested that its analysis may apply only to exclusion and not expulsion cas-
es. See Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (characterizing Con-
gress’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 sove-
reign 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, and the historic distinctions between the power to exclude, which was civil, and the power to expel, which was criminal. 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.

**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, the Court re-examined the “inherent powers theory,” which underlied the civil label and resoundingly repudiated it. 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-

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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).
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.\footnote{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.").} In \textit{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.\footnote{Afroyim, 387 U.S. at 257.}

Notwithstanding the Court’s repudiation of the rationale behind the civil label, it continued to apply the label after \textit{Reid} and \textit{Afroyim}.\footnote{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 \textit{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) (declaring “the invitation to transplant the categorical approach root and branch—without any modification whatever—into the civil removal context”).} 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.\footnote{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, \textit{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. Martínez, \textit{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

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/dojinterrogationmemo20020801.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.” 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. 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, the prohibition on ex post facto laws, protections
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 . . . .

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 (1915) (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 unswerving 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 deportation 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 deportation 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 Zakonaitė 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.\footnote{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.”).}

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\footnote{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, \textit{Miranda} warnings, the privilege against self-incrimination, trial by jury, restrictions on bills of attainder, the prohibition of \textit{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., \textit{United States ex rel. Bilokumsky v. Tod}, 263 U.S. 149, 157 (1923) (noting that involuntary confessions are admissible at deportation hearing); \textit{Fong Yue Ting}, 149 U.S. at 730 (stating that the Eight Amendment does not restrict deportation because it is not punishment); \textit{Briseno v. INS}, 192 F.3d 1320, 1323 (9th Cir. 1999) (same); \textit{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); \textit{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); \textit{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); \textit{Navia-Duran v. INS}, 568 F.2d 805, 808 (1st Cir. 1977) (allowing admission of statements made without \textit{Miranda} warnings); \textit{Avila-Gallegos v. INS}, 525 F.2d 666, 667 (2d Cir. 1975) (same); \textit{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); \textit{Chavez-Raya v. INS}, 519 F.2d 397, 399–401 (7th Cir. 1975) (allowing admission of statements made without \textit{Miranda} warnings); \textit{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); \textit{Burquez v. INS}, 513 F.2d 751, 755 (10th Cir. 1975) (same).}—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,
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.\footnote{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))).} Since the Sixth Amendment is applicable only to criminal proceedings, it generally follows that there is no right to effective counsel in civil proceedings.\footnote{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)).} 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.\footnote{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 proceedings77 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 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); Papu, 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).

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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, 343 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); Goonsuwon 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 I), 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 Basel 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, 350 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)).

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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. Keider, 505 F.3d 641, 642–43 (7th Cir. 2007) (same); Mai v. Gonzales, 473 F.3d 162, 163 (9th Cir. 2006) (same); Osei v. INS, 305 F.3d 1205, 1200–07 (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 Griñalva-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." However, in practice, it functions similarly to the facially lower standard of "reasonable performance" required under the Sixth Amendment. 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. 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.

However, in Jordan v. De George, the Supreme Court applied the criminal vagueness doctrine to examine the constitutionality of a depor-
tion statute for persons convicted of “crime[s] involving moral turpi-
tude.” 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 nev-
evertheless examine the application of the vagueness doctrine to this
case” because of the “grave nature of deportation.” Ultimately, the
Court concluded that the phrase was not unconstitutionally vague.
Recently in Arriaga v. Mukasey, the Second Circuit explained that the
“void for vagueness” doctrine is chiefly applied to criminal legisla-
tion. Laws with civil consequences receive less exacting vagueness
scrutiny” but that the Supreme Court assessed the deportation provi-
sion “as if it imposed a criminal penalty.”

Similarly, in Fong Haw Tan v. Phelan, the Court applied the “rule
of leniency”—commonly, though not exclusively, associated with crim-
inal proceedings—to deportation proceedings. The case required
the Court to interpret the meaning of a statutory provision that pro-
vided for the deportation of individuals who had been convicted of a
crime involving moral turpitude “more than once.” 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.” Since
Phelan, the Supreme Court has repeatedly applied the principle that
courts should construe ambiguous immigration statutes favorably to
noncitizens.

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).
ty to cases involving Native Americans) (citing McClanahan v. Arizona State Tax
89 Fong Haw Tan, 333 U.S at 7.
90 Id. at 10. See generally David S. Rubenstein, Putting the Immigration Rule of Leniency In Its Proper
the “immigration rule of leniency”); Brian G. Slocum, Canons, the Plenary Power Doctrine, and
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 leniency 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
(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. In contrast, evidence obtained in violation of the Fourth Amendment is admissible in civil proceedings. In *Lopez-Mendoza*, the Supreme Court specifically considered whether the exclusionary rule should operate in deportation proceedings. 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].” Howev-
er, the Court suggested that the exclusionary rule may be available if the Fourth Amendment violations by immigration authorities are “widespread” or “egregious.” 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. And indeed, suppression motions, while still the exception, are becoming an increasingly frequent feature of deportation proceedings. Again, the purported burden on respon-

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. Olivarce-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-Tahir 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 EGEES, PETER L. MARKOWITZ & JAVA 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?cmd=ContentEdit&kcmd=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.\footnote{See Albert W. Alschuler, \textit{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, \textit{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. GOVT ACCOUNTABILITY OFFICE, \textit{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, \textit{A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NJF Study and Other Studies of “Lost” Arrests}, 8 AM. B. FOUND. RES. J. 611, 660 (1983) (analyzing the GAO study); Peter Nardulli, \textit{The Societal Cost of the Exclusionary Rule: An Empirical Assessment}, 8 AM. B. FOUND. RES. J. 385, 596 (1983) (distinguishing success rates for motions to suppress based on the type of evidence).}

So, once again, we see a uniquely criminal law doctrine creeping into the “civil” deportation realm.\footnote{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. \textit{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, \textit{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). \textit{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. \textit{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. \textit{See Woodby v. INS}, 385 U.S. 276, 277 (1966) (“It is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, unequivocal, and convincing evidence.” (emphasis added)); \textit{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. 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. 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, and in light of the Court’s repudiation of its only articulated justification for the civil label—the inherent powers theory—what is revealed is the confused and indefensible state of the current jurisprudence regarding the nature of deportation.

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”); *Czekinek 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”); *Bilekumody*, 263 U.S. at 157 (“And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application”); *Briseño v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) (“[D]eporation is not criminal punishment.”); *Balsys*, 524 U.S. at 671 (“[R]eshis 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)); *Scheidebergen 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} The search revealed several styrofoam boxes containing approximately 1033 pounds of marijuana.\textsuperscript{108} Padilla was charged with, \textit{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.\textsuperscript{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.”\textsuperscript{110}

In fact, Padilla’s conviction was an aggravated felony\textsuperscript{111} subjecting him to mandatory detention and deportation.\textsuperscript{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.\textsuperscript{113} The trial court denied the motion but was reversed by the Kentucky Court of

\textsuperscript{105} 130 S. Ct. 1473 (2010).
\textsuperscript{106} Id. at 1477.
\textsuperscript{108} Id. at 3.
\textsuperscript{109} Id. at 3–4.
\textsuperscript{110} Padilla, 130 S. Ct. at 1478 (internal quotation marks omitted).
\textsuperscript{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.
\textsuperscript{113} Brief of Petitioner at 11, Padilla, 130 S. Ct. 1473 (No. 08-651).
Appeals. Ultimately, a divided Kentucky Supreme Court held that since deportation was a collateral, not direct, consequence of the criminal conviction, 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.” 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. Three state courts had held to the contrary that, in at least

114 Id. at 11–12.
some situations, defense attorneys have an affirmative obligation to advise clients about immigration consequences. 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 and only one jurisdiction joining Kentucky to hold to the contrary. 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.

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).


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. \(^{125}\)

\(^{121}\) 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 5 (“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 afool 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

\(^{126}\) *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*.”).

\(^{127}\) *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).


\(^{130}\) *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.” 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 . . . .”

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.” 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.

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.”

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.” 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.

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—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”\(^\text{141}\) 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.\(^\text{142}\) 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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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, dissenting judges, or scholars 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 to 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, 115–16 (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. 1725, 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

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146 See discussion infra Part III.C.
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, 392 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. As the Ninth Circuit explained:

[Whether 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.]

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” 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.” 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-
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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{156}

The case commonly cited as the origin of the doctrine is United States v. Parrino,\textsuperscript{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.”\textsuperscript{158} The collateral consequences doctrine has since been adopted by every other circuit court of appeals.\textsuperscript{159}

\textsuperscript{154} Kercheval v. United States, 274 U.S. 220, 223 (1927).
\textsuperscript{155} United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (citation omitted).
\textsuperscript{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.”);
\textsuperscript{157} 212 F.2d 919 (2d Cir. 1954).
\textsuperscript{158} Id. at 921–22.
\textsuperscript{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-Nahani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); Torrey v. Estelle, 842 F.2d 254, 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,’” has been interpreted by some lower courts as an affirmation of the collateral consequences doctrine. 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. 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. The link is so close, in fact, that some

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*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)).

160 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.”).

161 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.”), *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.”).

162 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. Even when courts purport to impose some other standard, such standards are almost always, in practice, mere proxies for the civil label. 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. The Padilla Court itself conflates the discussion of the criminal-civil nature of deportation with the collateral-direct de-

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) “whether 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. 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. Empirical data bears out these characterizations. The

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 Mins. L.J. 507, 565 (2007) (“[F]ew can deny that [the Roberts Court] is one of the most conservative Courts in modern history.”).

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. 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. Moreover, many of these victories were lopsided wins, with immigrants garnering significant support from the Court’s conservative voting block.


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 Rehnquist 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).

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, 535 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).

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

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 Immigration 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); Gonzalez v. Duenas-Alvarez, 549 U.S. 47 (win, determining that an alien was not disqualified from discretionarly 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-Martínez 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, 535 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 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 of 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.  

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. In fact, we find that immigrants fared significantly better than criminal defendants with immigrants prevailing in 48% of immigration cases and criminal defendants prevailing only 40% of the time. While this disparity is significant,

174 See discussion infra Part III.A.1.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).

it is not alone extraordinary and is potentially explained by factors other than the asymmetric incorporation of criminal justice norms in deportation proceedings.\textsuperscript{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 immigration crisis.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{181} Accordingly, I organized the da-
ta into three periods: (1) Rehnquist Court pre-IIRIRA immigration cases; (2) Rehnquist Court post-IIRIRA immigration cases; and (3) Roberts Court immigration cases.\textsuperscript{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.\textsuperscript{183} This, interestingly, was well below the criminal defendant win rate of 33\% for the same period.\textsuperscript{184} Since IIRIRA, however, along with the dramatic criminalization of immigration law, immigrants’ win rate drastically increased to 61\%,\textsuperscript{185} well above the 41\% win rate for criminal defendants during that same period.\textsuperscript{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.\textsuperscript{187} While immigrants won an impressive 57\%\textsuperscript{188} of their cases

\begin{itemize}
  \item The Rehnquist Court pre-IIRIRA immigration cases include all immigration cases, defined \textit{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.
  \item Immigrants prevailed in only one of the seven cases heard during this period. See discussion \textit{supra} note 175. 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.
  \item Immigrants prevailed in eleven of the eighteen cases heard during this period. See cases cited \textit{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.
  \item Significant post-IIRIRA events include: increased use of local police to enforce immigration laws, see, e.g., 8 U.S.C. \S 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 CHU 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, their win rate continued to increase thereafter with immigrants prevailing in 63% 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. It is also notable that, over these periods, while immigrants’ fortunes were improving the Court overall was moving consistently to the right. 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. The correlating crescendoing trends, when

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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 counterintuitive 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
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.

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.”

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.”

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199 Id. at 14.
Americans increasingly view undocumented immigrants in particular, and immigrants in general, as criminals. 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. 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.”

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. Meanwhile, uniquely criminal law doctrinal strands increasingly weave their way into these purportedly “purely civil proceedings.” 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 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/1Imm%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.”).


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 defendants206 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.
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, the Court has applied some rights commonly associated with criminal proceedings to non-criminal proceedings, including juvenile delinquency proceedings, parental termination proceedings, civil commitment proceedings, some parole revocation proceedings, and court martial proceedings. Moreover, there is significant scholarly support for the Court’s suggestion that deportation is quasi-criminal. 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. It seems eminently logical to simply weigh

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208 See supra notes 72–73 and accompanying text.
210 *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (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, 422–33 (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).
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

\(^{216}\) Id.

\(^{217}\) *Id.* 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.”).


\(^{220}\) *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" and "the equivalent of banishment or exile" 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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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. This can be so because bias can prevent us from making accurate calculations of the optimal course of action in individual cases 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.

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. Moreover, our system makes a very conscious decision to skew the error rate in favor of wrongful acquittals, rather than wrongful convictions, 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.

228 Id.
230 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.”).
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 short-
ened business trip is hardly a liberty deprivation comparable to crim-
inal incarceration, and it is doubtful that significant stigma would at-
tach 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 him-
self 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 ul-
timate deportation, we see a physical deprivation of liberty equivalent
to criminal incarceration, a stigma both here and in Honduras
related to criminal deportees that equals and may even surpass the
stigma associated with many criminal convictions, and membership
in a group that garners almost unrivaled political disfavor—“criminal
aliens.”

Thus, in many ways Padilla presented the easiest scenario

235 SCHIRRO, supra note 10, at 4 (“As a matter of law, Immigration Detention is unlike Crimi-
nal Incarceration. Yet Immigration Detention and Criminal Incarceration detainees tend
to be seen by the public as comparable, and both confined populations are typically ma-
naged in similar ways. Each group is ordinarily detained in secure facilities with har-
dened 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 manage-
ment strategies are based largely upon the principles of command and control. Likewise,
ICE adopted standards that are based upon corrections law and promulgated by correc-
tional 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 com-
unity safety through press releases and marketing materials. See, e.g., Press Release, U.S.
Immigration & Customs Enforcement, 87 Convicted Criminal Aliens and Fugitives Ar-
rested in ICE Enforcement Surges, (July 28, 2010), available at
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

\(^{238}\) Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (“Deportation is nevertheless intimately related to the criminal process.”).

\(^{239}\) Markowitz, supra note 7, at 315 (“The most important critiques of the inherent powers theory are those driven by an analysis based upon . . . the special status of permanent residents.”).


\(^{241}\) 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.uscifr.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. Whether the Court will ultimately step through the door and overrule Fong Yue Ting and whole-

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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. 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.