

2011

## Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?

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Maddali, Anita (2011) "Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?," *American University Law Review*: Vol. 61: Iss. 1, Article 1.  
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Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?

## ARTICLES

# *PADILLA V. KENTUCKY: A NEW CHAPTER IN SUPREME COURT JURISPRUDENCE ON WHETHER DEPORTATION CONSTITUTES PUNISHMENT FOR LAWFUL PERMANENT RESIDENTS?*

ANITA ORTIZ MADDALI\*

*In this Article, I argue that the deportation of lawful permanent residents on account of a criminal conviction is punitive, and therefore enhanced constitutional protections must be afforded to lawful permanent residents during removal proceedings. To support this argument I rely, in part, on the Supreme Court's recent decision in Padilla v. Kentucky. The Padilla Court held that counsel must inform a client when a plea carries the risk of deportation. The Court's analysis throughout the decision is groundbreaking in its recognition of the modern day realities of deportation—specifically the growing relationship between the immigration and criminal justice systems and the ways in which criminal convictions and deportation have become enmeshed over the years. The Court's*

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\* Assistant Professor of Law, Northern Illinois University College of Law, as of October 2011. This Article was written while I was a Visiting Assistant Clinical Professor of Law at the DePaul University College of Law. I am indebted to the many individuals who made this Article a reality. First and foremost, I would like to thank Stephen Legomsky for his ongoing generosity and kindness. He read and commented on many drafts and discussed my Article over email and telephone while teaching in Portugal. I also wish to thank Annette Appell for her mentorship, for her comments on my draft, and for shepherding me through this process. Thanks to Andrea Lyon, Allison Tirres, and John Robinson for reading and commenting on drafts of this Article. Thank you to Claudia Valenzuela, who answered numerous questions based upon her many years of experience representing detained immigrants. I am also grateful for the insightful comments from faculty members during my presentations at Valparaiso University School of Law, University of Notre Dame Law School, and Case Western Reserve University School of Law. Thanks to David Becker for his friendship and encouragement. This Article is dedicated to two individuals who will forever be in my heart: Chaitanya Maddali and John L. Ortiz; there are no words.

language provides support for the argument that deportation may not be a remedial exercise by the government to enforce immigration laws—as the Court has held for over a century—but may in fact constitute punishment. If deportation is recognized as punishment, then additional constitutional protections, like the right to counsel, must be afforded to lawful permanent residents who are in removal proceedings on account of criminal convictions.

This Article is novel in two respects. First, it offers a fresh look at the punitive nature of deportation, using the *Padilla* decision, and other case law, to bolster this argument. Second, this Article suggests that the analytical approach used by the Supreme Court in its juvenile delinquency jurisprudence, which extended greater constitutional protections to juveniles during the adjudicative stage of delinquency proceedings, could provide the framework for determining which protections should be afforded to lawful permanent residents who are in removal proceedings on account of a criminal conviction. Like deportation, juvenile delinquency proceedings have been labeled civil, but the Court has recognized that because a finding of delinquency could result in incarceration, the Due Process Clause requires additional protections during these proceedings. Similarly, lawful permanent residents face the risk of being removed from their country of permanent residence—this results in separation from family and removal from a person’s home. As such, due process requires the need for additional protections.

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## INTRODUCTION

The recent United States Supreme Court decision in *Padilla v. Kentucky*<sup>1</sup> arguably has changed how the deportation<sup>2</sup> of lawful permanent residents is viewed in the law. The Supreme Court has consistently held that deportation never constitutes punishment.<sup>3</sup> This has served as justification for the denial of constitutional criminal safeguards during removal proceedings. But when deportation is predicated upon a criminal conviction, as it often is today, the case for classifying deportation as punishment becomes stronger. As I will show, *Padilla* has fortified that conclusion. This Article explores the groundbreaking nature of the *Padilla* decision and how it changes the traditional view that deportation is not punitive.<sup>4</sup>

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1. 130 S. Ct. 1473 (2010).

2. Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), proceedings were referred to as exclusion and deportation proceedings. After the passage of IIRIRA, the law combined the two, referring to both as removal proceedings. Immigration and Nationality Act of 1952 § 240, 8 U.S.C. § 1229a (2006). I do not focus on exclusion—those who are found to be inadmissible—i.e. those who have not been lawfully admitted into the United States. *See id.* § 212(a). Instead, I focus on the removal of noncitizens after lawful arrival into the United States. Thus, as shorthand throughout this Article, I use the word “deportation” to refer to the removal of noncitizens after arrival.

3. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (emphasizing the use of deportation as a means of correcting immigration violations); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (focusing on the government’s power to expel undesirable residents); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime.”).

4. I have been guided by the ideas proposed by other eminent scholars. *E.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation In Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383 (2007); Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. (forthcoming 2011) (discussing the significance of the *Padilla* decision’s emphasis on the punitive nature and

Based on the logic employed in *Padilla*, I argue that the deportation of lawful permanent residents on the grounds of criminal convictions has to be considered punishment, and that additional constitutional safeguards should be afforded to lawful permanent residents in removal proceedings. I also argue that this is the logical extension of the Supreme Court's decision in *Kennedy v. Mendoza-Martinez*,<sup>5</sup> which set forth factors for examining whether a sanction is punitive.<sup>6</sup> Finally, I suggest a framework for assessing which constitutional criminal safeguards should be afforded to lawful permanent residents in removal proceedings.

In brief, *Padilla* held that counsel must adequately inform clients when a plea carries a risk of deportation.<sup>7</sup> Recognizing that “[t]he severity of deportation [is] ‘the equivalent of banishment or exile,’” the Court stated that the Sixth Amendment demanded such a professional duty.<sup>8</sup>

The language and logic employed by the *Padilla* Court supports the argument that deportation can constitute punishment. First, while the Court refrained from classifying deportation as a direct or collateral consequence of a plea, its description of deportation seemed to suggest that deportation is a direct consequence of a plea and, therefore, part of the criminal punishment imposed. Second, the Court emphasized the severity of deportation, particularly for lawful permanent residents, recognizing that deportation is the equivalent of banishment or exile.<sup>9</sup> I argue that these two emphases demonstrate that deportation for lawful permanent residents, when triggered by a criminal conviction, is punitive.

Part I of this Article will explore the distinction between criminal and civil proceedings, as this distinction is the touchstone for the provision of certain constitutional protections. These constitutional criminal protections

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severity of removal and the Court's characterization of deportation as a civil-criminal hybrid, and thus arguing that the constitutional right to effective assistance of counsel should apply to all noncitizens and all deportability grounds); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) [hereinafter Legomsky, *The New Path of Immigration Law*]; Stephen H. Legomsky, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment: Lieggi v. United States Immigration and Naturalization Service*, 389 F. Supp. 12 (N.D. Ill. 1975), 13 SAN DIEGO L. REV. 454 (1976) [hereinafter Legomsky, *Deportation of an Alien for a Marijuana Conviction*]; 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 (2008); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47 (2010).

5. 372 U.S. 144 (1963).

6. *Id.* at 168–69.

7. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

8. *Id.* (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

9. *Id.*

are typically not afforded during civil proceedings. As seen in the case law, the Supreme Court has recognized that some civil penalties may be punitive in nature and may require enhanced constitutional protections. However, at least in the removal context, the Court had always labeled deportation as a civil, non-punitive penalty. This section will provide an analysis of the key cases decided by the Supreme Court holding that removal proceedings are civil and that deportation does not constitute punishment.

Part II will detail the changes in immigration law that have tied the immigration process to the criminal process over the years, making the Supreme Court's reflexive rationale for finding that deportation is not punishment outdated. Specifically, this section will review the expansion of the criminal grounds leading to deportation and the interrelationship between the immigration and criminal systems.

Part III will review the *Padilla* decision. In this section, I parse the language that suggests deportation can constitute punishment. Part IV will explain why deportation of lawful permanent residents on account of criminal convictions constitutes punishment. I separate the treatment of lawful permanent residents from other non-citizens because of their unique nature—having more rights than non-citizens, while not having the complete freedom afforded to citizens. Here, I will argue that the goal of deportation for lawful permanent residents no longer serves the remedial purpose of regulating the immigration process, but seeks to punish permanent residents for the underlying criminal behavior. I will then utilize the factors outlined by the Supreme Court in *Mendoza-Martinez*, with the support of the *Padilla* decision, to demonstrate that the deportation of lawful permanent residents convicted of crimes is punishment.

Finally, Part V suggests a principled approach for determining which constitutional criminal protections should be afforded to lawful permanent residents in removal proceedings on account of criminal convictions. I suggest that the standard applied by the Supreme Court in the juvenile delinquency context—fundamental fairness under the Due Process Clause—should be applied in the deportation realm. I also examine the test employed by the Supreme Court in *Mathews v. Eldridge*<sup>10</sup> to determine the procedural protections that should be afforded to lawful permanent residents who are in removal proceedings based upon criminal convictions.

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10. 424 U.S. 319 (1976).

## I. CLASSIFICATION OF DEPORTATION AS CIVIL/NON-PUNITIVE

### A. *Labels Can be Misleading—the Civil/Criminal Law Distinction*

It might appear that the law is generally split into two broad categories—civil and criminal. But the line between these two categories is ambiguous. The traditional view is that civil law primarily emphasizes compensation and restitution while criminal law deters and punishes.<sup>11</sup> Because of the punitive nature of criminal laws, heightened constitutional protections are afforded to individuals in criminal proceedings.

[C]riminal law is distinguished by its punitive purposes, its high procedural barriers to conviction, its concern with the blameworthiness of the defendant, and its particularly harsh sanctions. In contrast, the civil law is defined as a compensatory scheme, focusing on damage rather than on blameworthiness, and providing less severe sanctions and lower procedural safeguards than the criminal law.<sup>12</sup>

In fact, certain provisions of the Bill of Rights only refer to criminal proceedings.<sup>13</sup> It has been argued that Congress has purposefully labeled some sanctions civil “to ensure the efficient control of private behavior without the need to honor such pesky rights as the guarantees against double jeopardy and excessive fines, and most importantly, the requirement that the state prove its cause beyond a reasonable doubt before inflicting punishment on a defendant.”<sup>14</sup>

Yet in spite of these broad generalizations, civil and criminal law do not necessarily fit into the broad categories mentioned above—punishment versus compensation and restitution. For instance, tort law imposes punitive damages as a form of deterrence.<sup>15</sup> Incarceration—typically associated with criminal law—can be imposed in the civil context for civil contempt.<sup>16</sup> Moreover, fines—typically associated with civil law—can be

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11. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1799, 1802 (1992) (arguing for an increase in punitive civil monetary sanctions that would fall in the “middleground” between criminal and civil law and would warrant heightened procedural protections, though not as stringent as those afforded during criminal proceedings).

12. *Id.* at 1799.

13. The Fifth Amendment’s Self-Incrimination Clause and the Sixth Amendment are limited to criminal proceedings, but the Self-Incrimination Clause has been applied in civil forfeiture proceedings when the culpability of the owner was a relevant part of the forfeiture statute. See, e.g., *United States v. U.S. Coin & Currency*, 401 U.S. 715, 721–22 (1971) (stating that the Fifth Amendment may be properly invoked in civil forfeiture proceedings).

14. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 6 (2005). Fellmeth argues that the distinction between criminal and civil law is “the least well-considered and principled in American legal theory.” *Id.* at 3.

15. See RESTATEMENT (SECOND) OF TORTS § 908 (1979) (imposing punitive damages to both punish and deter “outrageous conduct” stemming from “the defendant’s evil motive or reckless indifference to the rights of others”).

16. Mann, *supra* note 11, at 1804.

imposed in the criminal context as well.<sup>17</sup>

With the expansion of punitive civil sanctions, “the bifurcation of legal sanctions into two categories is misleading.”<sup>18</sup> In fact, “punishment no longer seems a distinctive attribute of the criminal law.”<sup>19</sup> Keeping in mind that civil sanctions may be more severe than the actual criminal sanction imposed,<sup>20</sup> the Supreme Court has extended constitutional criminal protections to “civil cases” when it has viewed the civil penalty as punitive.<sup>21</sup>

Under the Court’s reasoning, even if a proceeding is formally civil, the extension of constitutional criminal safeguards is not necessarily prohibited if the effect of the civil sanction is punitive. As an example, the Court has taken pains to review whether statutes divesting citizenship are punitive in nature,<sup>22</sup> and whether certain civil forfeiture sanctions are punitive.<sup>23</sup> In doing so, the Court has assessed “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention [to establish a civil penalty].”<sup>24</sup> It is noteworthy that in this respect, the Court has afforded great deference to the label applied by the legislature.<sup>25</sup> The Court

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17. *Id.*

18. *Id.* at 1797.

19. *Id.* at 1804.

20. *Id.* at 1797–98.

21. *See* *United States v. Ursery*, 518 U.S. 267, 280 (1996) (“Though it was well established that ‘a civil remedy does not rise to the level of ‘punishment’ merely because Congress provided for civil recovery in excess of the Government’s actual damages,’ we found that our case law did ‘not foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government’s damages and expenses as to constitute punishment.’” (citation omitted)); *see also* *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972) (per curiam) (stating whether a particular penalty is civil or criminal depends upon statutory construction).

22. *See* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164 (1963) (automatic forfeiture of citizenship); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (removal of citizenship for desertion of armed services).

23. *See* *United States v. Halper*, 490 U.S. 435, 449–50 (1989) (holding that double jeopardy barred civil sanctions following a criminal punishment when the civil sanctions were punitive in nature), *abrogated by* *Hudson v. United States*, 522 U.S. 93, 103–05 (1997) (stating that petitioners who were subjected to monetary penalties and debarment after violating federal banking statutes could, under the Double Jeopardy Clause, face criminal charges). According to the Court, the Double Jeopardy Clause only prohibits the imposition of multiple criminal punishments for the same offense. *Hudson*, 522 U.S. at 99. Because there was no proof that the civil sanctions were “‘so punitive in form and effect as to render them criminal,’” the Court held that the Double Jeopardy Clause did not apply. *Id.* at 104–05 (quoting *Ursery*, 518 U.S. at 290); *see also* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (holding that the Double Jeopardy Clause does not bar a civil forfeiture proceeding that follows an acquittal on criminal charges); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 698, 700, 702 (1965) (holding that the Fourth Amendment’s prohibition on illegal search and seizure applies to civil forfeiture proceedings that are “quasi-criminal” in nature); *Boyd v. United States*, 116 U.S. 616, 634 (1886) (holding that the unlawful search and seizure under the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment applies to civil forfeiture proceedings).

24. *United States v. Ward*, 448 U.S. 242, 249 (1980).

25. *See* *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (stating that clear intent is

has stated that evidence of a punitive effect must be shown by “the clearest proof.”<sup>26</sup>

In *Mendoza-Martinez*, the Supreme Court laid out the factors to be considered when deciding whether a particular sanction is penal.<sup>27</sup> The Court held that statutes divesting Americans of their citizenship for having fled the country to evade military service were punitive.<sup>28</sup> While the Court recognized the power of Congress to conduct war and regulate foreign relations, this power was subject to the constitutional requirement of due process.<sup>29</sup> In assessing whether divestment of citizenship constituted punishment, the Court looked to whether the statutes were penal in character.<sup>30</sup> The Court determined that Congress did, in fact, impose the sanction as punishment.<sup>31</sup> When conclusive evidence of Congressional intent does not exist, the Court indicated that the following factors “must be considered in relation to the statute on its face”<sup>32</sup>:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, whether it appears excessive in relation to the alternate purpose.<sup>33</sup>

The Supreme Court later stated that while the *Mendoza-Martinez* factors are meant to serve as guideposts,<sup>34</sup> “no one factor should be considered controlling.”<sup>35</sup> However, courts continue to apply these factors in their analyses of whether a penalty is punitive or remedial.<sup>36</sup> Therefore, I will

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necessary to demonstrate that a statute is punitive even though labeled civil).

26. *Id.*

27. *Mendoza-Martinez*, 372 U.S. at 168–69.

28. *Id.* at 180–82.

29. *Id.* at 164–65.

30. *Id.* at 164.

31. *Id.* at 165–66.

32. *Id.* at 169.

33. *Id.* at 168–69 (citations omitted).

34. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

35. *Id.* at 101.

36. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 97 (2003) (using the *Mendoza-Martinez* factors to determine whether Alaska’s Sex Offender Registration Act was punitive and violated the Ex Post Facto Clause); *Hudson*, 522 U.S. at 99–100 (criminal and civil punishment for banking violations); *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (Sexually Violent Predator Act); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (jury award of punitive damages); *Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) (state constitutional amendment disenfranchising felons); *Smith v. Dinwiddie*, 510 F.3d 1180, 1189 (10th Cir. 2007) (civil loss of parental rights); *Doe v. Bredezen*, 507 F.3d 998, 1004–05 (6th Cir. 2007) (violent sexual offender registration); *United States v. Reynard*, 473 F.3d 1008, 1020–21 (9th Cir. 2007) (requirement that parolees submit blood samples for DNA testing); *Porter v. Coughlin*, 421 F.3d 141, 147–48 (2d Cir. 2005) (prison disciplinary proceedings); *Myrie v. Comm’r*, 267 F.3d 251, 259–62

use these factors in Part IV.B to demonstrate that the deportation of lawful permanent residents is punishment.<sup>37</sup>

*B. Deportation Proceedings: Classification as Civil and Non-penal, a Historical Perspective*

The courts have reflexively dismissed the application of constitutional criminal safeguards to deportation proceedings on the basis that such proceedings are civil and not criminal<sup>38</sup> and on the basis that deportation does not constitute punishment.<sup>39</sup> This reflexive tendency to label deportation cases as non-punitive seems antithetical to the *Mendoza-Martinez* factors and case law in which the Court has found other civil penalties to be punitive.

In the 1893 case of *Fong Yue Ting v. United States*,<sup>40</sup> the Supreme Court had its first occasion to consider whether constitutional criminal protections should be afforded to noncitizens in deportation proceedings.<sup>41</sup> *Fong Yue Ting* involved Section 6 of the Act of May 5, 1892, which was “[a]n act to prohibit the coming of Chinese persons into the United States.”<sup>42</sup> Under Section 6, any Chinese laborer living in the United States who had not

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(3d Cir. 2001) (mandatory surcharge in prison commissary to fund victim compensation program).

37. Despite the guideposts laid down by *Mendoza-Martinez* and its progeny, the Court’s jurisprudence in this area has been described as a “jurisprudential Frankenstein’s monster.” Fellmeth, *supra* note 14, at 10. The Court has “vacillated” in its distinction between criminal and civil measures, as well its definition of the term punitive. *Id.* Moreover, the Court’s analysis has differed based upon the specific Constitutional provision in question. *Id.*; see also *Hudson*, 522 U.S. at 102–03 (finding that not all punishment is subject to double jeopardy constraints and that other constitutional protections can address punishment that is disproportionate or irrational).

38. See, e.g., *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (stating that deportation is civil and government does not have to apply the proof beyond a reasonable doubt standard); *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir. 2008) (asserting that deportation proceedings are civil); *Ngongo v. Ashcroft*, 397 F.3d 821, 823 (9th Cir. 2005) (noting that deportation proceedings are civil and, therefore, certain constitutional criminal protections are not available); *De La Teja v. United States*, 321 F.3d 1357, 1364–65 (11th Cir. 2003) (declaring that deportation proceedings are civil, so the Double Jeopardy Clause does not apply).

39. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (stating that the while the consequences of deportation are “grave,” deportation is “not imposed as a punishment”); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (holding that deportation is not punishment but “simply a refusal by the government to harbor persons whom it does not want”); *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005) (finding that the Eighth Amendment does not apply because deportation does not constitute punishment); *Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001) (stating that the Ex Post Facto Clause and petitioner’s Eighth Amendment claim of cruel and unusual punishment do not apply in removal proceedings, which are civil proceedings, “not criminal punishment”); *Cortez v. INS*, 395 F.2d 965, 968 (5th Cir. 1968) (stating that “deportation is not punishment” and “therefore cannot constitute cruel and unusual punishment”).

40. 149 U.S. 698 (1893).

41. *Id.* at 730.

42. *Id.* at 725.

obtained a certificate of residence within one year of the act's passage was deemed unlawfully present and ordered deported by a judge.<sup>43</sup> The Chinese resident could prevent his deportation if he could show that he was unable to obtain a certificate because of "accident, sickness, or other unavoidable cause" and demonstrate "by at least one credible white witness" that he was a resident.<sup>44</sup>

*Fong Yue Ting* involved three Chinese laborers who had been arrested and ordered deported under Section 6.<sup>45</sup> Each filed a petition alleging that his arrest violated due process and that Section 6 was unconstitutional.<sup>46</sup> The Supreme Court found that the power to exclude and expel aliens from United States territory was within Congress's plenary powers.<sup>47</sup> According to the Court, Chinese laborers could reside permanently in the United States, but they "remain[ed] subject to the power of [C]ongress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal [was] necessary or expedient for the public interest."<sup>48</sup> The Court noted that the hearing before the judge under Section 6 was not a trial or sentence for a criminal offense, but simply a determination as to whether the individual met the conditions established by Congress to remain in the United States.<sup>49</sup> The Court further elaborated:

[i]t is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own county of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the [C]onstitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.<sup>50</sup>

Justices Brewer and Field wrote compelling dissents.<sup>51</sup> Justice Brewer distinguished between those persons lawfully admitted and those who had

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43. *Id.* at 726–27.

44. *Id.* at 727.

45. *Id.* at 731–32.

46. *Id.* at 704.

47. *Id.* at 713–14.

48. *Id.* at 724.

49. *Id.* at 730.

50. *Id.*

51. Justice Fuller also dissented, stating that deportation was akin to banishment, and that the specific provisions of the act constituted punishment without a judicial trial. *Id.* at 762–63 (Fuller, J., dissenting).

not been admitted.<sup>52</sup> He stated that the three lawfully admitted petitioners in this case, because of their lengthy residence within the country, were “entitled to a more distinct and larger measure of protection than those who [were] simply passing through, or temporarily in [the country].”<sup>53</sup> Resident aliens, Justice Brewer asserted, were protected by the Constitution, and the deportation of lawfully admitted residents without a trial imposed punishment without due process of law.<sup>54</sup>

Justice Field agreed with Justice Brewer that deportation constituted punishment.<sup>55</sup> He described deportation as “beyond all reason in its severity.”<sup>56</sup> Justice Field stated that deportation could not be carried out without the protections of the Constitution.<sup>57</sup> Those residents domiciled here were entitled to the same constitutional protections as citizens.<sup>58</sup> The only difference between lawfully admitted residents and citizens, he said, was that the former could not vote or hold public office.<sup>59</sup> Justice Field noted: “[t]here is no dispute about the power of [C]ongress to prevent the landing of aliens in the country. The question is as to the power of [C]ongress to deport them, without regard to the guaranties of the [C]onstitution.”<sup>60</sup> Finding deportation of Chinese laborers under Section 6 of the act to be “of an infamous character,” Justice Field said that such a punishment could “only be imposed after indictment, trial, and conviction.”<sup>61</sup> He went on to note that if such a punishment had been applied to a citizen, “none of the justices of this court would hesitate a moment to pronounce it illegal.”<sup>62</sup>

Adhering to the precedent set by *Fong Yue Ting*, in 1913 the Court in *Bugajewitz v. Adams*<sup>63</sup> once again found that deportation did not constitute punishment.<sup>64</sup> *Bugajewitz* involved a woman who faced deportation under the Act of February 20, 1907.<sup>65</sup> According to the act, any alien woman found to be practicing prostitution within three years after entry was deportable.<sup>66</sup> In holding that the act was constitutional, the Court stated that deportation was not punishment but simply “a refusal by the

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52. *Id.* at 733–37 (Brewer, J., dissenting).

53. *Id.* at 734.

54. *Id.* at 739–41.

55. *Id.* at 758–59 (Field, J., dissenting).

56. *Id.* at 759.

57. *Id.* at 753–54.

58. *Id.* at 754.

59. *Id.*

60. *Id.* at 756–57.

61. *Id.* at 758–59.

62. *Id.* at 759.

63. 228 U.S. 585 (1913).

64. *Id.* at 591.

65. *Id.* at 590.

66. *Id.*

government to harbor persons whom it does not want.”<sup>67</sup>

In 1924, in *Mahler v. Eby*,<sup>68</sup> the petitioners were found deportable for having violated the Act of May 10, 1920—“An act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.”<sup>69</sup> Petitioners argued that their convictions were for actions committed prior to the act’s passage, and that their deportations would violate the constitutional prohibition on ex post facto laws.<sup>70</sup> While the Court acknowledged that deportation was “burdensome and severe,” it stated that deportation did not constitute punishment.<sup>71</sup> According to the Court, Congress, in passing the Act of May 10, 1920, was not “increasing the punishment for the crimes” but was simply “seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.”<sup>72</sup> The Court also stated that the constitutional ban on ex post facto laws applied only to criminal law and not to civil deportation proceedings.<sup>73</sup>

In 1951, Justice Jackson, dissenting in *Jordan v. De George*,<sup>74</sup> called into question the civil/non-punitive label of deportation and the denial of constitutional criminal protections during deportation proceedings.<sup>75</sup> The respondent, who had lived in the United States for thirty years, faced deportation because he had twice been convicted of crimes of moral turpitude (an immigration term of art).<sup>76</sup> The majority held that conspiracy to defraud the United States of taxes on distilled spirits was a crime of moral turpitude that warranted deportation.<sup>77</sup> Justice Jackson’s dissent, on the other hand, emphasized the fact that when deportation proceedings are triggered by a criminal conviction, they are an extension of the criminal process and deportation is part of the punishment imposed.<sup>78</sup> Justice Jackson stated:

[d]eportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a

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67. *Id.* at 591.

68. 264 U.S. 32 (1924).

69. *Id.* at 35–36.

70. *Id.* at 37.

71. *Id.* at 39 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)).

72. *Id.*

73. *Id.* (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

74. 341 U.S. 223 (1951).

75. *Id.* at 243 (Jackson, J., dissenting).

76. *Id.* at 224–25 (majority opinion).

77. *Id.* at 224–25, 229.

78. *Id.* at 243 (Jackson, J., dissenting).

day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime.<sup>79</sup>

A year later, *Harisiades v. Shaughnessy*<sup>80</sup> involved deportation proceedings that had been initiated against petitioners for violation of the Alien Registration Act of 1940 because of membership in the Communist party.<sup>81</sup> The Court held, in part, that the act did not deprive the petitioners of due process under the law, nor was it invalid under the Ex Post Facto Clause.<sup>82</sup> The Court recognized that deportation had been exercised with “increasing severity,” as the grounds for deportation had expanded.<sup>83</sup> In spite of its severity, the Court reasoned that the threat of communism was a heavy a burden on citizens and that the authority to deport noncitizens was within Congress’s power to protect the nation from these threats.<sup>84</sup> The Court further noted that “it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation.”<sup>85</sup> Finally, the Court reiterated once again that the constitutional ban on ex post facto laws applied only to criminal cases.<sup>86</sup> While the petitioners cited to civil cases in which the Court had previously found that the ban on ex post facto laws did apply, the Court in *Harisiades* distinguished those cases by stating that they involved criminal penalties “for which civil form was a disguise.”<sup>87</sup> Deportation, according to the Court, was not a criminal penalty disguised as a civil sanction.<sup>88</sup>

In the 1954 decision *Galvan v. Press*,<sup>89</sup> the Court held that a noncitizen who was a member of the Communist party was deportable.<sup>90</sup> The petitioner’s membership in the party occurred prior to the passage of the Internal Security Act of 1950, which made it a deportable offense to be a member of the Communist party.<sup>91</sup> While upholding the constitutionality of the law, Justice Frankfurter expressed discontent with the result,

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79. *Id.*

80. 342 U.S. 580 (1952).

81. *Id.* at 581–83.

82. *Id.* at 591, 594.

83. *Id.* at 588.

84. *Id.* at 591.

85. *Id.*

86. *Id.* at 594–95 (citing *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Johannessen v. United States*, 225 U.S. 227, 242 (1912); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

87. *Id.* at 595 (citing *Burgess v. Salmon*, 97 U.S. 381, 385 (1878)).

88. *Id.*

89. 347 U.S. 522 (1954).

90. *Id.* at 523, 531–32.

91. *Id.* at 523.

emphasizing the drastic nature of deportation.<sup>92</sup> “And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.”<sup>93</sup> Since the “slate [was] not clean,” however, the Court adhered to precedent, concluding that the “unbroken rule” of the Court had been that the Ex Post Facto Clause did not apply to deportation.<sup>94</sup>

Thus, despite the slight wavering in the logic behind labeling deportation as a civil, not punitive process—shown in *Galvan* and the dissent in *Jordan*—the Supreme Court has remained steadfast in holding that deportation is not punishment.<sup>95</sup> Because of this view, the Court has denied constitutional criminal protections to noncitizens in removal proceedings. As such, in the deportation context, courts have concluded that the prohibition on ex post facto laws do not apply,<sup>96</sup> the exclusionary rule does not apply,<sup>97</sup> the Sixth Amendment right to effective counsel does not apply,<sup>98</sup> the Eighth Amendment’s ban on cruel and unusual punishments does not apply,<sup>99</sup> and the prohibition on double jeopardy does not apply.<sup>100</sup>

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92. *Id.* at 530 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

93. *Id.* at 531.

94. *Id.*

95. While the Supreme Court rejected the categorization of deportation as a criminal proceeding in *Harisiades*, the Court has seemed to at least acknowledge that deportation may be criminal punishment in other cases. *See* *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.”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”).

96. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (noting that the constitutional ban on ex post facto laws does not apply since “[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure”); *see also* *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (citing *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Johannessen v. United States*, 225 U.S. 227, 242 (1912); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)) (declaring the ban on ex post facto laws inapplicable, since Congress was not punishing petitioners for certain acts but only ridding the country of undesirables).

97. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034–35, 1050 (1984) (holding that admission of unlawful presence in the United States during an unlawful arrest cannot be excluded from a deportation hearing).

98. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001).

99. *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005) (stating that the Eighth Amendment is “inapplicable” because deportation does not constitute punishment); *Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001) (asserting that the Eighth Amendment does not apply in removal proceedings, which are civil proceedings, “not criminal punishment”);

## II. HARSH IMMIGRATION LAWS HAVE INCREASINGLY TIED THE IMMIGRATION PROCESS WITH THE CRIMINAL PROCESS

This Part will explore the changes in immigration law since the Supreme Court's decision in *Fong Yue Ting*. Quite simply, the list of crimes resulting in deportation has expanded, while Congress has taken away many forms of discretionary relief. With the expansion of crimes leading to deportation, the immigration system has become more and more integrated into the criminal justice system. Additionally, immigration enforcement has trickled down to the local level. This has resulted in local law enforcement entering into agreements with U.S. Immigration and Customs Enforcement (ICE) to enforce immigration laws. This creeping expansion of immigration proceedings into criminal matters suggests a need for change in the law pertaining to deportation.<sup>101</sup>

### A. *The Expansion of Criminal Grounds for Deportation and the Removal of Discretionary Forms of Relief*

Early in the twentieth century, Congress began to deport noncitizens for criminal behavior. These early laws, however, were tempered with discretion—if a noncitizen met certain conditions, he could apply to have his deportation suspended. As the *Padilla* Court noted, “[e]ven as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.”<sup>102</sup> This is no longer the case. Over the years, more and more crimes have been added to the list of deportable offenses, but Congress has steadily reduced the forms of discretionary relief available.

In 1917, for the first time, U.S. immigration laws allowed for the deportation of noncitizens who committed certain crimes.<sup>103</sup> Specifically, an alien imprisoned for one year or more based upon a conviction for a

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*Cortez v. INS*, 395 F.2d 965, 967–68 (5th Cir. 1968) (emphasizing that deportation is not punishment and therefore cannot constitute cruel and unusual punishment).

100. See *De La Teja v. United States*, 321 F.3d 1357, 1364–65 (11th Cir. 2003) (holding that the Double Jeopardy Clause applies only to proceedings that are “essentially criminal,” and deportation is “purely civil” (citations omitted) (internal quotation marks omitted)).

101. See generally Legomsky, *The New Path of Immigration Law*, *supra* note 4 (arguing that the adoption of criminal methods in the immigration context, while immigration law has rejected the application of procedural protections, has resulted in an asymmetric incorporation of criminal justice into the immigration system); Stumpf, *supra* note 4 (exploring the convergence of criminal and immigration law and arguing that the goals of both are to exclude and alienate certain members of the population); Sweeney, *supra* note 4 (arguing that the changes in immigration law that have made deportation a direct consequence of a conviction have destroyed the factual and doctrinal foundation which has formed the basis for legal decisions asserting that deportation is not punishment).

102. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479 (2010).

103. Immigration and Nationality Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889 (1917) (codified as amended at 8 U.S.C. § 1227 (2006)).

crime of moral turpitude committed within five years after entry into the United States was deportable.<sup>104</sup> Noncitizens who committed two or more crimes of moral turpitude after entry were also deportable.<sup>105</sup> At the same time, this legislation was tempered with judicial discretion—a sentencing judge could recommend that an individual not be deported, and such recommendations were binding.<sup>106</sup> This procedure was known as a Judicial Recommendation Against Deportation (JRAD).<sup>107</sup>

In 1952, Congress again passed harsh legislation, but it also contained an important form of discretionary relief. The legislation excluded certain aliens from entering the United States on account of criminal behavior.<sup>108</sup> However, a lawful permanent resident who had lived in the United States consecutively for seven years, who had traveled abroad, and who faced inadmissibility, could apply for what was called section 212(c) relief.<sup>109</sup> While initially this relief only applied to lawful permanent residents seeking readmission, it was broadened so that lawful permanent residents in deportation proceedings could apply.<sup>110</sup>

Toward the end of the twentieth century, Congress continued to expand the criminal grounds that could result in deportation. But unlike the legislation previously mentioned, these harsh laws were not tempered by discretionary relief. In 1988, Congress introduced the “aggravated felony” category as a basis for deporting noncitizens.<sup>111</sup> While initially the crimes constituting an aggravated felony were limited to murder, any drug trafficking crime, or any illicit trafficking in firearms or destructive devices,<sup>112</sup> over time the aggravated felony category “accounted for the

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104. *Id.*

105. *Id.*

106. *Id.* at 889–90 (stating “nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act”).

107. *Padilla*, 130 S. Ct. at 1479.

108. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182–87 (1952) (codified as amended in scattered sections of 8 U.S.C.). Section 212 of the 1952 Immigration and Nationality Act (INA) excluded classes of aliens, including those convicted of crimes involving moral turpitude, those convicted of two or more crimes for which the aggregate sentences to confinement were five years or more, and those convicted of drug trafficking offenses. *Id.* at 182, 184.

109. *Id.* at 187. Section 212(c) relief was similar to a form of discretionary relief available under the 1917 legislation, which provided “[t]hat aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.” See Immigration and Nationality Act of 1917, § 19, 39 Stat. at 878.

110. *Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (adopting position of *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)).

111. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–43, 102 Stat. 4181, 4469–70 (1988) (codified as amended in scattered sections of 8 U.S.C.).

112. *Id.*

steadiest and most expansive growth in the range of crimes that give rise to removal.”<sup>113</sup> Today, many different crimes have been designated as aggravated felonies, including the following: forgery (when the term of imprisonment is at least one year), drug offenses, theft (when the term of imprisonment is at least one year), illegal re-entry after deportation, conspiracy to commit an aggravated felony, attempt to commit an aggravated felony, failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, and failure to face charges if the underlying sentence is punishable by two years.<sup>114</sup>

As the criminal grounds resulting in deportation continued to expand, discretionary relief was summarily stripped away. In 1990, Congress narrowed the scope of the previously mentioned section 212(c) relief, excluding from eligibility anyone convicted of an aggravated felony who served a term of imprisonment of at least five years.<sup>115</sup> The judicial discretion—JRAD—allowed under the 1917 legislation was also taken away that same year.<sup>116</sup>

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act<sup>117</sup> (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act<sup>118</sup> (IIRIRA), which were arguably the most drastic and harsh changes made to our immigration laws. These laws made it even more likely that criminal behavior would result in deportation. Congress expanded the crimes constituting aggravated felonies, and it named other crimes for which one could be deported.<sup>119</sup> The term of imprisonment required for certain crimes to be categorized as aggravated felonies under immigration law was also reduced.<sup>120</sup> IIRIRA broadened the definition of a “term of imprisonment,” defining it as the “incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence* in whole or in part”<sup>121</sup> and also broadened the definition of a conviction to even include the admission of

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113. Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 483.

114. 8 U.S.C. § 1101(a)(43) (2006).

115. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (1990) (codified as amended in scattered sections of 8 U.S.C.).

116. *Id.* § 505, 104 Stat. at 5050.

117. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

118. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

119. AEDPA § 440, 110 Stat. at 1278-79; IIRIRA § 321, 110 Stat. at 3009-627 to 28. This Article will later discuss additional grounds of inadmissibility and deportability. *Infra* Part II.C.

120. IIRIRA § 321, 110 Stat. at 3009-627 to 28.

121. *Id.* § 322, 110 Stat. at 3009-628 to 29 (emphasis added).

sufficient facts to warrant a finding of guilt.<sup>122</sup>

At the same time that the grounds for deportation greatly expanded, discretionary relief did not. A lawful permanent resident convicted of an aggravated felony was now automatically deportable with no ability to apply for discretionary relief.<sup>123</sup> As the *Padilla* Court explained,

Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.<sup>124</sup>

*B. Enforcement of Immigration Laws in Federal Court and by Law Enforcement Officials Has Increased to a Level Not Envisioned by the Fong Yue Ting Court*

While the number of crimes giving rise to deportation has increased, the immigration and criminal systems have become linked in other ways. As this section will describe, federal district court judges can order deportation, and certain immigration violations are prosecuted in federal court. Additionally, local law enforcement officials now have broad authority to enforce immigration laws.

In 1994, the authority to order deportation was no longer limited to administrative immigration judges. Instead, federal district court judges were given the authority during the sentencing phase of criminal proceedings to order the deportation of noncitizens.<sup>125</sup> Upon the request of the U.S. Attorney and within the discretion of the court, a judge can order the removal of an alien who is deportable.<sup>126</sup> Either party can appeal this decision to the appropriate court of appeals.<sup>127</sup> Should a court deny the

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122. *Id.* at 3009-628 (stating that if an adjudication of guilt has been withheld, it can still be a conviction where “a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”); see also MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 45 (Stephanie L. Browning ed., 2005) (“Criminal law statutes at both state and federal levels contain various types of procedures, from deferred adjudications to sealings to vacatur, which purport to avoid or eliminate a conviction for most purposes. However, immigration law, via statute and case law, takes an independent approach to the term ‘conviction,’ and hence, to the various types of adjudication procedures.”).

123. IIRIRA § 240A, 110 Stat. at 3009-594 (replacing section 212(c) with a form of discretionary relief called “cancellation of removal” and making ineligible lawful permanent residents convicted of an aggravated felony).

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

125. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322-24 (1994) (codified as amended in scattered sections of 8 U.S.C.).

126. 8 U.S.C. § 1228(c) (2006).

127. *Id.* § 1228(c)(3).

U.S. Attorney's request for a judicial order of removal, the Attorney General can still initiate removal proceedings in immigration court.<sup>128</sup> This authority was expanded in 1996, and as part of the expansion, deportation could serve as a condition of probation or a plea agreement.<sup>129</sup>

Additionally, certain immigration violations are prosecuted in federal court. For example, noncitizens may be prosecuted in federal court for entry at an improper time or place, as well as for reentry into the United States following an order of deportation.<sup>130</sup> The number of prosecutions in federal court is astounding. During the first nine months of fiscal year 2009, there were 40,050 prosecutions for improper time or place entries.<sup>131</sup> That same year, there were 21,892 prosecutions for reentry violations.<sup>132</sup>

Outside of federal court, immigration laws are now enforced at a local level by local law enforcement officials. The 1996 laws created a system for identifying criminal aliens, which included coordinating the efforts of federal, state, and local authorities.<sup>133</sup> As a result, local law enforcement officials across the United States have entered into a paper agreement referred to as a "Memorandum of Agreement," which provides the "necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering . . . and increased resources and support in more remote geographical locations."<sup>134</sup> Under this program, local law enforcement officials are authorized to perform immigration enforcement functions.<sup>135</sup>

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128. *Id.* § 1228(c)(4).

129. *See id.* § 1228(c)(5) ("The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of deportation from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall have jurisdiction to enter a judicial order of deportation pursuant to the terms of such stipulation."); IIRIRA, Pub. L. No. 104-208, § 374, 110 Stat. 3009, 3009-647 (1996) (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

130. *See* 8 U.S.C. §§ 1325-26 (2006) (designating civil and criminal penalties for improper entry or re-entry).

131. *See Immigration Prosecutions at Record Levels in FY 2009*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), <http://trac.syr.edu/immigration/reports/218/> (last visited Aug. 29, 2010).

132. *Id.*

133. *See* IIRIRA § 303, 110 Stat. at 3009-586; AEDPA, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

134. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, available at <http://www.ice.gov/news/library/factsheets/287g.htm>. These agreements are authorized under section 287(g) of the Immigration and Nationality Act. *Id.*

135. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

Along the same lines, an authorized immigration officer can place a detainer on an individual in the custody of a local jail.<sup>136</sup> “A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”<sup>137</sup> Under this authority, ICE coordinates with local jails to hold individuals who have a detainer placed on them for an additional amount of time.<sup>138</sup> Under a detainer, local jails can hold an individual for only forty-eight hours, excluding weekends and holidays.<sup>139</sup> For instance, an individual detained in a state jail who has paid bond would normally be released from custody. However, if an ICE detainer is placed on the individual, the jail can hold her for an additional forty-eight hours, allowing time for ICE to assume custody. While the statute provides that individuals cannot be held longer than forty-eight hours, local jails have held individuals beyond the statutorily allowable forty-eight hour period.<sup>140</sup>

The huge expansion of the crimes giving rise to deportation and the enforcement of immigration laws at all levels of the criminal justice system demonstrate that immigration enforcement is now deeply connected to the criminal justice system. This has indeed resulted in the “cimmigration” crisis.<sup>141</sup> As Julie Stumpf appropriately states, “the trend toward criminalizing immigration law has set us on a path toward establishing irrevocably intertwined systems: immigration and criminal law as doppelgangers.”<sup>142</sup>

### III. *PADILLA V. KENTUCKY*: A NEW CHAPTER IN SUPREME COURT JURISPRUDENCE

#### A. *Summary of Decision*

*Padilla* involved a lawful permanent resident by the name of Jose Padilla.<sup>143</sup> Padilla had lived in the United States for more than forty years when he was placed in removal proceedings after pleading guilty to the

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136. 8 C.F.R. § 287.7(a) (2010).

137. *Id.*

138. *Id.*

139. *Id.* § 287.7(d).

140. See Felisa Cardona, *ACLU Sues Jeffco Sheriff over Lengthy ICE Hold*, DENVER POST, Apr. 22, 2010, [http://www.denverpost.com/news/ci\\_14932928](http://www.denverpost.com/news/ci_14932928) (last visited Sept. 13, 2011); Justin Leighty, *Lawsuit: LaGrange Sheriff Held Woman in Immigration Case Too Long*, ETRUTH.COM (June 21, 2010) (on file with *Law Review*), <http://www.etruth.com/Know/News/Story.aspx?ID=516209>.

141. See generally Stumpf, *supra* note 4 (explaining that immigration law and criminal law have converged so much as to blur the distinction between them).

142. *Id.* at 378.

143. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

transportation of a large amount of marijuana.<sup>144</sup> According to the statute at issue,

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana is deportable.<sup>145</sup>

Padilla claimed that his counsel did not advise him that pleading guilty to the drug offense could result in deportation.<sup>146</sup> Instead, Padilla was told by his attorney that he “did not have to worry about immigration status since he had been in the country so long.”<sup>147</sup>

The Kentucky Supreme Court denied Padilla's Sixth Amendment claim of ineffective assistance of counsel.<sup>148</sup> The court held that a criminal defendant who is provided erroneous information about deportation is not protected under the Sixth Amendment because deportation is a collateral consequence of the conviction.<sup>149</sup> Thus, the court viewed deportation as outside the penal sanction, and, therefore, a noncitizen criminal defendant could not raise a Sixth Amendment claim for a matter outside of the criminal punishment imposed.

In reversing the Kentucky Supreme Court, the United States Supreme Court held that counsel must inform a client when a plea carries a risk of deportation.<sup>150</sup> Justice Stevens, writing for the majority, cited to *Strickland v. Washington*,<sup>151</sup> where the Court had previously held that a defendant is entitled to “the effective assistance of competent counsel.”<sup>152</sup> The *Padilla* Court found that Padilla's counsel's advice had fallen “below an objective standard of reasonableness.”<sup>153</sup> The majority concluded that advice regarding the immigration consequences of a plea must be provided when the law is clear.<sup>154</sup> When the law “is not succinct and straightforward,”

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144. *Id.* Padilla was placed in removal proceedings under 8 U.S.C. § 1227(a)(2)(B)(i). *Id.* at 1477–78 n.1.

145. *Id.* at 1483 (internal quotation marks omitted) (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006)).

146. *Id.* at 1478 (citing *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

147. *Id.* (quoting *Padilla*, 253 S.W.3d at 483) (internal quotation marks omitted).

148. *Id.* (citing *Padilla*, 253 S.W.3d at 485).

149. *Id.* (citing *Padilla*, 253 S.W.3d at 485).

150. *Id.* at 1486.

151. 466 U.S. 668 (1984).

152. *Padilla*, 130 S. Ct. at 1480–81 (quoting *Strickland*, 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

153. *Id.* at 1482, 1486–87 (quoting *Strickland*, 466 U.S. at 688). The *Padilla* decision did not decide the second *Strickland* prong—whether because of counsel's errors, there was a “reasonable probability” that the result would have been different. *Id.* at 1483–84. Instead, the Court remanded the case to determine the second part of the *Strickland* inquiry. *Id.*

154. *Id.* at 1483.

however, a defense attorney need only inform her client that criminal charges could carry a risk of adverse immigration consequences.<sup>155</sup>

Justice Alito, writing a concurring opinion, asserted that an attorney cannot misadvise a client about the immigration consequences of a plea.<sup>156</sup> Unlike the majority, however, the concurrence did not find that an attorney must affirmatively advise a client when a plea carries the risk of deportation. The concurrence stated that an attorney's obligation in providing effective assistance of counsel requires two things. First, an attorney cannot misadvise a client regarding the immigration consequences of a guilty plea.<sup>157</sup> Second, an attorney should inform his client that there could be adverse immigration consequences.<sup>158</sup> As such, a client should seek the advice of an immigration expert about these possible consequences.<sup>159</sup> Because immigration law is so complex, Justice Alito indicated that the majority's requirement that a criminal defense attorney provide advice concerning such a specific area of law imposes a significant "burden" on defense counsel.<sup>160</sup>

*B. The Padilla Language Supports an Argument that Deportation is Punishment*

The reasoning used to arrive at the holding in *Padilla* provides a logical pathway to conclude that deportation can be punishment. First, through its discussion of whether deportation is a direct or collateral consequence of a plea, the *Padilla* Court illustrated that deportation resembles a direct

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155. *Id.*

156. *Id.* at 1494 (Alito, J., concurring). Chief Justice Roberts joined in the concurring opinion. *Id.* at 1487. Justices Scalia and Thomas dissented. *Id.* at 1494 (Scalia, J., dissenting). The dissent argued that the Sixth Amendment did not require counsel to inform a client of collateral consequences—such as deportation—and that affirmative misadvice is also not constitutionally inadequate. *Id.* at 1495–96. The dissent argued that the majority's holding had "no logical stopping-point." *Id.* at 1496. The dissent noted, "[w]e could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given." *Id.* The dissent criticized the concurrence's concern for affirmative misadvice, stating that this stemmed more from a concern over the voluntariness of the defendant's plea, which relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than the Sixth Amendment. *Id.* (citations omitted). The dissent found that legislative changes would be more effective in terms of determining "which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given." *Id.* The dissent also noted that legislation could provide for the consequences of misadvice, nonadvice or failure to warn. *Id.* at 1496–97. One possible consequence—rather than nullification of the conviction—could be that the near-automatic removal would not apply. *Id.* at 1497.

157. *Id.* at 1487 (Alito, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.* at 1490.

consequence of a plea and is part of the criminal punishment imposed on noncitizen criminal defendants. Second, in emphasizing the severity of deportation, the *Padilla* decision demonstrated the punitive nature of deportation, particularly for lawful permanent residents. If deportation is considered a direct consequence of a plea and is viewed as severe, then deportation must be considered punitive. Moreover, the language used in *Padilla* suggests that removal proceedings following a criminal conviction are quasi-criminal.

It must be noted upfront that the Court stated deportation was “civil in nature” and “not, in a strict sense, a criminal sanction.”<sup>161</sup> This, of course, reflects the Court’s adherence to over a century’s worth of precedent on the matter. As will be detailed below, the analysis provided throughout the decision actually illustrates that deportation is punitive in nature.

1. *Deportation resembles a direct consequence of a plea—one that is part of the punishment imposed*

a. *Background regarding direct and collateral consequences*

This Section will argue that when deportation is viewed as a direct consequence of a plea, then deportation is considered part of the criminal punishment imposed, and should be viewed as punitive.

The Kentucky Supreme Court denied *Padilla*’s ineffective assistance of counsel claim on the basis that deportation was not a direct consequence of a plea. Rather, the court considered it to be a collateral matter outside of the sentencing authority of the court and therefore a matter for which counsel was not obligated to inform his client.<sup>162</sup> The U.S. Supreme Court, while not deciding whether deportation is a direct or collateral consequence of a plea, disagreed with the Kentucky Supreme Court and held that under the Sixth Amendment, counsel must inform clients when a plea will result in deportation.<sup>163</sup> As explained below, the Court’s dictum suggests that deportation more closely resembles a direct consequence rather than a collateral consequence.<sup>164</sup>

By way of background, according to the collateral consequences rule, matters outside of the penal sanction are considered collateral, and a plea is constitutionally valid even if a defendant is unaware of these consequences

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161. *Id.* at 1481 (majority opinion) (citation omitted).

162. *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008).

163. *Padilla*, 130 S. Ct. at 1482, 1486–87 (“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. The collateral versus direct distinction is thus ill-suited for evaluating a *Strickland* claim concerning the specific risk of deportation.”).

164. *See id.* at 1481–82 (outlining deportation’s close relationship with the criminal justice system).

when accepting the plea.<sup>165</sup> A defendant only needs to be informed of the direct or penal consequences of a plea, such as jail time, probation, or a fine.<sup>166</sup> Matters such as deportation, sex-offender registration, loss of voting rights, loss of employment rights, and involuntary civil commitment as a sexually violent predator have all been considered by the courts to be outside of the penal sanction and, therefore, collateral.<sup>167</sup>

Most federal courts have attempted to treat deportation as separate from the criminal punishment by classifying deportation as a collateral consequence.<sup>168</sup> Such a classification has prevented noncitizen criminal defendants from asserting certain constitutional rights.<sup>169</sup> Courts have

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165. Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124–25 (2009) (arguing that decisions from lower courts have created a perverse incentive structure regarding the collateral consequences rule). Some courts have held that while an attorney cannot *misadvise* a client regarding the consequences of a guilty plea, there is no affirmative obligation to inform a client of the immigration consequences of a guilty plea. *Id.* at 125–26. Such a rule, according to Roberts, encourages attorneys to remain silent and shield themselves from any ineffective assistance of counsel claim. *Id.* at 126. If attorneys speak and provide incorrect advice, then there could be an ineffective assistance of counsel claim. *Id.* Other courts have held that attorneys have no obligation to provide any advice concerning the immigration consequences of a guilty plea, and even incorrect advice does not implicate the Sixth Amendment right to effective assistance of counsel because deportation is a collateral consequence of a plea. *Id.* at 123 (citing *Padilla*, 253 S.W.3d at 485). Thus, according to Roberts, under this interpretation of the rule, attorneys encourage their clients “to plead guilty through deception or outright incompetence.” *Id.* at 123–24 (quoting Petition for Writ of Certiorari at 15, *Padilla*, 130 S. Ct. 1437 (No. 08-651)).

166. *Id.* at 124.

167. *Id.*

168. *See, e.g.*, *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (“[I]t is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.”); *United States v. Amador-Leal*, 276 F.3d 511, 516 (9th Cir. 2002) (“[W]hether an alien will be removed is still up to the INS. There is a process to go through, and it is wholly independent of the court imposing sentence. . . . Removal is not part of the sentence.”); *see also* *United States v. Gonzalez*, 202 F.3d 20, 27–28 (1st Cir. 2000); *United States v. Osiemi*, 980 F.2d 344, 349 (5th Cir. 1993); *United States v. Montoya*, 891 F.2d 1273, 1292–93 (7th Cir. 1989); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985); *United States v. Russell*, 686 F.2d 35, 39 (D.C. Cir. 1982); *Michel v. United States*, 507 F.2d 461, 464–66 (2d Cir. 1974); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973). In *United States v. Gonzalez*, the appellant argued that because of recent changes to immigration law, deportation could not be seen as a collateral consequence of a guilty plea. *Gonzalez*, 202 F.3d at 26. The appellant highlighted the drastic changes under IIRIRA which made deportation automatic following an aggravated felony conviction and imposed mandatory detention for many convicted of crimes. *Id.* The Court disagreed, holding that deportation of criminals is not enmeshed in the criminal proceeding. *Id.* at 27. The Court further provided that deportation is not part of the sentence imposed and is beyond the control of the trial court where the conviction originated. *Id.* (citing *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976)). Interestingly, the Supreme Court in *Padilla* observed that the criminal conviction and the penalty of deportation have become enmeshed and that changes in immigration law have led to a melding of the criminal and immigration systems. *Padilla*, 130 S. Ct. at 1478–82.

169. Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 516 (noting that noncitizen criminal defendants have attempted to remove a guilty plea on the ground that the plea was not knowing, but have been prevented from doing so because deportation has been labeled a collateral consequence).

determined that deportation is collateral because it is not part of the sentence imposed and it is not within the trial court's control, but instead within the control of another agency.<sup>170</sup> According to Professor Stephen H. Legomsky, the "unstated assumption" within these decisions "is that deportation—even when imposed solely because of the person's commission of a crime—is not part of the punishment."<sup>171</sup>

*b. Three factors discussed in Padilla reveal that deportation is a direct consequence of a plea*

In discussing the nature of deportation with regards to the direct/collateral distinction, the *Padilla* decision made three points, which illustrate that deportation is a direct consequence of the plea and, thus, punishment. The *Padilla* Court focused on the following factors: the automatic nature of deportation,<sup>172</sup> the fact that noncitizen criminal defendants cannot separate the penalty of deportation from the conviction,<sup>173</sup> and the fact that deportation has become enmeshed with the criminal conviction.<sup>174</sup>

*i. Deportation is largely automatic*

First, the *Padilla* Court noted that the elimination of many forms of discretionary remedies has made deportation an automatic result for many noncitizens convicted of a broad range of criminal behavior.<sup>175</sup> Consequently, it is difficult to separate deportation from the criminal conviction.<sup>176</sup> The emphasis on the automatic nature of deportation is important because whether a result is automatic is one factor courts have applied to determine whether a consequence is direct or collateral.<sup>177</sup> For instance, in *Cuthrell v. Director, Patuxent Institution*,<sup>178</sup> a case cited by many circuits for its discussion of the collateral consequences rule, the United States Court of Appeals for the Fourth Circuit found that the distinction between the direct and collateral consequences of a plea "turns on whether the result represents a definite, immediate and largely automatic

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170. See cases cited *supra* note 168.

171. Legomsky, *The New Path Of Immigration Law*, *supra* note 4, at 516–17.

172. *Padilla*, 130 S. Ct. at 1481.

173. *Id.* at 1481–82.

174. *Id.* at 1481.

175. *Id.*

176. *Id.*

177. See, e.g., *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000) (citing *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988)); *United States v. Lambros*, 544 F.2d 962, 966 (8th Cir. 1976) (citing *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)); see also *Sweeney*, *supra* note 4, at 47 (arguing that removal should only be imposed when it would not be disproportionate to the underlying crime).

178. 475 F.2d 1364 (4th Cir. 1973).

effect on the range of the defendant’s punishment.”<sup>179</sup>

The *Padilla* decision took particular notice of the fact that harsh immigration laws result in automatic deportation for noncitizens.<sup>180</sup> As an example, a lawful permanent resident convicted of an aggravated felony is automatically deportable.<sup>181</sup> The *Padilla* Court acknowledged that what was described by the Supreme Court as a “‘drastic measure’ . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.”<sup>182</sup> In fact, “[d]eportation is an integral part—and sometimes the most important part—of the penalty that may be imposed.”<sup>183</sup> Thus, deportation is in fact “a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”<sup>184</sup>

ii. *In noncitizens’ minds, deportation is directly tied to a plea*

Whether a matter is a direct or collateral consequence of a plea also turns on the defendant’s own ideas about the consequences that are directly related to the penal sanction. As an example, the Fourth Circuit in *Cuthrell* noted that a defendant pleading guilty to a crime that makes him ineligible for parole should be made aware of that fact.<sup>185</sup> In holding that parole eligibility was a direct consequence of a plea, the court noted that “the right to parole has become so engrafted on the criminal sentence that such right is ‘assumed by the average defendant’ and is directly related in the defendant’s mind with the length of his sentence.”<sup>186</sup>

The consequence of deportation is “directly related in the [noncitizen] defendant’s mind with the length of his sentence.”<sup>187</sup> The *Padilla* Court noted that noncitizen defendants find it quite difficult to separate the penalty of deportation from the criminal conviction and that noncitizen defendants are “acutely aware of the immigration consequences of their convictions.”<sup>188</sup> As such, a noncitizen criminal defendant views deportation as part of the penal sanction.

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179. *Id.* at 1366; *see also* Sweeney, *supra* note 4, at 53 (describing how courts have delineated between direct versus collateral consequences).

180. *See Padilla*, 130 S. Ct. at 1481 (calling deportation a “severe ‘penalty’” (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting))).

181. AEDPA, Pub. L. No. 104-132, § 442, 110 Stat. 1214, 1279–80 (1996) (codified as amended at 8 U.S.C. § 1252 (2006)); IIRIRA, Pub. L. No. 104-208, § 240A, 110 Stat. 3009–546 (1996) (codified as amended at 8 U.S.C. §§ 1101, 1229 (2006)).

182. *Padilla*, 130 S. Ct. at 1478 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

183. *Id.* at 1480 (citation omitted).

184. *Cuthrell*, 475 F.2d at 1366.

185. *Id.* at 1366 (citing *Paige v. United States*, 443 F.2d 781, 782–83 (4th Cir. 1971)).

186. *Id.* (quoting *Moody v. United States*, 469 F.2d 705, 708 (8th Cir. 1972)) (internal quotation marks omitted).

187. *Id.*

188. *Padilla*, 130 S. Ct. at 1481–82 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

iii. *Deportation and criminal convictions are intertwined*

In noting that our harsh immigration laws have “enmeshed criminal convictions and the penalty of deportation for nearly a century,” the *Padilla* decision again suggested that deportation more closely resembles a direct consequence rather than a collateral consequence of a plea.<sup>189</sup> The Seventh Circuit in *United States v. George*<sup>190</sup> held that deportation was not a direct consequence of a plea, stating, “[a] deportation proceeding is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding.”<sup>191</sup> Contrary to the Seventh Circuit’s reasoning, the *Padilla* decision found deportation to be intertwined with the criminal conviction.<sup>192</sup> Further, the Court found it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”<sup>193</sup>

Additionally, the *Padilla* Court referenced the Second Circuit’s view that the now extinct JRAD was “‘part of the sentencing’ process.”<sup>194</sup> Summarizing the Second Circuit’s reasoning, the *Padilla* decision noted that “the impact of a conviction on a noncitizen’s ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel’s duty to provide effective representation.”<sup>195</sup> While recognizing that JRAD is no longer available, the Supreme Court said that accurate legal advice is especially critical now because deportation is “sometimes the most important part . . . of the penalty that may be imposed.”<sup>196</sup>

Thus, if deportation is enmeshed with a criminal punishment and cannot be divorced from the conviction, it follows that deportation is a direct consequence of a plea and is part of the punishment.

2. *The consequences of deportation are severe for lawful permanent residents*

The second reason why *Padilla* supports the notion that deportation constitutes punishment is the Court’s acknowledgement that the consequences of deportation are severe. The severity of deportation for lawful permanent residents demonstrates that deportation is punitive. In assessing the importance of informing a client when a plea carries the risk

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189. *Id.* at 1481.

190. 869 F.2d 333 (7th Cir. 1989).

191. *Id.* at 337.

192. *Padilla*, 130 S. Ct. at 1481.

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

194. *Padilla*, 130 S. Ct. at 1480 (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)).

195. *Id.*

196. *Id.* (footnote omitted).

of deportation, the *Padilla* majority emphasized the severity of deportation for lawful permanent residents.<sup>197</sup> The Court stated that deportation is ““the equivalent of banishment or exile.””<sup>198</sup> While the Supreme Court in previous cases acknowledged the severity of deportation without finding that it constituted punishment,<sup>199</sup> the fact that the *Padilla* decision took particular notice of deportation’s severity, while at the same time emphasizing the close connection between the conviction and the penalty of deportation, bolsters the argument that the deportation of lawful permanent residents is punishment.

Justice Stevens’ description of the underlying facts of the case highlights the Court’s recognition of the severity of deportation:

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.<sup>200</sup>

The majority chose to highlight the following facts: (1) that Padilla was a lawful permanent resident; (2) that he lived in the United States for more than forty years; and (3) that he served with honor in the military during the Vietnam War. The focus on these three facts demonstrates that a person who has obtained permanent immigration status and who has become an active and contributing member of our society has much to lose if deported. He faces permanent separation from his family, loss of employment, and

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197. *Id.* at 1481. Some argue that the severity of a consequence does not properly distinguish between a remedial versus punitive sanction. *See* Pauw, *supra* note 4, at 326 (stating, as an example, that a community may quarantine individuals not to punish them but to protect the community from a dangerous disease); *see also* Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 513 (“Any number of devastating losses can result from any number of occurrences—car accidents, ill health, even intentional homicide—without the consequence of being termed punishment.”). While severity may not be the only factor demonstrating that deportation constitutes punishment, it is one factor that can point toward a punitive intent. For instance, the type of criminal punishment imposed—or the severity of the punishment—often takes into account the seriousness of the offense. When the consequences of a penalty are overly severe, in comparison to the act committed, this can demonstrate that the sanction is excessive and punitive.

198. *Padilla*, 130 S. Ct. at 1486 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

199. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 587–88 (1952) (stating that expulsion of long term residents “bristles with severities,” but is an inherent part of a sovereign nation’s powers); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (citing *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913)); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (recognizing that deportation may be “burdensome and severe,” but not punishment); *see also Delgado*, 332 U.S. at 391 (recognizing that because deportation was the equivalent of “banishment or exile,” the right to remain in the United States, according to the Court, should not be based on “circumstances so fortuitous and capricious as those upon which the Immigration Services has . . . seized”).

200. *Padilla*, 130 S. Ct. at 1477.

exile to a country that he may not even know. Moreover, it also demonstrates that the position of lawful permanent residents in society and the constitutional protections that should be afforded to them are distinguishable from those who have temporary immigration status in the United States.

The *Padilla* Court recognized the realities of deportation by focusing on the severe impact it has on the deported and his family. The majority's statement toward the end of the opinion reinforces this point. In finding that counsel must inform a client when a plea carries the risk of deportation, the majority stated: “[o]ur longstanding Sixth Amendment precedents, *the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country* demand no less.”<sup>201</sup>

### C. *Deportation Proceedings Are Quasi-Criminal*

The *Padilla* Court's language highlights the punitive nature of deportation, but deportation, as the Court acknowledged, is still civil.<sup>202</sup> So how do we classify deportation? The *Padilla* Court's emphasis on the “unique nature” of deportation and reflection that deportation is not “in a *strict* sense, a criminal sanction” demonstrates that deportation falls somewhere in the grey area of the civil/criminal divide.<sup>203</sup> Deportation involves both civil and criminal elements, making it appear quasi-criminal. For instance, in the civil forfeiture context, the Supreme Court has determined that proceedings with a civil label that have civil and criminal elements involved are actually quasi-criminal.<sup>204</sup> As the Court noted, the objective of a civil forfeiture proceeding “like a criminal proceeding, is to penalize for the commission of an offense against the law.”<sup>205</sup> As in the civil forfeiture context, when triggered by a criminal conviction, deportation is conditioned upon the commission of a crime. Thus, as with civil forfeitures, when deportation follows a criminal conviction, the process is a quasi-criminal one.

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201. *See id.* at 1486 (emphasis added).

202. *See id.* at 1481 (“[R]emoval proceedings are civil in nature.”).

203. *Id.* (emphasis added).

204. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *see also* Mann, *supra* note 11, at 1819 n.75 (stating that the forfeiture provision in *Boyd v. United States* was implicated when conditioned upon the commission of a crime (citing *Boyd v. United States*, 116 U.S. 616, 617 (1886))). According to Mann, “[t]his was a persuasive reason for viewing the particular forfeiture as a criminal sanction.” *Id.*

205. *One 1958 Plymouth Sedan*, 380 U.S. at 700.

IV. DEPORTATION ON ACCOUNT OF A CRIMINAL CONVICTION  
CONSTITUTES PUNISHMENT FOR LAWFUL PERMANENT RESIDENTS

This Part explores the punitive nature of deportation for lawful permanent residents on account of criminal convictions utilizing the factors articulated by the Supreme Court. As explained in Part I.A, the Court in *Mendoza-Martinez* laid out seven factors for determining whether a civil penalty is punitive in nature:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose.<sup>206</sup>

These factors, when combined with the rationale in *Padilla*, demonstrate that deportation based upon a criminal conviction is punitive for lawful permanent residents.

Prior to a discussion of the Court's factors, however, this Part first explains why the deportation of lawful permanent residents should be differentiated from the deportation of other classes of noncitizens.

A. *Why Lawful Permanent Residents?*

I do not argue that deportation constitutes punishment for all noncitizens. My argument is that *deportation of lawful permanent residents*—when predicated upon a criminal conviction—is punitive.

Lawful permanent residents constitute a distinct category for the following reasons. First, lawful permanent residents have been admitted *permanently* into the United States. As such, they have a heightened immigration status compared with other classes of noncitizens,<sup>207</sup> which should in turn provide heightened constitutional protections during removal proceedings. Second, there is no on-going immigration violation to be cured, since lawful permanent residents are here lawfully. Therefore, the arguments put forth stating that deportation serves a remedial function do not apply to lawful permanent residents who are in the United States legally and face deportation because of a criminal conviction.

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206. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (citations omitted).

207. *See Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting) (noting the differences between permanent residents and those in the country temporarily).

1. *Lawful permanent residents enjoy a heightened constitutional status as compared to other classes of immigrants*

As the name implies, lawful permanent residents have been admitted permanently into the United States. In deporting lawful permanent residents for criminal behavior, the government is no longer seeking to control the immigration *process* but instead is seeking to control the behavior of those permanently admitted.<sup>208</sup> Lawful permanent residents have made the United States their home and have been given permission by the government to do so by being admitted for permanent status in the first place. Because of this heightened status, when the government seeks to impose deportation for a criminal conviction, this should, at a minimum, warrant heightened constitutional protections.

The idea that lawful permanent resident status deserves heightened constitutional protections is not new. The Supreme Court in *Landon v. Plasencia*<sup>209</sup> stated that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”<sup>210</sup> Further, Justice Brewer, in his dissenting opinion in *Fong Yue Ting*, stated that resident aliens were equivalent to a British denizen.<sup>211</sup> “A denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject. . . . A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them.”<sup>212</sup> Justice Brewer articulated that a resident alien, like a denizen, was protected by the Constitution and laws of the United States.<sup>213</sup> He asserted that resident aliens were “entitled to a more distinct and larger measure of protection than those who were simply passing through, or temporarily in [the country].”<sup>214</sup> Thus, Justice Brewer distinguished between those noncitizens here for a temporary period of time versus lawful permanent residents. Those in the latter category, he said, were entitled to heightened constitutional protections.<sup>215</sup>

Deportation may be more severe for a lawful permanent resident than other noncitizens because they are not “simply passing through” as Justice Brewer indicated.<sup>216</sup> A lawful permanent resident has established significant ties to the United States. Unlike someone who is

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208. Kanstroom, *supra* note 4, at 1907.

209. 459 U.S. 21 (1982).

210. *Id.* at 32 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

211. *Fong Yue Ting*, 149 U.S. at 736 (1893) (Brewer, J., dissenting).

212. *Id.* (citation omitted) (internal quotation marks omitted).

213. *Id.* at 736–37.

214. *Id.* at 734.

215. *Id.*

216. *Id.*

undocumented, a lawful permanent resident has the warranted expectation that the United States is his permanent home.<sup>217</sup>

2. *There is no on-going immigration violation to be cured by deporting lawful permanent residents*

Justice Scalia indicated in *Reno v. American-Arab Anti-Discrimination Committee*<sup>218</sup> that one remedial, non-punitive purpose of deportation is to end an ongoing immigration violation.<sup>219</sup> Contrary to Justice Scalia's statement, a lawful permanent resident has been admitted permanently into the United States and is not living in the United States illegally. There is no ongoing violation to end.

It could be argued that while a lawful permanent resident may not be illegally present in the United States, his criminal behavior is a violation of the terms upon which he was admitted. In fact, Justice Scalia also stated in *Reno* that "[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted."<sup>220</sup>

The problem with this statement, however, is that immigration laws consistently change. Because the Ex Post Facto Clause does not apply to removal proceedings,<sup>221</sup> a lawful permanent resident could be convicted of a crime that at the time of commission, and at the time of admission into the United States, was not a deportable offense. Therefore, prohibition on committing this particular act would not have been part of his admittance criteria. Ten years later, though, because of a new law passed by Congress, it could become a deportable offense. In this environment, "noncitizens, even lawful permanent residents, may be subject to a shifting, even retroactive, regime of deportation sanctions."<sup>222</sup>

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217. Stating that deportation is severe for lawful permanent residents does not mean that the consequences are not severe for other noncitizens. Those who are undocumented and those who have acquired a temporary status may have an expectation of remaining permanently in the United States, too. Like lawful permanent residents, non-lawful permanent residents also face separation from their families, loss of income and removal to a country that could be unsafe.

218. 525 U.S. 471 (1999).

219. *Id.* at 491 (stating that "deportation is necessary in order to bring to an end *an ongoing violation* of United States law").

220. *Id.*

221. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (holding that the constitutional ban on ex post facto laws does not apply because "[d]eportation, however severe its consequences, has been consistently classified as civil rather than a criminal procedure" (citing *Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Fong Yue Ting*, 149 U.S. at 730 (1893)); *see also* *Mahler v. Eby*, 264 U.S. 32, 39-40 (1924) (holding the prohibition on ex post facto laws inapplicable because Congress is not punishing appellants for certain acts but only ridding the country of undesirables).

222. Kanstroom, *supra* note 4, at 1907.

The Court in *Mahler* stated that deportation was not punishment but was merely imposed to rid the country of undesirables.<sup>223</sup> The goal of ridding the country of undesirables, however, actually mirrors one of the goals of punishment—incapacitation. Therefore, ridding the country of undesirables carries out one of the traditional functions of criminal punishment and supports the argument that the deportation of lawful permanent residents on account of criminal convictions is punishment.<sup>224</sup>

Arguing that deportation constitutes punishment for lawful permanent residents does not mean the government can never deport a lawful permanent resident.<sup>225</sup> Admittedly, lawful permanent residents are not citizens, and the government may remove noncitizens who commit crimes. Even still, removing lawful permanent residents because of a criminal conviction constitutes punishment. As I argue below, because deportation is punitive, a lawful permanent resident—as someone permanently admitted into the United States—should be afforded constitutional criminal protections during removal proceedings. Liberty and even property interests are at stake in the deportation process.<sup>226</sup> As explained in Part V, fundamental fairness under the Due Process Clause demands proceedings that afford those admitted permanently enhanced constitutional protections.

*B. Applying the Mendoza-Martinez Factors Along with Padilla's Rationale Demonstrates the Punitive Nature of Deportation for Lawful Permanent Residents*

The Supreme Court in *Mendoza-Martinez* set forth factors to be utilized when determining whether a particular civil sanction is remedial or punitive. The factors are to serve as guideposts, so no one factor is controlling.<sup>227</sup> Analyzing these factors—with the *Padilla* decision as

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223. *Mahler*, 264 U.S. at 39 (citing *Bugajewitz*, 228 U.S. at 591; *Fong Yue Ting*, 149 U.S. at 730).

224. See STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 208–09 (1987) (highlighting the fact that courts have not provided explanation of why removal of undesirables from the country and removal of criminals to prison serve different purposes).

225. See Pauw, *supra* note 4, at 332 (arguing that deportation as a means to get rid of people who are a threat to the United States does not properly explain why deportation is non-punitive). According to Pauw, if we were to arrest a citizen and exile him from the community, we would consider this punitive. *Id.* He argues that this finding should not change simply because we are referring to noncitizens. *Id.* Pauw states that noncitizens “because of having previously been granted permanent resident status or because of close family ties to citizens, may also have a justifiable claim to continue living in our community.” *Id.*

226. The Court in *Landon v. Plasencia* noted the interests that were at stake when a lawful permanent resident faced the possibility of not being readmitted into the United States after having traveled abroad. 459 U.S. 21, 34 (1982). The lawful permanent resident stood to lose the right to live and work in the United States and the right to remain with her immediate family. *Id.* (citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).

227. See *Hudson v. United States*, 522 U.S. 93, 101 (1997) (finding that no one

background—shows that the deportation of lawful permanent residents constitutes punishment.

### 1. *Legislative history*

Before applying the *Mendoza-Martinez* factors, the Court in *Mendoza-Martinez* first looked to legislative history to determine whether Congress intended for the sanction—deprivation of nationality—to be punishment.<sup>228</sup> The *Mendoza-Martinez* Court determined that the Congressional intent was clear: the sanction employed was punitive.<sup>229</sup>

Thus, legislative history is a starting point for determining whether a particular sanction is punitive. Courts will first look to whether Congress intended to apply a civil or criminal label.<sup>230</sup> Where Congress has applied a civil label, courts will assess “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.”<sup>231</sup> Where there is not “conclusive evidence of congressional intent as to the penal nature of a statute, [the *Mendoza-Martinez*] factors must be considered in relation to the statute on its face.”<sup>232</sup>

While deportation has been labeled civil, the legislative history indicates that the statutory scheme negates that intention. Congress has continuously implemented harsher immigration laws, while gradually removing discretionary forms of relief to prevent deportation. In fact, the *Padilla* decision detailed nearly a century’s worth of punitive immigration laws, which have made deportation “virtually inevitable for a vast number of noncitizens convicted of crimes.”<sup>233</sup>

In particular, the 1996 laws—IIRIRA and AEDPA—demonstrate that Congress intended to punish noncitizens convicted of crimes by deporting them.<sup>234</sup> During one Congressional debate concerning IIRIRA, Senator Roth stated: “the bill broadens the definition of aggravated felon to include more crimes *punishable by deportation*.”<sup>235</sup>

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*Mendoza-Martinez* factor should be controlling (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)); *Dye v. Frank*, 355 F.3d 1102, 1105 (7th Cir. 2004). The *Dye* court held that a Wisconsin tax was punitive, even though it imposed no affirmative disability or restraint or required a finding of scienter. *Id.* “[T]he absence of these elements [was] not dispositive, as all of the factors [were] ‘relevant to the inquiry and may often point in differing directions.’” *Id.* (quoting *Mendoza-Martinez*, 372 U.S. at 169).

228. *Mendoza-Martinez*, 372 U.S. at 168-69.

229. *Id.*

230. *United States v. Ward*, 448 U.S. 242, 248 (1980) (citation omitted).

231. *Id.* at 248-49 (citation omitted).

232. *Mendoza-Martinez*, 372 U.S. at 169.

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

234. Since the legislative history of immigration laws is so extensive, I focus exclusively on the 1996 laws.

235. 142 CONG. REC. S4600 (daily ed. May 2, 1996) (statement of Sen. William Roth) (emphasis added); *see also* Pauw, *supra* note 4, at 334 (stating that the broadened definition of “conviction” was designed to remove immigrants regardless of valid justifications for

A number of factors relating to the passage of AEDPA illustrate its punitive, criminal-based intention.<sup>236</sup> First, the stated purposes of AEDPA were “[t]o deter terrorism, provide justice for victims, [and] provide for an effective death penalty, and for other purposes.”<sup>237</sup> These purposes reveal an intention to punish criminals, not curb illegal immigration. Second, AEDPA was codified at Titles 8 and 18 of the United States Code—sections of the code dealing with crimes and criminal procedure.<sup>238</sup> Third, while drafting AEDPA, *criminal* sentencing guidelines were used to amend the immigration definition of an aggravated felony. “In adding crimes to the list, effort was made to ensure that the overall reach of the definition would be consistent with the sentencing guidelines established by the United States Sentencing Commission.”<sup>239</sup> While the purpose of AEDPA was to deter terrorism, President Clinton noted, “[t]he bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”<sup>240</sup>

These are just some of the examples demonstrating the punitive intent behind the passage of the 1996 immigration laws. More examples of the punitive nature of this legislation will be provided during the discussion of the *Mendoza-Martinez* factors.

## 2. *Whether the sanction involves an affirmative disability or restraint*

*Mendoza-Martinez* asks whether the sanction involves an affirmative disability or restraint.<sup>241</sup> In listing this factor, the Court cited to earlier Supreme Court precedent that found that an act providing for the perpetual exclusion from a profession following the failure to take a specific oath was an affirmative disability or restraint that constituted punishment,<sup>242</sup> as was an act that prohibited any opportunity to serve the government.<sup>243</sup> The

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allowing continued residence).

236. See Kidane, *supra* note 4, at 427-28 (suggesting that a close reading of AEDPA and its legislative history illustrates the statute’s punitive intention to “penalize wrongdoers”).

237. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996).

238. Cf. *Reiserer v. United States*, 479 F.3d 1160, 1163 (9th Cir. 2007) (finding that the legislature’s placement of a statute in the chapter of the Internal Revenue Code titled “Additions to the Tax, Additional Amounts and Assessable Penalties,” rather than in the chapter entitled “Crimes, Other Offenses, and Forfeitures,” evidenced a legislative intent to impose a civil penalty rather than a punitive sanction).

239. H.R. REP. NO. 104-22, at 7 (1995).

240. 142 CONG. REC. 10055 (1996) (statement of Sen. Patrick Leahy) (detailing President Clinton’s message upon signing AEDPA).

241. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866)).

242. *Garland*, 71 U.S. (4 Wall.) at 377. *But see Hudson v. United States*, 522 U.S. 93, 104 (1997) (finding that prohibition on participating in the banking industry is not equal to the “infamous punishment of imprisonment” (citations omitted) (internal quotation marks omitted)).

243. *Lovett*, 328 U.S. at 316.

*Mendoza-Martinez* decision, however, also cited to a case in which the denial of Social Security benefits to a deported alien was held not to involve an affirmative disability or restraint,<sup>244</sup> for it was not a situation “approaching the ‘infamous punishment’ of imprisonment.”<sup>245</sup>

Following the *Mendoza-Martinez* decision, courts have had to assess whether other sanctions involve an affirmative disability or restraint. In one case, the dissent argued “imprisonment” to be “the clearest example of a restraint.”<sup>246</sup> The loss of parental rights has also been held to involve an affirmative disability or restraint.<sup>247</sup> However, statutes involving only monetary penalties and laws requiring the collection of DNA samples from inmates have both been held to not constitute an affirmative disability or restraint.<sup>248</sup>

Thus, aside from imprisonment and loss of parental rights, case law is not entirely clear on what constitutes an affirmative disability or restraint. The deciding element seems to be the permanence of the disability—for example, loss of parental rights—or whether there is actual restraint—imprisonment.

The permanence of the effect of deportation should constitute an affirmative disability. The deportation of a non-citizen, including that of a lawful permanent resident, normally renders the person inadmissible for ten years,<sup>249</sup> but if the crime is an aggravated felony, the bar to future admission is lifelong.<sup>250</sup> Since the vast majority of deportations based upon criminal convictions are aggravated felonies, the reality is that these removals are typically permanent. Thus, the disability is severe and profound. As the *Padilla* decision recognized, “[t]he severity of deportation [is] ‘the equivalent of banishment or exile.’”<sup>251</sup> The United

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244. *Mendoza-Martinez*, 372 U.S. at 168 n.22 (citing *Flemming*, 363 U.S. at 617).

245. *Flemming*, 363 U.S. at 617.

246. *Johnson v. City of Cincinnati*, 310 F.3d 484, 517 (6th Cir. 2002) (Gilman, J., dissenting) (discussing the implications of *Hudson*, 522 U.S. 93).

247. *Smith v. Dinwiddie*, 510 F.3d 1180, 1189 (10th Cir. 2007). Despite holding that the termination of parental rights proceedings involves an affirmative disability or restraint, the court indicated that none of the other *Mendoza-Martinez* factors supported a conclusion that such proceedings were penal. *Id.*

248. *See* *United States v. Coccia*, 598 F.3d 293, 298–99 (6th Cir. 2010) (citation omitted) (holding that the DNA Act is not punitive); *Reiserer v. United States*, 479 F.3d 1160, 1163 (9th Cir. 2007) (citing *Hudson*, 522 U.S. at 104) (holding that statutes involving only monetary penalties and no affirmative disability or restraint are not punitive); *United States v. Reynard*, 473 F.3d 1008, 1016 (9th Cir. 2007) (holding any disability imposed by the DNA Act to be minimal).

249. 8 U.S.C. § 1182(a)(9)(A)(ii) (2006).

250. *Id.* The only exception to a permanent bar to reentering the United States is if the Attorney General has consented to the individual’s admission. *Id.* § 1182(a)(9)(A)(iii). This permanent bar applies only to aggravated felonies. *Id.* § 1182(a)(9)(A)(ii). Otherwise, the bar for other convictions is ten years, or twenty years for repeat offenders. *Id.*

251. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

States may be the only country a lawful permanent resident knows, and the deported may be removed to a country where he does not even speak the language. A lawful permanent resident may be removed from “all that makes life worth living.”<sup>252</sup> Thus, under the “affirmative disability or restraint” *Mendoza-Martinez* factor, the deportation of lawful permanent residents is punitive.

3. *Whether it has historically been regarded as punishment*

The next factor under *Mendoza-Martinez* asks whether the sanction has historically been regarded as punishment.<sup>253</sup> The sanction imposed in *Mendoza-Martinez* involved the forfeiture of citizenship.<sup>254</sup> The Court determined that a review of historical practices supported its holding that such a sanction constituted punishment.<sup>255</sup> Specifically, the Court noted that forfeiture of citizenship, as well as banishment and exile, had been used as modes of punishment throughout history.<sup>256</sup>

The deportation of lawful permanent residents resembles the historical practices of banishment and transportation (transporting criminals to penal colonies) used in Europe to punish criminals.<sup>257</sup> The *Padilla* decision even referenced these historical practices when it stated that deportation is “the equivalent of banishment or exile.”<sup>258</sup>

Banishment was “[a] punishment by forced exile, either for years or for life, inflicted principally upon political offenders.”<sup>259</sup> Its origins date back to twelfth-century England.<sup>260</sup> Under the banishment system, a person who committed a crime could seek sanctuary on sacred ground, and within forty days would have to confess to the crime.<sup>261</sup> In confessing, he would take an oath to leave and not return without the permission of the Crown.<sup>262</sup> Because banishment was not effective in achieving deterrence, it was

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

253. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (citing *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896); *Mackin v. United States*, 117 U.S. 348, 350–52 (1886); *Ex parte Wilson*, 114 U.S. 417, 426–29 (1885); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320–21 (1866)).

254. *Id.* at 146.

255. *Id.* at 168 n.23.

256. *Id.*

257. See Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 513 (“From ancient Rome to eighteenth and nineteenth century Britain, France, and Russia, common forms of criminal punishment included exile, banishment, and transportation (particularly by Britain to the American and Australian colonies).” (citation omitted)).

258. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

259. *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (citation omitted) (internal quotation marks omitted).

260. Bleichmar, *supra* note 4, at 116–17 (using a historical analysis for arguing that deportation constitutes punishment).

261. *Id.* at 120 (citation omitted).

262. *Id.*

eventually abolished and replaced by the transportation system.<sup>263</sup>

Transportation—transporting criminals to British colonies—was a form of punishment that began to take effect in early seventeenth-century England.<sup>264</sup> Transportation was “by way of punishment of one convicted of an offense against the laws of the country.”<sup>265</sup> Under the Transportation Act of 1718, this practice became a more organized and official form of punishment.<sup>266</sup> It was typically used for “ordinary criminals,” though it had been employed for more serious offenders.<sup>267</sup>

Justice Brewer’s dissent in *Fong Yue Ting* succinctly laid out the historical basis for considering deportation as punishment. Justice Brewer stated that deportation involved “an arrest, a deprivation of liberty; and . . . removal from home, from family, from business, from property.”<sup>268</sup> These consequences were, according to Justice Brewer, similar to the definitions of banishment and transportation. He stated:

‘banishment’ is thus defined: ‘A punishment by forced exile, either for years or for life, inflicted principally upon political offenders; ‘transportation’ being the word used to express a similar punishment of ordinary criminals.’ . . . ‘Some punishments consist in exile or banishment, by abjuration of the realm, or transportation.’ In Vattel we find that ‘banishment is only applied to condemnation in due course of law.’<sup>269</sup>

In a separate dissent, Justice Field rejected the majority’s reference to other independent sovereigns’ powers to expel citizens—as had been done in England by banishing 15,000 Jews, by Spain in expelling the Moors, and by France in driving out the Huguenots in 1685.<sup>270</sup> He stated, “[i]ndeed, all the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the constitution.”<sup>271</sup>

As described above, the practices of banishment and transportation involved removing a person from the nation as punishment for a crime. The methods employed today in relation to lawful permanent residents more closely resemble these forms of punishment rather than the purported

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263. *Id.* at 121.

264. *Id.* at 122.

265. *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893).

266. Bleichmar, *supra* note 4, at 125.

267. *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) (citation omitted) (internal quotation marks omitted); *see also* Bleichmar, *supra* note 4, at 123–30 (providing a summary of the history of the Transportation Act of 1718 as well as its effect on transportation as a punishment).

268. *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting).

269. *Id.* (citations omitted).

270. *Id.* at 757 (Field, J., dissenting).

271. *Id.*

remedial purpose of enforcing and regulating immigration laws. A lawful permanent resident convicted of a crime is not deported because of unlawful presence or a typical immigration violation. His deportation is tied to his criminal conviction. Because of this, the *Padilla* Court found it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”<sup>272</sup> A lawful permanent resident’s deportation in these circumstances is predicated upon the conviction of a crime and is part of the criminal punishment. Thus, under this *Mendoza-Martinez* factor, the deportation of lawful permanent residents mirrors the historical practices of banishment and transportation, which have been regarded as punishment.

#### 4. *Whether it comes into play only on a finding of scienter*

The next factor listed in the *Mendoza-Martinez* decision is whether the sanction comes into play only on a finding of scienter—intent.<sup>273</sup> If the sanction comes into play on a finding of scienter, then it is considered punitive. In specifying this factor, the Court cited to cases in which a showing of scienter demonstrated that a particular sanction was punitive.<sup>274</sup>

Under immigration law, lawful permanent residents face deportation for specified criminal convictions. Lawful permanent residents convicted of a crime involving moral turpitude can be deported.<sup>275</sup> While crimes involving moral turpitude generally require a finding of scienter,<sup>276</sup> statutory rape—where no finding of intent is required—is also considered a crime of moral turpitude.<sup>277</sup> Statutory rape is also an aggravated felony under immigration laws, and a lawful permanent resident convicted of an aggravated felony is automatically deportable.<sup>278</sup> Thus, while rare, statutory rape is one crime resulting in deportation that does not require a

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272. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

273. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37–38 (1922); *Helwig v. United States*, 188 U.S. 605, 610–12 (1903)).

274. *Id.* at n.24 (citing *Bailey*, 259 U.S. at 37–38; *Helwig*, 188 U.S. at 610–12).

275. Immigration and Nationality Act § 237, 8 U.S.C. § 1227(a)(2)(A) (2006). The only exception to a permanent bar to reentering the United States is if the Attorney General has consented to the individual’s admission. A permanent bar to reentry applies only to aggravated felonies. *Id.* § 1182(a)(9)(A). Otherwise, the bar for other crimes is ten years, or twenty years for repeat offenders. *Id.*

276. See *Cristoval Silva-Trevino*, 24 I. & N. Dec. 687, 706 (B.I.A. 2008) (“A finding of moral turpitude under the Act requires that a perpetrator have [sic] committed the reprehensible act with some form of scienter.” (citation omitted)).

277. See, e.g., *Franklin v. INS*, 72 F.3d 571, 588 (8th Cir. 1995) (recognizing statutory rape as a crime of moral turpitude, even though it does not require a finding of intent); see also *Bleichmar*, *supra* note 4, at 153–54 (noting that statutory rape is a crime of moral turpitude, and that it could lead to deportation).

278. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A); *id.* § 1227(a)(2)(A)(iii); see also *Silva v. Gonzales*, 455 F.3d 26, 29 (1st Cir. 2006) (finding that all rape—including statutory rape—“comes within the aggravated felony taxonomy”).

finding of intent. However, almost every other crime resulting in deportation requires a finding of scienter.<sup>279</sup>

5. *Whether its operation will promote the traditional aims of punishment*

The next factor asks whether deportation will promote the traditional aims of punishment.<sup>280</sup> Under this factor, if a sanction promotes the traditional aims of punishment, such as deterrence,<sup>281</sup> retribution,<sup>282</sup> and incapacitation,<sup>283</sup> then it may be punitive.

The *Mendoza-Martinez* decision cited *United States v. Constantine*<sup>284</sup> to support this factor.<sup>285</sup> In *Constantine*, the Supreme Court held that a tax of \$1000 imposed upon the commission of a crime—violating state liquor laws—was penal.<sup>286</sup> The Court based its finding on the fact that the tax was imposed upon the commission of a crime and because the amount of the tax was grossly disproportionate to the normal tax of \$25.<sup>287</sup> These two factors demonstrated “that the purpose [was] to impose a penalty as a deterrent and punishment of unlawful conduct.”<sup>288</sup>

The *Mendoza-Martinez* Court also cited *Trop v. Dulles*<sup>289</sup> while discussing the aims of punishment.<sup>290</sup> In *Trop*, the Supreme Court found that a statute authorizing the loss of citizenship for those convicted by a court-martial of wartime desertion constituted punishment.<sup>291</sup> In assessing the punitive nature of the statute, the Court found that a statute is penal if it

279. In my opinion, this factor is not well thought out, since an act such as statutory rape that results in criminal punishment does not require a finding of scienter. *See, e.g.*, Bleichmar, *supra* note 4, at 154 (“The question then becomes, if punitiveness in the form of imprisonment may result under criminal law regardless of scienter, why is scienter relevant in determining punitiveness at all.”). Although it is true that a criminal statute is generally interpreted to include an element of scienter or criminal intent, “[t]he power of the Legislature to declare what acts shall constitute crimes ordinarily includes the power to make the commission of the act criminal without regard to the intent or knowledge of the accused.” *Booksellers Ass’n v. McMaster*, 282 F. Supp. 2d 389, 397 (D.S.C. 2003) (quoting *Guinyard v. State*, 195 S.E.2d 392, 395 (S.C. 1973)). Nonetheless, these acts that do not require scienter result in imprisonment—the clearest example of punishment. Therefore, it is unclear why a finding of scienter is necessary to determine whether a sanction is punitive.

280. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (citing *Trop v. Dulles*, 356 U.S. 86, 96 (1958); *id.* at 111–12 (Brennan, J., concurring); *United States v. Constantine*, 296 U.S. 287, 295 (1935)).

281. *Id.*

282. *Id.*

283. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005) (listing incapacitation as one purpose for punishment).

284. 296 U.S. 287 (1935).

285. *Mendoza-Martinez*, 372 U.S. at 168 n.25 (including citation to *Constantine*, 296 U.S. at 295).

286. *Constantine*, 296 U.S. at 295.

287. *Id.*

288. *Id.* (citing *Helwig v. United States*, 188 U.S. 605, 613 (1903)).

289. 356 U.S. 86 (1958).

290. *Mendoza-Martinez*, 372 U.S. at 170 n.25 (citing *Trop*, 356 U.S. at 96).

291. *Trop*, 356 U.S. at 97.

“imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.”<sup>292</sup>

The traditional purposes of punishment are deterrence (general and specific), incapacitation, rehabilitation, denunciation, and retribution.<sup>293</sup> Specific deterrence, rehabilitation, and incapacitation “seek to prevent future crimes *by [a] particular offender*.”<sup>294</sup> Under the theory of specific deterrence, the penalty that is imposed is meant to instill fear in an individual offender that a similar penalty, or more severe one, could be imposed in the future if the offender commits the same type of crime.<sup>295</sup> Rehabilitation attempts to address the reasons for the individual offender’s behavior and reform that behavior through treatment.<sup>296</sup> Incapacitation removes a person from the community so that he is not a danger to the community while he is incarcerated.<sup>297</sup>

General deterrence and denunciation seek to prevent future crimes “*by members of the public at large*.”<sup>298</sup> In terms of general deterrence, the penalty imposed on an individual is meant to instill fear in others within the community so that they do not commit the same crime.<sup>299</sup> Under the theory of denunciation, the penalty is meant to establish social norms within a society regarding law-abiding behavior and the seriousness of particular crime.<sup>300</sup>

Finally, retribution is also considered a traditional aim of punishment. According to the theory of retribution, “offenders should be punished in proportion to their blameworthiness (or desert) in committing the crime being sentenced.”<sup>301</sup> An offender’s blameworthiness is dependent upon the seriousness of the harm caused or threatened and the offender’s culpability.<sup>302</sup> “[O]ffenders are punished simply because they deserve to be and the severity of their punishment should be no more and no less than they deserve.”<sup>303</sup>

As will be demonstrated below, the purposes of deportation most closely mirror those of deterrence, incapacitation, and retribution.

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292. *Id.* at 96.

293. Frase, *supra* note 283, at 70–73.

294. *Id.* at 70 (emphasis added).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 71 (emphasis added).

299. *Id.* (citation omitted).

300. *Id.* at 72 (citations omitted).

301. *Id.* at 73.

302. *Id.* (citing ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 29–33 (1993); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 590 (2005)).

303. *Id.*

*a. Deportation is for deterrence purposes*

Deportation seeks to deter lawful permanent residents from committing crimes.<sup>304</sup> Under this theory, a lawful permanent resident who realizes that another lawful permanent resident was deported because of a criminal conviction will, theoretically, be deterred from engaging in the same behavior.

*b. Deportation is for incapacitation purposes*

Deportation is also carried out for incapacitation purposes—noncitizens are removed from the country to protect the public from future criminal behavior.<sup>305</sup> Indeed, statements made by legislators during the debates surrounding the 1996 laws illustrate that incapacitation was one reason for these harsh laws.

For instance, during a House debate concerning the passage of AEDPA, Representative Lamar Smith stated that recidivism was a major problem for noncitizens: “[r]ecidivism rates for criminal aliens are high—a recent GAO study revealed that 77 percent of noncitizens convicted of felonies are arrested at least one more time.”<sup>306</sup> Under the theory of incapacitation, deportation would ameliorate recidivism rates by completely removing a person from society. Representative Smith went on to say that under these laws, “the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—*will be protected from the criminals and terrorists who want to prey on them.*”<sup>307</sup> The House Judiciary Report on AEDPA stated: “[i]n the past, many aliens who committed serious crimes were released into American society after they were released from incarceration, where *they then continue to pose a threat to those around them.*”<sup>308</sup> Finally, during a Senate Committee Hearing on IIRIRA, Senator Roth noted that “criminal aliens are *a serious and growing threat to our public safety.*”<sup>309</sup> These statements illustrate that the purpose of the legislation was incapacitation—to remove noncitizens convicted of crimes from the country because such individuals posed a threat to society.

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304. See, e.g., Kanstroom, *supra* note 4, at 1894; Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 123–24 (1977) [hereinafter Legomsky, *The Alien Criminal Defendant*].

305. See, e.g., Kanstroom, *supra* note 4, at 1894 (citation omitted); Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 488; Legomsky, *The Alien Criminal Defendant*, *supra* note 304, at 125–27.

306. 142 CONG. REC. 7972 (1996).

307. *Id.* (emphasis added); see also HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 18 (2007), available at <http://www.hrw.org/print/reports/2007/07/16/forced-apart>.

308. H.R. REP. NO. 104-22, at 6 (1995) (emphasis added).

309. 142 CONG. REC. 10,054 (1996) (emphasis added).

*c. Deportation is for the purpose of retribution*

Deportation also mirrors the theory behind retribution.<sup>310</sup> Deportation, according to this theory, punishes noncitizens in proportion to their blameworthiness. Legislative history reveals that retribution played a role in the drafting and passage of the harsh 1996 laws. For instance, in choosing the crimes to be added to the definition of an aggravated felony, the Judiciary Committee focused on “those that clearly demonstrate a disregard for this nation’s laws.”<sup>311</sup> Those convicted of such crimes “have no legitimate claim to remain in the United States.”<sup>312</sup> According to the theory of retribution, because the offenders are not citizens, a criminal conviction is even more egregious. Punishment for the underlying criminal offense is not sufficient. Their just deserts must include more than incarceration—they should no longer be allowed to remain in the United States.

Thus, deportation mirrors the above theories of punishment. Immigration laws providing for deportation on account of criminal behavior seek to deter future criminal behavior, incapacitate the offender, as well as serve a retributive function. Hence, deportation of lawful permanent residents promotes the traditional aims of punishment and, therefore, satisfies this *Mendoza-Martinez* factor.

*6. Whether the behavior to which the sanction applies is already a crime*

The next factor asks whether the behavior for which a sanction is imposed is already a crime.<sup>313</sup> Under this factor, the Court examines the underlying behavior and the sanction imposed on account of the behavior. If the underlying behavior for which the sanction imposed is a crime, then the factor leans toward the sanction being labeled punitive.<sup>314</sup>

As an example, in *Lipke v. Lederer*,<sup>315</sup> the Court held that a tax imposed on the illegal sale of liquor under the National Prohibition Act served a punitive function.<sup>316</sup> Lipke had been arrested for the illegal sale of

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310. See, e.g., Kanstroom, *supra* note 4, at 1894 (citation omitted); Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 488; Legomsky, *The Alien Criminal Defendant*, *supra* note 304, at 121–23.

311. H.R. REP. NO. 104-22, at 8 (1995).

312. *Id.*

313. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (citing *United States v. Constantine*, 296 U.S. 287, 295 (1935); *United States v. La Franca*, 282 U.S. 568, 572–73 (1931); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922)).

314. See *La Franca*, 282 U.S. at 572–73 (defining penalty as a punishment for an unlawful act); *Lipke*, 259 U.S. at 562 (stating that if the nature of the imposition is a penalty, then it must also be punitive (citing *O’Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *Helwig v. United States*, 188 U.S. 605, 613 (1903))).

315. 259 U.S. 557 (1922).

316. *Id.* at 558, 562.

liquor.<sup>317</sup> While his prosecution was pending, he received notice that he was being taxed under Section 35 of the Act.<sup>318</sup> After failing to pay the tax, he received a second notice, which indicated that his fine had been increased and that his property would be taken away if he failed to pay the penalty.<sup>319</sup> The Court asserted that the purpose of the tax was to “define and suppress” crime.<sup>320</sup> “Evidence of crime . . . is essential to assessment [of the tax] . . .”<sup>321</sup> In this sense, the usual purpose of taxation—to support the government—was not present in this section of the Act.<sup>322</sup> Instead, the purpose of the tax was to punish the underlying criminal behavior—the illegal sale of liquor.<sup>323</sup>

When a lawful permanent resident is deported because of a criminal conviction, he is being deported because of his criminal behavior.<sup>324</sup> As the *Padilla* decision recognized, “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”<sup>325</sup> Thus, like the tax imposed in *Lipke*, “evidence of a crime” is necessary for deportation to be imposed. Therefore, under this *Mendoza-Martinez* factor, the deportation of lawful permanent residents is punitive.

#### 7. *Whether a non-punitive purpose can be assignable to deportation*

This *Mendoza-Martinez* factor asks whether an alternative, non-punitive purpose can be assigned to the imposition of a particular sanction.<sup>326</sup> For instance, a sanction that has both punitive and non-punitive (remedial) features may not necessarily constitute punishment if its purpose is not to punish but rather to further a legitimate governmental interest.<sup>327</sup>

There are situations when deportation can serve a remedial purpose—for instance, to control the admission process and entry at the border.<sup>328</sup> The

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317. *Id.* at 558.

318. *Id.*

319. *Id.* at 558–59.

320. *Id.* at 561–62 (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *O’Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *Helwig v. United States*, 188 U.S. 605, 613 (1903)).

321. *Id.* at 562.

322. *Id.* (citing *O’Sullivan*, 233 U.S. at 324).

323. *Id.*

324. See 8 U.S.C. § 1227(a)(2)(A)(ii) (2006) (providing that any alien convicted of an aggravated felony is deportable).

325. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

326. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (citing *Flemming v. Nestor*, 363 U.S. 603, 615, 617 (1960); *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958); *United States v. La Franca*, 282 U.S. 568, 572 (1931); *Lipke*, 259 U.S. at 561–62; *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 43 (1922); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866)).

327. *Trop*, 356 U.S. at 96 (citations omitted).

328. See *Kanstrom*, *supra* note 4, at 1907 (describing the three potential variants of deportation laws: laws that deport those who have entered unlawfully, laws that deport those who violate a condition of their admission, and laws that deport those who violate an “express prohibition” of which the alien was informed upon admission).

government may regulate entry at the border or deport an individual who overstays his or her stay on a visitor's visa.

The deportation of lawful permanent residents no longer merely seeks to control the admission process or regulate entry at the border, but it instead seeks to continuously control a lawful permanent resident's behavior.<sup>329</sup> Deportation of lawful permanent residents on account of criminal convictions exists strictly to punish the underlying criminal behavior. Thus, under the "alternative purpose" *Mendoza-Martinez* factor, the deportation of lawful permanent residents on account of a criminal conviction is punitive.

8. *Whether the sanction appears excessive in relation to the alternate purpose*

The final *Mendoza-Martinez* factor asks whether the sanction—deportation—is excessive in relation to its alternate purpose.<sup>330</sup> The Supreme Court has found that when a sanction is excessive, "it is a penalty in its intrinsic nature."<sup>331</sup> A number of courts have determined that this *Mendoza-Martinez* factor should be afforded the greatest weight of all the factors.<sup>332</sup> According to one state court, "this factor cuts most directly to the question of which statutes cross the boundaries of civil sanctions, and which do not."<sup>333</sup>

While generally the stated purpose of deportation is to regulate and control the immigration process, the incredibly harsh effects of deportation on lawful permanent residents convicted of crimes—especially minor crimes—make this sanction excessive in relation to the government's purported purpose of regulating immigration. Senator Kennedy illustrated this point during a hearing before the Senate Judiciary Committee when he stated that immigration laws "punish permanent residents out of proportion to their crimes."<sup>334</sup>

The real life stories of lawful permanent residents who have been

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329. See *id.* at 1894 (arguing that deportation for post-entry conduct serves an incapacitation and deterrent function (citations omitted)).

330. *Mendoza-Martinez*, 372 U.S. at 169 (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956); *United States v. Constantine*, 296 U.S. 287, 295 (1935); *Helwig v. United States*, 188 U.S. 605, 613 (1903); *Cummings*, 71 U.S. (4 Wall.) at 319).

331. See *Helwig*, 188 U.S. at 613 (holding a fine imposed that was "so enormously in excess" of the ordinary duties was punitive).

332. *E.g.*, *Kellar v. Fayetteville Police Dep't*, 5 S.W.3d 402, 409 (Ark. 1999); *Wallace v. State*, 905 N.E.2d 371, 383 (Ind. 2009) (citation omitted); *Commonwealth v. Mullins*, 905 A.2d 1009, 1017 (Pa. Super. Ct. 2006); *Rodriguez v. State*, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002) (citation omitted).

333. *Rodriguez*, 93 S.W.3d at 75 (citation omitted).

334. 146 CONG. REC. 19,640 (2000); see also HUMAN RIGHTS WATCH, *supra* note 307, at 36 (summarizing Senator Kennedy's bill, S. 3120, which would have changed many punitive aspects of immigration law).

deported or who are facing deportation for minor offenses best speak to the excessiveness and disproportionate nature of the deportation laws. In 2010, the *New York Times* reported on a fifty-year-old lawful permanent resident with schizophrenia who had been living in the United States since at least 1974.<sup>335</sup> Arrested on a trespassing charge, he was declared incompetent to stand trial and sentenced to ninety days at a mental institution.<sup>336</sup> Instead of serving out his sentence, he was transferred to a detention facility and placed in deportation proceedings.<sup>337</sup> It is likely that this arrest, combined with a previous criminal record, triggered removal proceedings.<sup>338</sup>

In another compelling story reported by the *New York Times*, a lawful permanent resident was placed in deportation proceedings for two marijuana offenses.<sup>339</sup> Jerry Lemaine was arrested in New York after police found a marijuana cigarette in his pocket.<sup>340</sup> He pled guilty and was fined \$100.<sup>341</sup> Because of a previous marijuana offense, he was placed in removal proceedings.<sup>342</sup> Under the interpretation of immigration laws in the Fifth Circuit, which had jurisdiction over Lemaine's case, two drug possession convictions constitute drug trafficking—an aggravated felony.<sup>343</sup> As such, Lemaine was flown to Texas where he was incarcerated

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335. Nina Bernstein, *Plight of Mentally Ill Detainees is Outlined in Study*, N.Y. TIMES, Mar. 30, 2010, at A18.

336. *Id.*

337. *Id.*

338. According to immigration laws, there would have had to have been a prior criminal record because a lawful permanent resident cannot be deported simply for trespassing. The article is unclear as to the exact basis for which removal proceedings were triggered and whether or not he was deported.

339. Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 31, 2010, at A17; *see also* Lemaine v. Holder, 391 F. App'x 353, 354 (5th Cir. 2010) (per curiam) (remanding the case to the Board of Immigration Appeals after the Supreme Court's decision in *Carachuri-Rosendo v. Holder*).

340. Bernstein, *supra* note 335.

341. *Id.*

342. *Id.*

343. *Id.* The Supreme Court held in *Carachuri-Rosendo v. Holder*, however, that second or subsequent simple possession offenses do not constitute aggravated felonies if the state conviction is not based on a prior conviction. 130 S. Ct. 2577, 2589 (2010). In *Carachuri-Rosendo*, a lawful permanent resident was placed in removal proceedings because of two drug offenses. *Id.* at 2580. For his first offense, he received twenty days in jail for possession of marijuana. *Id.* For his second offense, he was charged with possession of an antianxiety tablet without a prescription, receiving ten days in jail. *Id.* A conviction after a prior conviction constitutes a felony under 18 U.S.C. § 924(c) and is subject to a two-year sentence. *Id.* at 2581 (citations omitted). Under § 1101(a)(43)(B), a drug trafficking crime in which the term of imprisonment is greater than a year constitutes an aggravated felony. *Id.* (citations omitted). The petitioner in *Carachuri-Rosendo* was not charged as a recidivist in state court where no finding was made regarding his first conviction. *Id.* at 2586–87. Because he *could* have been convicted as a recidivist, the immigration court, and later the Fifth Circuit, determined that his offense was an aggravated felony. *Id.* at 2583–84 (citing *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009)). The Supreme Court disagreed, holding that in order to fall under the recidivist provisions mentioned above, the second conviction must have been based on the prior conviction, which it was not. *Id.* at 2589–90.

for three years while he fought his deportation to Haiti.<sup>344</sup>

In a July 2007 report on United States deportation policy, Human Rights Watch told the story of Mario Pacheco, a lawful permanent resident who came to the United States from Mexico when he was two months old.<sup>345</sup> Pacheco was convicted of possessing 2.5 grams of marijuana with the intent to distribute when he was nineteen years old.<sup>346</sup> While this offense was considered a misdemeanor under Illinois law, it is an aggravated felony under immigration laws.<sup>347</sup> Pacheco was placed in deportation proceedings.<sup>348</sup>

Deportation of lawful permanent residents can be excessive and has even been described as cruel and unusual punishment.<sup>349</sup> Justice Brewer, in his dissenting opinion in *Fong Yue Ting*, stated: “[e]very one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”<sup>350</sup> A judge of the United States District Court for the Northern District of Illinois shared this sentiment in a case involving a petitioner convicted of selling marijuana and thus facing deportation.<sup>351</sup> In its decision, the court noted, “[i]n this case petitioner stands to lose his residence, livelihood, and most importantly, his family. Certainly if the same thing occurred to a United States citizen a Court would not hesitate to call it punishment—moreover, cruel and unusual punishment.”<sup>352</sup>

As described in Part II, because of the sheer number of crimes giving rise to deportation, many lawful permanent residents find themselves in deportation proceedings without the possibility of discretionary relief to prevent deportation. As the *Padilla* Court noted, “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”<sup>353</sup>

While deportation is automatic for lawful permanent residents convicted of aggravated felonies, many of the crimes constituting aggravated felonies,

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344. Bernstein, *supra* note 335, at A17.

345. HUMAN RIGHTS WATCH, *supra* note 307, at 21.

346. *Id.*

347. *Id.*

348. *Id.*

349. See Leo Zaibert, *Uprootedness as (Cruel and Unusual) Punishment*, 11 NEW CRIM. L. REV. 384, 386 (2008) (arguing that some forms of deportation constitute cruel and unusual punishment); see also Legomsky, *Deportation of an Alien for a Marijuana Conviction*, *supra* note 4, at 461–62 (arguing that deportation is an unnecessary and disproportionate penalty for a marijuana offense).

350. *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

351. *Lieggi v. INS*, 389 F. Supp. 12, 14, 17 (N.D. Ill. 1975), *rev'd*, 529 F.2d 530 (7th Cir. 1976).

352. *Id.* at 17.

353. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

as illustrated above, are minor when compared to the severe penalty—“the equivalent of banishment or exile” as noted by the *Padilla* Court—of deportation.<sup>354</sup> In this regard, the sanction of deportation for lawful permanent residents for minor offenses is undoubtedly excessive. Stephen Legomsky, a professor and authority on U.S. immigration law, states that “in the growing number of cases in which the severity of the deportation sanction exceeds what is appropriate for the particular misconduct, the excess represents a cost, or harm, of over-reliance on the criminal enforcement model.”<sup>355</sup> Thus, under the “excessiveness” *Mendoza-Martinez* factor, the deportation of lawful permanent residents is punitive.

9. *The vast majority of the Mendoza-Martinez factors support the premise that deportation of lawful permanent residents constitutes punishment*

As discussed above, the majority of the *Mendoza-Martinez* factors—especially viewed in light of the *Padilla* decision—weigh in favor of finding that deportation of lawful permanent residents constitutes punishment. The only factor that may weigh against a finding of punishment is *Mendoza-Martinez*’s “scienter” factor. Although a majority of crimes that can lead to deportation require scienter, statutory rape is one crime that does not require such a finding. However, no single *Mendoza-Martinez* factor is controlling.<sup>356</sup>

When viewed as a whole, taking into account all of the *Mendoza-Martinez* factors, the deportation of lawful permanent residents appears to be punishment.

V. A FRAMEWORK FOR DETERMINING WHICH CONSTITUTIONAL CRIMINAL SAFEGUARDS SHOULD BE AFFORDED TO LAWFUL PERMANENT RESIDENTS IN REMOVAL PROCEEDINGS—LESSONS LEARNED FROM JUVENILE DELINQUENCY JURISPRUDENCE

Once it is established that deportation of lawful permanent residents on account of criminal convictions can constitute punishment and that certain constitutional criminal protections should be applied in removal

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354. *Id.* at 1486 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

355. Legomsky, *The New Path of Immigration Law*, *supra* note 4, at 520.

356. *Hudson v. United States*, 522 U.S. 93, 101 (1997) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)) (stating that no one *Mendoza-Martinez* factor should be controlling); *see also* *Dye v. Frank*, 355 F.3d 1102, 1105 (7th Cir. 2004) (holding that a Wisconsin tax was punitive, even though it imposed no affirmative disability or restraint or required a finding of scienter). The *Dye* court noted that “the absence of these elements [was] not dispositive, as all of the factors [were] ‘relevant to the inquiry, and may often point in differing directions.’” *Id.* (quoting *Mendoza-Martinez*, 372 U.S. at 169).

proceedings, the next important inquiry is to assess a framework for determining the protections that should be provided.<sup>357</sup> I begin this inquiry by suggesting a framework, or principled approach, for making such a determination.<sup>358</sup> I propose that the approach used by the Supreme Court in its juvenile delinquency jurisprudence could provide such a framework. Specifically, in determining the constitutional criminal protections that should be afforded to juveniles during the adjudicative stage of delinquency proceedings, the Court has assessed whether the addition of certain protections to delinquency proceedings would satisfy the fundamental fairness requirement of the Due Process Clause. I suggest that in the removal context, fundamental fairness under the Due Process Clause should be the principled approach.

A. *Juvenile Delinquency Jurisprudence: The Supreme Court Mandates that Certain Constitutional Protections Should Be Afforded During Delinquency Proceedings, Even Though These Proceedings Are Considered Civil*

Juvenile court proceedings, like removal proceedings, are considered civil rather than criminal.<sup>359</sup> In the juvenile delinquency context, however, the Court has found this label to be merely one of “convenience”<sup>360</sup> and, as I argue in the removal context, such labels should be ignored. In spite of the civil label, the Supreme Court has recognized that due process demands that certain rights be provided during the adjudicative stage of delinquency proceedings. Therefore, the civil label should not foreclose enhanced constitutional protections during removal proceedings involving lawful permanent residents.

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357. In addition to constitutional criminal protections being afforded to lawful permanent residents in deportation proceedings, it is equally important that legislative changes be implemented to provide greater discretionary relief for lawful permanent residents who are in removal proceedings because of an aggravated felony conviction. As noted earlier, lawful permanent residents convicted of aggravated felonies are no longer eligible for cancellation of removal. Under current law, immigration judges have no discretion to cancel the removal of a lawful permanent resident convicted of an aggravated felony. Thus, immigration judges currently cannot decide against deportation even if they find that such an action is excessive in relation to the criminal offense. *See also* Pauw, *supra* note 4, at 340–41 (arguing that avenues for relief from removal should be expanded, for instance by the revival of the 212(c) waiver of grounds of deportation for lawful permanent residents).

358. *See* Kanstroom, *supra* note 4, at 1932 (stating that “promising analogies might also be derived from arenas in which arguably civil proceedings have been recognized as criminal or quasi-criminal in nature” and highlighting the fact that juvenile delinquency proceedings are “one obvious example”).

359. *See In re Gault*, 387 U.S. 1, 17 (1967) (explaining that restrictions on the government in cases where an individual may be deprived of liberty were not applicable in juvenile proceedings because they were civil proceedings).

360. *Id.* at 50.

1. *In re Gault*—the right to notice of charges, counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination

In *In re Gault*,<sup>361</sup> the Supreme Court held that juveniles were entitled to notice of charges,<sup>362</sup> to counsel,<sup>363</sup> to confrontation and cross-examination of witnesses,<sup>364</sup> and to the privilege against self-incrimination<sup>365</sup> during the adjudicative stage of delinquency proceedings. *Gault* involved an appeal from the Arizona Supreme Court, which had affirmed the dismissal of a petition for a writ of habeas corpus.<sup>366</sup> The Arizona Supreme Court determined that while the Due Process Clause of the Fourteenth Amendment was applicable to delinquency proceedings, the proceedings under Arizona's Juvenile Code that resulted in the child's commitment did not offend the requirements of due process.<sup>367</sup> Appellants, *Gault*'s parents, urged the Supreme Court to find the Arizona Juvenile Code unconstitutional because *Gault* was taken from his parents and placed in a state institution as a result of proceedings that denied him the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination.<sup>368</sup> The denial of these rights, appellants argued, violated the Due Process Clause.<sup>369</sup> The Court restated its earlier holdings, finding that the Due Process Clause does apply to juveniles.<sup>370</sup> In *Gault*, the Court considered "the precise impact of the due process requirement" on proceedings that determine whether a juvenile is delinquent and can result in the placement of a child in a state institution.<sup>371</sup>

In assessing the precise impact of the due process requirement, the *Gault* Court detailed the history of the juvenile movement in the United States, which prescribed different procedures for children, compared to adults, in criminal proceedings.<sup>372</sup> The juvenile court movement sought to treat children differently from the way adult criminal defendants were treated.<sup>373</sup> "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."<sup>374</sup> It

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361. 387 U.S. 1 (1967).

362. *Id.* at 33 (citations omitted).

363. *Id.* at 41.

364. *Id.* at 57.

365. *Id.* at 55.

366. *Id.* at 3–4 (citing *In re Gault*, 407 P.2d 760 (Ariz. 1965)).

367. *Id.* at 4.

368. *Id.* at 10.

369. *Id.*

370. *Id.* at 13.

371. *Id.* at 13–14.

372. *Id.* at 14–18.

373. *Id.* at 15–16.

374. *Id.*

was insisted that these proceedings were not adversarial and that the state was simply acting as *parens patriae*.<sup>375</sup>

While the Court noted “the highest motives and most enlightened impulses” of the juvenile court movement, it held that these worthy ideals did not mean that juveniles should be denied fundamental fairness during delinquency proceedings.<sup>376</sup> After assessing some of the claimed benefits of the special procedures afforded within juvenile court, the Court asserted that the State could maintain the special characteristics of juvenile court while at the same time extending the fundamental fairness requirement of the Due Process Clause to juveniles.<sup>377</sup> The Court noted that “[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.”<sup>378</sup> The Court held that not all of the protections available in a criminal trial needed to be applied to delinquency proceedings, but that the hearing did require “the essentials of due process and fair treatment.”<sup>379</sup>

## 2. *In re Winship—the right to proof beyond a reasonable doubt*

In *In re Winship*,<sup>380</sup> the Court considered whether proof beyond a reasonable doubt was one of “the essentials of due process and fair treatment.”<sup>381</sup> *Winship* involved a boy adjudicated delinquent for larceny—stealing money from a woman’s pocketbook in a locker room.<sup>382</sup> Section 744(b) of the New York Family Court Act established a preponderance of the evidence standard to be applied when determining whether a juvenile was delinquent.<sup>383</sup> The New York Court of Appeals held this section of the New York Family Court Act to be constitutionally valid, noting that delinquency proceedings were not criminal and were designed “not to punish, but to save the child.”<sup>384</sup>

In assessing whether proof beyond a reasonable doubt should apply to delinquency proceedings, the *Winship* Court provided a historical overview of the reasoning for this standard of proof in criminal proceedings.<sup>385</sup> The

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375. *Id.* at 16 (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909)).

376. *Id.* at 17–19.

377. *Id.* at 26–27.

378. *Id.* at 19–20.

379. *Id.* at 30 (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)) (internal quotation marks omitted).

380. 397 U.S. 358 (1970).

381. *Id.* at 359 (quoting *Gault*, 387 U.S. at 30).

382. *Id.* at 359–60.

383. *Id.* at 360.

384. *Id.* at 365 (quoting *In re Samuel W.*, 247 N.E.2d 253, 254 (N.Y. 1969)) (internal quotation marks omitted).

385. *Id.* at 361–65.

Court determined that such a standard of proof was necessary when an individual stood to lose his liberty and would be stigmatized by a conviction.<sup>386</sup> It was also required to “command the respect and confidence of the community in applications of the criminal law.”<sup>387</sup> The *Winship* Court believed that “[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.”<sup>388</sup> It further noted that providing this standard of proof would not detract from the beneficial aspects of juvenile court proceedings.<sup>389</sup> Thus, the *Winship* Court held that proof beyond a reasonable doubt applied to juvenile delinquency proceedings.<sup>390</sup>

### 3. *McKeiver v. Pennsylvania—the denial of the right to a trial by jury*

In *McKeiver v. Pennsylvania*,<sup>391</sup> the Supreme Court held that a trial by jury was not required at the adjudicative stage of juvenile delinquency proceedings.<sup>392</sup> The majority determined that this right was not essential to due process or fair treatment and would not assist in the fact-finding process.<sup>393</sup>

The *McKeiver* Court thought that providing the right to a jury trial in juvenile court proceedings was unnecessary for a variety of reasons. The Court found it noteworthy that a Task Force Report on the efficacy of juvenile courts throughout the nation did not recommend a trial by jury.<sup>394</sup> The Court also noted that a jury trial could bring the “clamor of the adversary system” to juvenile court proceedings and further increase delays and formality.<sup>395</sup> The Court maintained that “[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the juvenile court’s assumed ability to function in a unique manner. It would not remedy the defects of the system.”<sup>396</sup>

In contrast, Justice Douglas’s dissent noted that when a juvenile was prosecuted for a criminal act and faced confinement, the same criminal procedures afforded to adults should be provided.<sup>397</sup> The dissent argued that a jury trial would “provide the child with a safeguard against being

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386. *Id.* at 363.

387. *Id.* at 364.

388. *Id.* at 365.

389. *Id.* at 366–67.

390. *Id.* at 368.

391. 403 U.S. 528 (1971).

392. *Id.* at 545.

393. *Id.* at 543–46.

394. *Id.* at 545–46.

395. *Id.* at 550.

396. *Id.* at 547.

397. *Id.* at 559 (Douglas, J., dissenting). Justices Black and Marshall joined with Justice Douglas in dissenting. *Id.* at 557.

prejudged.”<sup>398</sup> According to the dissent, differentiating delinquency proceedings from the criminal process was “spurious.”<sup>399</sup> The dissent also noted that “[t]his Court has discussed the futility of making distinctions on the basis of labels in prior decisions. Because the legislature dictates that a child who commits a felony shall be called a delinquent does not change the nature of the crime.”<sup>400</sup>

*B. Applying the Supreme Court’s Juvenile Court Framework to Removal Proceedings Involving Lawful Permanent Residents*

Using the Supreme Court’s framework in juvenile delinquency adjudications as a spring board, I propose that courts should consider whether a particular right is essential to due process and fundamental fairness when attempting to ascertain which constitutional criminal protections should apply to removal proceedings involving lawful permanent residents with criminal convictions. Part of this inquiry necessarily involves determining whether the right will assist in the fact-finding process.

While the Court has already recognized that due process of law applies to noncitizens in removal proceedings,<sup>401</sup> this recognition has not necessarily resulted in proceedings that are fundamentally fair. Similarly, as noted above, pre-*Gault* decisions recognized that the Due Process Clause applied to delinquency proceedings, but the *Gault* Court acknowledged that certain rights were still denied to juveniles during delinquency proceedings, resulting in proceedings that were not fundamentally fair.<sup>402</sup> Therefore, it is not sufficient in the removal context to simply say that due process applies. Certain additional rights must be afforded. As in *Gault*, the Court must consider “the precise impact of the due process requirement” in removal proceedings.<sup>403</sup>

In addition to using the juvenile delinquency jurisprudence as guidance, the test employed by the Supreme Court in *Mathews v. Eldridge* is

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398. *Id.* at 569.

399. *Id.* at 571.

400. *Id.*

401. *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (“But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”).

402. *In re Gault*, 387 U.S. 1, 19–20 (1967) (“Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”).

403. *Id.* at 14.

instructive for determining whether the existing administrative procedures in the deportation context are sufficient and comport with the requirements of due process.<sup>404</sup> *Mathews* asks whether the existing procedures “provide all the process that is constitutionally due before a recipient can be deprived of that interest.”<sup>405</sup> The *Mathews* test balances governmental and private interests by considering the following 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.<sup>406</sup>

In this Article, I do not attempt a comprehensive catalog of all the rights that might apply to lawful permanent residents who are in removal proceedings because of criminal convictions. However, two examples—the right to counsel and trial by jury—illustrate how the fundamental fairness principle invoked by the Supreme Court in the juvenile delinquency context might be applied to particular constitutional rights in the deportation setting.

### 1. *The right to counsel*

Fundamental fairness should require that lawful permanent residents in deportation proceedings have the constitutional right to an attorney, and an attorney should be appointed if the individual cannot afford one.<sup>407</sup>

The Supreme Court in *Gault* did not recognize the right to counsel under the Sixth Amendment, but it did recognize this right under the Due Process

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404. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

405. *Id.* at 332–33.

406. *Id.* at 334–35 (citation omitted).

407. 8 C.F.R. § 1003.16 (2011) (providing that an alien may be represented at no expense to the government). The right to effective assistance of counsel in removal proceedings is still unresolved. In *In re Compean*, Attorney General Mukasey partly overturned *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), a case decided by the Board of Immigration Appeals which established procedural requirements for filing a motion to reopen removal proceedings based upon a claim of ineffective assistance of counsel. *In re Compean*, 24 I. & N. Dec. 710, 712–13 (A.G. 2009), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009). In Attorney General Mukasey’s decision, he stated that noncitizens in removal proceedings had no right to counsel or to effective assistance of counsel under the Due Process Clause of the Fifth Amendment. *Id.* at 714. The decision was later vacated by Attorney General Holder. 25 I. & N. Dec. at 1. Attorney General Holder’s decision, however, did not address whether noncitizens have a right to effective assistance of counsel in removal proceedings. Instead, Attorney General Holder stated,

In *Compean*, the introduction of a new procedural framework depended in part on Attorney General Mukasey’s conclusion that there is no constitutional right to effective assistance of counsel in removal proceedings. Because that conclusion is not necessary either to decide these cases under pre-*Compean* standards or to initiate a rulemaking process, this Order vacates *Compean* in its entirety.

*Id.* at 2–3.

Clause.<sup>408</sup> The Court stated that “[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>409</sup> Because delinquency proceedings could result in incarceration, the Court found the right to counsel to be essential.

In the deportation context, lawful permanent residents face removal from the United States. While deportation proceedings do not result in incarceration, they involve an affirmative disability—near permanent exile from one’s home. This result could be considered even more severe than incarceration. The private interest at stake is significant.

Lawful permanent residents need an attorney who can make a “skilled inquiry into the facts” and “insist upon regularity of the proceedings.”<sup>410</sup> Without counsel, lawful permanent residents face the risk of erroneous deprivation of the right to remain in the United States. Lawful permanent residents who are not represented by counsel are not able to manage complicated proceedings involving issues of criminal and immigration law.

Specifically, counsel is necessary to determine whether the underlying conviction actually constitutes an aggravated felony or a crime involving moral turpitude—both criminal grounds that can result in deportation. Further, if a lawful permanent resident is convicted of a crime of moral turpitude, counsel is necessary to determine whether the individual is eligible for discretionary relief that would allow him to remain in the United States.

Providing counsel would certainly add additional fiscal and administrative burdens. It would require counsel to be appointed if a lawful permanent resident could not afford one. However, when considering the interest at stake—the right to remain in the country where the individual has permanent residence—the additional burdens placed on the government are minor compared to the errors that could result from a lack of legal representation. An erroneous finding that a lawful permanent resident was convicted of a deportable offense could result in near permanent removal from the United States. Such an error has severe and drastic consequences for lawful permanent residents.

The decision in *Padilla* reinforces this conclusion. The Supreme Court required defense counsel to inform the accused of the possible deportation consequences of a guilty plea.<sup>411</sup> In doing so, the Court highlighted not only the significance of deportation, but also the importance of competent

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408. *In re Gault*, 387 U.S. 1, 41 (1967).

409. *Id.* at 36 (footnote omitted).

410. *Id.*

411. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

counsel in ensuring that the defendant is able to proceed knowledgeably.<sup>412</sup>

2. *The right to a trial by jury*

Unlike the right to counsel, the fundamental fairness approach does not necessarily require the right to trial by jury in removal proceedings. Specifically, such a right may not aid in the fact-finding process. Typically, during such proceedings, the inquiry is a legal one—determining whether a particular crime constitutes an aggravated felony or crime involving moral turpitude. The facts are usually clear, since the court records will normally reveal whether the defendant has in fact been convicted, and if so, the crime resulting in a conviction. In this respect, it would be unnecessary to have a jury resolve factual disputes.

Some crimes triggering removal are not aggravated felonies, so discretionary remedies such as asylum and cancellation of removal can be litigated. The decision to grant these remedies is likely best suited for a judge who, unlike a jury, is familiar with the law and has more experience hearing removal cases.

Thus, the right to a jury trial would not assist in the fact-finding process and, therefore, would not be necessary to provide the essentials of due process in the deportation context. Under the *Mathews* test, because of the limited benefits of a jury in deportation proceedings, the government's interests would outweigh the provision of this protection.

#### CONCLUSION

Numerous factors illustrate that the deportation of lawful permanent residents because of criminal convictions constitutes punishment.

The recent Supreme Court decision in *Padilla* has changed the jurisprudential landscape in terms of how deportation is viewed under the law. In two respects, *Padilla* bolsters the argument that the deportation of lawful permanent residents constitutes punishment. First, the Court in dictum demonstrated that deportation resembles a direct consequence of a plea. As such, deportation is not separate from the criminal punishment, but is, in fact, part of the punishment imposed. Second, the decision emphasized the severity of deportation.

Additionally, in light of the *Padilla* decision, the factors applied by the Supreme Court in *Mendoza-Martinez* demonstrate that the deportation of lawful permanent residents in removal proceedings constitutes punishment.

Because of the punitive nature of deportation, I have suggested a framework for determining the constitutional criminal protections that should be afforded to lawful permanent residents during removal

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412. *Id.* (citing *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

proceedings based on criminal convictions. I have proposed that the framework of fundamental fairness under the Due Process Clause, applied by the Supreme Court to determine the protections that should be afforded to juveniles in delinquency proceedings, could also be used in the deportation context.