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Constitutionalizing Immigration Law on Its Own Path

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CONSTITUTIONALIZING IMMIGRATION LAW ON ITS OWN PATH

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ABSTRACT

Courts should insist on heightened procedural protections in immigration adjudication. They should do so under the Fifth Amendment's Due Process Clause rather than by importing Sixth Amendment protections from the criminal context. Traditional judicial oversight and the Due Process Clause provide a better basis than the Sixth Amendment to interpose heightened procedural protections in immigration proceedings, especially those involving removal for a serious criminal conviction. The Supreme Court's immigration jurisprudence in recent years lends support for this approach. The Court has guarded the availability of judicial review of immigration decisions. It has affirmed that courts are the arbiters of constitutional issues (including due process) and criminal statutory interpretation. The Court has accorded agency deference on matters of agency expertise, which does not include interpretation of criminal law and convictions. And the Court has created generally applicable procedural protections in order to minimize court interference with substantive immigration policy. Guided by these core concepts, courts are poised to develop procedural protections for immigrants in removal proceedings that are tailored to the institutional interests at stake and protective of immigrants. By constitutionalizing immigration on its own path, courts may also avoid some of the pitfalls of a Sixth Amendment–based criminal-rights model.

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INTRODUCTION

It is wholly desirable and constitutionally appropriate for courts to impose procedural protections in immigration proceedings to avoid due process concerns and facilitate judicial review, but they should not rely on Sixth Amendment protections to do so. It is well settled that aliens in

removal proceedings are entitled to due process under the Fifth Amendment to the Constitution. Some immigration scholars and advocates have argued that because immigration proceedings are sufficiently criminal in nature, immigrants, like defendants in criminal cases, should be afforded Sixth Amendment protections, especially the right to appointed counsel.[1] Those favoring this Sixth Amendment approach may find a glimmer of hope in the Court's recent decision in *Padilla v. Kentucky*,[2] in which it held that the defense counsel was deficient for failing to accurately advise the defendant about the certainty that he would be deported as a consequence of pleading guilty to a drug trafficking offense.[3] *Padilla* is a watershed decision because it recognizes that a defendant's failure to understand immigration consequences of his conviction could render his guilty plea invalid. And *Padilla* does much to erase the Court's rigid and historical classification of deportation as a civil, not a criminal, proceeding. By likening deportation to criminal punishment and bringing immigration consequences within the ambit of the defense counsel's duty to the client, *Padilla* arguably lends support to the view that Sixth Amendment protections should be afforded to persons in removal proceedings.

Despite the allure of the Sixth Amendment—especially because it offers the promise of a right to appointed counsel—courts should instead tailor procedural protections to fit immigration law based on traditional judicial powers and due process concerns. In confirming and developing procedural protections in immigration law, the Sixth Amendment doctrine might serve as an important guidepost, but it may neither fit immigration proceedings nor sufficiently protect immigrants. Instead, courts should rely, as they have done historically, on the Due Process Clause and their traditional judicial review functions to ensure that immigration proceedings are fair, just, and sufficiently transparent to allow review.

Over the past decade, the Supreme Court's immigration jurisprudence has amplified several themes that are essential to this approach. The Court has guarded the availability of judicial review of immigration decisions. It has affirmed that courts are the arbiters of constitutional issues (including due process) and criminal statutory interpretation. The Court has accorded deference on matters of agency expertise, while identifying areas not within the agency's expertise as within its own bailiwick. And it has created generally applicable procedural protections

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[1] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (proposing a right to deportation counsel based on the Sixth and Fifth Amendments).

[2] 130 S. Ct. 1473 (2010).

[3] Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (describing Padilla's contribution to a "reconceptualization" of the nature of deportation and arguing in favor of right to counsel).

in order to minimize court interference with substantive immigration policy and law. Aided by these core concepts, courts are poised to develop procedural protections for immigrants in removal proceedings that are tailored to the institutional interests at stake and protective of immigrants, who in many cases are facing permanent exile and the risk of harm upon return to their native land. Importantly, by constitutionalizing immigration on its own path, courts may also avoid some of the pitfalls of adopting a Sixth Amendment–based criminal-rights model.

This Article proceeds as follows. Part I describes some of the criminal aspects of removal proceedings, focusing on the adjudication of "aggravated felony" convictions under immigration law. Part II identifies several core features of a due process–based judicial review framework that would support judicially imposed procedural protections for noncitizens in removal proceedings. Part III examines two important procedural protections in criminal law, namely, constitutional discovery and the right to counsel, and proposes how analogous protections might be interposed in immigration courts using the due process–based judicial review framework.

I. CRIMINAL LAW IN IMMIGRATION COURT

Developments over the past several decades have changed the focus of immigration law and the role of courts in reviewing immigration decisions. Immigration laws expanded the immigration consequences of criminal convictions and restricted judicial review of immigration decisions. As a result, immigration courts are deeply involved in determining the immigration consequences of criminal convictions. At the same time, judicial review of immigration decisions has been limited or eliminated altogether. Coupled with stepped-up enforcement, greater numbers of immigrants are in removal proceedings than ever before,[4] facing harsher conditions during removal proceedings and harsher consequences as a result of the proceedings, with limited ability to seek judicial review of the agency action.

This Article focuses on removal proceedings for immigrants based on "aggravated felony" convictions, one of the centerpieces of immigra-

[4] In 1996, when Congress expanded the term "aggravated felony," approximately 50,000 noncitizens were removed, nearly 33,000 of them based on criminal conviction. IMMIGRATION & NATURALIZATION SERV., 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 173 (1997), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/statyearbk96.zip. By contrast, in 2010, approximately 363,000 noncitizens were detained and 387,000 noncitizens were removed, approximately 169,000 of them based on a criminal conviction. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010 1 [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2010], *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

tion enforcement. Though many grounds for deportation exist, removal based on prior criminal conviction is common and deportation based on an "aggravated felony" leads to automatic removal and permanent exile.[5] Because the aggravated felony determination focuses on a criminal conviction and the stakes are so high, these removal proceedings may be the most comparable to criminal proceedings. This discussion considers several aspects of these immigration proceedings, including the relationship to the underlying criminal conviction, the removal hearing environment, and the legal analysis immigration courts perform in determining aggravated felonies. While immigration courts are steeped in criminal law issues in a criminal-like setting, their function and mission is distinct from criminal court proceedings: they have no institutional expertise in criminal law, do not make factual findings, and do not adjudicate guilt or sentencing enhancements.

As the Supreme Court recognized in *Padilla v. Kentucky*, criminal proceedings and immigration proceedings are integrally related.[6] Critics have observed more broadly that the criminalization of immigration law has been asymmetric[7]: the government has increasingly relied on criminal statutes, criminal law enforcement tactics, and criminal and deportation penalties as immigration policy tools, but immigrants have not been accorded corresponding criminal procedural rights. Doctrinally, immigration proceedings have historically been labeled by the Court as civil, not criminal.[8] This classification is important because immigrants in removal proceedings do not have a right to appointed counsel or other procedural protections afforded criminal defendants under the Sixth Amendment.[9] In practice, however, this distinction has become blurred as immigration has transformed criminal practice and criminal law issues saturate immigration proceedings. In exploring the theoretical support for affording similar procedural rights in immigration court, it is helpful to examine the practical importance of procedural rights in the underlying criminal and subsequent removal proceedings.

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[5] *Padilla*, 130 S. Ct. at 1484.

[6] *Id.* at 1482.

[7] Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 n.1 (2009); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Markowitz, *supra* note 3, at 1339–47.

[8] Markowitz, *supra* note 3, at 1334; 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, 298–307 (2008) (describing the Supreme Court's treatment of immigration as a civil, rather than criminal, matter).

[9] U.S. CONST. amend. VI (referring to "all criminal prosecutions"); Kanstroom, *supra* note 1, at 1501 (citing Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875, 875–76 (1961)) (explaining that the civil law label has precluded application of the Sixth Amendment to immigration proceedings).

A. *Immigration Consequences of Aggravated Felonies*

For nearly a century, immigration law has imposed the severe sanction of deportation for immigrants convicted of crimes on American soil.[10] The Immigration and Nationality Act of 1917 authorized deportation for commission of a felony "crime involving moral turpitude" within five years of entry or two or more crimes involving moral turpitude any time after entry.[11] As early as 1922, narcotics offenses were added as grounds for removal and treated as crimes involving moral turpitude.[12] The term "aggravated felony" was incorporated into the immigration law in 1988 and is unique to the immigration code, as it is not used elsewhere in federal statutes.[13] Initially, the term only included a handful of serious crimes, including murder and trafficking in drugs or guns.[14] In 1990, Congress barred discretionary relief to any person convicted of an aggravated felony who had served at least five years in prison.[15]

The definition of "aggravated felony" was greatly expanded in 1996 with the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[16] These laws added many criminal convictions to the list of "aggravated felonies," even including cases in which the court imposed a suspended sentence, requiring no service of jail or prison time.[17] By expanding the list of deportable offenses, Con-

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[10] *Padilla*, 130 S. Ct. at 1478–79 (citing S. REP. NO. 1515, at 54–55 (1950)).

[11] *Id.* at 1479.

[12] *Id.*

[13] *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2585 (2010).

[14] *See* Anti–Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344, 102 Stat. 4182, 4469–70 (amending 8 U.S.C. §§ 1101a), 1252(a)).

[15] *See* INS. v. St. Cyr, 533 U.S. 289, 297 (2001) (citing Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (1990) (amending 8 U.S.C. § 1182(c))).

[16] Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, tit. IV, § 440(e), 110 Stat. 1214, 1277 (amending 8 U.S.C. § 1101(a)(43)); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, § 304(a)(3), 110 Stat. 3009-546 (amending 8 U.S.C. § 1229b(a)(3)). AEDPA became effective on April 24, 1996, 110 Stat. at 1214, and IIRIRA became effective on September 30, 1996, 110 Stat. at 3009-546.

[17] Under present law, 8 U.S.C.A. § 1101(a)(43) (West 2011):

The term "aggravated felony" means—

> (A) murder, rape, or sexual abuse of a minor;
>
> (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
>
> (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);
>
> (D) [money laundering, as defined in 18 U.S.C. §§ 1956–1957], if the amount of the funds exceeded $10,000;
>
> (E) [firearms and explosives offenses, described in 18 U.S.C. §§ 842(h–i); 844(d–i); 922(g)(1–5), (j), (n), (o), (p), or (r); or 924(b), (h); 26 U.S.C. § 5861];

gress created a much larger class of persons subject to removal based on criminal convictions.[18] That same year, Congress also barred discretionary relief for any person convicted of an aggravated felony, even if they received a suspended prison sentence.[19] Today removal of "crimi-

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> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;
> (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;
> (H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);
> (I) [a child pornography offense described in 18 U.S.C. §§ 2251, 2251A, or 2252];
> (J) [a racketeer-influenced-corrupt-organizations offense described in 18 U.S.C. §§ 1962, 1084 or 1955], for which a sentence of one year imprisonment or more may be imposed;
> (K) [a prostitution or involuntary servitude offense described in 18 U.S.C. §§ 2421, 2422, or 2423 or 18 U.S.C. §§ 1581–1585 or 1588–1591];
> (L) a [spying offense described in 18 U.S.C. §§ 793, 798, 2153, 2381 or 2382; or 50 U.S.C. § 421];
> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;
>
> (N) [an alien-smuggling offense described in 8 U.S.C. § 1324(a)(1)(A) or (a)(2)], except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent . . . to violate a provision of this chapter;
> (O) an [unlawful reentry] offense described in [8 U.S.C. §§ 1325(a) or 1326];
> (P) [a passport] offense in violation of [18 U.S.C. §§ 1543 or1546(a)] for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien [committed the offense intending to benefit the alien's spouse, child, or parent];
> (Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;
> (R) [a vehicle theft or fraud offense] for which the term of imprisonment is at least one year;
> (S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
> (T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
> (U) an attempt or conspiracy to commit an offense described in this paragraph.
>
> The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

Id. (footnotes omitted).

[18] *St. Cyr*, 533 U.S. at 297 (citing 110 Stat. at 1277 (amending 8 U.S.C. § 1182(c))).

[19] IIRIRA repealed the broad discretionary relief previously available under § 212(c). *See* § 304(b), 110 Stat. at 3009-597. The new law replaced discretionary relief with a provision that

nal aliens" is a central part of immigration enforcement and includes a large class of aggravated felons.[20]

A determination in immigration court that an alien's prior conviction is an "aggravated felony"[21] carries serious and lasting consequences. An aggravated felon faces certain removal and is ineligible for release pending removal[22] and discretionary relief from removal, such as "voluntary departure" or political asylum.[23] An aggravated felon cannot lawfully return to the United States[24] and will face criminal sanctions if found to have returned to this country, including significant sentencing enhancements based on the prior "aggravated felony" conviction.[25] Whether a prior conviction is an aggravated felony is a purely legal issue that can involve complex statutory analysis of criminal laws and criminal records.[26] The aggravated felony determination is made in the first instance by the immigration court and appealable to the Board of Immigration Appeals (BIA) and the federal circuit court where the removal action was filed.[27] Although courts generally lack jurisdiction to review an order of removal based on an aggravated felony conviction, the propriety of the aggravated felony determination is a judicially

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authorizes the Attorney General to cancel removal for a narrow class of inadmissible or deportable aliens, but excludes any person "convicted of any aggravated felony." *See id.* at 3009-594 (adding section 240A to the Immigration and Nationality Act, tit. II, ch. 4) (codified at 8 U.S.C. § 1229b (2006)); *id.* § 1229b(a)(3). In *Judulang v. Holder*, *appeal docketed*, No. 10-694 (U.S. Nov. 29, 2010), the Supreme Court will address whether a lawful permanent resident who previously pled guilty to offenses that rendered him excludable and deportable, but who did not leave the country before the start of removal proceedings against him, may be granted discretionary relief from deportation under former § 212(c). *See* Kevin Johnson, *Argument Recap: Former Section 212(c) Relief from Removal for Lawful Permanent Residents Convicted of Aggravated Felonies*, SCOTUSBLOG (Oct. 17, 2011, 1:01 PM), http://www.scotusblog.com/2011/10/argument-recap-judulang-v-holder-former-section-212c-relief-from-removal-for-lawful-permanent-residents-convicted-of-aggravated-felonies.

[20] *See* IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 4, at 1(noting that of the approximately 387,000 persons deported in 2010, 169,000 were "known criminal aliens").

[21] *See* 8 U.S.C.A. § 1101(a)(43) (West 2011).

[22] *See id.* § 1226(c) (requiring mandatory custody pending removal) and Demore v. Kim, 538 U.S. 510, 513 (2003) (discussing provisions requiring mandatory custody of aggravated felons and eliminating judicial review of custody decisions).

[23] *See* 8 U.S.C.A. § 1229(b)(a)(3) (prohibiting cancellation of removal for persons convicted of an aggravated felony); *id.* § 1229(c)(a)(i) (aggravated felon ineligible for voluntary departure); *id.* § 1158(b)(2)(A)(ii), (B)(i) (aggravated felon ineligible for asylum).

[24] 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (2006) (aggravated felons are "inadmissible").

[25] *See id.* § 1326 (criminalizing unlawful reentry by removed aliens); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (adding multiple-level sentencing enhancement for person committed of "aggravated felony," as defined in the INA). If convicted, the noncitizen, aggravated felon first serves a criminal sentence before being deported again.

[26] *See, e.g.*, Nijawan v. Holder, 129 S. Ct. 2294 (2009) (surveying state "fraud and deceit" statutes in effect in 1996, when Congress defined aggravated felony to include an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," to help discern Congress's intent in setting the threshold); Leocal v. Ashcroft, 543 U.S. 1, 8 nn.5–6 (2004) (referring to thirty-six state statutes criminalizing injury caused by driver under the influence).

[27] *See* 8 U.S.C. § 1252.

reviewable legal issue.[28] As discussed below, the aggravated felony determination may involve a detailed and technical analysis of a the prior conviction, the relevant state or federal statute of conviction, related case law, and the record of conviction from the state or federal court that adjudicated the conviction.

B. Padilla *and the Criminal Process Before Removal Proceedings*

Though the aggravated felony determination is made in immigration court, the underlying conviction for it is established in criminal court. In the litigation continuum, a noncitizen moves from conviction in state or federal criminal court where he has the assistance of counsel and other criminal procedure rights, to removal proceedings in immigration court where he has no right to counsel and many fewer procedural protections. The Supreme Court held in *Padilla* that counsel in criminal cases have a duty to inform the defendant about whether his plea carries a risk of deportation.[29] It is especially valuable for the noncitizen to get such advice in the criminal court record before or while the record is being made because that record of conviction forms the basis for the aggravated felony analysis in immigration court.[30] As *Padilla* highlights, immigration law consequences can significantly impact the resolution of the criminal case.

As the Court in *Padilla* recognized, immigration consequences are an "integral part—indeed, sometimes the most important part" of the penalty that may be imposed on noncitizen defendants for a criminal conviction.[31] The severe immigration consequences imposed on noncitizens with prior convictions "have dramatically raised the stakes of noncitizen's criminal conviction."[32] The Court explained that immigration consequences may be important to both sides in resolving a criminal case: because the "threat of deportation is a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal that does," both defense and prosecution may

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[28] *See id.* § 1252(a)(2)(C) (providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony or crime of moral turpitude); *id.* § 1252(a)(2)(D) (preserving judicial review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section).

[29] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010). The Court remanded on the issue of prejudice. *Id.* at 1487.

[30] 8 U.S.C. § 1229a(c)(3)(B) (describing documents used to prove prior convictions).

[31] *Padilla*, 130 S. Ct. at 1480.

[32] *Id.*

benefit by "[b]ringing deportation consequences into this process."[33] As a practical matter, state and federal prosecutors, and by extension defense lawyers, play an important role in determining which noncitizens will be deported permanently or with the possibility of administrative relief.[34]

In *Padilla*, a noncitizen who had been a lawful permanent resident of this country for over forty years pleaded guilty in state court to a felony drug charge that "made his deportation virtually mandatory."[35] His lawyer had assured him that having lived here so long, he did not have to worry about immigration consequences—which was obviously wrong because the drug transportation conviction would clearly make him deportable.[36] Claiming his lawyer in the criminal proceeding was ineffective in violation of his Sixth Amendment right to counsel, Padilla alleged that but for his attorney's incorrect advice, he would have insisted on going to trial.[37] Analyzing the claim under the two-part test for ineffective assistance of counsel,[38] the Court found that the defense counsel's performance was deficient based on the incorrect advice on the risk of deportation, and it remanded on the issue of whether the attorney's deficient performance prejudiced Padilla.[39]

Padilla highlights the indeterminacy of the civil–criminal distinction and its significance for the procedural rights afforded to noncitizens. In *Padilla* the civil–criminal distinction was considered in the narrow context of whether deportation was "collateral" to the criminal case or part of the criminal penalty that the defendant was required to understand before pleading guilty.[40] While *Padilla* specifically brings immigration consequences into the ambit of defense counsel's duties in

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33 *Id.*

34 *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010).

35 *Padilla*, 130 S. Ct. at 1478.

36 8 U.S.C.A. § 1101(a)(43)(B) (West 2011); *Padilla*, 130 S. Ct. at 1477 (referring to a guilty plea for "transportation of a large amount of marijuana").

37 *Padilla*, 130 S. Ct. at 1478.

38 *Id.* at 1482 (analyzing claim under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which provides for relief if counsel's performance "fell below an objective standard of reasonableness," and "but for counsel's unprofessional errors, the result of the proceeding would have been different").

39 *Id.* at 1486.

40 *Id.* at 1480; *see also* United States v. Bethurum, 343 F.3d 712, 715 (5th Cir. 2003) ("[Defendant] testified that, as an employee of his family's gun dealership, he would not have pleaded guilty to the offense had he known that the conviction would affect his ability to possess firearms."); United States v. Cariola, 323 F.2d 180, 181–82 (3d Cir. 1963) ("[T]he conviction has been a source of embarrassment and loss of prestige to petitioner as a responsible citizen and union leader, and that if petitioner had fully realized the consequences of the plea, he would not have entered it."); Brief for the United States As Amicus Curiae Supporting Affirmance at 18 n.6, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2509223, at *18 n.6 (listing other severe "collateral consequences" of conviction, such as sex offender registration, civil commitment, professional disbarment) (citing Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004)) ("[D]efendant was unaware of committal for life as sexually dangerous person").

a criminal case, the Court stopped short of labeling deportation as criminal or civil, finding that the "collateral versus direct distinction" is "ill-suited" to evaluating an ineffective assistance of counsel claim.[41] In *Padilla* the Court was focused on the assistance of counsel in the criminal proceeding, not the related immigration proceeding when the immigration consequences were actually imposed. The Court observed that deportation is a "particularly severe 'penalty'"[42] that is integral to the penalty aspects of a criminal case. At the same time, it stated that deportation "is not, in a strict sense, a criminal sanction,"[43] and removal proceedings in immigration court are civil in nature.[44] Still, the Court acknowledged the interrelationship of these two proceedings: "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century."[45] Because recent immigration law changes have made deportation "nearly an automatic result for a broad class of noncitizen offenders," the Court added, it is "most difficult to divorce the penalty from the conviction in the deportation context."[46]

While immigration law has become more criminal in nature, *Padilla* and other examples remind us that this is not a one-way street.[47] In criminal cases against a noncitizen, "civil" immigration law consequences may drive the resolution of the case. "Bringing deportation consequences into this [criminal] process,"[48] the Court explained, can be mutually beneficial to the defense and the prosecution, as the threat of immigration consequences is powerful incentive to plead guilty. Effective defense counsel would seek to negotiate a guilty plea that avoids or eliminates the risk of deportation.[49] While in *Padilla* the risk of deportation could be readily ascertained from the relevant immigration statute, the Court acknowledged that many criminal lawyers are not versed in immigration law, which "can be complex, and is a legal specialty of its own."[50]

As a practical matter, one must ask which criminal procedural protections benefit a noncitizen defendant in a criminal case. In theory, noncitizens in criminal court are afforded the same rights as other criminal defendants under the Fourth, Fifth, Sixth, and Eighth Amend-

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

42 *Id.* at 1481 (citing Fong Yue Ting v. United States, 140 U.S. 698, 740 (1893)).

43 *Id.* at 1482.

44 *Id.* at 1481 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)).

45 *Id.*

46 *Id*. at 1482.

47 Eagly, *supra* note 34, at 1298 (highlighting that while immigration scholars have challenged "the continuing classification of deportation as civil," they have not explored "the opposite question of whether criminal law may serve an immigration screening function").

48 *Padilla*, 130 S. Ct. at 1486.

49 *Id.*

50 *Id.* at 1483.

ments.[51] In practice, those rights may seem less robust to noncitizens in criminal cases for two main reasons. First, as *Padilla* reinforces, ninety-five percent of all defendants are convicted by means of a guilty plea.[52] Defendants who plead guilty waive many constitutional rights, including, typically, any challenge to guilt or pre-guilt issues,[53] the right to jury trial and trial-based protections,[54] proof of the elements beyond a reasonable doubt,[55] and, often, the right to appeal.[56] *Padilla* highlights that noncitizens face extreme pressure to plead guilty to avoid or minimize immigration consequences. Data on federal guilty pleas shows that noncitizen defendants plead guilty at higher rates than in other substantive areas.[57] Aside from the right to appointed counsel, most noncitizen defendants may actually exercise few criminal rights in criminal court. Second, noncitizens may not experience criminal procedure in the same way as citizens.[58]

Noncitizens, especially those charged with immigration crimes, may be treated differently in criminal court.[59] As Professor Eagly describes with respect to federal immigration prosecutions, many noncitizens cannot obtain bail because they are already in immigration custody or would be if ordered released by the federal court.[60] Prosecutors may have access to incriminating evidence obtained by immigration law enforcement under less protective standards, such as by interrogating a noncitizen without *Miranda* warnings,[61] making warrantless border

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51 Eagly, *supra* note 34, at 1295 (discussing the conventional view that noncitizen defendants in criminal courts are afforded a full panoply of criminal procedure rights and prosecutors enjoy institutional autonomy).

52 *Padilla*, 130 S. Ct. at 1485 n.13; *see also* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1393 (2011) ("[*Padilla*] may signal . . . the Court's recognition of plea bargaining's dominant role in criminal adjudication.").

53 United States v. Doyle, 348 F.2d 715, 718 (2d Cir. 1965).

54 *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty . . . is itself a conviction; nothing remains but to give judgment and determine punishment.").

55 *Id.*

56 The Federal Rules of Criminal Procedure specifically contemplates that defendants may waive "the right to appeal," and most do. FED. R. CRIM. P. 11(b)(1)(N); *see also* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that defendants waive appeal in nearly two-thirds of plea agreements nationwide).

57 Eagly, *supra* note 34, at 1323 fig.1, 1324 n.259 (discussing factors affecting guilty plea rates).

58 *See id.*; *see also* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1423–32 (2011) (describing ways in which noncitizens are disadvantaged in criminal proceedings).

59 Chin, *supra* note 58, at 1423–32.

60 Eagly, *supra* note 34, at 1307 (describing an "immigration detainer," which requires the district court to release a defendant to immigration custody); *see also* Chin, *supra* note 58, at 1423–32 (describing denial of bail under state laws).

61 Eagly, *supra* note 34, at 1308 (describing how un-Mirandized statements obtained in "administrative" or "noncustodial" settings later may be admitted against a criminal defendant). A witness's undocumented status may be used to impeach him, thus impeding a defendant's right to testify on his own behalf or the risk of summoning witnesses on his behalf. Chin, *supra* note 58, at 1427–28. Undocumented persons may be ineligible for nonprison sentences. *Id.* at 1430–31.

searches, or obtaining "administrative warrants" based on reasonable suspicion.[62] Some jurisdictions expedite high-volume processing of immigration crimes under "Operation Streamline," in which every illegal re-entrant in a particular border sector is prosecuted, and the "Fast Track" program, in which noncitizens may plead guilty quickly in exchange for a discounted sentence.[63]

The prosecution of noncitizens arrested in a 2008 immigration raid at a meat processing plant in Postville, Iowa offers an extreme example of how noncitizens may experience a form of criminal prosecution that is more administrative than criminal in nature.[64] In that case, hundreds of noncitizen factory workers were arrested, appointed counsel in groups of ten or more, and within four days of arrest, they pleaded guilty and were sentenced on the same day.[65] Most of them pleaded guilty to using false documents, which was unusual in that such undocumented persons often are promptly deported, not charged criminally.[66] The guilty plea agreements also contained a "stipulated removal order" in which they abandoned in criminal court any relief from removal that they might have obtained in immigration court.[67] Such en masse processing is reminiscent of removal proceedings against immigrant detainees rather than the individualized attention usually accorded criminal defendants in adjudicating guilt and imposing sentence.[68]

Padilla underscores that as a practical matter criminal practice has been transformed by immigration law and vice versa. Federally, immigration cases comprise over one-third of the total docket.[69] Scholars have observed how immigration and criminal law enforcement activities at the state and federal levels have blurred the line between these two areas.[70] The reality for noncitizen defendants is that immigration law

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[62] Eagly, *supra* note 34, at 1312–17 (referring to warrantless and administrative searches at the border or its "functional equivalent," such as airport).

[63] *See* Chacón, *supra* note 7, at 142 (describing Operations Streamline and Fast Track); Eagly, *supra* note 34, at 1321–24 (stating that in 2008 the median number of days for immigration case processing was less than 10 days, compared to 250 days for other crime categories).

[64] Chacón, *supra* note 7, at 143; Eagly, *supra* note 34, at 1301–03.

[65] Eagly, *supra* note 34, at 1301–03.

[66] Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008 at A1 (reporting that 260 of the immigrants were sentenced to five months for using false documents).

[67] Eagly, *supra* note 34, at 1304.

[68] Brandon Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 394–99 (2007) (highlighting the rhetorical emphasis on a criminal defendant's individualized rights and day in court).

[69] *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, at 12, *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseload Statistics/FederalJudicialCaseloadStatistics2010.aspx (reporting that immigration filings made up 35% of all criminal filings, an 11% increase over the prior year in terms of number of cases, and a 10% increase over prior year in terms of number of defendants).

[70] *See* Chacón, *supra* note 7, at 135 n.1 (citing Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827–

may shape the terms of a guilty plea, the court's processing of the case, and the sentence.[71] This overlay of immigration law in the criminal process may render it a quasi-administrative process, especially for this class of defendants.

C. *Criminal Aspects of Removal Proceedings*

Removal proceedings, which are traditionally civil and administrative in nature, have many quasi-criminal features. This is in part a reflection of the substantive criminal law focus in removal proceedings, as immigration courts adjudicate prior criminal convictions. But it also stems from the widespread use of detention of noncitizens, which affects the circumstances of adjudication in important ways. Detention and lack of counsel greatly diminish a noncitizen's chances of success in removal proceedings.[72] Detention is a hardship on the individual and the family that may make it difficult to access legal services, get advice from family or community, or gather evidence to support a defense to removal charges or claim for discretionary relief. These circumstances may result in some noncitizens being unable to support a defense or foregoing defenses altogether in order to expedite deportation.[73]

The rise in the number of persons in immigration detention has been dramatic.[74] In 1994, approximately 6000 noncitizens were in detention on any given day.[75] By 2001, the daily detention rate had tripled to more than 20,000 individuals and by 2008 it had spiked to 33,000.[76] The annual detention rate over this same period jumped from approx-

32 (2007) (outlining "origins and consequences of the blurred boundaries between immigration control, crime control, and national security")); Legomsky, *supra* note 7, at 471–72 (describing "growing convergence" of criminal justice and immigration control systems); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006).

71 *See* Chin, *supra* note 58, at 1430–31 (noting that undocumented persons may be ineligible for nonprison sentences under state law); Eagly, *supra* note 34, at 1318–19 (observing that noncitizens are more likely to receive a prison sentence and serve more time at higher security prisons based on their classification as a "deportable alien").

72 *See* Steering Comm. of the N.Y. Immigrant Representation Study Report, *New York Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357, 363–64 (2011) [hereinafter NYIRS Report] (finding that in removal proceedings noncitizens with counsel were five times more likely than unrepresented noncitizens to obtain relief and that seventy-nine percent of detained noncitizens were unrepresented).

73 Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 46 (2010).

74 *Id.* at 44–45.

75 *Id.*; DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POL'Y INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

76 Kalhan, *supra* note 73, at 44–45.

imately 81,000 to 380,000 individuals.[77] Today, almost half of all removal proceedings involve detainees, up from one-third of proceedings as recently as 2004.[78]

This increase in detention stems from overall growth in immigration removal proceedings generally as well as statutory changes. Noncitizens in detention comprise three main groups: persons deemed "inadmissible" upon their arrival or return to the United States, persons in removal proceedings, and persons awaiting deportation after a final removal order.[79] By statute, noncitizens facing removal based on a criminal conviction, including those alleged to have an aggravated felony conviction must be taken into immigration custody upon release from criminal custody.[80] Aggravated felons are ineligible for bail pending removal.[81] In 2010, approximately half of the 392,000 noncitizens removed from this country were convicted criminals, with drug crimes, immigration crimes, and criminal trafficking crimes leading the list of convictions.[82]

The circumstances of immigration detention exacerbate the general hardship. The U.S. Department of Homeland Security (DHS) contracts with local jails and prisons for detention space, so although these noncitizens are in "civil" detention, they often reside in a criminal jail setting and, even if separated, are treated like prisoners.[83] Reported lack of medical care, inadequate conditions, separation of children from par-

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[77] *Id.*

[78] *Id.*; EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at O1 fig.23 (2009), *available* at http:// www.justice.gov/eoir/statspub/fy08syb.pdf.

[79] Kalhan, *supra* note 73, at 45.

[80] *Id.* at 45 (citing 8 U.S.C. § 1226(c) (2006)); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–43 (2000) (discussing expansion of grounds for deportability).

[81] *See* 8 U.S.C. § 1226(c).

[82] *See FY2010 Sees Record Alien Removal from U.S.*, HOMELAND SECURITY NEWS WIRE, Oct. 8, 2010, http://www.homelandsecuritynewswire.com/fy2010-sees-record-alien-removal-us. In June 2011, ICE reported having removed 387,000 noncitizens, 169,000 of whom were convicted criminals. These reports do not specify whether the aliens were deemed aggravated felons, but the list of crimes suggest many were. IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 4, at 3–4. The Department of Homeland Security reported in 2011 that it had initiated 223,217 removal actions against criminal aliens in 2010 and had removed 169,000 convicted criminals. *Id.* The lag in actual removals compared to the number of charges suggests that a significant number of noncitizens succeed in getting the charge dismissed or obtaining discretionary relief from removal (if the criminal conviction is not an aggravated felony).

[83] Rachel L. Swarns, *2 Groups Compare Immigrant Detention Centers to Prisons*, N.Y. TIMES, Feb. 22, 2007, at A17 (describing children as young as six years old separated from their parents); *A Growing Detention Network*, N.Y. TIMES (Dec. 26, 2008), http://www.nytimes.com/interactive/2008/12/26/us/1227_DETAIN.html (interactive map of local, private and federal detention centers used to house immigration detainees); *see also About the U.S. Detention and Deportation System*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/aboutdetention (noting that DHS owns and operates its own detention centers and contracts for bed space from over 312 county and city prisons nationwide).

ents,[84] limited access to visitors,[85] and deaths in custody all contribute to concerns about detention.[86] Transfer of detainees far from their homes to remote detention facilities is routine and, some argue, raises due process concerns.[87] Such transfers disrupt access to families, legal services, evidence, and witnesses, and tend to extend the length of detention and delay immigration proceedings.[88]

The removal proceeding itself is affected by these conditions. These proceedings often take place in a detention facility, with the same immigration judge and government attorneys in case after case.[89] Burgeoning caseloads and a steady backlog strain immigration judges, who complain that they simply do not have time to think. Because most noncitizens do not have counsel and may lack access to any legal services, the burden falls on the immigration judge to develop the record, make sure the noncitizen understands their legal rights, and adjudicate a range of complex legal issues.[90] These tasks are made more difficult by the lack of judges, staff, equipment, and translators. Some immigration judges spend all of their time in prisons, adjudicating removal proceedings of convicted criminals in state custody before they are ever physically transferred to immigration detention.[91] The agency appeals process is high-volume and handled by few judges. Federal circuit courts of appeals, which review petitions challenging removal orders, reverse immigration court decisions at higher rates than other kinds of appeals.[92]

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84 Swarns, *supra* note 83.

85 Nina Bernstein, *Volunteers Report on Treatment of Immigrant Detainees*, N.Y. TIMES, Apr. 29, 2010, at A26.

86 Scott M. Stringer & Andrew Friedman, *Unfair to Immigrants, Costly for Taxpayers*, N.Y. TIMES, Apr. 5, 2011, at A23 (describing poor conditions, lack of medical care, and a reported 107 deaths detained aliens from 2004 to 2010).

87 *See* Markowitz, *supra* note 8, at 348–50.

88 Kirk Semple, *Transfers Delay Release of Detainees, Report Finds*, N.Y. TIMES, June 14, 2011, at A20.

89 DHS operates detention facilities with full-time immigration courts on site. *EOIR Immigration Court Listing*, U.S. DEP'T OF JUSTICE (last updated Oct. 2011), http://www.justice.gov/eoir/sibpages/ICadr.htm.

90 Julia Preston, *Immigration Judges Found Under Strain*, N.Y. TIMES, July 10, 2009, at A11 ("[J]udges spoke of an overwhelming volume of cases with insufficient time for careful review, a shortage of law clerks and language interpreters, and failing computers and equipment for recording hearings.").

91 In New York, for example, Immigration Judge Roger Sagerman is assigned full time to adjudicate immigration removal actions in the Downstate and Ulster Correctional Facilities. *See EOIR Immigration Court Listing*, *supra* note 89.

92 Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005) (noting a year-end forty percent reversal rate in appeals of Board of Immigration decisions, compared to an eighteen percent reversal rates in appeals in which the United States is appellee). Judge Posner stated that this high reversal rate was "due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* at 830. A recent article cites an opinion authored by Judge Posner overturning an agency decision denying asylum. James Warren, *Not Mincing Words Over Asylum*, N.Y. TIMES, Aug. 21, 2011, at A21; *see also* Lynne Ma-

D. *Aggravated Felony Determinations: Analyzing Criminal Law Immigration Courts*

The focus on criminal convictions requires immigration courts to assess immigration consequences of criminal convictions. To do that, immigration courts must analyze whether a state or federal conviction qualifies as a deportable offense.[93] Though the starting and end point of this analysis is an immigration law issue, this often requires a technical analysis of criminal law and the record of the conviction.[94] The definition of "aggravated felony" includes a long list of offenses, many of which refer to federal criminal statutes, and includes any federal- or state-law offense that meets the definition.[95] Since only six percent of convictions occur in federal court,[96] this analysis usually involves determining whether a state court conviction under a state statute as interpreted under state law,[97] qualifies under the federal definition of aggravated felony.[98] Unlike federal and state courts that actually handle criminal cases on a daily basis, the immigration court is not a criminal court, does not adjudicate guilt, and institutionally is not steeped in criminal procedure. Though administrative courts are empowered to

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rek, *Posner Blasts Immigration Courts as 'Inadequate' and Ill-Trained*, NAT'L L.J. ONLINE, Apr. 22, 2008 ("This is a system of adjudication that is clearly inadequate." (internal quotation marks omitted)).

93 The inquiry may require detailed comparison of state criminal statutes to determine the contours of the federal definition and how to apply it, *see* Leocal v. Ashcroft, 543 U.S. 1, 8 nn.5–6 (2004) (surveying state statutes criminalizing injury caused by driver under the influence), or touch on complex issues of statutory interpretation, *see, e.g.*, Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (discussing treatment of expunged state conviction for minor drug offense).

94 Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2587 n.12 (2010) (limiting inquiry to the state court record of conviction).

95 *See* 8 U.S.C.A. § 1101(a)(43) (West 2011) (including in the definition any state, federal, or foreign conviction "for which the term of imprisonment was completed within the previous 15 years").

96 MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf ("94% of felony convictions occurred in State courts, the remaining 6% in Federal courts.").

97 Johnson v. United States, 130 S. Ct. 1265, 1269 (2010) (stating that in determining whether a defendant's Florida conviction was "violent felony" under federal law, 18 U.S.C. § 924(e), the Court is "bound by the Florida Supreme Court's interpretation of state law," including the elements of the statute under which the defendant was convicted).

98 *See Carachuri-Rosendo*, 130 S. Ct. at 2587 n.12 ("Linking our inquiry to the record of conviction comports with how we have categorized convictions for state offenses within the definition of generic federal criminal sanctions under the Armed Career Criminal Act . . . ." (citation omitted)). Analysis of aggravated felony convictions and prior convictions under the ACCA requires careful analysis of each state's law as interpreted by that state's highest court. *See, e.g.*, Nijhawan v. Holder, 129 S. Ct. 2294, 2299 (2009) (observing that categorical analysis of prior convictions under the ACCA "is not always easy to apply"); Taylor v. United States, 495 U.S. 575, 602 (1990) (surveying state law statutes to derive generic definition of "burglary" under the ACCA).

perform such analysis for ancillary matters not within their subject expertise, aggravated felony determinations present a hybrid situation in which an immigration law expressly refers to definitions not within the agency's expertise.[99]

For example, the aggravated felony definition for "crime of violence" requires courts to analyze prior convictions under state and federal criminal law to determine whether prior conviction qualifies as an aggravated felony. The term "aggravated felony" includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment is at least one year."[100] The definition of aggravated felony would include any state or federal offense that meets this description[101] with two exceptions: it only includes felonies and does not include "purely political" offenses.[102] So the first step is to determine whether the conviction is a "crime of violence" under 18 U.S.C. § 16, a nonimmigration statute that is part of the criminal code, and the second step would be to determine whether any immigration statute exceptions apply.

To determine if a prior conviction is an "aggravated felony," immigration courts usually follow the same analysis as criminal courts when analyzing prior convictions.[103] Federal criminal courts have analyzed prior convictions in a variety of settings, primarily to determine whether statutory recidivist or other sentencing enhancements apply. One such statute is the Armed Career Criminal Act (ACCA), which enhances the sentence imposed upon certain firearm-law offenders who also have three prior "violent felony" convictions.[104] In analyzing whether a prior state conviction meets the definition of "violent felony," courts apply a "categorical method" by examining the elements of the

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[99] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 577 (2009) ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (recognizing agency jurisdiction to adjudicate claim under statutory procedure because that claim and related counterclaim were "necessary" to agency's exercise of jurisdiction).

[100] 8 U.S.C.A. § 1101(a)(43)(F).

[101] The law defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (2006).

[102] 8 U.S.C.A. § 1101(a)(43)(F) (excluding "a purely political offense" from the definition).

[103] *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

[104] The ACCA defines "violent felony" to include: first, felonies with elements that involve the use of physical force against another; second, felonies that amount to "burglary, arson, or extortion" or that involve the use of explosives; and third, felonies that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C.A. § 924(e)(2)(B) (West 2011).

federal or state statute of conviction and the nature of the offense,[105] without regard to the particular facts of the crime.[106] A prior conviction qualifies if the statute of conviction meets the "violent felony" definition and is no broader.[107] If the statute of conviction is broader than the "violent felony" definition, the court advances to a second step in which it may consider a narrow range of documents from the record of conviction to assess whether the defendant's conviction necessarily establishes that he was convicted of conduct that meets the "violent felony" definition.[108]

In analyzing prior convictions, criminal courts do not engage in formal fact finding. Some debate this point because the factual analysis of the record conviction can be technical and factually detailed, and its consequences in the later proceeding can be enormous.[109] But the distinction is legally significant because criminal defendants have a Sixth Amendment right to jury trial on any fact other than a prior conviction that is sufficient to raise the statutory maximum penalty.[110] The Supreme Court has thus been careful to limit the prior conviction analysis to avoid new fact-finding and has restricted the inquiry to historical facts contained in judicial documents from the record of conviction.[111]

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105 *See, e.g.*, Chambers v. United States, 555 U.S. 122, 127–30 (2009) (analyzing state failure-to-report conviction to determine whether it is a "violent felony" under § 924(e)); James v. United States, 550 U.S. 192, 203–07 (2007) (analyzing state attempted burglary conviction to determine whether it is a "burglary" under § 924(e)); Shepard v. United States, 544 U.S. 13, 19–25 (2005) (analyzing state burglary conviction by guilty plea to determine if it is a "burglary" under § 924(e)); Taylor v. United States, 495 U.S. 575, 599–602 (1990) (analyzing state burglary conviction by jury verdict to determine if it qualifies as a "burglary" for sentencing enhancement under the ACCA).

106 *See* Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (discussing categorical analysis applied in analyzing prior convictions under the ACCA).

107 The ACCA definition of "violent felony" is similar to the definition of "crime of violence" contained in 18 U.S.C. § 16 and incorporated in the aggravated felony definition in 8 U.S.C.A. § 1101(a)(43)(F).

108 *See Taylor*, 495 U.S. at 602.

109 Justice Thomas has criticized as unconstitutional the prior-conviction exception to the Court's general rule, articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment prohibits judicial determination of facts that increase the statutory maximum sentence. *Shepard*, 544 U.S. at 26–27 (Thomas, J., concurring). The prior-conviction exception allows for judicial determination of a prior conviction, even though the inquiry often requires factual analysis, if not findings of fact. *See* Almendarez-Torres v. United States, 523 U.S. 224, 239–44 (1998). The Court in *Shepard* acknowledged the risk that prior-conviction analysis, if too factually involved, could run afoul of the Sixth Amendment:

> While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings [requiring right to jury findings under] *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

Shepard, 544 U.S. at 25.

110 *See* Jones v. United States, 526 U.S. 227, 243 n.6 (1999); *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

111 For jury-verdict convictions, courts analyze the jury verdict, jury instructions, and charging documents. *Taylor*, 495 U.S. at 600–02. For guilty-plea convictions, the court analyzes the plea

The Court has prohibited consideration of other documents, like a police report, which it said "is too far removed from the conclusive significance of a prior judicial record, and too much like the findings" that would trigger a jury-trial right.[112] As a practical matter, courts seek to avoid relitigation of valid convictions and do not entertain challenges to the validity of a prior conviction in a later case.[113] While the prior-conviction analysis may be extremely technical, it has consistently been treated as a legal inquiry that does not require factfinding.

Immigration courts generally perform the same two-step legal analysis in analyzing criminal convictions for immigration purposes. The immigration court does not engage in factfinding so long as it is analyzing a general offense, like "theft" or "crime of violence."[114] The court's analysis focuses on documents and transcripts from the record of conviction, which must be proved by clear and convincing evidence.[115] At this stage, however, the noncitizen facing deportation for an aggravated felony conviction no longer has a right to appointed counsel, is detained, and his access to documents from his record of conviction may be limited to those presented by the government attorney. As a practical matter, it may be very difficult for an unrepresented noncitizen to challenge the prior conviction because the analysis is so technical and may turn on subtleties of law and documentary inferences that are not obvious to the uninitiated.[116]

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agreement and plea colloquy to determine the factual basis for the plea. *Nijhawan*, 129 S. Ct. at 2299 (citing *Shepard*, 544 U.S. at 26).

112 *Id.*

113 Defendants cannot challenge the validity of a prior conviction in federal sentencing unless the defendant was self-represented. Custis v. United States, 511 U.S. 485, 506 (1994).

114 *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2586 n.11 (noting that this approach applies to "generic" offenses but not "circumstance-specific" offenses, like "fraud or deceit in which the loss to the . . . victims exceeds $10,000," like in *Nijhawan*, 129 S. Ct. at 2301). In *Nijhawan*, the immigration court was permitted to determine whether the fraud exceeded $10,000, even though that loss amount was not an element of the statute of conviction. *Nijhawan*, 129 S. Ct. at 2303.

115 *See* 8 U.S.C. § 1229a(c)(3) (2006) (providing that the government must prove by clear and convincing evidence that the alien is removable, for example, based on the prior aggravated felony, and can rely on a range of documents from the record of conviction, including court transcripts, records, and judgments of conviction).

116 *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it."); Singh v. Gonzales, 499 F.3d 969, 980 (9th Cir. 2007) ("The maze of immigration statutes and amendments is notoriously complicated and has been described as 'second only to the Internal Revenue Code in complexity."' (quoting Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir.1988))).

E. *Improving Fairness in Immigration Court*

Deportation is a severe consequence for any crime, especially for persons who are here legally and rooted to the United States by culture, language, family, and work. Treating immigrants like criminals, but without the procedural protections afforded criminals or comparable opportunities for judicial review, presents a serious judicial and constitutional concern.[117] While many scholars have observed that the criminalization of immigration law has been asymmetric,[118] the question of how to respond to this inequality presents its own problems. Some urge that immigration law should remain faithful to its civil origins, i.e., by resisting the trend towards criminalization.[119] This may be unrealistic at least with respect to removal of aggravated felons, which accounts for a large portion of removals and involves no discretionary opportunity for relief by the immigration officials once the charge has been filed. Others argue that immigrants in quasi-criminal removal proceedings should be afforded criminal or quasi-criminal procedural protections.[120] This concept presents practical and theoretical questions about the overlap and uniqueness of criminal and immigration proceedings. Which criminal rights should be applied? What is the source of those rights? How would they apply in an immigration court setting? On this point, scholars have argued that Sixth Amendment criminal rights could apply if immigration proceedings were simply reclassified as criminal,[121] and, short of that, the Court in *Padilla* has opened the door to enhanced rights under the Fifth Amendment that could serve similar purposes.[122] Still others have observed the gaps and inefficiencies of these overlapping adjudication systems.[123] In these analyses, criminal procedural protections are usually deemed the gold standard and superior to Fifth Amendment due process protections, which tend to be more flexible and forgiving.[124]

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117 Legomsky, *supra* note 7.

118 Chacón, *supra* note 7, at 135 n.1; Legomsky, *supra* note 7; Markowitz, *supra* note 3, at 1339–47.

119 Markowitz, *supra* note 3, at 1339–47

120 Kanstroom, *supra* note 1, at 1467–72; Markowitz, *supra* note 3, at 1334.

121 Kanstroom, *supra* note 1, at 1472–73.

122 *Id.* (arguing that *Padilla* supports the "Fifth-and-a-Half Amendment" which "embodies both the flexible due process guarantees of the Fifth Amendment and—for at least certain types of deportation—the more specific protections of the Sixth Amendment"); Markowitz, *supra* note 3, at 1360–61.

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

124 Kanstroom, *supra* note 1, at 1472–73.

Against this background, the option remains that the Fifth Amendment provides a superior vehicle to securing procedural protections for noncitizens facing removal on the basis of prior criminal conviction. This approach is grounded in the Fifth Amendment due process concepts—which clearly apply in immigration proceedings—and animated by concerns about the unique issues that arise when immigration courts detain, process, and deport noncitizens based on their prior convictions. Charting a new path specifically tailored to immigration law allows courts to create protections that are protective of immigrants and specifically tailored to the immigration issues they face, while ensuring judicial review of immigration decisions. This approach is feasible under core principles recognized by the Supreme Court in its immigration jurisprudence.

II. A JUDICIAL REVIEW FRAMEWORK FOR CREATING PROCEDURAL PROTECTIONS IN IMMIGRATION PROCEEDINGS

The Supreme Court has asserted a dynamic role for the judiciary in immigration matters, especially those involving prior criminal convictions. The Court has carefully acted to safeguard judicial review even in the face of congressional efforts to strip the court of such power. The Court has affirmed that courts are the arbiters of constitutional issues (including due process) and statutory interpretation. Recognizing the interests at stake in detention and removal proceedings, the Court has created general procedural rules to ensure due process protection, while being sensitive to the policy decisions at stake in immigration proceedings. On matters of statutory interpretation, the Court defers to the immigration agency on matters of immigration law, while crediting judicial expertise in such areas as constitutional law, statutory construction, and, significantly, criminal law.

These core concepts reinforce that reviewing courts serve an important function in innovating procedural safeguards for noncitizens in removal proceedings. Such protections need not rely on criminal procedure or a classification of immigration proceedings as civil or criminal. Rather, they can instead be interposed judicially by interpreting immigration statutes to benefit the noncitizen, promote transparency and judicial review, and avoid constitutional concerns, or, if needed, to ensure fairness as a matter of constitutional due process. The judicial practice of using statutory interpretation, especially the doctrine of constitutional avoidance, to protect noncitizens in immigration proceedings is not new, though the criminal law emphasis in contemporary immigra-

tion law provides a new facet to this practice.[125] Immigration procedural protections could prove more effective than their criminal procedure counterparts if specifically tailored to the issues noncitizens face in this administrative process and with sensitivity to the government's policy concerns on immigration matters.[126] And while due process violations are traditionally reviewed on a case-by-case basis, the Court has been willing to craft due process–based rules to apply to a class of noncitizens in removal proceedings, thus creating a framework that avoids foreseeable or repeat violations.

A. *Preserving Judicial Review: Constitutional and Statutory Expertise*

While the Supreme Court has traditionally been reluctant to interfere in immigration decisions, it has long reviewed them on due process grounds, and has resisted Congress's efforts to eliminate judicial review entirely. The Court has instead inserted itself into immigration matters in ways that are procedural in nature, take into account systemic immigration problems, and may affect outcomes in immigration court. Judicial review of immigration decisions is on a pathway to become more, not less, rigorous. In this evolution, traditional reasons for shielding immigration decisions from rigorous judicial review might be seen as a basis for developing immigration-specific interventions tailored to agency goals and the problems facing noncitizens in immigration courts.

1. Traditional Judicial Review of Immigration Decisions

Several background principles inform judicial review of immigration decisions and the basic question of whether courts should defer to the Executive on immigration matters. The Court early on established

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125 *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548–49 (1990) (arguing that aliens tend to receive more favorable treatment when courts rely on statutory interpretation, especially the doctrine of constitutional avoidance, based on "phantom constitutional norms").

126 Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (describing a central feature of "immigration exceptionalism" as "the plenary power doctrine, which severely limits judicial review when a government decision regarding a noncitizen's entry or continued presence in the United States is challenged on constitutional grounds"). *See generally* Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?* 14 GEO. IMMIGR. L.J. 307 (2000) (commenting on Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000)).

that the political branches, namely, Congress and the Executive, have plenary power over immigration.[127] Constitutionally, this broad power is usually justified under Congress's power to conduct foreign affairs, though that provision does not mention immigration.[128] In *Chinese Exclusion Case*, the Court concluded that in light of the federal government's power to regulate immigration, immigration decisions were nonjusticiable political questions and "conclusive upon the judiciary."[129]

Soon, however, concerns about this unchecked power over immigration led to minimal due process review. Several Justices, dissenting in an 1893 immigration case, questioned whether a statute that allowed immigration officials to seize and deport Chinese residents without judicial review violated due process.[130] A few years later in *Japanese Immigrant Case*, the Court permitted review of a noncitizen's due process claim, but did not find a due process violation.[131] In that case, the noncitizen, four days after her arrival, was ordered by immigration officials to be arrested and removed on the suspicion that she was a pauper and would become a public charge.[132] The Court recognized that an alien residing here, even if here illegally, was entitled as a matter of due process to be heard on her right to be and remain in the United States.[133] The Court concluded that the petitioner had not been denied the opportunity to be heard, and that the immigration inspector's decision, having never been appealed to the Secretary, was "final and conclusive."[134] *Japanese Immigrant Case* established the Court would review constitutional challenges to agency removal decisions based on due process grounds.[135]

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127 *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1634 (1992) (citing Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 609 (1889)).

128 *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 181 (5th ed. 2003) ("The federal government's power to conduct foreign affairs . . . has led the courts to invalidate state statutes that attempt to regulate immigration.").

129 *See* Motomura, *supra* note 127, at 1634 (citing *Chinese Exclusion Case*, 130 U.S. at 609); *see also* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1572 (2008) (discussing the plenary power doctrine in *Chinese Exclusion Case*).

130 *See* Motomura, *supra* note 127, at 1635 (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

131 *Id.* at 1637 (citing Yamataya v. Fisher, 189 U.S. 86 (1903)).

132 *Yamataya*, 189 U.S. at 87.

133 *See* Motomura, *supra* note 127, at 1637 (citing *Yamataya*, 189 U.S. at 101).

134 *Yamataya*, 189 U.S. at 102.

135 *See* Motomura, *supra* note 127, at 1638. Over the years, the Court has distinguished between those aliens who are here facing deportation and those who are excludable at the border. *Id.* at 1643 (discussing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (upholding the exclusion without a hearing on national security grounds a returning permanent resident who briefly returned to Eastern Europe to visit his dying mother behind "the Iron Curtain") and Landon v. Plasencia, 459 U.S. 21, 32–34 (1982) (recognizing that a legal permanent resident, returning from a brief trip abroad, is entitle to due process when threatened with deportation)).

For decades courts reviewed immigration removal decisions solely in habeas review.[136] The Immigration Act of 1917 provided that a deportation order by the Attorney General "shall be final," and the Court had interpreted that provision to preclude "judicial intervention in deportation cases except insofar as it was required by the Constitution."[137] Immigration orders were not reviewable under the Administrative Procedure Act (APA) until 1952,[138] and in 1961 Congress replaced district court APA review with initial-deportation-order review in courts of appeals.[139] At the same time, Congress specifically preserved federal habeas review on statutory and constitutional challenges to deportation orders.[140]

While courts had a limited role in reviewing final deportation orders, they played an important role in deciding whether convicted noncitizens would be subject to removal at all.[141] Under the 1917 Act, which authorized deportation based on certain convictions, sentencing courts had an important procedure, known as a judicial recommendation against deportation (JRAD). The JRAD authorized the sentencing judge in both state and federal prosecutions to recommend "that such alien . . . not be deported," either at the time of sentencing or within thirty days thereafter.[142] The Court's decision was understood to be "part of the sentencing" process[143] and was binding on the agency.[144] The JRAD was codified and continued to exist until 1990.[145] During

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136 Zadvydas v. Ashcroft, 533 U.S. 678 (2001).

137 Heikkila v. Barber, 345 U.S. 230, 232 n.4, 234 (1953).

138 *Id.* at 235 (holding that APA did not apply to immigration cases, reaffirming that a noncitizen "may attack a deportation only by habeas corpus," and reaffirming that deportation orders "remain immune to direct attack"). *But see id.* at 236 (acknowledging precedent for litigant to challenge a deportation order on the basis of their status).

139 *Zadvydas*, 533 U.S. at 687–88 (citing Act of Sept. 26, 1961, § 5, 75 Stat. 651 (repealed 1996)).

140 *Id.* at 687–88 (citing Shaughnessy v. Pedreiro, 349 U.S. 48, 51–52 (1955)); *see also* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 106(a), § 5(a), 75 Stat. 650, 651 (1961) (repealed 1996).

141 Padilla v. Kentucky, 130 S. Ct. 1473, 1479–80 (discussing JRAD procedure).

142 The full text of the JRAD provision read as follows:

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, 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 . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.

Id. at 1479 n.3 (quoting Immigration and Nationality Act of 1917, ch. 29, 39 Stat. 874, 889–90 (codified as amended at 8 U.S.C. § 1227 (2006))).

143 Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986).

144 *Padilla*, 130 S. Ct. at 1479 (explaining that the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation" (internal quotation marks omitted) (quoting *Janvier*, 793 F.2d at 452)).

145 *See* 8 U.S.C. § 1251(b) (1994); *Padilla*, 130 S. Ct. at 1480 ("Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress

that period, the class of deportable offenses had grown, but noncitizens could still apply to the sentencing judge for the JRAD or the agency for discretionary relief from removal. Importantly, the JRAD ensured that judges retained discretion to prevent deportation of convicted noncitizens on a case-by-case basis.

In 1996, Congress enacted the major immigration changes that dramatically increased the stakes on prior criminal convictions. By this time, judicial relief from deportation using the JRAD had been eliminated, leaving deportation or "removal"[146] decisions solely to immigration officials. The 1996 laws greatly expanded the list of "aggravated felonies," made them automatically deportable offenses, and eliminated the Attorney General's discretion to grant relief from removal, such as voluntary departure, cancellation of removal, or withholding of removal based on asylum-related concerns.[147] Congress also enacted several provisions to eliminate all judicial review of immigration removal decisions.[148] This sweeping immigration reform signaled a new era in immigration enforcement and policy. The judicial backlash that ensued laid the groundwork for more robust scrutiny of immigration decisions by courts.

2. Judicial Protection of Judicial Review of Immigration Decisions

The Supreme Court's cognizance of its important constitutional role in reviewing immigration matters is evident in its treatment of removal orders. In *INS v. St. Cyr*, the Court held that habeas review remained available to persons challenging the constitutionality of removal orders, despite new statutory provisions that could have been interpreted to eliminate any judicial review of immigration decisions. The case involved a challenge to the application of comprehensive immigration

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entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation . . . .").

146 Beginning in 1996, Congress has used the term "removal" to refer to deportation. *Padilla*, 130 S. Ct. at 1480 n.6 (citing Calcano-Martinez v. INS, 533 U.S. 348, 350 n.1 (2001)).

147 *Id.* at 1480 ("Attorney General's authority to grant discretionary relief from deportation . . . had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996 . . . ." (citations omitted)).

148 INS v. St. Cyr, 533 U.S. 289, 298 (2001). The IIRIRA eliminated direct judicial review of a petition by an alien deemed removable for a criminal conviction, though courts still retained power to determine their own jurisdiction and consider in that inquiry whether the alien was removable. *See, e.g.*, Zavaleta-Gallegos v. INS, 261 F.3d 951, 954 (9th Cir. 2001). In 2005, Congress expanded direct judicial review of legal and constitutional claims in petitions by people ordered removed on the basis of a prior criminal conviction, and limited habeas review of final deportation orders. *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 106, 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(2)(D) (2006)). The REAL ID Act applied retroactively to all final removal orders issues before, on or after May 11. 2005. *Id.* at 311.

law changes enacted in 1996 under the AEDPA and the IIRIRA.[149] In *St. Cyr*, the noncitizen (St. Cyr) had been convicted of a drug offense that made him deportable before the 1996 laws took effect. St. Cyr would have been eligible for discretionary relief from deportation at the time of his conviction,[150] but by the time of his removal proceedings a year later, such discretionary relief had been eliminated under the new laws. St. Cyr brought a habeas action under 28 U.S.C. § 2241 arguing that the new laws should not apply to him because his guilty plea became final before they were enacted.[151]

As a threshold matter, the Court was faced with deciding if it had jurisdiction to hear the case in light of four new provisions that appeared to eliminate the judicial review of final deportation orders.[152] As a starting point, the Court recognized that the issue presented was "purely a question of law," presenting no factual issues or challenge to the exercise of discretionary agency authority.[153] This legal question, more importantly, raised a serious constitutional concern. The government argued that the new provisions eliminated judicial review so there existed "no judicial forum available to decide" the legal issue.[154] Construing these statutes to eliminate habeas jurisdiction would give rise to "substantial constitutional questions" under the Suspension Clause, which limits Congress's power to suspend the writ.[155]

The Court ultimately avoided this "difficult and significant" constitutional question by holding that the new laws did not eliminate habeas review of immigration decisions.[156] Toward that result, the Court applied three core concepts of statutory interpretation: it required a clear legislative statement to repeal habeas review, it applied the doctrine of constitutional avoidance to preserve judicial review, and it construed the

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149 *St Cyr*, 533 U.S. at 292.

150 *Id.* at 293.

151 *Id.*

152 *See* Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 593 (discussing *St. Cyr*, 533 U.S. at 309–10). One provision of AEDPA, § 401(e)—though entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"—merely repealed a judicial-review provision without mentioning the habeas statute, 28 U.S.C. § 2241. *St.* Cyr, 533 U.S. at 309. Three other provisions were contained in IIRIRA: one specified the law applicable to judicial review of a final order of removal in the reviewing court, s*ee* 8 U.S.C.A. § 1252(a)(1); a second required consolidation of judicial review of all questions of law and fact, including the application of statutory and constitutional provisions, in an appeal of a final order, *see* 8 U.S.C. § 1252(b)(9); and a third states that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses, *see* 8 U.S.C. § 1252(a)(2)(C). *St. Cyr*, 533 U.S. at 311–14.

153 *Id.* at 298.

154 *Id.* at 294–99.

155 The Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

156 Traum, *supra* note 152, at 593–94.

new provisions against a long history permitting judicial review of the legality of immigration decisions.

First, the Court rejected any repeal of habeas jurisdiction by implication and insisted on a "clear statement" that Congress intended to repeal habeas review.[157] This rule was supported, the Court said, because there is a "strong presumption in favor of judicial review of administrative action," and the Suspension Clause is a limitation on Congress's authority.[158]

Second, the Court applied the doctrine of constitutional avoidance to preserve judicial review and to avoid having to decide a "serious Suspension Clause issue."[159] The doctrine of constitutional avoidance is a canon of statutory construction that requires courts to construe a statute to avoid serious constitutional problems if an alternative interpretation is fairly possible.[160] Here, the elimination of judicial or habeas review presented a serious constitutional issue because some "judicial intervention in deportation cases" is unquestionably "required by the Constitution."[161] Rather than decide a thorny Suspension Clause issue, the Court opted to preserve judicial review.

Finally, the Court looked to historical practice. Habeas corpus had "always been available" to review the legality of executive detention. Before 1952 habeas review was the sole means of judicial review of final deportation orders. And at least since 1961 habeas review of immigration decisions was not limited to constitutional issues, but included other questions of law, even those arising in the context of discretionary relief.[162] "At its historical core," the Court stated, "the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[163]

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157 *St. Cyr*, 533 U.S. at 299.

158 *Id.* ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' [sic] power, we expect a clear indication that Congress intended that result."); *see also* Traum, *supra* note 152, at 590 ("The Suspension Clause is a limitation on Congress's power to legislate and appears in Article I, Section 9, with other limitations on congressional authority.") (citing Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 566 (2002)).

159 *St. Cyr*, 533 U.S. at 299–301.

160 *Id.* at 299–300; *see also* Motomura, *supra* note 125, at 561, 564 (observing that courts commonly apply the doctrine of constitutional avoidance as a statutory interpretation canon, in the immigration context this doctrine conflicts with the constitutional notion that executive power over immigration is plenary and nonreviewable).

161 *St. Cyr*, 533 U.S. at 299 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

162 Zadvydas v. Davis, 533 U.S. 678, 679–80 (2001); *St. Cyr*, 533 U.S. at 306–07.

163 *St. Cyr*, 533 U.S. at 301 n.14 ("At common law, '[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.'" (alteration in original) (quoting Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970))).

St. Cyr laid important groundwork for robust review of immigration decisions and executive detention generally.[164] The Court described its traditional habeas review function broadly, observing that courts in habeas were not relegated to simply determining whether immigration statutes or individualized immigration decisions violate the Constitution, but also redressed erroneous application or interpretation of immigration statutes.[165] The Court's authority to construe immigration statutes is aided by canons of statutory construction that, as a practical matter, may make it more likely to side with the noncitizen.[166] This is because when the application of statutory canons of construction resolve statutory ambiguities, there is no occasion to defer to the agency's own interpretation.[167] Thus, the doctrine of constitutional avoidance and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" may cause the Court to favor noncitizens when interpreting immigration statutes.[168]

Importantly, in safeguarding its habeas review of immigration decisions, the Court in *St. Cyr* was marking its own territory, defining its constitutional role in the face of Congress's broad immigration authority. The Court was more concerned with policing the limits of Congress's power under the Suspension Clause (an issue it ultimately avoided) than with respecting the breadth of Congress's plenary power over immigration matters (an issue it never even mentioned).[169] Subsequently, the Court has defended its traditional judicial powers in the

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164 *See* Boumediene v. Bush, 553 U.S. 723, 746 (2008) (citing *St. Cyr* for historical background on habeas review of executive detention); Rasul v. Bush, 542 U.S. 466, 474 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 526 (2004).

165 *St. Cyr*, 533 U.S. at 302–03.

166 *See* Motomura, *supra* note 125, at 548 (observing that aliens receive favorable treatment when courts interpret immigration statutes using "subconstitutional norms").

167 *St Cyr*, 533 U.S. at 320 n.45 (rejecting the need for *Chevron* deference, *see* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), because the Court "only defer[s] . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous"); *see also* Clark v. Martinez, 543 U.S. 371, 380 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.") (citing, inter alia, *Leocal v. Ashcroft*, 543 U.S. at 11–12 n.8, which explains that, "if a statute has criminal applications, 'the rule of lenity applies' to the Court's interpretation of the statute even in immigration cases '[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context'" (alteration in original)).

168 *St.* Cyr, 533 U.S. at 320 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

169 Neuman, *supra* note 158, at 561–62 (noting that "[t]he 'plenary power' of Congress over immigration played no explicit role in the opinions," in that "neither the majority nor the dissent argued that the force of the Suspension Clause was diminished in the field of immigration law"); *see also* Legomsky, *supra* note 126, at 312 ("[I]f the issue on the merits presents an important enough general principle, the Court will find a way around the principle of plenary congressional power.").

immigration context to ensure that noncitizens receive adequate process and access to judicial review.[170]

The Court's review of criminal issues in the immigration context reinforces that it is constantly policing the boundaries of Congress's and the Executive's immigration authority. *St. Cyr* suggests concerns about separation of powers and statutory interpretation. In criminal cases, as discussed below, these boundaries recognize a separation between criminal (involving federal law and state sovereignty) and immigration authority and competence. The Court appears to be confining immigration authority to matters within its traditional expertise and resolving statutory interpretation issues without deference to agency interpretation in many instances.

B. Zavydas*: Creating General Rules to Ensure Due Process and Minimize Judicial Interference*

The doctrine of constitutional avoidance has been used to powerful effect. In *Zadvydas v. Davis*,[171] which was decided in the same term as *St. Cyr*, the Supreme Court created a statute-based rule limiting post-removal detention to six months in order to prevent due process concerns about persons who may face indefinite detention.[172] *Zadvydas* provides a blueprint for innovating procedural protections on a class-wide basis to avoid recurring, foreseeable due process problems in the immigration context. The Court's reason for such a clear and protective rule was premised, at least in part, on its desire to avoid judicial intervention in sensitive immigration matters. This kind of immigration-specific, prophylactic due process rule could be replicated for other aspects of immigration.

The Court in *Zadvydas* confronted the problem of indefinite detainees who, despite having been ordered removed, were still in custody because they could not be repatriated to another country.[173] The consolidated cases involved two detainees, both of whom were ordered removed based on prior criminal convictions. Zadvydas was born in 1948 to Lithuanian parents in a displaced-persons camp in Germany and im-

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170 *See* Kucan v. Holder, 130 S. Ct. 827, 834 (2010) (holding that IIRIRA did not eliminate judicial review of motion to reopen removal proceedings, a longstanding "'important safeguard' that assures that the alien's claims have been accorded a reasonable hearing"); Nken v. Holder, 129 S. Ct. 1749 (2009) (affirming judicial power to stay removal proceedings in order to facilitate judicial review and rejecting the government's argument that such stays violated prohibition on injunctive relief under 8 U.S.C. § 1252(f)).

171 Zadvydas v. Davis, 533 U.S. 678 (2001).

172 *Id.* at 701.

173 *Id.* at 684–87.

migrated to the United States at age eight.[174] Kim Ho Ma, who was born in Cambodia, fled with his family to Thailand and the Philippines before coming to the United States at age seven. A post-removal statute required mandatory detention after entry of a final removal order and during the ninety-day removal period.[175] Detention was permitted beyond the ninety-day removal period and could continue indefinitely, provided the matter of detention was reviewed within a year or earlier if conditions changed.[176] Zadvydas and Ma each were detained well beyond the ninety-day period and filed habeas actions challenging the government's authority to detain them indefinitely under the statute.[177]

The Court in *Zadvydas* relied on constitutional avoidance to create a reasonable time limit on post-removal detention. Because detention "lies at the heart of the liberty" protected by the Due Process Clause, a statute permitting indefinite detention of an alien would raise a serious constitutional problem.[178] The fact that this detention was civil rather than criminal heightened the Court's concern. Criminal detention is imposed "with adequate procedural protections," but here there was "no sufficiently strong special justification" for indefinite civil detention and insufficient procedural protections afforded to the detainees.[179] The Court rejected the government's arguments that "alien status itself can justify indefinite detention," reiterating that noncitizens who have entered the country are entitled to due process protection.[180] Congress's plenary power, the Court said, "is subject to important constitutional limitations."[181] Finding no clear intent to authorize indefinite detention, the Court interpreted the statute to contain a reasonable duration limit of six months on post-removal detention.[182]

The six-month rule adopted by the Court was intended to facilitate Executive action on immigration matters that satisfy due process without judicial interference. Under traditional habeas review powers, courts have authority to review case-by-case the lawfulness of executive detention without trial.[183] Here, the Court acknowledged that judicial interference in immigration matters was undesirable, given "the greater immigration-related expertise" of the Executive Branch, its "primary responsibility" over immigration matters, the serious concerns inherent in enforcing complex immigration laws, and "the Nation's need to

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174 *Id.* at 684–85.
175 8 U.S.C.A. § 1231(a)(2) (West 2011).
176 *Zadvydas*, 533 U.S. at 683.
177 *Id.* at 688.
178 *Id.* at 690.
179 *Id.* at 690–92.
180 *Id.* at 692–94.
181 *Id.* at 694.
182 *Id.* at 701.
183 *Id.* at 699.

speak with one voice on immigration matters."[184] Ordinary principles of judicial review, the Court explained, "counsel judges to give expert agencies decision making leeway in matters that invoke their expertise," including sensitive foreign judgments affecting repatriation.[185] The six-month rule, the Court explained, would "recognize some presumptively reasonable period of detention" and "limit the occasions when courts will need" to interfere in detention matters in individualized cases.[186] The Court specifically referenced presumptions in criminal law that operate similarly, by creating a constitutional safe harbor that minimizes case-by-case judicial oversight.[187]

Zadvydas provides a framework for innovating procedural protections in the immigration context to avoid due process violations and minimize judicial interference. There, the Court recognized that the six-month rule would affect a class of individuals subject to a post-removal statute. Using the doctrine of constitutional avoidance, the Court interposed a reasonable time limit on the post-removal statute to avoid repeat, foreseeable due process violations. The post-removal, possibly indefinite detention was civil in nature and had no criminal analog. The Court's approach of creating a prophylactic rule establishing a presumptively constitutional duration of post-removal detention was drawn from criminal procedure law. But the rationale for this rule—to permit the Executive Branch leeway in immigration matters and limit judicial oversight—was tailored to the immigration context and unique importance of reviewing executive, not criminal, detention.

C. *Immigration Court's Inexpertise in Criminal Law*

The focus of immigration law on criminal law issues requires immigration courts to determine legal issues outside their traditional area of expertise. While immigration law has for nearly a century attached immigration consequences to criminal convictions, for much of that period this practice was limited to certain drug offenses, very serious crimes, and "crimes involving moral turpitude," a broad immigration

184 *Id.* at 700.

185 *Id.*

186 *Id.* at 701.

187 *Id.* (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 379–80 (1966) (plurality opinion), which "adopt[s] [a] rule, based on definition of "petty offense" in United States Code, that right to jury trial extends to all cases in which sentence of six months or greater is imposed," and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–58 (1991), which "adopt[s] [a] presumption, based on [the] lower court['s] estimate of time needed to process arrestee, that [a] 48-hour delay in probable-cause hearing after arrest is reasonable, hence constitutionally permissible").

law descriptor.[188] The operation of criminal law within immigration has greatly evolved, especially under the expanded "aggravated felony" definition enacted in 1996. Today immigration courts analyze a wide range of state and federal convictions, applying state and federal criminal laws and evaluating criminal records of conviction to determine what qualifies as an "aggravated felony." This definitional analysis is a large and complex undertaking. The definition of "aggravated felony" describes over twenty separate offense categories; it applies to any qualifying state, federal, or foreign conviction; and a prior conviction is properly analyzed in light of the law of the jurisdiction where it was obtained as well as under the applicable federal law referenced in the definition.[189] This aspect of immigration law requires careful analysis of criminal law by immigration courts that lack jurisdiction over or institutional expertise in criminal adjudication.

The Supreme Court has in several cases rejected the government's expansive interpretation of the aggravated felony definition. In addition to settling some very specific aspects of aggravated felony analysis, these cases hint at broader themes about the proper role of immigration courts deciding criminal law issues in a civil proceeding. These cases show that the Executive Branch is not accorded deference on criminal law matters outside its area of expertise. Rather, the Supreme Court appears to police the boundaries of the government's immigration authority based on concerns about criminal procedural protections, state sovereignty, federal law uniformity, and due process. The Court's rulings reflect an overarching concern about the severe immigration consequences that stem from criminal convictions imposed in a process that is closely related but procedurally divorced from the original criminal proceedings, and which lacks the same protections. The Court's cabining of immigration expertise and assertion of traditional judicial oversight could prove beneficial to noncitizens. Suspicions about the competence of immigration courts to handle criminal law issues may also raise questions about whether affording noncitizens full criminal procedural protections in immigration proceedings would improve outcomes.

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188 Padilla v. Kentucky, 130 S. Ct. 1473, 1479 (2010) (noting that Congress has never defined the term "moral turpitude").

189 8 U.S.C.A. § 1101(a)(43) (West 2011); *see also* Leocal v. Ashcroft, 543 U.S. 1, 5 (2004) (describing the Florida statute of conviction and federal law, 18 U.S.C. § 16, referenced in the aggravated felony definition) ("The question here is whether § 16 can be interpreted to include such [state law] offenses.").

1. *Leocal*: Interpreting Federal Criminal Law

The Supreme Court has emphasized that aggravated felony determinations that turn on the meaning of a federal criminal statute must be construed in favor of the noncitizen and consistent with other federal criminal laws. In *Leocal v. Ashcroft*[190] the Court examined whether the petitioner's Florida felony conviction for driving under the influence of alcohol and causing serious bodily injury was a "crime of violence" under 18 U.S.C. § 16, making it an aggravated felony.[191] The petitioner was a legal permanent resident who had lived in the United States for twenty years before his conviction.[192] After causing an accident that injured two people, he was charged with two counts of felony DUI causing serious bodily injury under a Florida statute, pleaded guilty to both counts, and was sentenced to prison.[193] In subsequent removal proceedings, he was found to have an "aggravated felony" conviction and ordered removed.

In *Leocal* the Court interpreted the "crime of violence" in 18 U.S.C. § 16 to require a reckless or intentional mental state, rejecting the government's position that it included negligence-based driving offenses. "Crime of violence" is defined in the criminal code and referenced in the definition of "aggravated felony."[194] The issue in *Leocal* was whether a conviction under a Florida statute punishing DUI causing serious bodily injury is, categorically, a "crime of violence," namely, as an offense that "has as an element"[195] or "by its nature, involves a substantial risk"[196] of the "use" of physical force. The Florida statute, like many similar state statutes, requires proof of causation of injury, but does not require proof of any particular mental state. Some other states require proof of negligence.[197] In *Leocal*, the Court construed § 16 to require "a higher degree of intent than negligent or merely accidental

190 543 U.S. 1.

191 *See* 8 U.S.C.A. § 1101(a)(43)(F) (defining "crime of violence").

192 *Leocal*, 543 U.S. at 4 (noting that Leocal entered the United States in 1980, became a legal permanent resident in 1987, and was convicted in 2000).

193 *Id.* at 3 (citing FLA. STAT. § 316.193(3)(c)(2) (2003)).

194 *See id.* at 6 ("18 U.S.C. § 16 was enacted as part of the Comprehensive Crime Control Act of 1984, which broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement . . . . Section 16 has since been incorporated into a variety of statutory provisions, both criminal and noncriminal."); *see also id.* at 4 ("[8 U.S.C. § 1101(a)(43)(F)] defines 'aggravated felony' to include . . . 'a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year'" (second alteration in original)).

195 18 U.S.C. § 16(a) (2006).

196 *See id.* § 16(b).

197 *Leocal*, 543 U.S. at 8 nn.5–6.

conduct."[198] As a practical matter, the holding in *Leocal* meant that the "crime of violence" definition of aggravated felony does not include DUI offenses.

The statutory analysis in *Leocal* reflects that the Court interprets a criminal statute using core criminal statutory analysis, even in the context of reviewing an immigration decision. This stance explains the Court's rejection of mere negligence as a criminal mental state and its repudiation of the notion that "crime of violence" could include such common DUI–injury offenses. Criminal law usually demands more, as the Court stated: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'"[199] The Court reasoned that other immigration provisions provided evidence that Congress did not intend to include DUI offenses as crimes of violence.[200] Though the Court found no ambiguity, it noted that

> we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.[201]

The Court refused to "shoehorn" a DUI offense "into statutory sections where it does not fit."[202]

Leocal reinforces that criminal laws are interpreted as such no matter where they appear. In *Leocal*, this meant that the immigration statute was construed narrowly in favor of a noncitizen in immigration proceedings. The rule of lenity sounds in a due process–based concern about clear notice about the scope of a criminal statute.[203] In *Leocal*, the Court's "ordinary" and "natural" reading of the statute was not merely procedural, as it yielded a substantive result: it limited the scope of the aggravated felony definition and meant that a class of noncitizens would not be subject to permanent exile.[204]

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198 *Id.* at 10–11.

199 *Id.* at 11.

200 *Id.* at 11–12.

201 *Id.* at 11 n.8 (citing United States v. Thompson/Center Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion), which applied the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

202 *Id.* at 13.

203 *See, e.g.*, United States v. Lanier, 520 U.S. 259, 266 (1997) (stating that the rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

204 *Leocal*, 543 U.S. at 11.

2. *Lopez*: Uniformly Applying Federal Drug Statutes

The Supreme Court again relied on basic statutory interpretation rules in twice rejecting the government's expansive treatment of prior drug crimes as aggravated felonies.[205] The aggravated felony definition includes any drug trafficking crime "as defined in 18 U.S.C. section 924(c)," which means "any felony punishable under," inter alia, "the Controlled Substances Act (21 U.S.C. sec. 801, et seq.)."[206] In *Lopez v. Gonzales* and *Carachuri-Rosendo v. Holder*, the Court held that the immigration court's analysis is restricted to the actual conviction, which must be a felony under federal law. As in *Leocal*, these decisions draw on procedural and definitional concepts but have a substantive component: by limiting the scope of the aggravated definition, many noncitizens convicted of drug crimes will not be subject to permanent removal.

In *Lopez*, a legal permanent resident was convicted in South Dakota of aiding and abetting another person's possession of cocaine, a felony under state law.[207] Under federal drug laws, mere drug possession is not a felony.[208] The government asserted that this conduct was nonetheless "punishable" under the federal drug laws, albeit as a misdemeanor, which was sufficient to deem it an aggravated felony.[209] Rejecting this reading, the Court held that a state offense qualifies as a "felony punishable under the Controlled Substance Act" only if it proscribes conduct punishable as a felony under that federal law.[210]

To interpret the term "illicit trafficking," the Court relied on familiar statutory themes of notice, predictability, and uniformity. Harkening to its construction of "crime of violence" in *Leocal*, the Court in *Lopez* relied on an everyday and commonsense reading of the statute: "ordinarily trafficking means some sort of commercial dealing," not mere possession.[211] The Court rejected the notion that a federal-law definition could depend on the vagaries of state law, a proposition it has carefully developed in the criminal-law context. Under the government's expansive reading, immigration judges' evaluation of prior convictions would turn on state law, not the federal drug scheme explicitly referenced in

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205 *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (holding that misdemeanor simple drug possession conviction under Texas law that could have, but was not actually charged as a recidivist offense, was not a felony under federal drug law); Lopez v. Gonzales, 549 U.S. 47 (2006) (holding that South Dakota felony offense of aiding and abetting possession of cocaine was not punishable as a felony under federal drug laws).

206 *Carachuri-Rosendo*, 130 S. Ct. at 2581.

207 *Lopez*, 549 U.S. at 51 (citing S.D. CODIFIED LAWS § 22-42-5 (1988)).

208 *Id.* (holding that the South Dakota felony offense of aiding and abetting possession of cocaine was not punishable as a felony under federal drug laws).

209 *Id.* at 53.

210 *Id.* at 60.

211 *See id*. at 53–55.

the aggravated felony definition.[212] This approach, if adopted, also would impact federal sentencing provisions, which rely on the aggravated felony definition for enhancement purposes.[213] Federal drug laws, not state laws, the Court explained, supply the relevant standard for evaluating prior drug convictions.[214] If Congress intended to create a state-by-state approach, it clearly could have said so.[215]

3. *Carachuri-Rosendo*: Respecting State Criminal Convictions

In a second case analyzing a prior drug conviction, the Court held that the aggravated felony determination must be based on the immigrant's actual conviction, not the immigration court's own assessment of his criminal conduct.[216] In *Carachuri-Rosendo*, a lawful permanent resident who had resided in the United States since he was five years old faced permanent deportation in his mid-twenties after conviction on two misdemeanor drug possession charges in Texas.[217] The first conviction for marijuana possession resulted in a twenty-day jail sentence, and the second for possessing one tablet of Xanax without a prescription led to a ten-day jail sentence.[218] After the second conviction, the government initiated removal proceedings asserting that the second conviction was an aggravated felony. Though simple drug possession is not a felony under federal law, it can be charged as a felony if the defendant has one or more prior drug convictions.[219] In such cases, the government must notice and prove the prior conviction, and the defendant has an opportunity to challenge its validity.[220] In *Carachuri-Rosendo*, the government argued that a noncitizen's second possession conviction was "punishable" as a felony drug offense because he could have been charged federally as a recidivist drug offender.[221] The Court rejected this reading, holding that because the immigrant's actual conviction was for simple possession and had not been enhanced based on the fact of a prior conviction, the conviction did not qualify as an aggravated felony.

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212 *Id* at 55–56.
213 *Id.* at 58.
214 *Id.*
215 *Id.* at 59 (highlighting that injecting a state law analysis would yield untoward results depending on the harsh or lenient treatment of drug possession offenses under different state laws).
216 *Carachuri-Rosendo*, 130 S. Ct. at 2580.
217 *Id.*
218 *Id.*
219 *Id.* at 2587–88 (citing 21 U.S.C. §§ 844(a), 851 (2006)).
220 *Id.*
221 *Id.*

Carachuri-Rosendo, like *Lopez* and *Leocal* before it, underscores the Court's role in statutory interpretation of aggravated felonies provisions and seems to caution against expansive interpretations. The Court's analysis in *Carachuri-Rosendo* focused on three points: the statutory text of the immigration law, the actual record of conviction, and the general rule of lenity applied to ambiguities in criminal statutes, including those that are referenced in immigration laws. In *Carachuri-Rosendo*, the Court began by giving the statutory terms a "commonsense" and "everyday understanding" of the term "aggravated felony" and its reference to felonies punishable under federal drugs laws.[222] The Court rejected the government's "unorthodox" position (of treating a petty possession charge as an aggravated felony), saying it "did not fit easily into the everyday understanding" of a recidivist drug possession offense.[223] The Court emphasized that the statutory text refers to a person "convicted of a[n] aggravated felony," requiring that "the conviction itself is our starting place, not what might have or could have been charged."[224] Here, the record contained no finding of the fact of his prior drug offense.[225]

The Court interpreted the aggravated felony definition in a manner consistent with the federal drug laws.[226] The same conduct would have yielded a misdemeanor sentence under the federal sentencing guidelines, and the government could not produce one example of similar conduct having ever been the basis for a felony recidivist charge in federal court.[227] In terms of statutory interpretation, the Court rejected the government's expansive definition of a criminal statute against an alien, stating that "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor. And here the critical language appears in a criminal statute."[228]

Carachuri-Rosendo also makes clear that immigration courts making aggravated felony determinations are not criminal courts in the first instance. Rather, their task is a purely legal one: deciding the legal significance of a conviction. In this task, the record of that state or federal conviction binds the immigration court. Importantly, this is a reminder that immigration courts are not adjudicating guilt or imposing sentence and must respect the decisions of state and federal prosecutors in charging and resolving criminal cases.[229] The immigration court "cannot, *ex*

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222 *Id.* at 2585 (quoting Lopez v. Gonzales, 549 U.S. 47, 53 (2006)).

223 *Id.*

224 *Id.* at 2586.

225 *Id.*

226 *Id.* at 2589 ("It seems the Government's argument is inconsistent with common practice in the federal courts.").

227 *Id.*

228 *Id.* (quoting Leocal v. Ashcroft, 543 U.S. 1, 11 n.8) (citing 18 U.S.C. § 924(c)(2) (2006)).

229 *Id.* at 2586–88.

post, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law."[230] Hence, the immigration court was powerless to attach immigration consequences to a state court conviction based on facts that could have authorized (but in fact did not) a higher penalty under state or federal law.[231]

In addition to comporting with the statute, constraining the immigration court's role also accords respect to the state-court conviction. The Court accorded "great significance" to the procedural safeguards required for a federal recidivist drug possession offense, which require notice, proof, and an opportunity to challenge the prior conviction, and reflect the important role of prosecutorial discretion.[232] The government's suggestion that such procedures could be satisfied in immigration court was rejected.[233] The prosecutor's decision to pursue a recidivist enhancement, the Court explained, is equivalent to a charging decision, i.e., it is not automatic but a calculated choice by the prosecutor, which must be afforded deference.[234] In this particular case, the record showed "the prosecutor specifically elected to 'abandon' a recidivist enhancement under state law."[235] Allowing immigration judges to apply recidivist enhancements that were not part of the original conviction would "denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns."[236]

Confining aggravated felony determinations to the record of conviction protects immigrants who have negotiated criminal cases to avoid certain deportation consequences. Noncitizens seek to resolve criminal cases to avoid or minimize immigration consequences. As the Supreme Court recognized in *Padilla v. Kentucky*, "changes in our immigration laws have dramatically raised the stakes of a noncitizen's criminal conviction."[237] The Court in *Padilla* stated that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[238] In *Padilla*, the Court recognized that criminal defendants have a right to effective assistance of counsel about risk or certainty of deportation as a consequence of conviction.[239] The threat of deportation is a "powerful incentive to plead guilty to an offense that does not

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230 *Id.* at 2586 (citing Almendarez-Torres v. United States, 523 U.S 224, 247 (1998) (holding that fact of recidivism is not an element of the offense requiring a right to jury trial)).

231 *Carachuri-Rosendo*, 130 S. Ct. at 2586–87.

232 *Id.* at 2588.

233 *Id.* at 2587–88.

234 *Id.* at 2588.

235 *Id.* (citing to state court judgment).

236 *Id.*

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

238 *Id.*

239 *Id.* at 1486.

mandate that penalty in exchange for a dismissal that does."[240] Plea agreements are contracts enforceable against the government.[241] This value would be lost, however, if the immigration court could assert its own view of how the noncitizen's conduct *could* have been prosecuted under federal law, as the government urged in *Carachuri-Rosendo*. The Court's insistence that the immigration court's aggravated felony inquiry is limited to the record of conviction ensures that the plea negotiated and the record created in criminal court is honored in subsequent immigration proceedings. This is especially critical because while the noncitizen has appointed counsel in criminal proceedings, he may not have counsel in subsequent immigration proceedings to adjudicate the immigration consequences.

By strictly construing criminal law statutes, the Supreme Court has cabined immigration courts' leeway in adjudicating aggravated felonies. In *Leocal*, *Lopez*, and *Carachuri-Rosendo*, the Court rejected the government's expansive application of the aggravated felony definition. In these cases, the Court's role as the arbiter of statutory interpretation is multifaceted: ensuring predictability and uniformity, resolving statutory ambiguities in favor of the noncitizen, and respecting the separation of criminal and immigration courts in terms of their function and sovereign interests. These themes reinforce that while immigration consequences are integral to the criminal process, these processes remain distinct. Through judicial oversight, the Court monitors that immigration courts stick to their proper, limited role.

These criminal immigration cases have procedural and substantive effects. Due process typically involves alleged process deficiency. In *Carachuri-Rosendo*, the Court limited the process that the immigration court could undertake, insisting that its analysis was limited to state-court record of conviction and rejecting the notion that it could address procedural deficiencies in the underlying conviction by providing procedures in immigration court.[242] Such process restrictions on immigration courts highlight that criminal and immigration court processes are not interchangeable. It also limits substantively the scope of the aggravated felony conviction. As a result of *Lopez* and *Carachuri-Rosendo*, many low-level drug offenses do not qualify as aggravated felonies.

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[240] *Id.*

[241] Santobello v. New York, 404 U.S. 257, 262–63 (1971) (holding that when prosecutor breaches the plea agreement, defendant is entitled to remedy of specific performance to enforce the contract), *cited in Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009).

[242] Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2587–88 (2010).

III. IMMIGRATION LAW ON ITS OWN PATH

The Supreme Court's immigration jurisprudence provides a judicial framework based in due process for developing broadly applicable procedural protections for noncitizens in immigration court. This approach builds on firm ground: it is well established that noncitizens in immigration proceedings are entitled to due process and that courts review due process issues arising in immigration proceedings.[243] In immigration law, procedural due process has served an important judicial check on Congress's plenary authority on immigration matters.[244] But due process analysis has not yielded in immigration proceedings the kind of standard procedural protections that have evolved under the Sixth Amendment in criminal proceedings. This gap in procedural protections is partially explained by the classification of immigration law as civil, not criminal.[245] Perhaps more important, a hallmark of due process analysis in both the civil and criminal contexts is that it is flexible and generally turns on a case-by-case analysis of the facts.[246]

Many criminal procedural rights are rooted in due process, including the right to counsel,[247] safeguards against involuntary confessions,[248] the beyond a reasonable doubt standard of proof,[249] and the right to disclosure of exculpatory evidence.[250] Some of these criminal procedural rights evolved in the shadow of the Sixth Amendment,

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243 Yamataya v. Fisher, 189 U.S. 86 (1903).

244 *See* Motomura, *supra* note 127, at 1665–71 (discussing cases in which procedural due process operated as a substantive check on Congress's authority, for example, to limit statute mandating detention for an entire class of aliens).

245 Markowitz, *supra* note 3, at 1307–08 (addressing classification of immigration law as civil, not criminal, and differing approaches to procedural rights in civil and criminal law).

246 Miranda v. Arizona, 384 U.S. 436, 508 (Harlan, J., dissenting) (describing pre-*Miranda* confession analysis under the due process clause as "'judicial' in its treatment of one case at a time," and "flexible in its ability to respond to the endless mutations of fact presented").

247 Before the Sixth Amendment right to counsel was made applicable to the states, *see* Gideon v. Wainwright, 372 U.S. 335 (1963), right-to-counsel claims were evaluated as due process claims under the Fifth Amendment. *See, e.g.*, Betts v. Brady, 316 U.S. 455 (1942) (holding that failure to appoint every indigent defendant accused in a state criminal prosecution did not necessarily violate due process); Powell v. Alabama, 287 U.S. 45 (1932) (holding that failure to appoint counsel in a capital case violated due process clause of the Fourteenth Amendment).

248 *See* Withrow v. Williams, 507 U.S. 680, 688–89 (1993) ("[O]ver the course of 30 years, beginning with the decision in *Brown v. Mississippi*, we analyzed the admissibility of confessions in such cases as a question of due process under the Fourteenth Amendment." (citation omitted)).

249 *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

250 *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

which was not applied to the states before its gradual incorporation under the Fourteenth Amendment during the 1960s.[251] Apart from such specific rights, courts analyze whether particular factual circumstances amount to a due process violation.[252] For example, involuntary confessions violate due process, and the Court's analysis of them is fact specific, flexible, and case-by-case.[253] The requirement of *Miranda* warnings was a departure from constitutional due process analysis of involuntary confessions because it created prophylactic rules based on a presumption that custodial interrogation is inherently coercive.[254] The *Miranda* rules anticipated the recurring, foreseeable problem of involuntary confessions and created a presumptively constitutional safe harbor for police interrogations that would likely withstand constitutional scrutiny.

In all procedural due process analysis lies the risk that the deficient proceeding is unfair and unreliable. In the context of coerced confessions, for example, the Supreme Court has articulated concerns about inappropriate state action, for example, torturing a suspect until he confessed, and the reliability of a coerced confession.[255] In the civil realm, accuracy is an explicit factor under the *Mathews v. Eldridge* balancing test used to evaluate procedural due process claims by weighing three factors: the private interest that will be affected by official action, the risk of an erroneous result, and the probable value of additional procedural safeguards.[256]

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[251] McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.12 (2010) (summarizing history of incorporation of Bill of Rights on states); 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(b) (3d ed. 2010) (observing that in some areas, "the Court's post-incorporation rulings initially relied on due process and subsequently turned to a specific guarantee as an alternative grounding for imposing basically the same constitutional limitations").

[252] LAFAVE ET AL., *supra* note 251, § 2.7(a) (providing examples of due process–based criminal procedural protections).

[253] *Id.* § 6.2(c) (describing due process analysis of confessions).

[254] Miranda v. Arizona, 384 U.S. 436, 467 (1966) (referring to the "inherently compelling pressures" of "in-custody interrogation of persons suspected or accused of crime"); *see also* Dickerson v. United States, 530 U.S. 428, 442 (2000) ("In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." (citation omitted)).

[255] *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 484–85 nn.12–13 (1972) (observing that while coercion is the touchstone of due process analysis of confessions, trustworthiness of the confession has been an abiding concern) (citing Jackson v. Denno, 378 U.S. at 385–86); *see also* 2 LAFAVE ET AL., *supra* note 251, § 6.2(c) (describing prohibited tactics to obtain confessions). In due process analysis of *identifications*, reliability is a primary concern. *See* United States v. Crew, 445 U.S. 463, 473 n.19 (1980) ("[T]he 'independent source' test of *United States v. Wade* and *Stovall v. Denno* . . . seeks only to determine whether the in-court identification is sufficiently reliable to satisfy due process . . . ." (citations omitted)).

[256] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Markowitz, *supra* note 3, at 1352–55 (proposing how the factors in *Mathews v. Eldridge* might be adapted to create more protective procedural protections in immigration proceedings).

In immigration law, accuracy, fairness, and the risks attached to prejudicial error are compelling concerns. The government processes a huge number of cases every year, in a bureaucracy that is overwhelmed and understaffed. The government's high reversal rate on legal issues in the appellate courts and at the Supreme Court indicates that the risk of error is high. The risk of harm from those errors is extreme because a deported aggravated felon cannot legally return to this country and may face actual harm—even torture or death—as a result of an erroneous legal decision to remove them. These concerns support the need for additional procedural safeguards under *Mathews.* Indeed, in the immigration context, the Court has signaled a willingness to safeguard judicial review, check aggressively broad statutory interpretation, and create broadly applicable procedural rules to avoid due process concerns.[257] The six-month detention rule in *Zadvydas* is significant in that it applied generally to a class of cases, namely, all post-removal detention proceedings.[258] The Court justified its six-month rule as necessary to provide the agency leeway in executing removal decisions, while still complying with constitutional due process norms.[259] Similar reasoning could support judicially developed, standardized procedural rights in immigration proceedings.

Unlike the Sixth Amendment pathway, rights developed under the Fifth Amendment's Due Process Clause need not depend on categorization of immigration proceedings as "criminal." The Court's decision in *Padilla* suggests that the civil–criminal labels are "ill-suited" to questions of permanent deportation based on criminal conviction. Getting courts to recognize that immigration proceedings are sufficiently criminal to fall within the ambit of the Sixth Amendment may prove difficult. Even if the Sixth Amendment were held to apply to immigration cases, there would remain serious questions about how it would apply and whether Sixth Amendment protections would sufficiently protect noncitizens in removal proceedings. Traditionally, when the Supreme Court has incorporated a federal constitutional right to make it applicable to states, the right has been applied co-extensively in federal and state proceedings. Because state and federal criminal prosecutions are essentially parallel systems, adapting new constitutional standards is not a difficult task, at least in theory. In contrast, immigration proceedings are distinct and importing Sixth Amendment procedures might pose some challenges. For example, Sixth Amendment protections are offense specif-

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257 Zadvydas v. Davis, 533 U.S. 678, 684–87 (2001).

258 *Id.* at 699–701 (reasoning that the rule would "recognize some presumptively reasonable period of detention" and "limit the occasions when courts will need" to rule on the legality of detention in individualized cases").

259 *Id.* at 700.

ic[260] and only apply to felonies and misdemeanors involving a loss of liberty.[261] Because these features of criminal law have no clear analogs in immigration court, application of the Sixth Amendment right to counsel in immigration cases would require new rules.

Pursuing the Fifth Amendment pathway dispenses with these questions and allows courts to innovate rights, borrowing from the Sixth Amendment as needed, and retooling it to fit the immigration context when necessary without fear of implication for the criminal context. This flexibility also allows courts to craft rights that would be more protective than their Sixth Amendment counterparts. Greater protection, greater flexibility, and greater speed in adoption (because they build on a framework already established by the Supreme Court) are three strong reasons to pursue a Fifth Amendment based strategy towards establishing more protection of noncitizens in immigration court.

Two areas ripe for innovation in immigration proceedings are discovery and the right to counsel. Both are critically important to improving the fairness and accuracy of the agency proceedings and would facilitate more efficient and meaningful judicial review. The following discussion examines constitutional discovery and the right to counsel as they apply in criminal cases under the Sixth Amendment and shows how comparable, or even more protective, rights could be applied in immigration proceedings relying on the due process motivated framework described in Part II.

A. *Discovery*

1. Constitutional Discovery in Criminal Court

Consider the issue of discovery in the criminal and immigration contexts. A criminal defendant has a constitutional right to discovery that entitles him to material exculpatory and impeachment evidence in the possession of the prosecution or its agents even without a request.[262]

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[260] *See* Texas v. Cobb, 532 U.S. 162, 164 (2001) (stating that "the Sixth Amendment right to counsel is 'offense specific,'" meaning that it attaches only to those offenses for which the defendant has been formally charged, and not to "other offenses 'closely related factually' to the charged offense").

[261] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the right to counsel to all misdemeanor state proceedings in which there is a potential loss of liberty).

[262] Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires prosecutors to "avoi[d] . . . an unfair trial" by disclosure of evidence favorable to the accused that is material either to guilt or to punishment); *see also* Kyles v. Whitley, 514 U.S. 419, 421 (1995) ("[T]he state's obligation under *Brady* . . . turns on the cumulative effect of all . . . evidence suppressed by the government . . . ."); United States v. Agurs, 427 U.S. 97, 112–13 (1976) (holding that the defense need not request exculpatory evidence under *Brady*); Giglio v. United States, 405 U.S.

This right to *Brady* evidence is a powerful tool for defendants, which in aid of the truth seeking process of trial represents a departure from a purely adversarial model.[263] While the right is grounded in due process, it serves the defendant's right to a fair trial.[264] The right is limited in important respects, as the Constitution does not require the prosecutor to share all useful information with the defendant.[265] Rather, the prosecutor only must disclose "material" evidence, which is favorable to the accused and, if suppressed, would deprive the defendant of a fair trial.[266] To prove a constitutional discovery violation under *Brady* and its progeny, the defendant must show that there is a "reasonable probability" that the prosecution's disclosure of the suppressed evidence would have led to a different result.[267]

One significant critique of this rule is that it relies on the prosecutor as a gatekeeper to decide which favorable evidence to disclose. Under *Brady* and it progeny, the prosecutor decides what evidence is favorable to the defense and whether such evidence is "material."[268] While the Supreme Court has encouraged prosecutors to err on the side of disclosure,[269] the prosecutor's duty to disclose favorable evidence is adverse to his own litigation interests.[270] Justice Marshall, in his dissenting opinion in *Bagley*, argued that the prosecutor should be required to disclose any favorable evidence, leaving it to defense counsel and the trier of fact to ascertain its value.[271] But this is not the law, which pro-

150, 154 (1972) (holding that exculpatory evidence under *Brady* includes impeachment evidence).

263 United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) ("By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.").

264 *See id.* at 675 ("The *Brady* rule is based on the requirement of due process."); *see also* United States v. Ruiz, 526 U.S. 622, 627 (2002) (citing the Fifth and Sixth Amendments to the U.S. Constitution and discussing the right to a fair trial); *Kyles*, 514 U.S. at 433–34 (referring to due process and fair trial).

265 *See Ruiz*, 536 U.S. at 630 (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977)) ("There is no general constitutional right to discovery in a criminal case.").

266 *Kyles*, 514 U.S. at 435 (stating that exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Bagley*, 473 U.S. at 675.

267 *Kyles*, 514 U.S. at 434 ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'") (citing *Bagley*, 473 U.S. at 678).

268 *Id.* at 437 (stating that constitutional discovery accords "a degree of discretion" to the prosecution, "which alone can know what is undisclosed" and requires it "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

269 *Id.* at 440 ("The prudence of the careful prosecutor should not therefore be discouraged.").

270 *Bagley*, 473 U.S. at 698 (Marshall, J., dissenting) ("[As the prosecutor] he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary.").

271 *Id.* at 698 (Marshall, J., dissenting) ("After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence.").

vides for much narrower discovery and may result in the prosecutor's suppression of evidence favorable to the defendant. Indeed, media reports have highlighted instances in which *Brady* violations have contributed to wrongful prosecution and convictions.[272]

Another significant limitation on constitutional disclosure is that it may not apply when a defendant pleads guilty. The Court held in *United States v. Ruiz* that the government is not constitutionally required to disclose material impeachment evidence before the defendant pleads guilty.[273] The Court reasoned in *Ruiz* that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary."[274] The Court could extend the same rule to the pre-plea disclosure of exculpatory evidence, though it has not addressed the issue.[275] The Court has treated impeachment and exculpatory evidence as equivalent for *Brady* purposes.[276] Since ninety-five percent of all criminal convictions are obtained by guilty plea, the absence of constitutional discovery in some or all guilty plea cases impedes the flow of favorable evidence to the accused or the trier of fact.

Applying a *Brady*-type constitutional discovery rule in immigration court would offer some advantages. The agency trial attorney would be required to review government files and disclose any "material" exculpatory evidence. Since criminal guilt is not the issue, the "materiality" standard would need to be adapted to immigration law and, for example, could cover any evidence that, alone or in conjunction with other evidence, might reasonably affect the outcome of the removal proceeding. Such a constitutionally mandated disclosure rule in removal proceedings could be extremely helpful to noncitizens, who currently rely on Freedom of Information Act (FOIA) requests, limited discovery, and their own investigation to gather helpful information.[277] At the same time, this constitutional discovery rule, if directly imported from criminal law, is deeply flawed, thus limiting its utility in immigration

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[272] Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 847 (2010) (citing examples).

[273] 536 U.S. at 630 (the government is not constitutionally required to disclose material impeachment evidence before the defendant pleads guilty).

[274] Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 954–55 (2008) (quoting *Ruiz*, 536 U.S. at 629).

[275] *Id.* at 955.

[276] *Id.*

[277] *See* Regina Germain, *Putting the "Form" in Immigration Reform*, 84 DENV. U. L. REV. 1145, 1146 (2007) (observing that the few discovery rules that exist relate to prehearing statements, subpoenas, and depositions, and "[t]here is no routine procedure for the government to turn over any prior statements to immigration officials or for access to information contained in previous filings with the U.S. Citizenship and Immigration Service"); *see also* Freedom of Information Act (FOIA), Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. § 552 (2006)); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (codified at 5 U.S.C. § 552a (2006)); 8 C.F.R. §§ 103.8, 103.9, 103.10 (2011) (FOIA regulations); *id.* § 103.20–103.36 (Privacy Act regulations).

court. It would vest the disclosure decision in agency counsel and potentially deprive the immigration judge, the noncitizen facing removal, and the appellate court's review valuable evidence and information relevant to the legal issues and discretionary decisions affecting the outcome of the case.

2. Discovery in Removal Proceedings

Now consider the facts in *Dent v. Holder*, in which the Ninth Circuit recognized that a person in removal proceedings is statutorily entitled to a copy of his or her alien file.[278] In *Dent*, the court established a broad statutory disclosure rule relying on the doctrine of constitutional avoidance to prevent serious due process violations. Consistent with the blueprint outlined in Part II, the statutory disclosure rule in *Dent* is a prophylactic rule, based on an existing immigration statute, designed to avoid foreseeable, repeat due process concerns, for the protection and benefit of a broad class of noncitizens in immigration proceedings. This rule is broader than constitutional discovery afforded criminal defendants because it entitles the noncitizen to all documents within the government's control, not merely those that the government deems important and helpful. And here, the aim of the disclosure rule is tailored to immigration proceedings: to aid the immigration courts in developing the record, especially for pro se litigants, and to facilitate judicial review on appeal to the federal circuit courts of appeals.

a. Dent Was Denied Access to His File in Immigration Proceedings

Sazar Dent was charged in removal proceedings with being an alien and having an aggravated felony conviction. He had previously been convicted of narcotics possession and escape in the third degree in Arizona and was sentenced to one year of imprisonment.[279] The thirty-seven-year-old Honduran native had lived in the United States for over two decades (since 1981) and the government alleged that he was a legal permanent resident, but not a citizen.[280] At a removal hearing, Dent claimed that he was a naturalized U.S. citizen because an American citizen had adopted him as a child.[281] The immigration judge, who knew nothing about Dent's adoption, continued the hearing so that Dent could

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278 Dent v. Holder, 627 F.3d 365, 375 (9th Cir. 2010).
279 *Id.* at 367.
280 *Id.* at 368.
281 *Id*. He also argued that his escape conviction was not an aggravated felony. *Id.*

provide his adoption papers.[282] After he did, the government objected that Dent had failed to prove that his mother was a U.S. citizen.[283] Unable to locate his now-deceased mother's birth certificate, Dent explained in a letter to the immigration judge the circumstances of his adoption and his inability to obtain his mother's birth certificate or passport. The government already had this information, he said, but was still requiring him to prove it.[284] Unsatisfied, the immigration court rejected Dent's citizenship claim, found him an aggravated felon, and ordered him removed to Honduras. On appeal to the BIA, Dent asked for help in getting documents relevant to his citizenship claim, but he got no response.[285] Dent was deported to Honduras.

In his federal appeal, Dent claimed that his due process rights were violated because the government possessed documents relating to his citizenship claim that it failed to disclose in removal proceedings. Dent's federal appeal had been delayed several years due to agency error.[286] In the interim, Dent had returned to the United States, and was prosecuted for illegal reentry.[287] During the criminal prosecution, which was eventually dismissed, Dent was represented by counsel and obtained documents from his Alien file, or "A-file," that he had never seen before.[288] These documents included a naturalization application Dent's adoptive mother had filed on Dent's behalf in 1982 when Dent was fourteen, and an Application to File Petition for Naturalization Dent had filed on his own behalf in 1986, when he was eighteen. These documents, which appeared not to have been adjudicated, had always been in the government's control, but were never given to Dent in the removal proceedings.[289] Dent claimed that the government's failure to disclose these documents in removal proceedings violated due process.

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282 *Id.*

283 *Id.* at 369.

284 *Id.* (telling the immigration judge in his letter, "[s]o I know that the government really knows that she was a U.S. born citizen").

285 *Id.* at 372.

286 *Id.* at 370.

287 *Id.* (citing 8 U.S.C. § 1326 (2006)).

288 *See id.* at 368 ("An A-file is the file maintained by various government agencies for each alien on record. 'Contents include, but are not limited to passport, driver's license, other identification cards, and photographs; immigration history (prior record); and all documents and transactions' relating to the alien." (quoting U.S. IMMIGRATION & NATURALIZATION SERV., INS DETENTIONS OPERATIONS MANUAL (2000), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/defin.pdf)).

289 *Id.* at 370.

b. The Court Construes a Disclosure Statute to Require A-file Disclosure

Citing due process concerns and constitutional avoidance, the court in *Dent* relied on a disclosure statute to establish a broad right of access to relevant documents for every person on removal proceeding. Though the court's analysis hews to the problem at hand, namely, accessing information from the government A-file, the court's approach reflects broader themes about judicial review and oversight and the need for procedural standards to prevent foreseeable due process violations, and facilitate adequate judicial review.

The key in *Dent* was the so-called "mandatory access law," which the court relied on to develop a broad due process–based discovery rule.[290] By its terms, the statute requires aliens to prove lawful presence in the United States "by clear and convicting evidence."[291] In order to meet this burden of proof in removal proceedings, "the alien shall have access" to his entry document "and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States."[292] While this broad language would appear to include the entire A-file and any other relevant documents in the government's control, the government argued that disclosure was not required because Dent's lawful presence was not in dispute,[293] and he needed first to file a request under FOIA.[294]

Voicing due process concerns, the court in *Dent* relied on the doctrine of constitutional avoidance to interpret the "mandatory access law" broadly. The "doctrine of constitutional avoidance requires us to construe the statute and the regulation, if possible, to avoid a serious constitutional question."[295] The "mandatory access law," the court said, pro-

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[290] *Id.* at 375 (citing 8 U.S.C. § 1229a(c)(2)(B) (2006)). § 1229a(c)(2) provides:

> (2) Burden on alien
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> In the proceeding the alien has the burden of establishing—
>
> . . . .
>
> (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.
>
> In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

8 U.S.C. § 1229a(c)(2).

[291] *Id.*

[292] *Id.*

[293] Brief for Respondent at 40, Dent v. Holder, 627 F.3d 365 (9th Cir. 2010) (No. CA 09-71987).

[294] *Dent*, 627 F.3d at 374.

[295] *Id.* (citing Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989)).

vides a rule for removal proceedings, and it "would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it."[296] The court found that Dent's due process rights had been violated because his A-file may show that he is in fact a naturalized citizen. The statutory right of access established in *Dent* does not turn on a due process violation or a claim of citizenship. The court required the government to hand over the A-file in every removal proceeding: "[t]he only practical way to give an alien access is to furnish him with a copy," adding, "[w]e are unable to imagine a good reason for not producing the A-file routinely without a request."[297]

3. Creating Protective Procedures in Removal Proceedings

The access rule in *Dent* is premised on facilitating judicial review and ensuring fundamental procedural fairness for persons in removal proceedings. The court was especially concerned about ensuring fairness and developing the record in cases in which the alien is unrepresented and facing deportation. Congress created in § 1229a(c)(2)(B) a broad right of access so that noncitizens could meet their burden of proof in removal proceedings.[298] Requiring a noncitizen to use FOIA to access his A-file during removal proceedings could create serious due process concerns, and contribute to him losing or foregoing certain claims and defenses as a result.[299] Such concerns are magnified given the consequences facing the noncitizen, namely, certain and possibly permanent deportation. The rule in *Dent* allows similar access as FOIA,[300] but accomplishes disclosure within the removal process itself. This rule not only speeds up disclosure, but also shifts the burden from the alleged noncitizen having to make a request (under FOIA) to the government having to disclose a physical copy of the file without a request (under the "mandatory access law").

The disclosure rule also facilitates record development, informed decision-making at the agency level, and judicial review of legal issues in the federal courts. In *Dent*, the government's failure to disclose

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296 *Id.* ("That would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about aliens' rights.").

297 *Id.* at 375.

298 8 U.S.C. § 1229a(c)(2) (2006).

299 *Dent*, 627 F.3d at 374 ("It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it.").

300 While FOIA limits access based on statutory exemptions, *see* 5 U.S.C. § 552(b), § 1229(a)(2) permits access to documents "not considered by the Attorney General to be confidential."

Dent's A-file meant that the immigration judge was unaware of facts relevant to Dent's citizenship claim, which impeded his "duty to fully develop the record."[301] Pro se aliens, the court added,

> often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the [immigration judge] "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."[302]

The value of judicial review is heightened when, as in *Dent*, the immigration judge is tasked with deciding legal issues not within its primary area of expertise, namely, citizenship (as a defense to removal proceedings) and an aggravated felony determination applying federal criminal law to a state-court conviction. The federal appellate court determines citizenship claims asserted in removal proceedings[303] and reviews aggravated felony determinations de novo. Because reviewable legal issues are often part of the removal process, courts have an institutional interest in ensuring that the record before them was fairly developed. The rule in *Dent* serves that purpose.

Importantly, the rule in *Dent* is broader than constitutional discovery in criminal cases. Under *Dent*, the government must hand over the entire file (except privileged documents). Unlike in criminal constitutional discovery, the government attorney is not tasked with identifying which evidence in the file in is favorable and whether it is "material." The *Dent* rule applies in every case; under current law, criminal constitutional discovery is not clearly required in guilty plea cases—which are most cases. Importing criminal constitutional discovery into the immigration context would create the risk that the procedure will be insufficient to actually protect noncitizens in removal proceedings, facilitate informed decision making, and facilitate meaningful judicial review.

Some might argue that a *Brady*-type disclosure in immigration proceedings would be better than no disclosure requirement at all (other than FOIA), as remains the rule in most jurisdictions. *Dent* offers a different model: one that is more protective, statute-based and grounded in due process, tailored to the immigration proceedings, and which maximizes the flow of information to those who need it, namely, noncitizens and the courts. Criminal defendants should prefer such a rule to *Brady*.

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301 *Dent*, 627 F.3d at 374 (citing Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002)).

302 *Id.*

303 8 U.S.C. § 1252(b)(5) (vesting courts with power to decide nationality claims asserted in removal proceedings); *id.* § 1252(a)(2)(D) (authorizing judicial review of legal issues, including aggravated felony determinations).

B. *Right to Counsel*

The Sixth Amendment right to counsel in criminal cases is the crown jewel of criminal procedural protections and, for good reason, is the right most coveted by noncitizens in immigration court. When the Supreme Court incorporated the Sixth Amendment right to counsel, applying it to the states, it recognized that "lawyers in criminal courts are necessities, not luxuries."[304] Because immigration proceedings have long been categorized as "civil," the Sixth Amendment does not apply to them. No similar categorical right to counsel exists under the Due Process Clause. Instead, the Court has recognized that counsel may be constitutionally required in some civil cases to ensure fundamental fairness in light of the private interest at stake and the risk of error.[305] No general due process right to counsel in removal proceedings has been recognized and Congress prohibits the appointment of counsel at government expense.[306] Scholars have charted two main pathways for establishing a right to counsel in removal proceedings. One is to categorize removal proceedings as "criminal" or "quasi-criminal" so that the Sixth Amendment right to counsel applies.[307] The other is to justify the appointment of counsel under the civil law test,[308] or some blending of the two approaches. Practical interventions such as increasing pro bono

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304 Gideon v. Wainwright, 372 U.S. 335 (1963) (making the Sixth Amendment right to counsel applicable to the states). Courts have recognized that lawyers are necessities in immigration court as well, due to complexity of the law. *See, e.g.*, Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.").

305 Vitek v. Jones, 445 U.S. 480, 500 (1980) (holding that appointment of counsel is necessary for the transfer of prisoners to mental health facilities); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (recognizing a due process right to counsel in civil cases); *In re* Gault, 387 U.S. 1, 47 (1967) (appointing counsel in delinquency proceedings); *see also* Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 21 (1981) (holding that appointment of counsel may be required in termination of parental rights cases).

306 8 U.S.C. § 1229(a)(4)(A) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

307 *See* Markowitz, *supra* note 3, at 1314–25 (exploring criminal-civil distinction); Markowitz, *supra* note 8, at 348–50.

308 *See* Kanstroom, *supra* note 1, at 1504 (proposing a right to deportation counsel rooted in the "deep relationship between the Fifth and Sixth Amendments); Markowitz, *supra* note 3, at 1355–60 (articulating three step analysis adapted from Mathews v. Eldridge, 424 U.S. 319 (1976), which would support a right to counsel in removal proceedings based on criminal conviction). Scholars have argued for a right to counsel in other immigration proceedings based on the noncitizen's circumstances, *see e.g.*, Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 400–12 (2011), or specific defenses, like asylum, *e.g.*, Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985); John R. Mills et al., *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009).

assistance to persons in immigration proceedings might provide another solution, at least for some.[309]

Under the framework developed in Part II, the right to appointed counsel should apply categorically to removal proceedings in which the noncitizen is charged with having a prior aggravated felony. The purpose here is not to resolve the debate over the proper or exclusive pathway to achieving the right to counsel. Rather, it is to examine this issue using this framework to incorporate unique aspects of doctrine and judicial oversight in the immigration-removal context.

1. A Right to Counsel in Aggravated Felony Cases

Strong reasons support a right to appointed counsel in removal proceedings involving an aggravated felony charge. The judicial-review framework described in Part II identifies several core themes in the Supreme Court's immigration cases that support this right to counsel in this category of cases premised on robust judicial review of statutory and constitutional legal issues, the criminal content of aggravated felony determinations, and the need for procedures that prevent foreseeable, repeat due process concerns while minimizing judicial interference. Although federal courts have recognized that due process may require the appointment of counsel in individual cases to ensure the fundamental fairness, such appointments are not common.[310] Rather than address this issue case-by-case, courts should guarantee the statutory right to counsel afforded by Congress by requiring the appointment of counsel categorically in aggravated felony cases based on the high stakes and criminal law issues involved.[311]

Key features of removal proceedings involving aggravated felonies highlight due process concerns of liberty and fairness. These include the risk of permanent harm from an erroneous legal determination, the complexity of that legal determination in many cases, and the burdens on access to counsel during removal proceedings. Removal proceed-

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309 *See, e.g.*, Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008).

310 *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 586 (6th Cir. 1975) ("The test for whether due process requires the appointment of counsel for an indigent alien is whether, in any given case, the assistance of counsel would be necessary to provide fundamental fairness—the touchstone of due process."); *see also* Escobar-Ruiz v. INS, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (noting that some immigration proceedings may require the appointment of counsel to comport with Fifth Amendment due process requirements).

311 "The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A)." Biwot v. Gonzales, 403 F.3d 1094, 1100 (9th Cir. 2005) (holding that noncitizens were denied statutory right to counsel in removal proceedings).

ings, though historically regarded as civil, operate as an extension of the criminal proceeding that led to conviction. *Padilla* makes clear that immigration consequences are central to the criminal process.[312] *Lopez* and *Carachuri-Rosendo* suggest that interests at stake in an underlying guilty plea would be disturbed if the immigration court on its own could enhance the immigration consequences that flow from criminal conduct, regardless of the actual conviction.[313] These cases highlight the government's penchant for broadly interpreting criminal statutes in the immigration context, despite statutory canons requiring leniency. It seems unfair that noncitizens have the benefit of counsel in the underlying criminal case, but do not have counsel in the subsequent removal proceeding when the terms and significance of that guilty plea are probed and tested in a technical and complex legal analysis.[314]

Mandatory detention of aggravated felons burdens the statutory right to retained counsel of choice and risks compromising the fairness and accuracy of the proceedings.[315] Detention, i.e., bodily liberty, is a significant concern in any due process analysis,[316] and it is mandatory for noncitizens charged with removal based on a prior aggravated felony.[317] Further impeding the right to counsel, the government frequently either initiates or transfers proceedings to a forum far from the noncitizen's residence.[318] Some scholars have argued that such transfers implicate venue-based due process concerns.[319] Transfer and detention significantly burden the noncitizen's statutory right to retain counsel of

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

313 Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2586–88 (2010) (holding actual conviction must supply basis for immigration consequences); Lopez v. Gonzales, 549 U.S. 47, 59 (2006) (rejecting notion that aggravated felony determination could rest on state classification for conduct not punishable as a felony under federal drug laws).

314 Santobello v. New York, 404 U.S. 257, 262–63 (1971) (plea agreements are enforceable contracts).

315 *See Biwot*, 403 F.3d at 1098 ("The high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel. The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.") (citing Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988)).

316 Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

317 8 U.S.C. § 1226(c) (2006) (requiring mandatory custody pending removal). Such detention is lawful in part because it is temporary and administrative. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 527 (2003) (rejecting due process challenge mandatory detention of criminal aliens during removal proceedings).

318 NYIRS Report, *supra* note 72, at 363 (stating that sixty-four percent of noncitizens detained in New York are transferred to far-off detention centers, most frequently in Texas, Louisiana, and Pennsylvania).

319 *See, e.g.*, César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17 (2011).

choice[320] or access to free legal services. In some remote areas, legal services are simply unavailable. It may be impracticable or infeasible for retained counsel to represent a client who has been moved to another part of the country. Though the quality of retained counsel in immigration proceedings is a perennial concern,[321] recent figures suggest having counsel dramatically increases a noncitizen's chance of success in immigration proceedings.[322] Detention is critical to due process because it may burden the noncitizen's ability to retain counsel or legal assistance, his ability to effectively self-represent, and his will to challenge the immigration court decision administratively and judicially.

In making aggravated felony determinations, immigration courts adjudicate criminal law issues outside their native institutional area of expertise. Courts have long deferred to the Executive Branch on sensitive matters within involving immigration expertise, including whom to admit, exclude, or remove from this country. In cases seeking removal based on a prior aggravated felony determination, the issues are purely legal and do not touch on these sensitive areas of agency expertise. Rather, the immigration court to must analyze state or federal criminal law, as interpreted by state and federal courts, and criminal records. The Supreme Court has repeatedly rejected on statutory interpretation grounds the government's expansive reading of federal and state criminal statutes at issue in these cases.[323] The legal analysis required in these cases can be very complex and has developed circuit-by-circuit.[324] Given the high stakes and the government's track record on broadly interpreting criminal laws in this context, noncitizens would be more protected if counsel were developing legal arguments on their behalf in the immigration court.

Zadvydas provides a template for prophylactic procedures applied categorically to certain groups particularly at risk for due process violations.[325] In *Zavydas*, the Supreme Court read into the post-removal sta-

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320 In criminal cases, denial of the right to retain counsel of choice violates the Sixth Amendment and is structural error. *See* United States v. Gonzalez-Lopez, 548 U.S. 212 (2006).

321 *See In re* Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988) (describing elements of due process-based claim of ineffective assistance of counsel); *In re* Compean, 25 I. & N. Dec. 1, 2 (B.I.A. 2009) (ordering rulemaking on Lozada framework on ineffective assistance of counsel claims in removal proceedings).

322 *See supra* note 72.

323 *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (holding that misdemeanor simple drug possession conviction under Texas law that could have, but was not actually charged as a recidivist offense, was not a felony under federal drug law); Lopez v. Gonzales, 549 U.S. 47 (2006) (holding that South Dakota felony offense of aiding and abetting possession of cocaine was not punishable as a felony under federal drug laws); Leocal v. Ashcroft, 543 U.S. 1, 10–12 (2004) (holding that absent proof of reckless or intentional mental state, Florida DUI causing serious injury was not a "crime of violence" under 18 U.S.C. § 16 and was thus not an "aggravated felony").

324 *See* García Hernández, *supra* note 319, at 36.

325 Zadvydas v. Davis, 533 U.S. 678, 699–701 (2001).

tute a reasonable detention duration of six months in order to prevent—not merely to redress—unlawful (indefinite) detention. A primary reason for this was to give the government leeway in effectuating removal with minimal judicial oversight. The same rationale can justify the appointment of counsel in all removal proceedings involving aggravated felony charges. These persons are detained. If determined to have committed an aggravated felony, they will be permanently exiled, and ineligible for discretionary relief. Upon return they face enhanced criminal penalties. In these cases, the aggravated felony determination is a critical threshold issue: only if the noncitizen is not an aggravated felon does the immigration court advance to its actual area of expertise, namely, determining what discretionary relief is available and whether to grant it.[326] While judicial review of aggravated felony determinations remains an important feature, the process would be much more streamlined if criminal legal issues were fully vetted by counsel in immigration court.

Finally, providing counsel in aggravated felony cases might significantly affect the government's charging decisions. If aggravated felony cases required the appointment of counsel and other cases did not, the government might forego charging an aggravated felony and instead litigate whether the noncitizen is entitled to any form of discretionary relief. Requiring counsel for the most serious criminals is a judicial response that might restore some civil discretionary balance to immigration law, preserve the aggravated felony charging option, and enhance the fairness and accuracy of those proceedings at the agency level and on judicial review.

2. An Incremental Approach

The strength of the due process–based approach is that it is incremental and does not depend on the nettlesome civil–criminal classification. The Supreme Court in *Padilla* recognized that criminal proceedings and their immigration consequences are "enmeshed," and that for noncitizens immigration consequences may drive resolution of the criminal case.[327] While the Court characterized immigration proceedings as civil, it acknowledged deportation as a uniquely severe and increasingly automatic penalty resulting from criminal conviction by noncitizens. For the Court in *Padilla*, the question of whether deportation is a civil or criminal consequence was not dispositive to its holding requiring appointed counsel to advise criminal clients on the risk of deportation

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[326] Markowitz, *supra* note 3, at 1359 (referring to "extraordinarily complicated legal issues" at play in determining whether a noncitizen is removal based on a prior conviction).

[327] Padilla v. Kentucky, 130 S. Ct 1473, 1481 (2010).

resulting from plea. *Padilla* seeds the notion that the Court may in time conclude that removal proceedings based on criminal conviction are sufficiently criminal to warrant the application of Sixth Amendment protections. That does not appear imminent and, arguably, may not provide the best protection for immigrants.

An important aspect of the judicial due process–framework is that immigration courts are limited by statute and institutionally in what they do and this fact justifies judicial oversight. According full Sixth Amendment rights in removal proceedings and endowing immigration courts with the power to guarantee such rights might radically change what it is that immigration courts do and how its decisions are reviewed. By statute, immigration courts must consider state and federal criminal laws in determining prior aggravated felony convictions. By case law, immigration courts are limited in their analysis of a prior conviction to the record of conviction and cannot enhance the conviction based on their own factfinding or by adding procedural safeguards. By legislative design and tradition, the immigration courts possess institutional expertise on sensitive areas of immigration, including whom to charge or grant discretionary relief. This discretion bears on whether and on what grounds to initiate removal proceedings. Once a person is charged as being removable based on an aggravated felony, that determination is purely a question of law, reviewable by the courts, and, because it centers on criminal convictions and law, does not actually involve agency expertise.

Applying the Sixth Amendment wholesale in removal proceedings might lay a foundation for expanding the functions immigration courts perform and change the nature of judicial oversight. Some have argued that immigration consequences should be settled in criminal court in a streamlined process that would allow the full vetting of criminal consequences with the assistance of appointed counsel.[328] If immigration courts could guarantee criminal procedural protections, why not allow them to adjudicate underlying criminal conduct and then impose immigration consequences immediately in a single streamlined process? Rather than simply make immigration proceedings more fair, this result might create a "crimmigration" process that bypasses traditional criminal court altogether. While such a result seems unlikely to occur, the point is simply that immigration courts are, well, immigration courts—courts of limited jurisdiction based on particularized expertise. Their authoritative reach should remain limited to what they are competent to do. To the extent that their determinations touch upon criminal judicial

[328] Taylor & Wright, *supra* note 123, at 1175–84 (suggesting efficiencies and advantages of streamlining procedure so that criminal sentencing judge would adjudicate immigration consequences of conviction).

proceedings or matters, such concerns may be adequately addressed through targeted due process protections overseen by courts of law.

The due process approach is incremental and flexible. This approach is not inconsistent with the argument that removal proceedings in immigration court are criminal in nature. But the due process approach draws on more than the fact that noncitizens are detained and facing severe consequences, with criminal law analysis forming the focus of the immigration court's inquiry. Rather, this framework, anchored in due process and traditional judicial oversight, posits a broader stage of institutional actors—immigration officials, local, state, and federal prosecutors, and reviewing federal courts interpreting statutes consistent with constitutional norms. This approach places courts at the center, balancing and respecting institutional actors and ensuring basic due process.

CONCLUSION

For noncitizens facing removal for having an aggravated felony conviction, the stakes are especially high. Their future turns on a legal assessment of their criminal history by an immigration court that has no institutional expertise in criminal adjudication or the state or criminal law that forms the focus of the inquiry. While courts have long deferred to immigration courts on sensitive matters within their expertise, such deference does not extend to the immigration court decisions on matters of criminal law central to the aggravated felony determination. Rather, the robust judicial oversight of such decisions has highlighted the role courts play in ensuring that immigration decisions are not at odds with federal criminal law, state sovereign interests in criminal prosecution, and the procedural protections and negotiated expectations encapsulated in criminal guilty pleas. Though additional procedural protections in immigration courts are required to better protect noncitizens in removal proceedings, it is not clear those protections should be derived from Sixth Amendment criminal law. The Due Process Clause better reflects the institutional concerns at play and may afford better protection.