THE RIGHT TO DEPORTATION COUNSEL IN *PADILLA V. KENTUCKY*: THE CHALLENGING CONSTRUCTION OF THE FIFTH-AND-A-HALF AMENDMENT

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The U.S. Supreme Court's pathbreaking decision in Padilla v. Kentucky *seems reasonably simple and exact: Sixth Amendment norms were applied to noncitizen Jose Padilla's claim that his criminal defense counsel was ineffective due to allegedly incorrect advice concerning the risk of deportation. This was a very significant move with virtues of both logic and justice. It will likely prevent many avoidable and wrongful deportations. It may also help some deportees who have been wrongly or unjustly deported in the past. However, the apparent exactness of the case, as a Sixth Amendment decision, raises fundamental constitutional questions. For more than a century, courts have formalistically distinguished between two consequences of criminal convictions: the punishment meted out in criminal courts and deportation. The former is, of course, a criminal sanction, while the latter is said to be civil or, at most, quasi-criminal. This Article suggests that* Padilla *has implicitly challenged this model with potentially powerful consequences.* Padilla *cannot be squared with the historical, formalist relegation of deportation to the realm of civil collateral consequences in which there is no clear constitutional right to counsel. This Article thus seeks to elucidate how the* Padilla *opinion might model a viable constitutional reconciliation between the Court's historical formalism and its current realism. This model bridges Fifth and Sixth Amendment jurisprudence and limns a new constitutional norm for deportation that we might call the Fifth-and-a-Half Amendment (Amendment V½). It embodies both the flexible due process guarantees of the Fifth Amendment and—at least for certain types of deportation—the more specific protections of the Sixth Amendment. Amendment V½ is certainly not a perfect solution. However, so long as deportation is formalistically understood as civil and nonpunitive while, in reality, being directly tied to the criminal justice system and highly punitive in effect, it is a legitimate and necessary construct.*

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"We are a nation of immigrants, dedicated to the rule of law . . . ."[1]

"[T]he Court should devote some attention to bringing its Fifth and Sixth Amendment jurisprudence into a logical alignment . . . ."[2]

INTRODUCTION

Deportation law has long been a rather challenging enterprise. Courts navigate gingerly between restrictive, formalist doctrines and compelling claims of basic human and constitutional rights. It is therefore unsurprising that the apparently straightforward majority opinion in *Padilla v. Kentucky*[3] illustrates the tension between two well-known legal maxims. The U.S. Supreme Court "cannot escape the demands of judging or of making the difficult appraisals

1. Hon. Barbara Jordan, August 1995, *quoted in* U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY (Sept. 30, 1997), *available at* http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf.

2. McNeil v. Wisconsin, 501 U.S. 171, 183 (1991) (Kennedy, J., concurring).

3. 130 S. Ct. 1473, 1478 (2010).

inherent in determining whether constitutional rights have been violated."[4] On the other hand, as Justice Holmes once noted, "delusive exactness is a source of fallacy throughout the law."[5]

The case involved the important problem of how criminal defense counsel ought to deal with deportation consequences. The Court's basic, pathbreaking holding seems reasonably simple and exact, and it surely made a "difficult appraisal": The Sixth Amendment norms of *Strickland v. Washington*[6] were applied to noncitizen Jose Padilla's claim that his criminal defense counsel was ineffective due to allegedly incorrect advice concerning the risk of deportation. Contrary to the opinion of the Kentucky Supreme Court (and others),[7] such advice on deportation was not "categorically removed from the ambit of the Sixth Amendment right to counsel"[8] even though deportation is nominally a civil sanction. This was a very significant move with virtues of both logic and justice. It will likely prevent many avoidable and wrongful deportations in the future. It may also help some deportees who have been wrongly or unjustly removed in the past. Indeed, given the large number of people who likely have been deported in part because of similarly bad legal counsel in criminal courts, the Supreme Court's recognition of the issue was long overdue.[9] However, the apparent exactness of the case, as a Sixth Amendment decision, leaves important questions unanswered about the increasingly harsh state of deportation law.

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4. Haynes v. Washington, 373 U.S. 503, 515 (1963).

5. Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting); *see also* Louisville & Nashville R.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905) ("[I]t is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed.").

6. 466 U.S. 668 (1984).

7. *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); Oyekoya v. State, 558 So. 2d 990 (Ala. Crim. App. 1989); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995); State v. Montalban, 810 So. 2d 1106 (La. 2002); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989); *see also* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (noting that "eleven federal circuits, more than thirty states, and the District of Columbia" held that defense counsel need not discuss with their clients the collateral consequences of a conviction, including deportation).

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

9. *See generally* Symposium, *Overcoming Barriers to Immigrant Representation: Exploring Solutions*, 78 FORDHAM L. REV. 453 (2009) (discussing the significant need for adequate representation of immigrants, the consequences of immigrants' receiving inadequate or no representation, and possible solutions to these problems).

I. THE CONSTITUTIONAL BASICS

The most fundamental question that is implicitly raised—but left unanswered—by *Padilla* is the constitutional understanding of deportation. For more than a century, many judges have relied upon a simple, formalistic distinction between two consequences of criminal convictions: the punishment meted out in criminal courts and deportation. The former is, of course, a criminal sanction, while the latter is said to be civil or, at most, quasi-criminal.[10] Occasionally, the Supreme Court, or a Justice or two, would be troubled by the brittleness of this dichotomy. The Court has, for example, noted the harshness of deportation as a sanction that could result "in loss of both property and life; or of all that makes life worth living."[11] But for the most part the formal distinction has long held. Indeed, the Supreme Court has rarely, if ever, seriously considered the basic analytical and normative questions raised by the civil/criminal dichotomy in the deportation context.[12] This Article suggests that *Padilla* may have implicitly opened this door with potentially powerful consequences.[13]

Deportation is a complex, multifaceted enforcement mechanism.[14] For the purposes of this Article, however, deportation may be adequately—if a bit simplistically—defined as "the removal of a noncitizen who has entered the United States either legally or illegally."[15] The United States has two basic forms of deportation which reflect two somewhat different, if interrelated, goals. The

10. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 530–31 (1954) (holding that deportation of noncitizens is not criminal punishment but a civil penalty, which makes procedural protections of criminal trial unavailable to deportation proceedings); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation was civil and not punishment for constitutional purposes).

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

12. *But see infra* notes 241–260 and accompanying text discussing *Wong Wing v. United States*, 163 U.S. 228 (1896). One can see glimmers of recognition of the problem in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (allowing retroactive application of a deportation statute). *See also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that there are limits to the valid period of postdeportation order detention); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (limiting the applicability of the selective prosecution defense in deportation cases); INS v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) (holding that the exclusionary rule generally does not apply in deportation hearings).

13. Of course, there is debate about whether these consequences would be a positive development. For example, in a recent Supreme Court oral argument, Stephanos Bibas used the prospect of counsel in "thousands of immigration and extradition cases" as a bête noire to bolster his argument against a right to counsel in certain civil contempt situations. Transcript of Oral Argument at 37, Turner v. Rogers, 131 S. Ct. 504 (2010) (No. 10-10).

14. *See generally* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 2–20 (2007) (describing different forms of deportation).

15. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 693 (6th ed. 2008).

first, *extended border control*, seeks to remove those noncitizens who have evaded the rules that govern legal entry into the United States or who violate the rules that govern temporary residence (for example, those who enter without inspection or overstay their allowed period of admission). Another form, *post-entry social control*, regulates the conduct of those who have been legally admitted (for example, as students, workers, or permanent residents) but who then engage in a wide variety of prohibited behaviors.[16] Deportation also comes in many procedural guises, some of which are rather formal and well structured, and others of which are quite informal, fast-track mechanisms, with names that reflect this, such as: "expedited removal," "administrative removal," and "reinstatement of removal."[17] Indeed, much of the late twentieth- and early twenty-first-century story of deportation is a story of deformalization in which basic procedural rights developed since the late nineteenth-century have been severely limited in practice.

Although violations of state laws can lead to deportation—as *Padilla v. Kentucky* demonstrates—all forms of deportation are primarily handled by federal agencies. The U.S. Department of Homeland Security controls most of the system through its subagencies—Immigration and Customs Enforcement (ICE), which handles most interior enforcement, and U.S. Customs and Border Protection (CBP), which manages the border and ports of entry.[18] Formal deportation hearings take place—as they have for many decades—before immigration judges who work under the jurisdiction of the Executive Office for Immigration Review within the U.S. Department of Justice.[19]

Deportation, as noted, has long been held to be a civil (as opposed to a criminal) system. However, it must comply with constitutional requirements of fundamental fairness and due process. The Supreme Court has held that the fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States.[20] As the Court has reiterated, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[21] The Court has also sometimes differentiated the constitutional rights of noncitizens according to their legal status: "[O]nce an alien gains admission to our country and begins

16. *See generally* KANSTROOM, *supra* note 14.
17. *See generally id.*
18. *See Protecting Our Borders—This Is CBP*, U.S. CUSTOMS & BORDER PROTECTION (June 7, 2010), http://www.cbp.gov/xp/cgov/about/mission/cbp.xml.
19. *See* 8 U.S.C. § 1252 (2006).
20. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
21. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

to develop the ties that go with permanent residence, his constitutional status changes accordingly."[22]

Notwithstanding this constitutional understanding of deportation, the system remains in many respects harsh and anomalous. For example, deportees, regardless of their status or the type of proceeding they face, do not have the right to appointed counsel (if a deportee cannot afford a lawyer, she has no right to one), the right to bail (many thousands face mandatory detention every day), the right to have illegally seized evidence suppressed (unless the agents' conduct was widespread or egregious),[23] the right against ex post facto laws (a person can be deported for conduct that became a deportable offense since its commission),[24] the right against selective prosecution (a deportee could be arrested and charged due to political associations and perhaps even due to national origin or ethnicity), or the right to a jury trial.[25] Thus, any possible intrusion into this realm of a specific, substantive constitutional norm, such as the Sixth Amendment right to counsel, is noteworthy and potentially momentous.

A. The Court's Sixth Amendment Realism

Padilla, though essentially a criminal case, embodies a refreshingly realist interpretation of contemporary crime-based deportation. Although this approach to deportation is somewhat tentative (that is, the Court does not quite say that deportation is punishment), Justice Stevens's majority opinion cannot fully be squared with the historical, formalist relegation of deportation to the realm of civil collateral consequences in which there is no clear constitutional right to counsel. The Court's description of the harsh (and often automatic) nature of the deportation sanction makes this point clear, as does its specific description of the benefits of bringing deportation consequences into the criminal plea bargaining process.[26] Indeed, whether or not one shares the Court's optimism about the consequences of including deportation directly into plea bargaining negotiations, the assertion that "informed consideration

22. Landon v. Plasencia, 459 U.S. 21, 32 (1982); *see also Zadvydas*, 593 U.S. at 694 ("[T]he nature of [due process] protection may vary depending upon status and circumstance. . . .").

23. INS v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) (holding that the Fourth Amendment exclusionary rule generally does not apply in deportation hearings).

24. Harisiades v. Shaughnessy, 342 U.S. 580, 593–96 (1952) (allowing retroactive application of deportation statute).

25. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (limiting the applicability of the selective prosecution defense in deportation cases).

26. Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010). As discussed *infra*, I have substantial doubts that this process will necessarily be beneficial to noncitizen defendants.

of possible deportation can only benefit both the State and noncitizen defendants during the plea bargaining process"[27] is a strong stamp of recognition of the convergence between the deportation and criminal systems.[28]

This realist methodology was logically necessary to facilitate the direct application of the Sixth Amendment to deportation consequences. Its powerful analytical implications could hold still more promise for those who support a robust theory of deportees' rights. However, a close reading of the opinion's apparent constitutional exactness reveals logical gaps and complexities as to the application of the Sixth Amendment to deportation. My goal in this Article is not to criticize these gaps and complexities. The two dissenters—Justices Scalia and Thomas—did this well enough, and their views should be taken seriously.[29] Rather, this Article seeks to elucidate how the *Padilla* opinion might nevertheless model a viable constitutional reconciliation between the historical formalism that has governed deportation law and the Court's realism in *Padilla*. This model also bridges Fifth and Sixth Amendment jurisprudence in a way that could (and I think, should) be applied to the general corpus of deportation law.

B. The Role of Counsel and Constitutional Framing

Padilla is most directly a case about various right-to-counsel problems in the criminal law setting. The decision is a watershed[30] in the evolution of the

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27. *Id.* at 1486.

28. *See e.g.*, Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post–September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COMM. REG. 639 (2004) [hereinafter Kanstroom, *Criminalizing the Undocumented*]; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000) [hereinafter Kanstroom, *Deportation & Social Control*]; Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1131 (2002).

29. *See infra* Part III.

30. The term "watershed" has some bearing on whether or not the *Padilla* case should apply retroactively, a matter that is not fully explored in this Article. The Court did not explicitly state whether *Padilla* constituted a new rule for purposes of retroactivity, but the opinion seems to lean in that direction. *See Padilla*, 130 S. Ct. at 1485 n.12 (suggesting that the decision follows directly from *Hill v. Lockhart*, 474 U.S. 52, 59–60 (1985) (explaining how *Strickland* applies to guilty pleas)); *see also* Williams v. Taylor, 529 U.S. 362 (2000) (holding that applying *Strickland* to particular scenarios does not establish a new rule under *Teague v. Lane*, 489 U.S. 288 (1989)). As the Court noted, "For at least the past 15 years, professional norms have required defense counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 130 S. Ct. at 1485. Alternatively, the case might well be seen as a "watershed" in the sense of *Gideon v. Wainwright*, 372 U.S. 335 (1962). *See* Whorton v. Bockting, 549 U.S. 406, 419 (2007); Schiro v. Summerlin, 542 U.S. 348 (2004); Beard v. Banks, 542 U.S. 406, 417 (2004); *Teague*, 489 U.S. at 301; *see also* Danforth v. Minnesota, 552 U.S. 264 (2008)

standards required of lawyers representing noncitizen criminal defendants. The opinion asserts that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation."[31] Transcending the affirmative misadvice scenario, the Court holds that even silence (that is, no advice about deportation) by defense counsel "would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'"[32] Indeed, the Court concludes that "the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[33] This in itself is surely a very big deal, especially for the future training of criminal lawyers.[34] It means, simply put, that noncitizen criminal defendants now have a right to competent deportation counsel in criminal court. In *Padilla*, this right arose in the context of the decision whether to accept a plea bargain. But there would seem to be no reason why the *Padilla* norms do not apply throughout the criminal process to all manner of other decisions, including decisions about which criminal counts ought to be challenged and which ones should be tried, proposed jury instructions, post-trial motions, and sentencing advocacy. *Padilla*'s new norms within the criminal process obviously raise technical and broad doctrinal questions relating to a wide array of other so-called collateral consequences and "civil *Gideon*" claims.[35] This Article considers more specifically how *Padilla*'s constitutional

(indicating that *Teague* should not necessarily constrain the authority of state courts to give broader effect to new rules of criminal procedure).

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

32. *Id.* at 1484 (quoting Libretti v. United States, 516 U.S. 29, 50 (1995)).

33. *Id.* at 1482. As the Court had previously noted in *INS v. St. Cyr*: "[T]he American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" 533 U.S. 289, 322 n.48 (2001) (quoting 3 ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.2 cmt., at 75 (2d ed. 1982)). Although "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel" per *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), *Strickland* had noted that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." Strickland v. Washington, 466 U.S. 668, 688 (1984).

34. *See, e.g.*, Peter L. Markowitz, *Protocol for Development of a Public Defender Immigration Service Plan*, IMMIGRANT DEF. PROJECT (2009), *available at* http://www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

35. *See, e.g.*, ABA, BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS (adopted Aug. 2010), *available at* http://www.abanow.org/2010/07/am-2010-105; ABA, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf; CAL. ACCESS TO JUSTICE COMM'N'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT §§ 401–404 (Feb. 8, 2008), http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/ca_state_basic_access_act_feb_08.pdf; Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 37 (2010) (noting that *Padilla* was "the first time that the Court has

implications might apply to civil deportation law itself[36] and to the newly developing field of postdeportation law.[37]

Much depends on constitutional framing, and *Padilla* is harder to frame than one might suspect from Justice Stevens's opinion. We could begin with an obvious, simple, but ultimately somewhat misleading question: Is *Padilla* a Sixth Amendment case or a due process case? The Court majority proceeds for the most part in the Sixth Amendment vein. The Kentucky Supreme Court had framed the issue this way, denying postconviction relief on the specific ground that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a collateral consequence of his conviction.[38] When the Supreme Court majority opinion described the issue presented, however, its language was less constitutionally specific:

> We granted certiorari . . . to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country.[39]

This simple phrasing masks underlying complexity. To be sure, the Court's approach to the requirements of fair criminal processes in state courts has moved away from general notions of fundamental fairness grounded in the Due Process Clause. The modern model has commonly been described as one of incorporation of specific Bill of Rights provisions, a method that appears to be more specific and precise and that seeks greater uniformity between state and federal processes.[40] Nevertheless, the *Padilla* opinion is also awash in all manner of due process streams. First of all, the Sixth Amendment was applied to Kentucky (albeit sub silentio) through the due process requirements of the Fourteenth Amendment.[41] One is reminded of Akhil Reed Amar's observation

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applied the 1984 *Strickland v. Washington* standard to a lawyer's failure to advise the client about a 'collateral' consequence of conviction—something other than imprisonment, fine, probation, and the like, that the court imposes at sentencing").

36. *See* Dan Kesselbrenner, *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After* Padilla v. Kentucky, IMMIGRANT DEF. PROJECT, Apr. 6, 2010 (revised Apr. 9, 2010), http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf.

37. *See* Daniel Kanstroom, *Post Deportation Human Rights Law: Aspiration, Oxymoron or Necessity?*, 3 STAN. J. C.R. & C.L. 195 (2007).

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

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

40. *See, e.g.*, Tracey L. Meares, *What's Wrong With* Gideon, 70 U. CHI. L. REV. 215 (2003).

41. Simply put, the Fourteenth Amendment incorporates those "specific pledges of particular amendments [that are] implicit in the concept of ordered liberty" against the states. Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

that, though the Court may appear to be applying the Bill of Rights directly to the states:

> Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.[42]

Sixth Amendment right-to-counsel jurisprudence, "the heartland of constitutional criminal procedure,"[43] has never been fully independent from due process ideas, especially when applied to the states. Indeed, notwithstanding the vigorous debates among twentieth-century Justices about incorporation, the modern Sixth Amendment right-to-counsel idea is best viewed as a subsidiary category of broader norms. As Hugo Black wrote in 1938, the safeguards of the Sixth Amendment were "deemed necessary to insure fundamental human rights of life and liberty."[44] It was, he continued, one of the "essential barriers against arbitrary or unjust deprivation of human rights . . . . [It is] a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[45] The Court has often reiterated this principle as that of a "fair trial."[46]

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42. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 7 (1998).

43. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 89 (1997).

44. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (citing *Palko*, 302 U.S. at 325).

45. *Id.*

46. Of course, the Court has viewed the Sixth Amendment as applicable beyond the trial stage itself, including pleas. *See* Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (the *Strickland* test applies to claims of ineffective assistance of counsel in bargaining). Although it is said that the current Sixth Amendment "critical stage" analysis is essentially "designed to protect the fairness of the trial itself," this surely does not mean only the formal trial. Schneckloth v. Bustamonte, 412 U.S. 218, 238–39 (1973); *see also* United States v. Ash, 413 U.S. 300, 322 (1973). The Sixth Amendment right to counsel is said to "attach" once adversary judicial proceedings have been initiated against the defendant. *See, e.g.*, United States v. Gouveia, 467 U.S. 180, 187–88 (1984). This may happen by way of "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 188 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)). It may also attach whenever an individual makes an initial appearance before a magistrate for a probable cause determination and the setting of bail. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008). After a defendant's Sixth Amendment right to counsel attaches, he or she has a right to the advice of counsel "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967). The Supreme Court has referred to such a stage as a "critical stage" of a criminal proceeding. Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986); Maine v. Moulton, 474 U.S. 159, 170 (1985). The Court has recognized that certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial. *See, e.g.*, *Ash*, 413 U.S. at 309–10; *Wade*, 388 U.S. at 226. Thus, an indigent defendant is entitled to the assistance of appointed counsel at a preliminary hearing if "substantial prejudice . . . inheres in the . . . confrontation" and "counsel [may] help avoid that prejudice." Coleman v. Alabama, 399 U.S. 1, 9 (1970) (plurality opinion) (internal quotation marks omitted); *see also* White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam). The assistance of counsel is also guaranteed at a pretrial lineup because "the

In 1967, for example, the Court hearkened back to *Powell v. Alabama*[47] to conceptualize the right to counsel:

> In sum, the principle of *Powell* . . . and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . .[48]

Justice O'Connor put it similarly in *Strickland v. Washington*—the case that undergirds *Padilla*:

> In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, *in order to protect the fundamental right to a fair trial*. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . .[49]

Padilla, even on its most narrow reading, must therefore be understood as an elaboration of *both* Fifth and Sixth Amendment constitutional guarantees as they apply in the criminal setting and, perhaps, as they apply to deportation itself.[50]

This dualistic framing comports with various reasons for the right to counsel. Some reasons are specific to the criminal process, such as ensuring that the innocent are not wrongly convicted, avoiding wrongful punishment, and promoting truth-seeking trials. Others are more general, such as promoting parity between the defendant and the government in the adversarial process, and protecting fairness and dignity.[51] Decisions in this realm typically mix these various factors in ways that are not always especially consistent. Consider in this regard the debates over whether there was a right to counsel in misdemeanor

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confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Wade*, 388 U.S. at 228. The Court has, however, rejected the argument that the Sixth Amendment entitles the criminal defendant to the assistance of appointed counsel at a probable cause hearing. *See* Gerstein v. Pugh, 420 U.S. 103, 122–23 (1975) (ruling that the Fourth Amendment hearing "is addressed only to pretrial custody" and has an insubstantial effect on the defendant's trial rights).

47. 287 U.S. 45 (1932).

48. *Wade*, 388 U.S. at 218; *see also Ash*, 413 U.S. at 300.

49. Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (emphasis added) (citing Gideon v. Wainwright, 372 U.S. 335 (1963); *Zerbst*, 304 U.S. 458; *Powell*, 287 U.S. 45).

50. For a similar insight regarding the relationship between *Escobedo* and *Miranda*, see HENRY J. FRIENDLY, *A Postscript on Miranda*, *in* BENCHMARKS 266, 266–67 (1967) (predicting that most people eventually would see *Escobedo* as a Fifth and not a Sixth Amendment decision).

51. *See, e.g.*, AMAR, *supra* note 42, at 89–144; Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 68 (2000).

cases. As one commentator noted, before the Court resolved the issue in *Argersinger v. Hamlin*:[52]

> It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases, the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf.[53]

The Court later rejected the premise that "since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[54] The majority, unconvinced that the legal and constitutional questions involved in such a case "are any less complex than when a person can be sent off for six months or more,"[55] held that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."[56]

This recognition of the deep connection between the Fifth and Sixth Amendments, with its attendant complexity, does not, of course, necessarily demand a revision of the constitutional understanding of deportation law, in which fundamental fairness is still the dominant due process model. *Padilla*'s logic, however, seems to call this methodological divide into serious question. Indeed, any contrary interpretation would have to explain why the entire first section of the Court's opinion is about how the "landscape of federal immigration law has changed dramatically over the last 90 years."[57] One of the opinion's most interesting features is the way the Court straddles the civil/criminal and punitive/regulatory lines in its understanding of deportation. Such welcome realism about deportation has largely, though not completely, overcome historical formalism. I suggest that it may have crafted a new constitutional norm.

C. The Fifth-and-a-Half Amendment

The *Padilla* opinion, as noted, does not recognize deportation itself as a criminal sanction or punishment for constitutional purposes. Had it done so, then the direct application of the Sixth Amendment would have been

52. 407 U.S. 25 (1972).
53. John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968).
54. *Argersinger*, 407 U.S. at 30–31.
55. *Id.*
56. *Id.* at 31.
57. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

obligatory. Nor, on the other hand, did the Court reaffirm the venerable doctrine that deportation is completely civil and collateral. Had it done that, then the case could only have been resolved through Fifth Amendment due process analysis.

Justice Stevens sought a middle way, noting that deportation "as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as *either a direct or a collateral consequence*."[58] The collateral-versus-direct distinction is, he wrote, "ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."[59] Thus, deportation is now neither categorically covered by Sixth Amendment protection nor "categorically removed from the ambit of the Sixth Amendment right to counsel"[60] in which, to reiterate, it would be considered only under the more general rubric of the Fifth Amendment Due Process Clause.[61] So we must confront a profound and complex question in the wake of *Padilla*: What is the constitutional status of deportation? Before we can get to that, however, we must refine the question a bit more. The case, we should recall, involved the deportation of a long-term legal permanent resident due to a criminal conviction. This, as noted above, is a specific type of deportation case that is distinct from the deportation of an undocumented noncitizen due to illegal entry or a visa overstay.[62] Thus, the specific question raised by *Padilla* is: What is the constitutional status of *post-entry social control* deportation?

The *Padilla* Court's rejection of a formalist categorization of deportation as simply civil and nonpunitive is—as I have long argued—conceptually correct and long overdue.[63] But the devil is in the doctrinal details. *Padilla* leaves us with a complex constitutional model for deportation and with two rather different approaches to right-to-counsel claims relating to deportation. Certain deportation issues that arise in criminal courts are now governed specifically by the Sixth Amendment, albeit with a due process foundation (or, if you prefer, an emanation or penumbra). The Court's admonition to criminal lawyers as to those types of cases was clear: "[C]onstitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him

58. *Id.* at 1482 (emphasis added).
59. *Id.*
60. *Id.*
61. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
62. *See generally* KANSTROOM, *supra* note 14.
63. *See e.g.*, Kanstroom, *Deportation & Social Control*, *supra* note 28, at 1891; Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 61 B.C. L. REV. 771 (2000) [hereinafter Kanstroom, *Deportation & Justice*].

subject to automatic deportation."[64] All lawyers involved in the criminal justice system—prosecutors as well as defense counsel—must now take deportation into account at all stages of the criminal process.[65] This will likely be salutary for many noncitizens charged with crime. It should also facilitate better outcomes as it will decrease the chances of accidental deportations caused by inadvertence in criminal courts.

So far so good (or at least so far pretty good—there are complexities even at this analytical stage that I will discuss below). But does *Padilla* inform right-to-counsel claims in civil deportation proceedings themselves?[66] The issue is a profoundly serious one. Lack of counsel and lack of effective counsel in deportation proceedings are major problems that have negatively affected many hundreds of thousands of deportees.[67] Indeed, wrongful deportations (that is, deportations based on mistakes of fact or law) will, I believe, come to be seen as among the most shameful legal phenomena of our time.[68] In recent years, even some U.S. citizens have found themselves deported, a situation that violates more laws and more legal principles than one can count. We also know that many noncitizen deportees should never have been deported, even though they may have had formal deportation hearings. Mistakes have been made for a wide range of reasons. Some deportees simply gave up fighting their cases because they could not stand to remain in immigration detention. Many deportees lacked immigration counsel or they had inadequate counsel. As the *Padilla* case highlights, many criminal defense lawyers have had no awareness of possible immigration consequences and have advised noncitizens badly. Administrative and judicial review has been severely limited—and so on. Still, there is no recourse in many such cases, either in criminal or in immigration court.

All of this, and—as we shall see—more, adds up to a powerful indictment of the accuracy and the justice of the deportation system. It indicates that many thousands of deportees have reasonable claims that they should still be in the United States with their families. Indeed, the Supreme Court has recognized

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

65. *See* Markowitz, *supra* note 34.

66. Such claims are not typically analyzed under the Sixth Amendment rubric but through Fifth Amendment due process methods.

67. *See Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, ABA COMM'N ON IMMIGRATION (2010), *available at* http://new.abanet.org/immigration/pages/default.aspx (noting that more than half of the noncitizens in removal proceedings, and 84 percent of the detained ones, lacked legal representation, which "calls into question the fairness of a convoluted and complicated process").

68. Of course, accuracy is not the only criterion by which one measures the quality of a legal system. But surely it matters. There is, after all, a reason why the well-known and highly influential "Innocence Project" was not called the "Disproportionality Project."

that the government theory of deportation in many cases involving lawful permanent residents was fundamentally flawed.[69] The full scope of this problem can probably never be accurately measured. But consider the fact that millions of people have been deported in the last fifteen years and imagine even a 1 or 2 percent error rate (which would be a rather positive accomplishment for the agencies involved.) Even a 1 percent error rate would mean some 80,000–100,000 mistakes just over the past few years, including refugees, asylum seekers, and many thousands of long-term legal residents. This, I suggest, is the backdrop against which the constitutional implications of the *Padilla* case should be considered.

Thus, it is worth serious thought whether *Padilla* could herald the recognition of a new constitutional norm for (at least) the *post-entry social control* type of deportation that would account for both the harshness and the complexity of deportation. This norm, which we might call the Fifth-and-a-Half Amendment (Amendment V½) embodies both the flexible due process guarantees of the Fifth Amendment and—at least for certain types of deportation—the more specific protections of the Sixth Amendment.[70] What this model lacks in exactness, it makes up for with a moderately bounded flexibility that pays attention to the real nature of modern deportation in its various guises. Though originalists and textualists might argue that my very naming of Amendment V½ proves its illegitimacy, the counter to that argument is strong: So long as deportation is formalistically understood as civil and nonpunitive while, in reality, being tied directly to the criminal justice system and punitive in effect, Amendment V½ is a legitimate construct. It appropriately imbues the fundamental fairness required by the Fifth Amendment with certain constitutional protections due to criminal defendants. It is also the best way to make complete logical sense of *Padilla*.

It is not, of course, a panacea. Indeed, criminal law specialists may be amused at how much the application of *Strickland* seems to mean to those who represent deportees. Critics of *Strickland* argue that it reduced a conglomeration of constitutional ideals down to one word—fairness—and that this requires very little. "[A] conviction will be branded as 'unfair' only if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

69. *See, e.g.*, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); Lopez v. Gonzalez, 549 U.S. 47 (2006); Leocal v. Ashcroft, 543 U.S. 1 (2004).

70. This model also implies that the ex post facto clauses and the prohibition of bills of attainder ought to apply to certain types of deportation. *Cf.* Alvarado-Fonseca v. Holder, 631 F.3d 385, 391–92 (7th Cir. 2011) (rejecting this argument notwithstanding *Padilla*).

proceeding would have been different.'"[71] "Unfairness was thus reduced one step further to mean actual unreliability."[72] As Steven Bright has commented: "Much less than mediocre assistance passes muster under the *Strickland* standard."[73] Still, for deportees, even this is a major step forward.

Various implications of this new norm are apparent, but an obvious first one is that Amendment V½ strongly cuts against decisions like the one rendered at the eleventh hour by then–Attorney General Michael Mukasey in *Matter of Compean*.[74] That case, now overturned by Attorney General Eric Holder but not necessarily fully repudiated, called into question whether a deportee has any sort of strong constitutional right to reopen a case due to ineffective assistance of counsel. According to Mukasey's view, deportees had only a statutory privilege to retain counsel of their own choosing. Put simply, even if deportation counsel was incompetent, fraudulent, asleep, or failed to appear, Mukasey held that such a hearing would not necessarily be fundamentally unfair.[75] The Mukasey opinion overruled two longstanding Board of Immigration Appeals (BIA) decisions that had recognized a right to effective counsel. In the first decision, *Matter of Lozada*, the BIA had concluded that ineffective assistance of counsel was a denial of due process under the Fifth Amendment "if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[76] Fifteen years later, this principle was reaffirmed in a second decision, *Matter of Assaad*, despite intervening Supreme Court decisions from the criminal context that suggested that there can be no constitutional claim for ineffective assistance of counsel without constitutional right to counsel.[77] Before Mukasey's decision in *Compean*, the BIA had applied *Lozada* and *Assaad* in many cases to conclude that an immigrant's right to

71. Kimberly Helene Zelnick, *In* Gideon's *Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 379 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

72. *Id.*

73. Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858 (1994); *see also* Messer v. Kemp, 760 F.2d 1080, 1088–92 (11th Cir. 1985) (finding no Sixth Amendment violation in a case in which the defendant was represented at trial by an attorney who, at the guilt phase, gave no opening statement, presented no defense case, conducted cursory cross-examination, made no objections, and then emphasized the horror of the crime in brief closing remarks); William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

74. 24 I. & N. Dec. 710 (B.I.A. 2009) (concluding that because there was no constitutional right to counsel in deportation proceedings, the attorney general could craft a new, stricter framework for reopening cases based on claims of ineffective assistance of counsel).

75. *Id.* at 724–27 (overruling *In re* Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988); *In re* Assaad, 23 I. & N. Dec. 553 (B.I.A. 2003)).

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

77. *In re Assaad*, 23 I. & N. Dec. at 558.

effective assistance of counsel was violated.[78] The *Padilla* model of Amendment V½ would avoid vicissitudes of this type and would mandate a much more robust and stable right to pursue such claims in deportation cases.

Further, the norms of Amendment V½ could also support claims made by those who may have been wrongly deported due to ineffective assistance of counsel and perhaps for other reasons. In this realm, however, various procedural and conceptual hurdles abound, including questions of *Padilla*'s retroactive application, limits on habeas claims, time limitations on state court motions, jurisdictional limitations on motions to reopen in deportation proceedings, the exercise of discretion in immigration proceedings, and difficulties of proof.[79]

Still, the interpretation of *Padilla* matters greatly. For more than a decade, many have decried the state of deportation law. Harsh 1996 laws known by their acronyms—AEDPA and IIRIRA[80]—reflected a rather broad-brush crime control justification for deportation and radically changed and expanded the system. Together with the increasing real-world convergence between the criminal justice and deportation systems, the harshness of deportation compels "a rethinking of the foundational principles underlying the constitutional status of deportation."[81] Also, it has long seemed both logical and just that some of the constitutional norms applicable to criminal cases should inform our approach

78. *See, e.g.*, *In re* Cortez-Bravo, No. A091 058 599, 2008 WL 5537824 (B.I.A. Dec. 23, 2008); *In re* Weiqing He, No. A094 922 047, 2008 WL 5244716 (B.I.A. Dec. 2, 2008); *In re* Grijalva, 21 I. & N. Dec. 472, 473–74 (B.I.A. 1996).

79. *See, e.g.*, Mendez v. INS, 563 F.2d 956 (9th Cir. 1977) (holding, in a case involving a wrongful deportation of a permanent resident alien without notice to his counsel, that deportation in derogation of the right to counsel was not a "departure" for purposes of 8 U.S.C. § 1105a(c)). A departure sufficient to preclude subsequent judicial review meant "legally executed" departure and not "departure in contravention of procedural due process." *Id.* at 958 (internal citations omitted); *see also* Thorsteinsson v. INS, 724 F.2d 1365, 1367 (9th Cir. 1984); Estrada-Rosales v. INS, 645 F.2d 819, 820–21 (9th Cir. 1981).

80. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C. (1999)), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.), were passed in the chaotic aftermath of the Oklahoma City bombing. Among other features, the 1996 laws: (1) radically changed many grounds of exclusion and deportation; (2) retroactively expanded criminal grounds of deportation; (3) eliminated some and limited other discretionary waivers of deportability; (4) created mandatory detention for many classes of noncitizens; (5) expedited deportation procedures for certain types of cases; (6) eliminated judicial review of certain types of deportation (removal) orders; (7) vastly increased possible state and local law enforcement involvement in deportation; and (8) created a new type of streamlined removal proceeding—permitting the use of secret evidence—for noncitizens accused of terrorist activity.

81. Kanstroom, *Deportation & Social Control*, *supra* note 28, at 1892; *see also* Kanstroom, *Deportation & Justice*, *supra* note 63.

to deportation far more specifically than they have in the past.[82] The *Padilla* Court has taken a major step in this direction with its implicit creation of Amendment V½. But in many respects we are still at a crossroads and, as the poet Antonio Machado put it many years ago, *no hay camino; se hace camino al andar*—"There is no road; the road is made by walking."[83]

II. THE FACTS AND ISSUES PRESENTED TO THE SUPREME COURT

Jose Padilla had been a lawful permanent resident of the United States for over forty years before he was indicted on October 31, 2001. He was alleged to have been caught driving a truck loaded with marijuana, along with some drug paraphernalia. The charges included possession of marijuana, possession of drug paraphernalia, trafficking in marijuana (an amount greater than five pounds), and operating a truck without a weight and distance tax number. After conferring with counsel, he pled guilty to three misdemeanor drug-related charges and the Commonwealth of Kentucky dismissed the vehicular violation.[84] This seems to have been a rather good result from the perspective of the criminal justice system, but as a direct result of the plea, he faced deportation.

In postconviction proceedings, he claimed that his criminal counsel not only had failed to advise him about the deportation consequence, but actually had told him not to worry about deportation since he had lived in this country so long. Padilla asserted that he would have gone to trial had he not received the incorrect legal advice. Such assertions are often read with great skepticism by courts, especially after serious charges have been substantially reduced. Padilla's arguments, however, were buttressed by his new lawyer's assertion that his knowledge of the truck's contents would have been a major triable issue in the case. Still, the trial judge summarily denied his motion without even granting him an evidentiary hearing.[85]

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82. *See* Kanstroom, *Deportation & Social Control*, *supra* note 28, at 1892; *see also* Kanstroom, *Deportation & Justice*, *supra* note 63.

83. "Proverbios y cantares XXIX" [Proverbs and Songs 29], *Campos de Castilla* (1912), *in* SELECTED POEMS OF ANTONIO MACHADO (Betty Jean Craige trans., La. State Univ. Press 1979).

84. Padilla v. Commonwealth, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *2 (Ky. Ct. App. Mar. 31, 2006).

85. Part of the trial court's reasoning was that Padilla's bond had been changed because he was suspected of being "an illegal alien." Thus, said the judge, he must have been aware of the possibility of deportation. Moreover, the trial court noted that Padilla's counsel did discuss the deportation issue with him (albeit incorrectly). The court concluded that: "Padilla's counsel does not make a deportation decision and neither does this Court." Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Motion at 3–4 (cited in *Padilla*, 2006 Ky. App. LEXIS 98, at *3); *see also* Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

The Kentucky Court of Appeals remanded the case for an evidentiary hearing. Although the Kentucky Supreme Court had held that so-called collateral consequences were outside the scope of representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences was not cognizable as a claim for ineffective assistance of counsel,[86] the Court of Appeals panel found Padilla's case distinguishable. The panel reasoned that, although collateral consequences do not have to be advised, "an affirmative act of 'gross misadvice' relating to collateral matters can justify post-conviction relief."[87] The Court of Appeals thus found that counsel's wrong advice in the trial court regarding deportation could perhaps constitute ineffective assistance of counsel.[88]

The Kentucky Supreme Court was not persuaded by this. It reversed the appeals court decision and found no possible exceptions to its categorical ruling about the scope of the Sixth Amendment. The court concluded:

> As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue[s] or his act of advising Appellee incorrectly provides no basis for relief.[89]

Essentially, the Kentucky Supreme Court denied Padilla's claims on the bright-line, formalistic ground that the Sixth Amendment's effective-assistance-of-counsel guarantee did not protect defendants even from clearly erroneous deportation advice because deportation was merely a collateral consequence of a conviction.[90] There were two dissenters from the decision, but they, too, apparently agreed with the Court's basic framework as to collateral consequences. Nevertheless, for reasons upon which they did not much elaborate, the dissenters thought that it was not "too much of a burden to place on our defense bar the duty to say, 'I do not know.'"[91] Whether they were implicitly thinking of due process norms or only the Sixth Amendment, it is impossible to know for sure.

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86. Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005).

87. *Padilla*, 2006 Ky. App. LEXIS 98, at *7.

88. *Padilla*, 253 S.W.3d at 483–84.

89. In neither instance is the matter required to be addressed by counsel, and thus an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.

90. In one sense, this might be seen as the inverse of the *Wong Wing* methodology. *See infra* Part IV.C.1. In *Wong Wing*, the late nineteenth-century U.S. Supreme Court pierced the veil of deportation proceedings to examine the real nature of a hard labor sanction, whereas the Kentucky Supreme Court was unwilling to pierce the veil of the criminal process to examine the nature of deportation.

91. *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting).

III. READING THE SUPREME COURT'S *PADILLA* OPINION(S)

A. Justice Stevens's Majority Opinion

1. Is ("Automatic") Deportation "Collateral"?

Padilla's Petition for a Writ of Certiorari to the U.S. Supreme Court highlighted two major questions raised by the case, and it framed them quite precisely. The first question was whether "the *mandatory* deportation associated with a plea to an 'aggravated felony' . . . can still be described as a 'collateral consequence' of a criminal conviction which relieves counsel from any affirmative duty to advise."[92] The second, narrower question, was "whether an attorney's 'flagrant' or 'gross' misadvice on a collateral matter, such as mandatory deportation, can constitute grounds for setting aside the guilty plea."[93]

One would have thought the second question more likely to be resolved favorably by the Supreme Court than the first. The affirmative misadvice exception had already been accepted by many courts and would not have required major restructuring of any prior Supreme Court precedent. Indeed, it was a rule that the solicitor general supported. As it turned out, however, the first question's focus on mandatory deportation became the centerpiece of the Supreme Court's reasoning and this, to a large degree, obviated the need to consider the second question at all.

Essentially, the Supreme Court, by a 7–2 margin, rejected the Kentucky Supreme Court's wholly formalistic approach. Justice Alito and Chief Justice Roberts concurred, but only as to misadvice.[94] The Court's basic holding was that the Sixth Amendment now requires that criminal defense counsel advise at least some noncitizens about at least some types of immigration consequences before tendering a guilty plea. As the Court put it: "[C]onstitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to *automatic* deportation."[95]

Padilla thus implicitly rejects the historical view of deportation as a civil collateral consequence of the criminal justice system, like losing the right to vote, eviction from public housing, or the loss of the right to possess firearms.

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92. Petition for a Writ of Certiorari at 7, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651).

93. *Id.* at 7–8.

94. Justice Scalia, with whom Justice Thomas joined, dissented. *Padilla*, 130 S. Ct. at 1494–97 (Scalia, J., dissenting).

95. *Id.* at 1478 (majority opinion) (emphasis added).

However, the opinion seems to vacillate among three positions about the direct-versus-collateral distinction itself. In some passages the Court seems to maintain the distinction. In others the Court seems to eliminate (or mitigate) it. And in others it suggests that, at least in this particular context, the distinction is irrelevant. Compare, for example, the following excerpts from the majority opinion:

> - We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland* . . . .[96]
> - Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.[97]
> - We have long recognized that deportation is a particularly severe "penalty," . . . but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, . . . deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, ... And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context.[98]
> - Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.[99]

Although these formulations cut in somewhat different directions, it is clear that—taken as a whole—the *Padilla* opinion has confirmed the tacit movement of deportation law out of civil law's formalist realm. What is now required is a more functionalist discourse in which the nature of the particular type of deportation at issue will matter. It appears that some forms of deportation in some settings are now directly governed by Sixth Amendment

96. *Id.* at 1481 (citations omitted).
97. *Id.*
98. *Id.* (citations omitted).
99. *Id.* at 1482.

norms, while others are to be analyzed as due process Fifth Amendment questions, perhaps with some Sixth Amendment framing. *Post-entry social control deportation* is now, one might say, subject to Amendment V½.

Essentially the *Padilla* case resolved both a temporal as well as a substantive problem: Deportation—which by itself is not protected by the Sixth Amendment—flows from and comes after a criminal conviction, but it is now viewed as an inextricable part of the criminal process. In 2002, the Court considered a somewhat analogous question in *Alabama v. Shelton*:[100] Where the State had provided no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? The Court concluded that it does not. The logic was simple: "A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point 'results in imprisonment.'"[101] This, held the Court, is precisely what the Sixth Amendment does not allow. The analogy to *Padilla* may be seen in the argument raised by Charles Fried as amicus curiae by invitation of the Court. Fried sought to align the *Shelton* issue with prior Court decisions in *Nichols v. United States*[102] and *Gagnon v. Scarpelli*.[103] The question in *Nichols* was whether the Sixth Amendment barred consideration of a defendant's prior uncounseled misdemeanor conviction in determining his sentence for a subsequent felony offense.[104] The Court held that it did not. In *Gagnon*, the Court ordered a case-by-case approach to determine whether counsel was required in probation and parole revocation hearings. This method would focus on the nature of the issues involved.[105] Considered together, Fried contended, *Nichols* and *Gagnon* established that "sequential proceedings must be analyzed separately for Sixth Amendment purposes, and only those proceedings 'result[ing] in immediate actual imprisonment' trigger the right to state-appointed counsel."[106] Note that this

100. 535 U.S. 654 (2002).

101. *Id.* at 662 (citing Nichols v. United States, 511 U.S. 738, 746 (1994)).

102. 511 U.S. at 740.

103. 411 U.S. 778 (1973) (adopting a case-by-case assessment of the need for counsel).

104. Nichols had pleaded guilty to federal felony drug charges. Several years earlier, however, unrepresented by counsel, he had been fined for the state misdemeanor of driving under the influence (DUI). Including the DUI conviction in the federal sentencing guidelines calculation allowed the trial court to impose a sentence for the felony drug conviction twenty-five months longer than if the misdemeanor conviction had not been considered. *Nichols*, 511 U.S. at 741.

105. *Gagnon*, 411 U.S. at 788–91.

106. Alabama v. Shelton, 535 U.S. 654, 663 (2002) (citing Brief of Charles Fried et al. as Amicus Curiae by Invitation of the Court at 11–18, *Shelton*, 535 U.S. 654 (No. 00-1214), 2001 WL 1631562, at *7–10).

logic, had it been accepted, could have been applied both to the issue raised in *Padilla* and to a possible claim to a right to counsel in deportation proceedings. But the Court did not accept this logic in *Shelton*. Rather, it held that "[t]he dispositive factor in [*Nichols* and *Gagnon*] was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony for which he was imprisoned."[107] For *Shelton*, revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel. Thus, held the Court, "neither *Nichols* nor *Gagnon* altered or diminished *Argersinger*'s command that 'no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.'"[108] The Sixth Amendment inquiry "trains on the stage of the proceedings . . . where[ ] guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined."[109] Unlike *Shelton*, however, *Padilla* does not separate the two proceedings but, in effect, nests one within the other and then applies the Sixth Amendment to them both.[110] This is a major difference.

2. Misadvice Versus No Advice

As we consider the significance and the legitimacy of Amendment V½, it is worth recalling that the debate over misadvice in this setting is not a new one.[111] As Judge Jerome Frank wrote in a 1954 dissent from a decision affirming

107. *Id.* at 664.

108. *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)).

109. *Id.* at 665.

110. One might also see analogies between *Padilla* and the Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "any fact" other than that of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), and *United States v. Booker*, 543 U.S. 220 (2005) (Stevens, J., dissenting in part) (holding that the Sixth Amendment is violated by the imposition of an enhanced sentence under the U.S. Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant). *See also* Oregon v. Ice, 555 U.S. 160 (2009) (upholding a state sentencing regime that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration); Cunningham v. California, 549 U.S. 270 (2007) (applying the *Apprendi* rule in striking down California's scheme that allowed judges to issue longer prison terms based on their own fact-finding); United States v. Pfaff, 619 F.3d 172 (2d Cir. 2010); United States v. LaGrou Distribution Sys., Inc., 466 F.3d 585 (7th Cir. 2006) (applying *Apprendi* to fines). *But see* United States v. S. Union Co., 630 F.3d 17 (1st Cir. 2010) (holding that *Apprendi* does not to apply to fines).

111. *See* United States v. Briscoe, 432 F.2d 1351, 1353–54 (D.C. Cir. 1970) ("Under appropriate circumstances the fact that a defendant has been misled as to the consequence of deportability may render his guilty plea subject to attack. Insofar as a contrary view may be inferred from *United States v. Parrino* on the ground that deportability is only a 'collateral consequence' of conviction, we agree with

the denial of a motion to withdraw a guilty plea[112] that had involved similar facts to *Padilla*:

> When a lawyer gives his client an erroneous opinion on a question the correct answer to which, by no stretch of the imagination, could be considered doubtful, and the client, relying on that opinion, enters a plea of guilty which will disastrously affect his future life, it is hard to understand how it can be maintained that "manifest injustice" has not occurred. If not, I wonder how manifest the injustice must be.[113]

In the following half-century, as deportation cases increased in both number and severity, some courts held that such affirmative misadvice about deportation could justify the withdrawal of a guilty plea.[114] As early as 1985, the Eleventh Circuit found that affirmative misrepresentation regarding immigration consequences, coupled with the likelihood that the petitioner would be imprisoned and executed after deportation, could be ineffective assistance of counsel.[115] Most notably, in 2002, the Second Circuit held that an affirmative misrepresentation regarding immigration consequences was deficient under *Strickland*.[116] Counsel in that case had not merely failed to advise the client regarding deportation consequences. In response to the client's inquiry, counsel had assured her that, although deportation was a possibility, "there were

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Professor Moore: 'the vigorous dissent of Judge Frank [in *Parrino*] more likely reflects the present attitude of the federal judiciary.'" (citations omitted)).

112. *See* FED. R. CRIM. P. 32(d).

113. United States v. Parrino, 212 F.2d 919, 926 (2d Cir. 1954) (Frank, J., dissenting).

114. *See, e.g.*, United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); United States v. Couto, 311 F.3d 179 (2d Cir. 2002); Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988); United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); *In re* Resendiz, 19 P.3d 1171 (Cal. 2001); State v. Rojas-Martinez, 125 P.3d 930, 935 (Utah 2005).

115. *See* Downs-Morgan v. United States, 765 F.2d 1534, 1540–41 (11th Cir. 1985). Other federal courts had suggested, hypothetically, that an affirmative misrepresentation by counsel that the accused would not be deported could constitute ineffective assistance of counsel and thus could invalidate a guilty plea. In *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975) (per curiam), although the court held that counsel's failure to inform the accused of the immigration consequences of his guilty plea did not establish ineffective assistance of counsel, the court further reasoned that "since [defense counsel] does not aver that he made an affirmative misrepresentation, [the defendant] fails to state a claim for ineffective assistance of counsel." *Id.* at 704; *see also* United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973). In *Briscoe v. United States*, 391 F.2d 984 (D.C. Cir. 1968) (per curiam), the court approved the district court's denial of a section 2255 motion "because there was no showing that either the prosecution or [the defendant's] counsel had made any promise to [the defendant] that deportation would ensue on his plea." *Id.* at 986; *see also* United States v. Briscoe, 432 F.2d 1351, 1353 (D.C. Cir. 1970) ("Under appropriate circumstances the fact that a defendant has been misled as to [the] consequence of deportability may render his guilty plea subject to attack.").

Also, in *People v. Correa*, 465 N.E.2d 507 (Ill. App. Ct. 1984), the court held that "where defense counsel has unequivocally represented to his client that [a guilty] plea will not result in his deportation and the defendant has relied upon this patently erroneous advice in deciding to plead guilty, post-conviction relief is appropriate to permit the defendant to plead anew . . . ." *Id.* at 512.

116. United States v. Couto, 311 F.3d 179, 187–88 (2d Cir. 2002).

many things that could be done to prevent her from being deported . . . ."[117] This, unfortunately, was incorrect, according to the court:

> [B]ecause the 1996 amendments to the Immigration and Nationality Act eliminated all discretion as to deportation of non-citizens convicted of aggravated felonies, her plea of guilty meant virtually automatic, unavoidable deportation.[118]

As a result, the Second Circuit found that counsel had affirmatively misrepresented the deportation consequences of the guilty plea and that such an affirmative misrepresentation was objectively unreasonable, particularly in light of contemporary standards of attorney competence. These strands of affirmative misadvice and automatic deportation were similarly woven together in *Padilla*.[119]

3. "Virtually Inevitable" Deportation and the Powerful Recognition of Convergence

Apart from the central right-to-counsel concerns presented in *Padilla*, the Court majority was clearly concerned about two interrelated issues: First, as noted, was the current nature of deportation law; second was the problem of how the Court's decision might relate to prior Fifth and Sixth Amendment precedents. The opinion begins with a powerful assertion that seems designed to address both concerns:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, . . . is now *virtually inevitable* for a vast number of noncitizens convicted of crimes.[120]

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117. *Id.* at 183.

118. *Id.* at 183–84.

119. Courts had periodically focused on the automatic nature of deportation for many years before *Padilla*. But this was typically done to justify a denial of relief. As Judge Kaufman wrote in *Santelises*, 476 F.2d at 790:

> Moreover, we should emphasize that deportation under section 1546 is not "automatic". Although 8 U.S.C. § 1251(a)(5) does allow deportation of any alien who has violated sec. 1546, without proof that the crime is one of moral turpitude, deportation results, however, only upon "order of the Attorney General" who retains discretion whether or not to institute such proceedings.

120. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (emphasis added) (citations omitted).

This *virtually inevitable* prong, as noted, is not a completely new idea. However, its unique importance in *Padilla* is that it enabled the Court to build an analytic bridge between criminal prosecution and deportation without going too far too fast. Thus, the majority concluded that:

> The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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.[121]

The Court cited with approval a 1986 Second Circuit case, *Janvier v. United States*,[122] that had held that a former legal provision, known as a Judicial Recommendation Against Deportation (JRAD), properly invoked Sixth Amendment scrutiny. The JRAD had originated in the 1917 Immigration Act. It provided that at the time of sentencing or within thirty days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported."[123] This procedure was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[124] Thus, wrote Justice Stevens:

> [F]rom 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.[125]

In 1986, the Second Circuit held that the right to effective assistance of counsel applied to a JRAD request or to the lack thereof. In its view, seeking a JRAD was part of the sentencing process, even if deportation itself was still a civil proceeding.[126] Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country "was a central

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121. *Id.* at 1480 (emphasis added).

122. 793 F.2d 449 (2d Cir. 1986); *see also* United States v. Castro, 26 F.3d 557, 561 (5th Cir. 1994).

123. As enacted, the statute provided:

> 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.

1917 Act, 39 Stat. 889–90 (codified at 8 U.S.C. § 1251(b) (1994)).

124. *Janvier*, 793 F.2d at 452.

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

126. *Janvier*, 793 F.2d at 452; *see also Castro*, 26 F.3d 557.

issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation."[127] The *Padilla* Court viewed this logic as a workable matrix, despite the historical fact that the JRAD did not apply to narcotics offenses after 1952[128] and was entirely eliminated in 1990.[129] It also did not explain whether the fact that a civil consequence is automatic necessarily equates to its being an integral part of the criminal process. But there is a difference between the two concepts. Many consequences that are still deemed collateral are automatic.[130] This is a problem to which we will return.

What is also fascinating is how a 1986 reading of the technical implications of a federal statutory system has now been transformed into a broad constitutional rule. The key now, for constitutional purposes, is not the fact that Congress had intended state or federal judicial involvement in deportation per the JRAD, but quite the contrary. It is that the system has rendered deportation a virtual inevitability in the absence of a JRAD option and the elimination of other forms of discretionary relief.

4. A More Formalistic Reading?

Lest I be accused of an unduly expansive reading of *Padilla*, we must also recognize that the case could be read to cut in a different, much more formalist, direction. It could be seen as a signal by the Court that Sixth Amendment norms should not be applied in deportation cases (outside of the criminal court context) at all. To make this argument, one might note that the focus in Justice Stevens's opinion on the automatic nature of the deportation sanction diverts attention from (indeed it may downplay) the harshness of deportation in its own right, whether linked to crime or not and whether automatic or not.[131] Indeed, the Sixth Amendment model applied by the *Padilla* Court was rather strange

127. *Padilla*, 130 S. Ct. at 1480.

128. The 1952 Act separately codified the moral turpitude offense provision and the narcotics offense provisions. *See* Immigration and Nationality Act, Pub. L. No. 414-477, §§ 237, 241, 66 Stat. 201, 204, 206 (1952). Under the 1952 Act, the Judicial Recommendation Against Deportation (JRAD) procedure applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. *Id.* § 241, 66 Stat. at 208; *see* United States *ex rel* DeLuca v. O'Rourke, 213 F.2d 759 (8th Cir. 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

129. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050.

130. *Contra* Justice Breyer's dissent in *Texas v. Cobb*, 532 U.S. 162, 186 (2001) ("There is, of course, an alternative. We can, and should, define 'offense' in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument.").

131. *See* discussion of *Wong Wing*, *infra* Part IV.C.

when considered in this light. The Court applied *Strickland v. Washington*[132] in a way that depended not on the harshness of the deportation sanction, but primarily on its analytic complexity. Thus, the nature of the requisite effective assistance of counsel now turns on whether the deportation sanction is automatic. As to nonautomatic, nonintegral deportation consequences, the *Padilla* Court did not enunciate an especially demanding Sixth Amendment standard at all. In the "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain," wrote Justice Stevens:

> The duty of the private practitioner . . . is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[133]

One obvious practical problem with this delineation, however, is that someone (presumably the criminal defense counsel) will have to distinguish the automatic cases from the uncertain ones. Once this has been properly done, the attorney will necessarily have much more information to impart to the client. It is not clear, however, whether the failure to share such information would justify the withdrawal of a guilty plea.

One might also ask why *Padilla* was primarily structured as a case in the Sixth Amendment *Strickland* line rather than in the Fifth Amendment *Boykin v. Alabama* line that deals with the validity of the plea itself, not simply the role of counsel.[134] If lawyers are obliged to advise clients about deportation, are courts now similarly obliged to make sure that the advice has been properly given?[135] The logic in support of that conclusion seems rather strong, but it is

132. 466 U.S. 668 (1984).

133. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

134. A criminal defendant entering a guilty plea must do so knowingly, voluntarily, and intelligently. Thus, the defendant must have "a full understanding of what the plea connotes and of its consequence." Boykin v. Alabama, 395 U.S. 238, 244 (1969). The general rule has long been, however, that "[t]he defendant need only understand the direct consequences of the plea; he need not be made aware every [sic] consequence that, absent a plea of guilty, would not otherwise occur." United States v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000) (citing Trujillo v. United States, 377 F.2d 266, 266 (5th Cir. 1967)).

135. *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327, 336–37 (5th Cir. 2008) ("We have previously held that neither due process nor Federal Rule of Criminal Procedure 11 require that a court advise a defendant of the collateral consequences of a guilty plea." (citing United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993)); United States v. Posner, 865 F.2d 654, 660 (5th Cir. 1989) (noting that "[t]he failure to advise a defendant of collateral consequences of a plea of guilty does not render it involuntary"). Under *Banda*, deportation was specifically named a collateral consequence. *See also* United States v. Amador-Leal, 276 F.3d 511, 514–17 (9th Cir. 2002) (rejecting the argument that changes in immigration laws affected the collateral nature of deportation such that judges must admonish defendants of the immigration consequences of a plea for that plea to be voluntary); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (holding that deportation was collateral

clear that the Court majority did not want to go that far. Also, although *Padilla* only addresses advice on immigration consequences in connection with guilty pleas, it calls into question cases that hold that immigration consequences are collateral and should not be considered at any point in a criminal proceeding.[136]

To understand the scope of the *Padilla* opinion, it is perhaps useful to recall that Justice Stevens had long written passionately about his view of the role of the lawyer in the adversarial system. As he wrote in dissent in 1986:

> This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.[137]

He has also previously expressed his view of the important prophylactic role of strong and clear Sixth Amendment norms once adversary criminal proceedings have commenced. In 1988, he wrote that "[g]iven the significance of the initiation of formal proceedings and the concomitant shift in the relationship between the state and the accused," it was "quite wrong to suggest that *Miranda* warnings—or for that matter, any warnings offered by an adverse party—provide a sufficient basis for permitting . . . trained law enforcement personnel and prosecuting attorneys to communicate with as-of-yet unrepresented criminal defendants."[138]

Moreover, Justice Stevens had also previously seen a rather broad array of concerns that might reasonably be considered as obligatory parts of the relationship between a criminal defense attorney and a defendant. In 1991, he wrote:

> The scope of the relationship between an individual accused of crime and his attorney is as broad as the subject matter that might reasonably be encompassed by negotiations for a plea bargain or the contents of a presentence investigation report. Any notion that a constitutional right

even in light of IIRIRA's changes to immigration law); *cf.* United States v. Couto, 311 F.3d 179, 188–91 (2d Cir. 2002).

136. *See, e.g.*, Commonwealth v. Quispe, 744 N.E.2d 21, 24 (Mass. 2001) (ruling that immigration consequences are collateral and may not be a basis for a judge's decision to dismiss criminal charges); Commonwealth v. Hason, 545 N.E.2d 52, 54 (Mass. App. Ct. 1989) (holding that, but for the Massachusetts immigration warnings statute, a trial judge would have no duty to warn of immigration consequences because they are collateral); People v. Garcia, 907 N.Y.S.2d 398, 407 (Sup. Ct. 2010) (concluding that a general warning by a court does not cure counsel's ineffective representation and does not overcome prejudice).

137. Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting).

138. Patterson v. Illinois, 487 U.S. 285, 306–07 (1988) (Stevens, J., dissenting).

> to counsel is, or should be, narrowly defined by the elements of a pending charge is both unrealistic and invidious.[139]

In any event, it seems rather strained to read such logical gaps and inconsistencies as indicative of a revitalization of the bright-line dichotomy against which the balance of the opinion pushes so strenuously. The better reading of the opinion, taken as a whole, is that such inconsistencies were the price that Justice Stevens had to pay to steer between the Scylla of a fully functionalist holding about deportation (which would have implied a right to deportation counsel in civil deportation proceedings and to a full colloquy about deportation) and the Charybdis of the direct/collateral formalism (which would have sustained the Kentucky Supreme Court). The reasoning of *Padilla* is thus somewhat similar to the Court's methodology in *INS v. St. Cyr* in which Justice Stevens (who also wrote the majority opinion in that case) first affirmed that "deportation is not punishment for past crimes," but then imported an anti-retroactivity norm redolent of constitutional criminal law into the nominally civil deportation realm.[140] In both cases the civil–criminal line and the definition of deportation as nonpunitive are maintained even as their recognized harsh consequences are overcome through other means.[141] The result is a bit of a mixed message, constitutionally speaking, but one that holds real promise for future development.

B. The Concurrence

The strong version of *Padilla*—that went beyond affirmative misadvice—was in major part a 5–4 decision. Justice Alito, joined by Chief Justice Roberts, endorsed the proposition that an attorney fails to provide effective assistance under *Strickland* by misleading "a noncitizen client regarding the removal consequences of a conviction."[142] They did this despite referring to the Court's decision as "a major upheaval in Sixth Amendment law."[143] The nub of their argument seems to have been that "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the

139. McNeil v. Wisconsin, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting).

140. *See* Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 421 (2002).

141. *Padilla*, however, goes farther than *St. Cyr* in one critical respect: It frames the deportation issue within the constitutional norms of the Sixth Amendment, thus creating the Fifth-and-a-Half Amendment (Amendment V½). The *St. Cyr* Court did not do this with the ex post facto clause, though there were (and there still are) powerful arguments in support of doing so. *Id.*

142. Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring).

143. *Id.* at 1491.

criminal proceeding itself into question."[144] As the Court had done in *Strickland* itself, the goal of ensuring a fair trial was seen to undergird the requirement of effective assistance of counsel.[145] As noted above, this is a blend of Fifth and Sixth Amendment concerns. Indeed, the concurring Justices' focus on due process supports my thesis that—taken as a whole—*Padilla* implies a new norm.

Apart from the duty not to "unreasonably"[146] provide incorrect advice, however, the maximum *Strickland* duty seen by Justices Alito and Roberts was to "advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney."[147]

They did not agree with the majority "that the attorney must attempt to explain what those consequences may be."[148] This was mostly due to the complexity of immigration law. As the concurring Justices noted, "Incomplete legal advice [by criminal defense lawyers who are not experts in immigration law] may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source."[149] This is a proposition with which I agree. But, rather than simply resting on a lesser *Strickland* burden, I suggest that this further supports a right to deportation counsel.

Justices Alito and Roberts also worried that "the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences."[150] They noted that twenty-eight states and the District of Columbia had already "adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas."[151] Although they only expressly endorsed this as a subconstitutional model (and neither would likely endorse it as a constitutional requirement), it seems potentially to express a nascent due process requirement as well.

144. *Id.* at 1493 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984) ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide.")).

145. *Id.*

146. It is not clear to me how one could "reasonably" provide incorrect legal advice.

147. *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring).

148. *Id.*

149. *Id.* at 1491.

150. *Id.*

151. *Id.*

C. The Dissent

Justice Scalia, joined by Justice Thomas, dissented. Beginning with an implicit nod to Voltaire, the dissenters asserted that "in the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised."[152] Their concern was that the Constitution "is not an all-purpose tool for judicial construction of a perfect world."[153] The Court, they suggested, swung "a sledge where a tack hammer is needed."[154]

In evaluating this dissent one should note at the outset that Justice Scalia is skeptical of the validity of not only the majority opinion in *Padilla*, but also of *Strickland* and, for that matter, of *Gideon v. Wainwright*[155] itself. Writing in a mode that can perhaps best be described as strongly polemical and iconoclastic, if not downright curmudgeonly, Justice Scalia wrote that "*Even assuming the validity of these holdings*, [*Gideon* and *Strickland*], I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create."[156]

Adopting a rather formalistic and certainly a tightly circumscribed view of the Sixth Amendment, the dissenters asserted that there is "no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand . . . ."[157] These were then narrowly defined as "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction."[158] In support of this narrow reading, they noted that, not only had the Court never before extended the Sixth Amendment to "consequences collateral to prosecution," but "we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event."[159]

152. *Id.* at 1494 (Scalia, J., dissenting).
153. *Id.*
154. *Id.*
155. 372 U.S. 335 (1963).
156. *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting) (emphasis added).
157. *Id.* at 1495.
158. *Id.*
159. *Id.* (citing Texas v. Cobb, 532 U.S. 162, 164 (2001)); *cf. Cobb*, 532 U.S. at 186–87 (Breyer, J., dissenting) ("There is, of course, an alternative. We can, and should, define 'offense' in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument . . . . One cannot say in favor of this commonly followed approach that it is perfectly clear—only that, because it comports with common sense, it is far easier to apply than that of

A major concern for the dissenters was that the majority's extension of counsel's duties to include "an obligation to advise about a conviction's collateral consequences has no logical stopping-point."[160] Even the misadvice limitation, they felt, was insufficient to avoid "[t]he same indeterminacy, the same inability to know what areas of advice are relevant . . . ."[161]

Finally, Justice Scalia noted that the concurrence's treatment of misadvice seemed driven largely by concern about the voluntariness of Padilla's guilty plea. One might also have found this implicit in the majority opinion. That concern, the dissenters argued, more properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than the Sixth Amendment, a proposition with which I tend to agree, at least partly.[162] Of course, they did not suggest that the Due Process Clause would provide relief. Indeed, such a rule would be broader than the majority holding and would require every judge to refine each plea colloquy to ensure that the defendant actually understood all the deportation risks. Under current law, the general rule is that mere awareness of direct consequences suffices for the validity of a guilty plea.[163] There is an extensive and contradictory body of case law applying the direct/collateral distinction in this context.[164] The required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which has been said to approximate the due process requirements for a valid plea, does not mention collateral consequences.[165] Thus, the dissenters' nod to the Fifth Amendment was perhaps a bit disingenuous. It does, however, appropriately focus our attention on the real problem for the *Padilla* majority: reconciling Fifth and

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the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. And, most importantly, the 'closely related' test furthers, rather than undermines, the Sixth Amendment's 'right to counsel,' a right so necessary to the realization in practice of that most 'noble ideal,' a fair trial." (citations omitted)).

160. *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting).

161. *Id.*

162. *Id.* at 1496 (citing McCarthy v. United States, 394 U.S. 459, 466 (1969); Brady v. United States, 397 U.S. 742, 748 (1970)).

163. *See Brady*, 397 U.S. at 755.

164. *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004) (holding that a defendant need not be informed that a committal for life as a sexually dangerous person was possible as a result of a guilty plea); *cf.* United States v. Littlejohn, 224 F.3d 960, 969 (9th Cir. 2000) (holding that permanent ineligibility for federal benefits was a direct consequence of a guilty plea that must be disclosed to the defendant by the court). In *United States v. Amador-Leal*, immigration consequences were deemed collateral under this rubric. 276 F.3d 511, 518 (9th Cir. 2002). *See generally* Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47 (2010).

165. *See* Libretti v. United States, 516 U.S. 29, 49–50 (1995).

Sixth Amendment jurisprudence regarding criminal pleas in the context of deportation consequences.

IV. PONDERING AMENDMENT V½ AFTER *PADILLA*

A. Amendment VI: Apparent Simplicity and Real Complexity

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[166] Though its language seems simple and direct, the full meaning is far from self-evident. Consider, for example, just a few threshold questions:

- **What is the meaning of the phrase "criminal prosecutions"?** Does it only apply to those instances in which the government calls the process a criminal one? Or should it extend to cases that impose sanctions similar or analogous to historical criminal sanctions even if the government chooses to label the process itself civil?
- **How far does the right to "assistance" for "defence" extend?** Must the government pay for a lawyer? If so, must it also pay for a lawyer at sentencing? Appeals? Collateral challenges?
- **Does the right to assistance imply a right to retrospective consideration of whether such assistance was effective?**

And so on. My purpose here is not to answer these questions; indeed each one has a long and complex history. Moreover, the Sixth Amendment was never seen as the only possible basis upon which a person could claim a right to appointed counsel. Common law courts had "inherent power to entertain gratuitously the plaints of the needy" in both civil and criminal cases.[167] And, as is discussed further below, the Court has occasionally seen fit to derive a right to counsel from due process norms.[168]

In the modern era, the Court has also sometimes extended Sixth Amendment norms beyond the "in-court" aspects of the criminal process. In

166. U.S. CONST. amend. VI.

167. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 365–66 (1923) (citing Rex v. Wright, 2 Stra. 1041 (1735), more fully reported in Cas. K. B. temp. Hardw. 200, 240 (referring to a criminal proceeding in which it was said that "as the prosecutor could have no costs[,] the defendant might be admitted *in forma pauperis*")).

168. *See In re* Gault, 387 U.S. 1, 33–34, 41, 55–56 (1967) (holding that juveniles accused of crimes in a delinquency proceeding must—under the Fourteenth Amendment—be afforded certain due process rights, including the right to timely notification of charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel).

Massiah v. United States,[169] for example, an indicted defendant was engaged in conversation by an acquaintance who was serving as a "wired" prosecution informer. The Court viewed this as an interrogation and ruled that the Sixth Amendment right to counsel precluded questioning of an indicted defendant under any circumstances without defense counsel present.[170] Decades later, in *Fellers v. United States*,[171] the Court held that interviewing an indicted defendant at home without the presence of counsel or waiver of counsel violated the Sixth Amendment right to counsel.[172]

Such cases inevitably involve a long-running *pas de deux* between Fifth and Sixth Amendment norms. In *Escobedo v. Illinois*,[173] the Court held that police had violated the Sixth Amendment by denying an arrested suspect the opportunity to consult with his retained counsel. The Court, in a pre-*Miranda* formulation, found that such a suspect's Sixth Amendment rights are violated if he has requested and has been denied an opportunity to consult with his lawyer, "and the police have not effectively warned him of his absolute constitutional right to remain silent . . . ."[174] To implement this rule, the Court also adopted an exclusionary rule: "[N]o statement elicited by the police during the interrogation may be used against him at a criminal trial."[175] As Charles Weisselberg has noted, *Escobedo*—particularly when read in the light of *Gideon*—raised a welter of questions not dissimilar from those raised by *Padilla*:

> Danny Escobedo had a retained attorney, but what about an indigent suspect who could not afford to hire a lawyer? When did these Sixth Amendment rights inhere? What did it mean for an investigation to "focus" on a suspect?[176]

The Court soon resolved some such questions by relying not on the Sixth Amendment, but on the Fifth, in *Miranda*.[177] In this sense, "*Escobedo* set the

169. 377 U.S. 201 (1964).

170. The ruling was limited to the specific situation in which the police have focused their investigation on a particular suspect in custody. *Id.* at 206–07. In *Brewer v. Williams*, the Court confirmed that interrogation of one who has been formally charged and is represented by counsel violates the Sixth Amendment. 430 U.S. 387, 400–01 (1977).

171. 540 U.S. 519 (2004).

172. *Id.* at 524–25.

173. 378 U.S. 478 (1964).

174. *Id.* at 490–91.

175. *Id.* at 491.

176. Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 116–17 (1998).

177. Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Court held that the prosecution may not use statements derived from a custodial interrogation of a suspect unless it can demonstrate the use of procedural safeguards effective in securing the privilege against self-incrimination. Although the Fifth Amendment protects only the right against self-incrimination and does not specifically discuss the right to counsel, *Miranda* held that the right to have an attorney present during interrogation is indispensable to the protection of the Fifth Amendment privilege against compulsory

stage for *Miranda*."[178] The ostensibly more focused Sixth Amendment reasoning of *Escobedo* was largely subsumed.[179] Indeed, the Court, in retrospect, has seen the prime purpose of *Escobedo* as not to vindicate the constitutional right to counsel as such, but, like *Miranda*, "to guarantee full effectuation of the privilege against self-incrimination . . . ."[180]

One could similarly view the *Padilla* problem as a temporal one: When does the criminal process end? Or more substantively: What sanctions are part of the criminal process for Sixth Amendment purposes? A related question was considered by the Court in *United States v. Gouveia*.[181] The defendants in *Gouveia* were prison inmates, suspected of murder, who had been placed in an administrative detention unit and denied counsel until an indictment was filed. Although no formal judicial proceedings had taken place prior to the indictment, the defendants argued that their administrative detention should be treated as an accusation for purposes of the right to counsel because the government was actively investigating the crimes. The Court recognized that "because an inmate suspected of a crime is already in prison, the prosecution may have little incentive promptly to bring formal charges against him, and that the resulting preindictment delay may be particularly prejudicial to the inmate. . . ."[182] But the conclusion was, in effect, the opposite of that reached in *Padilla*. The Court noted that statutes of limitation and Fifth Amendment protections guarded against delay and that there was no basis for "depart[ing] from our traditional interpretation of the Sixth Amendment right to counsel in order to provide additional protections for [the inmates]."[183]

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self-incrimination. *Miranda* has been recognized as a constitutional decision. Dickerson v. United States, 530 U.S. 428, 432 (2000) ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves."). The Court, however, has limited *Miranda*'s protective scope in various ways. *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (holding that, unless and until a suspect actually states that he is relying on his *Miranda* right, subsequent voluntary statements can be used in court and police can continue to interact with (or question) him). The *Berghuis* Court ruled that the mere act of remaining silent was, on its own, insufficient to imply that the suspect has invoked his rights and that a voluntary reply even after lengthy silence could be construed as implying a waiver. *Id.* at 2260–63. In her dissent, Justice Sotomayor described the majority opinion as "a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation." *Id.* at 2266 (Sotomayor, J., dissenting).

178. Weisselberg, *supra* note 176, at 117.

179. *Escobedo*, in general, "is not to be broadly extended beyond the facts of that particular case." Michigan v. Tucker, 417 U.S. 433, 438 (1974) (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972); Frazier v. Cupp, 394 U.S. 731, 739 (1969); Johnson v. New Jersey, 384 U.S. 719, 733–34 (1966)).

180. *Johnson*, 384 U.S. at 729.

181. 467 U.S. 180 (1984).

182. *Id.* at 192.

183. *Id.*

On the other hand, as Justice Scalia, writing for the Court, confirmed in 2006, it is a mistake to subsume the Sixth Amendment too completely within the broad parameters of due process.[184] In a case in which the defendant had been denied his counsel of choice, Justice Scalia concluded that "the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details."[185] While it is true enough, he continued, "that the purpose of the rights set forth in that Amendment is to ensure a fair trial," it does not follow that "the rights can be disregarded so long as the trial is, on the whole, fair."[186] The right at stake was the right to counsel of choice, not the right to a fair trial; "and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'"[187]

Padilla's application of Sixth Amendment norms to deportation may be fruitfully compared to the evolution of due process ideas applied to state court criminal proceedings, through the Fourteenth Amendment, culminating in *Gideon*.[188] One sees general, multifactored due process reasoning evolving into the purported specificity of a Sixth Amendment rule. For example, in the foundational case of *Powell v. Alabama*,[189] the Court noted that "*under the circumstances just stated*, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."[190] What were those circumstances? As is well known, the *Powell* case involved a group of African American youths who had been charged with the rape of two white girls—a capital offense—in Alabama.[191] The Court noted "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives . . . ."[192] Though the analogy might be

184. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).
185. *Id.* at 145.
186. *Id.*
187. *Id.* at 145–46.
188. *See* William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177, 180–82 (1970).
189. 287 U.S. 45 (1932).
190. *Id.* at 71 (emphasis added).
191. *Id.* at 49–50.
192. *Id.* at 71.

somewhat strained in some cases, one might make similar arguments about deportees, especially refugees.[193]

At first, the Court made it quite clear that *Powell* was not to be read as a wholesale importation of the Sixth Amendment into the Fourteenth: "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine."[194] For years, the model was the fundamental fairness approach of *Betts v. Brady*, in which the Court had held that, in cases decided by state courts:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[195]

Betts had seen due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[196] Thus, *Betts* had held that the refusal to appoint counsel *under the particular facts and circumstances presented* was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process.[197] That model was subjected to withering criticism (and an ever-increasing number of exceptions) for some two decades before the Court finally rejected it in *Gideon*, one of the most iconic and widely cited cases in U.S. history. Thus, the right to counsel in most kinds of criminal cases is now categorically fundamental and essential to a fair trial and obligatory upon the States through the Fourteenth Amendment.[198] As Justice Black put it in *Gideon*:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor

193. Echoing Michael Klarman's appraisal of *Powell*, one might view *Padilla v. Kentucky* as a case that also "sheds light on . . . the capacity of the Supreme Court to compel social change." Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 379–80 (2009).

194. *Id.*; *see also* Gideon v. Wainwright, 372 U.S. 335, 340–42 (1963) (applying the Sixth Amendment right to counsel in state criminal cases); Betts v. Brady, 316 U.S. 455, 461–62 (1942) (establishing a case-by-case model for state cases); Johnson v. Zerbst, 304 U.S. 458, 463 (1937) (noting that counsel must be provided to the indigent in federal criminal cases).

195. *Betts*, 316 U.S. at 462.

196. *Id.*

197. *Gideon*, 372 U.S. at 339 (emphasis added) (citing *Betts*, 316 U.S. at 473).

198. *Id.* at 340–41 ("We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").

> to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[199]

So is *Padilla* a *Gideon* decision for deportees?[200] Not quite. Indeed, as noted, the *Padilla* Court focused a great deal on the purportedly automatic nature of a particular type of deportation sanction in order to connect it to the criminal process and, in turn, to justify the invocation of the Sixth Amendment to it.[201] This approach raises at least as many questions as it answers. For instance, why should it matter for Sixth Amendment purposes whether or not the risk of deportation is automatic? Many so-called collateral consequences of criminal convictions could fairly be called automatic. Are they all therefore now direct consequences for Sixth Amendment purposes? Plainly, the answer to that is no. Thus, it is not only the automatic aspect that counts—our analysis must also involve the substance of the sanction. But then, of course, we must face a dilemma from the other side: If automatic deportation counts as part of the criminal process for right-to-counsel purposes, why doesn't it also count as double-jeopardy, at least in deportations that arise from federal criminal prosecutions? Again, the best reconciliation depends upon a norm that straddles Amendments V and VI.

Even if *Padilla* is not quite *Gideon*-redux, the recognition of Amendment V½ begins to breach the formalistic civil/criminal divide in deportation cases. This approach conforms to the rule that what is at issue is "not merely the 'weight' of the individual's interest, but whether the *nature* of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[202] Due process "is flexible and calls for such procedural protections as the particular situation demands."[203] It would seem to be clearly wrong now to categorize all forms of deportation as noncriminal, nonpunitive, and collateral, and thus subject only to flexible (and frequently ineffective) due

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199. *Id.* at 344. Justice Black continued:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.

Id.

200. *See* Maria Teresa Rojas, *A "Gideon Decision" for Immigrants*, OPEN SOC'Y FOUND. BLOG (Apr. 7, 2010), http://blog.soros.org/2010/04/a-gideon-for-immigrants.

201. The Sixth Amendment norms now will apply directly to such deportation consequences whether they arise in federal or in state criminal prosecutions.

202. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (emphasis added) (citing Fuentes v. Shevin, 407 U.S. 67 (1972)); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 789–90 (1973) (emphasis added). *Gagnon* held that part of the process due in parole or probation revocation proceedings might be the appointment of counsel, but this was to be determined on a case-by-case basis. *Id.*

203. *Morrissey*, 408 U.S. at 481.

process norms à la *Betts*.[204] A harder look is now required, if not in all deportation cases, then certainly in the *post-entry social control* type in which deportation is based on a criminal conviction.

B. Amendment V: The Civil Nature of Deportation and the Due Process Model

In civil litigation, some equalizing measures for the "poor, friendless . . . stranger"[205] have long been a feature of the Anglo-Saxon and American legal traditions.[206] Indeed, such protections go back millennia, to Roman law and to the reign of Henry I of England.[207] Such egalitarian ideas were sometimes included in early constitutions. The 1780 Massachusetts Declaration of Rights—part of "the oldest written Constitution still in use in the world today"[208]—provided that every subject "ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay . . . ."[209] Indeed, early treatises on constitutional law had noted that the right to counsel in civil cases and upon charges of misdemeanors antedated such a right in cases of felony and treason.[210] And the "presence, advice, and assistance of counsel" was generally seen as necessarily included in the requirements of "due process of law."[211] Still, as one commentator wrote in 1923, not only had the common law made little progress by the twentieth century regarding ideas of equal access, but there had been retrogression:

> Poverty, often through the application of some rule of law which otherwise seems eminently reasonable, blocks a civil litigant's path at every stage of the proceedings. A penniless suitor may . . . get into court, but be helpless because he cannot pay for a lawyer . . . .[212]

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204. This historical approach, as noted, involved a case-by-case method redolent of *Betts v. Brady*, 316 U.S. 455 (1942), that has virtually never inspired any court to find that a deportee has a right to appointed counsel.

205. Maguire, *supra* note 167, at 361.

206. *Id.* (citing *The Mirror of Justices*, 7 SELDEN SOC'Y 14 (1893)).

207. *See id.*

208. Remarks by the President and Historian David McCullough at Ceremony of 200th Anniversary of the White House. (Nov. 1, 2000), *available at* http://archives.clintonpresidentialcenter.org/?u=110100-remarks-by-president-and-mccullough-at-white-house.htm.

209. MASS. CONST. of 1780, pt. 1, art. XI. This provision remains unchanged. *See* MASS. CONST. pt. 1, art. XI.

210. *Ex parte* Chin Loy You, 223 F. 833, 838 (D. Mass. 1915) (citing THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 475 (1908)).

211. *Id.* (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 668 (4th ed. 1873)).

212. Maguire, *supra* note 167, at 362.

This inadequate help for the poor was especially problematic for deportees. In fact, at the start of the twentieth century, it was unclear whether deportation proceedings required due process of law at all. In the 1903 case of *Yamataya v. Fisher*,[213] the Court, albeit obliquely, stated that it had "never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."[214] In *Yamataya*, Justice Harlan thus made relatively clear—at least as to an "alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population"—that administrative process must comply with certain due process norms.[215] It could not be "arbitrary" and the "alien" must, at a minimum, be given an opportunity to be heard. Over time, as noted above, this standard developed into a flexible—if rather deferential—due process touchstone of fundamental fairness.[216]

By long describing deportation as civil, however, the Supreme Court had effectively ruled out any Sixth Amendment claims of a constitutional right to counsel. In 1961, Charles Gordon accurately noted the state of the law regarding the constitutional status of deportation: "[T]he courts thus far have resisted every effort to assimilate deportation to criminal punishment and to apply the constitutional guarantees and procedures that relate to criminal prosecutions."[217] As William Haney noted in 1970, strong arguments could be made against this formalism, based on the fact that "[m]any of the same considerations concerning the role of counsel that govern in criminal proceedings are also relevant to deportation proceedings."[218] These included the fact that

213. 189 U.S. 86 (1903).

214. *Id.* at 100.

215. *Id.* at 100–01.

216. The *Yamataya* Court used what in modern terms we would call a clear statement method—with which the Court interpreted a statute in a certain way to avoid a constitutional problem. *See id.* at 101 ("This is the *reasonable construction of the acts of Congress here in question*, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (emphasis added)).

217. Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN L. REV. 875, 875–76 (1961) (citing Galvan v. Press, 347 U.S. 522, 531–32 (1954)) (declining to apply ex post facto law to deportations); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594–96 (1952) (holding that deportation did not conflict with the Constitution's prohibition of "*ex post facto* enactments"); Carlson v. Landon, 342 U.S. 524, 536–47 (1952) (holding that denying bail to "aliens arrested for deportation" does not violate the Constitution); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (concluding that a deportee has no constitutional rights regarding trial by jury, unreasonable searches and seizures, or cruel and unusual punishment).

218. Haney, *supra* note 188, at 181.

"deportation proceedings are adversary proceedings in which a lawyer's skill may well prove decisive," in which the respondents are likely to be not only poor but also often "ignorant of our institutions and unfamiliar with the English language. . . ."[219] Still, essentially until *Padilla*, one could have framed the issue in dichotomous terms: The question of a right to counsel in deportation proceedings, as Gordon noted, "must take into account the currently accepted view that the immigration process is civil and administrative, not criminal and judicial."[220] But it also implicates "the growing awareness of the vital interests involved and of the need for assuring the fullest protection of basic human rights."[221] Formal categories, in short, have long been in some tension with vital interests and human rights in deportation cases.

The black-letter consequence of this dichotomy was the inapplicability of the Sixth Amendment and an evolving—but dull-edged—notion of the Fifth Amendment's guarantee of due process.[222] Essentially, procedural due process has meant, very generally, fairness and an opportunity to be heard. The idea of a constitutional right to appointed counsel was rarely mentioned in early deportation cases applying then-current notions of fairness. This is, of course, not surprising in that such a federal right had not even begun to be generally recognized in state criminal cases until the 1930s. However, it has long been clear that the right to have counsel (at least if one could hire a lawyer) "was evaluated as an aspect in the total picture of fair dealing."[223] In one 1915 immigration case, for example, the judge noted at the outset that the Sixth Amendment right to counsel related only to criminal prosecutions. He then went on to hold that "it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."[224] Thus, in an early legal realist mode, the court concluded that, "[t]o make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceeding be called 'criminal' or 'civil' seems to me unsound."[225] Charles Gordon noted in 1961, as had others before him, that aliens represented by counsel had a much better chance

219. *Id.*
220. Gordon, *supra* note 217, at 876.
221. *Id.*
222. *See e.g.*, *Ex parte* Chin Loy You, 223 F. 833, 838 (D. Mass. 1915); WILLIAM CABELL VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 180 (1932).
223. Gordon, *supra* note 217, at 879 (citing Yamataya v. Fisher, 189 U.S. 86 (1903); Ungar v. Seaman, 4 F.2d 80, 82 (8th Cir. 1924); Whitfield v. Hanges, 222 F. 745 (8th Cir. 1915)); *see also* JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 375 (1931).
224. *Ex parte Chin Loy You*, 223 F. at 838.
225. *Id.*

of success than the unrepresented.[226] In this vein, most scholarship,[227] cases,[228] and much litigation strategy have tended to focus more on the Fifth than on the Sixth Amendment right to counsel in deportation matters.

The most well-known such case is that of the Sixth Circuit in *Aguilera-Enriquez v. INS*.[229] Modeling its reasoning on the probation-revocation case of *Gagnon v. Scarpelli*[230] and on the parole-revocation hearing norms developed in *Morrissey v. Brewer*,[231] the Sixth Circuit adopted a case-by-case, retrospective due process approach to determine if appointed counsel was required. As the *Aguilera-Enriquez* court put it:

> [T]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide "fundamental fairness, the touchstone of due process."[232]

It turns out, however, that fundamental fairness of this variant virtually never seems to require counsel. As one commentator noted more than a decade ago, "In practice, the case-by-case approach has essentially resulted in across-the-board denials of appointed counsel."[233] This has remained true due to the very high burden that is placed on deportees. A typical formulation is found in a 2007 Sixth Circuit case:

> In order to establish a due process violation, Mossaad must show that his lack of counsel at his removal hearing rose to the level of a constitutional defect, and that had he been represented by counsel he would not have been ordered removed.[234]

A 2006 case reasoned similarly: "[Petitioner] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue

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226. Gordon, *supra* note 217, at 878.

227. *See id*.; *see also* Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); Robert S. Catz & Nancy Lee Frank, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 410 (1984); Haney, *supra* note 188, at 184–85; Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

228. *See, e.g.*, Kovac v. INS, 407 F.2d 102, 108 (9th Cir. 1969) (reversing denial of stay of deportation due to, inter alia, unrepresented alien's lack of understanding of proceedings); DeBernardo v. Rogers, 254 F.2d 81, 82 (D.C. Cir. 1958) (holding that a lack of representation claim also required showing of prejudice).

229. Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975).

230. 411 U.S. 778 (1973).

231. 408 U.S. 471 (1972).

232. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Gagnon*, 411 U.S. at 790).

233. Werlin, *supra* note 227, at 404.

234. Mossaad v. Gonzales, 244 F. App'x 701, 707 (6th Cir. 2007).

residing in the United States."[235] The basic doctrinal reason for this, as noted, was the Supreme Court's historical reluctance to revisit the civil/criminal formalism that has long governed deportation proceedings.[236]

C. Amendment V½

"One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"[237]

1. Does Amendment V½ Make Sense?

To understand how *Padilla* implies Amendment V½ and to construe it in its best light, we should note an obvious but perhaps still subtle point: The majority opinion is not really focused on the criminal process or the criminal sanction at all. Rather, the criminal process is simply the envelope within which the potential deportation sanction happens to be packaged. A simple hypothetical might help make my point: Imagine a noncitizen, a long-term legal permanent resident who is facing a relatively minor criminal charge (for example, simple drug possession with a maximum sentence of, say, six months). He is advised by his criminal lawyer to take a plea and he is sentenced to probation. But the drug conviction leads to a very harsh deportation against which he has no defense. He would be separated from a large U.S. family and sent to a very poor country where he knows no one and does not speak the language. Presumably, if he had been misadvised by his criminal defense lawyer about the deportation consequence, he might now have a viable claim to withdraw the plea under *Padilla*. But is the most salient aspect of this vignette really the fact that it happened to arise in the criminal context? "Well okay," you may say, "but this problem is not unique to deportation. We all know that some civil sanctions may be more onerous than criminal ones. But the Sixth Amendment is what it is. So it is only in the criminal context that one has any clear constitutional right to counsel." This is surely a valid point; but I am not sure that it is sufficient, particularly if we recall the deep relationship between the Fifth and Sixth Amendments.

Consider a slight variation on the previous facts: What if the defendant had *waived* counsel in the criminal case and—correctly recognizing the relative seriousness of his two problems—had hired immigration counsel instead to

235. Sako v. Gonzales, 434 F.3d 857, 864 (6th Cir. 2006).
236. There are, of course, fiscal, political, and other concerns animating judges as well.
237. *Ex parte* Sullivan, 107 F. Supp. 514, 517–18 (D. Utah 1952).

represent him in deportation proceedings and also to advise him as he proceeded pro se in criminal court? What if that specialist, in turn, had provided the exact same incorrect advice offered by Padilla's criminal lawyer? Again, the noncitizen has now seen the tragic error and he moves to withdraw his plea. Read narrowly, *Padilla* might seem to offer no support for the latter claim. But its underlying normative basis and its logic seem to provide a way through. Justice Stevens's opinion evokes not only our better expectations of lawyers, but it also recognizes the potential severity of deportation and, perhaps, the desire to ensure informed, genuine voluntariness in pleas. In light of that, *Padilla* and Amendment V½ reasoning seem equally supportive of a constitutional right to effective counsel in both cases and, perhaps, a constitutional right to a full colloquy regarding deportation in the criminal court.

But, if you are with me so far, why stop here? If the deportation sanction is sufficiently connected to—or analogous to—the criminal sanction to justify the imposition of Sixth Amendment norms to it in criminal courts, doesn't this also imply a right to counsel in immigration court? Among the most interesting and important post-*Padilla* tasks for advocates and courts will thus be to determine the extent to which Amendment V½ fortifies recognized Fifth Amendment protections in deportation proceedings. We must also ask whether Amendment V½ norms should be applied differently in different types of deportation cases.[238] And how, if at all, should *Padilla* inform our approach to postdeportation cases?[239]

Before we move to these questions, let me concede that I fully realize that some might reasonably find my Amendment V½ reading of *Padilla* to be—unlike the quality of mercy—a bit strained.[240] But, as discussed above, the strain is mostly due to the formalist background that the majority opinion struggles to avoid transcending. Further, the contrary reading is no less strained. Does it make better sense to derive a right to counsel in large part from a recognition of the harshness of a sanction and then say to a defendant whose case is complex that his criminal lawyer's duty is limited because his ultimate fate will be decided in a proceeding in which he has no right to counsel?

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238. I do not mean to suggest that other sorts of deportations of undocumented people do not also raise powerful normative and legal concerns. But the *post-entry social control* variety seems the easiest case for application of Amendment V½.

239. Conversely, one might expect government lawyers to argue that *Padilla* should be read as a *limitation* or *preclusion* of the possible extension of the Sixth Amendment itself to deportation cases beyond the criminal court setting. This view, however, seems to ignore the necessary due process underpinnings upon which the logic of the *Padilla* case rests.

240. "Portia: The quality of mercy is not strain'd,/It droppeth as the gentle rain from heaven/Upon the place beneath. It is twice blest:/It blesseth him that gives and him that takes." WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, at 180–87.

Of course, deportation law has faced this dilemma before. Consider the 1896 case of *Wong Wing v. United States*.[241] The Court confronted an 1892 deportation statute that also authorized the imprisonment at hard labor for up to a year of any Chinese person judged to be in the United States illegally.[242] The statute provided that such defendants would have no right to indictment or judicial trial before an Article III judge. The essential idea seems to have been that Chinese noncitizens were a completely different class of people for constitutional purposes (the law, it should be noted, only applied to a "Chinese person or person of Chinese descent"[243]). Indeed, they were sometimes analogized to property. As one Senator put it, "we have the right to make precisely the same laws, establish the same rules and regulations in respect to the immigration of foreigners that we have in respect to the importation of foreign manufactured goods, and we do not put them under our criminal laws."[244]

The Court found the hard labor provision unconstitutional, but not on the due process/equal protection grounds that immediately strike the modern observer as most applicable. Rather, the Court struggled with the civil/criminal distinction. Although detention or temporary confinement was held a permissible part "of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens"[245] when Congress implemented deportation policy with "infamous punishment at hard labor, or by confiscating their property," "such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."[246]

The distinction between detention that is merely "part of the means necessary" to facilitate deportation and that which would be part of "infamous punishment" is not so clear in practice as it seems in theory. For one thing, the two systems are now merged to a great degree and criminal prisoners often find themselves subject to immigration detainers that can prolong their confinement or impede their ability to access work release transfers and the like. Moreover, immigration detention may, in certain cases, continue for very long periods of time, and it often takes place in the very same facilities where criminal prisoners are held. Thus, the distinction between the two forms of incarceration may depend for the most part on the intention of the government.

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241. 163 U.S. 228 (1896).

242. *Id.* at 230, 233–34; *see also* Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25 (expired by its own terms in 1902).

243. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25; *see also Wong Wing*, 163 U.S. at 233.

244. 23 CONG. REC. 3878 (1892) (statement of Sen. Hiscock), *quoted in* Gerald L. Neuman, Wong Wing v. United States: *The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 33 (David A. Martin & Peter H. Schuck eds., 2005).

245. *Wong Wing*, 163 U.S. at 235.

246. *Id.* at 237.

In any event, Wong Wing's lawyers apparently did not argue, as they might have, that the deportation proceedings themselves were in their nature criminal[247] or quasi-criminal.[248] Such arguments might have convinced the Court to undertake a more serious due process analysis. But their line of argument accepted the civil/criminal distinction. Since the potential one year at hard labor was clearly criminal punishment, they contended, it therefore demanded all relevant constitutional protections.[249] The Court was thus spared the task of revisiting the constitutional status of deportation itself.

One can easily understand why Wong Wing's lawyers chose the more direct path to victory. Deportation had just recently been deemed a civil proceeding (and therefore not punishment for constitutional purposes) by the Court in its 1892 decision in *Fong Yue Ting v. United States*.[250] Though *Fong Yue Ting* had inspired passionate dissents, its holding was not ambiguous on this point. As one federal judge noted in an 1893 opinion that considered the same provision at issue in *Wong Wing*, it was by then clear that the "expulsion from this country of a foreigner who came into it contrary to its laws, and who was thereby excluded, is not subjecting him to prosecution or punishment for crime . . . ."[251] The implication of this, he continued, was

> that the constitutional, statutory, and common law provisions and rules in respect to criminal prosecutions have no application to the mere expulsion or deportation of such Chinese persons as came here contrary to and in violation of the laws of the United States.[252]

The Supreme Court reasoned similarly in *Wong Wing*, which actually had begun in 1892 but was not decided until 1896.[253] The Court reaffirmed that the government's extra-constitutional plenary power to exclude noncitizens extended to deportations from U.S. territory. Indeed, the opinion went so far as to say that courts could put no limits upon the power of Congress "to protect, by summary methods, the country from the advent of aliens whose race or

247. *See* Boyd v. United States, 116 U.S. 616, 633–34 (1886) ("We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.").

248. *See* KANSTROOM, *supra* note 14, at 241–43.

249. *See Wong Wing*, 163 U.S. at 233. The government, conversely, argued that punishment at hard labor did not automatically render the proceeding to be for an "infamous crime." *Id.* at 234.

250. Fong Yue Ting v. United States, 149 U.S. 698 (1892). The Court held that the power to deport was as absolute and unqualified as the power to exclude. *Id.* at 707.

251. United States v. Wong Dep Ken, 57 F. 206, 209 (S.D. Cal. 1893).

252. *Id.*

253. *See* Neuman, *supra* note 244, at 35–36.

habits render them undesirable as citizens, *or to expel such* if they have already found their way into our land and unlawfully remain therein."[254]

But if that were really so, then the case should have ended right there, and it did not. Clearly, the "no limits" phrasing seems to have been meant—for lack of a better term—in a limited sense. Thus, the *Wong Wing* Court, in addition to its plenary power discourse, also saw the constitutional civil/criminal line as applicable to deportees. The Court sought what it termed a "theory of our government"[255] that distinguished the civil mechanisms of deportation from criminal punishment. The year at hard labor could not be insulated from constitutional scrutiny simply because Congress had placed the sanction within the deportation system. Neither the formalistic plenary power doctrine nor the status of the accused as Chinese "deportable aliens" could override the fact that the sanction itself was clearly criminal punishment. As the Court reasoned, it is apparently one thing to deport people with minimal, if any, process, even with racist laws. But once the government chooses "to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property,"[256] then a different constitutional rule is involved. Such lawmaking "would . . . pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."[257]

Essentially, *Wong Wing* raised the same question that has been re-visited by *Padilla v. Kentucky*:[258] How should courts draw the line between what we might call regulatory civil deportation procedures and punitive deportation-related enforcement mechanisms that require constitutional protections similar to those which criminal defendants are due?[259] There are many ways to answer this question in addition to Amendment V½: One can use the traditional lens of due process, the Sixth Amendment, the Eighth Amendment, equal protection, etc. One way *not* to answer the question properly, however, is to focus excessively on the possible availability of discretionary relief in immigration court. For one thing, our understanding of discretion in deportation law is itself a complicated problem.[260] Also, its availability has been drastically reduced and many of its forms are not subject to judicial review. As we have seen, the

254. *Wong Wing*, 163 U.S. at 237 (emphasis added).
255. *Id.*
256. *Id.*
257. *Id.*
258. 130 S. Ct. 1473 (2010).
259. *See generally* Neuman, *supra* note 244.
260. *See generally* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

likelihood of success without counsel is much less than for those who are represented. All of this indicates that we should understand the deportation process as a whole and not seek to separate out the part that happens to be nested within the criminal process.

2. Does Amendment V½ Make a Difference?

We can now get to the nub of the matter. Could Amendment V½ really matter? As noted, Amendment V½ analysis bridges the divide between modern Sixth Amendment criminal right-to-counsel cases such as *Gideon v. Wainwright*[261] and its progeny, and Fifth Amendment due process cases governing administrative deportation proceedings. Right-to-counsel claims, as noted, have not fared well in the existing system. Though lack of counsel (and ineffective assistance of counsel) in deportation proceedings have long been recognized as problems, courts have very rarely seen either as a due process violation. The Immigration and Nationality Act of 1952 did provide that a noncitizen in deportation proceedings had at least a right to an attorney "at no expense to the government,"[262] a provision that has been carried forward to the present.[263] Claims of a *Gideon*-like right to appointed counsel for the indigent in deportation proceedings have virtually always failed, though. Forty years ago, some had thought that the implications of such cases as *In re Gault*[264] might carry the day.[265] As one commentator put it in 1970:

> The consequences of deportation are often fully as grave as those of imprisonment . . . wrenching a person from his home since childhood, separating him from his wife and children, who may be American citizens, and sending him to a strange land or, even worse, leaving him with no country at all to which to turn.[266]

261. 372 U.S. 335 (1962).

262. Immigration and Nationality Act, Pub. L. No. 82-414, § 242(b)(2), 66 Stat. 163, 209 (1952). *See generally* Gordon, *supra* note 217, at 879; Sidney B. Rawitz, *From* Wong Yang Sung *to Black Robes*, 65 INTERPRETER RELEASES 453, 456 (1998).

263. The current version of this provision states: "[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[.]" 8 U.S.C. § 1229a(b)(4)(A) (2006).

264. 387 U.S. 1, 41–42 (1967) (holding that juveniles are entitled to counsel as a matter of due process in delinquency proceedings); *see also* Vitek v. Jones, 445 U.S. 480, 494–97 (1980) (holding that the "stigmatizing consequences" of commitment, combined with a mandatory behavior modification treatment, represented a deprivation of liberty beyond criminal incarceration, leading to the conclusion that an indigent prisoner suffering from mental disease had a right to counsel "to understand or exercise his rights").

265. *See* Werlin, *supra* note 227.

266. Haney, *supra* note 188, at 185.

However, the lower courts have largely rejected this view and the Supreme Court has never resolved the issue.[267] Does *Padilla* portend any change to this due process line of cases? If so, one must apply its norms functionally and with an eye towards Sixth Amendment jurisprudence as well as towards deep norms of proportionality.[268] Constitutional rules in the criminal justice system may provide useful analogies. For example, in *Graham v. Florida*[269] the Court held that a sentence of life without parole for a juvenile nonhomicide offender failed a disproportionality test.[270] By analogy, consider the plight of refugees. These are people who have proven that they have a well-founded fear of persecution and yet they, too, may face deportation—perhaps to their death—for what are often relatively minor crimes. A court might well see their situation as covered by Amendment V½ due to the harshness of the sanction, the convergence with the criminal system, and—as importantly—the difference that counsel can make.[271] Recent studies have shown a wide disparity between represented and unrepresented asylum cases. As one study noted, "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6 percent, almost three times as high as the 16.3 percent grant rate for those without legal counsel."[272] Note that Amendment V½ goes well beyond the *Mathews v. Eldridge* test, in which courts must balance the private party's interest and the risk associated with a wrongful determination against the government's interests.[273]

267. *See, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), *cert denied*, 423 U.S. 1050 (1976) (denying review of deportation order for petitioner who claimed that a court's failure to appoint an attorney in deportation proceedings constituted a violation of due process).

268. *See, e.g.*, Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671–79 (2009) (proposing the creation of a rights-based category of relief from removal that would allow immigration judges to consider factors necessary to ensure due process–based proportionality); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009) (proposing a graduated system of sanctions for immigration violations); Michael Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 PITT. L. REV. (forthcoming 2011) (analyzing various types of proportionality review).

269. 130 S. Ct. 2011 (2010).

270. *Id.* at 2036 (Roberts, C.J., concurring).

271. *See* John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009) (arguing that "due process requires the government to provide counsel for noncitizens who file cases in fear of persecution and death—that is, for claims for asylum, relief under the CAT [Convention Against Torture], and restriction on removal").

272. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

273. Mathews v. Eldridge, 424 U.S. 319 (1976). The Court defined those three factors as:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest,

But many long-term legal residents surely also have powerful claims under Amendment V½. Indeed, they are the ones about whom the Court was writing when it described deportation as a deprivation of "all that makes life worth living."[274] As Donald Kerwin has shown, the right to counsel is powerfully important in their deportation cases as well.[275] As he noted, in 2003, a representative year, "U.S. immigration courts completed 250,763 cases. Noncitizens had legal representation in 120,033 (48 percent) of these cases and filed applications for relief in 89,360 cases (36 percent). Represented, nondetained immigrants secured relief in 34 percent of their cases, in contrast to 23 percent of unrepresented, nondetained cases. Represented detainees received relief in 24 percent of their cases, compared to 15 percent for unrepresented detainees."[276] Statistics since then have remained relatively consistent: From fiscal year 2005 through 2010, less than half of the noncitizens whose proceedings were completed were represented. The percentage of those represented ranged from 35 percent to 43 percent.[277] Success rates have also continued to show dramatic disparities, especially in asylum cases. In defensive asylum cases, 27 percent of applicants in 2007 who had representation were granted asylum, while only 8 percent of those without representation were successful.[278] The Constitution Project has reported that 3 percent of detained, unrepresented asylum seekers

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> including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

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

275. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POLICY INST., Apr. 2005, at 6 [hereinafter Kerwin, *Revisiting the Need*], *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf; *see also*, Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded*, 04-06 IMMIGR. BRIEFINGS 1 (2004) [hereinafter Kerwin, *Charitable Legal Programs*].

276. Kerwin, *Revisiting the Need*, *supra* note 275, at 4–6. Disparities were more pronounced in political asylum cases. "Thirty-nine (39) percent of nondetained, represented asylum seekers received political asylum, in contrast to 14 percent of nondetained, unrepresented asylum seekers. Eighteen (18) percent of represented, detained asylum seekers were granted asylum, compared to three percent of detained asylum seekers who did not have counsel." *Id.* at 6. In a 2004 study of expedited removal cases, 25 percent of represented asylum seekers were granted relief, compared to only 2 percent of those who were unrepresented. *See* CHARLES H. KUCK, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES 239 (2004), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

277. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK (2010), *available at* http://www.justice.gov/eoir/statspub/syb2000main.htm.

278. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008). A defensive case is one in which an individual requests asylum before an immigration judge. *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 277, at I1.

were granted relief.[279] However, a November 2009 report by the New York City Bar Justice Center report found that 39 percent of immigrant detainees it had interviewed at the Varick Federal Detention Facility had potentially meritorious immigration claims for relief.[280] A recent comprehensive report issued by the Inter-American Commission on Human Rights also noted a vast array of serious due process concerns raised by systematic detention practices.[281] Additionally, many long-term residents without legal status, especially those for whom the DREAM Act[282] is proposed, would seem to have strong claims under Amendment V½.

Courts might also apply *Padilla* in light of the prevalence of incarceration in removal proceedings. As the Court recognized long ago, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter, and may well result in quite serious repercussions affecting his career and his reputation."[283] Moreover, as the above statistics show clearly, detention makes a huge difference to outcomes in all sorts of deportation cases.

Postdeportation claims raise particular problems under *Padilla*. First, of course, there will frequently be a threshold question of whether *Padilla* is retroactive, a matter about which courts to date have split.[284] Then there will be numerous problems of how to raise such claims procedurally.[285] Perhaps most problematic is the fact that postdeparture motions to reopen and reconsider may be considered as barred.[286] However, if we take seriously, as we must,

279. *See Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, CONSTITUTION PROJECT 29 (Nov. 2009), *available at* http://www.constitutionproject.org/manage/file/359.pdf.

280. *See NYC Know Your Rights Project*, CITY BAR JUSTICE CTR. 2 (Nov. 2009), http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf.

281. *See Report on Immigration in the United States: Detention and Due Process*, INTER-AM. COMM'N ON HUMAN RIGHTS (Dec. 2010), http://cidh.org/countryrep/USImmigration/TOC.htm.

282. Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong.; American Dream Act, H.R. 1751, 111th Cong. (2009).

283. Baldwin v. New York, 399 U.S. 66, 73 (1970).

284. *See, e.g.*, Marroquin v. United States, No. M-10-156, 2011 U.S. Dist. LEXIS 11406, at *20 (S.D. Tex. Feb. 4, 2011); Martin v. United States, No. 09-1387, 2010 WL 3463949, at *3 (C.D. Ill. Aug. 25, 2010); United States v. Chaidez, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010); Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010); United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010); People v. Garcia, 907 N.Y.S.2d 398, 400 (Sup. Ct. 2010) (all finding *Padilla* to be retroactive). *But see* United States v Gilbert, No. 2:03-CR-349-WJM-1, 2010 WL 4134286, at *3 (D.N.J. Oct. 19, 2010) (declining to apply *Padilla* retroactively); People v. Kabre, 905 N.Y.S.2d 887, 893 (Crim. Ct. 2010) (same).

285. *See* Rachel E. Rosenbloom, *Will* Padilla *Reach Across the Border?*, NEW ENG. L. REV. (forthcoming) (unpublished version on file with author).

286. *See* 8 C.F.R. §§ 1003.2(d); 1003.23(b) (holding that the motion to reopen or reconsider "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States"); *In re* Armendarez-Mendez, 24

the recognition by the Supreme Court of the due process rights of permanent residents, we can see how, by analogy, the norms of Amendment V½ ought to govern at least those cases.

Finally, we should never forget the deep relationship between human dignity and the right to counsel. As David Luban has noted, "[t]he advocate defends human dignity by giving the client voice and sparing the client the humiliation of being silenced and ignored."[287] As he notes, poor litigants in particular may need legal representation because:

> They may be inarticulate, unlettered, [or] mentally disorganized . . . . They may know nothing of the law and so [are] unable to argue its interpretation. Knowing no law, they may omit the very facts that make their case, or focus on pieces of the story that are irrelevant or prejudicial. They may be unable to utilize basic procedural rights such as objecting to their adversary's leading questions. Their voices may be nails on a chalkboard or too mumbled to understand.[288]

These concerns are all the more important when one is representing—or seeking to represent—deportees.

CONCLUSION

"The Constitution does not take away with one hand what it gives with the other."[289]

In 1950, a federal judge in the Eastern District of Pennsylvania confronted the case of a foreign seaman who had been ordered deported after a hearing without counsel. The man was ordered deported because he had been unable

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I. & N. Dec. 646 (B.I.A. 2008) (upholding departure bar on motions); *cf.* Marin-Rodriguez v. Holder, 612 F.3d 591, 594–95 (7th Cir. 2010) (finding that an agency lacks authority to limit its own jurisdiction); Coyt v. Holder, 593 F.3d 902, 906–07 (9th Cir. 2010) (finding that a provision deeming motions to reopen to be withdrawn upon departure is ultra vires); William v. Gonzales, 499 F.3d 329, 332 (4th Cir. 2007) (finding departure bar as ultra vires); Lin v. Gonzales, 473 F.3d 979 (9th Cir. 2007) (ruling that the departure bar does not apply to a person who has departed the United States subsequent to being ordered removed because such a person is no longer the subject of removal proceedings). *But see* Zhang v. Holder, 617 F.3d 650, 660 (2d Cir. 2010) (upholding the validity of the departure bar with regard to untimely motions to reopen); Rosillo-Puga v. Holder, 580 F.3d 1147, 1156 (10th Cir. 2009) (upholding the validity of the departure bar); Ovalles v. Holder, 577 F.3d 288, 296 (5th Cir. 2009) (holding the departure bar to be valid with regard to untimely motions to reopen or reconsider); Pena-Muriel v. Gonzales, 489 F.3d 438 (1st Cir. 2007) (upholding the validity of the departure bar without considering the argument that regulation is ultra vires).

287. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 822.

288. *Id.* at 819.

289. Texas v. Cobb, 532 U.S. 162, 180–81 (2001) (Breyer, J., dissenting).

to prove that he was a person of good moral character. The hearing examiner relied on uncharged, allegedly criminal conduct to reach this conclusion. Although the judge saw the case through a conventional due process lens, his reasoning illustrates the sorts of norms that should govern such cases in the wake of *Padilla*. The court noted that the government had informed the man that he had a right to counsel. However, "[i]nforming a prisoner with total resources of $30.00, a stranger in a strange land with a complete lack of knowledge of the language of that country, that he had a right to counsel is almost an empty gesture."[290] Moreover, the court thought it crucial to look at substance rather than form.[291] The court continued that it would:

> be a reflection upon the American system of jurisprudence if this impecunious alien in the light of all the circumstances were to have the legal consequences of deportation visited upon him without having a full and complete opportunity to present for the determination of the Immigration and Naturalization Service all the facts adduced in the record before me.[292]

This language, quaint though it may now sound, was written in an era when deportation was a relatively rare event, when discretionary relief was much more available than today, especially to permanent residents, when courts had jurisdiction to review deportation cases, and when deportees could stay their physical removal and file motions to reopen if new evidence was discovered. Still, this court recognized even in that system the need for a strong version of due process. This need is all the more compelling now. Perhaps it has begun to be met by *Padilla v. Kentucky*. The cases to which Amendment V½ most directly applies—those involving long-term permanent residents deported due to criminal convictions—have finally been recognized as worthy of constitutional scrutiny with more bite than has previously been required. This, however, is just the beginning of the damage reparation needed in the wake of the anachronistic formalism of the late nineteenth-century Court and the harsh, mean-spirited expansion of deportation by the late twentieth-century political branches.

290. United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25 (E.D. Pa. 1950).
291. *Id.*
292. *Id.* at 26.