

**FACT OR FICTION:
THE LEGAL CONSTRUCTION OF DEPORTATION FOR CRIMES**

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[Abstract]

Thousands of long-term legal permanent residents are deported from the United States each year because they have been convicted of criminal offenses, many quite minor. These deportations occur without any of the constitutional safeguards that generally protect criminal defendants. Immigration authorities rely on cases asserting that such deportations are not punishment for the crime, but merely collateral consequences of the conviction.

This article challenges that reasoning. It argues that its factual and doctrinal foundation has completely disintegrated over the last 20 years. Far-reaching changes in immigration law and enforcement have rendered deportation for aggravated felonies a “definite, immediate and largely automatic effect on the range of the defendant’s punishment,” that is, the direct consequence of a conviction. As such, the state should impose it only subject to the same constitutional protections that apply to criminal prosecutions. One key implication is that non-citizen criminal defendants should be fully and accurately advised of the immigration consequences of any plea agreement.

Finally, this article argues that, while deportation has essentially become an additional criminal sanction for non-citizens, it is not a particularly effective or appropriate one. The article thus advocates a deep revision of immigration laws to restore deportation as a sanction imposed in the exercise of discretion on those whose criminal offenses outweigh their ties to the United States community and the hardship they and their community would suffer if they were deported.

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I. INTRODUCTION

The greatest joy and purpose of literary fiction is to tell the truth. Successful works of fiction use the techniques of invention to tell us deep truths about our private and communal lives, the meaning of existence, the textures of human love or forgiveness or absurdity or humor or hope.¹ There are instances where legal fictions serve the same important truth-telling purpose. Legal adoption of a child, for example, goes against our biological understanding of parenthood and creates a legal construct of a parental relationship between two biologically unrelated people. This is a “fiction” in that it has no biological basis, but it speaks of and gives legal solidity to the very real parental relationship that does exist between an adoptive parent and her child. The legal “fiction” reflects the deeper reality.

Some legal fictions, though, serve more to obscure truth than to reveal it. Such is the case with the theoretical construct of deportation for criminal activity. Under current immigration law, a non-citizen who is convicted of any one of a large array of criminal offenses (some serious but many others quite minor) is rendered deportable and disqualified from relief from deportation solely because of that crime. Over the last decade, immigration authorities

¹ Historical examples of fiction that helped tell important truths by portraying fictionalized realities include UNCLE TOM’S CABIN (1852), by Harriett Beecher Stowe (portraying the evils of slavery); THE GRAPES OF WRATH (1939), by John Steinbeck (the trials of refugees from the Oklahoma dust bowl of the 1930s); BELOVED (1987), by Toni Morrison (putting a personal face on slavery); TO KILL A MOCKINGBIRD (1960), by Harper Lee (racism in the Jim Crow South). Marilynne Robinson’s recent diptych of novels, GILEAD (2004) and HOME (2008) are beautiful examples of fiction eloquently telling truths of family, forgiveness, hope and the beauty of seemingly insignificant and forgotten people and places.

deported tens of thousands of lawful permanent residents, who were otherwise in legal status, as a result of such criminal conduct. Particularly for those with spouses and children in this country, the consequences of deportation were far more severe than the terms of their sentences. However, courts have consistently held that deportation is not punishment for crime but is rather a civil, remedial sanction and a collateral, rather than direct, consequence of a conviction. This theoretical characterization of deportation developed many decades ago in the context of the very different immigration law that existed then. It no longer corresponds in any meaningful way to the realities of immigration law and enforcement, which have changed radically in the last two decades. It has become a fiction that obscures rather than reflects any level of reality.

As a result of this legal construct, however, the sanction of deportation, severe and automatic as it has become, has been allowed to attach to criminal convictions outside the protections of the Constitution that generally apply to punishment for criminal activity.² Deportation for crimes is now imposed with fewer procedural protections than ever and with no concern for its proportionality to the underlying criminal activity.³ The United States Supreme Court recently acknowledged the constitutional import of these issues when it accepted *certiorari* in a case involving the question of whether the Sixth Amendment right to effective assistance of counsel requires criminal defense attorneys to provide accurate advice about deportation

² The Sixth Amendment, for example, requires that any waiver of the constitutional right to trial be voluntary and “knowing,” which requires, in turn, that the defendant understand the charges against him or her and the potential consequences of the conviction. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Brady v. United States*, 397 U.S. 742, 755 (1970). However, this requirement applies only to the “direct,” punishment-related consequences of a conviction and not to “collateral” consequences. *See, e.g., United States v. Crowley*, 529 F.2d 1066, 1072 (3d Cir. 1976); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973). Deportation has consistently been held to be a collateral, civil sanction, and defendants need not be advised of it in order for their waiver of constitutional rights to be knowing and voluntary. *See, e.g., Santos-Sanchez v. United States*, 548 F.3d 327, 336 (5th Cir. 2008).

³ If deportation for crime were to be acknowledged as punishment for or a direct consequence of the crime, it would be subject to limitations of proportionality within the Eighth Amendment’s protection against cruel and unusual punishment.

consequences.⁴ Even if the Court answers in the affirmative, however, a whole host of other vital procedural rights will continue to be denied legal immigrants accused of crimes.

For moral and doctrinal reasons, this legal construction of deportation has become untenable, and the time has come to re-examine it. As an initial matter, the human cost of our current legal construction of deportation is extremely high. Tens of thousands of individuals are deported for crimes each year, many after entering guilty pleas without any knowledge that their plea would lead directly to their deportation and permanent banishment from the United States, with no possibility for deviation, equity or mercy. Many of those deported are lawful permanent residents of the United States who have parents, children, spouses and other immediate family members who are themselves United States citizens or lawful permanent residents. The Department of Homeland Security recently reported that it had deported more than 100,000 parents of U.S. citizen children in the ten years prior to 2007.⁵ These families are faced with a life-shattering decision: should they acquiesce to the permanent break-up of their family through the banishment of one of their members, or should they uproot the entire family and move permanently to a country that may have never been home to any of them except the one being deported, where none of them may speak the language, where medical care may be lacking, and where they may have no support network and few educational, social or job prospects? Even those permanent residents without immediate family in the United States often have long residence here and face the loss of deeply rooted lives amidst communities, workplaces, businesses, churches and friends. The impact of deportation is profound; as the United States

⁴ *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 77 U.S.L.W. 3467 (U.S. Feb. 23, 2009) (No. 08-651), posing the issues of whether criminal defense counsel is required to advise a defendant of the automatic sanction of deportation for an aggravated felony conviction and whether affirmative misadvice from criminal defense counsel about deportation consequences constitutes ineffective assistance of counsel under the Sixth Amendment.

⁵ Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. TIMES, Feb. 14, 2009, at A16.

Supreme Court wrote in *Ng Fung Ho v. White*, deportation may result in “loss of both property and life; or of all that makes life worth living.”⁶

Second, this is not just the case of a gap between “real life” experience and theoretical legal construction; rather, it is a legal construction built many years ago on statutory and factual underpinnings that have since completely disintegrated. The Supreme Court first held that deportation was a civil remedial sanction, rather than punishment, in the 1893 case of *Fong Yue Ting v. United States*.⁷ At that time, immigration law was in its infancy, and the only provisions allowing for deportation related to the failure of individuals to comply with the terms of their admission to the country. There were no deportation provisions triggered by post-entry conduct such as the commission of a crime.⁸ It was in this context that the Supreme Court held deportation to be a civil, regulatory sanction that could be imposed outside the limitations of the Fourth, Sixth and Eighth Amendments.⁹ Likewise, the determination that deportation is not a direct consequence of conviction came decades ago, relying on the landscape of criminal and immigration law, procedure, and enforcement as it existed at that time.¹⁰ Courts held that deportation was a collateral consequence because it was decided by an independent, civil body; its imposition was contingent on a discretionary determination by that body; and its enforcement was too uncertain to be considered automatic or immediate. Since then, many courts have accepted prior courts’ analyses of the nature of the consequences without doing their own

⁶ 259 U.S. 276, 284 (1922).

⁷ 149 U.S. 698, 730 (1893).

⁸ See Section II, *infra*.

⁹ “The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.” *Fong Yue Ting*, 149 U.S. at 730.

¹⁰ See Section III.A., *infra*.

rigorous analysis of how dramatically the legal and practical realities have changed.¹¹ Many now take it as a truism that immigration consequences are not punishment but rather simply collateral consequences.¹²

While it was undoubtedly true that deportation initially related to violations of entry-related regulation and, even when that changed, that whether an immigrant convicted of a crime would be deported was highly uncertain, neither is any longer true.¹³ More and more deportations are based on post-entry behavior. Furthermore, radical changes in immigration law and procedure, most notably in multiple congressional enactments of 1996, along with profound changes in the enforcement infrastructure, have made the deportation process far more automatic. A non-citizen convicted today of any of a large number of crimes is guaranteed to find him- or herself facing deportation and a permanent bar to return. These changes have utterly obliterated the foundations of the traditional legal construction of deportation as non-punitive and collateral.

Finally, as important as these issues are to the rights of non-citizen defendants, they also have wider implications. The focus on a nominal, non-punitive purpose justifying deportation places these issues within a strand of constitutional jurisprudence in which courts have eroded constitutional protections by arbitrarily labeling the purpose of certain hardships or sanctions imposed by the force of law and then used those labels to justify a finding that the government

¹¹ The Maryland Court of Appeals provides a good case in point, having never directly analyzed whether immigration consequences are direct or collateral. In *Yoswick v. State* and *Skok v. State*, the court assumed without analysis that the consequences were collateral in nature. See *Yoswick v. State*, 700 A.2d 251, 256-58 (Md. 1997); *Skok v. State*, 760 A.2d 647, 661 (Md. 2000). In *Yoswick*, the Court cited with apparent approval the lower Court of Special Appeals case of *Daley v. State*, 487 A.2d 320, 322 (Md. Ct. Spec. App. 1985), for the proposition that immigration consequences were collateral rather than direct, but it did not directly address the question. *Yoswick*, 700 A.2d at 257. The Court of Appeals is currently considering a case in which it may conduct this analysis. *Rivera v. State*, 952 A.2d 396 (Md. Ct. Spec. App. 2008), *cert. granted*, 956 A.2d 201 (Md. Sept. 10, 2008) (No. 80-2008).

¹² See, e.g., *Nikolaev v. Weber*, 705 N.W.2d 72, 76 (S.D. 2005) (“the overwhelming majority of courts to have addressed the question [] have held that deportation is a collateral consequence”); see also *United States v. Nagaro-Garbin*, 653 F. Supp. 586, 589 (E.D. Mich. 1987).

¹³ See Section III.C, *infra*.

action falls outside the protective scope of the Constitution. These cases include *Bell v. Wolfish*,¹⁴ which held that conditions of pre-trial detention were not intended to be punitive and therefore were not subject to the Eighth Amendment limitations on punishment; *Terry v. Ohio*,¹⁵ which allowed police officers to avoid the Fourth Amendment's prohibition on suspicionless searches by declaring a purpose of ensuring their own safety rather than to find contraband; and *South Dakota v. Opperman*,¹⁶ which similarly set aside the Fourth Amendment when police declared that their searches of impounded vehicles served routine "inventory" purposes rather than investigatory ones. In all of these cases, the nominal intent or purpose of the government action was used to remove it entirely from the realm of constitutional protection. So it is also with deportation for crimes, which has been effectively removed from constitutional scrutiny by the century-old label of "civil sanction," or the decades-old label of "collateral consequence." The grave consequences of removing such governmental action from constitutional scrutiny militate for a reexamination of those labels. Our venerable constitutional jurisprudence is meaningful only inasmuch as it provides real legal protections within an actual, concrete legal and enforcement landscape.

This article challenges the two prongs of the prevailing legal construction of deportation and argues that – legally as well as practically – deportation for criminal activity *does* function as punishment and that deportation *is* a direct consequence of a criminal conviction. It begins by laying out the very trenchant arguments that deportation for convictions serves as punishment in the current legal landscape, even when imposed in a civil setting, and that some procedural safeguards must attach as a result. It then looks in depth at the question of whether the deportation of those convicted of aggravated felonies can be described as collateral in any

¹⁴ 441 U.S. 520 (1979).

¹⁵ 392 U.S. 1 (1968).

¹⁶ 428 U.S. 364 (1976).

meaningful way. Having concluded that these deportations constitute a direct, practical extension of the penalty for the crime, it looks briefly at some reasons that our current deportation regime is not an appropriate tool for the punishment of crime and makes some suggestions for possible implications of this analysis for immigration and criminal law.

II. CAN DEPORTATION BE PUNISHMENT?

The first level of inquiry into the nature of a consequence of conviction is whether the consequence constitutes “punishment” for a crime. Though the conventional wisdom of caselaw is unwavering in stating that deportation is not punishment for wrongdoing,¹⁷ a number of commentators and scholars have recently reexamined the history and contemporary legal framework of deportation for crimes and have argued quite persuasively that removability based on criminal convictions constitutes punishment for wrongdoing.¹⁸

As an initial matter, it is important to recognize the distinction between two types of deportation provisions in our law—those relating to extended regulation of entry and exit at borders (“border control”) and those relating to “social control,” that is, provisions that relate to individuals’ post-entry behavior.¹⁹ Border control provisions relate to requirements for and conditions on admissions and authorized stays in the country, including such requirements as a valid visa for entry and adherence with visa conditions (such as enrollment in school or refraining from employment).

¹⁷ See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 512 (2007) (decisions relying on formalistic characterization of deportation as a “civil” proceeding rather than punitive are “long on citation of precedent and short on independent reasoning”).

¹⁸ *Id.*; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 4 (2006).

¹⁹ Kanstroom, *supra* note 18, at 1906.

Constitutional questions about the nature of the sanction of deportation first arose in the context of the enforcement of border control provisions regulating conditions for entry, and the courts reasonably held that such deportations were regulatory in nature and not intended to punish the individual for any wrongful conduct.²⁰ In this context, the Supreme Court developed a doctrinal structure basing the government’s power to deport on its plenary power to regulate immigration, limited only by basic principles of procedural due process.²¹ A key principle of this structure is that deportation is a remedial action designed to correct the ongoing violation of a regulatory requirement, such as the requirement of a valid visa to authorize entry and presence in the U.S. or full-time enrollment in school for the holder of a student visa.

This doctrinal structure has stood from those early days and been used to justify a broad deportation power, despite the historically later development of the significant body of “social control” deportation provisions used to deport lawful permanent residents and others based solely on post-entry conduct in no way related to the conditions of their admission or authorized stay.²² These social control provisions are conceptually distinct from border control provisions and are not regulatory in the same way that justified earlier analysis of deportation. Rather, social control deportation provisions do, in fact, constitute punishment for the post-entry conduct being sanctioned. As such, they should be subject to constitutional protections relating to punishment.²³ To my mind, the disconnect between the past conduct or conviction being sanctioned by social control provisions and any theory of an ongoing violation that must be remedied is especially stark in the cases of those made deportable by provisions that retroactively

²⁰ *Id.* at 1901, 1908. See *Fong Yue Ting v. United States*, 149 U.S. 693 (1893).

²¹ *Id.* at 1910.

²² See, e.g., *Reno v. Arab-American Anti-Discrimination Comm.*, 525 U.S. 471 (1999), in which Justice Scalia states without further elaboration that, “[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of the United States law.” *Id.* at 491.

²³ Kanstroom, *supra* note 18, at 1935.

rendered their conduct a deportable offense years after it occurred.²⁴ It is hard to understand how such individuals can be considered to have violated the terms of their entry when their conduct, at the time of their entry *and at the time it was carried out*, was not sanctionable within the immigration law.

Commentators have also observed the move of modern courts away from an “all-or-nothing” distinction between civil proceedings (which result in purely remedial sanctions) and criminal proceedings (which result in punishment) and the courts’ willingness to acknowledge punishment imposed in some circumstances in civil proceedings and to accord some constitutional protections to such proceedings.²⁵ The Supreme Court has in recent decades held that sanctions imposed in civil proceedings must be justified by a legitimate remedial government interest and must be proportionate to that purpose.²⁶ If they cannot be justified as actually serving or proportionate to a remedial purpose, they will be seen as punitive and are subject to the Constitution’s limitations on the imposition of punishment.²⁷ While the Court has been less than entirely consistent or clear over the years on how to analyze for punitive intent,²⁸ it has recognized a principle of analysis that is essentially functional and considers the actual functioning and impact of a sanction rather than simply its legislative label.²⁹ The Court has

²⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), vastly broadened the categories and number of offenses that constitute deportable “aggravated felonies” and did so for violations that occurred “before, on or after the date of enactment” of the relevant aggravated felony definition. INA § 101(a)(43)(U); 8 U.S.C. § 1101(a)(43)(U) (2006).

²⁵ Pauw, *supra* note 18, at 316; Kanstroom, *supra* note 18, at 1920.

²⁶ *Austin v. United States*, 509 U.S. 602, 621 (1993) (civil drug forfeiture action served punishment purpose and was subject to Eighth Amendment limits); *Dep’t of Revenue v. Kurth Ranch*, 522 U.S. 767 (1994) (tax on possession of illegal drugs, assessed after criminal penalty, could be punishment for Double Jeopardy purposes); *United States v. Ursery*, 518 U.S. 267 (1996) (civil *in rem* forfeiture action imposes punishment for Double Jeopardy purposes).

²⁷ *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (“[I]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.”). For a discussion of the constitutional limitations that may apply if deportation is recognized as punishment, see Pauw, *supra* note 18, at 337-44.

²⁸ Kanstroom, *supra* note 18, at 1925-26.

²⁹ Pauw, *supra* note 18, at 328; Kanstroom, *supra* note 18, at 1925-26.

recognized as punitive civil sanctions in cases involving civil drug forfeiture,³⁰ civil fines for false medical expense claims,³¹ tax on illegal drug possession,³² and in rem forfeiture.³³

Beginning with this willingness in the Court to look beyond the formalistic civil/criminal label and to assess the actual effect of a sanction that purports to be remedial, a persuasive argument can be made for a functional analysis of the effect of deportation on lawful permanent residents who are otherwise authorized to remain indefinitely in the United States.³⁴ This analysis is more appropriate to the realities of our current immigration law than is a “civil proceeding” label that developed in the nineteenth century in the context of a regulatory, “border control” corpus of immigration law. The deportation of permanent residents because of post-entry criminal activity cannot reasonably be said to be an extended regulation of the conditions of their entry, but rather must be recognized as a sanction applied in response to that post-entry activity.

Though the argument is made that deportation in these circumstances continues to serve a remedial purpose and is imposed to remedy an ongoing violation,³⁵ this reasoning is revealed as circular when the ongoing violation is identified as the continuing presence of one who has committed the criminal act at issue. The “regulatory” violation in this argument is the *status* of having committed an act in the past, an act unrelated in any way to the conditions of admission. The finding of the violation in no way depends on any ongoing conduct or threat, but is satisfied by evidence of the past act alone. The “remedial” nature of the sanction, in turn, according to this argument, lies simply in the removal from the community of one who has committed the

³⁰ *Austin*, 509 U.S. at 621.

³¹ *United States v. Halper*, 490 U.S. 435 (1989). In *Hudson v. United States*, the Court rejected the Double Jeopardy analysis used in *Halper*, but did not overrule its finding that civil sanctions in civil proceedings may constitute punishment. *Hudson v. United States*, 522 U.S. 93, 96 (1977).

³² *Kurth Ranch*, 511 U.S. at 779.

³³ *Ursery*, 518 U.S. at 268-69.

³⁴ *Pauw*, *supra* note 18, at 331; *Kanstrom*, *supra* note 18, at 1928.

³⁵ *See Reno v. Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

past act. There is no claim that deportation accomplishes any other remedial purpose. Thus, in the context of deportation for a criminal conviction, despite the applied rhetoric of ongoing violations and remedial sanctions, deportability is based on and justified by the past act alone.

Furthermore, the sanction of deportation is “one-size-fits-all.” There is no attempt and no real way to make it proportionate to the crime committed or the harm caused by that crime. Thus, it cannot fairly be said to be a proper remedy for the violation of the immigration law, which violation consists of having been convicted of a particular crime.³⁶ With no possibility of being calibrated to fit a remedial purpose, the deportation of lawful permanent residents for criminal convictions cannot be justified as remedial or proportionate and must be acknowledged to be punishment of individuals for past wrongdoing.

Finally, deportation can very plausibly be said to fulfill the classic purposes of punishment, to incapacitate the offender, to deter others, and to exact retribution for the offense. Stephen Legomsky argues that the purpose of removing the offender from the community (the most common explanation of the “remedial” purpose of deporting those with convictions) is not, by its nature, actually remedial, but rather one of the classic purposes of punishment, the incapacitation of the offender.³⁷ Legomsky and other commentators also argue quite cogently that deportation as applied to otherwise lawful residents who are convicted of criminal wrongdoing also serves the classic penal purposes of retribution and deterrence of others.³⁸

Thus, while caselaw oft repeats the refrain that deportation is a civil proceeding and the remedying of a regulatory violation, the deportation of lawful permanent residents and other authorized non-citizens because of criminal activity can and should, in the current legal

³⁶ Pauw, *supra* note 18, at 333. *See also* Stumpf, *supra* note 18, at 264.

³⁷ Legomsky, *supra* note 17, at 514.

³⁸ *Id.* *See also* Pauw, *supra* note 18, at 328; Stumpf, *supra* note 18, at 265.

landscape and in the Supreme Court’s developing jurisprudence of “punishment” in the civil context, be properly understood both functionally and legally as punishment.

This understanding of deportation as punishment is certainly the reality lived by many criminal defendants who deal with immigration consequences in the context of plea negotiations. These lawful permanent residents (and other legally authorized individuals such as asylees and refugees) often accept longer terms to actual incarceration, extensions of parole or supervised release or other negative terms in plea agreements in exchange for avoiding conditions that could prejudice their immigration status.³⁹ They are willing to trade additional incarceration and probation—inarguably punishment—for protection from deportation; in essence, they trade a perceived lesser punishment—incarceration—for the punishment they experience as graver—deportation.

Let us turn now to another, less-explored aspect of the relationship between convictions and deportation—the question of whether deportation is the direct or collateral consequence of a conviction that falls within the broad category of an aggravated felony.

III. THE DIRECTNESS OF THE CONSEQUENCES OF AGGRAVATED FELONY CONVICTIONS

Despite the constitutional implications of the determination, courts have generally used a practical standard to determine whether the consequences of a conviction are direct or collateral. This analysis has been developed in the context of a variety of consequences, including discretionary loss of good time credit,⁴⁰ parole eligibility,⁴¹ civil commitment to a mental health facility,⁴² concurrent sentencing,⁴³ loss of voting rights,⁴⁴ and maximum possible incarceration,⁴⁵

³⁹ Author interviews and correspondence with Federal Public Defenders in the District of Maryland (Jan. 9, 2009); Northern District of Texas, Dallas Division (Jan. 7, 2009); Southern District of Texas, McAllen Division (Sept. 10, 2008); Northern District of Iowa (July 24, 2008); and Southern District of California, San Diego Division (Jan. 7, 2009) (on file with the author).

⁴⁰ *Hutchison v. United States*, 450 F.2d 930 (10th Cir. 1971).

⁴¹ *Paige v. United States*, 443 F.2d 781 (4th Cir. 1971); *Yoswick v. State*, 700 A.2d 251 (Md. 1997).

⁴² *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973).

and courts have varied in how they analyze the distinction between direct and collateral. Some courts simply state in conclusory fashion that a consequence is direct or collateral.⁴⁶ Other courts acknowledge the difficulty of making the distinction, but then rely on the determination made in prior cases rather than engaging in any independent analysis.⁴⁷ A relatively small number of courts apply a more substantive analysis. The latter have generally considered the question of whether the consequence is in the nature of punishment for the crime and the practical realities of the procedural relationship between the entry of the conviction and the imposition of the consequence. This section will address the way courts have assessed the procedural relationship between conviction and consequence.

In 1973, the Fourth Circuit, in *Cuthrell v. Director, Patuxent Institution*,⁴⁸ surveyed existing cases on directness and laid out a standard that has since been recognized by many courts.⁴⁹ The court in *Cuthrell* stated that the directness of a consequence turned on whether it “represent[ed] a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”⁵⁰ That case involved the involuntary commitment of a defendant for treatment in a state hospital as a “defective delinquent.” The court relied on the facts that the commitment proceeding that followed the defendant’s conviction was a separate civil proceeding in which the

⁴³ *Tindall v. United States*, 469 F.2d 92 (5th Cir. 1972).

⁴⁴ *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964).

⁴⁵ *Combs v. United States*, 391 F.2d 1017 (9th Cir. 1968); *Pilkington v. United States*, 315 F.2d 204, 210 (4th Cir. 1963).

⁴⁶ *See, e.g., Meaton*, 328 F.2d at 381 (“There was no abuse of discretion in the refusal of the court to grant leave to withdraw the plea of guilty because the appellant failed to understand the collateral effects such as the loss of civic rights.”).

⁴⁷ *See, e.g., United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982) (“The distinction between a collateral and a direct consequence of a criminal conviction, like many of the lines drawn in legal analysis, is obvious at the extremes and often subtle at the margin.”).

⁴⁸ 475 F.2d 1364 (4th Cir. 1973).

⁴⁹ *See, e.g., George v. Black*, 732 F.2d 108 (8th Cir. 1984); *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997); *United States v. Lott*, 630 F. Supp. 611 (E.D. Va. 1986); *United States v. Littlejohn*, 224 F.3d 960 (9th Cir. 2000); *United States v. United States Currency in Amount of \$228,536.00*, 895 F.2d 908 (2nd Cir. 1990); *Steele v. Murphy*, 365 F.3d 14 (1st Cir. 2004).

⁵⁰ *Cuthrell*, 475 F.2d at 1366.

defendant “would be afforded counsel and all due process rights” and that the outcome was far from certain, depending on the testimony and conclusions of trained experts and the independent judgment of a judge or jury. In short, “[c]ommitment thus depended not directly on the defendant’s plea but on *a subsequent, independent civil trial*”⁵¹ of substance. The court emphasized the lack of certainty in the outcome of the post-conviction commitment process, pointing out that (1) not all those convicted were ordered evaluated for delinquency, (2) of those evaluated, a third were not recommended for commitment, and (3) of those recommended, one-fifth prevailed at jury trial.⁵² In addition, the court observed that the purpose of the commitment was not punishment but treatment and rehabilitation of an individual with a mental disorder.⁵³

Given the profound impact of deportation as a consequence of a conviction, it is not surprising that a number of courts over the years have been asked to decide whether deportation was a direct or collateral consequence.

A. THE EARLY CASES ON THE DIRECTNESS OF IMMIGRATION CONSEQUENCES

Many early decisions addressing the directness of deportation as a consequence of conviction appeared in the 1970s and 1980s; some appeared decades earlier.⁵⁴ In any event, the relevant immigration law was relatively stable during this period. Some courts considering the directness of deportation simply stated in conclusory fashion that deportation was a collateral consequence.⁵⁵ Others took the standards of analysis developed for analyzing other consequences and applied them to the laws, procedure and practical realities of immigration

⁵¹ 475 F.2d at 1366 (emphasis in original).

⁵² *Id.* at 1367.

⁵³ *Id.*

⁵⁴ *See, e.g.*, United States v. Parrino, 212 F.2d 919 (2nd Cir. 1954); United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971); United States v. Holton, 228 F.2d 827 (7th Cir. 1956); Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975).

⁵⁵ *See, e.g.*, *Parrino*, 212 F.2d at 921 (“[Deportation] is a liability which may, and in this case does, depend on a conviction of crime. But it is nonetheless a collateral consequence of conviction.”).

enforcement that existed at that time.⁵⁶ In so doing, they concluded that deportation was not a direct consequence of a criminal conviction. In order to correctly understand the decisions from this period, it is important to have a good understanding of the legal and enforcement context of immigration law on which the courts were basing their analysis.

1. The immigration landscape at the time of the early decisions

U.S. immigration law has long imposed significant consequences on certain criminal convictions. However, through equally long-standing law, procedure and practice, these consequences have also been subject to uncertainties and vagaries of enforcement and open to amelioration through widely available discretionary waivers of deportability for those convicted of crimes.

Since 1917, non-citizens who have committed crimes “involving moral turpitude” have been excludable from the United States.⁵⁷ From that same time, however, immigration law also provided for a broad discretionary exception to that bar for long-term residents who could show they were, on the whole, deserving of a second chance.⁵⁸

The Immigration and Nationality Act (INA), enacted in 1952, like the 1917 law, contained provisions excluding, among others, those individuals convicted of crimes of moral turpitude or of drug trafficking.⁵⁹ Also like the prior law, the INA in 1952 gave the Attorney General broad discretion to admit individuals notwithstanding their convictions, provided they had been residing in the United States for seven years.⁶⁰ This “section 212(c) waiver,” named for its location in the INA, was also applied to waive deportation for lawful permanent residents of

⁵⁶ See, e.g., *Daley v. State*, 487 A.2d 320 (Md. 1985).

⁵⁷ Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 875 (1917), cited in *INS v. St. Cyr*, 533 U.S. 289, 294 (2001).

⁵⁸ Immigration Act of 1917, 39 Stat. 878.

⁵⁹ See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 1952.

⁶⁰ INA, 66 Stat. 187. See also 8 U.S.C. § 1182(c) (repealed 1996).

at least seven years, *Matter of Silva*,⁶¹ adopting the position of *Francis v. INS*,⁶² and it was widely available and used by non-citizens seeking relief from deportation after a criminal conviction.

The accepted standard for granting Section 212(c) relief was a weighing of the equities of the case.⁶³ A 212(c) court had to weigh the negative factors (including the nature and underlying circumstances of any immigration violation or ground of exclusion; the nature, seriousness and recency of any criminal convictions; and another other evidence reflecting an applicant's bad character) against the positive factors (including family ties in the U.S., residence of long duration, applicant's age at entry, hardship to the family or the applicant if deported, employment history, property, military service, service to the community, evidence of rehabilitation, and any other evidence of the applicant's good character. The immigration judge was to balance the positive and adverse factors and decide on the record as a whole whether the applicant was deserving of a positive exercise of discretion.⁶⁴

Relief under section 212(c) was granted in a wide range of cases, involving a wide range of convictions, even quite serious ones. In the period between 1989 and 1995, (prior to 1997 when the provision was eliminated) over 10,000 individuals were granted 212(c) relief.⁶⁵ More than half of all 212(c) applications filed during that time period were granted.⁶⁶ As a result, a broad expectation developed in the immigrant community that, even with a criminal conviction,

⁶¹ 16 I&N Dec. 26, 30 (BIA 1976).

⁶² 532 F.2d 268 (2d Cir. 1976).

⁶³ See *In re Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978).

⁶⁴ *Id.*

⁶⁵ See *INS v. St. Cyr*, 533 U.S. 289, 296 (2001) (citing Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 150 n.80 (1996)).

⁶⁶ *Id.*

an individual would have a chance to fight deportation by appealing to the discretion of an immigration judge.⁶⁷

In addition, at the time of many of the early decisions about the directness of immigration consequences, the immigration law provided for judicial recommendations against deportation (JRADs), which, if granted by a judge in a criminal proceeding, prohibited the federal government from using a conviction as the basis for deportation or exclusion.⁶⁸

Finally, and importantly, at the time of these decisions, there was little coordination between the criminal and the immigration bureaucracies, and the enforcement of deportation or exclusion provisions against individuals with convictions was uneven at best. Many deportable individuals were able to remain living in the U.S. for many years without threat of removal as long as they did not bring themselves to the attention of the government by leaving and seeking to reenter the country or by applying for some immigration or naturalization benefit.⁶⁹

This was, quickly sketched, the state of the law of immigration and crimes when courts began to analyze the question of the directness of immigration consequences. For decades, this scheme was largely stable and relatively unchanged.

2. The analysis of the early courts on immigration consequences

In 1985, the Maryland Court of Special Appeals applied the Fourth Circuit's criteria from *Cuthrell v. Director, Patuxent Institution*,⁷⁰ to analyze whether immigration consequences were direct or collateral in the case of *Daley v. State*.⁷¹ *Daley* is illustrative in revealing the factual

⁶⁷ This is the argument in *INS v. St. Cyr*, in which the Supreme Court upheld retroactive eligibility for § 212(c) relief based on criminal defendants' having pled guilty with the expectation of § 212(c) eligibility in immigration proceedings. 533 U.S. at 325.

⁶⁸ INA, § 241(b), 66 Stat. 208 (repealed 1990); 8 U.S.C. § 1251(b) (repealed 1990).

⁶⁹ For a detailed discussion of the profound problems in the enforcement of deportation against individuals with criminal convictions through the late 1990s, see Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999).

⁷⁰ *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973).

⁷¹ *Daley v. State*, 487 A.2d 320 (Md. 1985).

basis for the court’s analysis, which is typical of courts’ reasoning in cases from that era. The *Daley* court looked at the immigration legal landscape as it was in 1985, analyzed the relationship between a criminal conviction and an eventual consequence of deportation, and held that deportation was a collateral consequence of a conviction.

The *Daley* court applied the *Cuthrell* standard of whether the consequence of a conviction “represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”⁷² The court first observed that deportation arose in the context of a civil proceeding separate from the criminal proceeding.⁷³ The court next observed that deportation was “neither ‘definite’ not ‘largely automatic,’” and referred specifically to discretionary relief that was then widely available in immigration proceedings to individuals with convictions.⁷⁴ Finally, the court looked at the facts in Mr. Daley’s case and found that deportation proceedings in that case were by no means “immediate,” as the defendant in *Daley* only came to the attention of the immigration authorities nearly two years after he pled guilty when he happened to reenter the country after travel abroad.⁷⁵ The court rightly observed that in the enforcement landscape of 1985, proceedings “might never have been instituted” against Mr. Daley had he not left the country.⁷⁶

In *United States v. Sambro*,⁷⁷ the Court of Appeals for the District of Columbia characterized non-direct consequences as “*possible* ancillary or consequential results which are *peculiar to the individual* and which *may* flow from a conviction on a plea of guilty.”⁷⁸ The

⁷² 475 F.2d at 1366.

⁷³ *Daley*, 487 A.2d at 322.

⁷⁴ *Id.* The court referred specifically to relief from deportation then available in the form of a § 212(c) waiver, which was repealed in the IIRIRA in 1996. See discussion of this form of relief, *supra*, Section III.A.1.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 454 F.2d 918 (D.C. Cir. 1971).

⁷⁸ *Id.* at 920 (emphasis added).

court went on to hold, with no further analysis, that deportation was a collateral and not a direct consequence.⁷⁹

The analysis of these courts reflected the realities of the immigration landscape at the time they were decided, but that landscape subsequently began a dramatic shift.

B. CHANGES TO THE IMMIGRATION LANDSCAPE THROUGH 1996

In 1988, Congress began a process of revising the INA as it relates to individuals with convictions. This process began slowly and gathered steam until it culminated in 1996 in the profound revolution in the law of immigration and convictions that was embodied in the passage of two laws: the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),⁸⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁸¹ known as AEDPA and IIRIRA. These changes vastly expanded the universe of crimes for which an individual could be excluded or deported, in part by hugely expanding the technical definition of an “aggravated felony” in the INA. In addition, AEDPA and IIRIRA completely eliminated the discretion granted to the Attorney General to waive deportation for those convicted of any crime that falls within that definition. As a result of these changes, the conclusion of deportation now often follows automatically in a wide range of cases from the single fact that a conviction has been entered.

Congress started down this road with the Omnibus Anti-Drug Abuse Act of 1988⁸² when it invented the category of offense called the “aggravated felony,” which at that time was defined as consisting of murder and trafficking in drugs or weapons.⁸³ Those convicted of aggravated felonies were made deportable, were subject to mandatory detention during deportation

⁷⁹ *Id.* at 922.

⁸⁰ Pub. L. No. 104-132, title IV, 110 Stat. 1214 (1996).

⁸¹ Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

⁸² Pub. L. No. 100-690, title VII, subtitle J; 102 Stat. 4181 (1988); 1988 U.S.C.C.A.N. 5937.

⁸³ Pub. L. No. 100-690, title VII, subtitle J § 7342, 102 Stat. 4181 (1988).

proceedings, and were disqualified from a form of relief from deportation called “voluntary departure.”⁸⁴ At this time, Congress also greatly expanded the range of firearms offenses that rendered one deportable.⁸⁵ It did not, however, make any changes to the Section 212(c) discretionary relief from deportation, which still provided relief to thousands of non-citizens convicted of crimes.

In 1990, Congress again acted to expand deportability and restrict discretionary relief for those convicted of crimes. It expanded the definition of an “aggravated felony” to include drug trafficking, money laundering and any crime of violence for which a term of imprisonment of five years or more was imposed, and it barred 212(c) discretionary relief for anyone convicted of an aggravated felony who was sentenced to at least five years imprisonment.⁸⁶ It furthermore eliminated judicial recommendations against deportation (JRADs) for any conviction.⁸⁷

Significantly, IMMACT90 also began a long process of restricting and streamlining *procedures* for adjudicating cases involving the recently created and already expanding category of aggravated felonies. For example, Section 504 provided for mandatory detention of all aggravated felons except lawful permanent residents pending the outcome of deportation proceedings.⁸⁸ It also required states, as a way of facilitating identification and immigration prosecution of those convicted of crimes, to establish a plan to provide the Immigration and Naturalization Service (INS)⁸⁹ with certified records of conviction within thirty days of any conviction under state law.⁹⁰

⁸⁴ *Id.* §§ 7344(a), 7343(a), 7343(b).

⁸⁵ *Id.* § 7342.

⁸⁶ Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, § 501, 104 Stat 4978, 5048 (1990); IMMACT90, Pub. L. No. 101-649, § 511, 104 Stat. at 5052 (1990).

⁸⁷ IMMACT90, Pub. L. No. 101-649, § 505, 104 Stat. at 5050 (1990)

⁸⁸ IMMACT90, Pub. L. No. 101-649, § 504, 104 Stat. at 5049-50 (1990).

⁸⁹ The INS was the predecessor of the current Department of Homeland Security’s United States Citizenship and Immigration Service, Immigration and Customs Enforcement agency, and Customs and Border Patrol agency.

⁹⁰ IMMACT90, Pub. L. No. 101-649, § 507, 104 Stat. at 5050-51 (1990).

A few years later, Congress began to make efforts to streamline the deportation process for individuals convicted of aggravated felonies in the Violent Crime Control and Law Enforcement Act of 1994.⁹¹ For the first time, this Act gave the Attorney General the considerable power to bypass deportation proceedings entirely for any non-lawful permanent resident who was convicted of an aggravated felony and ineligible for relief from deportation.⁹² Individuals in this category were deprived of the right to an administrative deportation hearing before an immigration judge and permitted only limited judicial review of the agency decision to determine whether they were, in fact, not a lawful permanent resident, not eligible for relief and had been convicted of an aggravated felony.⁹³

At the same time, Congress began a long process of tightening connections between the criminal and immigration systems to ensure that individuals who were deportable for convictions were directly identified and deported.⁹⁴

In the same year, through the Immigration and Nationality Technical Corrections Act of 1994, Congress took the radical step of giving federal criminal sentencing judges jurisdiction in certain circumstances to issue an order of deportation based on a criminal conviction at the same time as the sentencing, thereby bypassing entirely a separate deportation process.⁹⁵ Congress also significantly expanded the definition of “aggravated felony” again, so that the definition now included sixteen different offenses ranging from murder to failure to appear to serve a sentence

⁹¹ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁹² Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 130004, 108 Stat. 2026 (1994).

⁹³ *Id.*

⁹⁴ *See, e.g.*, Criminal Alien Tracking Center, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130002, 108 Stat. 1796, 2023.

⁹⁵ Immigration and Nationality Technical Amendments Act of 1994, Pub. L. No. 103-416, §224, 108 Stat. 4305, 4322-24 (1994).

of fifteen years or more,⁹⁶ and expanded the grounds for deportation and exclusion for many crimes to include attempts and conspiracies to commit those crimes.⁹⁷

To this point, Congress had fairly significantly expanded criminal grounds for deportation and exclusion and had begun to address the problem of identification and enforcement against non-citizens with convictions. However, in 1996, Congress substantially overhauled the way that immigration law had previously treated individuals with convictions when it passed AEDPA and IIRIRA.

These two laws together revolutionized the way that convictions were addressed by the immigration system.⁹⁸ They redefined and substantially broadened (again) the universe of crimes for which one could be removed from the U.S. by expanding the definition of what constitutes both a “conviction” and a term of imprisonment for immigration purposes (including, for example, suspended sentences within the latter for the first time),⁹⁹ and further broadening the definition of aggravated felonies.¹⁰⁰ For example, whereas the prior aggravated felony definition had included only crimes of theft or violence for which a five year term of incarceration was imposed, aggravated felonies now included (and continue to include), among many other things, any crime of theft or violence for which a sentence, even a suspended sentence, of only one year was imposed.¹⁰¹

Even more significantly, though, in IIRIRA, Congress eliminated the immigration judge’s traditional power to exercise discretion on behalf of any individual with a conviction that

⁹⁶ Pub. L. No. 416, § 222, 108 Stat. 4305, 4320-21(1994).

⁹⁷ Pub. L. No. 416, §§ 203, 222, 108 Stat. 4305, 4311, 4320-21.

⁹⁸ IIRIRA even changed the very basic categories of deportation, eliminating “deportation” and “exclusion” proceedings in favor of the single “removal” proceeding. INA §240(a), 8 U.S.C. § 1229(a) (2006). Illegal Immigration Reform and Immigrant Responsibility Act, §§304, 309(d)(2), 110 Stat. 3009-587 (1996).

⁹⁹ § 322(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act.

¹⁰⁰ § 321(a) of the Illegal Immigration Reform and Immigrant Responsibility Act.

¹⁰¹ § 321(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act. *See* discussion, *infra*, of examples of current provisions which constitute aggravated felonies, many of which are surprisingly minor.

fell within the much-expanded aggravated felony definition. IIRIRA eliminated the traditional 212(c) waiver¹⁰² and replaced it with a much more limited form of relief for which, among other restrictions, individuals with aggravated felony convictions were made categorically ineligible.¹⁰³ The 212(c) waiver, which had provided discretionary relief from removal for many thousands of individuals per year prior to 1996, was no longer.¹⁰⁴

Furthermore, AEDPA and IIRIRA included a variety of provisions that significantly tightened the coordination between criminal and immigration proceedings, to ensure that criminal defendants passed as directly as possible from the state or federal criminal systems to removal proceedings. For example, the Attorney General was directed to detain all individuals convicted of virtually any crime upon their release from incarceration, parole, supervised release, or probation, and was directed to hold them, with no possibility of release on bond, pending removal proceedings and after an order of removal.¹⁰⁵ Thus, subsequent to October 9, 1998, when this provision went into effect, any deportable individual incarcerated even for a short time was subject to mandatory detention until the government could complete removal proceedings and remove the individual. In addition, provisions for expedited removal proceedings for convicted individuals serving sentences were broadened.¹⁰⁶

The jurisdiction of federal district court judges to enter removal orders directly was expanded from aggravated felony cases to any deportable criminal offense,¹⁰⁷ and their authority to enter a removal order as a condition of probation was written into statute.¹⁰⁸

¹⁰² § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act.

¹⁰³ Section 304(a) of the Illegal Immigration Reform and Immigrant Responsibility Act. *See also* current INA §240a(a)(3), 8 U.S.C. §1229b(a)(3).

¹⁰⁴ *INS v. St. Cyr*, 533 U.S. 289, 296 (2001).

¹⁰⁵ § 303(a) of the Illegal Immigration Reform and Immigrant Responsibility Act.

¹⁰⁶ Antiterrorism and Effective Death Penalty Act, § 442, 110 Stat. 1279 (1996).

¹⁰⁷ § 374 of the Illegal Immigration Reform and Immigrant Responsibility Act.

¹⁰⁸ § 374 of the Illegal Immigration Reform and Immigrant Responsibility Act.

Finally, Congress ordered immigration authorities to continue to develop systems to identify and track non-citizens with convictions, including a “criminal alien identification system” which would be used to help local, state and federal law enforcement identify and locate non-citizens subject to removal because of convictions.¹⁰⁹

C. ANALYSIS OF THE DIRECTNESS OF IMMIGRATION CONSEQUENCES IN THE CURRENT LEGAL FRAMEWORK

Any contemporary analysis of the directness of immigration consequences must obviously begin with an understanding of the realities of both immigration law and immigration enforcement at the beginning of the twenty-first century, taking into account the profound changes of the last two decades.

1. Removability for convictions under current immigration law

The reach of current INA provisions regarding crimes is extremely long. Non-citizens are removable and/or inadmissible for offenses involving moral turpitude,¹¹⁰ virtually any drug offense,¹¹¹ firearms offenses,¹¹² domestic violence offenses,¹¹³ and aggravated felonies.¹¹⁴

The category of aggravated felony is in turn quite broad, and has expanded over the years to include a “stunning range” of offenses,¹¹⁵ many of which are neither “aggravated” nor felonies. The list now includes twenty separate categories of charges, and encompasses a wide range of offenses, some of which are quite serious, but many of which are relatively minor.¹¹⁶

¹⁰⁹ Criminal Alien Tracking Center, of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130002, 108 Stat. 1796, 2023, *as amended by* Pub. L. No. 104-132, Title IV, § 432, 110 Stat. 1273 (1996); and Pub. L. No. 104-208, div. C, Title III, §§ 308(g)(5)(b), 326, 327, 110 Stat. 3009-623, 3009-630 (1996).

¹¹⁰ INA §§ 237(a)(2)(A)(i), (ii), 8 U.S.C. §§ 1227(a)(2)(A)(i), (ii); INA §212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

¹¹¹ INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B); INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

¹¹² INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

¹¹³ INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E).

¹¹⁴ INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

¹¹⁵ Legomsky, *supra* note 18, at 520.

¹¹⁶ INA § 101(a)(43)(A) - (43)(U), 8 U.S.C. § 1101(a)(43)(A) - (43)(U).
INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), defines “aggravated felony”:

(43) The term “aggravated felony” means—

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- (A) murder, rape, or sexual abuse of a minor;
 - (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);
 - (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);
 - (D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;
 - (E) an offense described in—
 - (i) section 842 (h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
 - (ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or
 - (iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);
 - (F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year;
 - (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;
 - (H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);
 - (I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);
 - (J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;
 - (K) an offense that—
 - (i) relates to the owning, controlling, managing, or supervising of a prostitution business;
 - (ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed; or
 - (iii) is described in any of sections 1581–1585 or sections 1588–1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);
 - (L) an offense described in—
 - (i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;
 - (ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or
 - (iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);
 - (M) an offense that—
 - (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or
 - (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;
 - (N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 U.S.C. § 1324(a)] (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;
 - (O) an offense described in section 275(a) or 276 [8 U.S.C. § 1325 or § 1326] committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;
 - (P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the

Some of the aggravated felony definitions are triggered by sentences to incarceration of one year or more, but the INA now defines a sentence to incarceration to include any suspended sentence, so even sentences with no actual jail time trigger the definition.¹¹⁷ As a result, “aggravated felony” offenses now include “simple” assault with a sentence or suspended sentence of a year or more,¹¹⁸ possession of marijuana with intent to distribute (regardless of sentence),¹¹⁹ and even petty theft with a prior jail term, where a sentence or suspended sentence of a year or more is imposed.¹²⁰ Furthermore, by definition, any attempt or conspiracy to commit any of these crimes is also considered an “aggravated felony.”¹²¹ Finally, Congress defined aggravated felony to include any of these convictions entered *at any time*, whether “before, on, or after the date of enactment” of the new definition, meaning that offenses that were not aggravated felonies or deportable offenses when they were committed have become so.¹²²

The consequences of an aggravated felony conviction such as any of these are wide-ranging and categorical, arising directly from the fact of the conviction, regardless of the severity

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- alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;
 - (Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;
 - (R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;
 - (S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
 - (T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
 - (U) an attempt or conspiracy to commit an offense described in this paragraph.
- The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

¹¹⁷ INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

¹¹⁸ See, e.g., *United States v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) (simple assault for punching a man in the face is an aggravated felony).

¹¹⁹ *Julce v. Mukasey*, 530 F.2d 30 (1st Cir. 2008) (possession of marijuana with intent to distribute is an aggravated felony).

¹²⁰ *Mutascu v. Gonzales*, 444 F.3d 710 (5th Cir. 2006).

¹²¹ INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

¹²² INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

of the actual offense. The law states plainly that any “alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.”¹²³ Furthermore, non-citizens convicted of aggravated felonies are automatically and mandatorily disqualified from virtually any discretionary relief from removal, including cancellation of removal for lawful permanent residents, the form of relief that replaced the much utilized § 212(c) waiver.¹²⁴ The fact of the conviction itself strips an immigration judge of any power to grant relief from removal. Following deportation for an aggravated felony conviction, an individual is permanently barred from reentering the United States.¹²⁵

2. Effective Coordination of Criminal and Immigration Enforcement Infrastructure

In addition to these profound changes in the underlying law of immigration and convictions, there has been a sea change in the practical, procedural relationship between the criminal and immigration enforcement systems. Beginning with the reforms of the 1990s, immigration authorities have been required to implement and maintain extensive systems to tighten the connections between these formerly separate enforcement schemes.¹²⁶ Congress has

¹²³ INA § 238(c), 8 U.S.C. § 1228(c). More generally, the law provides that anyone convicted of an aggravated felony at any time after admission is removable. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 227(a)(2)(A)(iii).

¹²⁴ INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). In addition, individuals with these convictions are specifically barred from seeking cancellation of removal for non-LPRs, special cancellation of removal for Central Americans under NACARA, voluntary departure, relief under the battered spouse provisions of the Violence Against Women Act, naturalization and, in most cases, temporary protected status. *See* INA § 101(f)(8), 8 U.S.C. § 1101(f)(8); INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B); INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C); 8 C.F.R. § 1240.65(a); INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1); INA § 240B(b)(1)(C), 8 U.S.C. § 1229c(b)(1)(C); INA § 240A(b)(1)(B), 8 U.S.C. § 1229c(b)(1)(B); INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C); 8 C.F.R. § 1244.4. They are even barred from humanitarian relief from persecution in the form of asylum and, in many circumstances, the more limited withholding of removal, as well. *See* INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i); INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii); INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C); § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

¹²⁵ INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

¹²⁶ For one example, under INA § 236(d), DHS is required to implement and maintain a computer-based system to identify individuals in state and local custody who have been arrested for aggravated felonies and to facilitate communication with federal authorities regarding the arrest, conviction and release of such individuals. INA § 236(d), 8 U.S.C. § 1226(d).

also generously funded these mandates.¹²⁷ As a result, through a number of programs designed to address different aspects of this interaction, the Department of Homeland Security now has “a comprehensive plan to identify and remove criminal aliens.”¹²⁸ The goal of this web of enforcement programs is to ensure that *all* individuals who may be deportable are identified as early and reliably in the criminal process as possible and passed as directly as possible from criminal authorities to immigration authorities.¹²⁹ The development of these systems for identifying and processing “criminal aliens” has been among the highest priorities for ICE,¹³⁰ and very effective systems are now in place from the moment of a law enforcement stop to and through the sentencing of a convicted individual and even beyond the completion of a sentence to ensure that all non-citizens who have contact with criminal enforcement in any way are screened for deportability and, if appropriate, surrendered directly into ICE custody.

This “Secure Communities” initiative, which ICE unveiled in 2008, identifies and draws together many of the components of the comprehensive system that immigration authorities have developed over the years, in conjunction with federal, state and local law enforcement and others, to identify and process non-citizens with convictions. The plan is the culmination of several years of serious investment by ICE in an infrastructure that is “transforming the way the federal government cooperates with state and local law enforcement agencies to identify, detain

¹²⁷ It does not appear that support for these programs will diminish anytime soon. The federal budget recently proposed by the Obama administration would include \$1.4 billion designated specifically for ICE programs to deport non-citizens who commit crimes. *How the \$3.6 Trillion Would be Spent*, WASH. POST, Feb. 27, 2009, at A7.

¹²⁸ See U.S. Immigration & Customs Enforcement, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* (Nov. 19, 2008), http://www.ice.gov/pi/news/factsheets/secure_communities.htm [hereinafter ICE Fact Sheet].

¹²⁹ *Id.*

¹³⁰ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 4-5 (2008), available at http://www.ice.gov/doclib/about/ice07ar_final.pdf [hereinafter ICE FISCAL YEAR 2007 ANNUAL REPORT] (“At the same time, ICE has introduced an aggressive and effective campaign to enforce immigration law within the nation’s interior, with a top-level focus on criminal aliens . . . Aliens involved in criminal activity are a threat to the safety and security of the American public and were a key focus for ICE in FY07”).

and remove all criminal aliens held in custody.”¹³¹ ICE has coordinated enforcement efforts among myriad agencies at all levels of government in this effort. In addition to state and local law enforcement agencies,¹³² its federal partners in this effort include U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP) and the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program within DHS, as well as agencies beyond DHS: the Bureau of Prisons (BOP), Executive Office for Immigration Review (EOIR), U.S. Attorneys, Department of State (DOS), Department of Justice (DOJ), U.S. Marshals Service (USMS), and FBI’s Criminal Justice Information Services Division (CJIS).¹³³

In June 2007, ICE consolidated its efforts and resources into its Criminal Alien Program (CAP), charged with identifying, detaining and removing non-citizens with convictions.¹³⁴ CAP uses a variety of programs to screen inmates in federal, state and local prisons and jails throughout the country, place DHS detainers on them (to ensure that they pass directly to DHS custody) and, if possible, secure removal orders against them before they can be released from the custody of the criminal system. In FY 2008, CAP officers issued charging documents to begin removal proceedings against more than 221,000 non-citizens with convictions. This was up from 164,000 in FY 2007 and 67,000 in FY 2006.¹³⁵

The Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago uses video teleconference equipment to interview federal BOP inmates for immigration screening and to begin proceedings. As a result of the DEPORT Center and local ICE efforts, inmates from *all* 114 federal detention centers are now screened and taken

¹³¹ ICE Fact Sheet, *supra* note 128.

¹³² For a window into the growing cooperative relationship between ICE and one state, see N.Y. DIVISION OF CRIMINAL JUSTICE SERVICES, CRIMINAL ALIEN IMPROVEMENTS IN NEW YORK STATE: 2006 CRIMESTAT UPDATE (Feb. 8, 2007), <http://criminaljustice.state.ny.us/pio/annualreport/criminalalienimprovements.pdf>.

¹³³ ICE Fact Sheet, *supra* note 128.

¹³⁴ *Id.*

¹³⁵ *Id.*

directly into ICE custody, if appropriate, upon completion of their sentences.¹³⁶ Together, CAP and DEPORT officers also currently screen all foreign-born individuals in all state prisons.¹³⁷

Furthermore, from the time any state, local or federal law enforcement officer stops an individual, that officer has access to ICE's Law Enforcement Support Center (LESC), a national enforcement operations facility that provides the officer with real-time immigration status and identity information twenty-four hours a day, seven days a week, even when the individual is not arrested.¹³⁸ Prior immigration and criminal history data is available even if the individual is merely subject to a traffic or other stop. Certainly, this information is readily available and accessed by any law enforcement officer in any case, including in the case of individuals charged and held in local jails. In FY 2008, LESL responded to 807,106 requests for information from other law enforcement agencies which came from 12,000 different sources including agencies in all fifty states and the District of Columbia.¹³⁹ Over the past five fiscal years, LESL agents have lodged 79,450 immigration detainers against individuals with convictions or prior immigration violations.¹⁴⁰

In addition, LESL administers the 250,000 ICE records in the National Crime Information Center (NCIC) database, which gives local law enforcement officers direct access to immigration related records.¹⁴¹ ICE is also working on establishing interoperability between the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and DHS's Automated Biometric Identification System (IDENT), which will facilitate the positive identification of individuals in local prisons and jails.¹⁴²

¹³⁶ ICE Fact Sheet, *supra* note 128; ICE FISCAL YEAR 2007 ANNUAL REPORT, *supra* note 130.

¹³⁷ ICE Fact Sheet, *supra* note 128.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

As soon as foreign-born individuals with convictions are identified in the criminal system, DHS places a detainer on them to ensure that they are surrendered directly into DHS custody. If the individual has not earlier had a removal hearing, these proceedings are begun in most cases after the individual goes into DHS custody on the detainer.¹⁴³

Furthermore, individuals with virtually any criminal conviction are subject to mandatory detention during the pendency of their removal proceedings,¹⁴⁴ and federal law requires that the Department of Homeland Security¹⁴⁵ “shall” take them into custody immediately upon their release from state custody, including release on parole, supervised release or probation.¹⁴⁶ This ensures that these individuals are unable to abscond or to avoid being subjected to any immigration process that might flow from their convictions.

However, in many cases, immigration removal proceedings begin and are completed even before an individual leaves state or federal custody. Current law provides for removal proceedings to be held in correctional facilities for those with aggravated felony convictions, in an effort to ensure that proceedings are completed while the individual is still serving his or her sentence for the criminal charge and removal can occur directly upon the individual’s release to DHS custody.¹⁴⁷ These proceedings take place through the ICE Institutional Removal Program

¹⁴³ Author interviews and correspondence with Federal Public Defenders and private criminal defense attorneys in the District of Maryland (Jan. 9, 2009); Northern District of Texas, Dallas Division (Jan. 7, 2009); Southern District of Texas, McAllen Division (Sept. 10, 2008); Northern District of Iowa (July 24, 2008); District of Arizona, Tucson Division (Jan. 8, 2009); and Southern District of California, San Diego Division (Jan. 6, 2009) (on file with author).

For an example of a federal district court order remanding a defendant to the custody of U.S. Marshals “for immediate processing to the Bureau of Immigration and Customs Enforcement (BICE) detainer,” see Judgment in a Criminal Case, *United States v. Osbaldo Lopez-Becerra*, CR 08-1309-1-LRR (N.D. Iowa 2008), PACER, Document 13, filed Oct. 9, 2008.

¹⁴⁴ INA § 236(c), 8 U.S.C. § 1226(c), provides for mandatory detention of anyone removable and/or inadmissible for convictions of crimes involving moral turpitude, aggravated felonies, drug offenses, firearms and “miscellaneous” offenses.

¹⁴⁵ With the transfer of authority under 6 U.S.C. § 557 as of March 1, 2003, the title “Attorney General” is synonymous with the Secretary of Homeland Security. *United States v. Rios-Zamora*, 153 Fed. Appx. 517, 520-21 (10th Cir. 2005).

¹⁴⁶ INA § 236(c), 8 U.S.C. § 1226(c).

¹⁴⁷ INA § 238(a), 8 U.S.C. § 1228(a).

(IRP), which is the vehicle for this overlap between criminal and immigration enforcement. The number of individuals receiving an order of removal while still serving a criminal sentence has increased markedly in recent years.¹⁴⁸

Even beyond the IRP, though, is the so-called “administrative” removal process for individuals with aggravated felony convictions who are not lawful permanent residents.¹⁴⁹ The INA provides that any such individual may be ordered removed by a DHS employee in a summary and strictly administrative process without any hearing or removal proceeding at all.¹⁵⁰ This streamlined “process” is reduced to a ministerial function by two other sections of the statute that provide that any individual with an aggravated felony conviction is “conclusively presumed” deportable on the basis of the conviction alone¹⁵¹ and, again on the basis of the conviction alone, specifically made ineligible for any discretionary forms of relief.¹⁵² Thus, the role of the decision-maker in these cases (a DHS employee), is merely to confirm the identity of the individual and the existence of the conviction. From the fact of that conviction, the law mandates that the individual is deportable and has no discretionary relief and therefore must be ordered removed. Though DHS refers to these orders as “administrative” orders of removal,¹⁵³ commentators have suggested that they are more accurately called “ministerial” orders, because

¹⁴⁸ Bureau of Prisons employee Kathy Grinley is quoted in the *ICE Fiscal Year 2007 Annual Report* as saying, “During the past year, there has been a noticeable increase in the number of inmates in BOP custody who have received an order of removal while serving their sentence.” ICE FISCAL YEAR 2007 ANNUAL REPORT, *supra* note 130, at 6.

¹⁴⁹ INA § 238(b), 8 U.S.C. § 1228(b). It is also noteworthy that this provision can be applied to the conditional permanent resident spouse of a U.S. citizen, that is, an individual granted adjustment of status to permanent residence within two years of marriage to a citizen. INA § 238(b)(2)(B), 8 U.S.C. § 1228(b)(2)(B). Such an individual has the same rights as a lawful permanent resident to reside, work and reenter the U.S., but must apply to remove the condition on her residence after two additional years of marriage. INA § 216, 8 U.S.C. § 1186(a). Though conditional permanent residents are considered the equivalent of lawful permanent residents for many purposes, courts have held that they can be subjected to summary administrative removal just like undocumented individuals.

¹⁵⁰ INA § 238(b), 8 U.S.C. § 1228(b).

¹⁵¹ INA § 238(c), 8 U.S.C. § 1228(c) (“Presumption of deportability. An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.”).

¹⁵² INA § 238(b)(5), 8 U.S.C. § 1228(b)(5) (“No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.”).

¹⁵³ See ICE 2007 FISCAL YEAR ANNUAL REPORT, *supra* note 130, at 33.

the order is entered following the unilateral exercise of a purely ministerial function on the part of the DHS employee.¹⁵⁴ In FY 2007, 4,242 individuals were administratively ordered removed for criminal convictions without a hearing.¹⁵⁵ The number of these ministerial or administrative orders of removal entered by DHS employees has risen over the years and risen sharply in FY 2008.¹⁵⁶

Finally, and tellingly, criminal courts themselves are now facilitating the initiation of removal proceedings and, in some cases, actually entering removal orders directly. It is now “routine” in many federal districts, especially those with high foreign-born populations, for judges to order surrender to immigration officials as a condition of supervised release or at the end of any period of incarceration.¹⁵⁷

In cases involving plea bargains, defendants are often required by prosecutors to stipulate to removal in order to benefit from a “fast track” plea or otherwise strike a deal for the quickest processing and the shortest incarceration.¹⁵⁸ In many districts, defendants are “routinely”

¹⁵⁴ Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1446 n.167 (1997), cited in Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1157 n.103 (2002).

¹⁵⁵ See ICE 2007 FISCAL YEAR ANNUAL REPORT, *supra* note 130, at 33.

¹⁵⁶ Interview with Nelson Vargas-Padilla, Senior Attorney, Office of the Chief Counsel, ICE, DHS (Jan. 15, 2009).

¹⁵⁷ Author interviews and correspondence with Federal Public Defenders in the District of Maryland (Jan. 8, 2009); Northern District of Texas, Dallas Division (Jan. 7, 2009); Southern District of Texas, McAllen Division (Sept. 10, 2008); and Northern District of Texas, Amarillo Division (Jan. 13, 2009); on file with the author. See Judgment in a Criminal Case, *United States v. Osbaldo Lopez-Becerra*, CR 08-1309-1-LRR (N.D. Iowa, 2008), PACER, Document 13, filed Oct. 9, 2008.

¹⁵⁸ Author interviews and correspondence with Federal Public Defenders in the District of Maryland (Jan. 9, 2009); Southern District of Texas, McAllen Division (Sept. 10, 2008); Northern District of Iowa (July 24, 2008); District of Arizona, Tucson Division (Jan. 8, 2009); and Southern District of California, San Diego Division (Jan. 6, 2009); on file with the author.

The vast majority of criminal cases are disposed of through plea agreements. In 2004, 57% of federal felony charges and 95% of state felony charges were disposed of by means of a negotiated plea agreement. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Felony Defendants in Large Urban Counties, 2004—Statistical Tables*, at tbl.19 (Apr. 25, 2008), <http://www.ojp.usdoj.gov/bjs/pub/html/fdluc/2004/tables/fdluc04st19.htm>; Bureau of Justice Statistics, U.S. Dep’t of Justice, *State Court Sentencing of Convicted Felons 2004—Statistical Tables tbl.4.1* (July 25, 2007), <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm>.

required to waive their right to contest removal proceedings as part of a plea agreement.¹⁵⁹ One such agreement contained the following provisions:

Consent to Removal from the United States

11. The Defendant acknowledges that he is subject to removal from the United States and agrees not to contest any removal proceedings brought by the Department of Homeland Security (DHS)... [T]he Defendant agrees to request an expedited removal hearing and to consent to removal... The Defendant knowingly waives any and all rights to appeal, reopen, reconsider or otherwise challenge his removal.

12. The Defendant agrees to waive any rights he may have to apply for any form of relief or protection from removal....

14. The Defendant agrees to assist the DHS in his removal....¹⁶⁰

The plea agreement in these cases acts as a binding contract between the defendant and the U.S. attorneys office and prevents the defendant from fighting deportation in immigration court.¹⁶¹

In any event, even when a plea agreement does not directly address immigration status, whenever it comes to the attention of the court or prosecution that a defendant is a non-citizen, it is the practice of the U.S. Attorneys office to notify ICE so that agents can screen and put a detainer on the individual, if ICE believes him or her to be removable.¹⁶² Individuals with detainers are then transferred directly into the custody of immigration officials at the end of their sentence or criminal process. The system, especially in federal district courts, has become extremely efficient at identifying and detaining removable defendants. One federal defender in

¹⁵⁹ Author correspondence with federal district court judge in the District of Maryland (Jan. 8, 2009), and author interviews and correspondence with Federal Public Defenders in the District of Northern District of Texas, Dallas Division (Jan. 8, 2008); Northern District of Iowa (July 24, 2008); and the District of Arizona, Tucson Division (Jan. 8, 2009) (on file with author).

¹⁶⁰ Obtained in correspondence with federal district court judge in the District of Maryland, Jan. 8, 2009 (on file with the author).

¹⁶¹ Author correspondence with Federal Public Defender in the Southern District of California, San Diego Division (Jan. 6, 2009) (on file with author).

¹⁶² Author interviews and correspondence with Federal Public Defenders and private criminal defense attorneys in the District of Maryland (Jan. 9, 2009); Northern District of Texas, Dallas Division (Jan. 7, 2009); Southern District of Texas, McAllen Division (Sept. 10, 2008); Northern District of Iowa (July 24, 2008); District of Arizona, Tucson Division (Jan. 8, 2009); and Southern District of California, San Diego Division (Jan. 6, 2009) (on file with author).

Tucson, Arizona estimated that in seven years of working as a federal public defender, she has seen exactly one of her non-citizen former clients mistakenly released following his sentencing; to her knowledge all the rest had detainers before they left her representation and were surrendered directly to immigration authorities.¹⁶³

The law allows for even more direct involvement of a federal criminal district court in the process of imposing removal as a result of a criminal conviction. The INA provides that a federal district court judge can enter a judicial order of removal directly against any individual convicted of any deportable criminal offense in the course of the criminal proceeding itself.¹⁶⁴ There is no need or provision in these cases for any separate DHS administrative or hearing process whatsoever. If the conviction is the result of a plea rather than a trial, the sentencing judge may enter a stipulated order of removal that was negotiated as part of a plea agreement.¹⁶⁵ Finally, a district court or magistrate judge has statutory authority to order deportation as a condition of probation.¹⁶⁶ In all of these cases, the district court itself enters an order of removal directly at the time of sentencing for the underlying criminal offense, and the individual is transferred without further proceedings to DHS for removal upon completion of any sentence on the criminal charge.

This use of this power of judicial removal is fairly new, but it was used in the rather notorious proceedings that followed the ICE raid of the Agriprocessors, Inc. meatpacking plant in Postville, Iowa in May 2008. Over the course of ten days in Postville, nearly 300 workers from the plant were arrested, pled guilty, and were convicted of document fraud charges and

¹⁶³ Author interview with Federal Public Defender in the District of Arizona, Tucson Division (Jan. 8, 2009).

¹⁶⁴ INA § 238(c)(1), 8 U.S.C. § 1228(c)(1).

¹⁶⁵ INA § 238(c)(5), 8 U.S.C. § 1228(c)(5).

¹⁶⁶ 18 U.S.C. § 3563(b)(21).

sentenced.¹⁶⁷ Following the entry of sentence in each of those cases, the court’s final order was a stipulated Order of Removal in which the district court judge ordered the defendant removed from the United States pursuant to the judicial removal provisions of INA §238(c)(5).¹⁶⁸ The final order of removal was entered directly by the criminal sentencing judge, and no further proceedings were required or conducted by any immigration authorities.

3. Under the accepted criteria for what constitutes direct consequences, immigration consequences in the current legal and enforcement framework have become direct consequences of a conviction.

As we have seen, earlier courts addressing the issue of the directness of the deportation consequence in the context of earlier decades concluded that deportation was “neither ‘definite’ nor ‘largely automatic’” and that it was the result of the independent action of a government agency that was, in turn, independent of the criminal court. As such, these courts held deportation to be a collateral consequence of a conviction.¹⁶⁹ The *Daley* court, for example, relied specifically on the availability of discretionary relief in separate, substantive immigration proceedings, as well as the uncertainties of enforcement.¹⁷⁰ Indeed, in that time period, the eventual outcome of deportation was contingent on the happenstance of whether the individual came to the attention of the immigration authorities, who had few systems to identify him, and whether they instituted proceedings against him, as well as whether the individual qualified by his circumstances for a §212(c) waiver or other discretionary relief from deportation.

¹⁶⁷ Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1; ICE News Release, 297 Convicted and Sentenced Following ICE Worksite Operation in Iowa (May 15, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080515waterloo.htm>.

¹⁶⁸ See, e.g., *United States v. Lastor-Gomez*, No. CR 08-1141, (2:08-cr-01141-LRR, N.D. Iowa) PACER, Document 12, filed May 19, 2008; and *United States v. Vega-Nava*, 2:08-cr-01257-LRR), PACER, Document 12, filed May 22, 2008.

¹⁶⁹ See *Daley v. State*, 487 A.2d 320, 322 (1985); *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976).

¹⁷⁰ 487 A.2d at 322.

However, if we apply the “definite, immediate and largely automatic effect” standard used by earlier courts to immigration consequences as they operate today, the conclusion is very different. We find that immigration law and its enforcement infrastructure have changed to such an extent in the past two decades that deportation has become a direct consequence of many convictions for non-citizens. This is particularly true in the case of anyone convicted of any of the myriad offenses that are now classified as aggravated felonies by the immigration law.

As we have seen, anyone convicted of an aggravated felony today is automatically removable by operation of INA § 238(c)¹⁷¹ and is disqualified categorically, precisely because of the conviction, from virtually any relief from removal.¹⁷² Thus, as a result of conclusive presumptions and disqualifications written into the law, deportation has become automatic for anyone with a conviction falling within the category of aggravated felonies. Immigration judges are powerless to do anything other than confirm the fact of the conviction and order removal. In the 2002 case of *United States v. Couto*,¹⁷³ the Second Circuit put it thus:

Given [the 1996 immigration law] amendments, an alien convicted of an aggravated felony is automatically subject to removal and no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation. Therefore, Defendant argues, the rationale behind the decisions in *Parrino* and *Santelises*—that deportation is not a direct consequence *because it is not automatic*—no longer reflects the state of the law. Instead, deportation today is an essentially certain, automatic, and unavoidable consequence of an alien’s conviction for an aggravated felony.¹⁷⁴

¹⁷¹ 8 U.S.C. § 1228(c) (“Presumption of deportability. An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.”)

¹⁷² INA § 238(b)(5), 8 U.S.C. § 1228(b)(5) (“No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.”). *See also* note 116, *supra*, describing the many specific disqualifications in the INA based on an aggravated felony conviction. Individuals with aggravated felony convictions remain eligible only for the most limited form of relief under the Convention Against Torture, 8 C.F.R. § 208.18 (2008), and, in some limited cases for restriction on removal (also known as withholding of removal), INA §241(b)(3), 8 U.S.C. § 1231(b)(3), relief mandated by international obligations that absolutely prohibit the United States and other signatories from returning an individual to a country where s/he will more likely than not be tortured or have his or her life or freedom threatened. Eligibility for this relief is extremely limited by the individual’s factual situation. The vast majority of individuals who are deportable for crimes will not qualify for this relief.

¹⁷³ 311 F.3d 179 (2d Cir. 2002).

¹⁷⁴ 311 F.3d at 189-90.

Five years later, in *Zhang v. United States*,¹⁷⁵ the same court went on to say even more directly:

The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), however, has altered the landscape of immigration law, and deportation of aggravated felons is now automatic and non-discretionary. [S]ee also *INS v. St. Cyr* (referring to deportation of aggravated felons as “certain”).¹⁷⁶

The court in both cases found that it did not have to decide the issue of directness, but observed in *dictum* that it found merit in the argument that the consequence of deportation was now automatic for individuals with aggravated felony convictions.¹⁷⁷

Furthermore, as we have seen, immigration and criminal authorities have collaborated, with considerable support from Congress, on systems that have made deportation both definite and immediate, following right on the heels of the criminal process and sentence, often even before the sentence has been served. Earlier courts found that it was not definite or immediate, observing the long delays between conviction and deportation, as well as the dumb luck that seemed to determine whether an individual with a conviction would come to the attention of the authorities or not.¹⁷⁸ In contrast, significant systems now ensure that non-citizen criminal defendants are identified quickly and move directly and immediately to immigration proceedings or even straight to removal, and DHS has prioritized the removal of non-citizens with convictions.¹⁷⁹ DHS is required by law to take custody of an individual with a removable conviction directly upon his or her release from state or local custody, and the government has

¹⁷⁵ 506 F.3d 162 (2d Cir. 2007).

¹⁷⁶ 506 F.3d at 167 (citations omitted).

¹⁷⁷ *Couto*, 311 F.3d at 190-91; *Zhang*, 506 F.3d at 167.

¹⁷⁸ See *Daley v. State*, 487 A.2d 320, 322 (1985). The *Daley* court observed that deportation proceedings in that case were by no means “immediate,” as the defendant in *Daley* only came to the attention of the immigration authorities and was put into deportation proceedings nearly two years after he pled guilty when he happened to reenter the country after travel abroad. *Id.* The court observed that proceedings “might never have been instituted” had he not left the country.

¹⁷⁹ See Section III.C.2, *supra*.

put elaborate systems into place to identify and keep track of these individuals even while they are still serving their criminal sentences.¹⁸⁰

Finally, a key factor—seemingly in many cases *the* key factor—for many courts addressing the directness question, is that the deportation decision has been made in the context of a separate, civil proceeding and not within the criminal trial. The centrality of this factor can be seen in many of the older cases.¹⁸¹

It is striking, however, how this one factor has come to dominate the analysis of courts which have considered the question of the directness of deportation following the 1996 changes to the immigration laws. As deportation has become demonstrably more “definite, immediate and largely automatic,” courts have backed away from consideration of the full standard for directness as originally applied and have come to focus almost exclusively on the fact that deportation is not imposed by the criminal court. The Sixth Circuit, for example, in *El-Nobani v. United States*,¹⁸² sidestepped the question of automaticity by stating without evidence that “although the INS has been restricted in its ability to grant certain discretionary relief in deportation proceedings, ‘there is no indication that the INS has ceased making this sort of determination on a case-by-case basis.’”¹⁸³ In any case, the court went on to hold, “the automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the guilty plea. A collateral consequence is one that ‘remains beyond the control and responsibility of the district court in which that conviction was entered.’”¹⁸⁴ Other courts

¹⁸⁰ *Id.*

¹⁸¹ *See, e.g., Daley*, 487 A.2d at 322; *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976); *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) (“The district judge, in our view, has the obligation to ascertain that the consequences of the sentence *he* imposes are understood. Deportation here, as before, was not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility.”).

¹⁸² 287 F.3d 417 (6th Cir. 2002).

¹⁸³ *Id.* at 421 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999)).

¹⁸⁴ *Id.* (citing *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000)).

have focused similarly on the nominal independence of the deportation decision-maker.¹⁸⁵ In fact, every single federal circuit court of appeals that has held that deportation continues to be a collateral consequence in the wake of the 1996 changes has relied on the sole factor that the final deportation order is entered by an agency other than the sentencing court, regardless of how definite, immediate or automatic the sanction is.¹⁸⁶

The forum of the deportation decision is presumably significant as a factor for these courts because it contemplates the independent judgment and action of another decision-making entity which considers factors outside the province of the sentencing court and exercises some independent judgment on factors relating specifically to the question of deportation. This intervention presumably assures the court that there is some kind of substantive process in which other considerations are taken into account, i.e., that the imposition of the consequence is not automatic, but meaningfully considered in an appropriate setting. In the absence of some meaningful independent consideration, it is difficult to see how or why this single factor should carry all the weight of determining whether a consequence is the direct result of a criminal court's action.

As we have seen, however, the link between criminal and immigration enforcement continues to grow stronger with each passing year, and it can no longer be said categorically that non-citizens convicted of crimes have the benefit of a separate administrative deportation hearing

¹⁸⁵ See, e.g., *United States v. Amador-Leal*, 276 F.3d 511, 516-17 (9th Cir. 2002) (“[W]hether an alien will be removed is still up to the INS. There is a process to go through, and it is wholly independent of the court imposing sentence. . . . Removal is not part of the sentence . . .”); and *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (“However ‘automatically’ [the defendant’s] deportation . . . might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a collateral consequence thereof.”); *People v. DeJesus*, 819 N.Y.S.2d 442, 445 (N.Y. Crim. Ct. 2006) (immigration consequences collateral despite definite, automatic nature because they are imposed by an “independent agency”); *Rumpel v. State*, 847 So. 2d 399, 401 (Ala. Crim. App. 2002).

¹⁸⁶ *Gonzalez*, 202 F.3d at 27; *Santos-Sanchez v. United States*, 548 F.3d 327, 337 (5th Cir. 2008); *El-Nobani*, 287 F.3d at 417; *Amador-Leal*, 276 F.3d at 516-17; *Broomes v. Ashcroft*, 358 F.3d 1251, 1256 (10th Cir. 2004).

“wholly independent of the court imposing sentence.”¹⁸⁷ *Indeed*, in the clearest cases, those involving judicial removal under INA §238(c), the removal order is, in fact, entered by the sentencing court.¹⁸⁸ The melding of the criminal with the immigration process in these cases has gone the last step in erasing any distinction between the criminal and immigration courts; the immigration consequence is imposed as part of the criminal process itself, together with, in the same forum as, and by the same judge who enters the conviction and the sentence.¹⁸⁹ There is, of course, no separate civil proceeding at all, and the analysis of the circuit courts of appeal that have relied on this single factor collapses in the face of the exercise of judicial removal power.

Judicial removal is the clearest illustration of the melding of the criminal and immigration processes for those convicted of crimes, but the other procedural permutations available to individuals convicted of aggravated felonies lead just as inexorably to an order of removal. For non-permanent residents subjected to “administrative” or “ministerial” removal, the sentencing judge may not order removal directly, but s/he is the last one to make a substantive decision relevant to deportation. There is no other judicial or hearing process in *any* branch of government to determine if these individuals should be removed. Rather, a DHS employee simply confirms that the individual has an aggravated felony conviction and, thanks to

¹⁸⁷ *Amador-Leal*, 276 F.3d at 516-17.

¹⁸⁸ *See, e.g.*, *United States v. Lastor-Gomez*, No. CR 08-1141 (N.D. Iowa 2008). This case is one of nearly 297 in which guilty pleas were entered and defendants were sentenced within ten days in May 2008. In each case, the district court, as part of the sentencing, entered a stipulated judicial order of removal pursuant to INA § 238(c)(5), 8 U.S.C. §1228(c)(5).

¹⁸⁹ *See* Ethan Venner Torrey, *"The Dignity of Crimes": Judicial Removal of Aliens and the Civil-Criminal Distinction*, 32 COLUM. J.L. & SOC. PROBS. 187, 199-200 (1999) (arguing against the use of judicial deportation on the grounds that it would so enmesh the criminal and immigration processes as to require constitutional protections in both):

If deportation decisions are embodied in plea agreements, however, as permitted by Section 1228(c) [INA §238(c)], then deportation would become part of "the sentence of the court which accepted the plea," and would emphatically *not* be the decision of "another agency over which the trial judge has no control and for which he has no responsibility." Deportation would therefore be a direct consequence of a criminal conviction.

Id. (citing *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) and *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989)).

the conclusive presumption of deportability and disqualification from any relief (both of which arise directly from the fact of the conviction), is able to order the individual removed without any right to a hearing of any kind.¹⁹⁰ For these individuals as well, there is simply no longer a separate civil proceeding to determine deportability but rather a bureaucratic series of steps to impose the inevitable removal order that follows from the conviction.

Finally, even for those individuals who are still given an immigration hearing, it has been questioned how meaningful that separate process can be considered when the decision-maker there is also restricted to an essentially bureaucratic or clerical function of connecting the dots to a pre-ordained outcome. In the case of an individual with an aggravated felony conviction, the immigration judge is as bound by operation of law as the DHS employee imposing “administrative” removal orders to enter an order of removal. There is no room for a finding that the individual is not removable¹⁹¹ and simply no legal option for the court to exercise its discretion and find her eligible for some form of relief from removal.¹⁹²

Given that the forum for the deportation decision is presumably significant precisely because it implies the existence of a separate process in which factors relevant to the appropriateness of deportation can be taken into account, can it be meaningfully said that a deportation hearing with a pre-ordained outcome constitutes a separate decision-making process? Addressing this question, the Second Circuit, in *United States v. Couto*,¹⁹³ dismissed the role of an immigration court following an aggravated felony conviction as “ministerial.” The court observed that “when an event is a certain consequence of a [prior] decision by a [sentencing] court, it is meaningless to say that the [sentencing] court did not ordain that event; any action by

¹⁹⁰ INA §§ 238(b), 8 U.S.C. § 1228(b), and 238(c), 8 U.S.C. § 1228(c).

¹⁹¹ INA § 238(c), 8 U.S.C. § 1228(c).

¹⁹² See Section III.C.2, *supra*, regarding the ineligibility of individuals with aggravated felony convictions for any discretionary relief from removal.

¹⁹³ 311 F.3d 179 (2d Cir. 2002).

other institutions are purely ministerial.”¹⁹⁴ As discussed above, the court found in *Couto* and in the subsequent case of *Zhang v. United States*¹⁹⁵ that it did not have to decide the issue of directness, but observed in *dictum* that it found merit in the argument that there was no longer any independent court or body with power to affect the deportation outcome in the case of aggravated felonies and that these individuals have lost a meaningful opportunity for a separate tribunal to make any determination other than an order of removal.¹⁹⁶

Thus, the calculus for all of the directness factors considered by earlier courts—definiteness, immediacy, the automatic nature of the sanction, and the independence of the decision-maker—has been changed by the revolution in immigration law and enforcement that has occurred gradually over the course of the last two decades. An analysis of the current landscape of immigration law and enforcement relating to convictions reveals that deportation does, in fact, function as punishment, and, at least in the case of those convicted of aggravated felonies, has come to a point where it can very fairly be characterized as the definite, immediate and automatic consequence of the criminal court’s action.

VI. DEPORTATION AS THE DIRECT CONSEQUENCE OR PUNISHMENT FOR CRIME

There are serious implications to acknowledging this reality that deportation has become the direct consequence or the extension of punishment for crime under our current statutory and enforcement regime. As discussed above, recognition of this reality implicates constitutional protections relating to the imposition of punishment and the conduct of criminal trials for non-citizens. Before addressing the practicalities of these implications, however, we need to ask whether the current system of an automatic deportation sanction serves our governmental and societal interests well and should be preserved.

¹⁹⁴ *Id.* at 190 n.10.

¹⁹⁵ 506 F.3d 162 (2d Cir. 2007).

¹⁹⁶ *Couto*, 311 F.3d at 190; *Zhang*, 506 F.3d at 167.

A. IS DEPORTATION AN EFFECTIVE AND APPROPRIATE SANCTION FOR CRIME?

There is no reason to conclude automatically that it is either desirable or undesirable to attach an inevitable sanction of deportation for designated criminal activity. As Stephen Legomsky points out, a combination of civil and criminal penalties is imposed in a variety of contexts,¹⁹⁷ including tort liability and civil forfeiture or penalties for conduct already punished as a crime.¹⁹⁸ If we conclude, as argued above, that the automatic, direct and punitive nature of the sanction of deportation demands constitutional accommodations in the way of substantial procedural reform in the criminal courts, however, it is appropriate to ask whether this particular system of double sanctions serves important interests in an appropriate way and is thus worth the considerable trouble of accommodating those constitutional concerns.

The most striking feature of deportation as a sanction in the context of convictions is its divergence from the criminal system of graduated penalties in sentencing. As Juliet P. Stumpf points out in her short but thoughtful article, *Penalizing Immigrants*, criminal law uses a complex system of graduated sanctions designed to fit the severity of a crime's punishment to the seriousness of the criminal behavior.¹⁹⁹ This system takes into consideration the circumstances and context of the crime, the history of the defendant, and the impact on the victim. Its tools include fines, community service, suspended sentences, parole, probation, diversionary programs, varying lengths of incarceration, and even the death penalty.²⁰⁰ In one of the few ways immigration law has failed to move closer to the criminal enforcement model, however, immigration still allows for only one sanction for almost any violation—deportation.²⁰¹

¹⁹⁷ Legomsky, *supra* note 17, at 519.

¹⁹⁸ See also cases discussed in Section II, *supra*, regarding the penal nature of sanctions in civil proceedings.

¹⁹⁹ Stumpf, *supra* note 18, at 264-65.

²⁰⁰ *Id.* at 265.

²⁰¹ *Id.* at 264. Stumpf proposes a system of graduated penalties in the immigration context that would take into account the nature and facts surrounding the violation as well as the individual's status and stake in the United States. Possible sanctions might include an extension of the waiting period for eligibility to naturalize, a finding and

This one-size-fits-all sanction of deportation does not function well as a punishment for crime because it cannot be calibrated to the severity of the criminal offense. It is as if the criminal sentencing system were to impose a life sentence without parole for any conviction, no matter how minor the conduct or justifiable the circumstances surrounding the criminal activity. Deportation is a severe sanction, especially for a lawful permanent resident who will be forced to leave behind all ties to the community in which she has made her home, including family, career, business, property, friendships, and community activities and connections. As an automatic punishment for an aggravated felony, the deportation sanction is the same for a murderer given a life sentence as for a shoplifter who received a suspended sentence (both of whom are considered aggravated felons by the immigration law). The disproportionate nature of the sanction and the inability to adjust it to the severity of the crime make automatic deportation a poor tool for criminal sentencing.

The Department of Homeland Security publicizes its program of deporting convicted individuals as a public safety measure. It argues that removing individuals who have committed crimes reduces the likelihood that others in the community will be victimized by crime. This is essentially an argument for the incapacitation justification of punishment—that the punishment keeps the individual from committing another crime. Incapacitation of offenders has become a dominant theme in the American response to crime generally, and has led us as a nation to a model of crime control centered on the incarceration of large numbers of people.²⁰² Rather than working on theories of rehabilitation or even deterrence, this approach seems to operate on the

stay of removal (analogous to a suspended sentence), a fine, or a probation in which any further violation would result in deportation.

²⁰² See, e.g., American Bar Association Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates*, August 2004, available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>; and Pew Center on the States, *One in 100: Behind Bars in America 2008*, available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

theory that once an individual has committed a crime, society is better off spending its resources trying to separate and protect itself from the individual than reintegrating that individual into the fabric of the community. The deportation (and subsequent bar to readmission) of non-citizens convicted of crimes is a very satisfying outcome within this theoretical framework, because it provides a permanent separation of the wrongdoer from the community, thereby providing maximum protection to society.²⁰³ The argument within this framework could be that, given a conflict of interests, we would choose to value the interests of those individuals most integrated into our community (citizens) at the expense of those who are not citizens and thus not full members of the community (non-citizens subject to deportation).

However, the urge to “wall off” offenders fails to take into account the many and complex connections these individuals have in our communities and the cost—to the individual and members of the community—of thwarting or cutting off those connections. In the case of non-citizens, the current regime of automatic deportation includes no meaningful review of the individual’s situation in the context of the deportation decision and thus has no mechanism to distinguish between different levels of connection between the individual and the community. Under the current system, a just-arrived undocumented person with no ties to the community is treated the same as a longtime permanent resident who has lived most of his life in the U.S. and has extensive connections with U.S. citizen and lawful permanent resident family and community members. In fact, permanent residents often do have extensive and important ties to family and community, ties that are as important for the family and community members as they

²⁰³ This strategy begs the question, of course, of the effect of these deportations on the receiving communities. One striking and extremely problematic example of this strategy’s results is the explosion of transnational gangs in Central America and the United States with the deportation of individuals who were gang members in Los Angeles and other American cities. *See, e.g.,* CLARE RIBANDO SEELKE, CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS: GANGS IN CENTRAL AMERICA 2-3 (updated Oct. 17, 2008), *available at* <http://www.fas.org/sgp/crs/row/RL34112.pdf>, and works cited therein.

are for the individual. Thus, it is often the U.S. citizen or permanent resident children and spouse who are hurt most by the loss of their breadwinner to deportation.

The failure to distinguish varying levels of connection to the community among immigrants is the result of a philosophy of immigration that maintains that all non-citizens are present in the country equally at the mercy of the government, with no vested interest built on time, connections or integration into society. A better understanding would acknowledge the investment that lawful permanent residents and others have and build over time in our communities and give that interest its appropriate weight in any decision relating to deportation.

If we acknowledge the investment of these longtime residents in our community, it becomes clear that the sanction of deportation, added to whatever sanction the criminal court has already imposed for a conviction, is an additional, very severe penalty. The inequality between that double sanction and the criminal sanction alone imposed on the citizen is manifest. The only distinction between a citizen convicted of shoplifting and a lawful permanent resident with the same conviction who has resided most of his or her life in the U.S. and has significant community and family ties is that of citizenship. The reality of the practical, familial, economic, social and psychological effects of permanent banishment from the U.S. on either individual would be very similar, yet we would be appalled at the idea of banishment as a punishment for a citizen. We should look honestly at the effect that deportation has on permanent residents and on their vested interest in our society, and recognize that the thin line of citizenship or national origin may not bear the weight of such a distinction. The inequality between the two sanctions is manifestly unjust.

Thus, for reasons at least of proportionality and equity among similar offenders,²⁰⁴ automatic deportation does not appear to be an appropriate or fitting sanction for the broad range of convictions to which it now applies. It is applied without reference to the true severity of the crime or the myriad factors that sentencing courts consider in tailoring punishment to a crime, and it results in grossly unequal sanctions on similarly situated offenders, which raises serious fairness issues.

B. IMPLICATIONS OF ACKNOWLEDGING DEPORTATION AS PUNISHMENT FOR CRIME

If courts are to acknowledge that the deportation of lawful permanent residents and other authorized non-citizens for criminal behavior constitutes punishment and a direct consequence of a conviction, it will implicate important and significant constitutional rights for non-citizen defendants. These include the right to trial and the effective assistance of counsel guaranteed by the Sixth Amendment and the right to be free of cruel and unusual punishment under the Eighth Amendment. In the context of plea bargaining, the Constitution and Rule 11 of the Federal Rules of Criminal Procedure²⁰⁵ would require that defendants be advised that deportation would be a consequence of certain pleas in order to knowingly and voluntarily waive their Sixth Amendment right to trial. The practical difficulties of administering this change in procedure would be substantial.

Courts have taken on revolutions in criminal practice in the past, however, such as in the wake of *Gideon v. Wainwright*,²⁰⁶ when the Supreme Court read the Sixth Amendment to require counsel for all criminal defendants. Surely, the logistical difficulty of ensuring constitutional rights is no argument for not doing so. It is hard, nonetheless, to envision how state and federal

²⁰⁴ For a further discussion of these and other costs of the current system of crime-related deportations, *see* Legomsky, *supra* note 17, at 519.

²⁰⁵ FED. R. CRIM. P. 11(b).

²⁰⁶ 372 U.S. 335 (1963).

criminal courts around the country would, as a practical matter, accommodate the recognition of these constitutional rights relating to immigration consequences. Expertise in matters of the intersection of criminal and immigration law is, frankly, not nearly widespread enough in the bar or the bench to accommodate the need that would be acknowledged.

For this reason, a better approach to the dilemma might be a combination of some additional procedural protections for non-citizens in criminal courts together with a revision of those aspects of our immigration law relating to crimes. Such a statutory revision would have to do away with the current, automatic imposition of deportation as a sanction for a very wide range of offenses and restore meaningful reality to a discretionary decision-making process surrounding deportation. In this way, it would restore the true independence of the immigration courts with regard to deportation decisions and give lawful permanent residents and other non-citizens vested in our communities a meaningful day in court to address the very serious consequence of possible deportation.

VII. CONCLUSION

The long-standing legal constructions that hold that deportation of lawfully authorized non-citizens with convictions is not punishment for crime and that immigration consequences are collateral have been fatally undermined by the last two decades' changes in the structure of immigration law and the infrastructure of immigration enforcement. These changes render deportation orders the automatic result of certain convictions and have integrated immigration into the criminal process to the extent that many sentencing courts are participating directly and indirectly in facilitating deportation; some are now even entering orders of removal directly. In the case of lawful permanent residents and other authorized non-citizens, it is the conviction alone that gives rise to deportability, and in this context deportation functions as punishment for

wrongdoing. Courts should recognize this evolution and hold that immigration consequences have become the direct consequences of an aggravated felony conviction, which flow automatically and without opportunity for discretionary relief or meaningful adjudicatory proceedings in another forum, from the fact of the conviction alone.

Recognition of deportation as punishment and as the direct consequence of aggravated felony convictions in our current legal and enforcement landscape would require that significant protections be added to criminal proceedings involving non-citizens, including an assurance that defendants be accurately advised of the fact that deportation will result from an aggravated felony conviction. Given the limited human, professional and other resources at the disposal of criminal courts, the practical challenges of instituting such changes are myriad. These challenges alone would not be justification for not protecting defendants' recognized constitutional rights, of course. However, deportation does not function well as a one-size-fits-all punishment for criminal conduct, as it is not tailored in any way to the severity of the crime, and it gives rise to serious problems of equity between similarly situated citizen and longtime permanent resident offenders. Thus, rather than requiring our criminal trial courts to make constitutional accommodations for an ill-fitting and often disproportionate punishment, we would be better served by a deep statutory reform of the way our immigration law addresses non-citizens with convictions, reform that reinstates individualized decision-making, proportionality and discretion in the far-reaching and life changing decision of whether an individual should be deported for having committed a particular crime.