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CLEAR AND SIMPLE DEPORTATION RULES FOR CRIMES: WHY WE NEED THEM AND WHY IT'S HARD TO GET THEM

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ABSTRACT

In *Padilla v. Kentucky*, the U.S. Supreme Court held that defense attorneys have a Sixth Amendment duty to advise noncitizen clients of the "clear" immigration consequences of a proposed plea agreement. This Article argues that the Court's reference to clarity denotes predictability, not simplicity, and that defense attorneys must advise their clients of predictable immigration consequences, even if they are difficult to ascertain. The scope of this duty has broadened as the U.S. Supreme Court has made the crime-related deportation rules more determinate, although many rules remain complex. A legislative move to a regime of simple deportation rules would greatly facilitate the implementation of *Padilla*, enhance the legitimacy of immigration law, and conserve judicial and administrative resources. However, pro-immigrant reformers hesitate to push for simple deportation rules because legislative reform in the area of immigration and crimes would likely widen the deportation net. Assuming the existence of the political will for more moderate treatment of noncitizens with criminal convictions, this Article argues for a bright-line trigger for the commencement of removal proceedings of five years imprisonment actually served and calls for the restoration of judicial discretion to halt deportations on a case-by-case basis.

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INTRODUCTION

In the years since the U.S. Supreme Court decided *Padilla v. Kentucky*,[1] courts and commentators have struggled to define the contours of defense attorneys' duty to advise their noncitizen clients of the "clear" immigration consequences of plea agreements.[2] Some take the position that "defense attorneys must advise noncitizen clients as specifically as research allows."[3] Others argue that it is too burdensome for defense attorneys to determine whether some crimes fall within certain categories, like the case law-defined category of "crimes involving moral turpitude."[4] This Article builds on the scholarly work and jurisprudence contending that the *Padilla* duty requires defense attorneys to research the immigration statute and relevant case law, counsel their clients about predictable immigration consequences, and attempt to negotiate an immigration-safe plea. As others have noted, a plethora of immigration law resources for defense attorneys has existed for decades and continues to grow and improve.[5] The debate should not be whether defense counsel

1. 559 U.S. 356 (2010).

2. *Id.* at 369; *see, e.g.*, Lindsay C. Nash, *Considering the Scope of Advisal Duties under* Padilla, 33 CARDOZO L. REV. 549, 551–54, 561–71 (2011); César Cuauhtémoc García Hernández, *Criminal Defense after* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 506 (2012)

3. Nash, *supra* note 2, at 554.

4. García Hernández, *supra* note 2, at 506.

5. For a list of the considerable resources available to defense counsel about the immigration consequences of crimes, see Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of the Petitioner-Appellant at 9–16, United States v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015). See also Maureen Sweeney, *Categorical Analysis of Immigration Consequences*, YOUTUBE (July 28, 2014), *available at* https://www.youtube.com/watch?v=eDAwVIedT0, and Maureen Sweeney, *Divisibility of Criminal Statutes and the Modified Categorical Analysis of Immigration Consequences*, YOUTUBE (May 5, 2015), *available at* https://www.youtube.com/watch?v=eAr6Fc0zhK8 for helpful introductory explanations of the

should reasonably be expected to advise about immigration consequences in light of the fact that immigration law can be difficult to master. Rather, the scope of the *Padilla* duty is a function of immigration law's predictability—a distinct concept from complexity. While some sets of technical or difficult rules do not generate predictable results, others do. I argue not only that the relevant concern is determinacy but also that the legal rules relating to immigration consequences of crimes are increasingly determinate.

Although the technical nature of immigration law should play no role in defining the scope of the *Padilla* duty, Congress should strive to make immigration law more accessible as it relates to criminal convictions. While it is eminently reasonable to require that all defense attorneys learn the tools needed to render competent advice about immigration consequences, there are good reasons to simplify the rules, if we can do so in a way that is both predictable and fair. The sheer number of removal grounds, as well as the learning curve needed to understand and apply the rules for measuring a criminal conviction against the grounds of removal, has contributed to unevenness in the quality of immigration advice by defense counsel across offices and jurisdictions. A simple and determinate deportation rule would not only promote accurate advice by defense counsel but would enhance the transparency and legitimacy of our immigration system, help to ensure proper notice of immigration consequences, and conserve judicial and administrative resources. Whatever the scope of the *Padilla* duty, simpler rules would facilitate the discharge of it.

Simple rules may never establish a foothold in this area of immigration law, however. Immigration advocates and pro-immigrant reformers hesitate to push for such rules for fear that Congress would create an even more punitive regime for immigrants convicted of a crime. History teaches that when Congress legislates in the area of immigration and crime, the result is expanded grounds of removal.[6] The fear is that a move to simple rules might result in a net loss for immigrants with a criminal record seeking to defend against deportation. A further concern is that the most workable simple rule—one that tethers deportation to a certain length of jail or prison sentence—would grant additional authority to sentencing judges to decide who will be subject to removal. Sentencing practices vary notoriously by jurisdiction.[7] Even worse, discrimination based on race and other factors distorts sentencing practices, rais-

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categorical approach to analyzing the deportation consequences of crimes—discussed below as a source of much confusion.

6. *See infra* notes 125–27 and accompanying text.

7. *See, e.g.*, Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1101, 1106 (2013); Ronald Helms & David Jacobs, *The Political Context of Sentencing: An Analysis of Community and Individual Determinants*, 81 SOC. FORCES 577, 577–78 (2002).

ing concerns about bundling deportation so closely with sentencing.[8] Any reform proposal involving a sentence trigger must ameliorate these significant drawbacks.

I argue that, on balance, both immigrants and our justice system would be significantly better served if Congress were to repeal the current crime-based grounds of removal and create a new ground based on a trigger of over five years actual incarceration for a crime, and grant immigration judges broad discretion to override deportability based on sentence length in appropriate cases.

This Article proceeds as follows: Part I explains how *Padilla*'s holding that defense counsel has a "clear" duty "when the deportation consequence is truly clear, . . . to give correct advice" refers to a duty to convey an accurate prediction, when possible, even if it requires an analysis of complex rules.[9] Part II maps "crimmigration" law and demonstrates how even the complex rules in this specialized area of the law are now generating more predictable results. Part III discusses the benefits that would flow from a simple rule for determining which crimes trigger immigration consequences. Part IV describes the barriers to the adoption of such a rule, and Part V presents a proposal for reform.

I. SCOPE OF THE *PADILLA* DUTY

In *Padilla v. Kentucky*, the U.S. Supreme Court considered whether Jose Padilla's defense attorney had rendered ineffective assistance of

8. Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 737 (2001) (finding that disparate sentencing between African Americans and whites is approximately twenty percent); Ojmarrh Mitchell & Doris L. MacKenzie, The Relationship Between Race, Ethnicity, and Sentencing Outcomes: A Meta-Analysis of Sentencing Research 8, 12 (Dec. 2004) (unpublished report), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/208129.pdf (concluding, in an analysis of eighty-five studies of sentencing practices "that even after taking legal factors into account, Latinos and African-Americans were sentenced more harshly than whites on average"); *see also* TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 1 (Marc Mauer ed., 2005), *available at* http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf; CASSIA SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT ix–xi (2002); Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER RACE & JUST. 73, 73 (2010); Brian D. Johnson, *Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction*, 41 CRIMINOLOGY 449, 467–69 (2003); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285 (2001); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 781 (1993); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145, 164–66 (2001); Jeffery T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 397–402 (1996); Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* 1 (Univ. of Mich. Law & Econs. Research Paper Series, Paper No. 12-018, 2012), *available at* http://ssrn.com/abstract=2144002; Jill K. Doerner, Explaining the Gender Gap in Sentencing Outcomes: An Investigation of Differential Treatment in U.S. Federal Courts (May 2009) (unpublished Ph.D. dissertation, Bowling Green State University), *available at* https://etd.ohiolink.edu/!etd.send_file?accession=bgsu1237482038&disposition=inline.

9. Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

counsel under the Sixth Amendment.[10] The attorney failed to counsel Mr. Padilla that his plea to a drug trafficking charge would result in his virtually automatic deportation.[11] Padilla's crime straightforwardly fit within the statutory grounds of deportation.[12] Noting that "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute," the Court concluded that "[t]his is not a hard case in which to find deficiency."[13]

The Court articulated its general holding as "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear."[14] The Court's focus on clarity as the touchstone for when and how attorneys should counsel clients about immigration consequences is best understood as referring to predictability or determinacy—the degree to which an immigration consequence like deportation is likely to occur. If a plea can be predicted to lead to immigration consequences, the attorney is obligated to counsel the client of these consequences.

In Mr. Padilla's case, the Court could ascertain with ease the result of the drug plea because a quick glance at the statute reveals that virtually all drug crimes are grounds for removal.[15] The Court's reference to the lack of effort needed to determine the deportation consequence in Padilla's case should not be read to limit an attorney's duty to only simple immigration assessments, however. At no point did the Court state that attorneys are excused from advising their clients about predictable immigration consequences simply because the assessment involves understanding and applying technical or multiple immigration rules. Nor did the Court indicate that defense attorneys must only research the immigration statute, as opposed to relevant agency and court decisions.

At the same time, the Court's discussion of the scope of defense counsel's duty is not a model of lucidity. In the paragraph announcing its holding, the Court muddles discussion of counsel's duty to communicate predictable results with commentary on the complexities of immigration law.[16] In one breath, the Court acknowledges that "[i]mmigration law can be complex" and that some defense attorneys "may not be well versed in" immigration law.[17] In the next, the Court states, "There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."[18] The juxtaposition of these two sentences might suggest that ignorance of immigration

10. *Id.* at 359–60.
11. *Id.* at 368.
12. *Id.* at 368–69.
13. *Id.*
14. *Id.* at 369.
15. *Id.* at 368 ("In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction.").
16. *Id.* at 369.
17. *Id.*
18. *Id.*

law can excuse a failure to advise. The Court's use of the phrase "succinct and straightforward" could also be read as requiring that the law be both predictable and simple.[19] But such a reading would be a mistake. The closing sentences of the Court's discussion make clear that the Court requires defense attorneys to advise noncitizen defendants of immigration consequences that can be accurately predicted, even if they are not immediately ascertainable.[20] The Court drives home its concern with predictability by contrasting a case in which "the deportation consequence is truly clear" with a scenario in which an attorney need only advise that the plea "may carry a risk of adverse immigration consequences."[21]

To read the majority opinion to express a concern with complexity, as opposed to clarity, would not only ignore the plain meaning of a "clear" consequence but would make an unwillingness to research the law an excuse for deficient lawyering. Such an approach to the Sixth Amendment would be unprecedented.[22] The Court has never suggested that the need for legal research puts certain advice outside the scope of a lawyer's duty to provide competent counsel. To the contrary, the Court has consistently upheld a lawyer's duty to investigate both the facts and the law.[23] In *Strickland v. Washington*,[24] the Court stated that counsel is expected to either conduct a "thorough investigation" of both the "law and facts" or make a "reasonable professional judgment[]" that "makes

19. *Id.*

20. *Id.* at 374.

21. *Id.* at 369.

22. *See* César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla*'s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 850 (2013) (arguing that *Padilla* has broken from *Strickland* to create an unprecedented *Strickland*-lite standard by "allow[ing] attorneys to provide legal advice to noncitizen defendants without first unraveling the complexities of crime-based removal").

23. *See, e.g.*, Hinton v. Alabama, 134 S. Ct. 1081, 1089 (2014) ("[I]gnorance of a point of law that [was] fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); Wiggins v. Smith, 539 U.S. 510, 511 (2003) (finding that "investigation supporting [counsel's] decision not to introduce mitigating evidence" was not reasonable); Williams v. Taylor, 529 U.S. 362, 363–64, 373 (2000) (finding deficient attorney performance where attorney incorrectly believed state law blocked access to mitigation records in death penalty case); Kimmelman v. Morrison, 477 U.S. 365, 368–70, 385–87 (1986) (finding deficient performance where attorney failed to engage in pretrial discovery based on an incorrect understanding that the State was affirmatively required to turn over all inculpatory evidence to the defense); Hill v. Lockhart, 474 U.S. 52, 58, 62 (1985) (finding the first prong of *Strickland*'s test is "a restatement of the standard of attorney competence" which "[t]he failure of an attorney to inform his client of the relevant law clearly satisfies"); *see also* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1106 (2004) (discussing defense counsel's Sixth Amendment duty to investigate the case). The duty to investigate the law applies to cases involving plea agreements. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (acknowledging deficient performance where attorney advised defendant to reject a favorable plea based on a misunderstanding of the law).

24. 466 U.S. 668 (1984).

particular investigations unnecessary."[25] The fact that a lawyer is practicing outside his or her usual area, or is a new lawyer, is no excuse.[26]

The distinct lenses of clarity and simplicity bring Justice Alito's concurrence in *Padilla* into sharp focus. Justice Alito agreed that Mr. Padilla's attorney had rendered ineffective advice but disagreed that defense counsel must advise about clear immigration consequences.[27] Defense attorneys, in Justice Alito's view, discharge their Sixth Amendment duty when they refrain from giving incorrect advice, tell their noncitizen clients that they may be deported, and advise them to speak with an immigration lawyer.[28]

Unlike the majority opinion, Justice Alito's concurrence rests on the premise that the complexity of an area of the law limits an attorney's duty, at least when it is outside of the attorney's normal area of expertise.[29] In Justice Alito's view, "Because many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms."[30] In other words, a lack of skill or effort excuses a lawyer's failure to advise of predictable consequences. Justice Alito discusses at length the complexity of the immigration consequences of crimes, characterizing it as "quite complex," "not 'easily ascertain[able],'" and "dizzying."[31] He, however, never considers whether complex rules can be clear because they generate predictable results. Instead, he appears to assume the opposite.[32]

It is incorrect to equate clarity with simplicity. Clarity and simplicity, while sometimes related, are distinct attributes of legal rules.[33] The clarity of a rule or set of rules is the degree to which its application generates foreseeable or determinate results. In contrast, the relative simplicity or difficulty of a rule or set of rules is how easily it can be understood. The difficulty of a rule or area of the law could have several causes, including the need to take multiple variables into account; a large quantity of relevant statutes, regulations, and case law, or actors with

25. *Id.* at 690–91.

26. United States v. Cronic, 466 U.S. 648, 665 (1984) (acknowledging possible deficient performance even though the "lawyer was young, . . . his principal practice was in real estate, [and it] was his first jury trial"). The American Bar Association rules permit lawyers to take on representation in a new area of the law. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. (2011).

27. Padilla v. Kentucky, 559 U.S. 356, 375 (2010) (Alito, J., concurring).

28. *Id.*

29. *Id.* at 376–77.

30. *Id.* at 377 (citation omitted).

31. *Id.* at 377–81.

32. *See id.* at 377–88. If Justice Alito were correct that the scope of the Sixth Amendment depends on the simplicity of a legal regime, the enactment of simple rules would presumably make the Sixth Amendment apply.

33. Scott Page explains the difference between simplicity and determinacy as follows: "Difficulty corresponds to problems with lots of local optima. Uncertainty corresponds to situations in which the value of an outcome depends on a state." Scott E. Page, *Uncertainty, Difficulty, and Complexity*, 20 J. THEORETICAL POL. 115, 127 (2008).

decision-making authority; the use of confusing or technical language, including exceptions to general rules and exceptions to those exceptions; and the degree to which relevant statutory provisions cross-reference other provisions.[34] As discussed below, the rules governing immigration consequences for a crime possess many of these features.

An example of a rule that is both simple and determinate is the rule that drivers must stop in front of a stop sign and wait for a clear path before proceeding.[35] Another example is the rule that young adults become authorized to buy alcohol at age twenty-one.[36] Predictability and simplicity, however, need not run together. Some simple rules do not generate predictable results. The "reasonable person" standard, for example, is readily accessible to experts and nonexperts alike, but as Peter Schuck has noted, the standard is "an example of an indeterminate rule" because of the judgment needed to determine what counts as reasonable.[37] A long line of scholarly work has expounded upon the difference between rules and standards, the latter being less determinate than the former.[38] More to the point for our purposes, rules that are relatively difficult to understand and apply can also generate predictable results. Indeed, technical rules are often adopted with the goal of making an area of the law more determinate. The complexity of the U.S. tax code, for example, is driven by a desire to address all likely scenarios, close tax liability loopholes, and ensure fairness.[39]

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34. *See* Lance W. Rook, *Laying Down the Law: Canons for Drafting Complex Legislation*, 72 OR. L. REV. 663, 669–70 (1993).

35. Of course, the stop sign rule is somewhat more complicated, as there are rules about which vehicle yields when more than one vehicle comes to a halt at the same time. Notwithstanding this complexity, most would agree that the rules governing stop signs are relatively simple.

36. Duncan Kennedy, relying upon Rudolph von Ihering's *Spirit of Roman Law*, uses "the determination of legal capacity by sole reference to age as a prime example of a formally realizable" rule. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

37. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 4 (1992) (describing the reasonableness standard as an example of an indeterminate rule, which is characterized as "usually open-textured, flexible, multi-factored, and fluid"). All rules may be at least somewhat indeterminate due to the "open texture" nature of language. H. L. A. HART, THE CONCEPT OF LAW 120 (1963); *see also* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 7–35 (1993) (discussing Hart's "open texture" concept).

38. *See, e.g.*, Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed., 1995), *reprinted in* 82 IOWA L. REV. 739, 740–43 (1997) (explaining that standards or principles are different from rules and are less desirable than rules); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25, 27 (1967) (contrasting rules, which apply in an "all-or-nothing fashion" if certain conditions are met, with standards or principles, which "do not set out legal consequences that follow automatically when the conditions provided are met" and possess the "dimension of weight or importance"); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586–96 (1992) (discussing the relative economic cost of rules versus standards); Kennedy, *supra* note 36, at 1687–1701 (discussing the difference between "a formally realizable rule" and "a standard or principle or policy").

39. *See* John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 78 (1993).

I argue below that many of the rules for determining the immigration consequences of crimes are examples of complex rules that generate predictable results. In many cases, the immigration consequences are virtually certain but the analysis needed to arrive at this conclusion requires either multiple steps or a more nuanced understanding of immigration law, or both. If *Padilla* were to limit the Sixth Amendment duty to only readily ascertainable immigration consequences, defense attorneys would not be required to advise their clients of entire classes of virtually certain outcomes.

II. COMPLEX BUT INCREASINGLY CLEAR RULES

Rules at the intersection of immigration and criminal law (sometimes referred to as "crimmigration" law) illustrate how a body of complex law can generate predictable results.[40] In this Part, I explain the complexity of this area of the law as well as its increasing determinacy.

A. Complexity

The rules governing the immigration consequences of crimes have many of the attributes associated with complexity. The criminal grounds of removal in the Immigration and Nationality Act are numerous, and case law plays a significant role in defining the scope of these grounds. People with lawful immigration status—including longtime lawful permanent residents—face deportation based on a wide range of criminal convictions, from murder to nonviolent misdemeanor offenses.[41] Some grounds of removal contain multiple subsections or cross-reference other statutory provisions that contain multiple subsections.[42] The aggravated

40. Juliet Stumpf coined this term. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). A sampling of the crimmigration scholarship includes: Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059 (2002); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 619–20 (2003); Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 61 (2010); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011); and Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

41. *See* 8 U.S.C. § 1227(a)(2) (2015) (criminal grounds of deportation); *id.* § 1182(a)(2) (criminal grounds of inadmissibility).

42. *See, e.g.*, *id.* § 1227(a)(2)(A)(i)(I) (crimes against moral turpitude); *id.* § 1227(a)(2)(A)(iv) (high speed flight); *id.* § 1227(a)(2)(A)(v) (failure to register as a sex offender); *id.* § 1227(a)(2)(B)(i) (controlled substances); *id.* § 1227(a)(2)(C) (certain firearm offenses); *id.* § 1227(a)(2)(D) (miscellaneous crimes). Noncitizens can be removed for having an aggravated felony conviction, which contains numerous subsections. *See, e.g.*, *id.* § 1101(a)(43)(B) (illicit trafficking in a controlled substance); *id.* §1101(a)(43)(C) (illicit trafficking in firearms or destructive devices); *id.* § 1101(a)(43)(D) (money laundering); *id.* § 1101 (a)(43)(E) (explosive materials and firearms offenses); *id.* § 1101(a)(43)(F) (crime of violence); *id.* § 1101(a)(43)(H) (ransom offenses); *id.* § 1101(a)(43)(I) (child pornography); *id.* § 1101(a)(43)(J) (corrupt organizations and

felony ground of removal, for example, incorporates the definition of aggravated felony, which contains twenty-seven subsections describing different types of qualifying offenses, many of which are defined by cross-reference to other federal statutes.[43]

Removal grounds are broken down into two types: the grounds of inadmissibility and the grounds of deportation.[44] The grounds of inadmissibility apply when a noncitizen seeks admission at the border or to "adjust status" to that of a lawful permanent resident while in the United States.[45] Inadmissibility grounds also apply to people who entered the country without inspection or who overstayed a temporary grant of "parole" to the United States.[46] In contrast, the grounds of deportation apply when U.S. immigration authorities seek to remove a person inside the United States who has lawful status or who was admitted to the country on a nonimmigrant visa.[47]

A removal ground is usually based on a type of crime, sometimes in combination with the length of a sentence. Application of the statutory reference to sentences is usually straightforward. The term "sentence" is statutorily defined and includes suspended sentences.[48] The removal grounds refer variously to the possible sentence, the sentence actually imposed, or the sentence actually served.[49] Determinations based on a sentence can fairly be regarded as simple while "type of crime" determinations can be much more difficult. Because our nation is composed of fifty states, each with its own criminal code, it would be impractical for immigration law to reference state criminal statutes. Instead, the grounds employ a federal standard against which state convictions are judged. As mentioned above, some grounds of removal cross-reference a federal definition. For example, the "crime of violence" aggravated felony ground cross-references the term "crime of violence" at 18 U.S.C. § 16.[50] Other grounds, in contrast, use phrases like "theft," "fraud," "burglary,"

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gambling offenses); *id.* § 1101(a)(43)(K)(ii) (prostitute transportation); *id.* § 1101(a)(43)(K)(iii) (trafficking in persons); *id.* § 1101(a)(43)(L) (security related crimes); *id.* § 1101(a)(43)(M)(ii) (tax evasion); *id.* § 1101(a)(43)(N) (alien smuggling); *id.* § 1101(a)(43)(O) (improper entry by an alien previously deported); *id.* § 1101(a)(43)(P)(i) (document fraud).

43. *See id.* § 1101(a)(43). For example, the drug trafficking aggravated felony ground references two federal criminal statutes. *Id.* § 1101(a)(43)(B).

44. For the grounds of inadmissibility, see *id.* § 1182(a). For grounds of deportation, see *id.* § 1227(a).

45. *Id.* § 1255(a)(2) (stating that to qualify for adjustment of status an applicant must be "admissible to the United States").

46. *Id.* § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); § 1182(a)(7)(A)(i)(I) (rendering inadmissible any noncitizen "not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter").

47. *See id.* § 1227(a).

48. *Id.* § 1101(a)(48)(B).

49. *See id.* § 1227(a)(2)(A)(i)(II); *id.* § 1182(a)(2)(A)(ii)(II).

50. *See id.* § 1227(a)(2)(E)(i).

or "involving moral turpitude," which refer to generic offenses whose elements are defined by federal case law.[51]

The complexity of this area of law stems not only from the multiplicity of statutory references but also from the methodology used to determine whether a particular conviction falls within a removal ground. With limited exceptions, what is now commonly referred to as the "categorical approach" governs the determination of whether a particular offense, state or federal, triggers removal.[52] The approach is rooted in over a century of federal and agency case law and practice.[53] Since the early twentieth century, courts have emphasized the importance of a single methodology for judging the nature of a conviction and have based deportation not on underlying conduct but the elements necessary to constitute the crime.[54] After the Board of Immigration Appeals (BIA) was established in 1940, it repeatedly endorsed the approach begun by federal courts.[55]

The categorical analysis rests on the bedrock principles that fairness requires that immigrants convicted of the same offenses be treated uniformly, immigration adjudicators are not triers of underlying facts of convictions, and adjudication of immigration cases should be efficient and not involve minitrials on the stale facts underlying a criminal case.[56] The categorical approach takes as its focus the elements of the offense. Elements are essential facts, defined by statute and case law, which the jury must find "unanimously and beyond a reasonable doubt" in order to convict.[57] Facts about which jurors can disagree but still convict are means by which the crime could have been committed rather than elements.[58] Under the categorical approach, to say that someone can be removed under our immigration law because of a conviction is to say that the person is being removed based on the elements of the offense.

The manner in which a defendant was alleged to have committed the elements of the crime is irrelevant. The only relevant conduct is the "the least of th[e] acts criminalized."[59] In applying this "minimum con-

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51. *Id.* § 1227(a)(2)(A)(i); *id.* § 1101(a)(43)(A); *id.* § 1101(a)(43)(G), (M).

52. Legal scholars have discussed the origins of the categorical approach. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1677 (2011); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 260 (2012); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 994–96 (2008).

53. Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) ("This categorical approach has a long pedigree in our Nation's immigration law." (citing Das, *supra* note 52, at 1688–702, 1749–52)).

54. *See* Sharpless, *supra* note 52, at 1008.

55. *See id.* at 995–97.

56. *See* Koh, *supra* note 52, at 267.

57. Descamps v. United States, 133 S. Ct. 2276, 2288 (2013).

58. *Id.*

59. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (alteration in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010) (internal quotation mark omitted)).

duct" test, the adjudicator reviews the universe of conduct made culpable under the statute and determines whether that universe is broader than the universe of culpable conduct defined by the pertinent federal standard.[60] For example, in cases involving fraud, the adjudicator asks whether the state definition of fraud, as it appears in the relevant criminal statute and case law, is broader than the federal definition. If the state definition of fraud criminalizes conduct that does not qualify as federal fraud, the state offense would not be a categorical match with the federal standard under the minimum conduct test and would not trigger deportation. The minimum conduct test ensures that when the immigration statute hinges consequences on a conviction rather than conduct, immigration adjudicators are not the triers of fact in the first instance. Rather, they rule only on the legal question of whether the conviction—as determined by the criminal justice system—falls within a removal ground.[61]

In 1992, the U.S. Supreme Court in *Taylor v. United States*[62] adopted the categorical approach as the methodology for evaluating whether prior crimes qualify as predicate offenses for federal sentencing enhancements.[63] Defense attorneys who practice in federal court thus routinely apply the categorical approach in their practice. States also employ analogs to the categorical approach in a variety of different criminal law contexts, including habitualization sentencing.[64]

Despite having pervaded immigration law jurisprudence since the earliest of immigration decisions, the categorical approach has historically frustrated immigration and federal courts. The U.S. Court of Appeals for the Ninth Circuit lamented in 2011 that "[i]n the twenty years since [the U.S. Supreme Court's decision in] *Taylor*," it has "struggled to understand the contours of the Supreme Court's" categorical approach, pronouncing that "over the past decade . . . no other area of the law has demanded more of [the court's] resources."[65] Commentators have characterized the categorical approach as complex, controversial, and confusing. "One scholar [has] compared the categorical approach to property law's rule against perpetuities in terms of its complexity, . . . not[ing] that '[e]ven lawyers who regularly practice [in the area] can struggle to

60. The minimum conduct test surfaces whenever an adjudicator is asked to assess whether a conviction falls within a definition, be it the definition of an element of a crime (e.g., fraud) or a definition of a category of offenses that trigger deportation (e.g., crime involving moral turpitude). The U.S. Supreme Court stated in *Gonzales v. Duenas-Alvarez* that adjudicators cannot engage in "legal imagination" when determining the universe of conduct made culpable under the statute but must point to cases to show that the language of a statute has been interpreted to apply to the scenario at issue. 549 U.S. 183, 193 (2007).

61. *See* Sharpless, *supra* note 52, at 979–80.

62. 495 U.S. 575 (1990).

63. *Id.* at 602.

64. *See, e.g.*, State v. Hearns, 961 So. 2d 211, 212 (Fla. 2007) (holding that when determining whether a prior conviction constituted a forcible felony, the only relevant consideration is the elements of the offense).

65. United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc).

understand the doctrine and its occasionally perplexing results.'"[66] The Supreme Court has noted that "the categorical method is not always easy to apply. . . . because sometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately."[67] Perhaps in part because of this complexity, the BIA, and some federal courts of appeals, had retreated from the strict categorical approach before the U.S. Supreme Court reaffirmed its saliency.[68]

A primary thesis of this Article is that these admittedly complicated rules governing the immigration consequences of crimes have become better defined and determinate in recent years.

B. Predictability

In the years since *Taylor*, the U.S. Supreme Court has weighed in at least fourteen times to clarify ambiguity in the rules that immigration adjudicators and federal sentencing judges must follow when applying the categorical approach.[69] The Court's decisions have significantly increased the ability of lawyers to predict the immigration consequences of a plea, making the immigration analysis of crimes more akin to a logic puzzle that is difficult but has a clear answer. To borrow from Duncan Kennedy's typology of rules, the rules governing removal for a crime have become more "formally realizable."[70]

Historically, the BIA, the U.S. Attorney General, and some lower federal courts had introduced dissonance in the law regarding the categorical approach, even going so far as to permit review of extrinsic evidence to determine whether a person could be removed under certain grounds.[71] The U.S. Supreme Court, however, has now definitively ruled

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66. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1834 (2013) (third and fourth alterations in original) (quoting Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 625 (2011)).

67. Nijhawan v. Holder, 557 U.S. 29, 35 (2009) (discussing James v United States, 550 U.S. 192 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015)).

68. *See infra* note 71.

69. Johnson v. U.S. 135 S. Ct. 2551, 2557 (2015); Mellouli v. Lynch, 135 S. Ct. 1980, 1986-1991 (2015); United States v. Castleman, 134 S. Ct. 1405, 1408 (2014); Descamps v. United States, 133 S. Ct. 2276, 2281 (2013); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684–85 (2013); Kawashima v. Holder, 132 S. Ct. 1166 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Johnson v. United States, 559 U.S. 133, 144 (2010); *Nijhawan*, 557 U.S. at 32; Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–86 (2007); *James*, 550 U.S. at 208; Lopez v. Gonzales, 549 U.S. 47, 50–51 (2006); Shepard v. United States, 544 U.S. 13, 16 (2005); Leocal v. Ashcroft, 543 U.S. 1, 3–4 (2004).

70. Duncan Kennedy describes formal realizability as "describ[ing] the degree to which a legal directive has the quality of 'ruleness,'" namely the degree to which an official following the rule acts based on "the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way." Kennedy, *supra* note 36, at 1687–88. He credits Rudolph von Ihering in *Spirit of Roman Law* for the term. *Id.* at 1687.

71. U.S. Attorney General Mukasey ruled in 2008 that the government may, in some cases, go beyond the categorical approach to look at evidence outside the record of conviction in order to determine removability under the crime involving moral turpitude grounds of removal. *See* Silva-Trevino, 24 I. & N. Dec. 687, 708 (U.S. Atty. Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (2015). *See*

that the categorical approach applies with only limited exceptions and has clarified the rules for applying the methodology.[72] In *Moncrieffe v. Holder*,[73] the U.S. Supreme Court affirmed that the strict categorical approach governs the determination of whether a conviction falls within a removal ground.[74] The Court reversed the U.S. Court of Appeals for the Fifth Circuit to hold that a state statute criminalizing possession of marijuana with intent to distribute is not a "drug trafficking" aggravated felony under immigration law when the statute includes conduct—namely social sharing of marijuana—that falls outside the federal definition of drug trafficking.[75] In response to the Court's ruling, the BIA and lower courts reversed their courses straying from the categorical approach.[76]

The Supreme Court has further engendered determinacy by reconciling divergent views about when statutes can be deemed to contain multiple crimes such that the adjudicator can look beyond the statute of conviction and review the record of conviction, a methodology called the modified categorical approach.[77] In the past, lower courts and the BIA were divided about when an adjudicator could look beyond the statute to review the record of conviction when determining whether a conviction was a categorical match with the relevant federal removal ground.[78] In the majority of cases, recourse to the record of conviction was appropriate only if the statute defined multiple crimes, and the record could establish which set of elements were the elements of conviction.[79] In other cases, however, courts sanctioned reliance on nonelement facts that appeared in the record of conviction.[80] The BIA and several circuits, including the Ninth Circuit, had permitted review of the record of convic-

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generally MANNY VARGAS ET AL., *MONCRIEFFE V. HOLDER*: IMPLICATIONS FOR DRUG CHARGES AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH, LEGAL ACTION CENTER 10–13 (May 2, 2013), *available at* http://www.legalactioncenter.org/sites/default/files/moncrieffe_v_holder-_implications_for_drug_charges_and_other_categorical_approach_issues_5-1-13_fin.pdf.

72. *Moncrieffe*, 133 S. Ct. at 1684–85. The Court has thus overruled U.S. courts of appeals precedent. *See, e.g.*, Garcia v. Holder, 638 F.3d 511, 514 (6th Cir. 2011), *vacated*, 133 S. Ct. 2019 (2013); Julce v. Mukasey, 530 F.3d 30, 35–36 (1st Cir. 2008), *abrogated by Moncrieffe*, 133 S. Ct. 1678.

73. 133 S. Ct. 1678 (2013).

74. *Id.* at 1684–85.

75. *Id.* at 1682, 1684.

76. *See, e.g.*, United States v. Flores-Cordero, 723 F.3d 1085, 1089 (9th Cir. 2013) (recognizing that *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), was abrogated by *Descamps v. United States*, 133 S. Ct. 2276 (2013)). On April 10, 2015, the U.S. Attorney General Eric H. Holder vacated *Silva-Trevino* in light of *Moncrieffe* and other Supreme Court cases. *See* Silva-Trevino, 24 I. & N. Dec. 687, 708 (U.S. Atty. Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (2015); *see generally*, VARGAS ET AL., *supra* note 71, at 10–13.

77. In *Descamps*, the Court reconciled divergent approaches to the modified categorical approach. 133 S. Ct. at 2282–83 & n.1 (comparing *Aguila-Montes de Oca*, 655 F.3d at 940, and United States v. Armstead, 467 F.3d 943, 947–50 (6th Cir. 2006), *abrogated by Descamps*, 133 S. Ct. at 2292, with United States v. Beardsley, 691 F.3d 252, 268–74 (2d Cir. 2012), and United States v. Giggey, 551 F.3d 27, 40 (1st Cir. 2008) (en banc)).

78. *Descamps*, 133 S. Ct. at 2282–83.

79. Sharpless, *supra* note 52, at 996–99.

80. *See id.* at 1030.

tion in a broad range of circumstances.[81] The Court in *Moncrieffe* set these courts straight, stating that the modified categorical approach is appropriate only if a "state statute[] . . . contain[s] several different crimes, each described separately."[82] Because the statute under which Moncrieffe had been convicted was not divisible in this way, the Court refrained from reviewing the record of conviction to see how much marijuana was alleged to have been in Moncrieffe's possession and whether the distribution was for remuneration.[83]

Shortly after deciding *Moncrieffe*, the Court squarely addressed the issue of when a criminal statute is divisible such that immigration judges and other adjudicators can consult the record of conviction under the modified categorical approach. *Descamps v. United States*[84]—a federal sentencing enhancement case—involved the issue of whether the federal government could seek to enhance a sentence under the Armed Career Criminal Act based on Descamps's prior state convictions, including a California conviction for burglary that the government contended was equivalent to federally defined generic burglary.[85] The issue was whether the California burglary conviction could serve as a predicate for enhancement because it did not require "unlawful entry," an element of generic burglary as defined by the Court in *Taylor v. United States*.[86] The sentencing judge had found that the conviction could be the basis for enhancement after reviewing the underlying record of conviction and finding that Descamps had admitted to an unlawful entry as a factual basis for the plea.[87] The Supreme Court, however, held that the sentencing judge should not have reviewed the record of conviction because the California burglary statute contained only a single set of elements.[88] The modified categorical approach, the Court found, is simply a "tool" to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."[89] The Court's deci-

81. *See, e.g.*, United States v. Aguila-Montes de Oca, 655 F.3d 915, 937 (9th Cir. 2011) (en banc) (permitting the modified categorical approach if the theory of the prosecution "necessarily rested" on a facts that "satisfy the elements of the generic offense") (internal quotation marks omitted); *Lanferman*, 25 I. & N. Dec. at 722 ("[A]ll statutes of conviction [are divisible] . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." (second alteration in original) (quoting Lanferman v. B.I.A., 576 F.3d 84, 90 (2d Cir. 2009) (internal quotation marks omitted)).

82. 133 S. Ct. at 1684.

83. *See id.* at 1685–86.

84. 133 S. Ct. 2276 (2013).

85. *Id.* at 2281.

86. *Id.* at 2282; 495 U.S. 575, 577–78 (1990).

87. *Descamps*, 133 S. Ct. at 2282.

88. *Id.* at 2283 (holding that "the modified categorical approach" does not apply to statutes "that contain a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense.").

89. *Id.* at 2285.

sions directly overruled contrary decisions from several circuit courts.[90] The BIA subsequently issued a precedent decision retreating from its former position and aligning with *Moncrieffe* and *Descamps*.[91]

The Court has also settled any lingering doubt about whether the categorical approaches used in the federal recidivist sentencing and immigration contexts are one and the same. The BIA had previously found that "the categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena."[92] Some court of appeals decisions had adopted similar positions.[93] In *Moncrieffe*, however, the Court made clear that the methodologies are identical in both immigration and criminal resentencing law.[94] By citing indiscriminately to both immigration and criminal precedent when elucidating the categorical approach, the Court demonstrated that the methodology is the same in both contexts.[95] The BIA subsequently acknowledged this unity of approaches.[96]

The Court has also provided guidance on the limited circumstances in which the categorical approach does not apply. In *Nijhawan v. Holder*,[97] the Court considered the aggravated felony ground of removal encompassing "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[98] The question before the Court was whether the "loss to the victim" language referred to "an element of the fraud or deceit" crime or the "particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion."[99] In finding the latter, the Court reinforced that the categorical approach applies to the threshold question of whether an offense involved an element of fraud or deceit. The Court listed the many aggravated felony provisions requiring the categorical

90. *See, e.g.*, United States v. Aguila-Montes de Oca, 655 F.3d 915, 946 (9th Cir. 2011) (en banc), *abrogated by Descamps*, 133 S. Ct. 2276; United States v. Armstead, 467 F.3d 943, 948 (6th Cir. 2006), *abrogated by Descamps*, 133 S. Ct. 2276.

91. Chairez-Castrejon, 26 I. & N. Dec. 349, 349, 352–54 (B.I.A. 2014), *partially vacated by* Chairez-Castrejon, 26 I. & N. Dec. 478 (B.I.A. 2015) (overruling *Lanferman*, 25 I. & N. Dec. 721). The U.S. Attorney General has stayed this decision pending her resolution of whether *Descamps* requires juror unanimity for a fact to be treated as an element rather than a means of committing a crime. Chairez-Castrejon, 26 I. & N. Dec. 686 (Att'y Gen. 2015). *See infra* note 102.

92. *Lanferman*, 25 I. & N. Dec. at 728.

93. *See, e.g.*, Bobadilla v. Holder, 679 F.3d 1052, 1056–58 & n.3 (8th Cir. 2012); Ali v. Mukasey, 521 F.3d 737, 741–42 (7th Cir. 2008); Conteh v. Gonzales, 461 F.3d 45, 55–56 (1st Cir. 2006).

94. Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013).

95. *Id.* at 1684 (citing immigration cases: Nijhawan v. Holder, 557 U.S. 29 (2009), Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), and Shepard v. United States, 544 U.S. 13 (2005), along with criminal sentencing case Johnson v. United States, 559 U.S. 133 (2010)). The Court has recognized that the term "crime of violence" in 18 U.S.C. § 16 must be interpreted uniformly in both criminal and noncriminal contexts. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

96. *Chairez-Castrejon*, 26 I. & N. Dec. at 353–54 ("*Descamps* itself makes no distinction between the criminal and immigration contexts.").

97. 557 U.S. 29 (2009).

98. *Id.* at 32 (alteration in original) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)).

99. *Id.*

approach, reaffirming its commitment to it.[100] Later, in *Moncrieffe*, the Court further emphasized the limited role for the circumstance-specific approach by excoriating "*post hoc* investigation[s] into the facts of predicate offenses" and "minitrials conducted long after the fact."[101]

While the Court has not definitively resolved every open question relating to the categorical approach, it has settled many of the debates among the BIA and lower courts.[102] The rules for determining whether a criminal conviction falls within a ground of removal are now sufficiently clear to generate predictable results in most cases.

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100. *Id.* at 37. For a chart mapping the aggravated felony provisions and whether *Nijhawan* designated them as requiring the categorical or circumstance-specific approach, see DAN KESSELBRENNER ET AL., NAT'L IMMIGRATION PROJECT, THE IMPACT OF *NIJHAWAN V. HOLDER* ON APPLICATION OF THE CATEGORICAL APPROACH TO AGGRAVATED FELONY DETERMINATIONS app. at 8–15 (2009), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_pa_Nijhawan%20and%20the%20Categorical%20Approach%20-%20NIPNLG%20and%20IDP%20-%202009.pdf.

101. Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013).

102. Several areas of confusion persist. The Court has stated that, when applying the minimum conduct test, noncitizens must demonstrate a "realistic probability" that a state would actually prosecute behavior that renders a state statute broader than the relevant federal standard. *Moncrieffe*, 133 S. Ct. at 1684–85 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). *See also* Ferreira, 26 I. & N. Dec. 415 (B.I.A. 2014) (a noncitizen must provide evidence of actual prosecutions to satisfy the "realistic probability" test). The standard for what counts as a "realistic probability" is unclear. *See* ANDREW WACHTENHEIM ET AL., NAT'L IMMIGRATION PROJECT, THE REALISTIC PROBABILITY STANDARD: FIGHTING GOVERNMENT EFFORTS TO USE IT TO UNDERMINE THE CATEGORICAL APPROACH (2014). A second dispute involves the question of who wins when there is ambiguity about whether a conviction falls within a removal ground. The government has the burden of establishing deportability for a crime, whereas the noncitizen has the burden of proof to establish eligibility for relief from removal. *See Nijhawan*, 557 U.S. at 42. Some forms of relief are unavailable to noncitizens who have been convicted of a certain type of crime, like an aggravated felony. *See id.* at 41–42. The BIA and some federal courts have held that even if the government could not meet its burden of establishing deportability for a particular crime, the crime could render the noncitizen ineligible for relief. *See, e.g.*, Young v. Holder, 697 F.3d 976, 989–90 (9th Cir. 2012), *abrogated by* Almanza-Arenas v. Holder, 771 F.3d 1184 (9th Cir. 2014), *rehearing en banc granted*, 785 F.3d 366 (2015); Salem v. Holder, 647 F.3d 111, 120 (4th Cir. 2011); Garcia v. Holder, 584 F.3d 1288, 1290 (10th Cir. 2009); Almanza-Arenas, 24 I. & N. Dec. 771, 775–76 (B.I.A. 2009). The Supreme Court's discussion in *Moncrieffe* characterizing the categorical analysis of crimes as a legal, rather than a factual, inquiry may settle this dispute by clarifying that the burden of proof for factual and evidentiary matters does not apply. *Moncrieffe*, 133 S. Ct. at 1684–86. Lastly, a circuit split exists regarding what qualifies as an element of a crime, as opposed to the means by which a crime was committed. If jurors need not agree about certain alleged facts, then the facts are means, not elements. Some circuits, however, have held that a statute's use of a list or "or" language definitively establishes multiple sets of elements such that the modified categorical approach applies, even if jurors need not agree on how the crime was committed. *Compare* United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015); Rendon v. Holder, 764 F.3d 1077 (9th Cir. 2014), *rehearing en banc denied*, 782 F.3d 466 (9th Cir. 2015), United States v. Estrella, 758 F.3d 1239, 1246 (11th Cir. 2014) (following juror agreement test), *with* United States v. Trent, 767 F.3d 1046 (10th Cir. 2014); United States v. Ozier, 796 F.3d 597 (6th Cir. 2015) (declining to follow juror agreement test). The U.S. Attorney General has vacated and certified to herself the BIA's decision in *Chairez-Castrejon*, a decision adopting the juror agreement test for any circuit that had not held otherwise. Chairez-Castrejon, 26 I. & N. Dec. 349, 349, 352–54 (B.I.A. 2014), *partially vacated by* Chairez-Castrejon, 26 I. & N. Dec. 478 (B.I.A. 2015), *stayed and certified by* Chairez-Castrejon, 26 I. & N. Dec. 686 (Att'y Gen. 2015).

III. THE CASE FOR SIMPLER RULES

I have argued that the relative simplicity or complexity of a legal inquiry should not define the scope of defense counsel's *Padilla* duty, that defense attorneys must counsel their clients about predictable immigration consequences, and that the admittedly complex area of law governing immigration consequences of crimes is now producing determinate results. Although simplicity cannot be the standard for measuring compliance with *Padilla*, simplifying the law would have positive, transformative effects.

Society stands to gain when the government minimizes the amount of human capital needed to run an effective legal system.[103] Congress rightly strives to make rules understandable by nonexperts, as it did in the Plain Writing Act of 2010.[104] At the same time, some degree of complexity is inevitable because precision sometimes requires it.[105] Moreover, "institutions" tend to "slowly creep toward complexity" because, over time, the aggregation of small additions to a legal regime becomes "unwieldy."[106] The critical task is thus to determine the optimal degree of complexity.[107] In the context of immigration law and crimes, simpler rules would have numerous salutary effects, including enabling the implementation of *Padilla*; enhancing the legitimacy of immigration law by ensuring understandability, notice, and fairness; and increasing administrative and judicial efficiency. Moreover, as illustrated below, the complexity of the current scheme could be eliminated without sacrificing predictable results.

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103. Daniel Katz and M. J. Bommarito define complexity as the amount of "human capital expended by a society when an end user is required to review and assimilate a body of legal rules." Daniel Martin Katz & M. J. Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 ARTIFICIAL INTELLIGENCE & L. 337, 340 (2014).

104. Plain Writing Act of 2010, Pub. L. No. 111-274, § 2, 124 Stat. 2861, 2861 (2010) ("The purpose of this Act is to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use."); *see also* 5 U.S.C. § 301 (2015); Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403, 413–14 (1997) (arguing that Congress has an obligation to draft the rule in a way that persons of reasonable intelligence can understand); Office of the Parliamentary Counsel, *When Laws Become Too Complex*, GOV.UK (Apr. 16, 2013), https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex.

105. *See* Kades, *supra* note 104, at 412 ("[T]he usual cure for indeterminacy . . . may itself introduce further complexity."); Miller, *supra* note 39, at 7 (noting that the "use of elaborative complexity to achieve fairness in tax law has been debated"). *See generally* Byron Holz, *Chaos Worth Having: Irreducible Complexity and Pragmatic Jurisprudence*, 8 MINN. J.L. SCI. & TECH. 303, 333 (2007); Schuck, *supra* note 37; R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 717 (2000).

106. Katz & Bommarito, *supra* note 103, at 339.

107. *See* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150–51 (1995); Gordon Tullock, *On the Desirable Degree of Detail in the Law*, 2 EUR. J.L. & ECON. 199, 202 (1995).

A. Implementation of Padilla

The enactment of simple rules would greatly facilitate implementation of *Padilla*.[108] Simple rules would increase both the quantity and quality of defense lawyer counseling about immigration consequences. Counseling based on simple rules is undeniably easier for lawyers to communicate and easier for clients to understand.

The post-*Padilla* practices of public defender offices illustrate this point. Public defender offices have taken a variety of approaches to implementing the *Padilla* decision, some more successfully than others.[109] In a limited number of venues, the office of the public defender has immigration specialists on staff and has routinized the screening of cases in which the defendant is a noncitizen.[110] In others, individual lawyers are expected to learn the relevant immigration law themselves, sometimes assisted by office trainings or outside consultants.[111]

A common strategy for dealing with difficult problems is to use a heuristic device as a shortcut. In the context of immigration consequences of crimes, such tools are typically lists of common crimes and their usual immigration consequences.[112] As with other heuristic devices, lists work well in some scenarios but also lead to errors.[113] Moreover, lists of crimes that trigger immigration consequences do nothing to help a defense attorney identify what category of consequences are relevant to a particular client's case.[114] For example, a list will never tell a defense

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108. For a discussion of the challenges in implementing *Padilla*, see Maureen A. Sweeney, *Where Do We Go from* Padilla v. Kentucky*? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 357–65 (2011).

109. For a blueprint of how offices could choose to implement *Padilla*, see PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFENDERS ASS'N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN 22–23 (2009), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf.

110. *See id.*

111. *See id.*

112. For examples of charts on immigration consequences of criminal convictions, see *Legal Resources*, NAT'L IMMIGRATION PROJECT, http://www.nationalimmigrationproject.org/legalresources.htm (last visited Feb. 10, 2015).

113. The disclaimers on charts by reputable immigration attorneys reflect their limitations. *See, e.g.*, Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses*, NAT'L IMMIGRATION PROJECT 1 (2010), http://www.nationalimmigrationproject.org/legalresources/fed_chart_2010%20update.pdf; Maureen Sweeney, *Immigration Consequences of Maryland Offenses*, U. MD. FRANCIS KING CAREY SCH. L. 1–2, http://www.law.umaryland.edu/faculty/Msweeney/ImmigrationConsequencesChart.pdf (last updated Aug. 3, 2015).

114. *See* Andres Benach, Sejal Zota & Maria Navarro, *How Much to Advise: What are the Requirements of* Padilla v. Kentucky, 2013 A.B.A. SEC. LITIG. 1 (discussing the *Padilla* duty as including investigating "the immigration status and criminal history of the defendant" and "the specific immigration consequences that the proposed plea would have on the particular individual" as well as "encompass[ing] both avoiding [the defendant] becoming removable and preserving eligibility to apply for relief from removal"). Under reputable post-*Padilla* protocols, defense attorneys are instructed to determine their client's (1) immigration status, if any, and when it was obtained; (2) prior criminal history; and (3) eligibility for immigration relief. *Id.* Only with this information can attorneys convey an accurate immigration consequences evaluation and effectively plea bargain. *See, e.g.*, MANUEL D. VARGAS, IMMIGRANT DEF. PROJECT, DUTY OF CRIMINAL DEFENSE

attorney whether a particular client should be concerned about pleading guilty to an aggravated felony, a crime involving moral turpitude, or both.

The degree to which offices have taken *Padilla* on board varies widely. Some offices have model programs with immigration specialists on staff, while others have only begun to grapple with *Padilla* implementation.[115] The crushing caseload of some public defender offices makes *Padilla* implementation a particular challenge.[116] Even in offices with immigration specialists, however, attorneys struggle to ensure that each and every noncitizen defendant receives advice and that the advice is accurate and complete.[117] Regardless of an attorney's level of success in implementing *Padilla*, he or she would stand to gain from simpler deportation rules.

B. Transparency, Legitimacy, and Notice

The complicated deportation rules of today render inaccessible the reasoning behind our government's choices about whom to deport. When the rules for how the system seeks to treat like cases alike are hard to explain, the public's confidence in the deportation system declines.[118] Decisions appear arbitrary rather than rule bound. Simple rules are more readily recognized as transparent than complex rules and therefore regarded as more legitimate.[119]

Simple rules about what convictions trigger removal or ineligibility for immigration status would greatly enhance the general public's understanding of the law and their confidence in the immigration system. Such rules would also more effectively put noncitizens on notice of what counts as a basis for being deported or denied immigration status. Immi-

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COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* (2010), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/01/Padilla_Practice_Advisory_011712FINAL.pdf.

115. MARKOWITZ, *supra* note 109.

116. *See* Malia Brink, *A Gauntlet Thrown: The Transformative Potential of* Padilla v. Kentucky, 39 FORDHAM URB. L.J. 39, 53–61 (2011) (discussing effect of high public defender caseloads on implementation of *Padilla*); Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 678–81 (2011) (discussing the impact of high caseloads and lack of funding on the ability of public defender offices to deliver *Padilla* advice); L. Jay Jackson, *Miami-Dade's Overburdened PD's Office May Decline New Clients, Florida Court Says*, A.B.A. J. (Oct. 1, 2013, 8:50 AM), http://www.abajournal.com/magazine/article/miami-dades_overburdened_pds_office_may_decline_new_clients_florida_court_s; Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1, *available at* http://www.nytimes.com/2008/11/09/us/09defender.html?pagewanted=all.

117. For a discussion of the need to make information about immigration consequences accessible to the defense bar, see Chin, *supra* note 116, at 684–88.

118. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 8–9 (2011).

119. *Id.* at 8 (arguing that in the context of jurisdictional rules "[t]he transparent judicial enforcement of a clear statutory rule of jurisdiction negates the democratically problematic perception of unauthorized judicial lawmaking."); Miller, *supra* note 39, at 21 (arguing that "the elaborative complexity of tax law is justified by its certain and uniform fairness when applied by one who has mastered it" but that "mastery of the rules is rendered extremely difficult" making it only possible for the "elite" to understand, a result that "would strike many as unfair").

gration adjudicators would also be properly incentivized to apply the law. As discussed above, immigration adjudicators, the BIA, and federal appellate courts had broken with the categorical approach and rendered a significant number of result-driven decisions prior to the Supreme Court's decisions in *Moncrieffe* and *Descamps*.[120] The complexity of the categorical approach may have made it easier for adjudicators to justify decisions designed to rule against the convicted noncitizen, as complexity can be mistaken for ambiguity. A simple replacement rule for the categorical approach would be more likely to constrain adjudicators and lead to more rule-bound decisions.[121]

C. Efficiency

Plain deportation rules would be easier to administer, resulting in cost savings for the administrative and court systems as well as the noncitizens embroiled in it. Litigation about the immigration consequences of crimes consumes a significant portion of administrative and federal court dockets.[122] As mentioned above, the Ninth Circuit stated in 2011 that cases involving the categorical approach have taken up more of the court's time than any other type of case.[123]

If the rules for determining deportation for a crime were more easily understood and applied, attorneys would save time when advising their clients and might pass these cost savings onto their clients. Judges would adjudicate cases more accurately and quickly, and judges' caseloads would be smaller because fewer people would be erroneously placed into removal proceedings.[124] Efficiencies would extend to savings on detention costs, as many immigration court cases involving the analysis of crimes take place while the noncitizen is detained.

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120. *See supra* notes 90–91.

121. Legal realists argue that judges do not follow rules when deciding cases. In this view, any determinacy that exists in the law stems not from the clarity of a rule but from the ability to predict what judges will do. Even if legal realism holds true as a general matter, it is difficult to see how immigration judges could fail to follow a sentence-trigger deportation rule, at least without enormous effort.

122. Between 2008 and 2012, the percent of deportation orders sought in immigration court based on alleged criminal activity ranged from 17.5 percent to 14.3 percent. *Deportation Orders Sought in Immigration Court Based on Alleged Criminal Activity by Type*, TRAC IMMIGRATION (2012), http://trac.syr.edu/immigration/reports/281/include/deportertype.html.

123. United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc).

124. An immigration judge, faced with making a determination about whether a hit and run crime constitutes a crime involving moral turpitude, remarked, "I have gone back and forth on this issue," and continued "[a]re these crimes of moral turpitude? This is tough." Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASH. POST (Feb. 2, 2014), http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html (internal quotation marks omitted) (quoting Judge Lawrence Burman of the Arlington Immigration Court).

IV. WHY SIMPLE RULES ARE HARD TO GET

Despite the benefits of simple criminal deportation rules, numerous barriers prevent their adoption, including a concern that any new legislation would be even more punitive than the current rules. Noncitizens with criminal convictions might be collectively better off under the current rules. As I argue below, the only way to significantly simplify the rules would be to tag deportation to sentence length. Because of widespread concerns about the fairness of sentencing practices, many rightly view the use of time served in prison a problematic trigger for removal.

History teaches that noncitizens with criminal convictions lose when Congress amends immigration law. Over the last three decades, legislative reforms at the intersection of crimes and deportation have increasingly expanded the reach of deportation for crimes and rolled back defenses from deportation for those found removable.[125] Congress added the term "aggravated felony" to immigration law in 1988 and, since then, has expanded it several times.[126] As the Supreme Court noted in *Padilla*, deportation is now "practically inevitable" for a wide range of criminal offenses.[127]

Given the history of progressively restrictive legislative amendments, pro-immigrant reformers are legitimately concerned that any simplification of the rules for deportation for a crime would be a net loss for immigrants with a criminal conviction. If deportation were tied to sentence length, the length of sentence that would be politically palatable as a trigger would likely be unacceptably short. As a group, immigrants with criminal convictions might be better off with the status quo.

One need look no further than the framing of the current debate on immigration reform to understand the fears of pro-immigrant reformers. The approach of the Obama Administration and mainstream immigration reformers is to seek political gains for some immigrants by contrasting them with immigrants who have been convicted of a crime. "Criminal aliens" serve as foils for "good" immigrants, who are packaged as model minorities.[128] In announcing administrative immigration reform, for ex-

125. Padilla v. Kentucky, 559 U.S. 356, 361–64 (2010) ("These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction.").

126. When the term "aggravated felony" was added to the INA in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (1988), it included murder, drug trafficking, and illicit trafficking in firearms or destructive devices. In 1990, Congress expanded the term in the Immigration Act of 1990, Pub. L. No. 101-649, §501, 104 Stat. 4978, 5048 (1990). In 1996, Congress added additional crimes to the definition in the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321(a)(1), 110 Stat. 3009 (1996).

127. *Padilla*, 559 U.S. at 363–64. During oral argument in the 2001 case *INS v. St. Cyr*, one of the justices expressed concern that stealing a pair of tennis shoes could be an aggravated felony. Transcript of Oral Argument at 15–16, INS v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-767.pdf.

128. *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. (forthcoming 2016).

ample, President Obama has framed the central tenet of his immigration policy as deporting "[f]elons, not families," thereby writing off convicted noncitizens with U.S. citizen children or other family members in the United States.[129] Creating the political space for simple, yet not harsh, deportation rules appears linked to the success of the broader movement to dial back overly punitive laws and enforcement practices.[130]

A second, formidable barrier to the adoption of a simple, sentence-trigger deportation rule is a concern about disparities in sentencing practices across jurisdictions and along racial, ethnic, and gender lines. The federal government keeps comprehensive statistics on federal sentencing broken down by type of crime and district. The data show that average sentences vary significantly by federal court district. For example, the average prison sentence in 2012 in Colorado federal court was forty-six months while it was twenty-nine months in the Southern District of California.[131] The average sentence for drug trafficking in Colorado federal court was seventy months, compared to forty-four months in the Southern District of California.[132] Statistics on state court sentencing practices also show that average time served varies significantly by jurisdiction.[133]

Even more troubling is research showing that disparate sentencing occurs on invidious grounds.[134] The Sentencing and Corrections Working Group of the Department of Justice has been charged with reviewing "unwarranted racial and ethnic disparities in sentencing."[135] A 2004

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129. Barack Obama, President, United States, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

130. *See* Sharpless, *supra* note 128.

131. U.S. SENTENCING COMM'NS, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2013), *available at* http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012 (last visited Sept. 7, 2015).

132. *Id.* The wide disparity of sentences by courts for the same or similar conduct was the impetus behind creating the sentencing guidelines. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 1A1.3 (2004) ("Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders."). Notwithstanding the guidelines, sentencing disparities persist. *See supra* note 131 and accompanying text.

133. Using data from the National Corrections Reporting Program, the Pew Charitable Trusts has calculated the average time served of released offenders in every state. THE PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 11 (2012). The statistics show that, for example, 2009 released offenders in Michigan who had committed violent crimes had served an average of 7.6 years, whereas similarly situated released offenders in Colorado had spent an average of 4.6 years imprisoned. *Id.* at 16.

134. *See* sources cited *supra* note 8.

135. Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT'G REP. 110, 110–11 (2010) (finding that the movement towards "a sentencing system that affords greater discretion to prosecutors and judges" requires an "increase . . . [in the] monitoring of sentencing practice and outcomes to ensure that unwarranted disparities are minimized"); *see also* Eric Holder, Attorney General, U.S. Dep't of Justice, Attorney General Holder's Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium "Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act" (June 24, 2009), *available at* http://www.justice.gov/opa/speech/attorney-general-holder-s-remarks-charles-hamilton-houston-institute-race-and-justice.

study funded by the U.S. Department of Justice reviewed the data, methodology, and conclusions of eighty-five studies on sentencing practices and concluded that, after controlling for other factors, "Latinos and African-Americans were sentenced more harshly than whites on average."[136] Researchers have summarized studies of state and federal sentencing practices as "show[ing] legally prescribed factors are the strongest predictors of sentencing outcomes, but defendant social statuses often influence the likelihood and type of incarceration, sentence length, and guideline departures."[137] Given the questionable nature of sentencing practices, any sentence-based deportation regime would have to take unwarranted sentencing disparities into account.

V. A PROPOSAL FOR REFORM

Assuming that the political will could be generated for simple and fair deportation rules, I argue for reforms that would create an over-five-year actual sentence trigger for deportation and restore judicial discretion to stop deportations. The proposal sketched below reflects the reality that there are three basic choices for conditioning deportation on conviction for a crime. Deportation could be made a function of type of crime, length of sentence, or some combination of the two. As described above, the current scheme is largely based on the type of crime but sometimes also requires a sentence of a particular type and length.

The only way to significantly simplify the rules would be to take the type of crime out of the deportation equation. As discussed above, federalism complicates hinging removal on types of crime.[138] The lack of a single criminal code under which all defendants are prosecuted requires a federal standard against which state convictions are judged using the complex categorical approach described above. The only viable alternative is for Congress to tag deportation to sentence length, as a number of countries in the United States' peer group already do.[139]

A sentence-based deportation regime would represent a paradigm shift in immigration law with immense efficiencies and benefits. The practical barriers to the full implementation of *Padilla* would cease to exist and noncitizen defendants would be much more likely to enjoy the full extent of their Sixth Amendment right. No longer would defense counsel, immigration attorneys, pro se noncitizens, federal appellate

136. Mitchell & MacKenzie, *supra* note 8, at 1, 12.

137. Jeffrey Ulmer, Michael T. Light & John Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the* Booker/Fanfan *Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUST. Q. 799, 801 (2011).

138. *See supra* notes 49–51 and accompanying text.

139. Australia and the United Kingdom, for example, have deportation rules that operate largely by reference to length of sentence. Migration Act of 1958, section 201 (Australia); UK Borders Act 2007, c. 30, § 32 (U.K). Although these countries have sentence triggers that are less than five years, they also impose significantly shorter sentences for crimes than the United States. *See infra* notes 148–52 and accompanying text.

judges, immigration judges, and other agency adjudicators struggle with the determination of whether a crime would lead to deportation. A plain deportation scheme would also be more transparent and therefore more legitimate. The general public would understand the deportation rule and noncitizens would more likely be on notice of what crimes result in removal.

At the same time, hinging deportation on sentence length is no silver bullet. As discussed above, chronic sentencing disparities, including ones based on invidious grounds like race, render sentence length a blunt instrument for treating like cases alike. A sentence-based deportation regime could minimize the impact of sentencing disparities in two ways. First, deportation could be made a consequence of only relatively long criminal sentences, specifically an actually served sentence of over five years. Second, Congress could legislate a return to the prior state of affairs in which immigrants had robust opportunities to apply for relief from removal in immigration court. I address each of these proposals in turn.

A. A Long Sentence Deportation Trigger

Deportation of a noncitizen with lawful status should occur only if the immigrant has been convicted of a crime for which he or she has actually served more than five years in prison. A five-year sentence standard has precedent in immigration law. It appeared in pre-1996 law as the cutoff for eligibility for a discretionary waiver of deportation under former INA section 212(c).[140] Under that provision, lawful permanent residents who had been domiciled for seven years and who had not served five years incarceration for an aggravated felony could apply to an immigration judge to retain their lawful permanent residency, despite having been convicted of a crime.[141] Although a sentence over five years has never been required to trigger removal proceedings, I argue that it should for several reasons.

Requiring a sentence of more than five years would offset the effect of sentencing disparities. While reasonable minds can disagree about what length of sentence constitutes the tipping point for deportation, most would agree that a sentence of more than five years (even if it reflects some amount of invidious discrimination) is long enough to warrant at least the commencement of removal proceedings. Some of those sentenced fairly to five years or under might also be people who most would say should be subject to removal. But just as the "beyond a reasonable doubt" burden of proof in criminal cases is designed to acquit some number of guilty people in order to ensure that few innocent people are convicted, an over-five-year sentence deportation trigger would help

140. 8 U.S.C. § 1182(c) (1992) (repealed 1996).
141. *Id.*

to ensure that people who were sentenced unfairly are not deported, even if it means that some people who should have been subject to removal proceedings are permitted to remain. Any sentence-based deportation scheme must err on the side of permitting people to stay who could have been given longer sentences in high sentencing jurisdictions as a means of ensuring that people who were sentenced unfairly are not erroneously subjected to removal proceedings.

Further support for a rule based on an over-five-year sentence derives from studies showing that length of time served correlates with recidivism.[142] A relatively small group of offenders are convicted of the majority of crimes.[143] If deportation for a crime is justified on public safety grounds, it is most justified when targeted at individuals who have proven to be chronic and serious lawbreakers.[144] Individuals who have not served more than five years for a crime generally fall outside of this category.[145]

Efficiency and cost considerations also weigh in favor of a long sentence trigger for deportation. If fewer people are ensnared in deportation proceedings, judges could hold fewer hearings and the number of people in immigration detention would decrease. At a price tag of $159 per detainee per day, the direct financial costs of immigration detention are high.[146] Moreover, our nation suffers multiple adverse ripple effects

142. LIN SONG & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED 5 (1993) ("[W]hile on parole, offenders with the longest time served generally had higher recidivism rates than offenders with the shortest time served." (quoting Don M. Gottfredson, Michael R. Gottfredson & James Garofalo, *Time Served in Prison and Parole Outcomes Among Parolee Risk Categories*, 5 J. CRIM. JUST. 1, 8 (1977)); Long sentences may cause recidivism. Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1093 (2008) ("As of roughly a decade ago, prison increased crime by at least 7 percent. . . . [but] the true impact today is likely higher."); Paul Gendreau, Claire Goggin & Francis T. Cullen, *The Effects of Prison Sentences on Recidivism*, PUB. SAFETY CAN. 15 (1999), http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf ("Spending more vs. less time in prison or being incarcerated vs. remaining in the community was associated with slight increases in recidivism for 3 of 4 outcomes."); M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, 9 AM. L. & ECON. REV. 1, 22–23 (2007) (explaining that the harshness of prison conditions increases recidivism).

143. *See* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 5 tbl.4 (2002), *available at* http://bjs.gov/content/pub/pdf/rpr94.pdf; Pritikin, *supra* note 142, at 1087 ("It is well known that a small percentage of offenders commit a disproportionately high percentage of crimes." (citing PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION 44–46 (1982)), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2007/R2815.pdf; Christy A. Visher, *Incapacitation and Crime Control: Does A "Lock 'Em Up" Strategy Reduce Crime?*, 4 JUST. Q. 513, 523 (1987).

144. I and others have discussed the downsides of linking immigration enforcement to crime control. *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Sharpless, *supra* note 128.

145. Indeed, some might argue that my proposal is not generous enough to convicted noncitizens, as some people serve more than five years for offenses such as nonviolent drug crimes. *See* Hall, *supra* note 7, at 1105 (illustrating how life sentences for nonviolent crimes are possible).

146. NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 2 n.5 (2013) (report-

when noncitizens with family and other ties to the United States are detained and removed.[147]

A further justification for linking deportation only to relatively long sentences is the reality that the United States punishes people for crimes far more harshly than others in its peer group. Per capita, the United States criminally incarcerates more people for longer periods of time than any other country in the world.[148] We hold 2,228,400 people in our criminal jails and prisons.[149] Our rate of imprisonment compares to that of Russia.[150] We lock up over five times more people per capita than the United Kingdom, Canada, France, and Germany.[151] The United States punishes drug offenders much more severely than similarly situated countries.[152] Given how out of step the United States is with comparable countries, a relatively long sentence trigger for deportation would help to offset the effect of the United States' harsh sentencing practices.

B. Restoration of Immigration Judge Discretion

In addition to a lengthy sentence trigger, the restoration of discretion to immigration judges to halt deportations in appropriate cases

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ing that ICE claims the daily cost per detention bed is $119 but that this figure rises to $159 when ICE's operational expenses are included).

147. *See* KALINA BRABECK ET AL., THE PSYCHOSOCIAL IMPACT OF DETENTION AND DEPORTATION ON U.S. MIGRANT CHILDREN AND FAMILIES: A REPORT FOR THE INTER-AMERICAN HUMAN RIGHTS COURT 4 (2013); AJAY CHAUDRY ET AL., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 27–31 (2010); HUMAN IMPACT PARTNERS, FAMILY UNITY, FAMILY HEALTH: HOW FAMILY-FOCUSED IMMIGRATION REFORM WILL MEAN BETTER HEALTH FOR CHILDREN AND FAMILIES (2013); SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011).

148. *See* CONNIE DE LA VEGA ET AL., UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 7–9 (2012); ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 2–6 (10th ed. 2013), *available at* http://www.apcca.org/uploads/10th_Edition_2013.pdf; *see also* Kevin R. Reitz, *Sentencing*, *in* CRIME AND PUBLIC POLICY 467, 469 (James Q. Wilson & Joan Petersilia eds., 2011) ("[T]he United States [has] the largest per capita confinement population in the world . . . .").

149. *See* LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU J. STAT., U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013). Roughly ninety percent of those incarcerated are held in state jails and prisons. Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie – A Prison Policy Initiative Briefing*, PRISON POLICY INITIATIVE (Mar. 12, 2014), http://www.prisonpolicy.org/reports/pie.html (comparing the number of people incarcerated in the United States and the many types of correctional facilities and the reasons that people are confined there with the most recent data available as of March 12, 2014).

150. THE LEADERSHIP CONF. EDUC. FUND, A SECOND CHANCE: CHARTING A NEW COURSE FOR RE-ENTRY AND CRIMINAL JUSTICE REFORM 6 (2013) ("[A]fter America surpassed Russia in 1991, no other country has had a higher rate of incarceration."); Charles Patton III, *Incarceration Data: Selected Comparisons*, 2 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 151, 154 fig.3 (2008).

151. Patton, *supra* note 150. *See also* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 72 (2005) (discussing how "[p]rison in Europe is truly an exceptional sanction").

152. James P. Lynch & William Alex Pridemore, *Crime in International Perspective*, *in* Crime and Public Policy 5, 38 (James Q. Wilson & Joan Petersilia eds., 2011) ("The United States imposes prison and jail sentences in 67 percent of drug cases . . . [And] imposes much longer sentences than any of the other nations studied.").

would also compensate for the impossibility of crafting a simple and truly evenhanded system of deportation based only on the outcome of the criminal system. As discussed above, Congress has repealed much of the authority of immigration judges to use their discretion to stop deportations. A noncitizen's deportation fate is therefore largely sealed in the criminal justice system. If discretion were restored to immigration judges, they could act as fail-safes against unfair outcomes resulting from harsh sentencing practices, among other things. Moreover, the significant time saved by immigration judges not having to adjudicate complex challenges to removability could be used to adjudicate discretionary relief cases on the merits.[153]

Restoring discretion to stop deportation based on a criminal record would also bring the United States back into compliance with its international law obligations.[154] In 2010, the Inter-American Commission held in *Wayne Smith, Hugo Armendariz, et al.*[155] that the 1996 amendments to U.S. immigration law repealing discretionary relief for lawful permanent residents convicted of an aggravated felony violated the human rights to family life and due process.[156] The Commission found that the petitioners "had no opportunity to present a humanitarian defense to deportation or to have their rights to family duly considered before deportation. Nor were the best interests of their . . . U.S. citizen children taken into account by any decision maker."[157] According to the Commission, "a balancing test" was required to "reach a fair decision between the competing individual human rights and the needs asserted by the State."[158] Other international bodies, including the European Court of Human Rights,

153. The Honorable Immigration Judge Dana Leigh Marks, President of the National Association of Immigration Judges, has urged Congress to restore discretion and "allow[] immigration judges to consider the individual circumstances unique to each case." Dana Leigh Marks, *Let Immigration Judges be Judges*, HILL (May 9, 2013, 8:03 PM), http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges.

154. DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 4, 53 (2008); Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699, 722–39 (2014); Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 33 BERKELEY J. INT'L L. (forthcoming 2016), *available at* http://ssrn.com/abstract=2526521.

155. Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10 (2010).

156. *Id.* at ¶ 1–5. In 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 440–42, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, Div. C, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.), restricted and then repealed the discretion of immigration judges to halt removal under former section 8 U.S.C. §1182(c).

157. Smith v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶ 59 (2010).

158. *Id.* at ¶ 58; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS OF ASYLUM SEEKERS WITHIN THE CANADIAN REFUGEE DETERMINATION SYSTEM ¶ 166 (2000), *available at* http://www.cidh.oas.org/countryrep/Canada2000en/canada.htm ("[S]eparation of a family . . . may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end.").

have also ruled that human rights law places limitations on a nation's sovereign right to deport.[159]

The United States' punitive approach to criminal and immigration law enforcement puts it out of step with its peer group and international standards. Reform efforts to simplify the law and fully realize immigrants' Sixth Amendment rights must go hand in hand with the scaling back of harsh immigration consequences for crimes and the restoration of immigration judge discretion.

CONCLUSION

The legal regime governing deportation for a crime is simultaneously complex and coherent. I have argued that we should interpret *Padilla* as enunciating a rule about predictability, not simplicity. Defense counsel discharge their *Padilla* duty only when they advise their clients of predictable immigration consequences, even if they must engage in legal research.[160] At the same time, all stakeholders—defendants, defense attorneys, criminal and immigration judges, and prosecutors—stand to gain from the simplification of the rules governing the intersection of criminal and immigration law. The current rules largely hinge on a type-of-crime analysis that can be complex because state convictions must be compared to a federal standard. While this categorical approach has become much better defined in recent years, a sentence trigger would be exponentially easier to understand and implement.

A fair sentence-based regime would be difficult to achieve, however. Congress has passed increasingly harsh legislation against noncitizens convicted of a crime over the last three decades, and any wholesale revamping based on sentence length could leave more, rather than fewer, people subject to removal. The wide disparities in sentencing practices, including on invidious grounds, also call into question the efficacy of length of sentence as a basis for removal. Notwithstanding these formidable reservations, I have argued that, on balance, both noncitizens and our justice system are better served by a sentence-based removal regime that conditions removal of lawfully present noncitizens on having actually been incarcerated for more than five years for a crime and restores discretion to immigration judges to halt removal in appropriate cases. An over-five-years sentence basis for deportation is sufficiently lengthy to ameliorate the effects of unfair sentencing. The ability of judges to grant

159. Human Rights Comm., *Madafferi v. Australia*, Comm. No. 1011/2001, ¶ 9.8, U.N. Doc. CCPR/C/81/D/1011/2001 (Aug. 26, 2004) (finding a violation of the right to family life if immigrant was deported because of hardship to his family who had lived in Australia for many years); Amrollahi v. Denmark, App. No. 56811/00, Eur. Ct. H.R., ¶¶ 41, 43–44 (2002) (holding that Denmark would violate the right to family life if it deported a man with a serious drug offense because his family would face "serious difficulties"); Boultif v. Switzerland, App. No. 54273/00, Eur. Ct. H.R., ¶ 47 (2001) (ruling that an immigrant convicted of a violent crime could not be deported because the sovereign right to deport for a criminal record must be put in "fair balance" with right to family life).

160. *See* Padilla v. Kentucky, 559 U.S. 356, 357 (2009).

relief from deportation on a case-by-case basis would further help to ensure just results. Moreover, such a scheme would also restore United States' compliance with international law.

As our nation contemplates immigration reform, it must carefully consider how the law should regard noncitizens with criminal records. Amendments to immigration law have historically constituted a one-way street of progressively harsh penalties for criminal activity. The current debate about immigration continues to perpetrate the over-simplified assumption that any noncitizen with a nontrivial criminal record has no place in our society. While the need for clear and simple immigration laws governing deportation for a crime is beyond controversy, reform efforts in the name of simplicity must simultaneously seek to reverse our nation's draconian historical approach.