NOTES

"A PRISON IS A PRISON IS A PRISON": MANDATORY IMMIGRATION DETENTION AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

INTRODUCTION

Roberto Cuellar-Gomez, a citizen of El Salvador, was admitted to the United States as a lawful permanent resident on April 4, 1992.[1] Nearly sixteen years later, on January 3, 2008, he was convicted, without the assistance of counsel, of misdemeanor possession of marijuana.[2] After a second conviction for marijuana possession eight months later, the Department of Homeland Security (DHS) concluded that Cuellar-Gomez had committed a "drug trafficking crime," and thus an "aggravated felony," within the meaning of the Immigration and Nationality Act[3] (INA), and initiated removal proceedings against him.[4]

Cuellar-Gomez's story highlights a unique problem facing noncitizens accused of minor crimes. Under longstanding Supreme Court precedent established in *Scott v. Illinois*,[5] criminal defendants are not entitled to invoke the Sixth Amendment's guarantee of the right to counsel when they are facing minor charges that do not carry the threat of jail time.[6] As a result, many states and municipalities do not provide counsel to indigent defendants in such circumstances.[7] But those same minor crimes can render a noncitizen deportable and subject to mandatory detention pending removal.[8] Because there is no

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[1] Cuellar-Gomez, 25 I. & N. Dec. 850, 851 (B.I.A. 2012).

[2] *Id.* at 850, 853.

[3] 8 U.S.C. §§ 1101–1537 (2012).

[4] *Cuellar-Gomez*, 25 I. & N. Dec. at 851–52.

[5] 440 U.S. 367 (1979).

[6] *Id.* at 373–74.

[7] *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1778 (2013); *see also id.* at 1778 n.149 (collecting state statutes). Wichita, Kansas, where Cuellar-Gomez was initially convicted, is one such municipality. *See* WICHITA, KAN., CODE OF ORDINANCES §§ 1.04.065, .210 (2015); *see also* KAN. STAT. ANN. § 12-4405 (West 2008). Cuellar-Gomez's first conviction appears to have violated even the lenient rule of *Scott*, however, since he was, in fact, sentenced to sixty days in jail. *Cuellar-Gomez*, 25 I. & N. Dec. at 851. The Board of Immigration Appeals (BIA) refused to consider this argument, holding that Cuellar-Gomez had to "seek postconviction relief in the Kansas courts" and that the "conviction remains effective for immigration purposes . . . unless and until it is vacated by a court of competent jurisdiction." *Id.* at 855.

[8] After *Cuellar-Gomez*, whether a noncitizen was represented during his criminal proceedings has no bearing on whether immigration consequences can attach to the resultant conviction. *See* Cade, *supra* note 7, at 1778.

constitutional right to counsel in immigration proceedings,[9] the end result is that noncitizens may be tried, convicted, confined in immigration detention facilities for months or years, and finally deported without the right to the assistance of counsel at any point.

Some commentators, noticing this problem, have argued that the Supreme Court's decision in *Padilla v. Kentucky*[10] implicitly altered this analysis. In *Padilla*, the Court held that the Sixth Amendment's guarantee of the effective assistance of counsel required an attorney representing a noncitizen to warn his client of the potential immigration consequences of a guilty plea.[11] In so holding, the Court rejected the view, previously universally accepted among lower federal courts, that a sharp distinction between the direct consequences of a criminal conviction and its *collateral* consequences[12] delineates the boundary of the Sixth Amendment.[13] Instead, the Court recognized that "deportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[14] Alice Clapman notes that *Padilla* is thus in tension with *Scott*'s insistence on prison time as the only criminal penalty that matters for Sixth Amendment purposes. She argues that *Padilla* should prompt a reinterpretation of *Scott* according to which prison time is merely a "proxy for a deprivation so severe that it could only be imposed after a full adversarial process."[15] Professor John King would go even further, arguing that after *Padilla*, the right to counsel should extend to "any indigent facing criminal charges."[16]

This Note takes a different approach. While there can be little doubt that *Padilla* represents a watershed moment in the Court's Sixth Amendment jurisprudence, it is also not obvious that in laying down a rule governing standards for the effective assistance of counsel, the Court would have understood itself to be expanding the scope of the underlying right. Both the Supreme Court and lower courts have in some circumstances found a right to the effective assistance of counsel even in the absence of an underlying right to the appointment of coun-

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[9] Immigration proceedings are civil, not criminal, Zadvydas v. Davis, 533 U.S. 678, 690 (2001), and the Supreme Court has long held that "the Sixth Amendment does not govern civil cases," Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011).

[10] 559 U.S. 356 (2010).

[11] *Id.* at 360.

[12] The *Padilla* Court described collateral consequences as "those matters not within the sentencing authority of the state trial court." *Id.* at 364.

[13] *See* Chaidez v. United States, 133 S. Ct. 1103, 1108–10 (2013).

[14] *Padilla*, 559 U.S. at 364 (footnote omitted).

[15] Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 607 (2011).

[16] John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 6 (2013).

sel.[17] Standing alone, therefore, *Padilla* is unlikely to provide a solid foundation upon which to erect a universal right to the appointment of counsel for noncitizens facing criminal charges that may result in deportation. There is, however, another aspect of the modern immigration enforcement regime that arguably provides a sounder basis for such a right: mandatory detention. Because the INA mandates that nearly all noncitizens who are deportable because of criminal convictions — even for extremely minor crimes — be detained during the pendency of their deportation proceedings, those criminal convictions do, for all practical purposes, result in the "actual imprisonment" required by *Scott*.[18] As a result, while deportation is often "the most important part . . . of the penalty that may be imposed on noncitizen" criminal defendants,[19] it is detention that provides the most promising basis for expanding the right to the appointment of counsel. Though the Court has previously characterized immigration detention as "civil" or "regulatory" rather than criminal, this Note argues that the Court should recognize that, in the words of one scholar, "a prison is a prison is a prison."[20] Immigration detention should thus satisfy *Scott* and provide the basis for a Sixth Amendment right to counsel.

I. THE EVOLUTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[21] This language appears, at first blush, to be straightforward and absolute. Indeed, the Supreme Court has asserted that "[t]he provisions of [the Constitution] on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning."[22] In practice, however, the meaning of the Sixth Amendment's guarantee of the right to counsel has been

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[17] *See* Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (holding that "ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial" may excuse a procedural default of the underlying claim, but declining to announce a constitutionally protected right to counsel at an initial-review collateral proceeding); Hernandez v. Mukasey, 524 F.3d 1014, 1017 (9th Cir. 2008) (explaining that "if an individual chooses to retain counsel [in a deportation proceeding], his or her due process right 'includes a right to *competent representation*'" (quoting Ray v. Gonzales, 439 F.3d 582, 587 (9th Cir. 2006))).

[18] *See* Scott v. Illinois, 440 U.S. 367, 373 (1979).

[19] *Padilla*, 559 U.S. at 364.

[20] César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 363 (2012).

[21] U.S. CONST. amend. VI.

[22] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866); *see also id.* at 120 (describing the criminal justice–related amendments as having been "expressed in such plain English words, that it would seem the ingenuity of man could not evade them").

anything but obvious. As Clapman explains, the Supreme Court's Sixth Amendment jurisprudence has been marked by "tension between . . . expansive and constrictive conceptions of the right to counsel,"[23] with the Court adopting each at different times.

Before the twentieth century, the Sixth Amendment was not understood to provide any affirmative guarantee of court-appointed counsel. To the contrary, "[t]he historical consensus is that this clause was meant to establish a negative, not a positive, right."[24] That consensus changed in 1932 with the Court's decision in *Powell v. Alabama*.[25] The defendants in *Powell* were nine African American men accused of raping two white women, a capital offense in Alabama at that time.[26] They were unrepresented until the morning of the trial, when the trial court "appointed an out-of-state lawyer who said that he had not prepared, was not familiar with Alabama procedure, and had merely come down to Alabama 'as a friend.'"[27] All nine were tried, convicted, and sentenced to death in a single day.[28]

The Court held that in light of the egregious circumstances of the case, the nominal appointment of counsel was insufficient and "the failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process."[29] While the Court stopped short of finding that the Sixth Amendment right to counsel was fully incorporated in the Fourteenth Amendment's due process guarantee, it nevertheless concluded that in many circumstances the assistance of counsel is of fundamental importance in securing a fair trial that comports with due process. The Court described the importance of the right in sweeping language, explaining that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel"[30] and asserting that a defendant "requires the guiding hand of counsel at every step in the proceedings against him."[31] But while this language intimates "that *no* adversarial proceeding, criminal or civil, can be fair without a

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[23] Clapman, *supra* note 15, at 599.

[24] *Id.* at 598; *see also* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."). On the history of the Sixth Amendment right to counsel, see generally JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL (2002).

[25] 287 U.S. 45 (1932).

[26] *Id.* at 49–50.

[27] King, *supra* note 16, at 8 n.44 (quoting *Powell*, 287 U.S. at 55).

[28] *Powell*, 287 U.S. at 50.

[29] *Id.* at 71; *see also id.* at 58 ("Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.").

[30] *Id.* at 68–69.

[31] *Id.* at 69.

presentation on both sides by a skilled practitioner of law,"[32] later in the opinion the Court scrupulously limited the scope of the holding, requiring the appointment of counsel only "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."[33]

Over the next thirty years, the Court at times appeared to vacillate between *Powell*'s extremes.[34] The decisive moment came with the landmark decision in *Gideon v. Wainwright*,[35] which, quoting at length from the broadest language in *Powell*, fully incorporated the Sixth Amendment right to counsel against the states. The Court explained that it was an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," and stressed the fundamental unfairness of denying counsel to defendants while states "spend vast sums of money to establish machinery to try defendants accused of crime."[36] *Gideon* thus took a substantial step toward establishing an unqualified right to counsel in "all criminal prosecutions."

The Court seemed inclined to continue in that direction in its next major decision in this area, *Argersinger v. Hamlin*,[37] which explicitly extended *Gideon* to misdemeanor prosecutions and held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[38] The length of confinement was irrelevant, since "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[39]

The next major right-to-counsel case, however, brought to a halt the continuing expansion of the right. In *Scott v. Illinois*, the Court determined that "*Argersinger* did indeed delimit the constitutional

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[32] Clapman, *supra* note 15, at 599.

[33] *Powell*, 287 U.S. at 71.

[34] *Compare* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)), *with* Betts v. Brady, 316 U.S. 455, 471 (1942) (rejecting the view that "the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment," *id.* at 465).

[35] 372 U.S. 335 (1963).

[36] *Id.* at 344.

[37] 407 U.S. 25 (1972).

[38] *Id.* at 37.

[39] *Id.* (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970) (plurality opinion)).

right to appointed counsel in state criminal proceedings,"[40] and held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[41] *Scott* thus sharply limited the broad understanding of the right to counsel as central to the fundamental fairness of the trial process that was evident in *Powell* and *Gideon*. But despite its arguable inconsistency with its predecessors, the line drawn in *Scott* has remained largely undisturbed since it was first articulated.

The Court has, however, announced one very important qualification. Despite the language in *Scott* requiring "actual imprisonment" before the right to the appointment of counsel attaches, in *Alabama v. Shelton*[42] the Court held that the imposition on an unrepresented defendant of a suspended sentence that "*may* 'end up in the actual deprivation of a person's liberty'" violated the Sixth Amendment.[43] Because the punishment imposed had the *potential* to result in imprisonment, the defendant was "entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his *vulnerability* to imprisonment is determined."[44]

In the years since *Scott* was decided, the rise of zero-tolerance policing and the proliferation of serious collateral consequences even for minor criminal convictions have dramatically changed the context in which minor crimes are prosecuted.[45] For noncitizens, the most important change has been the unprecedented increase in the severity of immigration consequences attached to criminal convictions. That development is discussed in the next Part.

II. MINOR CRIMES IN THE IMMIGRATION CONTEXT

Over the last thirty years, immigration enforcement has undergone a sea change. The hallmark of this change has been the "growing

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[40] 440 U.S. 363, 373 (1979).

[41] *Id.* at 373–74. Notably, then-Justice Rehnquist, the author of the majority opinion in *Scott*, joined Justice Powell's concurring opinion in *Argersinger*, which would have rejected such a rigid rule. *See Argersinger*, 407 U.S. at 44 (Powell, J., concurring). Justice Powell's opinion recognized that, in many cases, the collateral consequences of conviction can be more serious than brief imprisonment and argued that "[w]hen the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process." *Id.* at 48 (footnote omitted).

[42] 535 U.S. 654 (2002).

[43] *Id.* at 658 (emphasis added) (quoting *Argersinger*, 407 U.S. at 40).

[44] *Id.* at 674 (emphasis added).

[45] *See* King, *supra* note 16, at 17–34 (discussing these developments and giving examples of collateral consequences including immigration issues, sex offender registries, sentencing enhancements, and adverse impacts on child custody, parental rights, and housing, among others).

convergence of two critical regulatory regimes — criminal justice and immigration control."[46] This convergence has involved the increasing use both of criminal sanctions to punish immigration violations[47] and of "non-immigration-related crimes" to "trigger deportation and other adverse immigration consequences."[48] As one scholar puts it, "[i]mmigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct."[49]

A number of commentators have recognized that the "apparent basis for using criminal law as a response to migration issues is the myth of migrant criminality, sometimes tinged with (or even steeped in) racism or nativism."[50] Despite the fact that "the evidence [is] fairly consistent that immigrants commit crimes at relatively low rates compared to the native born and that the presence of immigrants is negatively correlated with crime rates,"[51] rhetoric associating noncitizens with criminal behavior continues to pervade public discourse,[52] even in the context of moves to liberalize immigration law, as President Obama recently demonstrated with his call to deport "felons, not families."[53] Whatever the underlying motivation, the practical result has been a remarkable increase in the harshness of immigration consequences for noncitizens convicted of even minor crimes.

A. The Scope of the Crime-Related Grounds of Deportability

Perhaps the clearest sign of this change has been the enormous expansion of crimes that can trigger immigration consequences. As Clapman points out, "[p]rior to the 1980s, only a relatively narrow range of convictions triggered deportation."[54] Beginning in the mid-1980s, however, Congress began passing legislation that increased the severity of immigration consequences attaching to an ever-broader list

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[46] Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007).

[47] *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635–40 (2012).

[48] Legomsky, *supra* note 46, at 471.

[49] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

[50] Chacón, *supra* note 47, at 629; *see also* Legomsky, *supra* note 46, at 500 ("[P]erceptions of immigrants as criminals appear to influence both the tone of the public debate and the outcomes.").

[51] Chacón, *supra* note 47, at 628.

[52] *See, e.g.*, Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST: FACT CHECKER (July 8, 2015), http://www.washingtonpost.com/blogs/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime [http://perma.cc/3ZVN-8Z3Z].

[53] *See* Christie Thompson, *Deporting "Felons, Not Families,"* MARSHALL PROJECT (Nov. 21, 2014, 5:22 PM), https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families [http://perma.cc/HC2L-JW3Y].

[54] Clapman, *supra* note 15, at 590.

of crimes.[55] Most notably, as part of the Anti-Drug Abuse Act of 1988,[56] Congress introduced the category of "aggravated felonies." Originally limited to murder, illicit trafficking in firearms, and drug trafficking, aggravated felonies carry the most severe immigration consequences: mandatory removal, mandatory detention during removal proceedings, ineligibility for discretionary relief, and severe criminal penalties for reentry following deportation.[57]

Congress dramatically expanded the category of aggravated felonies with two 1996 laws that together represent a major turning point in immigration enforcement: the Antiterrorism and Effective Death Penalty Act of 1996[58] (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[59] (IIRIRA). Since the passage of the 1996 laws, one of the most frequently remarked upon aspects of federal immigration law has been the "Alice-in-Wonderland-like definition of the term 'aggravated felony.'"[60] Commentators have frequently observed that "[a]s the term is defined, a crime need not be either aggravated or a felony."[61] For example, an aggravated felony includes a "crime of violence . . . for which the term of imprisonment [is] at least one year."[62] This definition sounds suitably serious, but it has been applied to trigger removal proceedings on the basis of a single conviction for misdemeanor battery for hair-pulling where the defendant received only a suspended sentence.[63] Similarly, courts have found that a conviction for shoplifting "four packs of Newport's cigarettes and two packs of Tylenol Cold Medicine," for which the defen-

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[55] For an account that ties this transformation to the rise of draconian criminal justice laws as part of the "war on drugs," see César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

[56] Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S. Code).

[57] *See* Hernández, *supra* note 55, at 1366–67; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

[58] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[59] Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

[60] Morawetz, *supra* note 57, at 1939.

[61] *Id.*; *see* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 561 (2013); *see also* United States v. Pacheco, 225 F.3d 148, 149 (2d Cir. 2000) ("In the case before us, we deal with the question of whether Congress can make the word 'misdemeanor' mean 'felony.' As will be seen, we hold that it can, because in this instance, we consider Congress 'to be master — that's all.'" (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS (1871))).

[62] 8 U.S.C. § 1101(a)(43)(F) (2012).

[63] *See* Lee, *supra* note 61, at 561 (citing Anthony Lewis, *Abroad at Home: "This Has Got Me in Some Kind of Whirlwind,"* N.Y. TIMES (Jan. 8, 2000), http://www.nytimes.com/2000/01/08/opinion/abroad-at-home-this-has-got-me-in-some-kind-of-whirlwind.html).

dant received a suspended sentence of one year, satisfied the "theft offense" aggravated felony.[64]

The INA's provisions for deportability on the basis of so-called crimes involving moral turpitude (CIMT) and controlled substances offenses go even further in attaching severe immigration consequences to minor crimes. The Act provides that a noncitizen is deportable if convicted, within five years after admission, of a single CIMT *punishable* by a year or more in prison, regardless of the penalty actually imposed;[65] furthermore, a noncitizen convicted of two or more CIMTs at any time, and subject to any punishment, is deportable.[66] CIMTs are notoriously difficult to define in advance; they constitute "a long-standing, but fairly amorphous category of crimes that are considered by courts to be 'morally reprehensible and intrinsically wrong.'"[67] In general, crimes involving some element of dishonesty, including petty theft or theft of services, tend to qualify as CIMTs. For example, subway turnstile jumping has been held to constitute a CIMT,[68] as has shoplifting,[69] "attempted petit larceny,"[70] and possession of stolen bus transfers.[71] Despite the severity of the potential immigration consequences, "[d]efendants often face petty theft charges without counsel."[72]

The INA also makes deportable any noncitizen convicted of a single offense "relating to a controlled substance," regardless of the punishment, or lack thereof, imposed, with the exception of "a single offense involving possession for one's own use of 30 grams or less of marijuana."[73] A conviction involving any amount at all of a drug other than marijuana renders a noncitizen deportable. Moreover, since the statute requires that the conviction need only be "relat[ed] to" a controlled substance, courts have consistently applied this provision to convictions merely for drug paraphernalia.[74] And as with minor

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64 *Pacheco*, 225 F.3d at 150; *see also id.* at 155.

65 *See* 8 U.S.C. § 1227(a)(2)(A)(i).

66 *See id.* § 1227(a)(2)(A)(ii).

67 Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 611 (2010) (citing Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004)).

68 *See* Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997). The example of turnstile jumping has been much discussed in the literature. *See, e.g.*, Cade, *supra* note 7, at 1759; Clapman, *supra* note 15, at 594; Lee, *supra* note 61, at 561; Morawetz, *supra* note 57, at 1945. In at least one case, a noncitizen charged as deportable for turnstile jumping was held in immigration detention for over three years. *See* Johnson v. Holder, 413 F. App'x 435, 436, 439 (3d Cir. 2010).

69 Da Rosa Silva v. INS, 263 F. Supp. 2d 1005, 1012 (E.D. Pa. 2003).

70 Caesar v. Ashcroft, 355 F. Supp. 2d 693, 703 (S.D.N.Y. 2005).

71 Michel v. INS, 206 F.3d 253, 256 (2d Cir. 2000).

72 Clapman, *supra* note 15, at 594; *see also id.* (citing accounts from practitioners confirming this phenomenon).

73 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

74 *See, e.g.*, Barma v. Holder, 640 F.3d 749, 751 (7th Cir. 2011); Alvarez Acosta v. U.S. Attorney Gen., 524 F.3d 1191, 1195–96 (11th Cir. 2008).

CIMTs, "states often prosecute drug-related offenses without appointing counsel even if these offenses may render a defendant deportable."[75]

These problems are compounded by the INA's definition of "conviction." For a noncitizen to be "convicted" of a crime, and thus deportable, under the INA, a court need not actually enter a guilty verdict. Instead, as long as a noncitizen "has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed," a conviction exists for immigration purposes.[76] In other words, the statute attaches full immigration consequences even to many state court dispositions that do not result in actual criminal convictions. The result is that "criminal court dismissals or plea vacaturs that result from rehabilitative expungements or postplea diversion programs are nonetheless convictions under federal immigration law and thus trigger grounds of removal."[77]

B. Mandatory Detention

The 1996 laws did more than expand the list of crimes that can result in deportation; they also drastically increased the use of immigration detention. Previously, noncitizens in removal proceedings were detained only in "rare cases" when they were found to be a significant flight risk or to pose a particular danger to the community; "[t]he general practice was to release undocumented immigrants pending their administrative proceedings."[78] As Professor César Cuauhtémoc García Hernández has shown, the groundwork for today's immigration detention regime was established during the 1980s in conjunction with Congress's burgeoning effort to crack down on crime as part of the "war on drugs," when Congress began requiring the detention of noncitizens convicted of aggravated felonies pending removal proceedings.[79] But the major shift came with the advent of AEDPA and IIRIRA, which together "changed the face of immigration law."[80]

The INA now requires DHS to detain nearly all noncitizens who are deportable on the basis of criminal conduct. Under the heading "Detention of criminal aliens," the statute provides that "[t]he Attorney General *shall* take into custody any alien who" is deportable because

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[75] Clapman, *supra* note 15, at 595; *see also id.* (collecting sources attesting to the frequency of this practice and citing state drug laws that "impose penalties that do not make a defendant eligible for representation at the public expense").

[76] 8 U.S.C. § 1101(a)(48)(A)(i)–(ii).

[77] Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 314 (2008).

[78] MARK DOW, AMERICAN GULAG 7 (2004).

[79] *See* Hernández, *supra* note 55, at 1360–72.

[80] *Id.* at 1370.

of a criminal conviction.[81] The statute permits the release of the noncitizen only in extremely narrow circumstances, when "release of the alien from custody is necessary" to protect a witness or otherwise assist in an investigation, "and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."[82] There is only a single exception: a noncitizen is not subject to mandatory detention if he or she is deportable on the basis of a single CIMT conviction for which the sentence imposed was less than one year.[83]

The upshot of these provisions is that a vast number of noncitizens convicted of minor crimes are subject to mandatory detention, with no bond hearing or other review to evaluate the necessity of detention in each individual case.[84] A detained noncitizen is entitled to a hearing to determine whether the crime asserted as a basis for removal falls within the mandatory detention provision,[85] but beyond this there is no room for discretion. The result has been the development, over the last two decades, of an immigration detention system of staggering and unprecedented scale.[86] In 2012 Immigration and Customs Enforcement (ICE) detained some 478,000 people, "[w]idely believed" to comprise the "largest immigration detention population in the world,"[87] at a rate of 34,000 each day.[88] Detainees are held in a disparate network of facilities, including "244 state and county jails . . . contracted to house immigrant detainees on behalf of ICE," as well as other facilities owned by private correctional corporations or by ICE itself.[89]

The growth of the detention system has continued apace despite spiraling costs and evidence that its regulatory objectives can be achieved far more cheaply by other means. The stated purpose of immigration detention is twofold: to ensure the presence of noncitizens at their deportation proceedings, and to protect the public from danger-

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[81] 8 U.S.C. § 1226(c)(1) (emphasis added).

[82] *Id.* § 1226(c)(2).

[83] *See id.* § 1226(c)(1)(C).

[84] The Supreme Court has held that noncitizens who are detained pending removal have no constitutional right to an individualized bond determination. *See* Demore v. Kim, 538 U.S. 510, 531 (2003).

[85] *See* Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999).

[86] *See generally* Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody*," 48 MICH. J.L. REFORM 879 (2015).

[87] *Id.* at 879.

[88] In fact, a little-discussed statutory provision known as the "bed mandate" *requires* ICE to fill 34,000 beds with noncitizen detainees *each day*. *See* Christina Elhaddad, Comment, *Bed Time for the Bed Mandate: A Call for Administrative Immigration Reform*, 67 ADMIN. L. REV. ACCORD 32, 33 (2014).

[89] NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 4 (2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-immigation-Detention-August-2013-FINAL.pdf [http://perma.cc/A7WF-UDD2].

ous criminals.[90] To achieve these goals, the House of Representatives approved over $2 billion for immigration detention — that is, $5.6 million each day, or $164 per person per day — in FY2014.[91] On the other hand, ICE has made only sparing use of alternatives to detention, such as remote monitoring. These alternatives cost between $0.17 per person per day and $17 per person per day, meaning ICE could save over $1.4 billion using even the most expensive alternative and continuing to detain those convicted of violent crimes.[92] The astronomical cost of the current detention regime, meanwhile, produces only minimal gains in securing the presence of noncitizens at hearings; the rate of appearance at immigration hearings for noncitizens monitored with alternative methods was 93.8%.[93] The public safety justification fares no better. In 2009, only 51% of detainees were felons, of whom a mere 11% had committed violent crimes.[94] Roughly 94% of all detainees, therefore, were detained on the basis of nonviolent crimes; among the most common were drug and traffic offenses.[95] The "majority of the [detained] population is characterized as low custody, or having a low propensity for violence."[96]

The detention system also imposes enormous costs on the noncitizens swept up in it. ICE routinely transfers detainees to detention facilities located thousands of miles from their homes — according to Human Rights Watch, 1.4 million such transfers occurred between 1999 and 2008.[97] Not only do these transfers take detainees away from their families and support networks, they also make it extremely difficult for them to retain counsel. As one commentator notes, ICE exhibits a "pattern of transferring detainees from urban areas such as New York or Los Angeles, near where immigrants live, to facilities in Louisiana, Texas, or Arizona underserved by lawyers."[98] In short, "detention creates barriers to accessing counsel, and detention without

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[90] *See* Demore v. Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.").

[91] NAT'L IMMIGRATION FORUM, *supra* note 89, at 3.

[92] *Id.* at 11.

[93] *Id.*

[94] DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009).

[95] *Id.*

[96] *Id.* at 2.

[97] HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY 1 (2009), http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf [http://perma.cc/2J5C-UJX7].

[98] Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 76 (2012).

counsel in turn impacts the outcome of deportation proceedings."[99] The disparities are striking: one well-known study found that among noncitizens challenging their removal, those who are represented by counsel and not subject to detention are successful 74% of the time, while those who are unrepresented and detained are successful a mere 3% of the time.[100]

Moreover, immigration detention can last for months or years while removal proceedings are pending.[101] During this period, a noncitizen subject to mandatory detention will be kept in custody in a jail or similar facility often thousands of miles from home. The result, unsurprisingly, is that detainees "often conclude that the costs of [contesting their removal] — years in detention and uncertain success — are simply too high," and give up their challenges.[102] Thus, while "some detainees' cases resolve more quickly, it is likely because many detainees accept deportation to escape detention, regardless of the merits."[103]

III. MANDATORY DETENTION AND THE RIGHT TO COUNSEL

As the foregoing Parts demonstrate, the current immigration regime places noncitizens accused of minor crimes in an untenable situation. Without the protection of the Sixth Amendment, they are pushed through a misdemeanor court system designed to process high numbers of defendants as quickly as possible.[104] Lacking advice from counsel, they may thus accept a plea deal without adequate — or indeed any — knowledge of the immigration consequences of their convictions. This concern is particularly acute when a court offers a rehabilitative solution, such as a dismissal of the charge following completion of a drug treatment program. The resulting disposition, even for the most minor crimes, is likely to render the defendant deportable and trigger mandatory detention, which will further burden the noncitizen's ability to contest his or her removal. This is a set of circumstances with no parallel in our system. On the basis of conduct

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[99] *Id.* at 75.

[100] N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE 3 (2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf [http://perma.cc/2DTA-AVK6].

[101] Noferi, *supra* note 98, at 81 (noting that the average immigration case involving a criminal charge has been pending for 455 days). This is contrary to the assertion of the Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003), which based its holding in part on the assumption that immigration detention "lasts roughly a month and a half in the vast majority of cases in which it is invoked," *id.* at 530.

[102] Morawetz, *supra* note 57, at 1947.

[103] Noferi, *supra* note 98, at 81.

[104] On misdemeanor courts, see generally Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); and Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

that a state may deem so trivial as to warrant a mere fine, a noncitizen who has lived in the United States for most of his life may be arrested, imprisoned for months or years, and finally banished from this country, without the assistance of counsel at any step along the way.

On the other hand, the Supreme Court's Sixth Amendment jurisprudence already provides a sound basis for remedying this state of affairs. In *Argersinger*, the Court, noting the "serious repercussions" for a defendant who is imprisoned for even a short time,[105] held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[106] In *Scott*, the Court, in holding that *Argersinger* represented the outer limit of the Sixth Amendment right to counsel, ratified "the central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[107] Both *Argersinger* and *Scott* took functional approaches, holding that the Constitution required appointed counsel when the practical consequences for the defendant were sufficiently severe.[108]

The argument of this Note is that immigration detention imposed as the result of a criminal conviction is the functional equivalent of penal incarceration, and thus implicates the same concerns that, in *Argersinger* and *Scott*, required the appointment of counsel. A noncitizen subject to detention faces the same "serious repercussions affecting his career and his reputation"[109] as an incarcerated citizen, in addition to a substantially increased likelihood of deportation. Just as much as penal incarceration, detention is a "penalty different in kind" from other, less serious sanctions.

The Court's later cases have only strengthened this argument. In *Shelton*, the Court held that, under *Scott*, the Sixth Amendment prohibited states from imposing a *suspended* sentence of imprisonment on a defendant who was not represented by counsel.[110] The Court explained that the mere possibility that the state could subsequently activate the suspended sentence was enough to trigger the right to counsel.[111] Furthermore, the fact that the suspended sentence could not be activated without a subsequent proceeding did nothing to vitiate the Sixth Amendment violation arising from the deprivation of counsel in the proceeding "where [the defendant's] guilt was adjudicated[and] el-

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105 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970) (plurality opinion)).

106 *Id.*

107 Scott v. Illinois, 440 U.S. 367, 373 (1979).

108 Indeed, the *Scott* Court acknowledged that the right to counsel had long since "departed from the literal meaning of the Sixth Amendment." *Id.* at 372.

109 *Argersinger*, 407 U.S. at 37 (quoting *Baldwin*, 399 U.S. at 73).

110 Alabama v. Shelton, 535 U.S. 654, 658 (2002).

111 *Id.*

igibility for imprisonment established."[112] As the dissent put it, the effect of the majority's decision was to "extend[] the misdemeanor right to counsel to cases bearing the mere threat of imprisonment."[113] And in *Padilla* the Court held for the first time that immigration consequences flowing from criminal convictions have Sixth Amendment significance.[114]

Mandatory detention presents a particularly strong case for further relaxing the heretofore rigid boundaries of the Sixth Amendment. The difficulty, of course, is that the Supreme Court has long understood immigration detention and removal to be mere *civil* sanctions,[115] separate and independent from any criminal penalty and comprising only part of the so-called collateral consequences of conviction. But as the rest of this Part demonstrates, these distinctions break down in the immigration context. This is so for two reasons: First, as a practical matter, "civil" immigration detention is virtually indistinguishable from criminal incarceration — indeed, it is often worse. Second, unlike many "collateral" consequences, immigration detention flows directly from the sentencing decisions of criminal courts, which exert a great deal of control over immigration consequences. Affording counsel to noncitizens is thus particularly important because effective counsel "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of [immigration consequences]."[116] Given the severity of the consequences of mandatory detention and their close relationship to the concerns animating the Court's right-to-counsel jurisprudence, the reach of the Sixth Amendment's guarantee of counsel should not depend on an artificial, formalist distinction. In short, this Note argues for what Daniel Kanstroom has called "Sixth Amendment Realism."[117]

A. The Civil/Criminal Distinction

Mark Dow recounts a story of visiting a county jail in New Jersey that was being used in part to house Immigration and Naturalization Service (INS) detainees. During a media tour, Dow writes, "the jail warden kept referring to his INS prisoners as 'inmates' and then quickly corrected himself by saying 'detainees.'"[118] This is typical of

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[112] *Id.* at 665.

[113] *Id.* at 675 (Scalia, J., dissenting).

[114] *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

[115] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.").

[116] *Padilla*, 559 U.S. at 373.

[117] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1466 (2011).

[118] DOW, *supra* note 78, at 16.

the position ICE takes today, in which the agency "goes out of its way to encourage use of the civil label to describe its detention apparatus."[119] Dow's anecdote encapsulates the absurdity of the official line, according to which "a person in the custody of [immigration authorities] is an administrative detainee — even when she or he is in your nearby county jail, sharing a cell with a sentenced inmate."[120] Indeed, some 70% of immigration detainees are simply held in state or county jails.[121] The remainder are held in "prison-like conditions,"[122] often in private facilities that may actually be worse for detainees than prisons.[123] Hernández points out that "the most invasive features of penal imprisonment resonate through the immigration detention estate," including routine strip searches, color-coded uniforms, restricted movement, and limited, no-contact visits with friends and family.[124]

The rhetoric of "civil detention" does more than simply paper over the obvious fact that immigration detainees are prisoners; in many cases it provides cover for making noncitizen detainees *worse off* than inmates incarcerated as criminal punishment. Dow points to instances in which immigration authorities deny detainees "participation in educational or work release programs . . . even when non-INS inmates in the same facility do participate — all on the grounds that they are not 'inmates' or 'prisoners' but 'detainees.'"[125] In this sense, the language of "civil confinement" and "detention" in place of incarceration or imprisonment is an example of the broader trend in immigration enforcement, in which "[i]mmigration law has borrowed the enforcement components of criminal justice"[126] while "consciously reject[ing]" the procedural rights that attach in criminal proceedings — a situation that, for a noncitizen, constitutes "the worst of both worlds."[127]

Despite its obvious illogic, neither the Supreme Court nor federal agencies have ever questioned the principle that removal and immigration detention are civil in nature.[128] The Court's continued insistence on this distinction has appeared conclusory, even reflexive. Hernández

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119 Hernández, *supra* note 55, at 1352.

120 DOW, *supra* note 78, at 16.

121 NAT'L IMMIGRATION FORUM, *supra* note 89, at 4.

122 HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS 10 (2011).

123 *See* DOW, *supra* note 78, at 89–109 (documenting abuses of power and denial of basic medical care at private immigration detention facilities); Torrey, *supra* note 86, at 881 (explaining that immigration detention is "often harsher than criminal detention").

124 Hernández, *supra* note 55, at 1384.

125 DOW, *supra* note 78, at 16–17.

126 Legomsky, *supra* note 46, at 473.

127 *Id.* at 472; *cf.* Torrey, *supra* note 86, at 880 ("Essentially, immigration detention is criminal detention without the constitutional protections.").

128 *See* Kanstroom, *supra* note 117, at 1464. For a nuanced history of the Court's understanding of the civil/criminal divide, see Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

notes that "none of [the Court's] decisions actually explains how confinement pending immigration proceedings fits within the civil or criminal dichotomy and why the Court has routinely placed immigration detention on the regulatory side of the regulatory/punitive divide."[129] By the same token, Legomsky observes that courts have "proceeded formalistically," and that the "now prolific case law dismissing deportation as civil rather than criminal or otherwise punitive is long on citation of precedent and short on independent reasoning."[130]

The failure on the part of ICE and the courts to acknowledge the functional equivalence of criminal incarceration and immigration detention not only offends common sense, but also demeans those subject to detention and trivializes the hardships they face. Dow writes:

> Legalistic distinctions aside, someone who is detained or imprisoned is a prisoner. . . . What must it mean to be held in a prison for weeks or months, even for a decade or more, and to be told by the administrative agency renting bed space for you that you are not a prisoner?[131]

As one detainee he quotes puts it, "I feel like I don't even exist anymore."[132] The rhetoric of "civil detention" erases the lived experiences of those on whom it is imposed. As the Court recognized in *Argersinger*, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[133] That is why "any amount of actual jail time has Sixth Amendment significance."[134] The Court should recognize that the concerns underlying its decisions in *Argersinger* and *Scott* apply with just as much force in the context of immigration detention.

Some lower courts have begun to acknowledge that immigration detention is functionally indistinguishable from penal incarceration. In *United States v. Estrada-Mederos*,[135] the Seventh Circuit unanimously vacated a lower court's sentence in an illegal reentry case. In imposing its sentence, the district court had rejected without comment the defendant's argument that it should depart downward from the guidelines in part because he was entitled to "credit for the time served in immigration custody."[136] The Seventh Circuit held that the defendant's argument was at least meritorious enough to require explicit

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[129] Hernández, *supra* note 55, at 1354.

[130] Legomsky, *supra* note 46, at 512.

[131] DOW, *supra* note 78, at 17.

[132] *Id.*

[133] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970) (plurality opinion)).

[134] Glover v. United States, 531 U.S. 198, 203 (2001).

[135] 784 F.3d 1086 (7th Cir. 2015).

[136] *Id.* at 1089–90.

discussion from the district court in exercising its sentencing discretion. In reaching this conclusion, the circuit court explained that the lower court had to consider the time spent in immigration detention because even though "the immigration custody is civil detention and the state custody is criminal incarceration, the similarities are too strong to ignore."[137] The court emphasized functional, rather than formal, concerns, noting that "many immigration detainees are housed in county jails alongside state criminal detainees and subject to the same conditions of confinement."[138]

The Supreme Court has previously reached a similar result in a different context. In *In re Gault*,[139] the Court considered what protections the Due Process Clause requires for juveniles in delinquency proceedings that could result in the loss of liberty. Despite the fact that such proceedings were considered civil rather than criminal, the Court held that a number of protections formally limited to criminal proceedings, such as the right to counsel and the right against self-incrimination, attached in this context.[140] Like the Seventh Circuit in *Estrada-Mederos*, the Court stressed functional considerations, noting that "in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.'"[141] To reach a contrary result "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."[142] Immigration detention requires a similar commonsense approach.

B. The Collateral/Direct Consequences Distinction

Padilla made clear that merely identifying a consequence of conviction as "collateral" does not end the Sixth Amendment inquiry. But while *Padilla* plainly weakened the distinction between collateral and direct consequences, the distinction likely still retains some force. Nonetheless, it should not prevent the Court from concluding that the potential for immigration detention resulting from a conviction triggers the right to counsel under *Scott*. As a growing body of scholarship demonstrates, immigration detention, as well as deportation and other immigration consequences, are "collateral" only in the most rigidly formal sense of the word. In fact, they flow directly from state court criminal convictions, and state actors exercise considerable control over them. Immigration thus does not fit comfortably within the clas-

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[137] *Id.* at 1091.
[138] *Id.* at 1091 n.1.
[139] 387 U.S. 1 (1967).
[140] *Id.* at 41, 55.
[141] *Id.* at 50.
[142] *Id.*

sic definition of collateral consequences as those which "are beyond the control of the sentencing court."[143]

For example, Professor Ingrid Eagly, examining the treatment of immigration issues in three district attorneys' offices across the Southwest, shows that "immigration enforcement has a far more powerful impact on local criminal process than previously understood" and that "officials are keenly aware of both the immigration status of defendants and the practical effects of the federal government's reliance on convictions in making immigration-enforcement decisions."[144] Maricopa County, Arizona, for example, takes an approach "designed to affirmatively maximize the immigration-enforcement potential of local policing power and state criminal process."[145] There, during plea bargaining, "immigration consequences are an express prosecutorial goal of the conviction."[146] In such jurisdictions, immigration consequences are not merely "collateral" to the criminal process, but rather are built directly into it, enabling prosecutors to wield considerable control over substantive immigration outcomes.

Making a similar point, Professor Stephen Lee points out that an "increasingly large cross section of crimes simultaneously renders noncitizens removable and categorically precludes them from even applying for equitable relief."[147] The result is that state criminal courts "have become de facto immigration courts — venues where the determinative decision for immigration purposes (the conviction) is negotiated."[148] Like Eagly, Lee stresses the power that the immigration system places in the hands of prosecutors: "By rendering removal an automatic consequence of conviction for a broad array of crimes, Congress effectively gave local prosecutors the power to use a noncitizen defendant's immigration status as one basis for negotiating particular criminal justice outcomes."[149]

In both Eagly's and Lee's accounts, the crucial point is that under federal law, immigration consequences flow automatically from the criminal sentence imposed.[150] The *Padilla* Court noted that "[u]nder

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143 Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704 (2002).

144 Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1134 (2013).

145 *Id.* at 1180–81.

146 *Id.* at 1187.

147 Lee, *supra* note 61, at 556.

148 *Id.*

149 *Id.* at 580.

150 In fact, in many cases, consequences flow not only from the criminal sentence, but also, less formally, from the mere fact of arrest. Professor Hiroshi Motomura has argued that the expanding power of state and local authorities to make arrests for violations of federal immigration law allows them "to use arrest powers to decide who will be exposed to federal immigration enforcement." Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State*

contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable," apart from very few narrow exceptions.[151] Because, since 1996, "the sanction of deportation is regularly and automatically meted out on the presumption that the label of a crime is all we need to know about a person before entering an order of banishment,"[152] local prosecutors and state judges have nearly plenary control over immigration outcomes for the defendants in their courts.

Immigration consequences are therefore just as much the direct outcome of the state plea bargain as any term of imprisonment imposed by the court. The Court should thus treat immigration detention as substantially equivalent to a sentence of incarceration for the purposes of the Sixth Amendment and require counsel for any noncitizen accused of a crime that could result in such detention.

C. Counterarguments

There are, of course, possible objections to requiring counsel on the basis of the possibility of immigration detention (apart from the purely formal ones discussed above). First and most obvious is that the cost of recognizing a right to counsel for indigent noncitizens facing criminal charges could be prohibitive. As it is, states struggle to provide counsel to all defendants with already-recognized rights,[153] and many public defenders' offices are stretched to the breaking point.[154] The Court itself has suggested that "any extension [of the *Argersinger* rule] would create confusion and impose unpredictable, but necessarily sub-

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and Local Arrests, and the Civil-Criminal Line, 58 UCLA L. REV. 1819, 1822 (2011). Thus, Motomura contends, police wielding the power to arrest — rather than legislators, judges, or federal officials — possess the "discretion that matters" in immigration enforcement. *Id.* at 1826.

151 Padilla v. Kentucky, 559 U.S. 356, 363 (2010). This fact is what allows prosecutors either to leverage those consequences as part of the negotiation process — as Lee argues — or to mobilize the state criminal process as a way to increase federal immigration enforcement — the practice in Maricopa County, as Eagly shows.

152 Morawetz, *supra* note 57, at 1959.

153 Numerous reports indicate that the right to counsel is often "completely disregarded in misdemeanor courts." ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE 15 (2009), https://www.nacdl.org/reports/misdemeanor [http://perma.cc/PK5W-H8BD]. Indeed, as the authors recount, the "Chief Justice of the South Carolina Supreme Court publicly stated that she instructed misdemeanor court judges to ignore" the Supreme Court's decision in *Alabama v. Shelton*. *Id.*

154 *See generally* AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [http://perma.cc/77YV-JQ95]; Tina Peng, Opinion, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [http://perma.cc/43QB-5WYB].

stantial, costs on 50 quite diverse States."[155] But the Court was there considering an extension of the rule to cover defendants who are *not* facing incarceration; the argument of this Note, by contrast, is that noncitizens vulnerable to mandatory immigration detention are squarely in the heartland of *Argersinger*/*Scott*. And as *Scott* explained, the *Argersinger* Court itself rejected cost-based arguments

> because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, *regardless of the cost to the States implicit in such a rule*.[156]

Neither *Scott* nor any case since has in any way unsettled this conclusion. Instead, the Court has repeatedly reaffirmed that "any amount of actual jail time has Sixth Amendment significance."[157] States are simply not free to abrogate constitutional rights because they are too expensive.[158]

A second potential objection is that a rule requiring the appointment of counsel for noncitizens at risk of detention and deportation could be seen as favoring noncitizens by providing them with more expansive Sixth Amendment protections than those enjoyed by U.S. citizens. While this rule would present situations in which noncitizens would be entitled to appointed counsel while U.S. citizens facing the same charges would not, it does not follow that the underlying right is broader for noncitizens; for both citizens and noncitizens, the Sixth Amendment mandates the appointment of counsel only when criminal charges carry the risk of actual imprisonment. But only noncitizens face the possibility of indefinite detention and permanent banishment after committing a mere misdemeanor. This rule would thus not "favor" noncitizens, but would simply reflect the asymmetry in punishment that means there are substantially greater stakes for noncitizens facing minor criminal charges.

A more challenging question is posed by the fact that it will often be difficult for courts to know in advance when a particular charge carries the risk of deportation and mandatory detention. Determining whether a state criminal charge fits within a category of crimes such as "crimes involving moral turpitude" that render a noncitizen deportable

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155 Scott v. Illinois, 440 U.S. 367, 373 (1979).

156 *Id.* at 372–73 (emphasis added).

157 Glover v. United States, 531 U.S. 198, 203 (2001).

158 *Cf.* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009) ("Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.' It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause — like those other constitutional provisions — is binding, and we may not disregard it at our convenience." (citation omitted)).

(and subject to detention) often involves a fairly technical inquiry that overburdened misdemeanor courts will not have time to engage in.[159] Potentially faced with hundreds of defendants each day, courts simply cannot feasibly determine which are noncitizens whose crimes might subject them to immigration detention, and who are thus entitled to representation.

While this argument undoubtedly has some force, the countervailing interests are too powerful to give way to practical concerns of this sort. Given the magnitude of the consequences facing noncitizens accused of minor crimes, we should err on the side of overprotection of constitutional rights. The Court should thus employ a precautionary principle and announce a rule stating that all indigent noncitizens are entitled to the appointment of counsel in any criminal proceedings. Such a rule will admittedly be overinclusive, in that it will give a right to counsel to some noncitizens who are not actually at risk of mandatory detention for any of a number of technical reasons. But because the crime-related grounds of deportability sweep so broadly, and because the mandatory detention provisions apply in nearly every case in which a noncitizen is subject to deportation on crime-related grounds, the rational assumption for any individual noncitizen facing any criminal charge is that he or she is likely to face detention.

A prophylactic rule of this sort would be consistent with the Court's later treatment of the *Argersinger*/*Scott* rule in *Shelton*. In that case, the Court recognized that the punishment of imprisonment was such a serious deprivation of liberty that the Constitution required a rule that would necessarily provide counsel to at least some defendants who would never actually be imprisoned as a result of their convictions. The Court should take a similar approach in the immigration context. For a noncitizen, any criminal conviction, no matter how seemingly trivial, carries with it a serious "threat of imprisonment" in the form of immigration detention. No one should have to face that risk without the assistance of counsel, and the Constitution should not be construed to permit such a result.

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[159] In order to determine whether a criminal offense is a deportable offense, courts apply what is known as the "modified categorical approach," under which they focus not on the criminal conduct of the noncitizen, but rather on the statute of conviction. Courts ask whether the conduct criminalized by the statute would, in every instance, qualify as the crime falling within the category of crimes constituting the ground of deportability. If the court determines that the statute is divisible — that is, if it sets out multiple crimes in the alternative — then the court may "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).