Looking for Wrongs in All the Right Places

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ABSTRACT

This contribution to the symposium on crimmigration law identifies Padilla v. Kentucky *as the center of gravity of contemporary crimmigration law. This essay describes* Padilla v. Kentucky *as modeling a counter-intuitive approach to recognition of rights. Rather than seeking to sow a right to counsel in the contested field of immigration law,* Padilla *recognized a right to deportation counsel in the criminal justice system where appointed counsel was already well-rooted, and where tendrils of that right reach into the neighboring field of deportation law. This essay examines examples of this model of relocating rights claims to more fertile fields, outside of immigration law, in ways that resonate within immigration law. This essay recounts Justice Stevens' story of the life and death of the Judicial Recommendation Against Removal (JRAD) and explains that the story of the JRAD is also a history of how the penalizing power of deportation eclipsed the criminal sentencing apparatus. The holding of* Padilla *is the resolution of this tale. It is a story of rejuvenation, in which a well-placed constitutional right—like the proverbial nail that saves the kingdom—puts the intersecting systems of criminal and immigration law back in balance, resurrecting the role of criminal sentencing.*

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I. INTRODUCTION

In 2010, the U.S. Supreme Court made crimmigration law history when it decided *Padilla v. Kentucky*,[1] now the core American precedent for crimmigration law.[2] *Padilla* holds that failure to advise a criminal defendant about the deportation consequences of a plea may constitute ineffective assistance of counsel under the Sixth Amendment.[3]

Padilla is the metaphorical center of gravity for modern crimmigration law. At the center of the *Padilla* opinion is a story. I'll tell that story here, and then append to it in a chapter or two.

The story I am interested in is not the tale of José Padilla, though that story has all the elements of a true tall tale. Padilla was arrested in Kentucky with a tractor trailer truck toting a half-ton of marijuana in Styrofoam boxes.[4]

Nor is my interest in retelling the not-so-true tale Padilla's first attorney told Padilla: that no immigration consequences would follow from pleading guilty to the crimes of trafficking in more than five pounds of marijuana; possession of marijuana and possession of drug paraphernalia would have no immigration consequences.[5] Truth be told, according to the Court, that plea landed Padilla squarely in the cross-hairs of section 237(a)(2)(B)(i) of the Immigration and Nationality Act, which triggers deportability proceed-

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

2. *See* Kari E. Hong, *Famigration (Fam-Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 76 (2014) (describing *Padilla* as embodying a significant accumulation of ideas that crimmigration scholars had advanced); *see also* Zachary D. Wood, *Applying* Padilla *in Missouri in Midst of the Public Defender Crisis*, 57 ST. LOUIS L.J. 253, 255 n.15 (2012) (calculating that as of January 2012, Westlaw Next showed that *Padilla* had been cited approximately 3.6 times each day since the case was handed down).

3. *Padilla*, 599 U.S. at 374.

4. Padilla v. Kentucky, 381 S.W.3d 322, 327 (Ky. Ct. App. 2012).

5. The state court told that tale in two curt strokes: "Padilla, represented by counsel, moved to enter a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge [of operating a tractor/trailer without a weight and distance tax number], and a total sentence of ten years on all charges. The plea agreement provided that Padilla would serve five years of his ten year sentence, and would be sentenced to probation for the remaining five years." Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 559 U.S. 356 (2010).

ings for people like Padilla who violate drug laws.[6]

Rather, the story I am interested in is the one that Justice Stevens related in *Padilla.* It is the one about state criminal justice actors and the role they played—once upon a time—in policing the line between immigration enforcement and criminal law. Part II of this essay begins by recounting Justice Stevens' story of the life and death of the Judicial Recommendation Against Removal. I explain that the story of the JRAD is also a history of how the penalizing power of deportation eclipsed the criminal sentencing apparatus.

Part III describes the holding of *Padilla* as the resolution of this tale. It is a story of rejuvenation, in which a well-placed constitutional right—like the proverbial nail that saves the kingdom—puts the intersecting systems of criminal and immigration law back in balance, resurrecting the role of criminal sentencing.

Part IV advances an understanding of *Padilla* as modeling a counter-intuitive approach to recognition of rights. Rather than seeking to sow a right to counsel in the contested field of immigration law, *Padilla* recognized a right to deportation counsel in the criminal justice system where appointed counsel was already well-rooted, and where tendrils of that right reach into the neighboring field of deportation law. This essay concludes with two examples of this model of relocating rights claims to more fertile fields, outside of immigration law, in ways that have consequences within immigration law. Part V concludes this article.

II. THE ECLIPSE OF CRIMINAL SENTENCING

The story of deportation's eclipse of criminal sentencing begins almost a hundred years ago. The way Justice Stevens tells it, before 1917, there were no deportation consequences for a criminal conviction.[7] Citizens and noncitizens were treated alike under the criminal justice laws[8] (at least they were if they were white).[9] For example, if U.S. citizen Bonnie and nonciti-

6. Immigration and Nationality Act (INA) § 237(a)(2)(B)(i) (1952); *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2008); *Padilla*, 559 U.S. at 359 n.1.

7. *See Padilla*, 559 U.S. at 360–61.

8. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1566–76 (tracing the evolution from colonial and state governance of migration using criminal law to the Supreme Court's separation of deportation from criminal punishment a century later).

9. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 36–37 (Oxford Univ. Press 2014) (describing historical restrictions added in 1917 on immigration from the "Asiatic barred zone" that included Chinese and Japanese immigration, and also migration from a wide swath leading from Saudi Arabia through Southeast Asia and beyond to Afghanistan and the Soviet Union). *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE

zen Clyde acted in cahoots to commit a crime, both would suffer the same consequences. Criminal law addressed punishment for crimes without the reverberations in immigration law that we are accustomed to today.[10] The sentencing judge was largely the sole arbiter of the consequences of a particular crime.[11] Since most criminal cases are adjudicated in state court, that meant state judges were the main architects of punishment for crimes.[12]

Then, in 1917, Congress linked immigration and criminal law in a way that undid the primacy of criminal courts in constructing punitive consequences for crimes. Congress amended immigration law to render certain criminal convictions grounds for removal from the country.[13]

The new deportation grounds were very controversial.[14] Just a few years prior to the 1917 Act, the Supreme Court had decided that noncitizens in deportation proceedings had almost no constitutional rights.[15] The new statutes meant that as a result of a criminal conviction, lawful permanent residents could effectively be banished from their adopted land.[16]

Congress ameliorated that result by turning to the entities already charged with adjudicating the consequences of crimes.[17] It invented the Ju-

IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW xiii–xiv (1995) (describing the singling out of the Chinese for arrest or enforcement of the prostitution laws); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in A "Post-Racial" World*, 76 OHIO ST. L.J. 599, 614-22 (2015) (describing the early history of discrimination against Latinos in the construction of crimmigration).

10. *See* INA § 212(a)(2) (listing crime-based inadmissibility grounds); INA § 237(a)(4) (listing crime-based deportability grounds).

11. *See Padilla*, 559 U.S. at 361–62.

12. *See What the Federal Courts Do*, FED. JUDICIAL CTR., http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/152 (last visited Feb. 5, 2016) (describing the differences between federal and state courts, one of which is that most criminal cases are tried in state court).

13. *See* Immigration Act of 1917, Pub. L. No. 64–301, ch. 29, § 3, 39 Stat. 874 (1917); INS v. Chadha, 462 U.S. 919, 990 (1983) (White, J., dissenting).

14. *Cf.* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1687 (2011) (noting that Congress removed the JRAD provisions as immigration law became more controversial).

15. Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (upholding detention and temporary confinement of noncitizens to effectuate their expulsion, but not the imposition of imprisonment at hard labor without heightened procedural protections); Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893) (holding that noncitizen Chinese laborers may be expelled from the country whenever Congress deems their expulsion in the public interest).

16. *See* Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 772 (2012).

17. *Id.* at 782–83.

dicial Recommendation Against Removal, or JRAD (pronounced "Jay-Rad").[18] JRAD is a radical misnomer. A JRAD was not so much a recommendation as a directive from a state court to the immigration agency to relieve a noncitizen of the deportation consequence of a crime.[19]

The JRAD might sound like a powerful tool, one every practical noncitizen should have in his or her arsenal of anti-deportation defenses. As a practical matter, however, most noncitizen criminal defendants refrained from requesting a JRAD, either because they were unaware of the provision, or because they had no idea how it worked.[20] Either the sentencing judge, the defense counsel if there was one, or the immigration lawyer if there was one, would have to raise it.[21] Consequently, the JRAD was rarely used.[22] But that was also true of deportation—removal rates were less than 1000 people per year prior to 1990.[23]

Nevertheless, the JRAD stood for something. The existence of the JRAD signaled that deportation as a consequence of conviction, was punitive, at least for lawful permanent residents.[24] Therefore, sentencing judges, as the personification of the criminal justice system, had a role to play in whether to mete out that punishment.[25]

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18. INA § 241(b)(2), *repealed by* Pub. L. No. 101–649, § 505(a), 104 Stat. 4978, 5050 (1990). *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143–57 (2002) (describing the JRAD and its history).

19. Taylor & Wright, *supra* note 18, at 1143–44; *see also* Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 25, 50 (2015), http://www.nyulawreview.org/online-features/return-jrad.

20. Taylor & Wright, *supra* note 18, at 1148.

21. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (highlighting that the defendant failed to request a JRAD).

22. *See* Cade, *supra* note 19, at 38 ("In practice . . . JRADs were not widely requested, in part due to the relative infrequency of conviction-based removals until the late twentieth century.") (citing Taylor & Wright, *supra* note 18, at 1148–50 (offering reasons for the infrequency of JRADs)); Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14–02 IMMIGR. BRIEFINGS 1, 5 (2014) (noting the low rate of crime-based deportations historically, and sentencing judges' reluctance to engage with immigration law).

23. Walter A. Ewing, *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (Apr. 9, 2014), http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine.

24. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 99 (2006) (describing the JRAD as a form of immigration as affiliation: "because long time lawful immigrants have strong ties in the United States, deportation for crimes is an issue for the criminal justice system, not for immigration law").

25. *Id.*

That was Justice Stevens' point in *Padilla*: the criminal justice system and the deportation system are intimately involved in a relationship of long historical dimension. The categorization of deportation as a civil sanction faded in relevance because of its marriage to the criminal process.[26] Justice Stevens acknowledged that deportation is not strictly a criminal sanction; his opinion applies the label of a "particularly severe penalty" to deportation and then fastens that penalty to the criminal conviction that triggered it.[27] Deportation, he wrote, is "intimately related to the criminal process."[28] The law "enmeshed criminal convictions and the penalty of deportation" for so long that courts, and noncitizens, find it "most difficult" to "divorce the penalty from the conviction in the deportation context."[29] Like an old married couple that finishes one another's sentences, deportation has cohabitated for so long with the criminal process that constitutional rights that were first voiced in criminal law end by resonating removal proceedings.[30]

Justice Stevens drew on the mechanics of JRAD as evidence of the intimacy of the relationship between deportation and the criminal process. "From 1917 forward," his opinion states, "there was no such creature as an automatically deportable offense" because of the discretion that sentencing judges retained "to ameliorate unjust results on a case-by-case basis."[31] The existence of that discretionary power revealed that the power to deport for crimes was domiciled in criminal court: due to the JRAD, the "impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter."[32]

Congress did away with the JRAD in 1990.[33] In the years following, Congress constructed the current crimmigration framework, intertwining immigration and criminal law.[34] It passed a litany of statutes to increase the

26. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295 (2008).

27. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

28. *Id.* at 365.

29. *Id.* at 365–66 (citing United States v. Russell, 686 F.2d 35, 38 (C.A.D.C. 1982)).

30. *See id.* at 365–67.

31. *Id.* at 362.

32. *Id.* at 363.

33. INA § 241(b)(2), *repealed by* Pub. L. No. 101–649, § 505(a), 104 Stat. 4978, 5050 (1990).

34. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 642–44 (2012); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477–78 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sover-*

deportation consequences of criminal convictions and the criminal consequences of immigration-related conduct.[35] These changes had two major consequences. First, they severed the union between deportation defense and criminal procedure protections and tied removal significantly closer to criminal punishment.[36]

Second, Congress's actions relegated criminal law judges to a tertiary role in deportation determinations, after immigration enforcement agents and rank-and-file police.[37] The retraction of the JRAD and the expansion of criminal deportation grounds empowered law enforcement officials to slip seamlessly between criminal adjudication and removal.[38] Crimmigration law conferred on police officers and immigration agents the power to use the criminal justice system to obtain deportation, and to use the immigration enforcement system to obtain a punitive consequence outside of the criminal justice system.[39] Crimmigration law conferred on police officers and immigration agents the functional power to add deportation as a consequence for a conviction, which had been a prerogative of the sentencing judge, and to do it beyond the reach of criminal procedural protections such as appointed counsel.

As enforcement agencies gained the skills and means to merge the criminal and immigration investigation and enforcement apparatus, an arrest by police—alone—could trigger a request to detain a suspected noncitizen for immigration reasons.[40] When so many arrests and so many pleas lead to deportation and when a deportable "conviction" included probation sentences, deferred sentences, expungement, or conditional discharge,[41] the role of the sentencing judge diminished in several ways.[42] The criminal court's decision regarding how much criminal punishment to mete out, or

eign Power, 56 AM. U .L. REV. 367, 383–84 (2006).

35. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015) (detailing the legislative history of crimmigration laws); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (tracing the history of immigration sanctions and identifying the arrival of deportation as the central immigration sanction).

36. *See Padilla*, 559 U.S. at 363–64.

37. *See generally* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819 (2011) (noting that prosecutorial discretion may be the only way for an arrested noncitizen to avoid deportation).

38. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1469–70 (2013).

39. Motomura, *supra* note 37, at 1826–27; *see* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. SCH. L. REV. 1281, 1353 (2010).

40. Motomura, *supra* note 37, at 1848.

41. INA § 101(a)(48)(A)(i)–(ii); *see also* 8 U.S.C. §§ 1101(a)(48)(A)(i)–(ii) (defining "conviction" to include these terms).

42. *See* Motomura, *supra* note 37, at 1845.

whether to grant bail, paled in relevance because the true consequence of the conviction was detention until deportation.[43] The tail of deportation had begun to wag the dog of criminal justice.

III. THREE IMPACTS OF *PADILLA*

On its face, *Padilla* is significant because it seems to bring immigration law into criminal law. It gives the defendant a second shot at a trial or a more favorable plea if he or she received inadequate advice about the immigration consequences of the original plea.

That understanding of *Padilla* is not necessarily wrong, but it is incomplete. It underestimates the impact of *Strickland v. Washington*'s prejudice prong[44] and overlooks *Padilla*'s real effect on the intimate relationship between deportation and the criminal process.

Strickland's requirement of prejudice dilutes the practical impact of *Padilla* on outcomes in both the criminal and immigration systems. Under *Strickland*, even if the defendant received constitutionally inadequate assistance of counsel, there is no practical consequence if the defendant was not prejudiced by it.[45] Prejudice is often the stumbling block in ineffective assistance of counsel cases, including those raising deportation as the consequence of conviction.[46] We see this in Justice Cordy's celebrated opinion in *Commonwealth v. Clarke*,[47] which held that *Padilla* operated retroactively.[48] The *Clarke* opinion is groundbreaking, forging new pathways in jurisprudence on retroactivity.[49] In the end, however, the court in *Clarke* found no evidence that the inadequate advice of defense counsel prejudiced the defendant.[50]

Padilla's true significance for crimmigration law is evident in three ways. First, *Padilla* establishes a procedural protection requiring that, to be constitutionally effective, a plea negotiation must take deportation into ac-

43. *See* Padilla v. Kentucky, 559 U.S. 356, 368 (2010).

44. Strickland v. Washington, 466 U.S. 668, 692 (1984) (holding that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution").

45. *Id.*

46. Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOWARD L.J. 693, 694–698 (2011).

47. Commonwealth v. Clarke, 949 N.E.2d 892, 895 (2011) (finding that while defense counsel was constitutionally ineffective, the defendant made an insufficient showing that he was actually prejudiced by defense counsel's failures).

48. *Id.* at 907.

49. *See id.*

50. *Id.*

count.[51] Unlike criminal law, immigration law does not confer a constitutional right to government-appointed counsel in deportation proceedings.[52] As Ingrid Eagly pointed out, the constitutional protection that *Padilla* extended has its greatest effect outside of the criminal justice system, in deportation adjudication.[53] This protection takes the form of deportation counsel during the criminal justice proceeding,[54] and requires advising defendants about the potential for removal.[55]

Perhaps counter-intuitively, this limited protection is more effective in some ways because it operates outside of the removal proceeding.[56] This right goes to the heart of the issue that will be at stake in removal proceedings—the proper consequences of a conviction, usually the most compelling ground for removal. It comes into play at the moment it is most useful, before the plea and sentencing.[57]

Second, *Padilla* revived the authority of the criminal court over the consequence of the criminal conviction. Justice Stevens invited the prosecutor and defense counsel to take an active part in the outcome of the immigration adjudication, reversing the post-JRAD decoupling of the sentencing judge from the deportation consequence of the conviction.[58] Since states dominate the enforcement of criminal law, state defense counsel, prosecutors, and judges are the main actors who enforce *Padilla*'s rule.[59] Defense

51. Jennifer H. Berman, Padilla v. Kentucky*: Overcoming* Teague's *"Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667, 668, 677 (2012).

52. 8 U.S.C. §§ 1229a(b)(4)(B), 1362 (2006) (conferring a "privilege" of representation in removal proceedings, but not at the government's expense); *see* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1059–61 (C.D. Cal. 2010) (holding that the Rehabilitation Act requires provision of paid government counsel in deportation proceedings against noncitizens with mental disabilities).

53. Ingrid V. Eagly, Gideon's *Migration*, 122 YALE L.J. 2282, 2294–95 (2013).

54. *See* Motomura, *supra* note 37, at 556.

55. *See* Eagly, *supra* note 53, at 2294.

56. *See* Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1029 (2015).

57. Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1304 (2011).

58. *See* Note, "*A Prison is a Prison is a Prison*"*: Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 531 (2015) (noting that immigration consequences flow from criminal proceedings even if the noncitizen accepts a plea that results in a dismissal or another form of a plea that is not a conviction for state law purposes).

59. *See* Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1190 (2015) (noting that when all sides are aware of the consequences, defense counsel and prosecutors may be able to craft a better bargain).

counsel, of course, are the primary players tasked with sorting out the consequences of a plea bargain, but, as *Padilla* notes, this responsibility manifests in the negotiations between defense counsel and prosecutors and in the plea colloquy with the criminal court.[60] *Padilla*'s vision of creativity in plea negotiations necessarily includes prosecutors responding to, or anticipating, shifts in negotiations.[61] It engages criminal court judges, tasked with signing off on the resulting plea, to manage the effectiveness of defense counsel's assistance.[62] To the extent that the system has an interest in convictions that are not vulnerable to ineffective assistance challenges, all three players have a stake in engaging with *Padilla*'s vision.[63]

This revival of the significance of the sentencing court is consistent with recent developments in other areas where criminal and immigration law intersect. Recent Supreme Court cases confirmed the use of a categorical approach to determine whether the result of a criminal law offense is a deportable offense.[64] The categorical approach requires an immigration judge to examine the criminal statute, usually a state law, that formed the basis of the conviction, and evaluate whether the elements of the criminal offense fit within the definition of a generic crime that satisfies a criminal removal ground in immigration law.[65] The Supreme Court has permitted only limited exceptions to the use of this categorical approach.[66]

The categorical approach prevents the removal proceeding from undermining the product of the criminal proceeding because it enforces the outcome of the criminal court proceeding as the measure of deportability.[67] Like *Padilla*, this line of cases protects the integrity of the criminal justice outcome because the crime cannot be re-litigated in immigration court to determine the deportability question. The categorical approach protects the outcome in the criminal case because the immigration deportability question might not be raised until many years after the conclusion of the criminal case.[68] The categorical approach also minimizes the risk that ancillary aspects of the criminal adjudication will undermine the conviction by pre-

60. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

61. *Id.* at 373.

62. *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, YALE L.J. 2650, 2666–67 (2013).

63. *Id.* at 2666.

64. *See generally* Mellouli v. Lynch, 135 S. Ct. 1980 (2015); Descamps v. United States, 133 S. Ct. 2276 (2013); Nijhawan v. Holder, 557 U.S. 29 (2009); Chambers v. United States, 555 U.S. 122 (2009).

65. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

66. *See Mellouli*, 135 S. Ct. at 1989 (adhering to the categorical approach in determining whether a state drug conviction constituted grounds for removal).

67. *See Moncrieffe*, 133 S .Ct. at 1684–85.

68. *Id.* at 1690.

cluding immigration judges from relying on police reports or pre-sentencing reports generated for the criminal case. [69]

IV. RELOCATING RIGHTS TO ALL THE RIGHT PLACES

Padilla models a non-traditional pathway to transforming the law, one that locates claims to immigrant rights outside of immigration law, in other more fertile legal fields. The case illustrates a powerful civil rights response to the rise of crimmigration law that displaces the right to counsel from one area of law (immigration) into another (criminal).[70] Achieving a constitutionally-based right to counsel in removal proceedings is daunting, at best, particularly for noncitizens with criminal convictions.[71] In some circumstances, such a right would come too late, after the plea bargain established the ground of deportability.[72]

By shifting the locus of the argument for assistance of counsel across the doctrinal line from immigration law into criminal law, *Padilla* encountered a new geography in which the pathway to the right to counsel was well-trodden, and where the criminal defendants who held that right were a familiar sight.[73] The question was not whether a right to counsel existed in criminal law or who deserved to hold it.[74] It was, instead, a more relative question of how broad or narrow the right should be.[75] That is not to say that it was an easy win. Half the battle, however, was won by transposing the argument for a right to deportation counsel into the criminal justice system.[76]

Crimmigration law is notorious for blurring the boundary between criminal and immigration law providing, in a post-*Padilla* landscape, a mecha-

69. IMMIGRANT LEGAL RES. CTR., § N.3 THE RECORD OF CONVICTION 74–75 (2013).

70. *E.g.*, MOTOMURA, *supra* note 9, at 164 (discussing the obliqueness of unauthorized migrants' rights).

71. STACY CAPLOW ET AL., ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL FOR NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 9 (2012).

72. Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 90–91 (2011).

73. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 836 (2011).

74. César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla's *Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 854–56 (2013).

75. John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 37 (2013).

76. *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010) (explaining that the court granted certiorari to decide whether counsel had an "obligation to advise" Padilla that the offense would result in his deportation).

nism for redirecting compelling civil rights arguments into more favorable locations. The overlap between criminal law and immigration law, however, is also a platform for compelling arguments that failed in the original legal arena. Scholars have focused on how government power increases when the lines between one area of law and another begin to blur.[77] That blurring, however, can allow for content in one legal arena to address gaps in another. When immigration law is hostile to compelling civil rights claims, legal advocates have successfully transplanted those claims in more hospitable landscapes. Two crimmigration examples in addition to *Padilla*'s expansion of the right to effective assistance of counsel allow for exploration of this model of advocacy: the litigation over immigration detainers and the campaign against family detention.[78]

The defeat of the mandatory immigration detainer is my first example of a similar migration from an inhospitable legal landscape to a more fertile one.[79] Under the nationwide Secure Communities program, when police arrested an individual who ICE wanted to investigate for suspected deportability, ICE regularly issued an immigration detainer.[80] That detainer resulted in the individual remaining in state or local custody until the crimi-

77. *See* Chacón, *supra* note 34, at 642–44; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–36 (2009); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 613, 617 (2007); Eagly, *supra* note 39, at 1281–84; 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, 639–40 (2004); Legomsky, *supra* note 34, at 471; Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81, 81 (2005); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 611–12 (2003); Stumpf, *supra* note 34, at 369.

78. *See* Galarza v. Szalczyk, 745 F.3d 634, 639–40 (3d Cir. 2014) ("Galarza contends that his detention resulted from Lehigh County's stated policy and practice of enforcing all immigration detainers received from ICE, regardless of whether ICE had, or even claimed to have, probable cause to detain the suspected immigration violator."); Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1667 (2012) ("Immigration advocacy organizations . . . wrote an open letter to the [Department of Homeland Security (DHS)] secretary to urge the DHS not to open new family detention centers.").

79. *See generally* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008) (describing the immigration detainer as a "key tool" of the executive branch and considering the various avenues to challenge abusive detainer practices).

80. 8 C.F.R. § 287.7 (2015); LISA SEGHETTI, ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 3 (2009), http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf; *see* U.S. IMMIG. & CUSTOMS ENF'T, *Archived Information: Secure Communities: Get the Facts*, https://www.ice.gov/secure-communities#wcm-survey-target-id (last visited Feb. 10, 2016).

nal case wrapped up and ICE could take custody of the person.[81]

Like the repeal of the JRAD, the immigration detainer was another practice that diminished the effect of state court decisions and defense advocacy. As a practical matter, immigration detainers invalidated the effect of judicial bail determinations, prosecutorial decisions to drop charges, defendant pleas to time served, and judge-ordered probationary sentences.[82] Instead, immigration law intervened via the detainer. Criminal custody merged seamlessly into immigration detention.[83]

The detainer suspended the noncitizen between criminal custody and immigration custody, in a way that placed access to freedom tantalizingly out of reach.[84] Separated from criminal bail by the intervention of immigration law enforcement, and separated from access to an immigration bond hearing by the criminal justice context, noncitizens remained in custody through the duration of their criminal proceedings until they could be transferred to federal hands.[85]

A direct challenge to the authority of the immigration agency to issue the immigration detainer would have been difficult because of the broad scope of authority that the federal government has to enforce immigration law and the characterization of the detainer as a form of cooperation between federal and nonfederal agencies.[86]

Instead, the defeat of the detainer occurred elsewhere, in the neighboring territories of criminal law and federalism.[87] The winning arguments stood on ground hallowed by criminal defendants: the Fourth Amendment's protection against unconstitutional seizure.[88] Linking this criminal procedure right with the Tenth Amendment's protection of the autonomy of states against overreach by the federal government, made for a formidable challenge to the detainer.[89] The Secure Communities program, discredited and

81. *See* 8 C.F.R. § 287.7 (2015); Elisabeth M. W. Trefonas, *Access to Justice for Immigrants in Wyoming*, 34 WYO. LAW. 24, 26 (2011).

82. *See* 8 C.F.R. § 287.7 (2015); Trefonas, *supra* note 80, at 26.

83. *See* sources cited *supra* note 82.

84. *See* sources cited *supra* note 82.

85. *See* sources cited *supra* note 82.

86. *See* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1335–36 (2012).

87. *See, e.g.*, Galarza v. Szalczyk, 745 F.3d 634, 640–42, 645 (3d Cir. 2014) (opening the way for municipal liability for relying on an immigration detainer to hold a U.S. citizen). *See generally* Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. TIMES (Nov. 21, 2014), http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html.

88. *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 913 SCHOLARLY WORKS 126, 131, 135–36 (2015).

89. *See generally Galarza*, 745 F.3d at 640–42, 645 (opening the way for municipal

ineffective without the mandatory detainer, simply deflated.[90]

The detention of female-headed families from Central America is my second example.[91] In 2014, immigration officials implemented a new policy of detaining mothers and children fleeing violence from Central America to seek asylum in the United States. The agency held them in custody in Texas, New Mexico, and Pennsylvania.[92]

The federal government's initial stance was that border security required uniform and mandatory detention of the asylum-seekers as a necessary adjunct to removal and to deter further unauthorized border crossing.[93] As with *Padilla* and the immigration detainer, arguments against the mass incarceration of female-headed families found little purchase when framed as issues about national security and immigration law. Section 235(b) of the INA provides a robust detention power that is largely immune to judicial intervention. National security considerations further limit administrative discretion in release decisions.[94] Both legal landscapes were anathema to claims framed as rights and protections against immigration detention.

Finding traction for protections against mass detention, once again, required transposing the rights-based claims from hostile territory to familiar ground. The locus of the argument against blanket detention shifted first

liability for relying on an immigration detainer to hold a U.S. citizen); Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *10–11 (D. Or. Apr. 11, 2014) (concluding, based on the Fourth Amendment, the county detained the plaintiff without probable cause pursuant to an immigration detainer); Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D. R.I. 2014) (holding that a detainer issued "for purposes of mere investigation" is insufficient for purposes of custody).

90. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al., *Secure Communities* 1–2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf .

91. *See generally* Flores v. Johnson, No. 85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015) (ordering the Department of Homeland Security to adhere to an agreement requiring it to minimize the time children remain in custody).

92. *See Family Detention*, AM. IMMIGR. COUNCIL, http://www.immigrationpolicy.org/family-detention (last visited Feb. 11, 2016). Detention has always been a crimmigration issue. *See* Stumpf, *supra* note 34, at 391; *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 42 (2010). *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351–53 (2014) (describing detention as a form of crimmigration law).

93. *See* Memorandum Order, Civ. No. 15–11 (JEB), R.I.L.R. v. Johnson, 2015 WL 737117, 80 F. Supp. 3d 164, 170, 175 (Dist. D.C. 2015).

94. *See* Matter of D-J-, 23 I&N Dec. 572, 578-79 (A.G. 2003) (holding that national security concerns about mass migration sufficed to justify blanket denial of release on bond).

from national security law to immigration law, and then from immigration law to child welfare law.

Framing the issue as a mainstream immigration question, rather than a national security issue won the families access to an individualized bond hearing.[95] From that point, the most compelling and effective locus for arguments about family detention was the state laws that govern child welfare, where the best interest of the child is the predominant concern. Immigration law itself has few provisions specific to the treatment of children, and the plenary power doctrine threatens to water down any constitutional claims that undocumented children may claim.[96] However, when the question is transposed from immigration law to a doctrinal space that presumes legal protections for children from institutional overreach, the question shifts in an important way. It makes the critical move from whether children possess legal protections in immigration detention, to whether the immigration law context diminishes the protections children are presumed to have against inadequate childcare.[97]

Calling on state laws that require institutional custody of children to meet state child welfare licensing laws led to severe restrictions on the use of secured facilities to detain children and prioritized release of children to non-institutional caretakers. State laws required corporations that undertake large-scale custody of children to be licensed by the state and comply with the numerous state requirements for adequate childcare.[98]

The doctrinal relocation drove Pennsylvania to revoke the state license of one detention facility.[99] It also presented a Texas licensing board with the option of either declaring two federal facilities to be in violation of state law, or making the painful choice to grant a waiver of major provisions of the childcare licensing requirements while under intense public scrutiny.[100]

95. *See id.* at 170.

96. *See generally* Plyler v. Doe, 457 U.S. 202 (1982) (explaining the rights afforded children of illegal aliens).

97. *See generally* Joanne Joseph, Note, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 CORNELL J. L. & PUB. POL'Y 209 (2014) (exploring the rights of immigrant children when their parents are detained).

98. *See id.* at 171–73.

99. *See* Beth Werlin, *Government Losing its License to Operate Family Detention Center in Pennsylvania*, AM. IMMIGR. COUNCIL (Feb. 1, 2016), http://immigrationimpact.com/2016/02/01/family-detention-pennsylvania-license/.

100. *See* Julia Preston, *Judge Increases Pressure on U.S. to Release Immigrant Children and Parents*, N.Y. TIMES (Aug. 23, 2015), http://www.nytimes.com/2015/08/23/us/judge-increases-pressure-on-us-to-release-migrant-families.html.

V. CONCLUSION

Justice Stevens' story in *Padilla v. Kentucky* is a parable about power and the geography of law. This short essay offers a counterpoint to the idea that blurring the boundaries in crimmigration law tends to only enhance government authority over noncitizens. The rights-creating arguments that become possible in the overlap of criminal law and immigration law foster a particular kind of argument, one that compares noncitizens to similarly situated citizens.[101] Noncitizens become criminal defendants with rights that do not depend on citizenship status.[102] The detained noncitizen stands-in for the state or local government, which is unconstitutionally burdened by federal overreach, into the control of state and local law enforcement resources.[103] Undocumented border crossers become state-protected children with the same needs for protection from unconstitutional institutionalization that any citizen child has.[104]

Once the barriers between doctrinal arenas drop, it becomes easier to draw on the ideas and resources of the overlapping fields. The lowering of the barriers between doctrinal arenas creates unforeseen opportunities to further the immigration advocates' project to reframe the noncitizen from an excluded other to a collection of individuals who are similar in their circumstances and characteristics to members of our society.

101. *See* Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC'Y REV. 241 (2015) (discussing how the arrest and detention trends of immigrants in King County, Washington mirror the biases against immigrants across the United States).

102. *See generally* Chacón, *supra* note 34.

103. *See generally* Beckett & Evans, *supra* note 100.

104. *See generally* Joseph, *supra* note 96 (analyzing whether U.S. citizen children retain specific constitutional rights or special protections in the immigration context).