


1-1-2015

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Recommended Citation

Mary Holper. "Confronting Cops in Immigration Court." *William and Mary Bill of Rights Journal* 23, no.3 (2015): 675-732.

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CONFRONTING COPS IN IMMIGRATION COURT

Mary Holper*

Immigration judges routinely use police reports to make life-altering decisions in noncitizens' lives. The word of the police officer prevents a detainee from being released on bond, leads to negative discretionary decisions in relief from removal, and can prove that a past crime fits within a ground of removability. Yet the police officers who write these reports rarely step foot in immigration court; immigration judges rely on the hearsay document to make such critical decisions. This practice is especially troubling when the same police reports cannot be used against the noncitizen in a criminal case without the officer testifying, due to both the Sixth Amendment's Confrontation Clause and the Federal Rules of Evidence, neither of which apply in immigration court.

In these days of the increasing criminalization of immigration law and prioritization of deporting so-called "criminal aliens,"¹ the police report problem is salient and potentially impacts thousands of noncitizens every year. The scholarship has focused on why other rights guaranteed in a criminal trial—court-appointed counsel, freedom from ex post facto laws, freedom from double jeopardy, proportionality principles, and the Fourth Amendment's exclusionary rule—should apply to removal proceedings.² An overlooked criminal protection is the right to confront one's accuser

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¹ See generally *Criminal Alien Program*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program>.

² See, e.g., Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 119, 160–63 (1999) (arguing that the current deportation laws violate the Double Jeopardy Clause of the Fifth Amendment); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624–27 (2010) (proposing the application of the Fourth Amendment exclusionary rule in removal proceedings); Stella Burch Elias, "Good Reason to Believe": *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1115 (2008) (arguing for an application of the Fourth Amendment exclusionary rule due to widespread constitutional violations by immigration officers and a fundamental change in immigration court practice since *Lopez-Mendoza*

in immigration court. This Article seeks to fill the gap in the literature by discussing the application of this important criminal procedure right in immigration law.

Part I of the Article outlines the police report problem by discussing the four situations in which police reports are used in immigration court, why police reports are unreliable, and the scope of the problem. Part II discusses criminal law's treatment of police reports, focusing on the Confrontation Clause of the Sixth Amendment, which provides the constitutional justification for excluding police reports in criminal cases. Part III discusses the use of hearsay evidence in immigration cases, where hearsay is allowed due to the characterization of removal proceedings as civil, not criminal. While there has been a trend to reject unreliable documents under the due process fundamental fairness test in immigration cases, this trend has stopped short when an immigration judge relies on a police report, especially when making a negative discretionary decision. Reviewing courts are more likely to critique immigration judges' reliance on police reports to establish removability, however. The Article offers an explanation of this disparate treatment: as courts and the agency began to reject the categorical approach—the time-honored, elements-based method for determining whether a conviction can lead to deportation—the police report problem was exposed, causing courts to critique the use of police reports to establish facts in removal cases.

Part IV examines the right to confront police officers by exploring three different ways to conceptualize removal proceedings: (1) in light of the Supreme Court's 2010 decision in *Padilla v. Kentucky*,³ deportation should be considered punishment, thus guaranteeing the application of the Sixth Amendment Confrontation Clause; (2) under the *Mathews v. Eldridge*⁴ case-by-case balancing test of the Due Process Clause, courts should balance the interests at stake and adopt a right to confrontation

was decided); Stephen H. Legomsky, Recent Development, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment: Lieggi v. United States Immigration and Naturalization Service*, 389 *F. Supp. 12 (N.D. Ill. 1975)*, 13 *SAN DIEGO L. REV.* 454 (1976) (arguing that the Eighth Amendment cruel and unusual punishment analysis should apply to deportation for marijuana convictions); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 *N.Y.U. L. REV.* 97 (1998) (arguing that the principles against retroactivity embodied in the Ex Post Facto Clause should apply to deportation proceedings); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 *ADMIN. L. REV.* 305, 339–40 (2000) (arguing that the Eighth Amendment's requirement that the punishment be proportional to the offense, the Ex Post Facto Clause, and the Sixth Amendment's right to counsel should apply in deportation proceedings); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 *U.C. IRVINE L. REV.* 415, 417–18 (2012) (arguing that removal “is sufficiently punitive to trigger constitutional proportionality review” pursuant to the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause).

³ 559 U.S. 356 (2010).

⁴ 424 U.S. 319 (1976).

and cross-examination of police officers in immigration court; and (3) if deportation is conceptualized as “quasi-criminal” and thus deserving of some, but not all, of the protections guaranteed at a criminal trial, one of those protections should be the right to confront one’s accuser, especially when the accuser is a police officer.

Part V explores the proposed right to confrontation in immigration court: that immigration judges not admit police reports into evidence against a noncitizen unless the police officers are subject to cross-examination.

I. THE POLICE REPORT PROBLEM

A. *Uses of Police Reports in Immigration Cases*

There are four phases of a removal case⁵ in which an immigration judge may rely on police reports: to decide (1) whether to grant a detained noncitizen release on bond; (2) whether a noncitizen is eligible for a form of relief from removal; (3) whether to grant discretionary relief; and, in limited circumstances, (4) whether a noncitizen is deportable for the reasons charged by the government. For the first three types of decisions, the burden is on the noncitizen.⁶ For findings of deportability, the burden is on the government.⁷

The first use of police reports in immigration court in which police reports play a major role is decisions on bond. Unless a noncitizen is subject to mandatory detention, which applies if he is removable for several crime-related grounds of removability,⁸ he must show that he is not a danger or a flight risk.⁹ The Board of

⁵ Prior to 1996, noncitizens who were in the process of being deported after having been admitted to the United States were considered to be in “deportation” proceedings, whereas those who were stopped attempting to enter the United States were placed in “exclusion” proceedings. The 1996 reforms to the INA combined these into “removal” proceedings. See 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 64.01 (Matthew Bender rev. ed., 2014). This Article uses both the terms “deportation” and “removal” to describe the expulsion of noncitizens, although the proceedings are formally known as “removal” proceedings.

⁶ See 8 U.S.C. § 1229a(c)(4) (2012) (requiring in applications for relief from removal that a noncitizen prove that he “satisfies the applicable eligibility requirements” and “merits a favorable exercise of discretion” if relief is discretionary); *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) (holding that in bond hearings, the noncitizen bears the burden of proving he will not present danger to persons or property).

⁷ See 8 U.S.C. § 1229a(c)(3) (requiring the government to prove deportability by clear and convincing evidence). The Supreme Court, in a 1966 case, required that the government prove deportability by “clear, unequivocal, and convincing evidence.” See *Woodby v. INS*, 385 U.S. 276, 285 (1966). However, in a 2009 decision, the Court cited the burden of proof to be “clear and convincing” evidence. See *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009).

⁸ See 8 U.S.C. § 1226(c) (2012).

⁹ See *In re Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976).

Immigration Appeals (“Board”) has held that judges must first decide whether a noncitizen is a danger to the community; if he passes this hurdle, then the judge may determine whether he is a flight risk.¹⁰ Bond is a highly discretionary decision where judges may consider police reports, even from dismissed charges, to make negative inferences about a person’s dangerousness or flight risk.¹¹

The second use of police reports is to determine whether a noncitizen is eligible for relief from removal. Once the government has proven that the noncitizen is removable, the burden then shifts to the noncitizen to prove that he is both eligible for and, if discretionary, that he merits discretionary relief.¹² For example, applicants for asylum and withholding of removal must prove that they have not been convicted of a “particularly serious crime.”¹³ The Board has set forth a test for determining whether an offense is particularly serious, which begins with a more categorical analysis of the nature of the offense and then yields to an investigation of the underlying facts of the offense to determine whether the offense indicates that the applicant would be a danger to the community.¹⁴ Offenses that are more violent in nature have been found to be particularly serious crimes.¹⁵ For example, a police report recounting the victim’s descriptions of the harm when there has been an assault conviction can factor into the particularly serious crime analysis.¹⁶ Another example is the waiver

¹⁰ See *In re Urena*, 25 I. & N. Dec. at 141.

¹¹ In a case in which the Author represented a noncitizen seeking release on bond, the noncitizen had been charged in state court with possession of a firearm; unbeknownst to him, a friend who was staying with him had brought a firearm into the house. The criminal charges were dismissed due to insufficient evidence, yet because of his lack of immigration status, he was referred to removal proceedings. During the bond hearing, the immigration judge considered all of the evidence, including the noncitizen’s own words denying knowledge of the firearm in his house and his wife’s declaration stating the same, yet denied bond, stating, “That police report is really damning.”

¹² See generally 8 U.S.C. § 1229a(c) (describing burdens of proof in removal proceedings).

¹³ See 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (2012).

¹⁴ See *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (noting that for particularly serious crime determination, a judge must consider “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community”); see also *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007) (“If the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence . . .”).

¹⁵ See, e.g., *In re N-A-M-*, 24 I. & N. Dec. at 337, 343 (concluding that felony menacing, a crime against the person, is a particularly serious crime); *In re B-*, 20 I. & N. Dec. 427, 431 (B.I.A. 1991) (holding that aggravated battery, which involved the use of a firearm, was a particularly serious crime); *In re Garcia-Garrocho*, 19 I. & N. Dec. 423, 425–26 (B.I.A. 1986) (concluding that respondent’s burglary in the first degree conviction, which involved a deadly weapon or physical injury to a non-participant, was a particularly serious crime).

¹⁶ The Author represented a noncitizen who sought asylum and withholding of removal because he faced persecution in Kenya due to his sexual orientation. He had been convicted

of inadmissibility for drug offenses, which requires a noncitizen to prove that his offense involved simple possession of thirty grams or less of marijuana.¹⁷ Police reports detailing the amount of marijuana found at the scene of a crime and whether implements to weigh or sell the drug, which are evidence of an intent to sell, can be used to determine that a noncitizen is not eligible for this waiver.¹⁸

The third use of police reports is in deciding whether a noncitizen merits discretionary relief from removal. For example, cancellation of removal is a discretionary form of relief that is available to lawful permanent residents who are removable—usually for a criminal conviction—yet are asking for a “second chance” by demonstrating to the judge that the positive factors in their lives outweigh the negative.¹⁹ Discretionary decisions are quite common in immigration court,²⁰ and the Board has authorized judges to use police reports in these decisions.²¹ In addition to police reports from convictions, police reports from dismissed charges are used to determine whether a noncitizen merits discretionary relief. Although the Board has instructed judges to give these police reports less weight because the charges were dismissed,²² judges often combine police reports from both convictions and dismissed charges to paint an image of a person as an unsavory character.²³

of assault, and the police report stated that his girlfriend told the police she sustained injuries when he hit her. His girlfriend testified at the removal hearing, denying that he hit her, but the judge found his crime to be particularly serious because of the contents of the police report. *See also* Solis v. Mukasey, 515 F.3d 832, 834–36 (8th Cir. 2008) (upholding Board’s decision that a noncitizen was convicted of a particularly serious crime based on the contents of a police report about the circumstances leading up to a conviction for delivering a controlled substance).

¹⁷ See 8 U.S.C. § 1182(h) (2012).

¹⁸ See, e.g., *In re Grijalva*, 19 I. & N. Dec. 713, 724 (B.I.A. 1988) (discussed *infra* Part III.B).

¹⁹ See 8 U.S.C. § 1229a(a) (2012); *In re C-V-T-*, 22 I. & N. Dec. 7, 11–12 (B.I.A. 1998) (laying out factors for the balancing test that judges must use when considering whether a noncitizen merits cancellation of removal in the exercise of discretion).

²⁰ Asylum, cancellation of removal, adjustment of status, and voluntary departure are common forms of discretionary relief regularly considered in immigration court. See 8 U.S.C. § 1158 (2012) (asylum); § 1229b (cancellation of removal); § 1229c (voluntary departure); § 1255 (adjustment of status).

²¹ See *In re Teixeira*, 21 I. & N. Dec. 316, 321 (B.I.A. 1996); *In re Grijalva*, 19 I. & N. Dec. at 722.

²² See *In re Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (B.I.A. 1995) (discussed *infra* Part III.B).

²³ In a recent case, the Author represented a noncitizen who was applying for adjustment of status, a discretionary form of relief. The client had been convicted of possessing a fake identification document and assaulting his children. He also had been arrested for hitting his wife, although these charges were dismissed. The judge denied relief based on the history of domestic violence. In the oral decision, the judge read the contents of each police report as

The final use of a police report is to determine whether a noncitizen is deportable for one of the criminal grounds of deportability.²⁴ Because the majority of crime-related grounds of deportability require a conviction,²⁵ the Board historically has used the categorical approach to determine whether a criminal conviction fits an immigration category such as aggravated felony.²⁶ Following this approach, judges first must examine the elements of a noncitizen's statute of conviction; if those elements line up with the elements of the immigration crime (i.e. aggravated felony), the offense is an aggravated felony.²⁷ Only when the statute of conviction is divisible—that is, contains multiple criminal offenses, some of which are aggravated felonies and some of which are not—can the judge consult a limited selection of documents—those contained in the record of conviction.²⁸ The underlying facts are irrelevant to determining deportability under the categorical approach.²⁹

Strictly applying the categorical approach, it would appear that police reports should never be used to determine whether a noncitizen is removable for an offense

though they were facts proven beyond reasonable doubt, notwithstanding his wife's testimony that there had been no domestic violence in the home.

²⁴ The criminal grounds of deportability include crimes involving moral turpitude, aggravated felonies, firearms offenses, high-speed flight from an immigration checkpoint, failure to register as a sex offender, controlled substance offenses, certain miscellaneous crimes relating to sabotage and treason, and crimes of domestic violence, stalking, or child abuse. 8 U.S.C. § 1227(a)(2) (2012).

²⁵ The only criminal ground of deportability that does not require a conviction is a violation of a restraining order. *See* 8 U.S.C. § 1227(a)(2)(E)(ii). In contrast, there are several criminal grounds of inadmissibility (the inability for one to get a U.S. visa or become a permanent resident) that do not require a conviction. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(C), (H)–(I) (2012) (deeming inadmissible any noncitizen the Attorney General has reason to believe is a drug trafficker, human trafficker, or money launderer). The grounds of inadmissibility apply in immigration court either when a noncitizen is seeking relief that requires him to be admissible to the United States (such as adjustment of status to lawful permanent resident) or when a noncitizen has not yet been admitted to the United States (such as a noncitizen who was paroled into the United States for humanitarian reasons or who entered the United States without inspection). *See, e.g.*, 8 U.S.C. § 1255(a) (adjustment of status); § 1182(d)(5)(A) (humanitarian parole); § 1182(a)(6)(A) (deeming inadmissible noncitizens present in violation of the law). There are also lawful permanent residents who face the grounds of inadmissibility because, upon a return from a trip abroad, the statute deems them to be “seeking an admission” if they have committed an offense identified in the criminal grounds of inadmissibility. *See* 8 U.S.C. § 1101(a)(13)(C) (2012).

²⁶ *See, e.g., In re Pichardo-Sufren*, 21 I. & N. Dec. 330, 334 (B.I.A. 1996) (describing the categorical approach).

²⁷ *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (describing the categorical approach).

²⁸ *See Descamps v. United States*, 133 S. Ct. 2276, 2281–82 (2013); *Moncrieffe*, 133 S. Ct. at 1690.

²⁹ *See Moncrieffe*, 133 S. Ct. at 1684.

such as an aggravated felony. Indeed, in applying the categorical approach, the Board has prohibited judges from relying on police reports.³⁰ However, decisions by the Attorney General,³¹ Board,³² and Supreme Court³³ have created exceptions to this time-honored approach in immigration law, allowing more findings of fact by immigration judges to determine deportability.³⁴ Thus, police reports have played

³⁰ See *In re Teixeira*, 21 I. & N. Dec. 316, 320 (B.I.A. 1996).

³¹ In 2008, Attorney General Mukasey, in *In re Silva-Trevino*, 24 I. & N. Dec. 687 (Att’y Gen. 2008), permitted immigration judges to use any evidence to determine whether an offense was a crime involving moral turpitude if the statute was divisible. Although several circuit courts have refused to uphold *Silva-Trevino*, it still remains good law in other circuits. See, e.g., *Silva-Trevino v. Holder*, 742 F.3d 197, 205 (5th Cir. 2014); *Olivas-Motta v. Holder*, 746 F.3d 907, 916 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Jean-Louis v. Att’y Gen. of the United States*, 582 F.3d 462, 482 (3d Cir. 2009).

³² See, e.g., *In re Gertsenshteyn*, 24 I. & N. Dec. 111, 115–16 (B.I.A. 2007) (creating a bifurcated approach for analyzing prostitution aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(K)(ii), which requires judges to use the categorical approach to determine whether the offense involves prostitution but permits judges to use a factual inquiry to determine whether the offense was committed for commercial advantage); see also *In re Introcaso*, 26 I. & N. Dec. 304, 309 (B.I.A. 2014) (applying the circumstance-specific approach in a visa petition case involving the Adam Walsh Child Protection and Safety Act of 2006 to determine whether a petitioner has been convicted of a “specified offense against a minor”); *In re Davey*, 26 I. & N. Dec. 37, 39–40 (B.I.A. 2012) (applying the bifurcated approach to the controlled substance ground of deportability under 8 U.S.C. § 1227(a)(2)(B) and holding that judges must use the categorical approach to determine if the offense involved was a controlled substance crime and the circumstance-specific approach to determine whether the offense involved simple possession for one’s own use of thirty grams or less of marijuana); *In re Babaisakov*, 24 I. & N. Dec. 306, 322 (B.I.A. 2007) (applying the bifurcated approach to another aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(i), and holding that judges should use the categorical approach to determine whether the offense involves fraud, but they may use a factual inquiry to determine whether the loss to the victim exceeded \$10,000).

³³ In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Supreme Court applied the bifurcated approach for analyzing fraud aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(M)(i); the Court held that judges should use the categorical approach to determine whether the offense involves fraud, but may use a factual inquiry to determine the loss to the victim. See 557 U.S. at 40.

³⁴ Until the Supreme Court’s 2013 decisions in *Moncrieffe* and *Descamps*, it appeared that the categorical approach was dying a slow death. In *Moncrieffe*, the Court, strictly applying the categorical approach, held that a noncitizen was not deportable for a drug distribution conviction. 133 S. Ct. at 1690. In *Descamps*, the Court strictly applied the categorical approach to determine that a criminal defendant could not have his sentence enhanced under the Armed Career Criminals Act (ACCA) due to a prior conviction for burglary. *Descamps v. United States*, 133 S. Ct. 2276, 2281–82 (2013). Because the categorical approach in both sentencing and immigration proceedings are identical, the Board has applied ACCA cases to the immigration context. See *In re Chairez-Castrejon*, 26 I. & N. Dec. 349, 353–54 (B.I.A. 2014).

a role in more decisions on deportability since the creation of exceptions to the categorical approach.³⁵

B. Why Police Reports Are Unreliable

Why is it problematic that an immigration judge assumes the truth of police reports when deciding a case? Critical decisions turn on facts such as whether a noncitizen was intending to sell or simply possess marijuana, yet the police officer does not appear in immigration court to describe his observations of an alleged sale.³⁶ Also critical to many cases is a victim's description of the harm suffered, yet the police report is often double hearsay, relying on a statement from the victim. If neither the officer nor the victim appears in immigration court, how does a judge determine whether the victim had a motive to lie to the police, or whether she later recanted her statements?

Courts have always disfavored hearsay, which is an out-of-court statement introduced to prove the truth of the matter asserted, because it is unreliable.³⁷ Since the person who asserts the fact is not present in court, hearsay cannot be tested by cross-examination.³⁸ In 1975, the prohibition against the use of hearsay was codified in the Federal Rules of Evidence (FRE).³⁹ The rule against hearsay, however, "is

³⁵ During a presentation by a local immigration judge in the Author's Immigration Clinic seminar, a question was posed about whether the judge found the fact-finding on crimes involving moral turpitude to be complicated following the Attorney General's decision in *Silva-Trevino*. See *supra* note 31. The judge replied, "I just look at the police reports."

³⁶ See, e.g., *In re Grijalva*, 19 I. & N. Dec. 713, 724 (B.I.A. 1988).

³⁷ See, e.g., *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994) ("Hearsay is generally inadmissible because 'the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined.'" (quoting *United States v. Console*, 13 F.3d 641, 656 (3d Cir. 1993))); ERIC D. GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 405 (3d ed. 2000).

³⁸ See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 32 (Chadbourn rev. 1974) (stating that cross-examination is "the greatest legal engine ever invented for the discovery of truth").

³⁹ See FED. R. EVID. 801 (defining hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement"). The historical backdrop to the codification dates back to 1942, when the American Law Institute adopted the Model Code of Evidence; although the Model Code "stimulated much discussion and debate," it was not adopted by any jurisdiction. George W. Pugh, Foreword, *The Federal Rules of Evidence*, 36 LA. L. REV. 59, 62 (1975). In 1961, a Special Committee was formed to determine whether a federal evidence code was feasible and desirable; when this committee answered affirmatively, Chief Justice Earl Warren appointed an Advisory Committee on Rules of Evidence to draft the proposed rules. *Id.* at 63. The rules ultimately were promulgated by the Supreme

riddled with exceptions.”⁴⁰ The exceptions generally indicate the document’s trustworthiness.⁴¹

A police report likely fits within the public records exception at FRE 803(8), which reads:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

.....

Public Records. A record or statement of a public office if: (A) it sets out: (i) the office’s activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.⁴²

Police reports are public records because they document a “matter observed while under a legal duty to report” or “factual findings from a legally authorized investigation.”⁴³

Court in 1972. *Id.* The House Judiciary Committee, and subsequently the Senate Judiciary Committee, then held extensive hearings on the rules and proposed several amendments, which led to both a House and a Senate version of the rules. *Id.* at 64. The two chambers reached agreement, and the rules were enacted into law and became effective on July 1, 1975. *Id.*

⁴⁰ *Ohio v. Roberts*, 448 U.S. 56, 62 (1980); *see also* FED. R. EVID. 803, 804 (listing exceptions to the hearsay rule). FRE 807, called the “residual exception,” permits the admission of hearsay that does not fit within one of the specified exceptions in FRE 803 and 804, when

(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

FED. R. EVID. 807.

⁴¹ *See Roberts*, 448 U.S. at 66 (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”); Fred Warren Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 AM. J. TRIAL ADVOC. 229, 231 (1997) (citing 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE 803-261 (Supp. Nov. 1995)) (stating that the hearsay exceptions are premised “on the principles of necessity and trustworthiness”).

⁴² FED. R. EVID. 803(8).

⁴³ *Id.*

The public records exception exists because these documents generally are reliable, since “public officials are presumed to perform their duties properly and generally lack a motive to falsify information.”⁴⁴ Also, it is believed that a public record is often more accurate than “the potentially hazy memory of a public official who must deal with hundreds of instances of similar conduct.”⁴⁵ Finally, courts have justified this exception by the “inconvenience of calling to the witness stand all over the country government officers who have made in the course of their duties thousands of similar written hearsay statements concerning events coming within their jurisdictions.”⁴⁶

When a police report is written, does the source of the information or other circumstances indicate a lack of trustworthiness?⁴⁷ Police reports are written very early in an investigation, when officers are first starting to form theories of what happened in a criminal case. As the Fourth Circuit wrote, “[P]olice reports . . . often contain little more than unsworn witness statements and initial impressions. . . . Further, because [they] are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections.”⁴⁸ Also, there are often multiple police reports; another report from the same case may include additional witnesses or evidence that call into question some of the “facts” in the first police report.⁴⁹ Judge Kleinfeld of the Ninth Circuit reasoned that police reports

⁴⁴ *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996) (citing MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6759, at 663 (interim ed., 1992)); *see also* FED. R. EVID. 803 advisory committee’s notes to paragraph (8) (“Justification for the [public records] exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.”).

⁴⁵ *Felzcerek*, 75 F.3d at 116 (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952)); *see also* *United States v. Quezada*, 754 F.2d 1190, 1193 (5th Cir. 1985) (citing 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, PUBLIC RECORDS § 454) (stating that the reasons underlying the public records exception are “the presumed trustworthiness of public documents prepared in the discharge of official functions, and the necessity of using such documents, due to the likelihood that a public official would have no independent memory of a particular action or entry where his duties require the constant repetition of routine tasks”).

⁴⁶ *See Wong Wing Foo*, 196 F.2d at 123; *see also* *United States v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990) (stating that a consideration of the public records exemption is “the great inconvenience that would be caused to public business if public officers had to be called to court to verify in person every fact they certify”). Because public records are presumed to be reliable, an opponent of this evidence must come forward with enough negative factors to persuade the court not to admit it. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995); *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992).

⁴⁷ The Advisory Committee’s notes cite four factors that are indicative of trustworthiness: “(1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; [and] (4) possible motivation problems.” FED. R. EVID. 803 advisory committee’s notes to paragraph 8 (citations omitted).

⁴⁸ *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012).

⁴⁹ Email from Wendy Wayne, Dir., Immigration Impact Unit, Comm. for Pub. Counsel Servs., to author (Aug. 11, 2014) (on file with the author). Wayne cites as an example conflicting police reports in which one report describes evidence or statements suggesting

are helpful in guiding further investigation, helping prosecutors and defense counsel locate useful witnesses, and serving as a contemporaneous recollection of what the officer observed and what the officer understood people to have told him.⁵⁰ “But,” he reasoned, “police reports are not especially useful instruments for finding out what persons charged actually did.”⁵¹ This is because “[a]ll the defects of hearsay, double hearsay, and triple hearsay apply, since people may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported. People sometimes lie or exaggerate when they talk to the police.”⁵²

Motive is one reason why police reports may be untrustworthy.⁵³ Police reports are prepared in anticipation of litigation, and thus an officer may be attempting to improve the litigation position of the prosecution at trial.⁵⁴ Motive in any witness’s statements is important as well, as witnesses may lie or exaggerate to the police for a variety of reasons.⁵⁵ The nature of the confrontation between the police and a criminal defendant also is inherently adversarial, raising concerns about reliability of police reports.⁵⁶ This was one of the concerns that guided Congress, when adopting the FRE, to specifically exclude police reports from the public records exception

possession with intent to distribute, while another report in the same case is written by an officer who saw evidence of possession for personal use. *Id.*

⁵⁰ *Olivas-Motta v. Holder*, 746 F.3d 907, 918–19 (9th Cir. 2013) (Kleinfeld, J., concurring).

⁵¹ *Id.*; see also *United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013) (“While police reports may be demonstrably reliable evidence of the fact that an arrest was made they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true.” (quoting *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986))).

⁵² *Olivas-Motta*, 746 F.3d at 918–19 (Kleinfeld, J., concurring) (footnote omitted) (citing *Prudencio*, 669 F.3d at 483–84).

⁵³ See FED. R. EVID. 803 advisory committee’s notes to paragraph 8.

⁵⁴ In the Advisory Committee’s notes to FRE 803(8), “motivational problems” include those raised by the Supreme Court in *Palmer v. Hoffman*. See *id.* (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)). In *Palmer*, the Court carved out an exception to the “shop book rule” for those business records that were prepared in anticipation of litigation. *Palmer*, 318 U.S. at 113–14; see also *United States v. Stone*, 604 F.2d 922, 925 (5th Cir. 1979) (“This hearsay exception [for public records] is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation.”); Bennett, *supra* note 41, at 251 (“Government agencies tend to be neutral and objective with respect to matters reported in official records, particularly when the records are prepared without an eye toward litigation.”).

⁵⁵ See *Olivas-Motta*, 746 F.3d at 919 (Kleinfeld, J., concurring).

⁵⁶ See *Bell*, 785 F.2d at 643–44 (finding in a probation revocation hearing that urinalysis laboratory reports bear substantial indicia of reliability, but reasoning that police reports are not as inherently reliable because “[t]he relationship between police officers and those whom they arrest is much more personal and adversarial in nature than that between chemists and those whose urine they test”).

to the hearsay rule when used against a defendant in a criminal case.⁵⁷ As stated in the Senate Report recommending adoption of the FRE:

Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.⁵⁸

Additionally, the Honorable William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, when presenting the final version of the FRE, stated, “Police reports, especially in criminal cases, tend to be one-sided and self-serving. They are frequently prepared for the use of prosecutors, who use such reports in deciding whether to prosecute.”⁵⁹

Scholars have discussed the problem of police officers falsifying information on reports.⁶⁰ Many have commented on the ultimate control police have over the construction of the facts of a criminal case—the way police record facts creates the framework for how judges, prosecutors, and defense attorneys think about the case.⁶¹

⁵⁷ See S. REP. NO. 93-1277, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064; H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7111 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, Upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration) [hereinafter Hungate Statement]; see also *Bell*, 785 F.2d at 644 (“We note that Congress exhibited similar doubts about the reliability of such reports when it specifically excluded them from the public records exception to the hearsay rule in criminal cases.”). The other concern underlying the exclusion of police reports from criminal trials was the Confrontation Clause of the Sixth Amendment. See *infra* Part II.

⁵⁸ S. REP. NO. 93-1277, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064.

⁵⁹ Hungate Statement, *supra* note 57, at 7111.

⁶⁰ See, e.g., Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 5–13 (2010) (collecting evidence of police lies from video and audio records, judges’ in-court observations, jury findings of police perjury, commissions dedicated to studying police corruption, an empirical study of Chicago’s criminal justice system, and circumstantial evidence from the Innocence Project and other studies); see also David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 460 (1999) (“Police officers can be expected to omit, redact, and even lie on their police reports, sworn or unsworn.”); Stanley Z. Fisher, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 6 (1993); Wilson, *supra*, at 8 n.50 (collecting cases in which judges found that police had lied in their sworn statements); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 324 (2005) (“The belief that police falsification is ubiquitous is widely held.”).

⁶¹ See, e.g., Fisher, *supra* note 60, at 4 (“Through their reports, the police ‘have fundamental control over the construction of [the] ‘facts’ for a case, and all other actors (the

The scholarship discusses two main functions of a police report: 1) if an arrest is made, to recite facts obtained or observed to support probable cause; and 2) if an arrest is not made, to guide further investigation.⁶² Since the officer must tell the same story during a later suppression hearing, there is incentive to lie in the report to justify unlawful searches and arrests.⁶³ Thus, “police often justify their lies by convincing themselves that lying will ensure that a guilty and dangerous defendant is not released or acquitted.”⁶⁴ David Dorfman has discussed incentives to conduct false arrests and the reasons why police “overcharge” on an arrest report: “to aggrandize themselves, to anticipate the inevitable reduction of charges during plea-bargaining, or as an essentially adversarial act against a person the police officer presumes is guilty of the more serious crime, despite a lack of sufficient evidence.”⁶⁵ Stanley Fisher wrote that police lie in reports to avoid potential embarrassment or civil liability for a false arrest, to convince the public that they are “doing something” about crime, and because they have an interest in punishing the guilty and a “psychological stake in believing that a particular suspect . . . is . . . guilty”—thus

prosecutor, the judge, the defense lawyer) must work from the framework of facts as constructed by the police.” (alteration in original) (quoting Richard V. Ericson, *Rules for Police Deviance*, in ORGANIZATIONAL POLICE DEVIANCE: ITS STRUCTURE AND CONTROL 96 (Clifford D. Shearing ed., 1981)); Wilson, *supra* note 60, at 15–16 (“The police decide who to interview, where to look, what documents to collect, what people and places to leave uninvestigated, what questions to ask, and with what tone to ask them. Police flavor and shape every case from beginning to end. Without [the police] . . . few criminals could be convicted.”).

⁶² See Dorfman, *supra* note 60, at 492; Fisher, *supra* note 60, at 7–8.

⁶³ See Dorfman, *supra* note 60, at 492; see also Zeidman, *supra* note 60, at 322, 324 (discussing findings of the Mollen Commission, which was assembled in response to corruption in police precincts in New York City, that corrupt officers “manufactured facts” to justify unlawful searches and arrests, one of which was the “dropsy” testimony that “the person dropped a bag . . . as the officers approached” (alteration in original) (quoting COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMM’N REPORT 1994, at 37)).

⁶⁴ Wilson, *supra* note 60, at 4. Other motives to lie include gaining the trust of a suspect, convincing a suspect to admit criminal behavior, and covering up wrongdoing by themselves or other officers. See *id.*; see also Dorfman, *supra* note 60, at 461 (“Police will commit perjury to further the prosecution of a citizen by adding inculpatory ‘evidence’ to better secure a conviction, to gild the lily of police conduct, or merely to sanitize the record of uncomfortable facts.” (footnotes omitted)); Fisher, *supra* note 60, at 15 (“[O]fficers justify deception in terms of the need to safeguard competing values that are perceived as superior to truth-telling. Justifications . . . include the maintenance of order, self-protection, and the apprehension and punishment of the ‘guilty.’” (footnotes omitted)); *id.* at 12 n.46 (discussing a social scientist’s observations of an urban police department that lying is a “routine way of managing legal impediments—whether to protect fellow officers or to compensate for what [the policeman] views as limitations the courts have placed on his capacity to deal with criminals” (alteration in original) (quoting Jerome H. Skolnick, *Deception By Police*, CRIM. JUST. ETHICS 40, 42–43 (1982))).

⁶⁵ Dorfman, *supra* note 60, at 475.

they lie to “ensure conviction of the ‘guilty.’”⁶⁶ A major problem with police lies, Melanie Wilson noted, is with the legal system, which “treats the police as if they are impartial fact gatherers, trained and motivated to gather facts both for and against guilt, rather than biased advocates attempting to disprove innocence, which is the reality.”⁶⁷

C. Scope of the Police Report Problem

What is the scope of the police report problem? While there are not statistics available to report the number of immigration court decisions in which a police report played a role, in fiscal year 2013, immigration courts nationwide completed 253,942 cases.⁶⁸ Of these, 63,313 were detainee cases and 57,132 were bond cases.⁶⁹ There is a significant correlation between criminal activity and immigration detention;⁷⁰ thus, it is likely that a significant number of these detainee and/or bond cases involved judges looking at police reports. Of course, these numbers do not account for the large number of immigration cases that are diverted out of the regular adjudication system through “fast-track” procedures such as expedited removal, administrative removal, and reinstatement of removal.⁷¹ These numbers also do not account for the thousands of decisions by the U.S. Citizenship and Immigration Services to deny an application for immigration status where a police report played a role in the discretionary denial.⁷²

⁶⁶ See Fisher, *supra* note 60, at 8–17.

⁶⁷ Wilson, *supra* note 60, at 3.

⁶⁸ EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP’T OF JUSTICE, FY 2013 STATISTICAL YEARBOOK A5 tbl.2, <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

⁶⁹ *Id.* at A6 tbl.2A, G1 fig.11.

⁷⁰ See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1361–72 (2014) (tracking how immigration detention became part of the punitive consequences for drug-related criminal activity during 1980s war on drugs); see also *id.* at 1379 (“The federal government’s fifteen-year history of intermingling immigration detention and crime-fighting legislation strongly implies that Congress and, at times, the president viewed this as a criminal law enforcement tool.”).

⁷¹ See, e.g., 8 U.S.C. § 1225 (2012) (authorizing expedited removal for noncitizens arriving at a port of entry who do not have proper documentation to enter); § 1231(a)(5) (authorizing reinstatement of removal for those already ordered removed in the past); § 1228 (authorizing administrative removal for certain noncitizens convicted of aggravated felonies). See generally Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009) (discussing diversions from the immigration adjudication system).

⁷² The U.S. Citizenship and Immigration Services (CIS) is the branch of the Department of Homeland Security responsible for considering affirmative applications such as those for adjustment of status, waivers of inadmissibility, asylum, and naturalization. See RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 2:2 (2014).

The police report problem takes on added significance when one considers the Obama administration's focus on deporting "criminal aliens." As Janet Napolitano, the former Secretary of the Department of Homeland Security, wrote to Senator Dick Durbin in 2011, one of the department's priorities for enforcement was "identifying and removing criminal aliens."⁷³ She wrote that, thanks to the use of the Secure Communities Program, over fifty percent of Immigration and Customs Enforcement (ICE) removals in fiscal year 2010 were convicted criminals.⁷⁴ In addition, a 2011 memo from ICE Director John Morton directed ICE agents on the exercise of prosecutorial discretion.⁷⁵ The memo stated that "in furtherance of ICE's enforcement priorities, the following negative factors should . . . prompt particular care and consideration[:]. . . serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind [and] known gang members or other individuals who pose a clear danger to public safety."⁷⁶ A November 2014 ICE memo regarding prosecutorial discretion, which superceded the 2011 Morton Memo, lists as "Priority One" for enforcement those who have been convicted of a felony, aggravated felony, or an offense for which an element was active participation in a criminal street gang.⁷⁷ The same memo lists as "Priority Two" those convicted of multiple misdemeanors or certain "significant misdemeanors" such as domestic violence.⁷⁸ ICE's statistics indicate that in fiscal year 2013, in furtherance of its priority to remove "criminal aliens," "ICE conducted 133,551 removals of individuals apprehended in the interior of the U.S."; of these, eighty-two percent previously had been convicted of a crime.⁷⁹

The increased cooperation between ICE and local law enforcement creates more opportunities for police reports to factor into critical decisions in immigration cases. For example, 287(g) agreements, whereby state or local officers enforce federal immigration law,⁸⁰ allows ICE to use police reports to meet its burden to prove alienage, since a noncitizen first makes admissions of alienage to a police officer. Efforts such

⁷³ Letter from Janet Napolitano, Sec'y of Homeland Sec., to Senator Dick Durbin (Aug. 18, 2011), *available at* http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

⁷⁴ *Id.*

⁷⁵ Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., et al. (June 17, 2011) [hereinafter Morton Memo].

⁷⁶ *Id.*

⁷⁷ Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Johnson Memo].

⁷⁸ *Id.*

⁷⁹ *See* Enforcement & Removal Operations, *FY2013 ICE Immigration Removals*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> (last visited Mar. 11, 2015).

⁸⁰ *See* Immigration & Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2012).

as ICE's Operation Community Shield that target criminal street gangs through the immigration enforcement system allow increased use of police reports to deny bond and discretionary decisions because of a noncitizen's alleged membership in or affiliation with a criminal street gang, even if law enforcement chooses not to prosecute such criminal activity.⁸¹

Immigration judges' reliance on police reports in life-altering decisions in noncitizen's lives clearly is a problem within the immigration adjudication system. How would those same police reports be treated in criminal law?

II. POLICE REPORTS AS EVIDENCE IN CRIMINAL CASES

FRE 803(8) expressly prohibits the use of a police report against a defendant in a criminal case, even if it meets the definition of a "public record."⁸² One reason is that such statements are inherently unreliable.⁸³ A second reason is that Congress was attempting "to avoid a collision between the hearsay rule and the confrontation clause of the Sixth Amendment."⁸⁴ What were the constitutional issues that concerned

⁸¹ See generally Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, 2007 U. CHI. LEGAL F. 317 (2007). Additionally, the Secure Communities Program, discontinued since November 2014, allowed state and local officials to run arrestees through DHS databases to identify removable noncitizens, leading to detention and deportation even if there was no criminal conviction. See Chacón, *supra* note 2, at 1595–96; Johnson Memo, *supra* note 77. Noncitizens referred to ICE through this program could be denied bond and relief from removal based on the police reports from that initial encounter with law enforcement. Secure Communities was replaced with the Priority Enforcement Program, where ICE should only seek transfer of a noncitizen from state or local custody when that person fits within certain enforcement priorities, most of which require convictions. See *id.*

⁸² FED. R. EVID. 803(8)(A)(ii).

⁸³ See *supra* Part I.B.

⁸⁴ *United States v. Quezada*, 754 F.2d 1190, 1193 (5th Cir. 1985); *United States v. Oates*, 560 F.2d 45, 66 (2d Cir. 1977) ("[The] efforts to avert the possibility of conflict between the hearsay exceptions and the confrontation clause find their most emphatic expression in FRE 803(8) . . ."). In *Oates*, the Second Circuit carefully examined the legislative history of FRE 803(8) to conclude that a chemist's report that analyzed a substance it determined to be heroin could not be admitted as a hearsay document when the witness was unavailable. 560 F.2d at 64, 68–69. The court reasoned that the legislative intent to make police and law enforcement reports absolutely inadmissible against a criminal defendant would be meaningless if they could come in via other exceptions, such as the residual exception or the business records exception. See *id.* at 70–78. The court stated,

[T]he pervasive fear of the draftsmen and of Congress that interference with an accused's right to confrontation would occur was the reason why in criminal cases evaluative reports of government agencies and law enforcement reports were expressly denied the benefit to which they might otherwise be entitled under FRE 803(8).

Id. at 78.

Congress when prohibiting the use of police reports against a defendant in a criminal case, notwithstanding their classification as public records?

A. The Sixth Amendment Confrontation Clause

The Confrontation Clause of the Sixth Amendment reads, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁸⁵ In a criminal case, the police officer who wrote a report detailing what facts led up to the arrest is a witness against the accused. The Confrontation Clause gives the criminal defendant the right to meet the police officer face-to-face in court and to have the officer’s testimony tested through cross-examination.⁸⁶

In the 1980 case *Ohio v. Roberts*,⁸⁷ the Court interpreted the Confrontation Clause to allow admission of an out-of-court statement if it fell within a “firmly rooted hearsay exception” or carried “particularized guarantees of trustworthiness.”⁸⁸ Scholars criticized the Court’s decision as demoting what was formerly a constitutional right protecting the accused to “essentially a minor adjunct to evidence law.”⁸⁹ In 2004, in *Crawford v. Washington*,⁹⁰ the Court overruled its decision in *Roberts*, holding that when the Confrontation Clause applies, it guarantees a defendant the opportunity to cross-examine the maker of the hearsay statement.⁹¹ The *Crawford* Court held, however, that the Confrontation Clause only applied to “testimonial” statements—ones “made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.”⁹² Thus, the Court found that to admit the testimonial statement of the defendant’s

⁸⁵ U.S. CONST. amend. VI.

⁸⁶ See *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (“Confrontation means more than being allowed to confront the witness physically. ‘Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.’” (alteration in original) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))).

⁸⁷ 448 U.S. 56 (1980).

⁸⁸ *Id.* at 66. Jeffrey Bellin discusses the logic of *Roberts*: “(1) [T]he Sixth Amendment mandates confrontation to ensure that testimony is reliable, and thus (2) if the reliability of hearsay can be established in some other way (for example, by a judicial determination of reliability), confrontation is not required.” Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1873 (2012).

⁸⁹ See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988); see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Jonakait, *supra*, at 574 (“The confrontation clause is not now a constitutional provision controlling evidence law. Instead, evidence law dominates the confrontation right.”).

⁹⁰ 541 U.S. 36 (2004).

⁹¹ *Id.* at 59.

⁹² *Id.* at 51–52 (quoting Brief for National Ass’n for Criminal Defense Lawyers et al. as Amici Curiae at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

wife, whose statement would otherwise be admissible under evidence law because she was “unavailable” due to the spousal privilege, violated the defendant’s confrontation rights.⁹³ The only out-of-court testimonial statements the *Crawford* Court would allow were those where the defendant had made the witness unavailable by wrongdoing because “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.”⁹⁴

The Court in a 2012 case summarized its post-*Crawford* test for what characteristics of a hearsay document prompt Confrontation Clause concerns:

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.⁹⁵

Under this test, the Court has found violations of the Confrontation Clause when prosecutors relied on hearsay documents such as certified lab reports having the purpose of showing that the defendant’s blood-alcohol level exceeded the legal limit⁹⁶ and certified lab reports having the purpose of showing that the substance connected to a defendant contained cocaine.⁹⁷

The police reports that are introduced against noncitizens in immigration court certainly fit these two characteristics. They are out-of-immigration-court statements

⁹³ *Id.* at 40, 68. The Court later held that a statement in the course of police interrogation under circumstances indicating that the primary purpose was to enable police to meet an ongoing emergency is not “testimonial” under *Crawford*’s definition. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Thus, a police interrogation that took place in the course of a 911 call did not produce “testimonial” statements and therefore was admissible notwithstanding the lack of cross-examination of the 911 caller. *Id.* at 828–29. In *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the Court found that statements made to the police by a dying victim of a gunshot wound were not “testimonial” because the circumstances of the encounter and the statements and actions of the police and victim “objectively indicate[d] that the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’” *Id.* at 1166–67 (quoting *Davis*, 547 U.S. at 822). The Court’s focus after *Crawford* about which statements were “testimonial” has created, in the opinion of Jeffrey Bellin, a “dramatic curtailment of the post-*Crawford* confrontation right.” Bellin, *supra* note 88, at 1868 (discussing the Court’s decisions in *Michigan v. Bryant* and *Davis v. Washington*).

⁹⁴ *Crawford*, 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

⁹⁵ *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012).

⁹⁶ *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

⁹⁷ *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 329 (2009). In *Williams*, the Court applied this test to hold that a DNA report of the semen from the vaginal swabs of a rape victim was not “testimonial” because it was not prepared for the primary purpose of accusing a targeted individual, but to catch a dangerous rapist who was still at large. *Williams*, 132 S. Ct. at 2243.

that have the primary purpose of accusing the noncitizen of engaging in criminal conduct. They are formalized statements such as affidavits.⁹⁸ Why, then, are they routinely admitted and relied upon by immigration judges? The next section discusses this question.

III. HEARSAY AND CONFRONTATION RIGHTS IN IMMIGRATION LAW

Immigration proceedings are civil, not criminal; thus, the full constitutional protections of a criminal trial do not attach.⁹⁹ Courts deciding immigration cases and the Board repeatedly have held that neither the Federal Rules of Evidence nor the Sixth Amendment Confrontation Clause apply.¹⁰⁰ The Immigration and Nationality Act (INA) gives noncitizens in removal proceedings “a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.”¹⁰¹ The INA allows noncitizens to subpoena witnesses, although, unlike criminal proceedings, there is no compulsory process right that guarantees the appearance of those witnesses.¹⁰² In deportation cases, the noncitizen also has the right to have the government prove its case by “clear and convincing evidence” (with the government bearing the burden of proof).¹⁰³ Beyond these statutory rights, there is one constitutional protection—the Due Process Clause of the Fifth Amendment—that applies. Due process requires that immigration proceedings be “fundamentally fair.”¹⁰⁴

A. Hearsay’s Treatment in Immigration Law

Courts have held that hearsay evidence is admissible in immigration proceedings if it is probative and its use is fundamentally fair.¹⁰⁵ Courts also have reasoned that fairness is “closely related to the reliability and trustworthiness of the

⁹⁸ See *Williams*, 132 S. Ct. at 2242.

⁹⁹ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (holding that deportation is not punishment).

¹⁰⁰ See, e.g., *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974); *In re Wadud*, 19 I. & N. Dec. 182, 188 (B.I.A. 1984); *In re DeVera*, 16 I. & N. Dec. 266, 268 (B.I.A. 1977); see also *Emile v. INS*, 244 F.3d 183, 189 (1st Cir. 2001) (“Since deportation is civil, the Confrontation Clause does not apply.”).

¹⁰¹ 8 U.S.C. § 1229a(b)(4)(B) (2012).

¹⁰² Compare 8 U.S.C. § 1229a(b)(1) (“The immigration judge *may* issue subpoenas” (emphasis added)), with U.S. CONST. amend. VI (“[T]he accused *shall* enjoy the right . . . to have compulsory process for obtaining witnesses in his favor” (emphasis added)).

¹⁰³ See 8 U.S.C. § 1229a(c)(3)(A).

¹⁰⁴ See *Pouhova v. Holder*, 726 F.3d 1007, 1011 (7th Cir. 2013); *Felzcerk v. INS*, 75 F.3d 112, 115 (2d Cir. 1996); see also *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990).

¹⁰⁵ See cases cited *supra* note 104.

evidence.”¹⁰⁶ To determine whether evidence introduced in immigration court is “reliable and trustworthy,” courts and the Board have used the Federal Rules of Evidence, which, in codifying many of the firmly rooted exceptions to the hearsay doctrine, provide an easy test for reliability.

For example, in a line of cases, the government sought to produce an affidavit signed by an ex-spouse, a U.S. citizen, whose written testimony proved that the noncitizen committed marriage fraud. The courts discussed a right to confrontation and cross-examination, rooted in either the statutory right to cross-examine adverse witnesses¹⁰⁷ or the Due Process Clause.¹⁰⁸ In all of these cases, the courts held that when the government introduces a hearsay document in immigration proceedings, it must make “reasonable efforts” to ensure the presence of the witness.¹⁰⁹ This rule stems from a 1977 Board case,¹¹⁰ in which the Board reasoned that the U.S. citizen spouse was writing the hearsay declaration against her own penal interest, and thus it was reliable, as it would be admissible under FRE 804(b)(3).¹¹¹ If the government could prove they tried to find her but could not, that made her “unavailable” under FRE 804(a)(5).¹¹² Courts generally have held that the burden is on the government, not the noncitizen, to make efforts to produce the witness.¹¹³

¹⁰⁶ *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (quoting *Felzcerk*, 75 F.3d at 115); *see also* *Duad v. United States*, 556 F.3d 592, 596 (7th Cir. 2009) (stating that despite flexibility of evidentiary rules in removal proceedings, “evidence must, in the final analysis, be reliable”).

¹⁰⁷ 8 U.S.C. § 1229a(b)(4)(B).

¹⁰⁸ *See, e.g.,* *Malave v. Holder*, 610 F.3d 483 (7th Cir. 2010) (holding that an immigration judge’s rejection of the noncitizen’s subpoena request denied statutory right to cross-examine the ex-husband whose affidavit proved marriage fraud and declining to reach the due process challenge); *Ocasio v. Ashcroft*, 375 F.3d 105, 107–08 (1st Cir. 2004) (reasoning that due process requires the government to make reasonable efforts to secure the ex-husband whose written testimony proved marriage fraud, yet because the noncitizen did not object, she forfeited any objection); *Olabanji v. INS*, 973 F.2d 1232, 1234–36 (5th Cir. 1992) (finding that ex-wife’s affidavit proving marriage fraud was not admissible based on principles of fundamental fairness when the government did not make reasonable efforts to secure her presence); *Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985) (finding that the government did make a reasonable effort to subpoena the witness); *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983) (holding that the government’s introduction of ex-wife’s affidavit deprived noncitizen of his statutory and constitutional right to confront and cross-examine the witnesses against him).

¹⁰⁹ *See* cases cited *supra* note 108; *see also* *Pouhova*, 726 F.3d at 1015 (questioning, in dicta, the “reasonable efforts” theory, and stating, “We do not see why making an unsuccessful effort to locate a witness renders the unreliable hearsay evidence any more reliable or its use any fairer than without such effort”).

¹¹⁰ *In re DeVera*, 16 I. & N. Dec. 266, 269–71 (B.I.A. 1977).

¹¹¹ *See id.* at 270 (citing FED. R. EVID. 804(b)(3)).

¹¹² *See id.* (defining an “unavailable witness” as “a witness absent from the hearing where ‘the proponent of the statement has been unable to procure his attendance or testimony by process or other reasonable means’” (quoting FED. R. EVID. 804(a)(5))).

¹¹³ *See Olabanji*, 973 F.2d at 1236 (placing burden with INS when it produces the hearsay document and discussing difficulty for pro se respondents without language skills or experience

Several courts have considered due process challenges to an immigration judge's reliance on the form I-213, Record of Inadmissible/Deportable Alien.¹¹⁴ This form, which is a recording of an immigration officer's encounter with the noncitizen, can be likened to the police report of removal proceedings because the information in the I-213 usually forms the basis for issuing the charging document in immigration court.¹¹⁵ The government, when seeking to meet its burden of showing alienage,¹¹⁶ frequently provides the I-213 to prove that the noncitizen told an immigration officer of his foreign birth. Courts have held that the form I-213 is inherently trustworthy; some have discussed its trustworthiness by concluding that it is a public record.¹¹⁷ Thus, the burden is on the noncitizen to "produce[] probative evidence that contradicts anything material on the I-213 [that] would cast doubt upon its reliability."¹¹⁸ If the noncitizen proves the I-213 to be untrustworthy, courts have found it to be a violation of due process for the immigration judge to rely on it.¹¹⁹

In another example of the due process fundamental fairness test, courts have considered the admissibility of hearsay documents admitted against asylum-seekers.¹²⁰ In these cases, the government sent asylum-seekers' corroborating evidence to the

in the American conflict resolution system); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) ("[W]e require that 'the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.' This duty is not satisfied where the 'government . . . effectively . . . shift[s] the burden of producing its witness onto [the alien.]'" (alteration in original) (citation omitted) (quoting *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988))).

¹¹⁴ See, e.g., *Pouhova*, 726 F.3d at 1012–16; *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975).

¹¹⁵ See STEEL, *supra* note 72 at § 14:18–19.

¹¹⁶ See 8 C.F.R. § 1240.8(c) (2014).

¹¹⁷ See, e.g., *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995); *Bustos-Torres*, 898 F.2d at 1056; *Trias-Hernandez*, 528 F.2d at 369.

¹¹⁸ *Espinoza*, 45 F.3d at 311; see also *id.* at 310 ("The burden of establishing a basis for exclusion of evidence from a government record falls on the opponent of the evidence, who must come forward with enough negative factors to persuade the court not to admit it." (citing *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992))); *In re Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) (holding that, absent any indication that a I-213 form contains information that is manifestly incorrect or was obtained by duress, the form is "inherently trustworthy and admissible as evidence").

¹¹⁹ See, e.g., *Pouhova*, 726 F.3d at 1012–13, 1016; see also *id.* at 1013 (listing reasons why I-213 may be unreliable: if it contains information known to be incorrect, was drafted carelessly or maliciously, mischaracterizes material information, was obtained by coercion or duress, or the information was obtained by someone other than the noncitizen who is the subject of the form).

¹²⁰ See, e.g., *Angov v. Holder*, 736 F.3d 1263 (9th Cir. 2013); *Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009); *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003).

U.S. Department of State in the country of persecution for the purposes of authentication and then sought to produce the hearsay State Department reports to prove the documents were fake. While this report would be trustworthy as a public record, several litigants successfully argued that reliance on an untrustworthy consular report violated an asylum-seeker's due process rights;¹²¹ one reached the same conclusion on statutory grounds.¹²² In these cases, courts remanded the cases back to the agency to consider the asylum applications without the damaging hearsay documents. A recent decision by the Ninth Circuit, however, harshly criticized these cases, stating, "This is just the opening chapter in what could well become the constitutionalization of vast areas of administrative law."¹²³

Thus, courts have found hearsay documents unreliable under the due process fundamental fairness test and granted confrontation rights in immigration cases. This trend, however, seems to stop short when the hearsay document in question is a police report, especially when the case involves discretionary relief.

B. Police Reports in Discretionary Cases

The Board's 1988 decision in *In re Grijalva*¹²⁴ is key to understanding how immigration judges rely on police reports in discretionary cases. In *Grijalva*, a lawful permanent resident was deportable for having been convicted of a drug crime, yet sought a waiver of deportation that only applied to convictions involving thirty grams or less of marijuana.¹²⁵ Over his objection, the government submitted a police report

¹²¹ See *Banat*, 557 F.3d at 892–93; *Anim*, 535 F.3d at 256–58; *Alexandrov*, 442 F.3d at 407; *Ezeagwuna*, 325 F.3d at 406–08. But see *Angov*, 736 F.3d at 1272–80.

¹²² See *Lin*, 459 F.3d at 269 n.9 (reasoning that because the consular report was unreliable, the agency decision that relied on it was not based on "substantial evidence").

¹²³ *Angov*, 736 F.3d at 1272. The Ninth Circuit in *Angov* found no due process violation when the immigration judge relied on a State Department report demonstrating that the asylum-seeker's documents were fake. See *id.* at 1274. This was because (1) an asylum-seeker has, as an applicant for admission, limited due process rights, *id.* at 1272–74 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); (2) the Federal Rules of Evidence do not apply in administrative proceedings, see *id.* at 1275 (citing *Richardson v. Perales*, 402 U.S. 389, 400–02 (1971)); (3) the court should attribute a presumption of regularity to the functioning of the Department of State, see *id.* at 1276; and (4) asylum applicants themselves always rely on hearsay to prove their cases, see *id.* at 1279. The Court stated, "The balance struck by the other circuits is so one-sided and unfair that it hobbles the government's ability to detect and combat fraud in the asylum application process." *Id.* at 1280.

¹²⁴ 19 I. & N. Dec. 713 (B.I.A. 1988).

¹²⁵ *Id.* at 714–15. He applied for a waiver under former section 241(f)(2) of the INA, which provided a discretionary waiver for noncitizens deportable for a drug crime that related to simple possession of thirty grams or less of marijuana who had certain permanent resident or U.S. citizen family members. *Id.* (citing 8 U.S.C. § 1251(f)(2) (1982)).

that conflicted with his testimony in immigration court about the drug arrest.¹²⁶ After stating that the formal rules of evidence do not apply, the Board decided that the report was probative and that Mr. Grijalva had not explained why its use was fundamentally unfair.¹²⁷ Instead of “fundamental fairness” turning on the reliability of the police report, the Board suggested that the fundamental fairness test only would be satisfied if the police had coerced statements from him or had committed an egregious Fourth Amendment violation in his arrest.¹²⁸ The Board applied a regulation permitting the admission of prior statements made by the respondent in any investigation¹²⁹ (presumably reasoning that the police investigation was a “prior investigation” under this regulation).¹³⁰ Although the prior statements Mr. Grijalva made to the police would have been admissible under this regulation, the Board went further to find that Mr. Grijalva’s testimony contradicted what the police report stated was found at the scene (he said it was a small amount of marijuana; the police reported that scales and baggies also were found).¹³¹ The Board held that Mr. Grijalva had not proven eligibility for the relief he sought because of the discrepancies between the police report and his testimony in immigration court.¹³²

The *Grijalva* decision is troubling because the noncitizen was denied the opportunity to apply for relief due to a police officer’s written account that scales and baggies were found at his house. Mr. Grijalva disputed this version of events and properly objected to the hearsay evidence, yet the Board denied him an opportunity to test the evidence through cross-examination. Moreover, the Board appeared to ignore its prior test that based the fundamental fairness of a hearsay document on whether it was reliable,¹³³ and suggested it is only fundamentally unfair to admit police reports if there was some gross misconduct by the police officer.¹³⁴ To further prevent any attempts to question police reports, in dicta, the Board stated, “[T]he admission into the record of the information contained in the police reports is especially

¹²⁶ *Id.* at 721. The discrepancies included both the alleged statements Mr. Grijalva made to the police at the time of arrest and the evidence police found at his house. *Id.* at 724.

¹²⁷ *Id.* at 722.

¹²⁸ *Id.* (“The respondent does not claim, for example, that he made statements involuntarily to the officers who arrested him, or that the police officers acted egregiously in seizing evidence at his house.” (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984); *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980))).

¹²⁹ The regulation at issue was 8 C.F.R. § 242.14(c): “The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.” 8 C.F.R. § 242.14(c) (1997); see also *Grijalva*, 19 I. & N. Dec. at 722.

¹³⁰ See *Grijalva*, 19 I. & N. Dec. at 722.

¹³¹ *Id.* at 724.

¹³² *Id.*

¹³³ See *In re De Vera*, 16 I. & N. Dec. 266, 269–71 (B.I.A. 1977).

¹³⁴ *Grijalva*, 19 I. & N. Dec. at 722.

appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion.”¹³⁵

Contrast *Grijalva* with the 1995 Board case, *In re Arreguin de Rodriguez*.¹³⁶ Ms. Arreguin, a lawful permanent resident, was deportable due to a drug trafficking conviction and applied for a discretionary waiver of deportation under former section 212(c) of the INA.¹³⁷ The Immigration Judge denied her application for several reasons, one of which was the adverse factor of her arrest on suspicion of alien smuggling (although Ms. Arreguin denied any wrongdoing and the arrest report indicated that prosecution was declined).¹³⁸ The Board reversed, finding that she merited a favorable exercise of discretion.¹³⁹ With respect to the arrest report for alien smuggling, the Board reasoned, “[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein Considering that prosecution was declined and that there is no corroboration, from the applicant or otherwise, we give the apprehension report little weight.”¹⁴⁰ In *Arreguin*, it appears that the Board at least implicitly acknowledged the reliability concerns when it decided to give “little weight” to police reports that are not corroborated by other evidence.¹⁴¹ The Board did not, however, reject the admission into evidence of such reports.

Courts of appeals reviewing discretionary immigration decisions generally have followed *Grijalva*'s reasoning that police reports are entirely admissible when determining discretionary relief. Multiple courts of appeals have held that in discretionary decisions, the agency could rely on the contents of police reports, even absent a conviction and even if the noncitizen disputed the facts in the police reports.¹⁴² In these

¹³⁵ *Id.*; see also *In re Teixeira*, 21 I. & N. Dec. 316, 321 (B.I.A. 1996) (reasoning, in dicta, that a “police report may be helpful in answering [whether the respondent merits a favorable exercise of discretion] because it bears on the issue of the respondent’s *conduct* when he was arrested, and this in turn is germane to whether the respondent merits discretionary relief from deportation”); cf. *In re Thomas*, 21 I. & N. Dec. 20, 24–25 (B.I.A. 1995) (reasoning that although a conviction was not final because it was on direct appeal, it could be considered as a negative factor in a discretionary application for voluntary departure).

¹³⁶ 21 I. & N. Dec. 38 (B.I.A. 1995).

¹³⁷ *Id.* at 38–39.

¹³⁸ *Id.* at 42.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1349 (11th Cir. 2010) (discussing *Arreguin* in holding that unreliable police reports without corroboration were insufficient evidence to prove the noncitizen was removable).

¹⁴² See, e.g., *Carcamo v. U.S. Dep’t of Justice*, 498 F.3d 94, 98 (2d Cir. 2007) (citing *In re Grijalva*, 19 I. & N. Dec. 713, 722 (B.I.A. 1998)) (“[P]olice reports and complaints, even if containing hearsay and not a part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief.”); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (“[W]hile an arrest, without more, is simply an unproven

cases, however, it was rarely just the allegations in the police reports that formed the basis of a denial of relief.¹⁴³ Dicta from the Ninth Circuit¹⁴⁴ and the Fifth Circuit¹⁴⁵ suggests that police reports, when no conviction resulted, should not be given any serious weight in immigration court. A few courts have followed *Arreguin*'s skepticism about relying on uncorroborated police reports in discretionary cases.¹⁴⁶ For example, in *Avila-Ramirez v. Holder*,¹⁴⁷ the Seventh Circuit recently held that it was error for an immigration judge to consider an arrest report that did not result in a conviction in order to deny discretionary relief.¹⁴⁸ The court chastised the judge and Board for failing to follow *Arreguin*, a binding agency decision.¹⁴⁹ No court, however,

charge, the fact of an arrest, and its attendant circumstances, often have probative value in immigration proceedings.”); *Paredes-Urrestarazu v. U.S. INS*, 36 F.3d 801, 810 (9th Cir. 1994) (“The fact of an arrest, insofar as it bears upon whether an alien might have engaged in underlying conduct and insofar as facts probative of an alien’s ‘bad character or undesirability as a permanent resident’ arise from the arrest itself, plainly can have relevance in performing the analysis required by section 212(c).”); *Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985) (“Evidence of an alien’s conduct, without a conviction, may be considered in denying the discretionary relief of voluntary departure.”); *cf. Esposito v. INS*, 936 F.2d 911, 913, 915–16 (7th Cir. 1991) (reasoning that the Board properly denied a discretionary waiver of inadmissibility when adverse factors included both pending murder charges and *in absentia* Italian convictions for criminal associations, forgery, and unlawful possession of firearms). *But cf. In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 205 (B.I.A. 2001) (finding, in a cancellation of removal discretionary case, that the judge should not consider as an adverse factor an arrest warrant for murder in Mexico where there was no conviction). The First Circuit distinguished *Arreguin* by stating that “*Arreguin* implicates matters of degree” and that “[n]othing in the opinion suggests that, when facing a closer balance of equities, the Board might not properly decide that a record of arrest tips the scales against the bestowal of discretionary relief.” *Henry*, 74 F.3d at 6.

¹⁴³ See, e.g., *Schroeck v. Gonzales*, 429 F.3d 947, 951 (10th Cir. 2005) (reasoning in a discretionary adjustment and waiver application that the “Board’s decision was based on *all* of petitioner’s criminal conduct, not only or even primarily on the ‘unlawful contact’ that had not resulted in a criminal conviction”).

¹⁴⁴ See *Paredes-Urrestarazu*, 36 F.3d at 816 (“Although we would be troubled if this were a case in which the Board found the *mere fact* of arrest probative of whether Petitioner had engaged in underlying conduct, here, the Board had before it much more.” (footnote omitted)).

¹⁴⁵ See *Sierra-Reyes v. INS*, 585 F.2d 762, 764 n.3 (5th Cir. 1978) (reasoning that the immigration judge should not have considered as adverse factors in a 212(c) case two police reports where the prosecution determined there was insufficient evidence to prosecute, but deciding that reversal of a denial was not warranted because other evidence revealed a “rather lengthy, involved and complicated involvement with law”).

¹⁴⁶ See, e.g., *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712–13 (6th Cir. 2004).

¹⁴⁷ 764 F.3d 717 (7th Cir. 2014).

¹⁴⁸ *Id.* at 725.

¹⁴⁹ See *id.*; see also *Billeke-Tolosa*, 385 F.3d at 712–13 (reasoning that because of the Board’s precedential decision in *Arreguin*, it was impermissible for an immigration judge to deny discretionary relief based on charges for sexual misconduct when the charges had been amended to simple assault and disorderly conduct).

has held that an immigration judge impermissibly *admitted* a police report in a discretionary case; at most, courts have instructed immigration judges to give an uncorroborated police report no weight in its discretionary decision.¹⁵⁰

C. Police Reports in Non-Discretionary Decisions

When police reports are used outside of the discretionary context in immigration law, courts may be more willing to question their reliability. In *Garces v. United States Attorney General*,¹⁵¹ the Eleventh Circuit refused to uphold a finding of inadmissibility based on reason to believe a noncitizen was a controlled substance trafficker.¹⁵² The noncitizen previously had pled guilty to distributing cocaine, although it was unclear whether he admitted actual guilt.¹⁵³ Later, his conviction was vacated, leaving only the police report to form the basis of the government's charged ground of inadmissibility.¹⁵⁴ The court acknowledged that police reports would be impermissible in a criminal case pursuant to FRE 803(8), yet reasoned that they were not barred from being considered in an administrative immigration proceeding.¹⁵⁵ Turning to the police reports, the court determined that they only stated the officers' conclusions as opposed to observing any facts sufficient to show guilt, and thus, "the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking."¹⁵⁶

While the court in *Garces* questioned the reliability of one particular police report, Judge Kleinfeld of the Ninth Circuit, in a concurring opinion, suggested a more blanket rejection of using police reports to prove removability.¹⁵⁷ The majority opinion in *Olivas-Motta v. Holder*¹⁵⁸ refused deference to the Attorney General's

¹⁵⁰ The Second Circuit, in dicta, recognized this discrepancy in the Board's treatment of police reports and called on the Board to either distinguish or overturn its precedents in *Arreguin* and *Sotelo-Sotelo*. See *Padmore v. Holder*, 609 F.3d 62, 69–70 (2d Cir. 2010) (citing *In re Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (B.I.A. 1995); *In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 205 (B.I.A. 2001)).

¹⁵¹ 611 F.3d 1337 (11th Cir. 2010).

¹⁵² See 8 U.S.C. § 1182(a)(2)(C)(i) (2012).

¹⁵³ See *Garces*, 611 F.3d at 1348 (stating that it is not clear whether he admitted his guilt or entered a "plea of convenience" that the state adopted pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970)).

¹⁵⁴ *Id.* at 1340–41.

¹⁵⁵ *Id.* at 1349.

¹⁵⁶ *Id.* at 1349–50; see also *id.* at 1346 (stating that the "reason to believe" ground of inadmissibility must be based on "reasonable, substantial, and probative evidence" and factual determinations must be supported by "reasonable, substantial, and probative evidence on the record considered as a whole" (citing *In re Rico*, 16 I. & N. Dec. 181, 185 (B.I.A. 1977); *Diallo v. U.S. Att'y Gen.*, 596 F.3d 1329, 1332 (11th Cir. 2010))).

¹⁵⁷ See *Olivas-Motta v. Holder*, 746 F.3d 907, 918–19 (9th Cir. 2013) (Kleinfeld, J., concurring).

¹⁵⁸ 746 F.3d 907 (majority opinion).

decision in *In re Silva-Trevino*¹⁵⁹ (which, rejecting the categorical approach, permitted judges to look at any evidence when determining whether certain convictions involved moral turpitude).¹⁶⁰ The majority rejected any fact-finding on the issue of whether a crime involved moral turpitude, holding that Congress clearly intended immigration judges to use the categorical approach.¹⁶¹ Judge Kleinfeld, however, saw that the real problem stemmed from the immigration judge's reliance on a police report, which he stated was not "reasonable, substantial, and probative evidence" that a noncitizen was deportable and did not satisfy the "clear and convincing evidence" standard.¹⁶² In stating that "police reports are not especially useful instruments for finding out what persons charged actually did,"¹⁶³ Judge Kleinfeld appears to follow the reasoning of other circuit courts that have rejected the reliability of police reports when they are used to establish facts in other civil contexts.¹⁶⁴

D. The Categorical Approach: The Canary in the Coal Mine

The strict categorical approach, which immigration judges historically have used to determine whether noncitizens are removable for criminal convictions,¹⁶⁵ has prevented judges from relying on police reports to make legal determinations about

¹⁵⁹ 24 I. & N. Dec. 687 (Att'y Gen. 2008).

¹⁶⁰ *Olivas-Motta*, 746 F.3d at 916–17.

¹⁶¹ *Id.*

¹⁶² *Id.* at 918 (Kleinfeld, J., concurring) (quoting 8 U.S.C. § 1229a(c)(3)(A)).

¹⁶³ *Id.* at 919 & n.17 ("[P]olice reports . . . often contain little more than unsworn witness statements and initial impressions. . . . Further, because the[y] are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections.") (alterations in original) (quoting *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012)).

¹⁶⁴ *See, e.g., United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013) (finding due process violation when police report was not subject to cross-examination at a parole revocation hearing and stating, "While police reports may be demonstrably reliable evidence of the fact that an arrest was made they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true.") (quoting *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986)); *Bell*, 785 F.2d at 643–44 (finding in a probation revocation hearing that urinalysis laboratory reports bear substantial indicia of reliability, but reasoning that police reports are not as inherently reliable because "[t]he relationship between police officers and those whom they arrest is much more personal and adversarial in nature than that between chemists and those whose urine they test"); *see also Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003) ("We join the other circuits in expressing concern about the reliance in parole revocation hearings on hearsay in police reports . . ."). *But see id.* at 130–31 (finding that the police report in the instant case bore indicia of reliability because it was quite detailed, portions were corroborated by the parolee's testimony, and the report contained internal corroboration of the complainant's version of events).

¹⁶⁵ *See Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (discussing the history of the categorical approach).

removability.¹⁶⁶ The police report problem was largely wrapped up in discretionary, not legal, decisions. Many of the discretionary decisions never received serious review by the courts, for reasons detailed below.¹⁶⁷ However, courts and the Board have created several exceptions to the categorical approach in recent years.¹⁶⁸ With the dawn of more fact-finding on removability, courts increasingly were asked to decide whether facts as presented in a police report could be clear and convincing evidence of removability.¹⁶⁹ This led circuit courts to critique immigration judges' reliance on police reports to establish facts in removal cases.¹⁷⁰ This Article proposes that the exposure of the police report problem to reviewing courts by stripping away the categorical approach is the factor that may cause the demise of the police report problem.

First, it is necessary to let us look at why the police report problem can be ignored by circuit courts when it arises in a discretionary decision. In some cases, the reliance on untrustworthy police reports essentially amounted to harmless error, since other negative factors existed to deny discretionary relief or the noncitizen himself admitted to several facts of the police report.¹⁷¹ The fact pattern of a noncitizen admitting to wrongdoing, yet expressing remorse, is common and perhaps strategically wise when a noncitizen is begging for mercy, as he is when he asks for a discretionary waiver.¹⁷² Yet such concessions of guilt by the noncitizen relieve immigration judges and reviewing courts of the need to determine whether the police report is reliable.

In other cases, important legal questions got swallowed up in a discretionary decision. This is because 8 U.S.C. § 1252(a)(2)(B) precludes judicial review of most

¹⁶⁶ See *supra* notes 25–34.

¹⁶⁷ See 8 U.S.C. § 1252 (2012).

¹⁶⁸ See *supra* notes 31–34.

¹⁶⁹ See, e.g., *Olivas-Motta v. Holder*, 746 F.3d 907, 917–19 (9th Cir. 2013) (Kleinfeld, J., concurring); *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012).

¹⁷⁰ See, e.g., *Olivas-Motta*, 746 F.3d at 917–19 (Kleinfeld, J., concurring); *Prudencio*, 669 F.3d at 483–84.

¹⁷¹ See *Paredes-Urrestarazu v. U.S. INS*, 36 F.3d 801, 816 (9th Cir. 1994) (“Although we would be troubled if this were a case in which the Board found the *mere fact* of arrest probative of whether Petitioner had engaged in underlying conduct, here, the Board had before it much more.” (footnote omitted)); *Sierra-Reyes v. INS*, 585 F.2d 762, 764 n.3 (5th Cir. 1978) (reasoning that the immigration judge should not have considered as adverse factors in a 212(c) case two police reports where the prosecution determined there was insufficient evidence to prosecute, but deciding that reversal of a denial was not warranted because other evidence revealed a “rather lengthy, involved and complicated involvement with law” (citation omitted)).

¹⁷² See Abira Ashfaq, “*We Have Given Them this Power*”: *Reflections of an Immigration Attorney*, NEW POLITICS, Summer 2004, at 66, 71 (describing one attorney’s counseling of her client who was asking for immigration discretionary relief and saying that her client “knew what the judges wanted to hear. . . . They know judges want them to accept responsibility, express remorse, say they are guilty and sorry, ashamed and reformed . . . and grovel for release. This is the story they want to hear and nothing else”).

discretionary decisions, including decisions on cancellation of removal, waivers of inadmissibility, voluntary departure, and adjustment of status—the vast majority of discretionary decisions in which police reports play a critical role.¹⁷³ While issues such as whether a judge may properly rely on hearsay evidence or whether a non-citizen has a right to confront his accuser are legal questions that are reviewable under 8 U.S.C. § 1252(a)(2)(D),¹⁷⁴ in some cases courts have refused to decide these important legal questions because they arose in the context of a discretionary decision. In one example, the Second Circuit in *Carcamo v. U.S. Department of Justice*¹⁷⁵ reasoned that “‘talismanic invocation of the language of due process’ is insufficient to confer jurisdiction on this Court”¹⁷⁶ because “[d]ue process does not require that the [immigration judge] credit Carcamo’s testimony over the evidence contained in the criminal complaint.”¹⁷⁷ The *Carcamo* decision is a good example of Daniel Kanstroom’s

¹⁷³ 8 U.S.C. § 1252(a)(2)(B)(i) (2012). Also precluded is judicial review of “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security,” other than asylum decisions. § 1252(a)(2)(B)(ii).

¹⁷⁴ See, e.g., *Solis v. Mukasey*, 515 F.3d 832, 835 (8th Cir. 2008) (reasoning that a due process claim that a police report should be inadmissible because it is hearsay and the non-citizen disputes its contents is a legal issue that the court can consider pursuant to 8 U.S.C. § 1252(a)(2)(D)).

¹⁷⁵ 498 F.3d 94 (2d Cir. 2007).

¹⁷⁶ *Id.* at 98 (quoting *Saloum v. U.S. Citizenship & Immigr. Servs.*, 437 F.3d 238, 243 (2d Cir. 2006)).

¹⁷⁷ *Id.* In an older case that preceded 8 U.S.C. § 1252, *Jay v. Boyd*, 351 U.S. 345 (1956), a noncitizen was denied the discretionary relief of suspension of deportation based on secret evidence. In *Jay*, the petitioner was deportable for being a member of the Communist Party; he applied for suspension of removal under former 8 U.S.C. § 1254(a), which was a discretionary form of relief. 351 U.S. at 347–49. The special inquiry officer found that he met the statutory prerequisites for the relief but that the petitioner did not “‘warrant favorable action’ in view of certain ‘confidential information’”; the Board of Immigration Appeals upheld this determination. *Id.* at 349–50. The petitioner challenged a regulation that provided for the use of “confidential information in ruling upon suspension applications if disclosure of the information would be prejudicial to the public interest, safety or security.” *Id.* at 352. The Court held that the use of confidential information in a suspension hearing was properly within the exercise of the agency’s discretion; the Court reasoned, “In view of the gratuitous nature of the relief, the use of confidential information in a suspension proceeding is . . . clearly within statutory authority . . .” *Id.* at 359, 361. Although the *Jay* Court was not considering a constitutional challenge to the statute at issue, the Court stated that “the constitutionality of [the statutory section] as herein interpreted gives us no difficulty.” *Id.* at 357 n.21; see also Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–59 (1997) (focusing on *Jay* and discussing the role of discretion in immigration law). In a more recent decision, the Eighth Circuit upheld a similar regulation in immigration law that permitted a denial of discretionary relief based on material that was confidential. *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir.

observation that “[d]iscretion will be a dustbin of a jurisprudential category: the place where—as triples were once said to do in the glove of Joe Jackson—complicated legal questions go to die.”¹⁷⁸

It is next important to show how the categorical approach has masked the police report problem. Since the 1900’s, with the advent of what is now called the categorical approach, courts have avoided the facts of a conviction when determining immigration consequences, holding that this analysis was elements-based.¹⁷⁹ In the early days of this elements-based approach, courts were determining whether a non-citizen’s conviction was a crime involving moral turpitude, as this is one of the earliest criminal grounds of inadmissibility and deportability.¹⁸⁰ Julia Simon-Kerr hypothesizes that courts, when faced with the difficult and value-laden judgement on whether someone’s acts involved moral turpitude, created this approach to avoid moral assessments by removing much of the factual material upon which an evaluation of an individual’s character could be made.¹⁸¹ Courts thus preferred the categorical approach as a mechanical rule that avoided moral assessments of an individual.¹⁸² Against the backdrop of this long history of avoiding facts of a conviction, the Board held that police reports were specifically excluded when judges employed the categorical approach.¹⁸³ The police report, where all of the most damaging facts about an individual’s crime tend to be, could not be considered under this approach.¹⁸⁴

Unsurprisingly, courts and the Agency were frustrated with the blinders that the categorical approach put on them.¹⁸⁵ Thus developed a body of case law with

1985) (holding that the application of 8 C.F.R. § 242.17(a), (c) (1984), a regulation that permitted consideration of non-record material evidence that is not disclosed to the petitioner, did not violate due process). There, the court, citing *Jay*, stated that although “[a]s a matter of fairness and logic, the [due process] argument has considerable appeal, . . . it is foreclosed by authority.” *Id.* (citing *Jay*, 351 U.S. at 357 n.21, 360–61).

¹⁷⁸ See DANIEL KANSTROOM, *DEPORTATION NATION* 240 (2007).

¹⁷⁹ See *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914). See generally Das, *supra* note 165 (discussing the history of the categorical approach); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 979–80 (2008).

¹⁸⁰ See Mary Holper, *Deportation for a Sin*, 90 NEB. L. REV. 647, 649–51 (2012).

¹⁸¹ Julia Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1056 (2012).

¹⁸² *Id.*

¹⁸³ See *In re Teixeira*, 21 I. & N. Dec. 316, 320 (B.I.A. 1996).

¹⁸⁴ See *id.*

¹⁸⁵ See, e.g., *Montero-Ubri v. INS*, 229 F.3d 319, 321 (1st Cir. 2000) (“The push in the law toward categorical approaches to classifying crimes as either involving moral turpitude or not is largely based on the policy of not retrying prior criminal convictions in later deportation hearings. No such interest is served by precluding consideration of basic facts stated on the official court records of the charging and conviction documents. The categorical approach does not require that blinders be worn.”); *In re Silva-Trevino*, 24 I. & N. Dec. 687, 695 (Att’y Gen. 2008) (“I cannot believe that Congress intended for [persons who have actually committed crimes involving moral turpitude] to be allowed to remain simply because there might

exceptions to the strict categorical approach.¹⁸⁶ Scholars critiqued this caselaw, arguing for the preservation of the categorical approach because of fairness,¹⁸⁷ historical consistency,¹⁸⁸ uniformity,¹⁸⁹ consistency with Congressional intent,¹⁹⁰ and administrative efficiency.¹⁹¹ Until 2013, when the Supreme Court issued a set of decisions affirming a very strict categorical approach,¹⁹² one might have wondered whether the categorical approach would continue to exist in immigration law.

This Article does not attempt to address the normative questions surrounding the categorical approach. It proposes, however, a perhaps unintended consequence of stripping away the categorical approach: exposing the police report problem to circuit courts. A good example of this phenomenon is the circuit courts' treatment of the Attorney General's 2008 *Silva-Trevino* decision. In *Silva-Trevino*, Attorney General Mukasey permitted immigration judges to use a factual inquiry to decide whether many offenses were crimes involving moral turpitude.¹⁹³ Several courts have rejected the holding in *Silva-Trevino* because the statutory ground of deportability requires a "conviction," which evinces a Congressional intent to use the categorical approach, not a factual inquiry.¹⁹⁴ In one decision, *Prudencio v. Holder*,¹⁹⁵ the Fourth Circuit went further to address the "very real evidentiary concerns" that *Silva-Trevino*'s factual inquiry allows.¹⁹⁶ These concerns include "allow[ing] immigration judges to rely on documents of questionable veracity as 'proof' of an alien's conduct. These documents, such as police reports and warrant applications, often contain little more

have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment." (quoting *Marciano v. INS*, 450 F.2d 1022, 1027 (1971) (Eisele, J., dissenting))).

¹⁸⁶ See *supra* notes 31–34.

¹⁸⁷ See Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L. J. 257 (2012).

¹⁸⁸ See Das, *supra* note 165.

¹⁸⁹ See Sharpless, *supra* note 179.

¹⁹⁰ See *id.*

¹⁹¹ See, e.g., Das, *supra* note 165; Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241 (2011); Koh, *supra* note 187; Sharpless, *supra* note 179. But see Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625, 662 (2011) (discussing how the realistic probability test of the categorical approach has made the categorical approach more difficult, and thus less efficient, to administer).

¹⁹² See *supra* note 34 (describing the Court's decisions in *Moncrieffe* and *Descamps*).

¹⁹³ *In re Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008).

¹⁹⁴ See, e.g., *Silva-Trevino v. Holder*, 742 F.3d 197, 205 (5th Cir. 2014); *Olivas-Motta v. Holder*, 746 F.3d 907, 916–17 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of the United States*, 582 F.3d 462, 482 (3d Cir. 2009).

¹⁹⁵ 669 F.3d 472 (4th Cir. 2012).

¹⁹⁶ *Id.* at 483–84.

than unsworn witness statements and initial impressions.”¹⁹⁷ Judge Kleinfeld, in the *Olivas-Motta* case, repeatedly questioned the government during oral argument about how a police report could be the basis of facts.¹⁹⁸ In a concurring opinion, he disagreed that the word “conviction” evinced a Congressional intent to use the categorical approach,¹⁹⁹ and made a larger issue out of the evidentiary concerns of relying on police reports.²⁰⁰

There are other possible explanations of courts’ newfound critique of immigration judge’s reliance on police reports. One could say that the outcome is different in cases where the government bears the burden of proof, such as decisions on deportability,²⁰¹ versus decisions such as eligibility for relief, eligibility for bond, and discretionary decisions, where the noncitizen bears the burden of proof.²⁰² In *Garces*, however, the noncitizen bore the burden of proof since he had never been admitted to the U.S.;²⁰³ there, the Eleventh Circuit refused to uphold a finding of inadmissibility based on reason to believe a noncitizen was a controlled substance trafficker.²⁰⁴ One could also say that this is just a recent trend that federal courts are finally critiquing immigration judges’ blind reliance on police reports to establish facts in removal cases.²⁰⁵ However, this trend surely is influenced by other factors—and this Article proposes that the main factor is the demise of the categorical approach. If so,

¹⁹⁷ *Id.*

¹⁹⁸ Oral Argument, *Olivas-Motta v. Holder*, 746 F.3d 907 (9th Cir. Oct. 13, 2011) (No. 10-72459).

¹⁹⁹ *See Olivas-Motta*, 746 F.3d at 919 (Kleinfeld, J., concurring) (“The majority places more weight on the phrase ‘convicted of’ than it can bear. The phrase could mean . . . that we may look to conduct that an alien committed . . . the ambiguity of the phrase supports a need for deference to the subsequent interpretation by the administrative agency.”).

²⁰⁰ *Id.*

²⁰¹ *See* 8 U.S.C. § 1229a(c)(3) (2012).

²⁰² *See* 8 U.S.C. § 1229a(c)(4); *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

²⁰³ *See Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1345–46 (11th Cir. 2010) (citing 8 U.S.C. § 1229a(c)(2)(A)) (finding that a noncitizen who is applicant for admission must prove that he is “clearly and beyond a doubt” entitled to be admitted to the U.S. and not inadmissible under 8 U.S.C. § 1182). The court reasoned that “the burden of proof in the immigration hearing and the standard of review on appeal are not the same thing.” *Id.* at 1346. Reasoning that “a finding of inadmissibility must be based on something more than the alien’s failure to prove a negative,” the court refused to affirm the Board’s decision because it was not supported by reasonable, substantial, and probative evidence. *Id.* at 1346, 1350.

²⁰⁴ *See* 8 U.S.C. § 1182(a)(2)(C)(i).

²⁰⁵ *See, e.g., Avila-Ramirez v. Holder*, 764 F.3d 717, 723 (7th Cir. 2014) (criticizing the B.I.A. for relying on uncorroborated arrest report in denying discretionary relief); *Olivas-Motta*, 746 F.3d at 918–19 (Kleinfeld, J., concurring) (criticizing judge for relying on police report to sustain deportability finding for crime involving moral turpitude); *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) (criticizing *In re Silva-Trevino*, 24 I. & N. Dec. 687, 690 (Att’y Gen. 2008), for allowing immigration judges to rely on documents such as police reports that are of “questionable veracity as ‘proof’ of an alien’s conduct”).

as criminal grounds of deportability are decided less through the categorical approach and more through findings of fact,²⁰⁶ there are likely to be more critiques of immigration judges' reliance on police reports.²⁰⁷ These critiques can easily spill over into the use of police reports in the discretionary context, as in the recent *Avila-Ramirez* decision where the Seventh Circuit criticized an immigration judge for relying on an uncorroborated arrest report in denying discretionary relief.²⁰⁸

The categorical approach thus has become the canary in the coal mine: as long as it lives, the police report problem can be ignored by reviewing courts. Once the categorical approach was threatened with extinction, immigration courts' blind reliance on police reports was exposed to circuit courts, which were presented with the clean legal issue of whether the facts as detailed in a police report could cause the deportation of a noncitizen. Thus the whole system in immigration court of building facts solely from police reports threatened to come crashing down.

IV. CONFRONTING COPS IN IMMIGRATION COURT

Given the untrustworthiness of police reports and immigration judges' frequent reliance on them, should there be a right to confront police officers in immigration court? This section examines the right to confront police officers in immigration court by conceptualizing removal proceedings in three different ways²⁰⁹: (1) deportation is punishment, and thus there should be a complete application of the Sixth Amendment's protections, including the Confrontation Clause; (2) deportation is civil, and the case-by-case balancing test of the Due Process Clause of the Fifth Amendment guarantees the right to confront and cross-examine cops; and (3) deportation

²⁰⁶ See *supra* Part I.A.

²⁰⁷ For example, the Attorney General's 2008 decision in *In re Silva-Trevino*, 24 I. & N. Dec. 687, permitted immigration judges to use a factual inquiry to decide whether many offenses were crimes involving moral turpitude. Several courts have rejected the holding in *Silva-Trevino* because the statutory ground of deportability requires a "conviction," which evinces a congressional intent to use the categorical approach, not a factual inquiry. See, e.g., *Silva-Trevino v. Holder*, 742 F.3d 197, 205 (5th Cir. 2014); *Olivas-Motta*, 746 F.3d at 916; *Prudencio*, 669 F.3d at 484; *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of the United States*, 582 F.3d 462, 482 (3d Cir. 2009). In rendering these decisions, some of the courts also discussed how the evidence the judge relied on to support a finding of deportability—a police report—was unreliable. See, e.g., *Olivas-Motta*, 746 F.3d at 918–19 (Kleinfeld, J., concurring); *Prudencio*, 669 F.3d at 483–84.

²⁰⁸ See *Avila-Ramirez*, 764 F.3d at 723–25.

²⁰⁹ See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 67 (1984) (describing how the judicial assimilation into the deportation process of rights drawn from criminal procedure can take several forms, including expanded notions of "fundamental fairness," classification of deportation as "quasi-criminal," application of equal protection standards, or general administrative law principles).

is “quasi-criminal” and thus deserving of heightened protections, including the right to confrontation.

A. Application of the Sixth Amendment Confrontation Clause in Immigration Court (Deportation is Punishment)

Immigration law historically has been categorized as a civil proceeding, which means the constitutional protections available to criminal defendants do not apply.²¹⁰ Thus, immigration law has seen all procedural protections either guaranteed by statute, or, to the extent they are imposed constitutionally, filtered through the Fifth Amendment Due Process Clause²¹¹ where “fundamental fairness” dictates whether a certain procedure is necessary. The “fundamental fairness” test has led to a watering down of the protections available in a criminal case.²¹² Several scholars have convincingly argued that deportation—or at least deportation of lawful permanent residents—is punishment, and therefore the procedural protections of a criminal trial should apply.²¹³ Of particular interest on this topic is the Supreme Court’s 2010 holding in *Padilla v. Kentucky*.²¹⁴

Padilla calls into question the categorization of deportation as civil, thus questioning whether the Sixth Amendment should apply to deportation proceedings.²¹⁵ In

²¹⁰ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (reasoning that deportation is punishment).

²¹¹ Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1895 (2000) (“If noncitizens should happen to have any of the rights accorded to criminal defendants, it is primarily because of statutory or regulatory protections or because the courts have read such rights to be implicit components of due process.”).

²¹² See, e.g., Chacón, *supra* note 2, at 1604–05 (discussing the limited Fourth and Fifth Amendment protections that apply in the immigration, as opposed to the criminal, context); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 393 (2006) (“Fifth and Sixth Amendment rights, prominent features of criminal trials, do not apply in deportation proceedings except to the limited extent that ‘fundamental fairness’ requires them.”).

²¹³ See Bleichmar, *supra* note 2; Kanstroom, *supra* note 211; Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105 (1977); Legomsky, *supra* note 2; 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 (2008) (exploring “the tension between the firmly established civil label and the contrary experience of people subject to removal proceedings”); see also Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 512 (2007) (“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.”).

²¹⁴ 559 U.S. 356 (2010).

²¹⁵ See, e.g., 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

Padilla, the Supreme Court ruled that criminal defendants have a Sixth Amendment right to be counseled about the specific immigration consequences of their guilty pleas.²¹⁶ On its face, *Padilla* appears to be a simple holding about defense counsel's duty to advise noncitizen defendants about deportation consequences.²¹⁷ To reach that holding, however, the Court made significant headway into reclassifying deportation as punishment. For example, the Court stated 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,"²¹⁸ after discussing how "[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century,"²¹⁹ and it is "'most difficult' to divorce the penalty from the conviction in the deportation context."²²⁰ The Court seemed to waffle between calling deportation civil or criminal. Repeating the time-honored passage that deportation is not punishment for a crime, the Court then stated that "deportation is nevertheless intimately related to the criminal process."²²¹ The Court ultimately refused to classify deportation as either civil or criminal. Conflating the civil-criminal distinction with the collateral-direct designation, the Court stated that deportation is "uniquely difficult to classify as either a direct or a collateral consequence [of a criminal conviction]."²²²

The Court went very far in saying that the Sixth Amendment applies when deportation is a certain consequence of a criminal conviction, all the while maintaining the historical classification of deportation as "civil."²²³ Perhaps the Court did not go far enough; as Daniel Kanstroom has written, *Padilla* introduced a "Fifth and a Half Amendment," which embodies both the specific protections of the Sixth Amendment and the flexibility of the Fifth Amendment Due Process Clause.²²⁴ Kanstroom

(2011); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (examining the evolution of the Supreme Court's jurisprudence regarding the "quasi-criminal" nature of deportation proceedings).

²¹⁶ See *Padilla*, 559 U.S. at 374.

²¹⁷ See *id.* ("It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.' To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation." (citation omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))).

²¹⁸ *Id.* at 364 (footnote omitted).

²¹⁹ *Id.* at 365–66.

²²⁰ *Id.* at 366 (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. 1982)).

²²¹ *Id.* at 365.

²²² *Id.* at 366; see Markowitz, *supra* note 215, at 1337–39 (discussing how "courts tend to use the term 'collateral consequence' as synonymous with 'civil consequence'" and that the *Padilla* Court conflates these two discussions).

²²³ See *Padilla*, 559 U.S. at 365 ("We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction." (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893))).

²²⁴ See Kanstroom, *supra* note 215, at 1475.

and others argue, applying the Court's holding and reasoning in *Padilla*, that counsel should be appointed in deportation proceedings.²²⁵ This is because the Court's opinion "cannot fully be squared with the historical, formalist relegation of deportation to the realm of civil collateral consequences in which there is no clear constitutional right to counsel."²²⁶

If *Padilla*'s logical extension is that the Sixth Amendment right to counsel attaches in immigration court, noncitizens should benefit from other protections of the Sixth Amendment in removal proceedings, namely, the Confrontation Clause. Police reports such as those described in Part I are out-of-immigration-court statements that have the primary purpose of accusing noncitizens of engaging in criminal conduct; they also are formalized statements such as affidavits.²²⁷ These reports certainly would be considered "testimonial" under *Crawford* and its progeny.²²⁸ Thus, if the Confrontation Clause applied in removal proceedings, no police report could be admitted in immigration court without the right to confront and cross-examine the police officer.

One can argue that this stretches the *Padilla* holding too far. *Padilla* was merely a case about criminal defense counsel's obligation to advise about immigration consequences, and the Court said nothing about what evidence should be admitted in immigration court.²²⁹ However, the Court's grounding of the issue in the Sixth Amendment right to counsel, as opposed to the Fifth Amendment voluntariness of the plea, introduces some of the "hard-floor" protections of a criminal trial, such as the Sixth Amendment right to counsel, into deportation law.²³⁰ One of these hard-floor protections is the Confrontation Clause. If *Padilla* can be read to introduce the Sixth Amendment right to counsel into deportation proceedings, other Sixth Amendment hard-floor rights that guarantee the fairness of a trial should attach as well.²³¹

²²⁵ See, e.g., Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 319 (2011); Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 55–57 (2011); Markowitz, *supra* note 215, at 1358–59.

²²⁶ Kanstroom, *supra* note 215, at 1466.

²²⁷ See *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012); *supra* Part I.

²²⁸ See generally *supra* Part II.

²²⁹ See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

²³⁰ See Kanstroom, *supra* note 215, at 1488–89; *id.* at 1497–1500 (discussing cases leading up to *Gideon*'s recognition of a right to counsel in criminal cases and stating, "It would seem to be clearly wrong now to categorize all forms of deportation as noncriminal, nonpunitive, and collateral, and thus subject only to flexible (and frequently ineffective) due process norms à la *Betts*"); Markowitz, *supra* note 215, at 1352–53.

²³¹ See *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . .").

One may also ask: would applying the Confrontation Clause to removal proceedings solve the police report problem described in Part I? First, not all types of removals may be easily conceptualized as “punishment” and therefore trigger Sixth Amendment protections. As Kanstroom has described, deportation of noncitizens like Mr. Padilla—those who have been admitted to the U.S. who are deportable due to criminal conduct—can be labeled “*post-entry social control*” deportation.²³² For them, Kanstroom argues, deportation essentially functions as punishment because it regulates their behavior and thus exercises continual control over them, as does the criminal law.²³³ Thus, the constitutional protections of a criminal trial should apply in these proceedings.²³⁴ This is not the case for “*extended border control*” types of deportations, when the noncitizen has not been admitted to the U.S. or has been admitted but violates the rules that govern his temporary residence.²³⁵ These proceedings are essentially contractual, and thus it is more appropriate to think of them as civil and non-punitive.²³⁶ One can read the *Padilla* Court’s Sixth Amendment holding as limited to the facts of the case: Mr. Padilla was a lawful permanent resident deported for a criminal conviction.²³⁷ If one were to relook at the Supreme Court’s test for determining whether a civil sanction is “punishment” and thus deserving of all the criminal protections,²³⁸ lawful permanent residents have the most to lose if deported.²³⁹ For others, though, such as noncitizens who were paroled into the United States for humanitarian reasons and years later seek to be admitted to the United States, like the Mariel Cubans,²⁴⁰ it is not so clear that their removal proceedings would be deemed punishment, thus requiring Sixth Amendment Confrontation rights.

²³² Kanstroom, *supra* note 215, at 1465.

²³³ See Kanstroom, *supra* note 211, at 1898.

²³⁴ Kanstroom, *supra* note 215, at 1465, 1499–1500.

²³⁵ *Id.* at 1465–66.

²³⁶ See Kanstroom, *supra* note 211, at 1897–98.

²³⁷ See generally *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²³⁸ See Maddali, *supra* note 225, at 34–49 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)) (considering post-*Padilla* whether deportation is punishment under the *Kennedy-Mendoza* test for whether a given civil sanction is deemed punishment).

²³⁹ See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2404–06 (2013); Markowitz, *supra* note 213, at 291–92; see also Kanstroom, *supra* note 216, at 1510 (arguing that refugees can benefit from the application of the “Fifth-and-a-Half Amendment” due to the harshness of deportation as a sanction in their cases, the convergence of these cases with the criminal system, and the difference that counsel can make).

²⁴⁰ In 1980, about 125,000 Cubans were part of the “Freedom Flotilla,” where Fidel Castro allowed them to leave via the port of Mariel. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1666 (1992). It was impossible for the Immigration and Naturalization Service (INS) to process all of them at once, so INS utilized the parole power to bring them into the United States. *Id.* Many of the “Marielitos” were inadmissible because of criminal records and were excluded. *Id.* Because Cuba refused to repatriate them, many of the Marielitos remained in indefinite immigration detention, unsuccessfully making substantive due process arguments against indefinite detention. *Id.* Their plight finally reached the

Second, it is not clear that the Sixth Amendment Confrontation Clause would apply when immigration courts make decisions regarding relief from removal and bond. In a criminal trial, the Sixth Amendment Confrontation Clause is a trial right,²⁴¹ thus, it does not apply at sentencing²⁴² or in pre-trial matters such as bail hearings.²⁴³ When comparing removal to criminal proceedings, discretionary decisions on relief can be likened to sentencing because the judge already has found the noncitizen removable—the “guilty” phase—and then decides a noncitizen’s fate by balancing the good against the bad in his life.²⁴⁴ As described above, some of the most problematic uses of police reports can be seen when immigration courts decide discretionary relief.²⁴⁵ Similarly, bail hearings in criminal court can be likened to bond hearings in immigration court.²⁴⁶ Because the Sixth Amendment Confrontation Clause does not apply to pre-trial hearings such as bail,²⁴⁷ that right would not necessarily attach in the analogous hearing in immigration court. Thus, conceptualizing deportation as punishment post-*Padilla* to extend Sixth Amendment Confrontation rights in immigration court may only solve a small sliver of the police report problem.

Supreme Court in 2005, where the Court decided, based on statutory interpretation grounds, that they could not be indefinitely detained. *See Clark v. Martinez*, 543 U.S. 371, 385–87 (2005). Because the Court made a statutory, instead of a due process, holding to release them, Cold War era case law stating that noncitizens seeking entry had no due process rights was not overruled. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213–15 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). The *Garces* case, which is described *supra* Part III.C, is one example of a Mariel Cuban who, years after he was paroled into the United States, sought to adjust status, yet the government argued, presenting police reports, that he was inadmissible to the United States. *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1339–41 (11th Cir. 2010).

²⁴¹ *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011) (“As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused *at trial* unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.” (emphasis added)).

²⁴² *See, e.g., United States v. Katzopoulos*, 437 F.3d 569, 575–76 (6th Cir. 2006); *United States v. Martinez*, 413 F.3d 239, 243–44 (2d Cir. 2005).

²⁴³ *See United States v. Hernandez*, 778 F. Supp. 2d 1211, 1223–27 (D.N.M. 2011) (holding, post-*Crawford*, that the right to confrontation does not apply at detention hearings and collecting pre-*Crawford* cases in which courts held that the Sixth Amendment Confrontation Clause did not apply to bail hearings); *United States v. Bibbs*, 488 F. Supp. 2d 925, 926 (N.D. Cal. 2007) (“Nothing in *Crawford* requires or even suggests that it be applied to a detention hearing under the Bail Reform Act, which has never been considered to be part of the trial.”).

²⁴⁴ *See supra* Part I.A.

²⁴⁵ *See supra* Part III.B.

²⁴⁶ IMMIGRATION COURT OBSERVATION PROJECT, NATIONAL LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 9 (Conor Gleason et al. eds., 2011), <http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf>.

²⁴⁷ *See, e.g., Hernandez*, 778 F. Supp. 2d at 1223–27; *Bibbs*, 488 F. Supp. 2d at 926.

Finally, there are practical problems with importing the Sixth Amendment Confrontation Clause into removal proceedings. As Anne Traum has observed,²⁴⁸ the Fifth Amendment can provide greater protection,²⁴⁹ greater flexibility, and greater speed in adoption of rights.²⁵⁰ In addition, importing Sixth Amendment procedures into immigration proceedings might prove difficult because the Sixth Amendment is offense-specific and only applies to felonies and misdemeanors involving a loss of liberty.²⁵¹ Traum argues that importing rights into deportation proceedings based on the Fifth Amendment “allows courts to innovate rights, borrowing from the Sixth Amendment as needed, and retooling it to fit the immigration context when necessary without fear of implication for the criminal context.”²⁵²

B. Fifth Amendment Due Process Balancing (Deportation is Civil)

Another framework through which to view the application of confrontation rights in deportation proceedings is through the Due Process Clause of the Fifth Amendment. The signature component of due process is flexibility: as the Court has stated, “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”²⁵³ In *Mathews v. Eldridge*,²⁵⁴ the

²⁴⁸ See generally Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491 (2011) (arguing that while the Sixth Amendment may serve as an important guidepost, courts should tailor procedural protections to the Due Process Clause).

²⁴⁹ She cites the example of discovery. In the criminal context, under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the prosecution must disclose material evidence which is favorable to the accused; this allows the prosecutor to be the gatekeeper to decide which evidence to disclose. See Traum, *supra* note 248, at 535. In comparison, in removal proceedings, non-citizens must “rely on Freedom of Information Act (FOIA) requests, limited discovery, and their own investigation.” *Id.* at 536. In immigration proceedings, 8 U.S.C. § 1229a(c)(2) establishes that a noncitizen seeking admission must show he is lawfully present in the United States pursuant to a prior admission, and in order to meet this burden of proof he shall have access to his visa and all other entry documents (as long as they are not deemed confidential by the Attorney General) pertaining to his admission. In the case of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), the Ninth Circuit read this access statute broadly and, citing due process concerns, required the government to produce documents that would prove he had a derivative citizenship claim. 627 F.3d at 373–74. Traum cites this comparison of the discovery rights in immigration and criminal court as an example of how criminal procedures can be more limited, since unlike criminal discovery, the government in a case like *Dent* is not tasked with identifying which evidence is favorable or whether it is material; the government must hand over the entire file. Traum, *supra* note 248, at 541.

²⁵⁰ This is because it builds on a framework that the Supreme Court has already established. Traum, *supra* note 248, at 534.

²⁵¹ *Id.* at 533–34. But see Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2301 (2013) (arguing that following *Padilla*, the Sixth Amendment should require appointment of counsel for the fine-only crimes that will result in deportation).

²⁵² Traum, *supra* note 248, at 534.

²⁵³ *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

²⁵⁴ 424 U.S. 319 (1976).

Court adopted a three-part test to determine whether the Fifth Amendment Due Process Clause requires any particular procedure in a civil case before the government can take away a statutorily created right.²⁵⁵ Courts must consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁵⁶

The *Mathews* test has been the preferred means by which courts and scholars alike have examined whether procedural protections should be provided in immigration court.²⁵⁷

There is ample precedent for finding that due process requires the right to confrontation and cross-examination in civil cases.²⁵⁸ For example, in the 1963 case

²⁵⁵ The Court held that the claimant in the case had a property right to Social Security disability benefits. This right, which was created by statute, created a property interest that could not be taken away without due process of law. *Id.* at 332–33, 335.

²⁵⁶ *Id.* at 335.

²⁵⁷ See, e.g., *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002) (applying the *Mathews* balancing test to determine if videoconferencing violates due process rights in removal proceedings); see also Markowitz, *supra* note 215, at 1351–53 (analyzing the civil *Mathews* test and the hard floor criminal model to evaluate whether certain procedures should apply in deportation proceedings).

²⁵⁸ In many civil cases finding confrontation rights, the Court has relied on dicta from a 1959 case, *Greene v. McElroy*, 360 U.S. 474 (1959), where the petitioner was discharged from his employment in a company that provided products to the government; this discharge was a direct result of the government revoking his security clearance due to *ex parte* evidence about his alleged ties to the Communist Party. 360 U.S. at 475–79. Although the Court in *Greene* decided that the agency acted without statutory authority to revoke the security clearance without confrontation, the Court's decision cited strong due process principles:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

See *id.* at 496. As William Kuehnle has noted, the Court's strong language on the right of confrontation may have been due to the extreme secrecy of the evidence (as opposed to the garden-variety hearsay admitted in civil cases, where all parties know who wrote the document).

Willner v. Committee on Character and Fitness,²⁵⁹ the Court determined that due process required confrontation when the New York State Bar excluded an applicant who had passed the bar exam but was denied bar membership because of ex parte statements about his bad character.²⁶⁰ In the 1970 case *Goldberg v. Kelly*,²⁶¹ the Court, holding that due process required a hearing on termination of welfare benefits prior to the termination, stated, “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”²⁶² The Supreme Court has held that there is some right to confrontation in parole and probation revocation hearings,²⁶³ prison disciplinary hearings,²⁶⁴ and hearings prior to the transfer of an inmate to a mental institution.²⁶⁵ However, the Court in these cases reasoned that confrontation rights could be denied if there is a government interest (i.e., safety) that outweighs the right to cross-examine witnesses.²⁶⁶

See William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 863–65 (2004–05) (discussing *Greene*). But see *supra* note 177 (discussing the Court’s decision in *Jay*, decided three years before *Greene*, where the Court did not consider confrontation rights in an immigration case despite the fact that secret evidence was used to deny discretionary relief).

²⁵⁹ 373 U.S. 96 (1963).

²⁶⁰ *Id.* at 105–06; see also *id.* at 103 (citing *Greene*, 360 U.S. at 492, 496–97) (“[P]rocedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.”).

²⁶¹ 397 U.S. 254 (1970).

²⁶² *Id.* at 269. Under the city’s existing procedures, which gave a hearing after the termination of benefits, the welfare recipient was not permitted to present evidence or confront or cross-examine adverse witnesses. *Id.* at 268. The Court held that “[t]hese omissions are fatal to the constitutional adequacy of the procedures.” *Id.* In the case of *Richardson v. Perales*, the Court distinguished *Goldberg* on its facts, stating that the rejection of disability benefits did not involve as serious of a deprivation as terminating welfare benefits. *Richardson v. Perales*, 402 U.S. 389, 406–07 (1971); see also *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976) (distinguishing *Goldberg* and holding that for the termination of disability benefits due process did not require a pre-termination hearing partially because eligibility for disability benefits is not based upon financial need as is welfare benefits). Additionally, the *Perales* Court was not concerned about the credibility or veracity of the reports, as would be the case in evidence submitted in a welfare termination proceeding. *Perales*, 402 U.S. at 407. The Court in *Mathews* later confirmed that hearsay reports such as unbiased medical reports in SSI disability cases are inherently reliable and thus limited confrontation rights when these reports were introduced. See *Mathews*, 424 U.S. at 344.

²⁶³ See *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 488–89, 491 (1972). Several courts of appeals have rejected an application of the Sixth Amendment Confrontation Clause in parole revocation hearings following the Supreme Court’s decision in *Crawford*. See, e.g., *United States v. Ray*, 530 F.3d 666, 667–68 (8th Cir. 2008); *United States v. Kelley*, 446 F.3d 688, 689 (7th Cir. 2006).

²⁶⁴ See *Wolff v. McDonnell*, 418 U.S. 539, 586 (1974) (Marshall, J., concurring in part and dissenting in part).

²⁶⁵ See *Vitek v. Jones*, 445 U.S. 480, 494–96 (1980).

²⁶⁶ See *id.* at 496 (“The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner’s right to call witnesses, to confront and

In administrative law, the 1971 case of *Richardson v. Perales*²⁶⁷ is instructive. In *Perales*, the Court considered whether the Social Security Administration could deny social security disability benefits based on a hearsay report.²⁶⁸ The hearsay report at issue was a doctor's report; the doctor was not subjected to cross-examination, although the claimant had not sought to subpoena the doctor.²⁶⁹ The hearing examiner also called an independent medical examiner, who was cross-examined and provided evidence that was consistent with the hearsay report.²⁷⁰ The claimant, however, presented medical reports with diagnoses that conflicted with the hearsay report.²⁷¹ The hearing administrator based his decision on the hearsay evidence.²⁷² The Court held that the hearing examiner's decision did not violate the Social Security Act (which provided for relaxed rules of evidence),²⁷³ the Administrative Procedures Act (which the Court described as consistent with the Social Security Act),²⁷⁴ or the Due Process Clause of the Fifth Amendment.²⁷⁵ The Court allowed the agency to base its decision on hearsay evidence and dispensed with the right of confrontation and cross-examination because there were a variety of factors that indicated the reliability and probative value of the evidence.²⁷⁶

cross examine.”); *Wolff*, 418 U.S. at 586 (Marshall, J., concurring in part and dissenting in part) (concluding that due process in prison disciplinary proceedings should include a general right to cross-examination, but recognizing that there may be circumstances in which “confidentiality must prevail over the accused’s right of confrontation”); *Morrissey*, 408 U.S. at 489 (due process in parole revocation includes “the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)”); *see also* FED. R. CRIM. P. 32.1(b)(2)(C) (governing revocation proceedings and guaranteeing “an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear”); *United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009) (reasoning that *Morrissey*’s requirements have been incorporated into FED. R. CRIM. P. 32.1(b)).

²⁶⁷ 402 U.S. 389 (1971).

²⁶⁸ *Id.* at 390.

²⁶⁹ *Id.* at 390, 397.

²⁷⁰ *Id.* at 396.

²⁷¹ *Id.* at 393.

²⁷² *Id.* at 396.

²⁷³ *Id.* at 400 (“Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.” (quoting Social Security Act § 205(b), 42 U.S.C. § 405(b))).

²⁷⁴ *Id.* at 409.

²⁷⁵ *Id.* at 402.

²⁷⁶ *Id.* at 402–06. These factors included: the lack of bias by reporting witnesses; that “[t]he vast workings of the social security administrative system make for reliability and impartiality in the consultant reports” because the agency operates as an adjudicator, not as an advocate or adversary; that “[t]hese are routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they had seen;” that because of the number of different specialists who examined him, “[i]t is fair to say that the claimant received professional examination and opinion on a scale beyond the reach of most persons and that this case reveals a patient and careful endeavor by the state agency and the examiner to ascertain the

In the immigration context, courts and the Board generally have applied the *Perales* “reliable and probative” test for determining admissibility of hearsay evidence.²⁷⁷ As discussed in Part III, there appears to be a more stringent fairness test when police reports are introduced in discretionary cases.²⁷⁸ Thus, the Board is not correctly applying the due process test, which has created the police report problem.²⁷⁹ Reviewing courts are ignoring the problem by not second-guessing these discretionary decisions.²⁸⁰ When one examines the police report problem through due process balancing, the insufficient weighing of interests is especially stark: shouldn’t the stakes of detention and deportation be greater when compared to the loss of employment (for which the Court has found confrontation rights)?²⁸¹ In light of *Padilla*, courts must rethink the balancing of interests at stake, because the loss to the noncitizen and risk of erroneous deprivation can be considered greater now that the Court has said it is “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”²⁸²

Is the Fifth Amendment Due Process Clause a desirable method of conceptualizing whether noncitizens have the right to confront cops in immigration court?²⁸³ The Due Process Clause “accommodates the necessary shades of gray between civil and criminal”²⁸⁴ and is attractive to courts because of its flexibility.²⁸⁵ Yet flexibility means that courts can choose an outcome-determinative balance to avoid bestowing too many rights upon litigants. As the Supreme Court stated in *Crawford*, “judges, like other government officers, could not always be trusted to safeguard the rights of the people” so the Framers were “loath to leave too much discretion in judicial hands.”²⁸⁶ For this reason, “[b]y replacing categorical constitutional guarantees with

truth,” there was no inconsistency in the reports of five specialists; that the claimant did not take advantage of the opportunity to subpoena these doctors; the longstanding practice of courts recognizing “the reliability and probative worth of written medical reports even in formal trials” and admitting them as an exception to the hearsay rule; that courts reviewing social security disability cases routinely have recognized the reliability and probative value of medical reports; and that the cost of live medical testimony at each hearing is too burdensome with 20,000 disability cases heard annually. *Id.*

²⁷⁷ See *supra* Part III.A.

²⁷⁸ See *supra* Part III.B.

²⁷⁹ See *supra* Part III.B.

²⁸⁰ See *supra* Part III.B.

²⁸¹ See, e.g., *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 105–06 (1963); cf. *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (holding that the Department of Defense was unauthorized to deprive petitioner of employment in a proceeding in which he was not afforded confrontation rights).

²⁸² *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. 1982)).

²⁸³ See generally Traum, *supra* note 248 (arguing that while the Sixth Amendment may serve as an important guidepost, courts should tailor procedural protections to the Due Process Clause).

²⁸⁴ W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 122 (2011).

²⁸⁵ Kanstroom, *supra* note 211, at 1898.

²⁸⁶ *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

open-ended balancing tests, we do violence to their design.”²⁸⁷ To quote Richard Friedman, “Balancing tests are not very good protectors of rights, because a judge disposed to rule against the right will generally have an easy enough time finding ample weight on the other side of the balance.”²⁸⁸

Take, for example, the right to court-appointed counsel in immigration court. In 1975, the Sixth Circuit in *Aguilera-Enriquez v. INS*²⁸⁹ applied the Fifth Amendment Due Process Clause and found that in some cases due process would require court-appointed counsel.²⁹⁰ In Mr. Aguilera-Enriquez’s case, however, fundamental fairness did not require the appointment of counsel because the court reasoned that a lawyer would not have made a difference in the outcome of the proceedings.²⁹¹ In the almost forty years following *Aguilera-Enriquez*, no court has held that due process requires the appointment of counsel in an immigration case.²⁹²

A case-by-case assessment of whether a police report is untrustworthy enough to require confrontation can be skewed by courts’ biases against politically disfavored defendants and in favor of other criminal justice actors such as police.²⁹³ As Peter Markowitz has discussed, the existence of such biases counsel in favor of the “hard floor” rights that apply in criminal cases, as compared to the *Mathews* balancing test.²⁹⁴ Although there is sufficient academic critique about the unreliability of police reports,²⁹⁵ it would be difficult on a case-by-case basis to argue that the circumstances in a given case indicate lack of trustworthiness. This test pits the noncitizen’s word against that of the police officer. The bias in favor of criminal justice actors such as police, who are regular collaborators with courts in the administration of justice,²⁹⁶

²⁸⁷ *Id.* at 67–68.

²⁸⁸ Friedman, *supra* note 89, at 1031. Friedman also argues that balancing tests can create inconsistent results since they are highly case-specific in their application and can demand great expenditure of appellate resources in order to not cede too much power to trial judges. *Id.*

²⁸⁹ 516 F.2d 565 (6th Cir. 1975).

²⁹⁰ *Id.* at 568.

²⁹¹ *Id.* at 569.

²⁹² Kanstroom, *supra* note 215, at 1503 (“It turns out, however, that fundamental fairness of this variant virtually never seems to require counsel.”). In *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010), the district court required government-paid counsel for unrepresented, indigent mentally ill detainees. Ingrid Eagly describes the decision as “grounded in due process logic,” although the decision to appoint counsel was to provide an accommodation under the Rehabilitation Act. *See* Eagly, *supra* note 251, at 2303.

²⁹³ Markowitz, *supra* note 215, at 1354.

²⁹⁴ *Id.* at 1352–55.

²⁹⁵ *See, e.g.*, Dorfman, *supra* note 60, at 460 (“Police officers can be expected to omit, redact, and even lie on their police reports, sworn or unsworn.”); Fisher, *supra* note 60, at 6 (“Police reports may mislead by misstating facts, omitting facts, or a combination of both.”); Zeidman, *supra* note 60, at 324 (“The belief that police falsification is ubiquitous is widely held.”).

²⁹⁶ *See* Markowitz, *supra* note 215, at 1354 (citing Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006)).

means that the noncitizen faces an uphill battle trying to argue that the police report in his case lacks trustworthiness.²⁹⁷ Moreover, noncitizens, particularly those who are pro se, may not have access to enough facts to adequately prove that a report is untrustworthy.²⁹⁸

Flexibility also means it is easier to reject rights because they are expensive.²⁹⁹ Ensuring a police officer's availability to testify in immigration court imposes costs on the government: time spent away from the demands of the officer's normal duties; costs to transport the officer to a far-away immigration court;³⁰⁰ costs in the form of additional immigration court time spent hearing police testimony;³⁰¹ and costs associated with additional detention of the noncitizen while removal proceedings are continued to accommodate the officer's schedule.³⁰² Some of these costs are undertaken by state and local governments, who are not responsible for initiating removal proceedings; courts thus may be less likely to burden state and local police departments.

A final problem with relying on the case-by-case due process balancing test is that due process does not apply to all removal proceedings. A lawful permanent resident

²⁹⁷ Cf. Dorfman, *supra* note 60, at 472 (discussing reasons why judges accept perjured testimony from police officers during search and seizure: "(1) 'it can be very difficult to determine whether a witness is lying,' especially if the judges work under the principle that police officers are presumptively trustworthy; . . . (2) 'judges dislike excluding probative evidence;' (3) judges are often predisposed to believe that the defendant is guilty; (4) assuming a swearing contest between the defendant and the police officer, judges are likely to disbelieve the defendant; and . . . (5) judges do not like to call police officers liars" (footnotes omitted) (citing Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1321–24 (1994))).

²⁹⁸ Cf. Wilson, *supra* note 60, at 27 (arguing that *Franks v. Delaware*, 438 U.S. 154 (1978), which permits the challenge to an officer's sworn statements in a warrant application if the defendant can prove falsification of police affidavit, places a significant evidentiary burden on the defendant "given the small likelihood that a challenger will have access to evidence sufficient to demonstrate deceit by the police").

²⁹⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

³⁰⁰ Removal proceedings often do not occur in the location where the arrest that led to the proceedings took place because, among other reasons, removal proceedings can be initiated years after the arrest and conviction and immigration detainees are frequently transferred from one jurisdiction to another due to bed space. See César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 19–20 (2011) (describing rise in the number of transfers of immigration detainees in a decade).

³⁰¹ Immigration courts nationwide already are burdened by "managing the largest caseload the immigration court system has ever seen." Designation of Temporary Immigration Judges, 79 Fed. Reg. 39,953 (July 11, 2014) (to be codified at 8 C.F.R. pt. 1003).

³⁰² The government pays approximately \$159 a day to detain a noncitizen. See *The Math of Immigration Detention*, NAT'L IMMIGR. F. (Oct. 17, 2014), <http://www.immigrationforum.org/blog/themathofimmigrationdetention/>.

facing deportation has different due process rights than a noncitizen who is seeking admission to the United States. The lawful permanent resident has the strongest due process rights;³⁰³ the noncitizen who has not yet been admitted to the United States has none.³⁰⁴ One might wonder why courts should be concerned with the rights of persons who have not yet been admitted to the United States. After all, those seeking visas to come to the United States do not find themselves in immigration court; nor should they be able to claim the protections of the U.S. Constitution.³⁰⁵ There are, however, noncitizens who were paroled into the United States for humanitarian reasons and years later sought to be admitted to the United States (one is again reminded of the Mariel Cubans).³⁰⁶ Others, such as those admitted to the United States as visitors, students, or refugees, stand somewhere in the middle of these two. They have been admitted to the United States, so the Due Process Clause applies;³⁰⁷ however, as they are not yet lawful permanent residents, their due process protections should not be as strong.³⁰⁸

While due process rights can vary depending on *who* is asking, they also can vary depending on *what* is being requested. Some courts have held that when seeking discretionary relief, which is the vast majority of cases in which police reports are used,

³⁰³ See, e.g., *Demore v. Kim*, 538 U.S. 510, 543–45 (2003) (Souter, J., concurring in part and dissenting in part) (discussing all of the protections that should attach once a noncitizen has been admitted as a lawful permanent resident); Johnson, *supra* note 239, at 2404–13 (arguing under the *Mathews* balancing test that lawful permanent residents should be guaranteed court-appointed counsel in deportation proceedings).

³⁰⁴ The Fifth Amendment Due Process Clause applies only to deportation proceedings; in exclusion proceedings, due process rights are virtually nonexistent. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Motomura*, *supra* note 240, at 1655 (reasoning that *Landon v. Plasencia*, 459 U.S. 21 (1982), indicated a turn in due process rights because the Court indicated that noncitizens “enjoyed degrees of ‘entitlement’—and in turn degrees of access to procedural due process rights—depending on the nature and extent of their attachment to the United States”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990) (discussing key immigration due process decisions from the 1950s and reasoning that “aliens ‘outside’ the United States would continue to find it very difficult to raise any constitutional challenge to immigration decisions”).

³⁰⁵ Cf. *Knauff*, 338 U.S. at 544. See generally Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113 (2010) (discussing the doctrine of nonreviewability of consular decisions).

³⁰⁶ See, e.g., discussion of Mariel Cubans *supra* note 240.

³⁰⁷ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

³⁰⁸ See Johnson, *supra* note 239, at 2404–13 (discussing why lawful permanent residents should have Due Process right to appointed counsel because they have the strong legal entitlement to remain in the United States and the deepest community ties to the United States).

there is no liberty interest at stake.³⁰⁹ The lack of a liberty interest in the *outcome* of an application for discretionary relief is distinguishable from the right to *apply* for such relief, where the Supreme Court has held that there is a liberty interest.³¹⁰

C. Unbundling the Criminal Trial Rights (Deportation is Quasi-Criminal)

Another possible approach is to “unbundle” the constitutional protections guaranteed in a criminal trial. One might ask, shouldn’t it be an “on/off” switch—either the criminal procedures apply because a proceeding is criminal, or they don’t apply because it is civil.³¹¹ One way of conceptualizing this unbundling of procedural rights is by thinking of deportation as quasi-criminal. This is what the Court did when assessing a purportedly “civil” sanction such as forfeiture, where the Court was willing to apply some protections of a criminal trial.³¹² Kenneth Mann has described these punitive civil sanctions as the “middleground” between criminal and civil law.³¹³ They fit into neither the criminal nor civil paradigm: they are punitive in purpose and effect, yet are labeled “civil” by the legislature.³¹⁴ Mann argues that these middleground

³⁰⁹ See, e.g., *Patel v. Gonzales*, 470 F.3d 216, 220 (6th Cir. 2006) (“To prevail, Patel first must show that the BIA’s failure to consider his voluntary departure claim deprived him of a liberty interest. However, we have previously held that ‘[t]he failure to be granted discretionary relief [such as voluntary departure] does not amount to a deprivation of a liberty interest.’” (alterations in original) (quoting *Ali v. Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004))); *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (“There is no property interest involved and, because the relief of voluntary departure (like the relief of adjustment of status) is essentially discretionary, there is no cognizable liberty interest in that remedy.” (citing *Ali*, 366 F.3d at 412)); see also *Sova v. Holder*, 451 F. App’x 543, 547 (6th Cir. 2011) (reasoning that there was no due process right to cross-examine an adverse witness upon whose statement the government relied to prove marriage fraud because the noncitizen was applying for discretionary relief and there is no liberty interest in seeking discretionary relief).

³¹⁰ See *INS v. St. Cyr*, 533 U.S. 289, 307–08 (2001).

³¹¹ See *Pauw*, *supra* note 2, at 309.

³¹² See *Boyd v. United States*, 116 U.S. 616, 634 (1886) (applying the Fourth Amendment and Fifth Amendment privilege against self-incrimination to civil forfeiture proceeding after labeling the proceeding as “quasi-criminal”); see also *Austin v. United States*, 509 U.S. 602 (1993) (holding that forfeiture of property following conviction constitutes punishment and therefore the Eighth Amendment’s Excessive Fines Clause applies); *United States v. Halper*, 490 U.S. 435 (1989) (holding that the Double Jeopardy Clause applies to civil sanctions under the False Claims Act because the Court viewed them as punitive). *But see Hudson v. United States*, 522 U.S. 93 (1997) (disavowing *Halper* and returning to the two-part test established in *Ward*); *United States v. Ward*, 448 U.S. 242 (1980) (establishing in civil sanction case a two-part test to determine whether a sanction is punitive by first examining the intent of the legislature, and if the legislature intended the sanction to be civil, finding it punitive only if there is the clearest proof that the sanctions are so punitive in form and effect so as to render them criminal).

³¹³ Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1799, 1862 (1992).

³¹⁴ *Id.* at 1801.

sanctions require heightened procedures that are similar to, yet not as stringent as, criminal procedures.³¹⁵

Although the Court's decision in *Padilla* can be interpreted to mean that deportation is punishment,³¹⁶ at a minimum, the Court's decision can be read to mean that deportation is quasi-criminal.³¹⁷ Other precedent exists to think about deportation as "quasi-criminal" and thus deserving of some of the protections of a criminal trial.³¹⁸ Peter Markowitz has outlined where criminal law protections have seeped into purportedly civil immigration proceedings.³¹⁹ For example, the Supreme Court has held that it would analyze the deportation statute under the "established criteria of the 'void for vagueness' doctrine" because of deportation's harsh consequences, notwithstanding deportation being civil in nature.³²⁰ In another example, the Court in *INS v. St. Cyr*³²¹ applied criminal principles against retroactivity when the consequence was deportation.³²² The Court has applied the rule of lenity,³²³ a heightened burden of

³¹⁵ *Id.* at 1862; see also Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 720 (1999) (arguing that rather than trying to attach a label of "criminal" or "civil" to a given sanction, courts should begin to develop a "middleground" jurisprudence and determine which civil sanctions are serious enough to require heightened procedures; for those serious enough, courts should determine incrementally which procedures should be guaranteed).

³¹⁶ See Kanstroom, *supra* note 215, at 1466; Maddali, *supra* note 225, at 49.

³¹⁷ See *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence."); Markowitz, *supra* note 215, at 1301 ("[D]eportation does not fit neatly into the civil or criminal box, but rather . . . it lives in the netherworld in between.").

³¹⁸ Several scholars have argued that deportation should be seen as "quasi-criminal." See, e.g., Bleichmar, *supra* note 2, at 134; Kanstroom, *supra* note 211, at 1932; Maddali, *supra* note 225, at 30; Pauw, *supra* note 2, at 316–17.

³¹⁹ See Markowitz, *supra* note 215, at 1314–25.

³²⁰ *Jordan v. De George*, 341 U.S. 223, 231 (1951).

³²¹ 533 U.S. 289 (2001).

³²² See *id.* at 315–21. One can argue that this is too broad of a reading of *St. Cyr*, as the Court reasoned that Congress could have retroactively stripped noncitizens of their right to apply for a 212(c) waiver by making a clear statement. *Id.* Daniel Kanstroom discusses how this was a pragmatic approach to obtain a majority and avoid unnecessary confrontations with Congress, but that "this approach renders much of the most powerful normative underpinnings of *Landgraf* and other retroactivity cases bitterly irrelevant," as Congress can simply be clear about taking away vested rights in civil cases. Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 460 (2002). Kanstroom writes that "[t]he Court's apparent recognition of the similarities between the constitutional protections in criminal cases and deportation subtly bridges the civil and criminal categories." *Id.* at 461. Kanstroom also discusses how the issue in *St. Cyr* was similar to that in *Padilla* in that the Court upheld the formal line of deportation as civil, not criminal, yet overcame the harsh consequences through other means; he wrote, "The result is a bit of a mixed message, constitutionally speaking, but one that holds real promise for future development." Kanstroom, *supra* note 215, at 1490.

³²³ *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

proof,³²⁴ and the exclusionary rule (albeit a watered-down version).³²⁵ Given the incremental introduction of these criminal trial-like procedures, it appears that immigration proceedings are looking more and more like criminal trials.³²⁶

Can one argue that there is a Sixth Amendment right of confrontation in a proceeding that is technically labeled “civil”—would this not require a court to disregard the text of the Sixth Amendment, which states that these rights should only apply in a *criminal trial*?³²⁷ When a given proceeding is technically civil in nature, rights granted in a criminal trial can attach via the Due Process Clause of the Fifth Amendment.³²⁸ Conceptualizing deportation as “quasi-criminal” allows courts to assign some, but not all, rights guaranteed in criminal trials.³²⁹ Most significantly, these rights can attach categorically, as opposed to relying on a case-by-case analysis of whether the facts of a given case require the application of a right.³³⁰

As scholars have noted, analogizing deportation to juvenile delinquency proceedings is helpful.³³¹ As Tamar Birkhead has discussed, “The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating

³²⁴ See *Woodby v. INS*, 385 U.S. 276, 285 (1966). The Court has referred to the “clear, unequivocal, and convincing” standard of proof adopted by the *Woodby* Court in deportation cases as an “intermediate standard,” which is generally used “in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.” *Addington v. Texas*, 441 U.S. 418, 424 (1979); see also *id.* at 432 (holding that in civil commitment cases, due process requires the intermediate standard of proof and not the criminal “proof beyond reasonable doubt” standard).

³²⁵ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (suggesting that, while the exclusionary rule is available in such proceedings, it is only available where there has been an egregious violation of the Fourth Amendment).

³²⁶ Cf. *Addington*, 441 U.S. at 427 (citing *In re Winship*, 397 U.S. 358, 365–66 (1970)) (discussing the *Winship* holding that proof beyond reasonable doubt should apply in juvenile delinquency proceedings as decided “against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions”).

³²⁷ See *Austin v. United States*, 509 U.S. 602, 607–08 (1993).

³²⁸ See, e.g., *In re Winship*, 397 U.S. at 368 (applying a heightened burden of proof in juvenile delinquency proceedings); *Woodby*, 385 U.S. at 285 (applying a heightened burden of proof in deportation proceedings).

³²⁹ See Markowitz, *supra* note 215, at 1350–51; Pauw, *supra* note 2, at 316–17.

³³⁰ See Markowitz, *supra* note 215, at 1351–55 (discussing the difference between “hard floor” rights in the criminal realm and case-by-case rights in the civil realm, and advocating for a test that recognizes some deportations as quasi-criminal and therefore certain hard floor rights should apply).

³³¹ See Kanstroom, *supra* note 211, at 1931–32 (arguing that juvenile delinquency proceedings can provide an example of proceedings that are civil in name but many of the protections of a criminal trial attach); Maddali, *supra* note 225, at 49–57 (discussing how juvenile delinquency proceedings can provide a helpful analogy to how procedural protections should apply in deportation proceedings); Pauw, *supra* note 2, at 316–17 (discussing juvenile delinquency proceedings as a “quasi-criminal” proceeding where some of the constitutional protections of a criminal trial are available even though the proceeding is nominally civil).

aspects of both the civil and criminal court systems.”³³² Juvenile delinquency proceedings are, in name, civil, yet many of the criminal procedural protections of a trial attach because of the consequences of a juvenile delinquency finding.³³³ Notably, the Supreme Court held in *In re Gault*³³⁴ that the right to confrontation and cross-examination should apply in juvenile delinquency proceedings even though historically those proceedings were never intended to be adversarial in nature.³³⁵ The Court applied these rights by interpreting the Due Process Clause of the Fourteenth Amendment, not by applying the Sixth Amendment criminal trial rights.³³⁶ These rights, the Court held, attached to all juvenile delinquency proceedings; the Court did not make a case-specific holding that depended on the unique circumstances of that particular juvenile’s case.³³⁷ The Supreme Court has not gone so far as to label the juvenile delinquency system “criminal,” but it has stated, “Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either ‘civil’ or ‘criminal.’”³³⁸ This refusal to label the proceeding either “civil” or “criminal” is substantially similar to the Court’s reasoning in *Padilla*, where the Court found that deportation is

³³² Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1447 (2009).

³³³ See, e.g., *In re Winship*, 397 U.S. at 368 (finding that due process requires that the burden of proof in juvenile delinquency proceedings be beyond reasonable doubt); *In re Gault*, 387 U.S. 1, 31–56 (1967) (finding that due process requires right to appropriate notice, counsel, confrontation and cross-examination, and privilege against self-incrimination in juvenile delinquency proceedings); *Kent v. United States*, 383 U.S. 541, 561–62 (1966) (finding that due process requires the right to a hearing, that counsel be given access to records, and that the court be provided a statement of reasons motivating the waiver before a case is transferred from juvenile court to adult court). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (finding that the right to trial by jury in juvenile delinquency proceedings is not required under the Due Process Clause).

³³⁴ 387 U.S. 1 (1967).

³³⁵ The *Gault* Court described the history of juvenile court proceedings, which were never intended to be adversary proceedings because the state was proceeding as *parens patriae*. *Id.* at 16. The Court examined the history of juvenile courts and determined that although these proceedings are civil and intended to rehabilitate the child, “the admonition to function in a “parental” relationship is not an invitation to procedural arbitrariness.” *Id.* at 30 (quoting *Kent*, 383 U.S. at 555).

³³⁶ See Birkhead, *supra* note 332, at 1459–60 (citing *In re Gault*, 387 U.S. at 13–14, 30–31).

³³⁷ See *In re Gault*, 387 U.S. at 41 (“We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”); *id.* at 57 (“We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.”).

³³⁸ *McKeiver*, 403 U.S. at 541.

“uniquely difficult to classify as either a direct or a collateral consequence [of a criminal conviction].”³³⁹

Conceptualizing immigration proceedings as “quasi-criminal,” although not perfect, presents the best way to address the police report problem. A partial application of the guarantees of a criminal trial—namely, the right of confrontation when a police report is introduced in immigration court—presents a hard floor of rights that are not subjected to a case-by-case balancing test.³⁴⁰ However, the immigration system could retain its efficiency because the full panoply of criminal trial rights would not apply.³⁴¹ The “unbundling” of criminal procedural rights presents a more realistic solution.

A due process balancing test would necessarily include an assessment of the extent to which the noncitizen even possesses due process rights either because of his status, place, or whether he is seeking discretionary relief.³⁴² Addressing the right to confront police officers under this test may lead to the exclusion of some hearsay police reports. For example, lawful permanent residents would be afforded the right to confront a police officer, especially if the police report is used in a legal determination of removability as opposed to an application for discretionary relief.³⁴³ Little is gained, however, by granting confrontation rights in such a limited set of circumstances. Courts already have rejected immigration judges’ reliance on police reports to prove deportability, citing reasons other than the right to confrontation.³⁴⁴ Such limited confrontation rights would hardly solve the police report problem, as the vast majority of instances where police reports are used against noncitizens include applications for discretionary relief and bond.³⁴⁵ Additionally, granting confrontation rights based on the unreliable nature of police reports more closely tracks courts’ rejection of other unreliable hearsay documents in immigration cases. Courts have rejected the use of unreliable hearsay against arriving asylum-seekers,³⁴⁶ whom by Supreme Court precedent possess no due process rights, having not yet been admitted to the U.S.³⁴⁷ Courts also have rejected the use of unreliable hearsay against noncitizens who entered without inspection,³⁴⁸ another category of noncitizens with limited due process rights.³⁴⁹ Finally, courts have rejected the use of unreliable hearsay against applicants

³³⁹ *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

³⁴⁰ *See Kanstroom, supra* note 215, at 1510; *Markowitz, supra* note 215, at 1352.

³⁴¹ As an example of rights borrowed from criminal procedure that do not warrant application in deportation, Peter Markowitz cites the rights to a grand jury and speedy trial. *See Markowitz, supra* note 215, at 1355.

³⁴² *See supra* notes 291–98 and accompanying text.

³⁴³ *See id.*

³⁴⁴ *See supra* Part III.C.

³⁴⁵ *See supra* Part I.A.

³⁴⁶ *See supra* notes 121–24.

³⁴⁷ *See Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 213–15 (1953); *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

³⁴⁸ *See generally supra* note 120.

³⁴⁹ *See supra* note 240.

for adjustment of status,³⁵⁰ who are not yet permanent residents (thus deserving fewer due process rights)³⁵¹ and seek discretionary relief (where some courts have held there is no liberty interest and thus no due process rights).³⁵² Granting confrontation rights when police reports are introduced in immigration court merely extends what appears to be a subtle application of the Federal Rules of Evidence for testing a document's reliability.³⁵³

Conceptualizing removal proceedings as “quasi-criminal” allows confrontation rights to attach whenever a police report is introduced in immigration court. If the confrontation right attaches to any use of the police report itself, it matters not who is the subject of the report or how strong his due process rights are when he later arrives in immigration court. What matters is that a police officer has accused him of wrongdoing; he has a right to cross-examine that officer to dispute those facts. When this written recording of wrongdoing is later introduced to prove that he should be deported, should remain detained without bond, or should not be eligible for or merit discretionary relief, confrontation rights should attach.

It is the universal application of the right of confrontation whenever a police report is introduced in immigration court that distinguishes this Article's proposal from Peter Markowitz's “*Mathews v. Eldridge* with teeth” test.³⁵⁴ Markowitz argues for a three-step test: first, a court must “determine whether the values a criminal right seeks to protect are at issue in comparable ways in the deportation context”; second, if the right applies, the court must determine what categories of deportation proceedings require criminal-style hard floor rights and what categories are appropriate for the civil-style balancing model; third, “the court must determine the parameters of the right to be applied.”³⁵⁵ Applying the first step, it thus far has been argued that in removal proceedings, the values the criminal right to confrontation protects are at issue in a comparable way.³⁵⁶ At the second step, the proposal in this Article diverges: while Markowitz argues that only certain categories of removal proceedings should require hard-floor criminal process rights,³⁵⁷ this Article proposes that confrontation rights should attach whenever a police report is introduced in immigration court, regardless of who is in court and what they are requesting.

³⁵⁰ See *supra* notes 107–14.

³⁵¹ See *supra* note 240.

³⁵² See *supra* notes 310–11.

³⁵³ See *generally* Part III.A.

³⁵⁴ See Markowitz, *supra* note 215, at 1355–58.

³⁵⁵ *Id.* at 1355.

³⁵⁶ *Id.* at 1305–07 (discussing the need for additional protections in removal proceedings and the Court's apparent alignment with this view).

³⁵⁷ At the second step, Markowitz urges courts to determine whether factors exist that justify a hard floor: “(1) bias against a politically disfavored group; (2) bias in favor of state enforcement actors who are regular collaborators with the court in the administration of justice; (3) gravity of potential loss of liberty; and (4) gravity of social stigma associated with a negative outcome in the proceedings.” *Id.* at 1356.

If deportation is “quasi-criminal,” then “quasi-rights” apply.³⁵⁸ Should there be a watered-down version of the Sixth Amendment Confrontation Clause in immigration court? What would that look like?

V. QUASI-CONFRONTATION RIGHTS

The solution this Article proposes is for federal courts reviewing immigration decisions to find that the Fifth Amendment Due Process Clause requires confrontation and cross-examination of the police officer any time the government seeks to introduce a police report against a noncitizen in immigration court. Given the underlying confrontation rights,³⁵⁹ the lack of reliability of many police reports,³⁶⁰ and the pivotal role that such reports play in immigration cases,³⁶¹ judges should refuse to admit police reports against a noncitizen without the opportunity for cross-examination of the police officer. This proposal permits *noncitizens* to introduce police reports to the extent it would be useful in proving facts;³⁶² the proposal thus closely tracks FRE 803(8), which only prohibits courts from admitting police reports *against* a criminal defendant.³⁶³

Why are the statutory rights granted by the Immigration and Nationality Act insufficient? The statute guarantees a right to cross-examine adverse witnesses.³⁶⁴ However, this right is not absolute, as courts frequently invoke the familiar administrative law principle that the agency may rest its decision on hearsay documents when that document enjoys a presumption of reliability, as do hearsay documents written by a government actor such as a police officer.³⁶⁵ There is also the right to subpoena police officers in immigration court.³⁶⁶ This right, however, does not require

³⁵⁸ See *id.* at 1355 (stating that in the proposed “*Mathews* with teeth” test, at the third step, courts should determine the parameters of the criminal trial right to be applied to removal proceedings).

³⁵⁹ See *supra* Part IV.

³⁶⁰ See *supra* Part I.B.

³⁶¹ See *supra* Part I.A.

³⁶² For example, noncitizen applicants for relief under the Violence Against Women Act (VAWA) often introduce police reports to show that they have been battered or subjected to extreme cruelty by a citizen or lawful permanent resident spouse. See 8 C.F.R. § 204.2(c)(2)(iv) (2014) (listing police reports as potential evidence that can be presented in VAWA self-petitions to prove abuse).

³⁶³ See FED. R. EVID. 803(8).

³⁶⁴ See 8 U.S.C. § 1229a(b)(4)(B) (2012) (providing the right to a reasonable opportunity to cross-examine witnesses presented by the government in removal proceedings); see also *Malave v. Holder*, 610 F.3d 483, 487 (7th Cir. 2010) (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)) (“A declarant is a ‘witness’ when testimony comes in on paper, no less than when it is offered in person.”).

³⁶⁵ For an illustration of the principle that hearsay is admissible in the administrative context see, e.g., *Angov v. Holder*, 736 F.3d 1263, 1270 (9th Cir. 2013) (citing *Richardson v. Perales*, 402 U.S. 389, 397–98 (1971)).

³⁶⁶ 8 U.S.C. § 1229a(b)(1).

immigration judges to issue such subpoenas. Rather, the noncitizen must prove that he has made a diligent effort, without success, to produce the witness, and the judge must deem the witness's testimony to be essential.³⁶⁷ Nor does the subpoena authority of the immigration court guarantee expeditious appearance of the witness. If a witness refuses or neglects to appear in response to the subpoena, immigration judges must request that the U.S. Attorney report such refusal or neglect to appear to the U.S. district court and request such court to issue an order requiring the witness to appear and testify.³⁶⁸ By the time a noncitizen makes his own efforts to produce an officer and proves those efforts to the immigration judge, the judge issues a subpoena, the officer refuses to appear, the judge reports to the U.S. Attorney who reports to the U.S. district court, and the district court finally enforces the subpoena, a typical detained case is long since completed.³⁶⁹ If a judge continues a case to allow for these delays, the noncitizen's detention is prolonged, impacting his liberty rights and adding significant costs to the government. Finally, for pro se respondents, it would be unreasonable to expect them to make subpoena motions in immigration court,³⁷⁰ particularly since they must first demonstrate unsuccessful efforts to produce the witness prior to requesting the subpoena.³⁷¹

The opportunity to cross-examine police officers is, of course, no panacea. As the scholarship reflects, "testilying" frequently occurs in criminal courts, such that there is no reason to believe police officers will tell the truth on the stand.³⁷² Years ago, it was noted that the criminal justice system provided police incentives to lie in court.³⁷³

³⁶⁷ 8 C.F.R. § 1287.4(a)(2)(ii)(B) (2014). Although beyond the scope of this Article, another criminal right that might need to attach is the Compulsory Process Clause of the Sixth Amendment, which Akhil Amar has referred to as "the confrontation clause's fraternal twin." See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 131 (1997); see also *Malave*, 610 F.3d at 488 (holding that before an immigration judge can base a negative discretionary decision on a hearsay document (written by the noncitizen's ex-husband, whose affidavit proved marriage), the judge "must furnish the alien with compulsory process to seek the adverse witness's presence, so that the truth of the writings may be tested").

³⁶⁸ 8 C.F.R. § 1287.4(d).

³⁶⁹ See EVAL. & INSPECTIONS DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, I-2013-001, *MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW* 7 tbl.1 (Oct. 2012), <http://www.justice.gov/oig/reports/2012/e1301.pdf> (establishing as a goal that 85% of detained cases be completed within sixty days).

³⁷⁰ See *Olabanji v. INS*, 973 F.2d 1232, 1236 (5th Cir. 1992) (explaining the difficulty for pro se noncitizens without language skills or experience in the American conflict resolution system to produce a witness).

³⁷¹ See 8 C.F.R. § 1287.4(a)(2)(ii)(B).

³⁷² See Zeidman, *supra* note 60, at 323 (discussing the concept of police "testilying" when giving sworn testimony in court).

³⁷³ Irving Younger, *The Perjury Routine*, 204 *THE NATION*, 596-97 (May 8, 1967), reprinted in Radley Balko, *How Do We Fix the Police 'Testilying' Problem?*, *WASH. POST* (Apr. 16, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/04/16/how-do-we-fix-the-police-testilying-problem/>.

Scholars repeatedly have advocated for criminal court judges to stop “winking and nodding” at police lies on the stand and to subject police witnesses to the same tests of proof as other witnesses.³⁷⁴ However, in criminal cases defendants have the critical tool of cross-examination to expose the lie.³⁷⁵ As scholars have noted, cross-examination is “the greatest legal engine ever invented for the discovery of truth”³⁷⁶ and is “thought to expose any testimonial infirmities.”³⁷⁷ Noncitizens currently do not have the opportunity to expose police lies through cross-examination.

One might also question whether the officer’s testimony would not simply be a recitation of the contents of the report, especially if he cannot remember the underlying facts.³⁷⁸ Would the right of confrontation be useless if it is not accompanied by the right to court-appointed counsel and funds to hire an investigator to comb the scene of the crime and interview witnesses to reveal any factors indicating an untrustworthy police report? Others have advocated for a right to counsel in immigration court, especially following the Court’s Sixth Amendment decision in *Padilla*,³⁷⁹ thus it is possible that courts will recognize a right to court-appointed counsel. However, even without a lawyer the confrontation right in immigration court is not meaningless. The purpose of cross-examining police officers is to determine facts. While most pro se noncitizens may find the presentation of legal arguments to be impossible without a lawyer, the presentation of facts is manageable for most pro se litigants.³⁸⁰ Moreover, giving noncitizens the opportunity to cross-examine police officers may contribute to their assessment of the fairness of the proceedings.³⁸¹

Would the right to confront police officers in immigration court solve the problem when the issue is double hearsay—where the officer merely cited a victim’s statement in his report? Should there also be a right to confront the *victim* when a police report is introduced in immigration court? Cross-examination of the officer would present the opportunity to ask what basis the officer believes the victim had for

³⁷⁴ See Dorfman, *supra* note 60, at 466; see also Cloud, *supra* note 297, at 1312–13.

³⁷⁵ See Dorfman, *supra* note 60, at 463.

³⁷⁶ WIGMORE, *supra* note 38, at § 1367.

³⁷⁷ Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 962 (1974).

³⁷⁸ Under the current doctrine, Confrontation Clause rights are satisfied if the witness who wrote the report is subject to cross-examination, even if the witness does not remember the facts leading up to the report. See *United States v. Owens*, 484 U.S. 554 (1988).

³⁷⁹ See, e.g., Kanstroom, *supra* note 215, at 1509–13; Maddali, *supra* note 225, at 55–57; Markowitz, *supra* note 215, at 1358–59.

³⁸⁰ See, e.g., *Olabanji v. INS*, 973 F.2d 1232, 1236 (5th Cir. 1992) (suggesting that if the government had produced an adverse witness, the noncitizen could have adequately cross-examined her, despite the fact that he was “without language skills or experience in American conflict resolution”).

³⁸¹ See, e.g., Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 975–81 (2006) (discussing the concept of procedural justice theory—the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision-makers are fair, unbiased, and efficient).

making the particular statement. Additionally, for those cases where the victim appears on behalf of the noncitizen in immigration court—for example, in domestic violence charges where the victim is an intimate partner³⁸²—a judge can hear testimony from both the officer and the victim in order to assess what happened during the criminal incident.

Why should judges draw the line at police reports? There are plenty of hearsay documents that the government introduces against noncitizens in removal proceedings.³⁸³ For example, the government frequently submits notes written by an asylum officer during an affirmative interview for asylum.³⁸⁴ Judges rely on these notes to undermine the credibility of an asylum applicant during a removal hearing, yet asylum officers rarely appear in immigration court to be cross-examined.³⁸⁵ A police report, however, is a different type of hearsay document. Its lack of reliability stems from the inherently adversarial nature of the confrontation between a criminal defendant and a police officer and the myriad reasons police may lie in a report (e.g. to justify an arrest).³⁸⁶ These concerns, in addition to defendants' Sixth Amendment Confrontation Clause rights, motivated the FRE drafters to prohibit criminal courts from admitting police reports against a defendant.³⁸⁷ This temporal aspect of unreliability does not change when the same report is introduced in a different forum—an immigration court instead of a criminal court. And, as discussed in Part IV.A, Sixth Amendment Confrontation Clause rights may apply to at least certain types of deportations, thus justifying a prohibition on introducing police reports against noncitizens in immigration court. It is inexplicable that police reports be given greater weight than other hearsay documents,³⁸⁸ despite the fact that they are less reliable.³⁸⁹ Police reports also are used in such a variety of immigration judges' decisions, thus justifying a special rule as applied to these particular documents.³⁹⁰

Would allowing cross-examination of police officers make the supposedly “streamlined” removal proceedings too complex for the system to handle?³⁹¹ While it is true that immigration judges cannot adjudicate guilt,³⁹² judges routinely engage in fact-finding by hearing testimony.³⁹³ This Article proposes nothing more than what

³⁸² See, e.g., *supra* note 23.

³⁸³ See *supra* Part III.A.

³⁸⁴ See, e.g., *Barry v. Gonzales*, 224 F. App'x 32 (2d Cir. 2007) (relying in part on asylum officer's notes in a credibility finding).

³⁸⁵ See, e.g., *id.* at 35–36 (upholding adverse credibility finding based on discrepancies between asylum applicant's testimony and asylum officer's notes from asylum interview).

³⁸⁶ See *supra* Part I.B.

³⁸⁷ See *supra* Part I.B.

³⁸⁸ See generally *supra* Part III.

³⁸⁹ See generally *supra* Part I.B.

³⁹⁰ See *supra* Part I.A.

³⁹¹ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984).

³⁹² See *id.* at 1038.

³⁹³ The proposal to allow immigration judges to cross-examine police officers is different from asking them to determine more complex legal questions, such as whether law enforcement

immigration judges routinely do: assess credibility by hearing testimony. Would the cost of the additional time spent hearing police testimony overburden the system? One way to make confrontation rights less costly is to permit telephonic testimony of police officers.³⁹⁴ Live testimony is the means to fully realize Sixth Amendment confrontation rights because it both permits a literal face-to-face confrontation with the accused³⁹⁵ and allows for the most effective cross-examination where the trier can best assess credibility.³⁹⁶ However, the implementation of the “quasi-right” to confrontation need not require face-to-face confrontation. While telephonic testimony still incurs some costs because it is time police officers spend away from their other duties, it is not as costly as live testimony because the police officers need not spend time and money traveling to the immigration court, which may be located far from where the alleged crime took place.

Not every cross-examination of a police officer in immigration court will expose untrustworthy police reports or deliberate lies. The practice of requiring the confrontation of police, however, will encourage government attorneys to use their prosecutorial discretion to avoid introducing questionable reports or raising arguments that lack a solid evidentiary foundation.³⁹⁷ The regular cross-examination of police officers also will change the culture of immigration court so that hearings are no longer trial by suggestion, but trials by evidence.³⁹⁸ This proposal may have an added benefit to the criminal justice system of fixing the “reportilying” problem since there will be more opportunity for exposing any police lies through cross-examination in immigration court.³⁹⁹

violated a noncitizen’s Fourth Amendment rights, thus requiring exclusion of evidence in immigration proceedings. *See* Chacón, *supra* note 2, at 1623–27 (arguing that even if the exclusionary rule were applied in immigration proceedings, immigration courts were not designed to police the police, and thus there are inadequate mechanisms in place to address these rights violations).

³⁹⁴ *See, e.g.*, CAL. R. CT. 3.670 (“To improve access to the courts and reduce litigation costs, courts should permit parties, to the extent feasible, to appear by telephone at appropriate conferences, hearings, and proceedings in civil cases.”).

³⁹⁵ In *Maryland v. Craig*, 497 U.S. 836 (1990), the Court stated, “In sum, our precedents establish that ‘the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,’” *id.* at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)), yet held that this preference “‘must occasionally give way to considerations of public policy and the necessities of the case,’” *id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). The Court held that Maryland’s statute preventing a child witness from seeing the defendant as he or she testifies against the defendant at trial did not violate the defendant’s rights under the Confrontation Clause of the Sixth Amendment because the procedure furthered a compelling state interest in the protection of minor victims of sex crimes from further trauma and embarrassment. *Id.* at 852–53.

³⁹⁶ JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 14.01(8th ed. 2007); MCCORMICK ON EVIDENCE § 245 (Kenneth S. Brown ed., 7th ed. 2014).

³⁹⁷ *See* Morton Memo, *supra* note 75.

³⁹⁸ *See* Ashfaq, *supra* note 172, at 68.

³⁹⁹ *See* Zeidman, *supra* note 60, at 330–31 (discussing how many police lies in reports are

CONCLUSION

A recent Washington Post op-ed stated, “[T]he problem isn’t that cops aren’t capable of telling the truth. The problem is that the courts have treated cops as if they’re incapable of lying.”⁴⁰⁰ This blind reliance on police reports has pervaded immigration judges’ decisions to deny bond, to deny discretionary relief, and, in some cases, to find noncitizens removable. The historical classification of immigration proceedings as “civil” has allowed police reports to be admitted without concern for Sixth Amendment Confrontation Clause rights that would keep these documents out of a criminal case without the officer’s testimony. The due process fundamental fairness test, which allows the admission of evidence that is fundamentally fair, has led the Board and courts to examine whether a document is trustworthy before allowing judges to rely on it. Except when the hearsay document in question is a police report and it is used in a discretionary case; then it appears to matter little if the noncitizen disputes the police officer’s version of events because the words memorialized in the police reports are presumed true.

It is time to rethink the way police reports influence immigration judges’ decisions. If the due process fundamental fairness test is allowing judges to blindly rely on police reports in making such important decisions, perhaps that test is not doing its job. While it is possible to argue for a direct application of the Sixth Amendment Confrontation Clause following *Padilla*, it is not necessary to go that far. Rather, conceptualizing deportation as quasi-criminal can ensure the right to confront cops in immigration court.

“buried under an avalanche of guilty pleas” in the criminal context, since officers need not testify at trial or even pre-trial hearings if defendants accept guilty pleas).

⁴⁰⁰ See Balko, *supra* note 373.