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Confronting Cops in Immigration Court

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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,” 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. An overlooked criminal protection is the right to confront one’s accuser.

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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).
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 case 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. For findings of deportability, the burden is on the government.

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, he must show that he is not a danger or a flight risk.

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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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{12} For example, applicants for asylum and withholding of removal must prove that they have not been convicted of a “particularly serious crime.”\textsuperscript{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.\textsuperscript{14} Offenses that are more violent in nature have been found to be particularly serious crimes.\textsuperscript{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.\textsuperscript{16} Another example is the waiver

\textsuperscript{10} See \textit{In re Urena}, 25 I. & N. Dec. at 141.
\textsuperscript{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.”
\textsuperscript{12} See generally 8 U.S.C. § 1229a(c) (describing burdens of proof in removal proceedings).
\textsuperscript{14} See \textit{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 \textit{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 . . . .”).
\textsuperscript{15} See, e.g., \textit{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); \textit{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); \textit{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).
\textsuperscript{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.\footnote{See 8 U.S.C. § 1182(h) (2012).} 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.\footnote{See, e.g., In re Grijalva, 19 I. & N. Dec. 713, 724 (B.I.A. 1988) (discussed infra Part III.B).}

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 demonstrat-
ing to the judge that the positive factors in their lives outweigh the negative.\footnote{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).} Discretionary decisions are quite common in immigration court,\footnote{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).} and the Board has
authorized judges to use police reports in these decisions.\footnote{See In re Arreguin de Rodriguez, 21 I. & N. Dec. 38, 42 (B.I.A. 1995) (discussed infra Part III.B).} 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,\footnote{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.\textsuperscript{24} Because the majority of crime-related grounds of deportability require a conviction,\textsuperscript{25} the Board historically has used the categorical approach to determine whether a criminal conviction fits an immigration category such as aggravated felony.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} The underlying facts are irrelevant to determining deportability under the categorical approach.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{27} See Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (describing the categorical approach).

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

\textsuperscript{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 Court\(^33\) 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

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\(^{31}\) 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.\footnote{35}

\textbf{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.\footnote{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.\footnote{37} Since the person who asserts the fact is not present in court, hearsay cannot be tested by cross-examination.\footnote{38} In 1975, the prohibition against the use of hearsay was codified in the Federal Rules of Evidence (FRE).\footnote{39} The rule against hearsay, however, “is
riddled with exceptions.\footnote{Ohio v. Roberts, 448 U.S. 56, 62 (1980); see also FED. R. EVID. 803, 804 (listing exceptions to the hearsay rule).} The exceptions generally indicate the document’s trustworthiness.\footnote{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”).}

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

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

\begin{itemize}
\item 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.\footnote{FED. R. EVID. 803(8).}
\end{itemize}
\end{quote}

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.”\footnote{FED. R. EVID. 803(8).}

\begin{flushright}
\textit{Id.}
\end{flushright}
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. LOUSELL & 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).


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

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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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{59}

Scholars have discussed the problem of police officers falsifying information on reports.\textsuperscript{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.\textsuperscript{61}

\textsuperscript{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.


\textsuperscript{59} Hungate Statement, supra note 57, at 7111.

\textsuperscript{60} See, e.g., Melanie D. Wilson, \textit{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, \textit{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, “\textit{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, \textit{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.”).

\textsuperscript{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. 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. Thus, “police often justify their lies by convincing themselves that lying will ensure that a guilty and dangerous defendant is not released or acquitted.”

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.”

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...

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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.’” 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.”

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. Of these, 63,313 were detainee cases and 57,132 were bond cases. There is a significant correlation between criminal activity and immigration detention; 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. 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.

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66 See Fisher, supra note 60, at 8–17.
67 Wilson, supra note 60, at 3.
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.”).
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 superseded 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


\(^74\) 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.


\(^78\) Id.


\(^80\) 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.


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) (“[T]he 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 . . . .” U.S. Const. amend. VI. 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.

In the 1980 case Ohio v. Roberts, 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.” In 2004, in Crawford v. Washington, 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. 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.”

Thus, the Court found that to admit the testimonial statement of the defendant’s

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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 UCLAL. 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.”).
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)).
96 See Bullecoming 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. 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. Courts deciding immigration cases and the Board repeatedly have held that neither the Federal Rules of Evidence nor the Sixth Amendment Confrontation Clause apply. 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.” The INA allows noncitizens to subpoena witnesses, although, unlike criminal proceedings, there is no compulsory process right that guarantees the appearance of those witnesses. 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). 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.”

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. Courts also have reasoned that fairness is “closely related to the reliability and trustworthiness of the
evidence.” 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 witnesses or the Due Process Clause. 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. This rule stems from a 1977 Board case, 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). If the government could prove they tried to find her but could not, that made her “unavailable” under FRE 804(a)(5). Courts generally have held that the burden is on the government, not the noncitizen, to make efforts to produce the witness.

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106 Ezeagwuna v. Ashcroft, 325 F.3d 396, 405 (3d Cir. 2003) (quoting Felzcerek, 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”).


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); Dullo 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”).


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.\textsuperscript{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.\textsuperscript{115} The government, when seeking to meet its burden of showing alienage,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{119}

In another example of the due process fundamental fairness test, courts have considered the admissibility of hearsay documents admitted against asylum-seekers.\textsuperscript{120} In these cases, the government sent asylum-seekers’ corroborating evidence to the
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;\(^\text{121}\) one reached the same conclusion on statutory grounds.\(^\text{122}\) 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.”\(^\text{123}\)

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*\(^\text{124}\) 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.\(^\text{125}\) Over his objection, the government submitted a police report

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\(^{121}\) *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.


\(^{125}\) *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. 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. 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. The Board applied a regulation permitting the admission of prior statements made by the respondent in any investigation (presumably reasoning that the police investigation was a “prior investigation” under this regulation). 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). 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.

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, and suggested it is only fundamentally unfair to admit police reports if there was some gross misconduct by the police officer. 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.
131 Id. at 724.
132 Id.
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.\footnote{135}

Contrast *Grijalva* with the 1995 Board case, *In re Arreguin de Rodriguez*.\footnote{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.\footnote{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).\footnote{138} The Board reversed, finding that she merited a favorable exercise of discretion.\footnote{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.”\footnote{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.\footnote{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.\footnote{142}

\footnote{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).


\footnote{137} Id. at 38–39.

\footnote{138} Id. at 42.

\footnote{139} Id.

\footnote{140} Id.

\footnote{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).

\footnote{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.\textsuperscript{143} Dicta from the Ninth Circuit\textsuperscript{144} and the Fifth Circuit\textsuperscript{145} suggests that police reports, when no conviction resulted, should not be given any serious weight in immigration court. A few courts have followed \textit{Arreguin}'s skepticism about relying on uncorroborated police reports in discretionary cases.\textsuperscript{146} For example, in \textit{Avila-Ramirez v. Holder},\textsuperscript{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.\textsuperscript{148} The court chastised the judge and Board for failing to follow \textit{Arreguin}, a binding agency decision.\textsuperscript{149} No court, however,
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.\textsuperscript{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 \textit{Garces v. United States Attorney General},\textsuperscript{151} the Eleventh Circuit refused to uphold a finding of inadmissibility based on reason to believe a noncitizen was a controlled substance trafficker.\textsuperscript{152} The noncitizen previously had pled guilty to distributing cocaine, although it was unclear whether he admitted actual guilt.\textsuperscript{153} Later, his conviction was vacated, leaving only the police report to form the basis of the government’s charged ground of inadmissibility.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{156}

While the court in \textit{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.\textsuperscript{157} The majority opinion in \textit{Olivas-Motta v. Holder}\textsuperscript{158} refused deference to the Attorney General’s
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

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\(^{160}\) *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).

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. However, courts and the Board have created several exceptions to the categorical approach in recent years. 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. This led circuit courts to critique immigration judges’ reliance on police reports to establish facts in removal cases. 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. 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. 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

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166 See supra notes 25–34.
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. 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), 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 reasoned that “‘talismanic invocation of the language of due process’ is insufficient to confer jurisdiction on this Court” because “[d]ue process does not require that the immigration judge credit Carcamo’s testimony over the evidence contained in the criminal complaint.” The Carcamo decision is a good example of Daniel Kanstroom’s

173 8 U.S.C. § 1252(a)(2)(B)(ii) (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 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.”

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. 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. 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. Courts thus preferred the categorical approach as a mechanical rule that avoided moral assessments of an individual. 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.

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

182 Id.
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. Scholars critiqued this caselaw, arguing for the preservation of the categorical approach because of fairness, historical consistency, uniformity, consistency with Congressional intent, and administrative efficiency. Until 2013, when the Supreme Court issued a set of decisions affirming a very strict categorical approach, 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. 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. In one decision, Prudencio v. Holder, the Fourth Circuit went further to address the “very real evidentiary concerns” that Silva-Trevino’s factual inquiry allows. 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.
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 Dueñas-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).
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 142, 482 (3d Cir. 2009).
195 669 F.3d 472 (4th Cir. 2012).
196 Id. at 483–84.
than unsworn witness statements and initial impressions.”

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. In a concurring opinion, he disagreed that the word “conviction” evinced a Congressional intent to use the categorical approach, and made a larger issue out of the evidentiary concerns of relying on police reports.

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, versus decisions such as eligibility for relief, eligibility for bond, and discretionary decisions, where the noncitizen bears the burden of proof. In Garces, however, the noncitizen bore the burden of proof since he had never been admitted to the U.S.; there, the Eleventh Circuit refused to uphold a finding of inadmissibility based on reason to believe a noncitizen was a controlled substance trafficker. 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. 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,

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197 Id.
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.
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.
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,\textsuperscript{206} there are likely to be more critiques of immigration judges’ reliance on police reports.\textsuperscript{207} These critiques can easily spill over into the use of police reports in the discretionary context, as in the recent \textit{Avila-Ramirez} decision where the Seventh Circuit criticized an immigration judge for relying on an uncorroborated arrest report in denying discretionary relief.\textsuperscript{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 ways\textsuperscript{209}: (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

\textsuperscript{206} See supra Part I.A.
\textsuperscript{207} For example, the Attorney General’s 2008 decision in \textit{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 \textit{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. \textit{See, e.g.}, Silva-Trevino v. Holder, 742 F.3d 197, 205 (5th Cir. 2014); \textit{Olivas-Motta}, 746 F.3d at 916; \textit{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. \textit{See, e.g.}, \textit{Olivas-Motta}, 746 F.3d at 918–19 (Kleinfeld, J., concurring); \textit{Prudencio}, 669 F.3d at 483–84.
\textsuperscript{208} See \textit{Avila-Ramirez}, 764 F.3d at 723–25.
\textsuperscript{209} See Peter H. Schuck, \textit{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

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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.”).


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. To its face, Padilla appears to be a simple holding about defense counsel’s duty to advise noncitizen defendants about deportation consequences. 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,” after discussing how “[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century,” and it is “most difficult to divorce the penalty from the conviction in the deportation context.” 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.” 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].”

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.” 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.

See Padilla, 559 U.S. at 374.
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))).
Id. at 364 (footnote omitted).
Id. at 365–66.
Id. at 366 (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. 1982)).
Id. at 365.
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).
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))).
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. 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.”

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. These reports certainly would be considered “testimonial” under *Crawford* and its progeny. 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. 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. 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.

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

228 *See generally supra* Part II.


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.
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;\textsuperscript{241} thus, it does not apply at sentencing\textsuperscript{242} or in pre-trial matters such as bail hearings.\textsuperscript{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.\textsuperscript{244} As described above, some of the most problematic uses of police reports can be seen when immigration courts decide discretionary relief.\textsuperscript{245} Similarly, bail hearings in criminal court can be likened to bond hearings in immigration court.\textsuperscript{246} Because the Sixth Amendment Confrontation Clause does not apply to pre-trial hearings such as bail,\textsuperscript{247} that right would not necessarily attach in the analogous hearing in immigration court. Thus, conceptualizing deportation as punishment post-

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\textsuperscript{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)).

\textsuperscript{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).

\textsuperscript{243} See United States v. Hernandez, 778 F. Supp. 2d 1211, 1223–27 (D.N.M. 2011) (holding, post-

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\textsuperscript{244} See supra Part I.A.

\textsuperscript{245} See supra Part III.B.


\textsuperscript{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, the Fifth Amendment can provide greater protection, greater flexibility, and greater speed in adoption of rights. 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. 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.”

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.” In Mathews v. Eldridge, the

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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.


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. The Court 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.

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.

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

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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.” The Supreme Court has held that there is some right to confrontation in parole and probation revocation hearings,262 prison disciplinary hearings,263 and hearings prior to the transfer of an inmate to a mental institution.264 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.265

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).

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.”).
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 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.

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* is instructive. In *Perales*, the Court considered whether the Social Security Administration could deny social security disability benefits based on a hearsay report. 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. The hearing examiner also called an independent medical examiner, who was cross-examined and provided evidence that was consistent with the hearsay report. The claimant, however, presented medical reports with diagnoses that conflicted with the hearsay report. The hearing administrator based his decision on the hearsay evidence. The Court held that the hearing examiner’s decision did not violate the Social Security Act (which provided for relaxed rules of evidence), the Administrative Procedures Act (which the Court described as consistent with the Social Security Act), or the Due Process Clause of the Fifth Amendment. 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.

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.\textsuperscript{277} As discussed in Part III, there appears to be a more stringent fairness test when police reports are introduced in discretionary cases.\textsuperscript{278} Thus, the Board is not correctly applying the due process test, which has created the police report problem.\textsuperscript{279} Reviewing courts are ignoring the problem by not second-guessing these discretionary decisions.\textsuperscript{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)?\textsuperscript{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.”\textsuperscript{282}

Is the Fifth Amendment Due Process Clause a desirable method of conceptualizing whether noncitizens have the right to confront cops in immigration court?\textsuperscript{283} The Due Process Clause “accommodates the necessary shades of gray between civil and criminal”\textsuperscript{284} and is attractive to courts because of its flexibility.\textsuperscript{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.”\textsuperscript{286} For this reason, “[b]y replacing categorical constitutional guarantees with

\textsuperscript{277} See supra Part III.A.

\textsuperscript{278} See supra Part III.B.

\textsuperscript{279} See supra Part III.B.

\textsuperscript{280} See supra Part III.B.

\textsuperscript{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).


\textsuperscript{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).


\textsuperscript{285} Kanstroom, supra note 211, at 1898.

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

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

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; costs in the form of additional immigration court time spent hearing police testimony, and costs associated with additional detention of the noncitizen while removal proceedings are continued to accommodate the officer’s schedule. 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...
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; the noncitizen who has not yet been admitted to the United States has none. 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. 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). 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, however, as they are not yet lawful permanent residents, their due process protections should not be as strong.

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, 305

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”).
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.\textsuperscript{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.\textsuperscript{310}

\textbf{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.\textsuperscript{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.\textsuperscript{312} Kenneth Mann has described these punitive civil sanctions as the “middleground” between criminal and civil law.\textsuperscript{313} They fit into neither the criminal nor civil paradigm: they are punitive in purpose and effect, yet are labeled “civil” by the legislature.\textsuperscript{314} Mann argues that these middleground

\textsuperscript{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).


\textsuperscript{311} See Pauw, supra note 2, at 309.

\textsuperscript{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). \textit{But see} Hudson v. United States, 522 U.S. 93 (1997) (disavowing Halper and returning to the two-part test established in \textit{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).


\textsuperscript{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. Cyr321 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.


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.

proof,\textsuperscript{324} and the exclusionary rule (albeit a watered-down version).\textsuperscript{325} Given the incremental introduction of these criminal trial-like procedures, it appears that immigration proceedings are looking more and more like criminal trials.\textsuperscript{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\textit{criminal trial}?\textsuperscript{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.\textsuperscript{328} Conceptualizing deportation as “quasi-criminal” allows courts to assign some, but not all, rights guaranteed in criminal trials.\textsuperscript{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.\textsuperscript{330}

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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{326} Cf. Addington, 441 U.S. at 427 (citing \textit{In re Winship}, 397 U.S. 358, 365–66 (1970)) (discussing the \textit{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”).


\textsuperscript{328} See, e.g., \textit{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).

\textsuperscript{329} See Markowitz, supra note 215, at 1350–51; Pauw, supra note 2, at 316–17.

\textsuperscript{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).

\textsuperscript{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.”

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. Notably, the Supreme Court held in In re Gault 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. The Court applied these rights by interpreting the Due Process Clause of the Fourteenth Amendment, not by applying the Sixth Amendment criminal trial rights. 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. 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.’” 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

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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 Birckhead, 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].”

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. However, the immigration system could retain its efficiency because the full panoply of criminal trial rights would not apply. 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. 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. 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. 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. 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, whom by Supreme Court precedent possess no due process rights, having not yet been admitted to the U.S. Courts also have rejected the use of unreliable hearsay against noncitizens who entered without inspection, another category of noncitizens with limited due process rights. Finally, courts have rejected the use of unreliable hearsay against applicants

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.
348 See generally supra note 120.
349 See supra note 240.
for adjustment of status, who are not yet permanent residents (thus deserving fewer due process rights) and seek discretionary relief (where some courts have held there is no liberty interest and thus no due process rights). 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.

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. 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.” 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. At the second step, the proposal in this Article diverges: while 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.”

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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. 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, the lack of reliability of many police reports, and the pivotal role that such reports play in immigration cases, 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; the proposal thus closely tracks FRE 803(8), which only prohibits courts from admitting police reports against a criminal defendant.

Why are the statutory rights granted by the Immigration and Nationality Act insufficient? The statute guarantees a right to cross-examine adverse witnesses. 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. There is also the right to subpoena police officers in immigration court. This right, however, does not require

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558 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).
559 See supra Part IV.
560 See supra Part I.B.
561 See supra Part I.A.
562 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).
563 See FED. R. EVID. 803(8).
564 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.”).
565 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)).
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. 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. 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. 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, particularly since they must first demonstrate unsuccessful efforts to produce the witness prior to requesting the subpoena.

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. Years ago, it was noted that the criminal justice system provided police incentives to lie in court.

\footnote{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 A\textsc{khil} R\textsc{eed} A\textsc{mar}, T\textsc{he} C\textsc{onstitution And C\textsc{riminal} P\textsc{rocedure} 131 (1997); see also M\textsc{alave}, 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”).}
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. However, in criminal cases defendants have the critical tool of cross-examination to expose the lie. As scholars have noted, cross-examination is “the greatest legal engine ever invented for the discovery of truth” and is “thought to expose any testimonial infirmities.” 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. 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; 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. Moreover, giving noncitizens the opportunity to cross-examine police officers may contribute to their assessment of the fairness of the proceedings.

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.
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 partner— 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. For example, the government frequently submits notes written by an asylum officer during an affirmative interview for asylum. 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. 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). 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. 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, despite the fact that they are less reliable. Police reports also are used in such a variety of immigration judges’ decisions, thus justifying a special rule as applied to these particular documents.

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

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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.
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 accused \(^{395}\) 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.

\(^{396}\) See JACk B. WEnSTEIn & MARGARET A. BERGEr, WEnSTEIn’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
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.” 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.