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### ***Padilla v. Kentucky's* INAPPLICABILITY TO UNDOCUMENTED AND NON-IMMIGRANT VISITORS**

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The Supreme Court's recognition in *Padilla v. Kentucky* that the Sixth Amendment right to counsel requires criminal defense attorneys to advise noncitizen defendants of the possibility of deportation prior to pleading guilty promises to lift the veil of misinformation from many plea negotiations. This promise, however, means little to non-immigrant visitors and undocumented people because they lack a critical characteristic that animated the *Padilla* Court: the right to remain in the United States indefinitely. Therefore, *Padilla's* advice mandate, this essay argues, does not apply to undocumented individuals and non-immigrants facing criminal charges, continuing to leave them subject to the perils of incorrect or incomplete advice.

*Padilla v. Kentucky*,<sup>1</sup> the two-year-old decision in which the U.S. Supreme Court announced that the Sixth Amendment right to counsel requires advice about deportation prior to entering a guilty plea, has been much hailed by immigration attorneys and the criminal defense bar for recognizing the severity of deportation and its interconnectedness with criminal proceedings. This essay casts doubt on *Padilla's* likely impact on a large swath of individuals who suffer immigration consequences as a result of criminal convictions: non-immigrant visitors and undocumented people. These groups, the essay argues, do not fall within the Court's reasoning in *Padilla* because they lack the substantial connection to the United States that pushed the Court to expand its Sixth Amendment right to counsel jurisprudence so as to provide a glimmer of hope for *Padilla* and other similarly situated lawful permanent residents ("LPRs"). Without the protection *Padilla* offers, the millions of non-immigrant visitors and undocumented people in the country are left in the legal predicament in which they have been all along: at the peril of incomplete or incorrect advice about the immigration consequences of a conviction.

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<sup>1</sup> 130 S. Ct. 1473 (2010).

## I. The *Padilla* Decision

*Padilla* epitomizes the intersection of criminal law and immigration law - that convergence recently dubbed ‘crimmigration’ law.<sup>2</sup> The Sixth Amendment right to counsel has long been interpreted as requiring that criminal defense attorneys effectively advise defendants about the penalty that may be meted upon them if convicted.<sup>3</sup> Relying on a distinction between “direct” and “collateral” consequences of conviction, many state and federal courts had held that the Sixth Amendment right to counsel is irrelevant to the concerns some criminal defendants have about staying in the United States.<sup>4</sup>

The Court in *Padilla* took a different approach. The number of crimes for which deportation may be ordered has vastly expanded, the Court observed, while Congress has steadily scaled back the discretionary authority of immigration judges and federal judges to prevent deportation from actually occurring. Combined,

[t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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.<sup>5</sup>

The Court announced that because deportation is now an “integral part” of criminal sentencing for many defendants, the direct or collateral consequence distinction is “ill-suited” to this context.<sup>6</sup> Rather, *Padilla* held that the right to effective assistance of counsel requires advice about deportation prior to entry of a guilty plea.<sup>7</sup>

## II. *Padilla*’s Concern for Lawful Permanent Residents

While the *Padilla* Court never explicitly limits its holding to LPRs, the most privileged class of noncitizens, its reasoning suggests a unique concern for these individuals.<sup>8</sup> In the first sentence of the plurality opinion, Justice Stevens references not only petitioner José Padilla’s status as an LPR but also emphasizes his “more than 40 years” in that status.<sup>9</sup> The Justices suggest the ties that Padilla developed as an LPR over this period, including service in the military during the Vietnam War, are significant.<sup>10</sup> They further acknowledge that Padilla has enmeshed himself so thoroughly in this

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<sup>2</sup> Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 644 n.17 (2011).

<sup>3</sup> See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

<sup>4</sup> See *Padilla*, 130 S.Ct. at 1481 n.8 (collecting state and federal cases following this approach).

<sup>5</sup> *Id.* at 1480.

<sup>6</sup> *Id.* at 1482.

<sup>7</sup> See *id.* at 1477.

<sup>8</sup> See Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 29-30 (2011).

<sup>9</sup> *Padilla*, 130 S. Ct. at 1477.

<sup>10</sup> See *id.* at 1477.

country's routine affairs that forcible removal to the streets of another country may be a worse punishment than confinement in the prisons of Kentucky.<sup>11</sup> The Court does not take this concern lightly; indeed, it seems to animate its decision just as much as the increasing convergence of criminal and immigration law.<sup>12</sup> Applying *Padilla*, the U.S. Court of Appeals for the Third Circuit explained that an LPR has a special concern "with remaining in the United States."<sup>13</sup>

### III. *Padilla's* Inapplicability

Like LPRs, approximately 1.8 million individuals present in the United States pursuant to a non-immigrant visa are authorized to stay for long periods of time.<sup>14</sup> Similarly, most are eligible to work while in their non-immigrant visa status.<sup>15</sup> Despite the similarities between the rights and obligations conferred upon LPRs such as *Padilla* and those conferred upon non-immigrant visitors, there remain many more differences. Moreover, these differences reach to the heart of the concern that animates the Court in *Padilla*: deportation's severance of meaningful ties to the United States. While LPRs are legally welcomed into the United States to enjoy many of the privileges and obligations that are included with one's membership in the nation's political community,<sup>16</sup> in the eyes of the law non-immigrant visitors are treated more like temporary interlopers.<sup>17</sup> Unlike LPRs who are "accorded the privilege of residing permanently in the United States,"<sup>18</sup> no non-immigrant visa allows a recipient to come to the United States with permission to stay indefinitely.<sup>19</sup> When

<sup>11</sup> See *id.* at 1480 (explaining that deportation is "sometimes the most important part . . . of the penalty" that results from a criminal conviction; because the Court applies the standard it enunciates in this decision to *Padilla*, presumably he falls into this category of people); see also DAVID C. BROTHERTON & LUIS BARRIOS, BANISHED TO THE HOMELAND: DOMINICAN DEPORTEES AND THEIR STORIES OF EXILE 4 (2011) (quoting Pedro V., a Dominican deportee, as writing, "Better to live in prison in New York than free in the D.R.>").

<sup>12</sup> Cf. Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 FALL CRIM. JUST. 21, 23 (Fall 2010) (arguing that severity that deportation represents to defendants was one of two characteristics of modern immigration law that motivated the *Padilla* Court's holding, the other reason being the "virtually automatic" nature of deportation arising from criminal conviction).

<sup>13</sup> *United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011).

<sup>14</sup> See, e.g., INA § 214(c)(2)(D), 8 U.S.C. § 1184(c)(2)(D) (2009) (authorizing admission pursuant to INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (2011) for up to seven years for managers or executives and up to five years for individuals with specialized knowledge). The Department of Homeland Security estimates that in 2008 there were approximately 1.83 million "resident non-immigrants" in the United States—that is, "foreign nationals who are legally admitted into the United States for specific, temporary purposes and whose classes of admission are associated with long stays." BRYAN C. BAKER, DEP'T OF HOMELAND SEC., ESTIMATES OF THE RESIDENT NONIMMIGRANT POPULATION IN THE UNITED STATES: 2008, 1 (June 2010), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ni\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_pe_2008.pdf).

<sup>15</sup> See 8 C.F.R. § 214.1(e) (2009) (explaining that two types of non-immigrant visas do not allow the holder to "engage in any employment": B-2 tourist visas and C transit visas).

<sup>16</sup> Cf. Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 41-42 (1997) (arguing that permanent residents were traditionally viewed as "citizens in training," but in recent years have become more frequently conceptualized as outside the polity).

<sup>17</sup> See, e.g., *LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005) (describing non-immigrants as possessing only a "temporary connection to this country").

<sup>18</sup> INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).

<sup>19</sup> See AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 5:1.1; see also INA § 214(a)(1), 8 U.S.C. § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . ."); 8 C.F.R. § 214.1(a)(3)(ii) (setting forth the general rule that "[a]t the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay . . ."); 8 C.F.R. § 214.1(c)(1) (explaining that the following non-immigrant visa categories are eligible for an extension: E-1, E-2, H-1B, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, or TN); 8 C.F.R. § 214.1(c)(3) (explaining that the following non-immigrant visa categories are, at least sometimes, not eligible for an

measured by the total length of allowable stay, even some of the most generous non-immigrant visas, namely, the E-2 reserved for executives or supervisors from countries that have special treaties with the United States<sup>20</sup> and the TN reserved for Canadian and Mexican professionals,<sup>21</sup> may be granted initially for up to two or three years, respectively.<sup>22</sup> Compounding this temporal limitation on authorized stay is the requirement common to many non-immigrant visas that applicants not intend to become immigrants; that is, that they intend to return to their country of origin upon reaching the end of their allotted stay.<sup>23</sup> The end result of these conditions imposed upon non-immigrants but not LPRs is that non-immigrants are treated as sojourners rather than individuals allowed to anchor their lives in the United States.

The roughly eleven million individuals who lack authorization to be in the United States are even more dissimilar from LPRs.<sup>24</sup> As is true of LPRs, many of these individuals have been present in the United States for significant periods of time.<sup>25</sup> During these years they have worked, developed or expanded family ties, and have become part of the social, cultural, economic, and political affairs of their communities.<sup>26</sup> Nonetheless, they have done so without the government's official sanction. They are excluded from participating in almost all formal political activity, denied

extension: B-1, B-2, C-1, C-2, C-3, D-1, D-2, K-1, K-2, S, Q-2, and others); AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON, & DANIEL MONTALVO, 1 IMMIGRATION PROCEDURES HANDBOOK 2010-2011 EDITION § 1:2 (2010) (explaining that the B-1 visa available for business visitors usually “are approved for less than three months” and that B-2 visas, issued to tourists, “are automatically given a period of entry of six months”).

<sup>20</sup> U.S. Dep't of State, *Treaty Countries*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/fees/fees\\_3726.html](http://travel.state.gov/visa/fees/fees_3726.html) (listing the countries with which the United States has a necessary treaty) (last visited Sept. 7, 2011).

<sup>21</sup> See INA § 214(e)(2), 8 U.S.C. § 1184(e)(2); FRAGOMEN, SHANNON, & MONTALVO, *supra* note 10, at § 10:02.

<sup>22</sup> See 8 C.F.R. § 214.2(e)(19)(i) (2011) (regarding E-2 non-immigrant visas); 8 C.F.R. § 214.6(e)(3) (2008) (regarding TN non-immigrant visas). After the initial issuance period, unlimited two-year extensions are allowed for E-2 non-immigrants and unlimited three-year extensions are allowed for TN non-immigrants. See 8 C.F.R. § 214.2(e)(20) (regarding E-2 non-immigrant visas); 8 C.F.R. § 214.6(h)(iii)-(iv) (regarding TN non-immigrant visas). Though the A visas reserved for foreign diplomats are granted “for the duration of the period for which the alien continues to be recognized by the Secretary of State as being entitled to that status,” a period that could be rather long, diplomatic visas represent such a minor part of non-immigrant admissions that they are not a particularly useful window into the broader operation of immigration law procedures. See 8 C.F.R. § 214.2(a)(1). The F-1 visa for students is unusual in that it authorizes admission for the “duration of status.” 8 C.F.R. § 214.2(f)(5)(i). Though “duration of status” is not defined by reference to a specific time period, it is coextensive with a course of study that will eventually terminate. See *id.*

<sup>23</sup> See FRAGOMEN & BELL, *supra* note 19, at § 5:1.1 (explaining that before issuing a non-immigrant visa a “consular officer evaluates the alien’s eligibility for admission to the United States as a bona fide nonimmigrant—whether he/she intends to remain in the United States for a temporary period rather than indefinitely or permanently” among other criteria).

<sup>24</sup> See PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 3 (Dec. 1, 2011).

<sup>25</sup> See MICHAEL HOFER, NANCY RYTINA, & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 (Jan. 2010), 3 tbl. 1 (Feb. 2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf) (providing statistical data indicating that of the total number of undocumented people present in the United States in January 2009, only nine percent entered in 2005 or later; ninety-two percent entered before 2005, and sixty-four percent have been in the country for at least a decade).

<sup>26</sup> See JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (Apr. 14, 2009) (noting that three fourths of households of unauthorized immigrants are cohabitating or married couple with or without children. Compared with native or legal immigrant households, unauthorized immigrant households are more likely to have children.); *Id.* at 9 (noting that “[c]hildren of unauthorized immigrants are 6.8% of students enrolled in kindergarten through grade 12.”); *Id.* at 12-13 (“Among men of working age, 94% of undocumented immigrants are in the labor force, compared with 85% of legal immigrant men and 83% of U.S.-born men.”).

employment authorization,<sup>27</sup> and, most vividly, constantly subject to detention and physical expulsion from the country<sup>28</sup> (even if, by legal fiction, such expulsion is termed “exclusion” or “inadmissibility”<sup>29</sup>). Indeed, some federal courts have relied on undocumented peoples’ presence in violation of law to limit the constitutional protections to which they are entitled.<sup>30</sup> These features of undocumented life are critical in the *Padilla* context (and in immigration law generally) because they stem from an individual’s lack of legal permission to be present or remain in the United States.<sup>31</sup>

Without a legally cognizable “right to remain in the United States,”<sup>32</sup> non-immigrants and undocumented individuals are unlikely to reap any benefit from *Padilla*.<sup>33</sup> The “privilege of residing permanently in the United States”<sup>34</sup> that the Court stressed *Padilla* enjoyed for forty years is missing from the lives of non-immigrants and undocumented people. They cannot claim this privilege even for a *day*, never mind the significant period during which *Padilla* acculturated to life in the United States, including to the point of proving himself willing to die in its defense.<sup>35</sup>

Even if courts do not focus on *Padilla*’s LPR status and his deep ties to the United States, they might nonetheless determine that *Padilla*’s holding is irrelevant to non-immigrants and undocumented people under *Strickland v. Washington*’s effective assistance of counsel framework.<sup>36</sup> *Strickland*’s second prong - that a defendant’s right to effective assistance of counsel is violated only

<sup>27</sup> See 8 C.F.R. § 274a.12(a)-(b) (2011) (granting work authorization eligibility to specific categories of noncitizens but not including people present in the United States without the federal government’s permission).

<sup>28</sup> See, e.g., 8 U.S.C. § 1182(a)(6)(A)(i) (2001) (rendering inadmissible any noncitizen “present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General”).

<sup>29</sup> See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 65-66 (2001) (explaining that entrants without inspection are subject to grounds of inadmissibility rather than grounds of deportability).

<sup>30</sup> See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (concluding that undocumented people are not part of the “people” contemplated by the Second Amendment right to bear arms); *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1269-71 (D. Utah 2003) (explaining that for Fourth Amendment purposes “it is difficult to see how criminal aliens would have been considered part of or connected to the nation’s political community [and] previously deported alien felons...are not covered by the Fourth Amendment.”). *Portillo-Munoz* and *Esparza-Mendoza* rely on *United States v. Verdugo-Urquidez* in which the Supreme Court explained “that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” 494 U.S. 259, 265 (1990). *Verdugo-Urquidez* concerned a Mexican citizen who, at the request of United States Marshals, was arrested in México by Mexican police officers and delivered to United States Marshals at the United States Border Patrol station in Calexico, California. See *id.* at 262. Later, DEA officials “working in concert with” Mexican police officers searched Verdugo-Urquidez’s home in México. See *Id.*

<sup>31</sup> Though some individuals who have been physically present in the United States for more than ten years are eligible for cancellation of removal, which is a discretionary form of relief granted by administrative grace and grant a statutory right to remain in the country. See 8 U.S.C. § 1229b(b)(1) (2008); see also Maddali, *supra* note 8, at 32-33 (contrasting the rootedness of lawful permanent residents from undocumented individuals).

<sup>32</sup> *Salazar v. State*, 2011 Tex. App. LEXIS 7229, at \*6 (Tex. Ct. App. 2011).

<sup>33</sup> See, e.g., *People v. Bahamadou*, 32 Misc. 3d 1230(A), at \*4-\*5 (N.Y. Sup. Ct. 2011) (rejecting a *Padilla* claim brought by an individual who stayed in the United States beyond the period authorized by his B-1 visa because his “immigration problems are unrelated to the challenged conviction.”).

<sup>34</sup> INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).

<sup>35</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010); but see Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 U.C.L.A. L. REV. 1705, 1720-21 (2011) (arguing that undocumented individuals develop a stronger argument for remaining in the United States “[t]he more time it takes the government to deport” them).

<sup>36</sup> 466 U.S. 668 (1984).

if an attorney's deficient performance is shown to have actually prejudiced the defendant<sup>37</sup> - means that noncitizens must not only show that a defense attorney failed to provide reasonably competent representation (*Strickland's* first prong<sup>38</sup>) but also that the outcome of the proceeding would have been different had the attorney advised the client in accordance with *Padilla*. Courts might assume, without deciding, that *Padilla* applies<sup>39</sup> only to then deny the claim on the basis that even if the defense attorney had provided competent advice about the immigration consequences of a criminal conviction that the advice could not help a non-immigrant visa holder or undocumented person avoid deportation because the defendant could have been removed regardless of the conviction.<sup>40</sup> In other words, the failure to provide such advice would be harmless, since the end result - forced removal - would be the same.

#### IV. What Non-Immigrants and Undocumented People Stand to Lose

*Padilla's* inapplicability to non-immigrants and undocumented people would not matter if they had nothing to lose by acting on incomplete or incorrect advice. Despite the potential for courts to conclude that a lack of advice cannot prejudice these individuals in a legally cognizable way, both groups, as a practical matter, do face adverse immigration consequences upon conviction that they may prefer to avoid. Individuals in either category, for example, might seek to become LPRs by adjusting their status.<sup>41</sup> Adjustment is precluded for individuals convicted of a wide range of crimes.<sup>42</sup> This is particularly relevant given that most individuals who have been granted permanent residence in recent years have been in the United States at the time of application; that is, they sought to adjust their status from something other than permanent residence, including non-

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<sup>37</sup> See *id.* at 687.

<sup>38</sup> See *id.*

<sup>39</sup> See, e.g., *Diunov v. United States*, 2010 U.S. Dist. LEXIS 59723, at \*2, \*7 n.4, 2010 WL 2483985, \*1, \*2 n.4 (S.D.N.Y. June 16, 2010) (applying *Padilla* to a claim raised by a person who "was legally admitted to the United States on a temporary visa" in 2002 but, as of 2010, "never obtained lawful permanent status"; separately, the court noted that, according to the Presentence Investigation Report, "Petitioner's application for adjustment of status had been denied, and that she was subject to removal proceedings. These references appear to refer to her overstay (as her temporary visa expired on January 8, 2003), and not to her guilty plea and conviction.").

<sup>40</sup> See, e.g., *United States v. Aceves*, 2011 U.S. Dist. LEXIS 27813, at \*14, 2011 WL 976706, at \*5 (D. Haw. 2011) (explaining that an individual who was present in the country without authorization after having entered without inspection cannot satisfy *Strickland's* prejudice prong by pointing to a criminal conviction since undocumented status sufficed to render him removable); *People v. Garcia*, 2011 NY Slip Op. 51527U, at \*4 (N.Y. Sup. Ct. 2011) (same regarding an individual who stayed in the United States in violation of the terms of a B-1 visa thus could not establish prejudice); *Neufville v. State*, 13 A.3d 607, 614 (R.I. 2011) (acknowledging that "we need not undertake the second part of the *Strickland* analysis" because it had already determined that counsel's performance was not deficient, but nonetheless explaining that the petitioner-defendant was not prejudiced because "had [he] proceeded to trial, he ran the risk of receiving a longer sentence than was imposed"); see also *Pet'r Reply Br.* at 17-18, *Padilla v. Kentucky* 130 S.Ct. 1473 (2010). ("[O]nly lawfully admitted immigrants can plausibly allege prejudice from conviction of a deportable offense. Illegal aliens generally cannot, absent a colorable pending or future claim to legal immigration status, because illegal presence is grounds for removal independent of the conviction."). While a person lacking authorization to be in the United States is deportable for no other reason, INA § 212(a)(9)(B)(ii) (2012), 8 U.S.C. § 1182(a)(9)(B)(ii) (2010), non-immigrants must be admissible to receive an extension or renewal of their visa. See also 8 C.F.R. § 214.1(a)(3).

<sup>41</sup> See INA § 245(a)(2011), 8 U.S.C. § 1255(a) (2011) (authorizing the adjustment of status to that of lawful permanent resident to noncitizens who have been admitted into the United States, a category that includes non-immigrants); INA § 245(i), 8 U.S.C. § 1255(i) (providing the same for some entrants without inspection).

<sup>42</sup> See INA § 245(a), 8 U.S.C. § 1255(a) (allowing adjustment only to noncitizens who are "admissible into the United States"); INA § 212(a)(2) (2010), 8 U.S.C. § 1182(a)(2) (2010) (providing a range of crime-based grounds of inadmissibility).

immigrant visa holder and present without authorization, to permanent residence.<sup>43</sup> Conviction for an offense that precludes admission, therefore, forecloses eligibility for adjustment.

Another example touches on what is perhaps the most vivid feature of modern immigration law enforcement: imprisonment. A conviction for any of the crime-based grounds of inadmissibility or most crime-based grounds of deportability would trigger mandatory detention once removal proceedings are initiated.<sup>44</sup> In contrast, individuals who are merely unlawfully present in the United States, whether because they entered without inspection or because they violated a condition of their non-immigrant visa other than commission of an enumerated crime, are eligible for release from custody pending a removal decision.<sup>45</sup> Though these consequences are likely insufficient to trigger *Padilla's* advisory requirement, they are nonetheless quite significant in the lives of these individuals.

## V. Conclusion

No matter what route courts take to decide *Padilla's* applicability to non-immigrant visitors and people present without legal authorization, they are likely to conclude that *Padilla* is of limited, if any, relevance. Lacking the strong, legally cognizable ties that influenced the Supreme Court in reviewing *Padilla's* claim, these individuals are in a much less favorable position than LPRs. *Padilla*, it seems, does not affect the Sixth Amendment protections owed these individuals.

All is not lost, however. As is true of all Supreme Court pronouncements of what the Constitution requires, *Padilla* sets a floor not a ceiling - the Constitution will fathom nothing less, but offers little about what *more* attorneys might provide. The Sixth Amendment, as explained by *Padilla*, might not require that non-immigrants and undocumented people receive advice about the deportation consequences of conviction, but there is nothing stopping defense attorneys from providing this advice as a matter of best practices.

Indeed, early reports suggest that this hope is being realized. *Padilla* has presented the criminal and immigration defense bars with a catalyst for speeding up a process that was years in the making: the routinization of advising noncitizen defendants about deportation. The *Padilla* Court relied on this cultural shift within the bar in concluding that the type of advice required by the Sixth Amendment had been a prevailing norm for at least fifteen years.<sup>46</sup> Since *Padilla* was issued, this norm has been embraced with renewed vigor. In the last two years, innumerable bar associations and academics have turned their attention to the immigration consequences of conviction.<sup>47</sup> All, it seems, view *Padilla* as ripe with potential to provide noncitizen criminal defendants information that is critical to deciding whether to plead or go to trial. There is no reason to exclude non-immigrants

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<sup>43</sup> See DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGR. STATISTICS, 2010 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2010), [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf), (evidencing that more people obtained lawful permanent residence through adjustment of status than new arrival in fiscal years 2001-2010 except 2003 where new arrivals surpassed adjustments by a mere 13,124).

<sup>44</sup> See INA § 236(c)(1)(A)-(B) (2011), 8 U.S.C. § 1226(c)(1)(A)-(B) (2011).

<sup>45</sup> See *id.*

<sup>46</sup> See *Padilla*, 130 S. Ct. at 1482-83.

<sup>47</sup> See, e.g., KARA HARTZLER, SURVIVING *PADILLA*: A DEFENDER'S GUIDE TO ADVISING NONCITIZENS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS (2011); MANUEL D. VARGAS, IMMIGRANT DEF. PROJECT, A DEFENDING IMMIGRANTS PARTNERHSIP PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* 1 (Apr. 6, 2010), available at [www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf).

and undocumented individuals from these best practices. To date, nothing suggests that the bar is doing so. In this regard, *Padilla*, though firmly a decision about constitutional criminal procedure (or, perhaps more fittingly, constitutional crimmigration law), seems to be having a meaningful impact on criminal proceedings involving non-immigrants and undocumented defendants.