

THE DEPORTATION TRIGGER:
COLLATERAL CONSEQUENCES AND THE CONSTITUTIONAL
RIGHT TO A TRIAL BY JURY

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INTRODUCTION

Mr. Jean-Baptiste Bado came to the United States from Burkina Faso as a political asylum-seeker after being prosecuted and tortured in his country for his political and religious beliefs.¹ After living in the United States for six years, he was accused and convicted of misdemeanor sexual assault in the District of Columbia, a crime with a maximum penalty of 180 days in prison.² Mr. Bado's request to be tried by a jury of his peers was denied on the grounds that his crime was a petty offense.³ Mr. Bado's conviction, decided by a judge instead of a jury of his peers, would lead to his deportation.⁴ The U.S. Court of Appeals for the District of Columbia Circuit took Mr. Bado's case on appeal and held that a defendant who will face deportation if convicted of a crime has a Sixth Amendment right to a jury trial, even if the crime with which he is charged is so "petty" that it ordinarily does not trigger the right to a jury trial.⁵

The right to a trial by jury is "fundamental to the American scheme of justice."⁶ Designed to escape governmental oppression,⁷ the Framers of the United States Constitution developed this right in response to their acknowledgement that "judges too responsive to the voice of higher authority" could not be wholly entrusted with the life and liberty of the American citizen.⁸ Therefore, the right of the accused to be tried by a jury of his peers provided a protection from

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¹ *Bado v. United States*, 186 A.3d 1243, 1247 (D.C. 2018).

² *Id.* at 1247, 1262.

³ *Id.* at 1262.

⁴ 8 U.S.C. § 1227(a)(2)(A)(i)-(iii) (2019).

⁵ *Bado*, 186 A.3d at 1262.

⁶ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁷ *Id.* at 155.

⁸ *Id.* at 156.

the “corrupt, overzealous prosecutor” or the “biased, eccentric judge.”⁹ Today, the right to a jury trial in a criminal prosecution is guaranteed by both Article III of the United States Constitution and the Sixth Amendment.¹⁰

However, the right to a jury trial does not extend to all criminal prosecutions.¹¹ Petty offenses, which were tried without juries in England and the Colonies, have long been recognized by the Supreme Court to be outside of the jury trial guarantee.¹² Historically, to determine whether an offense was “petty,” and therefore not covered by the Sixth Amendment, the Court examined the nature of the offense and whether it was triable by jury at common law.¹³ Eventually, the Court shifted its framework to a more objective analysis, focusing on “indications of the seriousness with which society regards the offense.”¹⁴ The most relevant of these indications is the “severity of the penalty authorized for [the offense’s] commission.”¹⁵ In consideration of misdemeanors, which often carry a maximum prison term of six months or less, the Court has found a presumption of pettiness exists for purposes of the Sixth Amendment.¹⁶ However, the Court has carved out an exception to this presumption for misdemeanors.¹⁷ The Court found that a defendant is entitled to a jury trial if he can demonstrate that any additional statutory penalties he may face—in addition to the maximum prison term of six months or less—are severe enough to illustrate a legislative determination that the offense is serious for Sixth Amendment purposes.¹⁸ Thus, at this time, statutory penalties are the only sanctions capable of changing a presumptively petty offense into a serious offense and thereby triggering the defendant’s right to a jury trial.¹⁹ However, statutory penalties are not

⁹ *Id.*

¹⁰ U.S. CONST. art. III, § 2, cl. 3 (“The trial of all crimes, except in cases of impeachment, shall be by jury”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury”).

¹¹ *Duncan*, 391 U.S. at 160.

¹² *Id.*

¹³ *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

¹⁴ *Frank v. United States*, 395 U.S. 147, 148 (1969).

¹⁵ *Id.*

¹⁶ *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543-44 (1989).

¹⁷ *Id.* at 543.

¹⁸ *Id.*

¹⁹ *Id.*

the only supplementary sanctions that can result from a criminal conviction.²⁰

A criminal conviction typically results in two types of legal consequences: direct and collateral.²¹ Direct consequences are traditional sanctions and punishments, which include incarceration, monetary fines, and supervision.²² Collateral consequences encompass any penalties or disadvantages inflicted upon an individual as a result of a criminal conviction that are supplementary to the conviction's direct consequences, which can range from social stigma to deportation.²³ Due to the wide-ranging and pervasive nature of these additional consequences, they produce a significant impact on the lives of the post-convicted.²⁴ However, despite being highly significant, federal courts often do not count collateral consequences as penalties reflecting the seriousness of the offense and, therefore, do not contribute to triggering the Sixth Amendment right to trial by jury.²⁵

Immigration consequences of criminal cases present a unique problem to the categorization of offenses. In *Padilla v. Kentucky*, the Supreme Court recognized this unique problem and acknowledged that immigration consequences are not easily classified as either direct or collateral.²⁶ The most common immigration consequence is deportation from the United States.²⁷ The Immigration and Nationality Act (INA)²⁸ provides that a noncitizen is removable if convicted of any crime listed in 8 U.S.C. § 1227(a)(2), which includes some misdemeanors that carry a maximum prison term of six months or less.²⁹ Collat-

²⁰ See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 672 (2008).

²¹ *Id.* at 678.

²² See Gabriel J. Chin, *Collateral Consequences of Criminal Conviction*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 1 (2017).

²³ See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1106 (2010); see, e.g., UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2(1)-(2) (UNIF. LAW COMM'N 2010).

²⁴ See Gabriel J. Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH. L. REV. 151, 154 (2012).

²⁵ See *Foote v. United States*, 670 A.2d 366, 372 (D.C. 1996).

²⁶ See *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010).

²⁷ 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (2019).

²⁸ 8 U.S.C. §§ 1101-1537 (2019).

²⁹ An alien is deportable if he is convicted of: (i) a "crime involving moral turpitude" committed within five years of admission, and punishable by at least one year in prison, or (ii) "two or more crimes involving moral turpitude" committed any time after admission and regardless of the possible prison sentence. 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (2019).

eral consequences related to immigration create an even more unique problem, because they are not applicable to all defendants, only noncitizen defendants.

This Comment examines the extent to which collateral consequences influence the seriousness determination of an offense and explains why the risk of deportation should elevate an otherwise petty offense to a serious offense for the purposes of applying the Sixth Amendment right to a jury trial. First, this Comment will provide a general overview of current Sixth Amendment jurisprudence as well as the underlying history and doctrines by which the right to a trial by jury developed. In addition, it will examine collateral consequences and their relationship to overall criminal procedure. Then, this Comment will argue that collateral consequences should be further incorporated into criminal procedure, particularly in the classification of offenses. It will further contend that deportation qualifies as a severe penalty and, therefore, indicates the legislative determination that deportable offenses are serious. Next, this Comment will offer reasons why deportation in particular should serve as a trigger for the Sixth Amendment right to a trial by jury. Finally, this Comment will conclude with a discussion of how the U.S. Supreme Court may analyze the *Bado* case.

I. BACKGROUND

A. *History of the Trial by Jury*

When designing our judicial system, the Framers of the United States Constitution relied heavily on their English heritage.³⁰ They invoked the radical idea that government is a public matter conducted for the benefit of the people rather than for the benefit of the sovereign.³¹ The idea of popular sovereignty is reflected, in part, in the judicial branch, which provides for citizen decision-making through jury trials.³² The constitutional right to a trial by jury is based on the idea that a group of laymen, separate from any state sovereign, should

³⁰ See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 421 (1996).

³¹ See *id.* at 422 (explaining the jury's significance in early American communities as political power).

³² *Id.* at 495-96.

participate in the fact-finding required by a criminal case in tandem with the presiding judge.³³

Trial by “a jury of one’s peers” traces back to the Magna Carta.³⁴ “The jury, as a fact-finding body in England, has a long-established pedigree and played a significant role in early English trials—significant enough [to merit] constitutional protection.”³⁵ Jury trials emerged to prevent the government from arbitrarily exercising power.³⁶ This more equitable form of dispute resolution was a favored substitute to the more arbitrary alternatives of the time, such as duels.³⁷

Therefore, the colonists placed a great deal of significance on the right to a jury trial. This is evidenced by colonists’ inclusion of various forms of the right to a jury trial, which were included in King James I’s Instructions for the Government of the Colony of Virginia drafted in 1606, the Massachusetts Body of Liberties adopted in 1641, the Concessions and Agreements of West New Jersey of 1677, the Frame of Government of Pennsylvania of 1682, the Declaration of Rights of the First Continental Congress of 1774, the Constitution of Virginia of 1776, and finally, the Declaration of Independence.³⁸ In the founding documents of the United States, the colonists described the right to a trial by jury as “a valuable safeguard to liberty” and “the palladium of free government.”³⁹ This rhetoric further illustrates the colonists’ conviction that the fact-finding mission of laymen on juries would prevent the government from exercising power arbitrarily against its citizens.⁴⁰

B. *Jury Trials Under the United States Constitution*

This fundamental right to a jury trial is embodied the United States Constitution. Article III, Section 2, of the Constitution provides that:

³³ BENNETT H. BRUMMER, TRIAL BY JURY: AN EXPERIMENT IN DEMOCRACY IN THE COURTS 1 (1987); see generally Toni Massaro, *Peremptories of Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 505 (1986) (explaining the “diffused impartiality” provided by “twelve laypeople” serves a significant interest).

³⁴ Massaro, *supra* note 33, at 505.

³⁵ Smith, *supra* note 30, at 391.

³⁶ Massaro, *supra* note 33, at 505.

³⁷ See Smith, *supra* note 30, at 394.

³⁸ Massaro, *supra* note 33, at 507-08.

³⁹ *Id.* at 508 (quoting THE FEDERALIST NO. 83, at 521-22 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)).

⁴⁰ *Id.*

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.⁴¹

The scope of the right guaranteed in Article III is nearly identical to that of the Sixth Amendment. The Sixth amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.⁴²

In addition, the Supreme Court has found that the right to trial by jury in criminal cases is fundamental to American justice and, therefore, is incorporated to apply to the states under the Fourteenth Amendment.⁴³ In *Duncan v. Louisiana*, the Supreme Court held that the Fourteenth Amendment guarantees the right to a jury trial in all state criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment's guarantee.⁴⁴ The Court also emphasized a distinction between petty offenses and serious offenses in relation to the jury trial guarantee.⁴⁵ This distinction is essential to the further understanding of the right to a jury trial and how it is constitutionally applied to the wide-ranging criminal procedures that take place in the United States today.

The Constitution enshrines the right to a jury trial in Article III, Section 2, which definitively commands that the trial of all crimes shall be by jury, except for cases of impeachment.⁴⁶ However, this guarantee to a trial by jury is not limitless. As previously noted, the Supreme Court has recognized that the jury trial guarantee only applies to seri-

⁴¹ U.S. CONST. art. III, § 2, cl. 3.

⁴² U.S. CONST. amend. VI.

⁴³ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁴⁴ *Id.*

⁴⁵ See *id.* at 158.

⁴⁶ See U.S. CONST. art. III, § 2, cl. 3.

ous, not petty, offenses.⁴⁷ Beginning with *Callan v. Wilson*, the Court stated that, “When it is declared that the party is entitled to a speedy trial by an impartial jury . . . it could never have been intended to embrace every species of accusation involving either criminal or penal consequences.”⁴⁸ The Court reaffirmed this limitation in *Duncan v. Louisiana*, where it held that petty crimes and offenses are not subject to the Sixth Amendment jury trial provision.⁴⁹ The Court supported the distinction between petty and serious offenses by highlighting a historical argument that referenced the common-law roots of jury trials to contextualize the Framers’ intent behind the Sixth Amendment.⁵⁰ The Court stated, “So-called petty offenses were tried without juries both in England and in the Colonies . . . There is no substantial evidence that the Framers intended to depart from this established common-law practice.”⁵¹

Although the Court has authoritatively established the existence of the petty crime exception to the Sixth Amendment’s jury trial guarantee, it has not clearly *defined* the distinction between petty and serious offenses.⁵² The Court’s approach to defining this distinction, as well as the scope of the distinction itself, has changed over time.⁵³ At present, the Court confines the petty crime exception—and denies the

⁴⁷ See *Duncan*, 391 U.S. at 160 (“So-called petty offenses were tried without juries both in England and the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.”); see also Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 979 (1926) (“The Supreme Court, therefore, has given emphatic recognition to the common-law and colonial exemption of ‘petty offenses’ from the constitutional requirement of jury trial. The implication of exemption is itself part of the Constitution.”).

⁴⁸ *Callan v. Wilson*, 127 U.S. 540, 552 (1888).

⁴⁹ See *Duncan*, 391 U.S. at 160.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Stephen A. Siegel, *Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text*, 51 Hous. L. REV. 89, 108 (2013).

⁵³ The Court’s initial approach involved an attempt to determine and apply a set of principles that captured the nature of the low-level crimes that did not require a jury trial at the founding. See *id.* at 108-10 (describing the Supreme Court’s initial approach to the petty or serious crime distinction); see also Frankfurter & Corcoran, *supra* note 47, at 980-81 (mentioning factors that determine the distinction between petty and serious offenses such as lack of moral stigma, relatively light punishment, and gravity of harm). In the early 1970’s, the Court shifted toward more objective criteria to evaluate the size of the fine and jail term in order to make the distinction. See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989).

right to a jury trial—to defendants facing no more than six months in jail, or a fine of no more than \$500.⁵⁴

C. *Classifying Offenses as Serious or Petty*

In classifying an offense as serious or petty, the Court historically has examined the nature of the offense and whether it was triable by jury at common law.⁵⁵ The Court eventually shifted its focus to more objective indications of the seriousness, “with which society regards the offense,” the “most relevant” of which is “the severity of the penalty authorized for its commission.”⁵⁶ Therefore, at present, the classification of offenses as either serious or petty is determined by: (1) the amount of punishment prescribed by statute, and (2) the nature of the offense.⁵⁷ In *Schick v. United States*, the Supreme Court stated that, “The truth is, the nature of the offense and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classified among serious or petty offenses, whether among crimes or misdemeanors.”⁵⁸

1. Nature of the Offense

In classifying an offense as serious or petty, the Supreme Court historically has examined the nature of the offense and whether it was triable by jury at common law to define the line between petty and serious offenses.⁵⁹ The Court held for the first time that a particular offense was petty in nature in *Natal v. Louisiana*.⁶⁰ There, Natal violated a municipal ordinance and the Court held that a breach of a municipal ordinance is a petty offense that may be tried summarily by a magistrate and not a jury.⁶¹ The nature of the offense approach eventually proved unworkable, because the Court had difficulty evaluating the nature of statutory offenses lacking common-law antecedents.⁶² Therefore, the Court eventually shifted its focus from the

⁵⁴ See Siegel, *supra* note 52, at 111-112 (discussing the scope of the petty crime exception).

⁵⁵ *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

⁵⁶ *Frank v. United States*, 395 U.S. 147, 148 (1969).

⁵⁷ See *Schick v. United States*, 195 U.S. 65, 68 (1904); see also *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

⁵⁸ *Schick*, 195 U.S. at 68.

⁵⁹ See *Colts*, 282 U.S. at 73; see also *Schick*, 195 U.S. at 68.

⁶⁰ *Natal v. Louisiana*, 139 U.S. 621, 624 (1891).

⁶¹ *Id.*

⁶² *Frank v. United States*, 395 U.S. 147, 149 (1969).

nature of the offense to rely primarily on the amount of punishment prescribed.⁶³

2. Amount of Punishment Prescribed

One of the most relevant indicators of the seriousness of an offense is the severity of the punishment authorized to penalize an individual for its commission.⁶⁴ The amount of punishment prescribed is used to define the line between petty and serious, in part, because the punishment authorized by the law may be taken “as a gauge of its social and ethical judgments of the crime in question.”⁶⁵ Therefore, it is the “seriousness with which *society* regards the offense” that determines whether a jury trial is required.⁶⁶ The Supreme Court has explicitly relied on the “judgment of the Nation,” as reflected by federal law and national practice, in drawing the line between petty and serious offenses at six months of imprisonment.⁶⁷

In *Baldwin v. New York*, the Supreme Court considered whether a misdemeanor punishable by up to one year of imprisonment was serious enough to require a jury trial on the basis of the possible penalty alone.⁶⁸ The Court concluded that from the near-uniform judgment of the nation, no offense can be deemed petty for the purposes of the right to a jury trial when imprisonment for more than six months is authorized.⁶⁹

The Court’s reliance on the amount of punishment prescribed as a means to classify offenses further developed as various forms of non-imprisonment penalties, such as fines and community service, became more popular.⁷⁰ In *Blanton v. City of North Las Vegas*, the Supreme Court held that although an offense carrying a maximum prison term of six months or less is not automatically considered petty, it is appropriate to presume for the purposes of the Sixth Amendment

⁶³ See *id.*

⁶⁴ *Id.* at 148.

⁶⁵ See *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

⁶⁶ See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (emphasis added) (quoting *Frank*, 395 U.S. at 148-49).

⁶⁷ See *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970); see also *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968).

⁶⁸ *Baldwin*, 399 U.S. at 69.

⁶⁹ *Id.* at 72-73.

⁷⁰ See *Blanton*, 489 U.S. at 543.

that society views such an offense as petty.⁷¹ As the court stated, “A defendant is entitled to a jury trial . . . only if he can demonstrate that any additional statutory penalties . . . are so severe that they clearly reflect a legislative determination that the offense in question is a serious one.”⁷²

At the time *Blanton* was decided, D.C. Code § 16-705(b) provided for a jury trial “in any case involving a fine of more than \$300 or imprisonment for more than ninety days.”⁷³ However, following *Blanton*, the District of Columbia attempted to improve judicial efficiency by “misdemeanor streamlining” and amended the D.C. Code to authorize a jury trial only when the offense carries a possible fine of more than \$1,000 or possible imprisonment for more than 180 days,” and “reduced the maximum penalties for a variety of crimes” from one year to 180 days “so as to make them non-jury-demandable.”⁷⁴ These changes reflected a classification of offenses based on the amount of punishment prescribed, which was meant to reflect the seriousness of the crime.⁷⁵ However, the amount of punishment prescribed for the commission of the offense includes more than just fines and prison time, it also may include collateral consequences.⁷⁶

II. FURTHER SUPPORT

A. *Legal Consequences*

The legal consequences resulting from a criminal conviction can be either direct or collateral—and often a combination of both.⁷⁷ Direct consequences are traditional legal penalties like incarceration and fines, whereas collateral consequences include any penalties or disadvantages that result from a criminal conviction. Examples of collateral consequences can range from social stigma, diminished opportunities to attain employment and housing, and even in some cases,

⁷¹ See *id.*

⁷² See *id.*

⁷³ *Burgess v. United States*, 681 A.2d 1090, 1094 (D.C. 1996).

⁷⁴ See D.C. CODE § 16-705(b)(1)(A)-(B) (2019).

⁷⁵ *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

⁷⁶ See, e.g., *Blanton*, 489 U.S. at 543 (“A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a “serious” one”).

⁷⁷ See *Roberts*, *supra* note 20, at 678.

deportation.⁷⁸ These terms, however, are not self-defining. Collateral consequences “are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court.”⁷⁹ Rather than appearing in the state or federal statute defining permissible sentences for the particular conviction, collateral consequences are scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.⁸⁰ Evaluating the effect and impact of these consequences is important to criminal procedure as an aid in classifying offenses and determining the amount of punishment prescribed.

1. Direct Consequences

“Direct consequences include the potential jail or prison term, fines, and any other criminal punishment that a trial judge may impose after conviction.”⁸¹ These penalties typically fall within the sentencing authority of the state or federal trial court.⁸² In the criminal context, judges are not required to warn a defendant who plans to accept a guilty plea of any of the *collateral* consequences that may result from this plea.⁸³ However, judges must warn defendants of the *direct* consequences that will result from a guilty plea.⁸⁴ This is critical, because defendants are seldom notified of the full ramifications of a criminal conviction, such as the effect on social services, employment, immigration status, and more.⁸⁵

2. Collateral Consequences

A collateral consequence is any sanction or disability imposed by law as a result of a criminal conviction that is in addition to the convic-

⁷⁸ See Logan, *supra* note 23, at 1104; see also, e.g., UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2(1)-(2) (UNIF. LAW COMM’N 2010).

⁷⁹ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 633 (2006).

⁸⁰ See U.S. COMM’N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 29 (2019); see, e.g., N.Y. PENAL LAW § 70.00 (McKinney 2009).

⁸¹ Roberts, *supra* note 20, at 672.

⁸² See Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

⁸³ Chin, *supra* note 22, at 4.

⁸⁴ *Id.*

⁸⁵ See Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT’L INST. OF JUST., 24, 26 (2013).

tion's direct consequences.⁸⁶ A collateral consequence is not an explicit punishment handed down by the court.⁸⁷ Instead, a collateral consequence stems from the fact that the court has convicted the defendant.⁸⁸

Collateral consequences affect not only defendants, but also defense attorneys, prosecutors, and judges. For defendants, the collateral consequences of a criminal conviction are often more punitive and long-lasting than court-imposed sanctions.⁸⁹ For defense attorneys, collateral consequences affect how they practice. Competent defense attorneys must now be informed about the range of collateral consequences potentially affecting their clients, and accordingly prepare to bargain with the prosecutor, shape the disposition of the case, and create mitigation strategies for clients.⁹⁰

For prosecutors, collateral consequences can grant significant leverage over defendants in low-level cases like misdemeanors. This is evidenced by the fact that prosecutors will sometimes charge particular offenses with the specific aim of imposing a collateral consequence triggered by that offense.⁹¹ In other cases, prosecutors may charge—or decline to charge—to avoid unjust collateral consequences.⁹² For judges, collateral consequences can influence sentencing decisions based on the theory that sentences should be proportionate to the offense.⁹³ American Bar Association standards codify this standard by directing courts to consider applicable collateral sanctions in determining a defendant's overall sentence.⁹⁴

⁸⁶ See, e.g., Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(d)(1) (2007); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2(1)-(2) (UNIF. LAW COMM'N 2010).

⁸⁷ Pinard, *supra* note 79, at 634.

⁸⁸ *Id.*

⁸⁹ Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699-700 (2002) (observing that, in most criminal cases, “the collateral consequences are a far more meaningful result of such a conviction” and that “traditional sanctions such as fine or imprisonment are comparatively insignificant.”).

⁹⁰ See *id.* at 700.

⁹¹ See Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 796 (2016).

⁹² See *id.* at 778-79.

⁹³ See STANDARDS FOR CRIMINAL JUSTICE § 19-2.4(a) (A.B.A. 2004).

⁹⁴ *Id.*

3. Deportation as a Collateral Consequence

Many offenses in which a defendant faces little to no jail time can still result in a noncitizen's deportation from the United States upon conviction.⁹⁵ The laws governing deportation were overhauled in the 1990s⁹⁶ as Congress significantly expanded the number of misdemeanor offenses that render a noncitizen deportable.⁹⁷ The process of deportation is an immigration matter that takes place outside of the standard criminal justice system.⁹⁸

A recent division of authority among state appellate courts has developed, involving whether a defendant, subject to deportation from the United States upon conviction, is constitutionally entitled to a jury trial.⁹⁹ In *Bado*, the U.S. Court of Appeals for the District of Columbia Circuit became the first court to hold that a defendant facing deportation *does* have the right to demand a jury trial.¹⁰⁰ In doing so, it diverged from the Nevada Supreme Court and the Supreme Court of New York, which have each held that such defendants *do not* have a jury trial right.¹⁰¹ This development is significant because it showcases an inflection point in which courts are endeavoring to incorporate deportation—predominately viewed as a collateral consequence—into the evaluation of criminal penalties for Sixth Amendment purposes. As discussed below, courts can take steps to consider collateral consequences—including deportation—when determining which criminal penalties trigger a defendant's right to a jury trial.

⁹⁵ See Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-59 (2013).

⁹⁶ See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 § 1(1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1278-79 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5050 (1990).

⁹⁷ See Cade, *supra* note 95, at 1758-59.

⁹⁸ See *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (stating that “removal proceedings are civil in nature”).

⁹⁹ Compare *Bado v. United States*, 186 A.3d 1246, 1246-47 (D.C. 2018), with *People v. Suazo*, 146 A.D.3d 423, 424 (N.Y. 2017), and *Amezcuca v. Eighth Judicial Dist. Court of Nev.*, 319 P.3d 602, 604 (Nev. 2014).

¹⁰⁰ See *Bado*, 186 A.3d at 1246-47.

¹⁰¹ See *Suazo*, 146 A.D.3d at 424; *Amezcuca*, 319 P.3d at 604.

III. ANALYSIS

This Section sets forth a framework by which the courts can integrate collateral consequences into the evaluation of a criminal penalty and, accordingly, the procedural entitlements defendants receive. Specifically, this Section lays out this framework by: (1) determining which collateral consequences should be eligible for incorporation; (2) explaining how courts may incorporate consideration of collateral consequences into their Sixth Amendment analyses by objectively ranking the severity of the collateral consequence; and (3) exploring the ways a court may then measure the severity of a collateral consequence by determining the degree to which it infringes upon a constitutional right. In following this framework, courts can integrate collateral and direct consequences into their Sixth Amendment analyses to determine whether a potential penalty triggers the defendant's right to a jury trial.

A. *Guaranteed Collateral Consequences Versus Potential Collateral Consequences*

As discussed above in Part II(A)(2), collateral consequences are wide-ranging in type and severity. Researchers have identified over 48,000 collateral consequences scattered throughout both state and federal codes with even more codified at the local level.¹⁰² Because collateral consequences vary so widely, it is likely that courts and legislatures may be discouraged from incorporating them into criminal procedure, thus disabling collateral consequences from serving as triggers to procedural entitlements such as the right to a jury trial.¹⁰³ Therefore, this Section explains which collateral consequences should be considered when determining whether a defendant is entitled to a procedural entitlement by examining whether the consequence is automatically imposed or discretionary upon conviction, the jurisdiction prosecuting the offense and applying the consequence, and the uniformity in the application of the consequence.

¹⁰² John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FED. SOC'Y REV. 36 (2018).

¹⁰³ See Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 247-48 (2018) (describing the challenge of organizing and categorizing all of the various collateral consequences).

Some collateral consequences are considered “collateral sanctions” and apply automatically upon conviction of an offense while others are considered “discretionary disqualifications” and potentially apply based on the discretion of some administrative entity.¹⁰⁴ Therefore, the distinction between “collateral sanctions” and “discretionary qualifications” can be simplified into two types of collateral consequences: guaranteed and potential.¹⁰⁵ A guaranteed consequence is imposed even if it is not included in the defendant’s sentence.¹⁰⁶ A potential consequence is any penalty or disadvantage that is authorized but not required to be imposed upon a defendant.¹⁰⁷ Sex offender registration requirements, firearm prohibitions, and some immigration consequences are guaranteed consequences whereas disqualification from public benefits and other immigration consequences are potential.¹⁰⁸ The importance of this distinction is relevant to determining which collateral consequences should be eligible for consideration. Only guaranteed consequences should be eligible for consideration because of the uncertainty surrounding potential consequences. Therefore, the first step in deciding which collateral consequences to incorporate is determining whether the consequence is guaranteed or potential.

Under this framework, the next step in considering a collateral consequence’s eligibility for incorporation is analyzing the relationship between the jurisdiction imposing the conviction and the jurisdiction imposing the consequence. A collateral consequence may be imposed by the same jurisdiction that prosecuted the offense and convicted the defendant or it may be imposed by a jurisdiction that is totally separate from the one prosecuting the defendant.¹⁰⁹ For example, a criminal conviction in state court can trigger consequences imposed by the federal government, such as immigration consequences.¹¹⁰ Similarly, a criminal conviction in federal court can trigger consequences imposed by a state government, such as sex offender registration requirements.¹¹¹

¹⁰⁴ See STANDARDS FOR CRIMINAL JUSTICE § 19-1.1(a)-(b) (A.B.A. 2004).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at § 19-1.1 cmt.

¹⁰⁹ See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (illustrating a criminal conviction in state court that triggered consequences imposed by the federal government).

¹¹⁰ *Id.*

¹¹¹ 34 U.S.C. § 20912 (2019).

Consequences imposed by other jurisdictions do not necessarily reflect the views of the prosecuting jurisdiction.¹¹² If the right to a jury trial is based on how serious the legislative jurisdiction considers the offense to be, then collateral consequences other jurisdictions impose should not be considered in determining the severity of the offense, because they do not reflect the legislative determination of the prosecuting jurisdiction. However, if the right to a jury trial is determined based on the seriousness of the offense from the perspective of the defendant, then consequences imposed by other jurisdictions are relevant to the analysis. For the defendant, it does not matter which government imposes the collateral consequence, but rather whether the consequence will be imposed at all. Because immigration consequences are imposed only by the federal government, the consequences from the defendant's perspective will be the same for federal prosecutions but not for state prosecutions that result in federal deportation proceedings.¹¹³

B. *Ranking the Relative Severity of Collateral Consequences*

Under existing law, the determination of whether a defendant is entitled to a jury trial turns on two types of sanctions—fines and imprisonment.¹¹⁴ By incorporating collateral consequences into this determination, specifically the consequence of deportation, things can no longer be so simple. The incorporation of collateral consequences creates incommensurability issues by evaluating the severity of different crimes against varying standards.¹¹⁵ This Section addresses whether to evaluate a collateral consequence from an objective or subjective perspective in order to establish whether it is severe enough to trigger the right to a jury trial. By doing so, this Comment aims to provide a solution that circumvents issues regarding incommensurability to illustrate why deportation is severe enough to trigger the right to a jury trial.

¹¹² See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989) (explaining that the severity of the penalty in the prosecuting jurisdiction is indicated by the determination of the legislature in that jurisdiction).

¹¹³ See 8 U.S.C. § 1103(g)(1) (2019).

¹¹⁴ See *Schtick v. United States*, 195 U.S. 65, 68 (1904); see also *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

¹¹⁵ See Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

1. Difference Between Evaluating Collateral Consequences from an Objective and Subjective Perspective

In ranking the relative severity of a collateral consequence, the first question is whether it should be viewed from an objective or subjective perspective. Viewing relative severity from a subjective perspective would require judging the severity of a particular collateral consequence on an individual basis.¹¹⁶ For example, for some low-income defendants, the collateral consequence of being prohibited from welfare programs could be disastrous, whereas for other defendants, these consequences may be inconsequential because of financial stability.¹¹⁷ Therefore, a subjective calculation of severity would rely on each defendant's particular circumstances and how each collateral consequence would affect that defendant. Accordingly, a subjective calculation would differ from person to person and consequence to consequence and, thus, would promote more individualized treatment in the criminal justice system. However, the subjective evaluation of the severity of a collateral consequence would likely be too difficult in application and lead to unequal results. This is because it would be hard to accurately assess how severe each and every collateral consequence would be for each and every defendant. How would the court determine the way a defendant personally experiences a certain collateral consequence compared to that of another? Uncertainty of this magnitude would lead to disparate results, especially considering the wide discretion that trial judges are already afforded in sentencing matters.¹¹⁸ As such, the relative severity of a collateral consequence should be ranked objectively.

¹¹⁶ See Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 124 (2007).

¹¹⁷ See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999) (explaining that welfare programs are designed to help those in need of financial assistance).

¹¹⁸ See Roberts, *supra* note 20, at 679; see also Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMPLE L. REV. 1075, 1077 (2006).

2. Benefit of Evaluating Collateral Consequences from an Objective Perspective

Current doctrines about relative severity follow an approach that objectively assesses the relative severity of a particular sanction.¹¹⁹ When determining whether a defendant has a right to a jury trial, courts do not inquire about the impact that fines or imprisonment have on an individual defendant or how that defendant would be affected by time in prison or a hefty fine.¹²⁰ Rather, as discussed above in Part II, courts consider the length of imprisonment or amount in fines based objectively on the seriousness of the offense.¹²¹ However, not all defendants will have similar experiences in imprisonment, or react to the conditions of imprisonment in similar ways. Courts do not measure the seriousness of an offense based on how an individual defendant experiences prison; rather, courts objectively measure the length of punishment to be prescribed.¹²² Therefore, courts should analyze and rank the relative severity of collateral consequences through an objective lens when incorporating these consequences into a defendant's penalty for Sixth Amendment purposes. As such, the next issue to consider is what method should be used to objectively assess the severity of a collateral consequence.

C. *Measuring the Seriousness of a Collateral Consequence by the Degree in Which it Infringes on a Constitutional Right*

The constitutional interest in liberty is enshrined in the Fourteenth Amendment,¹²³ which provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

¹¹⁹ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (stating that when determining whether the length of the authorized prison term or the seriousness of other punishment is enough to trigger a right to a jury trial, the Court prefers objective criteria).

¹²⁰ See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989).

¹²¹ See *Frank v. United States*, 395 U.S. 147, 148 (1969).

¹²² See *Duncan*, 391 U.S. at 161 (stating that when determining whether the length of the authorized prison term or the seriousness of other punishment is enough to trigger a right to a jury trial, the Court prefers objective criteria).

¹²³ *Id.* at 149.

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹²⁴

In utilizing existing doctrine, courts should assess a collateral consequence's relative severity by considering whether the consequence infringes on a defendant's liberty interests to the same degree as the relevant term of imprisonment.¹²⁵ Courts often evaluate the severity of a penalty, and consequently the seriousness of the offense, by measuring the extent to which the penalty infringes on constitutional liberty interests, which are freedoms and liberties guaranteed in the Constitution.¹²⁶ It would be convenient to merely convert collateral consequences into terms of imprisonment. For example, deportation could be worth sixty months of imprisonment. However, this would be little more than pulling numbers out of thin air. For purposes of triggering the right to a jury trial, exact measurements of terms of imprisonment are seldom needed.¹²⁷ Rather, most entitlements are triggered by a range, like more than six months imprisonment, or more than one-year imprisonment.¹²⁸ This can be mirrored in measuring the collateral consequence's relative severity. Courts can approximate a collateral consequence's relative severity by assigning it to a range category. This Comment proposes the following categories: (1) the functional equivalent of no imprisonment; (2) the functional equivalent of six months of imprisonment; and (3) the functional equivalent of one year or more of imprisonment.

Assigning a collateral consequence to one of these categories would be based on the degree to which the collateral consequence infringes on a constitutional liberty interest. For example, a prohibition on the possession of firearms is a common collateral consequence

¹²⁴ U.S. CONST. amend. XIV.

¹²⁵ See *Derendal v. Griffith*, 104 P.3d 147, 154 (Ariz. 2005) ("To mandate a jury trial, collateral consequences must approximate in severity the loss of liberty that a prison term entails.") (quoting *Blanton*, 489 U.S. at 542); see also *Blanton*, 489 U.S. at 542 (acknowledging that penalties other than imprisonment, such as "probation or a fine . . . may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity the loss of liberty that a prison term entails") (quoting *Frank*, 395 U.S. at 151).

¹²⁶ See *United States v. Nachtigal*, 507 U.S. 1, 5 (1993) (considering whether a \$5,000 fine and 5 years of probation with certain conditions approximated the severe loss of liberty caused by imprisonment for more than six months).

¹²⁷ See *infra* Part I.

¹²⁸ See *id.*

of a criminal conviction.¹²⁹ The right to keep and bear arms is enshrined in the Constitution.¹³⁰ Additionally, the Supreme Court has held that the right to possess firearms is, “fundamental to our scheme of ordered liberty.”¹³¹ Therefore, it is clear that firearm prohibition is a collateral consequence that infringes on a constitutional liberty interest to a considerable degree. However, the Supreme Court explicitly recognized that an individual’s liberty interest in the Second Amendment is not unlimited.¹³² Further, many states have also enacted firearm prohibitions for some misdemeanor offenses.¹³³ This exemplifies that firearm prohibition, while definitely an infringement on constitutional liberty interests, ranks as less severe than other collateral consequences that the Court has placed fewer limitations on. Accordingly, the collateral consequence of firearm prohibition should be assigned to the functional equivalent of six months of imprisonment.

Another example is sex offender registration. Courts have recognized lifetime sex offender registration as a serious collateral consequence—even more serious than a short probation sentence, which is a common penalty imposed on defendants.¹³⁴ Under federal law, a convicted sex offender must provide his name, social security number, license plate number, and the address of his residence.¹³⁵ Offenders must also provide the name and address of any place he is employed or is enrolled as a student.¹³⁶ This collateral consequence infringes on constitutional liberty interests involving privacy. The Supreme Court

¹²⁹ Congress first prohibited the possession of firearms by some criminal offenders in 1938 and then subsequently prohibited the possession of firearms by all criminal offenders convicted of a felony in 1968. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, § 1202 (1968); see also Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, § 301 (1968).

¹³⁰ See U.S. CONST. amend. II.

¹³¹ See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis removed); see also *id.* at 778 (“It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

¹³² See *District of Columbia v. Heller*, 554 U.S. 570, 626-28 (2008) (discussing limitations on the Second Amendment).

¹³³ See, e.g., MINN. STAT. § 624.713 (prohibition for three years in cases of crimes of violence or where a person has been convicted at the “gross misdemeanor level”); N.Y. PENAL LAW § 265.02(5) (prohibition, for five years, on possessing a firearm outside the home or place of business after conviction of a class A misdemeanor).

¹³⁴ See, e.g., *Fushek v. State*, 183 P.3d 536, 542 (Ariz. 2017).

¹³⁵ 34 U.S.C. § 20914(a) (2016).

¹³⁶ *Id.*

recognized the legitimacy and importance of the right to privacy, a right the Court noted as “older than the Bill of Rights.”¹³⁷ This right to privacy has become a fixture of Supreme Court jurisprudence in numerous, diverse cases where the Court resisted placing limitations on the right to privacy.¹³⁸ Therefore, sex offender registration ranks as more severe than firearm prohibition because of the Supreme Court’s greater emphasis on the right to privacy. Correspondingly, sex offender registration should be assigned to the functional equivalent of one year of imprisonment.

There are also examples of collateral consequences that are so minor that they clearly should be assigned to the functional equivalent of no imprisonment. For example, exclusion from certain public benefits—such as public housing or financial aid—do not objectively rank as severe as deportation or even the firearm possession prohibition. More importantly, disqualification from public benefits does not infringe on any constitutional liberty interest, because public benefits serve more accurately as entitlements provided by the government rather than rights to the liberty preserved by the Constitution. Therefore, exclusion from public benefits is a collateral consequence that objectively ranks as less severe than other collateral consequences and does not infringe on any constitutional liberty interests. For these reasons, exclusion from public benefits is the functional equivalent of no imprisonment.

D. *Applying the Framework to Deportation*

From an objective perspective, it is clear that deportation is a common collateral consequence. In 2015, deportations prompted by criminal convictions accounted for approximately 42% of the total number of all deportations.¹³⁹ The Supreme Court has already recognized that deportation is a “severe penalty” that must be considered in criminal cases.¹⁴⁰ In addition, under the Supreme Court’s holding in *Padilla v. Kentucky*, criminal defense attorneys are required to under-

¹³⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

¹³⁸ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

¹³⁹ OFF. OF IMMIGR. STAT., U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 115 (2019).

¹⁴⁰ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

stand the immigration consequences of a criminal conviction.¹⁴¹ As such, immigration consequences, such as permanent banishment from the United States, should be considered the functional equivalent of one year or more of imprisonment.

Deportation infringes on constitutional liberty interests more than almost any other collateral consequence. This is because, “like incarceration, deportation separates a person from established ties to family, work, study, and community. In this forced physical separation, it is similar in severity to the loss of liberty that a prison term entails.”¹⁴² The Supreme Court similarly emphasized that deportation—which almost always guarantees civil detention at some point in the process¹⁴³—is a “particularly severe” deprivation of constitutional liberty that could be more impactful on the defendant than any potential term of imprisonment.¹⁴⁴ Deportation “involves—[f]irst, an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property.”¹⁴⁵ Deportation includes civil confinement at an immigration detention facility, which is virtually indistinguishable from imprisonment.¹⁴⁶ This civil confinement can last longer than the potential term of imprisonment. In fact, many noncitizen defendants are held for months or even years in detention facilities.¹⁴⁷ Not only is civil confinement similar to imprisonment in length, detention facilities for those in the process of deportation are typically subject to conditions that are indistinguishable from the condition in prison, despite the confinement being “civil.”¹⁴⁸ Because

¹⁴¹ *Id.* at 367.

¹⁴² *Bado v. United States*, 186 A.3d 1246, 1246 (D.C. 2018).

¹⁴³ *See Carlson v. Landon*, 342 U.S. 524, 538 (1952).

¹⁴⁴ *See Padilla*, 559 U.S. at 368.

¹⁴⁵ *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

¹⁴⁶ *See Rodriguez v. Robbins*, 804 F.3d 1060, 1079-81 (9th Cir. 2015) (observing that noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c) “are often detained for years without adequate process,” and holding that due process requires a bond hearing after mandatory detention exceeds six months); *see also id.* at 1073 (“Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors.”).

¹⁴⁷ *See Rodriguez*, 804 F.3d at 1080.

¹⁴⁸ *See id.* at 1073 (“Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors.”).

removal from the United States is often for life, deportation is the functional equivalent of more than one year of imprisonment.¹⁴⁹

Considering that deportation is objectively more severe than almost any other collateral consequence as it deprives defendants of the constitutional interest in liberty, this framework provides that deportation is functional to more than one year of imprisonment. With the collateral consequence of deportation incorporated into the penalty, courts can utilize existing doctrine to determine that the defendant's conviction triggers the Sixth Amendment right to a jury trial. The penalty, more than one year of imprisonment, indicates that the offense is of a serious nature based on the amount of punishment prescribed. As such, under this framework, defendants charged with an offense that mandates deportation are entitled to a trial by jury as enumerated in the Constitution.

Some have argued that treating deportation in particular as an additional penalty reflecting the seriousness of an offense would be hindered by difficulties and uncertainties that result in a slippery slope.¹⁵⁰ However, the proposed framework in this Comment illustrates that treating deportation as an additional penalty for Sixth Amendment purposes does not guarantee that all other civil consequences will require jury trials for misdemeanors. Moreover, even if the utilization of this framework increases the number of jury-demandable cases, the argument that this would overburden the court system is easily dispelled based on the number of states that guarantee a jury trial to all defendants charged with offenses with any possibility of imprisonment for any period of time.¹⁵¹ Regardless, it is the high cost of a jury trial that makes it an effective tool against the arbitrary exercise of government power, which is the jury trial's main intent.¹⁵² Choosing to ignore significant infringements on constitutional principles merely to avoid cost would be an arbitrary exercise of power that jury trials are meant to protect against.

¹⁴⁹ See *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) (recognizing that “preserving the right to remain in the United States may be more important to the defendant than any potential jail sentence”).

¹⁵⁰ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 390 (2010) (Scalia, J., dissenting) (claiming that the right recognized by the Court in *Padilla* “has no logical stopping point.”).

¹⁵¹ See *Baldwin v. New York*, 399 U.S. 66, 74 (1970) (“Experience in other States, notably California where jury trials are available for all criminal offenses including traffic violations, suggests that the administrative burden is likely to be slight, with a very high waiver rate of jury trials”).

¹⁵² See *Massaro*, *supra* note 33, at 508.

E. *Returning to Bado*

Mr. Bado is subject to two collateral consequences discussed in this Comment: deportation and sex offender registration.¹⁵³ Under the framework proposed in this Comment, Mr. Bado would certainly be entitled to a jury trial. Objectively, both deportation and sex offender registration indicate that the penalty of conviction is very severe. Additionally, under this framework, deportation would be functionally equivalent to more than a year in prison and sex offender registration would be functionally equivalent to one year of imprisonment. Combined, this penalty exceeds the petty crime exception to the Sixth Amendment and fulfills requirements set forth by the Supreme Court to trigger the right to a jury trial. The penalty generated under this framework clearly illustrates legislative judgment indicating that Mr. Bado's charged offense is "serious" for purposes of the Sixth Amendment.

CONCLUSION

The indisputable influence collateral consequences have on the criminal justice system generally, and criminal procedure in particular, signals its impact on the classification of serious and petty offenses. This impact on classification is even more apparent in immigration consequences, which include grave costs like deportation. Deportation, in particular, is such a serious consequence of a criminal conviction for noncitizens that it clearly indicates the seriousness of the offense and similarly signals the nature of the offense. Therefore, deportation must elevate an offense from petty to serious for purposes of the Sixth Amendment right to a jury trial.

¹⁵³ *Bado v. United States*, 186 A.3d 1246, 1247 (D.C. 2018).