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The Webbing of Public Law: Looking Through Deportation Doctrine

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Abstract

The process of deporting non-citizens is subject to judicial review under several fields of public law. These fields—criminal law, constitutional law, and administrative law—arc towards the protection of the individual. And yet, a series of judicial interpretations place deportees on the margins of that otherwise protective arc. This marginalization is principally explained by the relationships between the fields: The "webbing" of public law joins the fields of criminal law, constitutional law, and administrative law together. Reading deportation cases laterally across these fields reveals that they function as mutual referents for one another, providing assurance that some other field will offer legal cover for the deportee, and buttressing the persistent divide between immigration law and other fields of public law. After examining the webbing as an intervening register in public law theory and practice, the article explores the judicial doctrine of deportation in each field and traces the content of the webbing between them.

The Webbing of Public Law: Looking Through Deportation Doctrine

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The process of deporting non-citizens is subject to judicial review under several fields of public law. These fields—criminal law, constitutional law, and administrative law—arc towards the protection of the individual. And yet, a series of judicial interpretations place deportees on the margins of that otherwise protective arc. This marginalization is principally explained by the relationships between the fields: The "webbing" of public law joins the fields of criminal law, constitutional law, and administrative law together. Reading deportation cases laterally across these fields reveals that they function as mutual referents for one another, providing assurance that some other field will offer legal cover for the deportee, and buttressing the persistent divide between immigration law and other fields of public law. After examining the webbing as an intervening register in public law theory and practice, the article explores the judicial doctrine of deportation in each field and traces the content of the webbing between them.

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DEPORTATION MATTERS EXIST AT SOME REMOVE from mainstream public law. This distance has been affected by a series of judicial decisions emanating from various fields of public law. In this article, I examine those judicial decisions to illuminate the connections they make between the fields of public law. My argument is that the fields of public law are related and often work together in deportation law. The cases reveal that the fields of public law function as mutual referents for one another, providing assurance to the judiciary that some other field of public law will provide legal cover for the individual and shoring up the dictum that deportation, and immigration more generally, are distinct from other fields of public law. These assurances truncate the role of public law in immigration and deportation matters.

The process of deportation from Canada, from an administrative decision to physical removal, is subject to judicial review under several bodies of law. These fields of law—criminal law, constitutional law, and administrative law—are fields of public law. In each of these fields, public law theory and practice arc towards the protection of the individual. Criminal law contains several due process protections because of the risk to liberty and security posed by arrest and imprisonment. Constitutional law upholds a range of rights to further the values of liberty, equality, and human dignity. Administrative law provides access to justice through "governments in miniature" and fairness in delegated decision making.[1] And yet, in deportation matters, a series of exceptional judicial

1. R Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-41" (2000) 9 Dal J Leg Stud 36 at 50; Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" [Liston, "Governments"] in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Emond Montgomery, 2013) 39.

interpretations place individuals subject to deportation on the margins of this otherwise protective arc.[2]

The laws and practices of deportation operate against non-citizens in ways that would be legally problematic if the deportees were citizens.[3] As Daniel Kanstroom observes, it is possible for people to believe—and for a liberal democratic state to hold out—that individuals should not be subject "to an arbitrary, disproportionately harsh system" of law, that punishment should not be retroactive, that individuals should not be detained indefinitely, and that families should not be separated, and to have a deportation system that violates all of these tenets.[4] This incongruity occurs through the executive and legislative branches of government that establish and implement the deportation regime, as well as through the judicial branch of government that reviews it. This article is focused on how judicial interpretations produce the incongruity. There are various tensions present in the deportation jurisprudence, ranging from its strained curtailment of constitutional rights to its dogged characterization of deportation as distinct from punishment to its emphasis on negligible administrative remedies. There is a growing body of excellent scholarship on the curtailment of *Canadian Charter of Rights and Freedoms* ("*Charter*") protections in the non-citizen context; in this article, I focus specifically on deportation in the fields of public law and the relationships between them.[5]

This judicial landscape was in flux until very recently. In the past fifteen years, the Supreme Court of Canada has heard more immigration law cases than in the thirty years before that. In part, this reflects the increasing significance of immigration law in the twenty-first century, as demographic needs and

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2. Peter Schuck, "The Transformation of Immigration Law" (1984) 84 Colum L Rev 1 at 3; Hiroshi Motomura, "Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation" (1990) 100 Yale LJ 545; Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Harvard University Press, 2010) [Kanstroom, *Deportation Nation*]; Daniel Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases" (2000) 113 Harv L Rev 1889 [Kanstroom, "Hard Laws"].
3. Kanstroom, *Deportation Nation*, *supra* note 2.
4. *Ibid* at 15.
5. Catherine Dauvergne, "How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58 McGill LJ 663 [Dauvergne, "Charter Failure"]; Colin Grey, "Thinkable: The Charter and Refugee Law after Appulonappa and B010" (2016) 76 SCLR 111; Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312. For a sustained examination of these relationships in a narrower context, see David Dyzenhaus, ed, *The Unity of Public Law* (Hart, 2004).

xenophobic national security concerns press in contradictory directions on the borders of the nation state. It is also, however, part of the ongoing judicial effort to articulate the limits of the state's immigration law power. Since the earliest immigration cases, the power of immigration to determine membership in the political community secured its location near the centre of sovereignty.[6] One recurring leitmotif in these recent cases is the judiciary's struggle to locate the limit point between citizens and foreigners: the point at which non-citizen status may be the primary determinant of the judicial decision.

In the criminal law field, this inquiry has focused on the immigration consequences of criminal convictions. These cases further cleave deportation from theoretical criminal justification. In the constitutional law field, non-citizen status anchors the judicial creation of a curious on/off switch for section 7 of the *Charter* in deportation matters. Through a series of decisions that were refused leave to appeal last year, the Supreme Court of Canada confirmed that the *Charter* is "off" in deportation matters until all administrative safeguards are exhausted.[7] This riff on the requirement to exhaust local remedies relies upon circumscribed statutory safeguard provisions that were not intended to function as constitutional remedies, which further solidifies the relationship between the fields of public law. In the administrative law field, non-citizen status determines the measure of procedural fairness available, the nature of reasonableness in standard of review decisions, and the weight placed on the availability of administrative remedies, which is where it has come to rest.[8] These cases emanate from different fields of public law, but they are in dialogue with one another, as are the fields themselves. In this article, I propose the idea of "webbing" to analyze the relationships

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6. Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008) [Dauvergne, *Making People Illegal*]; Schuck, *supra* note 2; Mary Bosworth, "Border Control and the Limits of the Sovereign State" (2008) 17 Soc & Leg Stud 199; Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56 Am U L Rev 367.
7. *Moretto v Canada (Citizenship and Immigration)*, 2018 FC 71, aff'd 2019 FCA 261, leave to appeal to SCC refused, 38964 (2 April 2020) [*Moretto*]; *Revell v Canada (Minister of Citizenship and Immigration)*, 2017 FC 905, aff'd 2019 FCA 262, leave to appeal to SCC refused, 38891 (2 April 2020) [*Revell*]; *Kreishan v Canada (Minister of Citizenship and Immigration)*, 2018 FC 481, aff'd 2019 FCA 223, leave to appeal to SCC refused, 30714 (19 August 2019) [*Kreishan*].
8. See Febles v Canada (Citizenship and Immigration), 2014 SCC 68 [Febles]; B010 v Canada (Citizenship and Immigration), 2015 SCC 58 [B010] (on remedies); Agraira v Canada (Minister of Public Safety and Emergency Preparedness), 2013 SCC 36; Kanthasamy v Canada (Citizenship and Immigration), 2015 SCC 61 [Kanthasamy] (discussing standard of review and the role of the certified question).

between the individual fields of public law. The webbing of public law is the connective tissue that links the fields of criminal law, constitutional law, and administrative law together in particular contexts.

This article is a close yet panoramic reading of gaps and relationships in the judicial doctrine of deportation in Canada. Part I examines the field of public law on its own terms. It sets out two of the registers in which public law speaks, and then it proposes an intervening relational register revealed by the deportation context. This is the webbing of public law. Parts II through IV examine the three individual fields of public law from the perspective of deportation law. These fields—criminal law, constitutional law, and administrative law—are each the subject of settled, guiding principles that govern judicial interpretation. In the deportation context, however, these principles are modified and subverted. Part II explores the criminal law field, focusing on sticky historical precedents that maintain deportation's non-criminal, non-penal nature, and analyzing the recent cases of *Pham*, *Tran*, and *Wong*.[9] Part III examines the curtailment of constitutional law's doctrinal scope and access to its protections, explaining the case of *Chiarelli* and its progeny,[10] and indicating what was at stake in the recent trilogy of *Kreishan*, *Revell*, and *Moretto*.[11] Part IV examines the curtailment of access to constitutional law protections through administrative law and its statutory safeguards. The picture that emerges is one in which the fields of public law shunt deportation towards administrative law, which presents applicants with its own challenging labyrinth of potential remedies. Part V concludes with some observations about how these relationships attenuate the scope of public law in deportation matters.

I. THE WEBBING OF PUBLIC LAW

Public law, by nature, comprises more than one field of law. The antecedent of public law is the base distinction between private law and public law, where public law comprises those legal fields in which the individual interacts with the state. The fields of public law have in common the nature and identity of the legal parties involved: the state and the individual. Contemporary public law "is assumed to have a distinctive anatomy and can be subdivided into constitutional law,

9. *R v Pham*, 2013 SCC 15 [*Pham*]; *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*]; *R v Wong*, 2018 SCC 25 [*Wong*].
10. *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 735 [*Chiarelli*].
11. *Kreishan*, *supra* note 7; *Revell*, *supra* note 7; *Moretto*, *supra* note 7.

administrative law, civil liberties law, criminal law, revenue law, EU law, and public international law."[12] The three fields of law that adjudicate deportation matters—criminal law, constitutional law, and administrative law—are often considered among the core fields of public law.[13] This article focuses on the value added by looking through public law's distinctive anatomy to the relationships between its fields.

It is a well-known but rarely articulated feature of public law that its scholars communicate in different registers. In this section, I focus on two of those registers—the higher register and the lower register—and the different public law concerns contemplated by them. One group of public law scholars focuses on public law theory, exploring the relationship between public law and its political environment. As the legal embodiment of the political domain, public law here is focused on concepts, values, and forms often explored through public law history and political theory. This is the higher register, concerned with the justification and limits of law writ large, visible in the scholarship of Martin Loughlin, David Dyzenhaus, Neil Walker, and others. Meanwhile, there is another group of public law scholars trained in particular sub-fields of public law. Given the regulatory and judicial form that public law takes, this lower register is focused on the principles and outer limits of individual fields. These scholars are less interested in explaining or justifying the whole and are more attentive to public law in specific contexts. They are not atheoretical; rather, they are focused on the principles and frameworks of particular public law settings rather than on its theory or genealogy. These registers are not hermetic or exclusive. The form and doctrine of public law have much to tell us about its theory and vice versa, and many scholars move easily between them.[14]

By looking at the full legal context of deportation, an intervening register of public law comes into focus. This medial register comprises the relationships *between* public law's individual fields. Similar to the comparative law undertaking, this register requires looking across the fields rather than squarely at them or above them. Public law scholars often miss the connective tissue that joins the fields because they are focused instead on theorizing its political meaning or assembling its doctrinal frameworks. The deportation context illuminates

12. Martin Loughlin, "The Nature of Public Law" in Cormac Mac Amhlaigh, Cláudio Michelon & Neil Walker, eds, *After Public Law* (Oxford University Press, 2013) 11 at 11.
13. This article focuses on criminal, constitutional, and administrative law as the fields that operate inside the public law state—the ones that courts apply when judicially reviewing deportation. International human rights law plays a role, but it has not generated much traction in the deportation context. See Dauvergne, "Charter Failure," *supra* note 5.
14. See *e.g.* the work of David Dyzenhaus, Mary Liston, and Evan Fox-Decent.

the webbing because of its significance for the judicial doctrine governing the deportee. This takes two forms: the horizontal and vertical aspects of the webbing. The horizontal aspect of the webbing demonstrates how individual subfields may lead to situations in which claims are shunted towards a particular silo or subfield of public law. In deportation matters, the connective tissue is what carries the deportee to the field of administrative law. The vertical aspect of the webbing reveals the rupture between public law theory and doctrine. In deportation matters, the connective tissue is the method through which the deportee is placed at the margins of public law's theoretical values of equality and the rule of law. The webbing of public law, in other words, may reveal the limits of the higher and lower registers of public law, presenting a fuller picture than is visible by examining either register alone.

The term "public law" in the first register refers to the relationship between public law and the political domain. James Tully defines public law as "the basic laws that juridicalise or legalise the distribution, institutionalization and exercise of the political powers of governing…in any form of legal and political association."[15] It marries law and governance. Public law as a meta-field on its own terms has achieved traction in the legal academy because it adds conceptual range and rigour. The range and rigour come from public law's distinctive anatomy, as discussed by Martin Loughlin, which brings politics, government, and institutions to the surface. Because public law is "in close synergy with its political environment," it often finds itself in the crosshairs of constitutional and political theory.[16] The resulting amalgam of public legal fields and their political scaffolding embodies, or seeks to embody, certain legal values to guide the exercise of public power. Predictably, the identification and content of these values are matters of significant debate.[17] In their account of the ascendance of modern public law, Cormac Mac Amhlaigh, Claudio Michelon, and Neil Walker explain:

> [Public law] first announced itself against pre-modern forms of political organization and did so by pushing an agenda predicated upon ideas of political equality (as opposed to *status*-centred forms of political organization), sovereignty, state, nation,

15. James Tully, as quoted in Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Routledge, 2008) at 69 [Christodoulidis & Tierney, *Public Law and Politics*].
16. *Ibid* at 1 (describing Loughlin's account).
17. See *e.g.* Vicki Jackson, "Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges" (2010) 8 ICON 517; Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in Jeffrey L Dunoff & Joel P Trachtman, eds, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 258.

> and constitution. As modern public law conceived of itself as the *legal* embodiment of such ideals and forms, and not merely a philosophically sophisticated account of politics, from the outset it had to assert itself against private law or what was then simply understood as "the law."[18]

Loughlin similarly expounds: "[Public law] was founded on basic ideas of sovereignty and citizenship and, later, on notions of democracy and rights. It is a mode of rule that claims to be law (*droit*)-governed."[19] The theoretical values referred to in these accounts and others generate agreement in the abstract, but scholars diverge on precisely which values are implied by public law and the priority among them. The argument in this article does not depend on the settled content of public law values; it relies on the *a priori* existence of those values to demonstrate the significance of the relationships between the individual fields. When administrative, constitutional, and criminal law are studied together in the deportation context, the webbing between them belies several of the theoretical public law values espoused in the higher register as well as the judicial public law values articulated in the lower one.

The values of public law take on heightened importance in the deportation context because of its population of interest. The vast majority of people who are deported from Canada are racialized, and there are frequently intersecting considerations related to mental health, addiction, and poverty. The fields of criminal, constitutional, and administrative law are cautiously grappling with these social determinants of justice, such as through pre-sentence reports, reasonable person analysis, equality and discrimination concepts of intersectionality and harm, and dispute resolution initiatives in administrative settings. The webbing of deportation doctrine precludes meaningful access to these frameworks of social justice by holding the deportee between the fields of public law.

Meanwhile, public law in the lower register is concerned with regulation and doctrine. The values of particular public law fields are invariably specified through decisions. For example, the content of fairness, the role of constitutional values, and the extent of state interference upon arrest will differ according to state and context. Together they cohere to provide a snapshot of the values in specific fields of public law. In deportation matters, however, knowledge of constitutional and common law cases and judicial doctrine does not provide interpretative guidance.

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18. "Introduction" in Mac Amhlaigh, Michelon & Walker, *supra* note 12, 1 at 1 [emphasis in original].
19. Emilios Christodoulidis & Stephen Tierney, "Public Law and Politics: Rethinking the Debate" [Christodoulidis & Tierney, "Rethinking"] in Christodoulidis & Tierney, *Public Law and Politics*, *supra* note 15, 1 at 4 (describing Martin Loughlin's chapter, "Reflections on The Idea of Public Law").

Instead, the webbing, underwritten by the citizen/non-citizen distinction, holds these values at bay. It is ultimately the connective tissue between the three fields that matters. Immigration scholars and lawyers know that administrative law holds more promise for deportees than constitutional law, but the contours of this promise, as well as the connections between the fields, require further academic scrutiny. This article sets out to demonstrate those relationships: showing, for example, how *Charter* section 7 engagement is truncated by reference to statutory administrative safeguards and how the characterization of deportation as non-punitive withdraws corollary constitutional protections.

The following sections begin with the Supreme Court of Canada cases that establish the framework from which the Federal Court and Federal Court of Appeal render their decisions. The vast majority of deportation cases do not reach the Federal Courts, and concomitantly fewer reach the Supreme Court. In other words, to spot the divergent lines of authority and the interpretative sticking points, one must often look to the Federal Court jurisprudence. This case set is unique because it places the three fields of public law that govern the judicial review of deportation into conversation.[20] What emerges is a repeated judicial preference for administrative processes over constitutional or criminal ones based on quite intricate connective rationales between the fields. These interpretations efface the conception of the state as prosecutor from criminal law and the state as rights-protector from constitutional law, leaving only the regulatory state from administrative law to judge deportation.[21]

II. CRIMINAL LAW

A. DEPORTATION IS NOT PUNISHMENT

Nearly a century ago, deportation was excised from the sphere of criminal law. In 1924, in the United States, Chief Justice Taft famously opined, "it is well-settled that deportation, while it may be burdensome and severe for the alien, is not punishment."[22] In Canada, in 1933, Chief Justice Duff echoed that deportation provisions were "not concerned with the penal consequences of the acts of

20. Methodology analysis [on file with the author]. The methodology, in brief, consisted of searching legal databases for various combinations of terms (*e.g.*, "deportation and liberty" and "removal and procedural fairness"), reviewing them, and coding the results.
21. I am grateful to Mary Liston for this understanding of the regulatory state.
22. Mahler v Eby, 264 US 32 (1924); *Harisiades v Shaughnessy*, 342 US 580 (1952), upheld in *Reno v American-Arab Anti-Discrimination Committee,* 525 US 471 (1999), Scalia J.

individuals."[23] The lasting significance of these opinions is the wholesale removal of deportation from the realm of criminal and penal law. This interpretation sustains deportation as administrative and civil in nature, removing the need for criminal due process protections.[24] The marginal location of deportation was then reinforced with the advent of the *Charter*, as courts relied on the finding that deportation was not punishment as well as the *obiter* surrounding it to further distance deportation from constitutional rights protections. In this section, I trace this trajectory and explore its implications in an era of so-called crimmigration.

In *Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings* ("*Prerogative of Mercy"),* Chief Justice Duff laid the foundations for deportation's relationship to punishment. The issue was whether a convict, after serving their sentence in full or upon early release under an act of clemency, was then to be removed from the statutory category of "prohibited or undesirable classes" described in the *Immigration Act.*[25] In reaching the conclusion that such a convict was not so removed from the category, the Supreme Court observed:

> It is, perhaps, almost unnecessary to observe that the group of sections under consideration is not concerned with the penal consequences of the acts of individuals. They are designed to afford to this country some protection against the presence here of classes of aliens who are referred to in the statute as "undesirable."
>
> Moreover, the results which follow from proceedings under s. 42 are not attached to the criminal offence as a legal consequence following *de jure* upon conviction for the offence or imposable therefor at the discretion of a judicial tribunal. They follow, if they follow at all, as the result of an administrative proceeding initiated at the discretion of the Minister at the head of the Department of Immigration.[26]

The significance of this analysis lies in its abrogation of *Lee v. The King* ("*Lee*"), a Supreme Court case from seven years earlier, without ever directly addressing it. This abrogation has come to structure deportation's relationship with criminal

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23. *Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] SCR 269 at 278 [*Royal Prerogative of Mercy*]. For a longer historical view, see William Walters, "Deportation, Expulsion, and the International Police of Aliens" (2002) 6 Citizenship Studies 267; Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights, and the Production of the Alien" (2014) 40 Queen's LJ 1 (discussing banishment).
24. Stumpf, *supra* note 6; Kanstroom, "Hard Laws," *supra* note 2. There is a large body of scholarship concerning the plenary power doctrine in the United States, which governs, *inter alia*, the relationship between deportation and the Constitution. While that scholarship informed the trajectory of this article, this article is concerned with the Canadian contours of deportation and, in criminal and penal contexts, with the concept of punishment.
25. *Royal Prerogative of Mercy*, *supra* note 23 at 269; *Immigration Act*, RSC 1927, c 93.
26. *Royal Prerogative of Mercy*, *supra* note 23 at 278 [emphasis added].

law in much the same way that the *Chiarelli* decision has come to structure deportation's relationship with constitutional law.

Prerogative of Mercy confirmed that deportation was an administrative proceeding insulated from penal consequences, and it would later form the backbone of the more specific finding that deportation is not punishment. However, Chief Justice Duff equivocated on the nature of the relationship between the criminal conviction and deportation, hesitating to draw a direct line. Seven years earlier, the Supreme Court had decided this relationship in *Lee.* At issue in *Lee* was an exception in the 1906 *Supreme Court Act* that precluded the Court from exercising jurisdiction in "proceedings for or upon a writ of *habeas corpus*…arising out of a criminal charge."[27] Lee challenged his detention prior to deportation under *habeas corpus*. The Supreme Court found a clear and direct relationship between the criminal conviction and deportation, noting that the *Immigration Act* subjected him to deportation "as a result of his conviction and, therefore, as something directly flowing from the judicial finding of his guilt of the criminal charge laid against him.… It is impossible to say that the custody and deportation…do not 'arise out of the criminal charge' of which the alien was convicted."[28] The result did not favour Lee, whose *habeas* application was thus within the exception to the Court's jurisdiction. The decision nonetheless established deportation as a direct consequence of a criminal conviction, opening the door to the possibility that it might warrant criminal protections. In *Prerogative of Mercy*, however, Chief Justice Duff found that deportation was an *indirect* consequence of a criminal conviction. The use of immigration law to trigger deportation constituted an intervening administrative proceeding that changed its source and also its nature.

The issue then laid more or less dormant until after the advent of the *Charter* in 1982.[29] In 1992, in *Canada (Minister of Employment and Immigration) v. Chiarelli* ("*Chiarelli*"), the doctrinal anchor of subsequent deportation cases, the Supreme Court agreed with the Federal Court of Appeal below that "deportation

27. *Supreme Court Act*, RSC 1906, c 139, s 36.
28. *Lee v The King*, [1926] SCR 652 at 654.
29. *Canadian Charter of Rights and Freedoms*, ss 8-9, 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

is not imposed as punishment," citing *Prerogative of Mercy*.[30] Justice Sopinka conceded that it could come within the scope of treatment, but he did not decide this point because the deportation was not, in his view, cruel and unusual.[31] One year later, in *Rodriguez v. British Columbia (Attorney General)* ("*Rodriguez*"), Justice Sopinka elaborated on his decision in *Chiarelli*:

> While the deportation order in *Chiarelli* was not penal in nature as it did not result from any particular offence having been committed, it was nonetheless imposed by the state in the context of enforcing a state administrative structure—in that case, the immigration system and its body of regulation. The respondent Chiarelli in that case, who had not complied with the requirements imposed by the regulatory scheme, was dealt with in accordance with the precepts of the administrative system.[32]

This paragraph is a double-edged sword for deportation: On the one hand, it is an effort to extend the application of "treatment" within the meaning of section 12 to administrative contexts.[33] On the other hand, it is limiting because it secures deportation as an administrative decision separate and apart from the penal and even quasi-penal context—and this is indeed the interpretation that has been carried forward in the case law. Ultimately, the statutory availability of a fair assessment procedure mitigated the possibility of cruel and unusual treatment, which has come to play little role outside of the refugee context.[34]

Deportation's ouster from the criminal and penal contexts is challenging on its own terms, but the challenge is heightened by the growing imbrication of criminal law and constitutional law. So deep is this imbrication that criminal law is arguably "now best understood and approached as a species of the

30. *Chiarelli*, *supra* note 10, citing *Hoang v Canada (Minister of Employment and Immigration)* (1990), 13 Imm LR (2d) 35 (FCA) at 41 (stating that "deportation…is not to be conceptualized as a deprivation of liberty or punishment"); *Hurd v Canada (Minister of Employment and Immigration*), [1988] FCJ No 945 (FCA). For the most recent iteration, see *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*]. For punishment under security of the person, see *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 207 [*Singh*].
31. *Chiarelli*, *supra* note 10 at 715.
32. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 610 [*Rodriguez*].
33. *Ibid*.
34. For case law showing that section 12 plays no significant role outside of the refugee context, and that section 12 claims are typically precluded by a risk assessment, see *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 270; *Barrera v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 1127; *Sinnappu v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 791 (dismissed for mootness); *Arduengo v Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 468; *Mohammed v Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 299; *Solis v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 407, leave to appeal to SCC refused, [2000] SCCA No 249.

constitutional."[35] This is perceivable through the lens of the *Charter* and its approach to legal rights: Characterizing deportation as administrative in nature withdrew access to most of the legal rights enumerated in sections 7 to 14. These legal rights are among the most important for the integrity of the criminal law process; they include freedom from unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned, and the right to general due process.[36] Moreover, as explored in Part II(B), below, since the rights in sections 8 through 14 are considered illustrative of the rights protected by section 7, deportees' inability to access them significantly impedes their ingress to section 7 rights.[37]

The difficulties of excising the deportation process (which in many respects closely resembles the criminal process and typically follows from its application) are mounting. The doctrinal foundations of this excision rest on judicial tenets established nearly one hundred years ago about the administrative (and therefore non-penal) nature of deportation. *Chiarelli* intervened in 1992, but only to further buttress these precedents and renovate them for a post-*Charter* context. The problems presented by this dated jurisprudence are becoming acute in an era of crimmigration. Crimmigration refers to the convergence between criminal law and immigration law. Writing about the United States, Juliet Stumpf detailed the substantive overlap of immigration law and criminal law, the similar enforcement methods for immigration and criminal violations, and the procedural commonality for prosecuting immigration and criminal violations.[38] In both the United States and Canada, immigration law was morphing from a primarily administrative civil process overseen by a government department charged with labour and employment matters into a criminalized process of warrants, arrests, and detention overseen by an agency closely resembling a police force.

The trouble is that the growing parallels and intersections between the fields do not track corollary constitutional or procedural protections. Twenty years ago, Kanstroom explained the correspondence between deportation and criminal punishment. Looking through the lens of criminal law theory, he observed their shared justifications: punishment, incapacitation, deterrence, and retribution.[39] He then argued that such state acts would, in any other context, attract constitutional protection.

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35. Benjamin Berger, "Constitutional Principles" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 423 at 423.
36. *Charter*, *supra* note 29, ss 7-14.
37. *R v Swain*, [1991] 1 SCR 933 at 1008-1013 [*Swain*]. Section 7 is examined in the next Part.
38. Stumpf, *supra* note 6 at 378 (describing the United States but Canada has followed a similar trajectory).
39. "Hard Laws," *supra* note 2 at 1893-94.

> That [deportation] proceedings are initiated by a government enforcement agency, are directly based on criminal conduct, involve incarceration and forced movement of persons, and may result in lifetime banishment supports the logic of this assumption.[40]

Yet, despite these shared characteristics, immigration law has enfolded several prohibitions of criminal law but none of its procedural ballasts. This divergence in protection is based on the status of the non-citizen. As Sharryn Aiken, David Lyon, and Malcolm Thorburn observe:

> [I]t is no great exaggeration to say that there are now two criminal laws at work: one for non-citizens (which includes a host of immigration offences that do not apply to citizens, as well as deportation as a further response to crime for which citizens are not liable) and another for citizens (who are subject neither to these additional offences nor these additional responses to crime).[41]

There are three primary sites of intersection between criminal law and immigration law.[42] First, commission or conviction of crimes attract immigration-related consequences. The statutory inadmissibility provisions of immigration law directly refer to the *Criminal Code* for types of offences, listed offences, and sentencing limits.[43] The immigration consequences for more serious crimes typically eliminate rights of appeal and require deportation.[44] Second, immigration violations carry criminal consequences. These enforcement provisions criminalize entry in cases of smuggling or trafficking, offences relating to documents (typically, fraudulent identity documents), misrepresentation, and a catch-all provision: "any contravention of the Act that does not specify a penalty."[45] Some of these contraventions reappear in the *Criminal Code*; all of them attach criminal forms and punishments to immigration acts. Third, features of the criminal law's enforcement apparatus are brought to bear in immigration matters. The statutory regime for deportation authorizes a detailed

40. *Ibid* at 1894.
41. "Introduction: 'Crimmigration, Surveillance and Security Threats': A Multidisciplinary Dialogue" (2014) 40 Queen's LJ i at iii.
42. César García Hernández, "Deconstructing Crimmigration" (2018) 52 UC Davis L Rev 197 at 210.
43. See *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 36-37 [*IRPA*] (among other provisions).
44. *Ibid*, ss 68(4), 34-37, read in conjunction with *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 227-29 [*IRPR*].
45. *IRPA*, *supra* note 43, ss 117-29. Section 124 is the catch-all provision. Some of these provisions appear in the *Criminal Code*, RSC 1985, c C-46. See *IRPA*, *supra* note 43, ss 183 (human trafficking, counselling misrepresentation), 279.03 (document destruction). While these provisions are comparatively rarely used, their potential application is vast.

system of warrants and arrests, detention, detention reviews, and physical restraints, including handcuffs.[46] Although the federal government recently built new immigration detention centers, deportees may still be held in provincial jails, underlining that immigration detention is not only analogous to penal detention—it is often identical.[47] Crimmigration raises several concerns in its own right, but those concerns are heightened by judicial reliance on precedent to keep deportation and criminal law as far apart as possible.[48]

B. CRIMINAL LAW AND IMMIGRATION CONSEQUENCES: *WONG*, *PHAM*, AND *TRAN*

The first axis of convergence—more crimes carrying immigration consequences—culminated in a trio of Supreme Court of Canada cases about the relationship between criminal sentences and immigration consequences: *Wong*, *Pham*, and *Tran*. None of the cases raised constitutional claims. The cases required the Court to reckon with the nature of deportation as a collateral consequence of a criminal conviction—an area where the link between criminal law and immigration law is evident. All three judgments struggled to contain non-citizen status in the sphere of immigration law, highlighting the conceptual difficulty of denying that deportation often follows directly from a criminal conviction and that deportation is punishment.

In *R. v. Pham* ("*Pham*"), the Supreme Court addressed the role of collateral immigration consequences in criminal sentencing.[49] Pham was convicted of producing and trafficking marijuana and received a prison term of two years. Under the *Immigration and Refugee Protection Act* ("*IRPA*"), a two-year prison sentence removes the right to appeal a removal order. Pham's conviction would have necessarily triggered a removal order against him, making his right to appeal crucial to his efforts to remain. The Court agreed to reduce the sentence to two years less a day, but only because the Crown conceded it would have agreed to the reduction. In its analysis, the Court explained that collateral consequences may be relevant to the individualization of the sentence, the principle of parity, and

46. *IRPA*, *supra* note 43, ss 54-87; *IRPR*, *supra* note 44, ss 223-51. See also Immigration, Refugees and Citizenship Canada, *ENF 10 Removals* (IRCC, 24 February 2017), s 10, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf10-eng.pdf> [*ENF 10*].
47. *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*].
48. "Preface" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) vii.
49. *Pham*, *supra* note 9.

rehabilitation analysis.[50] Citing *The Law of Sentencing* by Allan Manson, Justice Wagner explained:

> The mitigating effect of indirect consequences must be considered in relation to future re-integration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel.[51]

But, he cautioned, "these consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation."[52] The problem with this analysis is that deportation is different in kind to the other factors or inputs that go into sentencing. Deportation removes the possibility of rehabilitation, future integration, or living productively in the community. The failure to consider deportation as a global or meta factor takes away the strength of the reason for modifying the sentence in the first place; it renders superficial the inquiries into individualization and rehabilitation. Moreover, to place deportation on par with the other relevant factors for sentencing ignores the nexus between *IRPA* and the *Criminal Code*—a nexus made real by crimmigration. Deportation is the direct downstream effect of sentencing. *Pham* tries to foreclose this connection by aligning deportation with other collateral consequences, despite their obvious differences.

Four years later, in *Tran v Canada (Public Safety and Emergency Preparedness)* ("*Tran*"), the Supreme Court decided that conditional sentences were not included in a "term of imprisonment" under *IRPA*.[53] Justice Côté also had to make a temporality determination: which "maximum term of imprisonment" to use, where that maximum term had varied over time. In her discussion of *IRPA's* objectives, she emphasized its similarity to the criminal law context:

> The fundamental duty of justice requires the state to recognise certain rights of individuals in its dealings with them; notably, in the sphere of criminal law, the state should respect the rule of law and the principle of legality, so that citizens as rational agents may plan their lives so as to avoid criminal conviction.[54]

This description, wrote Justice Côté, is "apposite in the immigration law context."[55] This is an expansive vision for immigration law, one that folds immigrants into the circle of criminal law and its core understanding of the relationship between the state and its citizens. For this brief moment, permanent residents could equally

50. *Ibid* at para 10.
51. *Ibid* at para 12; Allan Manson, *The Law of Sentencing* (Irwin Law, 2001) at 137.
52. *Pham*, *supra* note 9 at para 16.
53. *Tran*, *supra* note 9.
54. *Ibid* at para 41.
55. *Ibid*.

expect their obligations to be "knowable" and communicated to them in advance, as part of the same bargain between citizens and the state.[56] And yet, despite the Court's analogy between immigration and criminal prohibitions, it nonetheless opted to anchor the rule against retrospectivity in criminal inadmissibility in common law statutory interpretation rather than in section 11(i) of the *Charter*.[57] This interpretation provides weaker protection against retrospective application than one acknowledging deportation as a criminal or penal matter.

Then, in 2018, the Supreme Court heard *R. v. Wong* ("*Wong*"), a case about the immigration consequences of a plea deal.[58] Wong lived in Canada for twenty-five years with his wife and Canadian-born child. In 2012, he was charged with a single count of trafficking cocaine, and he pleaded guilty. Two immigration consequences followed his conviction: He became inadmissible for serious criminality, and he lost his right to appeal his inadmissibility to the Immigration Appeal Division.[59] In *Wong*, the Court split. They agreed that a plea would be uninformed if the accused was unaware of a legally relevant collateral consequence and that Wong was, in fact, not aware that his guilty plea carried immigration consequences. The Supreme Court disagreed, however, on the test for establishing prejudice. The majority required subjective prejudice, finding that Wong could not withdraw his guilty plea. The decision to plead guilty reflected "deeply personal considerations, including subjective levels of risk tolerance, priorities, family and employment circumstances, and individual idiosyncrasies."[60] Their judgment turned on Wong's failure to depose to what he would have done differently in his affidavit, and the majority's refusal to draw an inference based on the factual record.[61]

The dissent took an objective approach to the reasonable person analysis, preserving the possibility of a common standard that acknowledges the severity of deportation. Justice Wagner began by situating the issue squarely on the terrain of criminal law: Any answer must "strike a balance between core values of the criminal justice system…while also preserving the finality and order that

56. *Ibid* at paras 41-42.
57. *Ibid* at para 43.
58. *Wong*, *supra* note 9.
59. Inadmissibility followed under *IRPA*, *supra* note 43, s 36(1). Removal of appeal followed under *IRPA*, *supra* note 43, s 64(1).
60. *Wong*, *supra* note 9 at para 11.
61. *Ibid* at paras 38-39 (the majority refused to draw an inference from the fact that Wong had taken his case all the way to the Supreme Court, which for many advocates clearly signalled that he would not have pleaded guilty if he had known of the immigration consequences).

are essential to the integrity of the criminal process."[62] He distinguished *Pham*, noting that the accused forfeits their rights in the plea context.[63] Most importantly, Justice Wagner acknowledged that immigration consequences "may well have mattered more than any criminal sanction in the form of a custodial sentence."[64] The legal consequence of deportation is of a different order of magnitude from even the most severe criminal consequence because it severs the relationship between the individual and the state in its entirety.[65] Deportation is not analogous to other personal and subjective factors; it is a universally significant goblin for non-citizens, especially for permanent residents who have spent little or no part of their adult lives in their country of citizenship. *That* reasonable person, Justice Wagner notes, would not take the certain deportation that accompanies a plea deal over the risk of deportation implicit in a trial.[66] The modified objective approach to the reasonable person makes permanent resident status a meaningful factor, affirming the shared "state of deportability" among non-citizens.[67] This in turn clears the path to draw inferences based on this common understanding of reasonableness.

In these three recent cases, the Supreme Court ducked the implications of deportation as the consequence of a criminal conviction and maintained deportation's non-punitive character. However, underneath *obiter* statements that deportation may be analogous to other collateral consequences or subject to rule of law constraints because it is a peripheral part of the bargain between the state and its citizens is the implicit recognition that deportation is not *sui generis*, that deportation may indeed function as a kind of punishment. And yet it is the formal holdings that carry over into constitutional law.

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62. *Ibid* at para 43.
63. *Ibid* at para 68.
64. *Ibid* at para 103.
65. Bridget Anderson, Matthew J Gibney & Emanuela Paoletti, "Citizenship, Deportation and the Boundaries of Belonging" (2011) 15 Citizenship Studies 549; Matthew J Gibney, "Is Deportation a Form of Forced Migration?" (2013) 32 Refugee Survey Q 119.
66. *Wong*, *supra* note 9 at para 106, Wagner J (stating "I do not accept that a reasonable person would necessarily plead guilty when faced with a strong chance of conviction at trial, even in light of the fact that a guilty plea would operate as a mitigating factor at sentencing").
67. Nicholas De Genova & Nathalie Peutz, eds, *The Deportation Regime: Sovereignty*, *Space*, *and the Freedom of Movement* (Duke University Press, 2010).

III. CONSTITUTIONAL LAW

A. THE CURTAILMENT OF SECTION 7'S DOCTRINAL SCOPE

When the state exercises coercion and force in its interactions with citizens, it does so in the context of a sustained and ongoing relationship with the individual. The *Charter* modulates the terms of that relationship. The state acts of coercion and force in the criminal and deportation spheres are often strikingly similar: arrest, forcible restraint, detention, and transfer. In the criminal frame, these acts are subject to specific constitutional oversight; in the deportation frame, it is difficult for non-citizens to access even the basic rights to life, liberty, and security of the person. In part, this is attributable to individual non-citizen status and the termination of any ongoing relationship with the state. As a result, however, coercive and sometimes forceful state acts occurring on state territory remain largely unscrutinized. Constitutional law in deportation matters is circumscribed by a series of judicial interpretations, which gather their force from the webbing of public law. In this section, I first examine the curtailment of section 7's doctrinal scope and then turn to the curtailment of access to section 7 protections.[68]

Section 7 is one of the most important and most-invoked provisions of the *Charter*.[69] It reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[70] There are two parts to this provision: The first concerns the right to life, liberty, and security, while the second permits deprivations of those rights so long as they are in accordance with the principles of fundamental justice. The rights to liberty and security are the most often invoked in deportation matters. "The right to liberty implies at least two elements: freedom from physical restraint and freedom to make fundamental life choices," while the right to security includes freedom from both physical

68. Section 12 of the *Charter* is also important in deportation matters, due to judicial openness to consideration of deportation as "treatment." *Charter*, *supra* note 29, s 12. I discuss section 12 where applicable.
69. According to a CanLII search, section 7 has been cited in 13,136 cases as of 7 April 2022, making it the most cited section of the *Charter*.
70. *Charter*, *supra* note 29, s 7.

harm and state-imposed severe psychological harm.[71] The intersections between deportation and section 7 implicate both of its parts.

Deportation's remove from section 7 is rooted in the judiciary's reliance on both criminal law and administrative law. As set out above, its reliance on criminal law is based on the field's prior interpretation of deportation as outside of its bailiwick. This conception of deportation as non-penal and administrative in nature precludes robust access to sections 7 to 14 of the *Charter*. In *Reference re s 94(2) of Motor Vehicle Act (British Columbia)* ("*Motor Vehicle Reference*"), Justice Lamer conceived of sections 8 through 14 as "conceptually fused" to section 7, observing,

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice.[72]

As Evan Fox-Decent and Alexander Pless observe, the rights in sections 8 to 14 are often regarded as "elaborations of the fundamental principles of justice in the detention context," but they are "parasitical on invasive state action."[73] The criminal law's eschewal of deportation precludes analogous reasoning that would permit robust application of section 7, or indeed any application of sections 8 through 14. However, the reach of constitutional law is equally—if not more—limited by judicial reliance on the administrative aspects of the deportation regime.

Judicial reliance on statutory administrative safeguards to interpret section 7 follows two paths. With respect to the first part of section 7—engagement—the courts have found that deportation itself does not engage section 7. The precise act that constitutes deportation is in flux, but the rationale for non-engagement is the doctrine of prematurity. According to this doctrine, if there are remaining decisions to be made or safeguards to be invoked prior to removal, the invocation of section 7 is premature. Regarding the second part of section 7—in accordance

71. Both of the harms that violate security include the threat thereof. See Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part I: Procedural Fairness" [Fox-Decent & Pless, "Charter"] in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Montgomery, 2018) 237 at 239 [Flood & Sossin 2018]; *Carter v Canada (AG)*, 2015 SCC 5 at paras 62-64.
72. [1985] 2 SCR 486 at 502 [*Motor Vehicle Reference*].
73. Fox-Decent & Pless, "Charter," *supra* note 71 at 239, n 7; *Swain*, *supra* note 37 at 1008-1013.

with the principles of fundamental justice—courts have consistently found that the process of deportation as a whole generally accords with those fundamental principles. Claims of overbreadth and arbitrariness are met by the availability of procedural fairness and statutory administrative safeguards.

These judicial findings have grown in importance, with the Supreme Court remarking on the relationship between these administrative processes and the act of deportation, and then recently refusing leave to appeal them.[74] At the same time, increasing judicial reliance on these interpretative pathways has thickened the webbing between constitutional law and administrative law. The path to this point is a winding one. In 1985, during the *Charter*'s infancy, the Supreme Court decided *Singh v. Canada (Minister of Employment and Immigration)* ("*Singh*"). Often considered the pinnacle of *Charter* protection for non-citizens, the Court held that section 7 protections apply to "every human being who is physically present in Canada."[75] *Singh*'s potential, however, has not been realized.[76]

Four subsequent Supreme Court cases form the doctrinal backbone of deportation's relationship with section 7. In 1992, the Supreme Court squarely confronted the issue of whether deportation constituted a deprivation of life, liberty, or security of the person in the *Chiarelli* case. Chiarelli was a long-term permanent resident convicted of a series of crimes and the subject of a ministerial danger opinion.[77] The decision's endurance rests in part on its analytical order of operations, elided by the subsequent *Medovarski v. Canada (Minister of Citizenship and Immigration)* ("*Medovarski*") decision. Justice Sopinka did not decide whether Chiarelli's deportation engaged section 7 since it was, regardless, in accordance with the principles of fundamental justice.[78] Ten years later,

74. *Febles*, *supra* note 8; *B010*, *supra* note 8.
75. *Singh*, *supra* note 30 at 202; Dauvergne, "Charter Failure," *supra* note 5 at 668.
76. *Ibid* at 674 (discussing *Singh* as the "high-water mark"); Grey, *supra* note 5 (discussing Supreme Court and Federal Court interpretations of section 7 which curtail Singh's promise).
77. The *Chiarelli* case and its progeny are the subjects of sustained scholarly analysis. See Heckman, *supra* note 5; Dauvergne, "Charter Failure," *supra* note 5; Audrey Macklin, "The Inside-Out Constitution" in Jacco Bomhoff, David Dyzenhaus & Thomas Poole, eds, *The Double-Facing Constitution* (Cambridge University Press, 2020) 243; Asha Kaushal, "The Constitution in the Shadow of the Immigration State" in Bomhoff, Dyzenhaus & Poole, *supra* note 77, 277; Joshua Blum, "The *Chiarelli* Doctrine: Immigration Exceptionalism and the *Canadian Charter of Rights and Freedoms*" 54 UBC L Rev [forthcoming]; Jamie Liew & Donald Galloway, *Immigration Law*, 2nd ed (Irwin Law, 2015); Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law, 2007); Ninette Kelley, "Rights in the Balance: Non-Citizens and State Sovereignty Under the Charter" [Kelley, "Balance"] in Dyzenhaus, *supra* note 5, 253; *R v Appulonappa*, 2015 SCC 59 [*Appulonappa*]; *B010*, *supra* note 8. See especially Grey, *supra* note 5.
78. *Chiarelli*, *supra* note 10 at 731-32.

in *Suresh v. Canada (Minister of Citizenship and Immigration)* ("*Suresh*"), the Supreme Court held that deporting a refugee to torture or risk of harm *may* engage section 7.[79] Although Suresh prevailed because he had not received sufficient procedural protections in his deportation proceeding, the decision nonetheless "diluted the Court's earlier position in *Singh*" in part through the introduction of the device of 'constitutionalized' ministerial discretion.[80] In 2005, in *Medovarski*, the Supreme Court further restricted its partial holding on section 7 from *Chiarelli*, finding that deportation "*in itself* cannot implicate the liberty and security interests protected by s. 7."[81] Finally, in 2007, in the context of the security certificate regime, the Supreme Court held in *Charkaoui v. Canada (Minister of Citizenship and Immigration)* ("*Charkaoui*") that, while deportation itself could not engage section 7, "some features associated with deportation" may do so.[82] Together, these cases establish that the deportation process generally accords with fundamental justice; deportation to torture or risk of harm may engage section 7; deportation itself does not engage section 7; and the procedures surrounding deportation may engage section 7.

The first judicial tack from section 7 is the doctrine of prematurity, or the notion that deportation is not yet imminent because "a number of proceedings may yet take place before…deportation from Canada may occur."[83] Prematurity precludes the requisite level of causation to engage section 7 life, liberty, or security interests.[84] Grey explains the evolution of the doctrine of prematurity, following its trajectory from section 12 to section 7, from inadmissibility and ineligibility in the context of the entire statutory scheme to a decision pertaining to removal, and from the Pre-Removal Risk Assessment (PRRA) to subsequent decision points such as deferral of removal and stays of removal.[85] Although the concept of prematurity percolated in the Federal Courts for years, it only reached the Supreme Court in 2014 in *Febles v. Canada (Citizenship and Immigration)*

79. 2002 SCC 1 [*Suresh*].
80. Kelley, "Balance," *supra* note 77 at 279; Dauvergne, "Charter Failure," *supra* note 5 at 690.
81. *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46 [emphasis added] [*Medovarski*]. Others have made compelling arguments about the misreading of *Chiarelli* and the ill-founded standards of engagement that underwrite section 7 reasoning. See Heckman, *supra* note 5; Jamie & Galloway, *supra* note 77; Stewart, *supra* note 77.
82. 2007 SCC 9 at para 17 [*Charkaoui*].
83. *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 63. This is well-examined by Heckman, *supra* note 5.
84. Grey, *supra* note 5; Heckman, *supra* note 5.
85. Grey, *supra* note 5.

("*Febles*").[86] In *Febles*, Chief Justice McLachlin found *Charter* compliance in the availability of a stay of removal under a PRRA application.[87]

One year later, in *B010 v. Canada (Citizenship and Immigration*) ("*B010*"), Chief Justice McLachlin clarified how the availability of that administrative remedy answered the section 7 argument: Section 7 was not engaged prior to that stage.[88] The answer to constitutional concerns in both cases, Grey notes, is "the eventual access to a PRRA." [89] Heckman then criticized the untenable situation that these interpretations created for deportees, arguing that courts have imposed a standard of causation in the immigration and refugee context more onerous than that which it applies for section 7 generally, including in criminal and extradition proceedings.[90] He demonstrates how deportation's logic has not prevailed in other multi-stage proceedings that implicate detention or imprisonment.[91] The practical problem is that the point at which deportation becomes non-speculative is slowly becoming the moment the deportee is sitting on the airplane, at which point the issue is effectively moot.

The second judicial tack from section 7 is reliance on the deportation process "as a whole" to meet the requirements of fundamental justice. The principles of fundamental justice are both substantive and procedural; they protect against overbreadth, arbitrariness, and disproportionality, among other things.[92] The procedural justice contemplated by section 7 requires "at minimum, compliance with the common law requirements of procedural fairness."[93] Due in part to Justice Sopinka's reliance on the principles of fundamental justice in *Chiarelli* without having ruled on section 7 engagement, these principles have become the workhorse of constitutional law in deportation matters. Tracking the broad interpretative trajectory of engagement, the evolution of fundamental justice in the Federal Courts' jurisprudence relies on the precept that "the process as a

86. *Supra* note 8. Other authors have discussed the history of prematurity. See Heckman, *supra* note 5 at 347; Grey, *supra* note 5.
87. *Febles*, *supra* note 8; Grey, *supra* note 5 at 122.
88. *B010*, *supra* note 8 at para 75; Grey, *supra* note 5 at 121.
89. *Ibid*.
90. Heckman, *supra* note 5 at 314; Stewart, *supra* note 77.
91. Heckman, *supra* note 5 at 351.
92. *Motor Vehicle Reference*, *supra* note 72.
93. *Suresh*, *supra* note 79 at para 113.

whole" and "in a total context" preserves fundamental justice.[94] The parts of that process and context may be individualized depending on personal circumstances, but their totality consistently adds up to an adequate "degree of protection."[95] Federal Court decisions typically list the "individualized legislative safety valves" available to the deportee to support their holdings that deportation is in accordance with the principles of fundamental justice.[96] The substance of this process as a whole overlaps significantly with the set of administrative remedies and recourse that underwrite the doctrine of prematurity.

Both of the judicial pivots away from section 7 rely on the administrative parts of deportation. They shift the focus away from the decision at issue and towards its broader statutory and administrative context. In the following section, I examine the increasingly absurd results of these interpretations through three recent Federal Court of Appeal cases for which the Supreme Court refused leave to appeal.

B. THE CURTAILMENT OF ACCESS TO SECTION 7 PROTECTIONS: FROM *SINGH* TO *MORETTO*

The role of section 7 in deportation matters is limited by the doctrine of prematurity and the role of administrative safeguards. Prematurity means that deportation proceedings will not engage section 7 until the very final stage of proceedings, if at all, and the existence of administrative safeguards means that such proceedings will accord with the principles of fundamental justice. The shaky foundation that these interpretations laid for section 7 took a turn for the worse when the Supreme Court refused leave in a trio of cases in March 2020. The Supreme Court's leave refusals cemented the curious ambulation of section 7 in deportation cases, which is now engaged at the beginning of a refugee claim, then disengages for the duration of removal proceedings, only to reengage for the final individualized stage of proceedings. In what follows, I explain the series of cases that created this on/off switch for section 7.

Both parts of the section 7 analysis in deportation matters rely on the perspective that deportation is not a singular act, but rather a series of stages

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94. *Revell*, *supra* note 7 at para 211. See also *Powell v Canada (Citizenship and Immigration)*, 2004 FC 1120 at para 30 [*Powell*]; *Stables v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1319 at para 56 [*Stables*]; *Torre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 591, aff'd 2016 FCA 48, leave to appeal to SCC refused, 36936 (25 August 2016) [*Torre*]; *Brar v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1214 [*Brar*].

95. *Powell*, *supra* note 94 at para 28.

96. See *e.g. Moretto*, *supra* note 7 at paras 59-66; *Stables*, *supra* note 94.

and decisions that together constitute the deportation proceeding. This requires a brief explanation of how deportation works. After an individual has entered Canada, they may be found inadmissible. In the usual course, inadmissibility renders them vulnerable to deportation. There are several statutory grounds of inadmissibility, including criminality, misrepresentation, and health and financial grounds.[97] An inadmissibility finding generally triggers a section 44 report, which may result in a removal order.[98] There is a gap between the removal order coming into force under *IRPA*, section 49, and a removal order becoming enforceable under *IRPA*, section 48.[99] These sections are reproduced below:

> 48(1) A removal order is enforceable if it has come into force and is not stayed.
>
> (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.[100]
>
> 49(1) A removal order comes into force on the latest of the following dates:
>
> (a) The day the removal order is made, if there is no right to appeal;
>
> (b) The day the appeal period expires, if there is a right to appeal and no appeal is made; and
>
> (c) The day of the final determination of the appeal, if an appeal is made.

Individuals subject to a removal order in force have essentially three options: they may leave voluntarily, they may challenge their removal order, or they may do nothing and risk forcible removal.[101] Removal is complicated by the availability of recourse options in the gap between the section 44 report and the enforcement of a removal order. A select group of individuals may appeal their removal orders to the Immigration Appeal Division (IAD).[102] Individuals may also apply for a stay of their removal order, whether as part of their IAD appeal or

97. *IRPA*, *supra* note 43, ss 34-42.
98. *Ibid*, ss 44(1)-(2).
99. There is also a gap between the s 44 report (which may not correspond to the removal order in force) and enforceability.
100. *IRPA*, *supra* note 43, ss 48-49.
101. *IRPR*, *supra* note 44, s 239. Canada Border Services Agency (CBSA) data obtained through *Access to Information and Privacy Act* ("ATIP") requests showed that actual removals most frequently involve departure orders converted into deportation orders because the individual did not depart (ATIP responses, on file with author).
102. This is available only to a small category of people, mostly permanent residents, and not those with a serious inadmissibility. See *IRPA*, *supra* note 43, ss 63-65.

by statutory, regulatory, or judicial stay application.[103] Then, there are three types of statutory administrative processes that, if granted, will allow the individual to remain. For most people, each of these processes carries the option of permanent residence down the line. The first is the Pre-Removal Risk Assessment (PRRA). It measures risk in the country of return.[104] The person will not be removed until the PRRA application has been decided. Second, there is the Humanitarian and Compassionate (H&C) application.[105] Pending H&C applications do not stop removal. The third possibility is a temporary resident permit (TRP).[106] Successful TRP applicants receive a temporary exemption from a requirement of the statute for compelling short-term reasons. Embedded in *IRPA*, section 48(2) is also the possibility of deferred removal, which may be requested and granted in exceptional cases but cannot be directly translated into permanent status.

The administrative remedies that operate in this gap have come to play a pivotal role in section 7 deportation analysis. This heightened role stems from the judicial focus on what precisely constitutes the deportation act. That inquiry has now moved to the centre of judicial deportation analysis. Because several of these administrative safeguards operate in the beat between the issuance of a removal order and its enforceability, they hold the key to the deportation act. In *Febles* and *B010*, the Supreme Court indicated that for individuals who are at risk, the PRRA crystallized the deportation act, engaging section 7. However, this is not the bright line that it had appeared to be. A number of deportees do not have access to the PRRA. Refugee claimants, of whom *Singh* was one, follow a separate process through the statutory scheme, which includes different procedural requirements as well as different available risk assessments.[107] Some failed refugee claimants may not have access to a PRRA because of the PRRA bar.

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103. There are judicial stays, statutory stays, and regulatory stays. See *IRPA*, *supra* note 43, s 50. For a judicial stay, the applicant must have an underlying application for leave for judicial review.
104. *ENF 10*, *supra* note 46, s 25.3. If a removals officer decides the individual is not eligible, then the recourse is to judicially review that decision. This is determined by officers in accordance with *IRPA*, *supra* note 43, s 112(2). See also generally *ENF 10*, *supra* note 46, s 25.
105. *IRPA*, *supra* note 43, s 25. See also Immigration, Refugees and Citizenship Canada, "Guide 5291 - Humanitarian and Compassionate Considerations" (last modified 6 June 2021), online: Government of Canada <www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5291-humanitarian-compassionate-considerations.html> [*Guide 5291*].
106. See *IRPA*, *supra* note 43, ss 25 (H&C), 112 (PRRA), 24 (TRP).
107. A refugee claimant receives a conditional removal order that comes into force if their claim is found ineligible, rejected, withdrawn, abandoned, or terminated. See *IRPA*, *supra* note 43, s 49(2).

Additionally, very few deportees who are not also failed refugee claimants will face the type of risk contemplated by the PRRA upon return.[108]

In *Kreishan v. Canada* ("*Kreishan*"), one of the cases that sought leave to appeal to the Supreme Court, the Federal Court of Appeal addressed the constitutionality of the Refugee Appeal Division (RAD) bar for failed refugee claimants.[109] Justice Rennie explained that the refugee determination process was bookended by two constitutional protections: initial adjudication and removal consistent with international law.[110] Upon the first presentation of a refugee claim, section 7 requires the right to a hearing before an independent decision maker. Section 7 then re-engages at the conclusion of the process to ensure that claimants are not removed to face section 7 risks.[111] In terms of the deportation (rather than refugee) proceedings, section 7 interests are protected at the removal stage, "whether by a PRRA, a request to defer removal or the right to seek a stay of removal in the Federal Court."[112] The claimants in *Kreishan*, although barred from RAD, could still "seek a deferral of removal administratively, failing which, [they could] seek a stay in the Federal Court."[113] What remained, then, were these two temporary and exceptional measures through which the claimants' section 7 interests were protected. Although the refugee process is distinct from the immigration process, the processes intersect at the removal stage at which point an immigrant is equally entitled to a PRRA (if they are at risk), a request for deferral, or a stay. After *Kreishan*, it stands that section 7 interests are engaged upon making a refugee claim through the hearing requirement, then disengaged for the remaining determinations, only to reengage again at the very end of the deportation process.

At the beginning of 2020, counsel for *Kreishan* sought leave to appeal to the Supreme Court. One month later, counsel in *Revell v. Canada* ("*Revell*") and *Moretto v. Canada* ("*Moretto*") sought leave as well.[114] These three cases, although substantively different, each addressed the puzzling operation of section 7 in

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108. *IRPA*, *supra* note 43, ss 112(2)(b.1)-(c) (the PRRA "bar").
109. *Kreishan*, *supra* note 7. Refugee claims are heard by the Refugee Protection Division (RPD) and may generally be appealed to the Refugee Appeal Division (RAD). However, certain exceptional categories of refugee claimants under the *Safe Third Country Agreement* (*STCA*) do not have a right to appeal to the RAD. The right of appeal for STCA-excepted claimants was the crux of the issue in *Kreishan.*
110. *Kreishan*, *supra* note 7 at paras 113, 117.
111. *Ibid* at para 117.
112. *Ibid* at para 122.
113. *Ibid* at para 127.
114. *Moretto*, *supra* note 7; *Revell*, *supra* note 7.

removal proceedings. The Supreme Court refused leave to appeal in all three cases, leaving the Federal Court of Appeal decisions as the last word on the matter. The result is that immigration counsel will have to continue to argue into the thicket of public law webbing about the details of the administrative remedies and how and where they may fall short of section 7 requirements.

Revell and Moretto were long-term permanent residents. They immigrated from the United Kingdom and Italy, respectively, when they were children. They did not make refugee claims and they did not face risk upon return. In separate applications, they challenged their deportations under sections 7 and 12 of the *Charter* and asked the Federal Courts to reconsider *Chiarelli* and *Medovarski*.[115] The cases were heard together, and the same panel of the Federal Court of Appeal delivered the decisions on the same day. They illuminate section 7 in non-refugee claimant removal proceedings, focusing attention on what constitutes the deportation act and sharpening how it is modulated by its administrative character, requirements, and remedies.

David Revell immigrated to Canada at the age of 10. He has three adult children in Canada. In 2008, he was convicted of drug possession and trafficking, and then later pleaded guilty to separate charges of assault, which ultimately landed him before the Immigration Division (ID) for an inadmissibility hearing. The ID found that Revell's section 7 rights were engaged but that the deprivation was in accordance with the principles of fundamental justice.[116] Upon review, the Federal Court found that the ID erred in finding that section 7 was engaged but otherwise agreed with the ID on fundamental justice. The decision at issue for the Federal Court of Appeal, then, was Revell's "inadmissibility adjudication stage," for which it had to address both parts of section 7.[117] With respect to section 7 engagement, Justice De Montigny distinguished between causation and foreseeability. Addressing Heckman's argument that section 7 engagement in immigration and refugee matters runs counter to the low causation standard set out in *Bedford v. Canada (Attorney General)* ("*Bedford*"),[118] the Federal Court of Appeal stated:

> What is uncertain here is not whether the state will eventually be responsible for the deportation if it actually occurs, but whether the likelihood of it is real enough

115. Moretto also challenged his deportation under section 2(d) of the *Charter*. See *Moretto*, *supra* note 7.
116. *Revell*, *supra* note 7 at paras 14-27.
117. *Ibid* at para 35.
118. 2013 SCC 72.

> to take it outside the realm of pure speculation and engage the rights protected by section 7 of the Charter.[119]

Justice De Montigny observed that *Bedford* "speaks to the cause of the prejudice."[120] It was *ad idem* between the parties and the court that when Revell was deported, the state would have caused his deportation; the issue was the *likelihood* of Revell's deportation. Is the decision proximate enough for his eventual deportation to have passed the speculative stage? In explaining this foreseeability requirement, the Federal Court of Appeal noted that "an admissibility hearing is but one step in a complex, multi-tiered inadmissibility determination and removal regime under the *IRPA*."[121] The Federal Court of Appeal refused Revell's argument that his inadmissibility determination was proximate enough to removal, listing the remaining possibilities: ministerial relief under *IRPA*, section 42.1(1) (which would remove the inadmissibility) in combination with an H&C application; a PRRA; and an *IRPA*, section 48 deferral of removal. These three possibilities kept Revell's inadmissibility from being proximate enough to deportation, and thus kept section 7 of the *Charter* from engagement.

With respect to fundamental justice, the Federal Court of Appeal accepted that the approach to the principles of fundamental justice had "significantly evolved" since the birth of the *Charter* and the *Chiarelli* and *Medovarski* decisions, but disagreed that Revell had met the high threshold required to depart from precedent.[122] Justice De Montigny upheld the fundamental justice of the deportation process based on the presence of "a number of safety valves in the *IRPA* ensuring that the deportation process as a whole is in accordance with the principles of fundamental justice."[123] "At each and every step of this process, an applicant is entitled to make submissions and to be represented by counsel, may challenge any decision by way of an application for judicial review before the Federal Court, and may seek a stay of removal";[124] these features of administrative procedural law (judicial review, stays, submissions, counsel) ensure that the deportation process accords with fundamental justice. Considering overbreadth in particular, the Federal Court of Appeal observed that the safety valves provided by the Act "save the paragraphs in question from any charge of

119. *Revell*, *supra* note 7 at para 45.
120. *Ibid*.
121. *Ibid*.
122. *Ibid* at para 97.
123. *Ibid* at paras 46-52.
124. *Ibid* at para 51.

overbreadth by effectively narrowing their scope," and that "this whole process acts as a safety valve."[125]

In making these findings, Justice De Montigny remarked that the *nature* of the section 7 rights at issue is determinative. "The process leading to the potential infringement of these rights must be fair and in accordance with the basic tenets of our judicial system"[126]—this is fundamental justice. There is no doubt, he observed, "that the procedural aspects of section 7 are engaged as soon as a person's right to life, liberty or security are put at risk by state action."[127] Linking section 7 of the *Charter*, procedural justice, and the principles of fundamental justice together, he found that "it is in *this* sense that section 7 can be said to permeate the entire extradition and criminal process, and the same can probably be said of the inadmissibility and removal process under the *IRPA*."[128] On the other hand, the substantive aspects of section 7 rights need not be considered at every step of the process. "The jurisprudence in the immigration context is clear: section 7 rights are considered at the removal or pre-removal detention stage."[129] These substantive aspects are the interests engaged by section 7. In order to get under this substantive tent, the consequences or harms of deportation "would go beyond the typical impacts of removal," which Revell's did not.[130]

The tenability of this distinction between procedural and substantive aspects of section 7 is uncertain. On the one hand, section 7 clearly consists of two parts, and the fundamental principles of justice necessarily include common law procedural fairness.[131] On the other hand, the Supreme Court has confirmed that the fundamental principles of justice are not only procedural, which means one cannot simply map substance onto interests and procedure onto fundamental justice.[132] Indeed, prior Federal Court case law included many more safety valves, some of them substantive assessments of risk or hardship, as part of the "total context" of the fundamental principles of justice. This suggests that Justice De Montigny's distinction is a pivot from precedent. In *Powell*, the "total context that has preserved consistency with the principles of fundamental justice" included

125. *Ibid* at paras 115-16 (referring to *IRPA*, *supra* note 43, ss 36(1)(a) and 37(1)(a)).
126. *Revell*, *supra* note 7 at para 55.
127. *Ibid*.
128. *Ibid*.
129. *Ibid* at para 56.
130. *Ibid* at para 66 (Revell argued his section 7 interests were engaged because of the sufficiently serious consequences of deportation and because the psychological harm of deportation was "a feature associated with deportation" per *Charkaoui*, *supra* note 82).
131. *Suresh*, *supra* note 79.
132. *Motor Vehicle Reference*, *supra* note 72.

judicial review, the PRRA, and the H&C.[133] Fundamental justice was found in the "degree of protection" provided by the listed administrative remedies. Subsequent cases then picked up this thread and articulated the individualized components of this total context.[134]

The Federal Court of Appeal dismissed Moretto's appeal for "essentially…the same reasons" given in *Revell*.[135] Massimo Moretto was a long-term permanent resident who immigrated to Canada from Italy when he was nine months old. He challenged the decision to lift the stay of removal against him that held his inadmissibility in abeyance. One of the distinctions between *Moretto* and *Revell* is their stage of deportation proceedings. In *Moretto*, the issue was the Immigration Appeal Division (IAD) decision to automatically cancel his stay of removal pursuant to section 68(4) of *IRPA* because of his subsequent conviction.[136] Although the Federal Court below agreed that recent developments in the case law permitted reconsideration of the binding nature of *Chiarelli*, the Federal Court of Appeal rolled back this decision.[137]

Moretto argued that section 68(4) was the decision that rendered his deportation order enforceable. There were no remaining steps between the operation of section 68(4) of *IRPA* and his removal: "[H]is PRRA was denied, his humanitarian and compassionate (H&C) application is not a bar to removal, and the discretion left to enforcement officers at the removal stage is highly limited."[138] With respect to prematurity, however, Justice De Montigny observed that the appellant could still apply for a TRP, seek a deferral of removal at a later stage of his deportation process, and apply for an H&C.[139] As for fundamental justice, Moretto argued that the presence of "safety valves" was irrelevant because section 68(4) "removes any further opportunity to explain his circumstances to a decision maker."[140] The Federal Court of Appeal disagreed, finding that Moretto's circumstances were considered at the report and referral stage, as well as the "quasi-judicial hearing" before the ID, and under the IAD's H&C jurisdiction,

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133. *Powell*, *supra* note 94 at para 30.
134. See *e.g. Stables*, *supra* note 94 at para 56, de Montigny J (s 44 report submissions, ID hearing, PRRA, and judicial review); *Torre*, *supra* note 94 at paras 74-75 (PRRA, *IRPA* s 42.1 exemption, and judicial review); *Brar*, *supra* note 94 at paras 27-28 (s 44 submissions and Minister's Delegate weighing H&C factors).
135. *Moretto*, *supra* note 7 at para 3.
136. The IAD decision to lift the stay also cancelled his access to appeal.
137. *Moretto*, *supra* note 7.
138. *Ibid* at para 42.
139. *Ibid* at para 44.
140. *Ibid* at para 59.

and then in the Federal Court review of his IAD decision, and upon IAD redetermination.[141] Justice De Montigny used these processes to protect against overbreadth and gross disproportionality. Later, the Federal Court of Appeal relied on the remaining "safety valves" to affirm that there was no violation of the principles of fundamental justice, observing that "even at this late stage," Moretto could make an application for a TRP, H&C, PRRA, and deferral of removal.[142] This is hard to reconcile with the analytical framework for engagement, which insists that the deportation act does not crystallize until the very last stage of the deportation proceeding. Several of the prior proceedings to which Justice Montigny referred (section 44 report, ID, and IAD hearings) contemplated acts that a prematurity analysis had deemed not yet to have occurred and were therefore immune from section 7 scrutiny. As Moretto edged closer to the deportation act, the fundamental justice of those more proximate stages should have provided an equivalent opportunity to explain his circumstances as the prior stages.

Each applicant filed a psychologist report. Moretto's described deportation as "a life-shortening event," while Revell's observed that, without his family, Revell would be "devoid of direction and purpose."[143] Moretto's history of mental health and addiction problems juxtaposes the absence of intersectional frameworks of harm in the deportation context with the growing emphasis on social determinants of justice in other public law fields. The question in *Moretto* and *Revell* was whether such psychological or social harm exceeded the threshold of ordinariness, rather than how these social determinants had figured into their life histories, their interactions with the justice system, and their treatment in the immigration regime. This is attributable both to the axis of non-citizenship around which deportation rotates and to the webbing of deportation doctrine, which trains the judicial eye on the form of administrative remedies rather than the substance of access to justice.

The cases opened two potential lines of constitutional recourse, although neither was successful. The first concerned psychological harm under section 7, which was made out by the evidentiary record and exceeded the ordinary consequences of removal, but the Federal Court of Appeal was nonetheless reluctant to overturn *Medovarski*.[144] The second concerned section 12. *Revell*

141. *Ibid* at para 61 (s 44 referral process, H&C application, PRRA, and deferral removal prevent overbreadth), 62-64 (s 44 referral process, ID and IAD hearings, and judicial review provide individual assessment), 65 (H&C application, TRP, PRRA, and deferred removal prevent gross disproportionality and overbreadth).
142. *Ibid* at para 65.
143. *Moretto*, *supra* note 7 at para 36; *Revell*, *supra* note 7 at para 31.
144. *Revell*, *supra* note 7 at paras 30-34; *Moretto*, *supra* note 7 at para 36.

foreclosed treating deportation as punishment, citing *Tran* and *Chiarelli*, and reinforcing the strands of the web: "Inadmissibility proceedings are therefore not criminal or quasi-criminal in nature, and courts have consistently held that the deportation of a person found criminally inadmissible to Canada is not imposed as punishment."[145] The Federal Court of Appeal agreed that "treatment" could "probably" include deportation but did not decide this point because the treatment was not cruel and unusual.[146]

In many ways, these cases raise more questions than answers. Precisely which stage of decision making constitutes the deportation act remains an outstanding and individualized issue. In *Kreishan*, it was either a deferral of removal or a judicial stay. In *Revell*, it was section 42.1 in combination with an H&C application, a PRRA, or deferral of removal. And in *Moretto*, it was an H&C application, a TRP, or a deferral of removal. The common remaining stage suggests that the deportation act, for those who are not at risk, will likely come to rest on deferral of removal. Apart from the load these interpretations place on deferral, which I explore in the next section, they also lead to the concern that there is little time between the decision refusing deferral and the actual deportation. If this is the point when section 7 turns on, then it does not amount to meaningful protection of section 7 interests.

This formalistic understanding of deportation as the final potential act of removal is premised on the webbing of public law. The Federal Court of Appeal repeatedly points to remaining administrative possibilities to justify the limited reach of constitutional law. This marks a pan-public law approach that looks across the public law fields. The webbing is visible in both parts of the section 7 inquiry, but each seems to rely on a different conception of the administrative processes, either as separate, individual modes of recourse or as part of a single multi-stage proceeding. On section 7 engagement, the judiciary views deportation as a singular act in a long, inter-connected scheme. Each of the decision-making points is individuated, which means the deportation act remains speculative until the final decision-making point. On fundamental justice, the judiciary views deportation as a regime consisting of several stages and processes, such that the "process as a whole" or the "total context" protects deportation from violating fundamental justice. In the result, reliance on criminal and administrative law keeps deportation from constitutional law's embrace. This demands scrutiny of the equivalency between these fields. The administrative processes and safeguards aim to protect procedural fairness, to guard against errors (particularly those

145. *Revell*, *supra* note 7 at para 54. See also *Tran*, *supra* note 9 at para 43; *Chiarelli*, *supra* note 10.
146. *Revell*, *supra* note 7 at para 125.

involving risk), and to soften the harsh consequences of immigration law in compelling cases. They do not address the substantive concerns that underwrite the constitutionality of deportation.[147]

IV. ADMINISTRATIVE LAW

A. THE MEANING OF ADMINISTRATIVE FAIRNESS

The relationships between the three fields of public law are most developed—and their webbing is thickest—when it comes to administrative law. While criminal law relies primarily on higher order categorizations of deportation's "administrative nature," constitutional law particularizes this reliance, referring to specific administrative solutions. This section examines administrative law in the deportation context, which comprehends the powers to legislate, to exercise discretion, and to adjudicate.[148] Focusing on administrative fairness in the intersecting contexts of delegation and discretion exposes how and why reliance on administrative law to protect the deportee is misplaced. The regulatory nature and scope of administrative law instruments are distinct and self-limiting.

The administrative law of deportation has several unique features. Its internal statutory requirements and the limits they place on access to justice are the most significant. Nearly all immigration-related cases must go through the Federal Courts.[149] The primary exception to this requirement is *habeas corpus* claims about immigration detention, which, since 2019, may go through provincial courts.[150] All applicants must obtain leave to judicially review their decision; in order to appeal the review decision, the sitting judge must certify a "serious question of general importance"; the appellant must have funding to appeal; and then, with a Federal Court of Appeal decision in hand, the appellant must

147. This was argued by Revell and dismissed by the Federal Court. See *ibid* at para 112.
148. See Sharryn J Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary*, 3rd ed (Emond, 2020) at 130.
149. *Federal Courts Act*, RSC 1985, c F-7, s 17(1). See Craig Forcese, "Making a Federal Case Out of It: The Federal Court and Administrative Law" in Flood & Sossin 2018, *supra* note 71, 553 at 557 (confirming that administrative cases based on issues of constitutionality may be brought in either section 96 provincial superior courts or federal courts).
150. *Chhina*, *supra* note 47 at para 17.

receive leave to appeal to the Supreme Court of Canada.[151] Not infrequently, the Federal Court diverges in its approach to particular immigration issues.[152] Due to the peculiar nature of judicial review in the immigration context, these divergent lines of authority will only be reconciled if such a question is certified at the Federal Court level and one of the parties to the case decides to appeal it. Together, these requirements limit access to public law processes in deportation matters well before courts even reach questions of application in administrative, constitutional, or criminal law. These kinds of judicial requirements do not exist in other administrative regimes of Canadian law.

In the contexts of delegation and discretion, administrative law generally enters the frame through the common law, through statutory requirements, or through the *Charter*'s fundamental principles of justice.[153] These sources relate and overlap in ways that make it most productive to follow their evolution through two frameworks. The first framework is administrative common law, primarily the common law procedural rules of natural justice, including fairness, notice, disclosure of the case to be met, and the right to make submissions. The fundamental principles of justice in section 7 incorporate common law procedural fairness at minimum, requiring natural justice, and may surpass the requirements of the common law.[154] I refer to these forms of natural justice and procedural fairness jointly as "administrative fairness," regardless of their

151. Only 18.6% of immigration proceedings commenced at the Federal Court between 2010 and 2019 obtained leave for judicial review (14,586 of 78,250). See "Statistics" (last visited 18 June 2020), online: *Federal Court* <www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics>. The FC has certified 157 questions in that time span or on average 16 per year. See "Certified Questions (Immigration/Citizenship)" (last visited 18 June 2020), online: *Federal Court* <www.fct-cf.gc.ca/en/pages/law-and-practice/certified-questions-immigrationcitizenship>.

152. This has happened with respect to calculating residency for citizenship, the test for a genuine marriage, and the standard of review for certified questions. See also David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27.

153. Audrey Macklin, "Citizenship, Non-Citizenship and the Rule of Law" (2018) 69 UNBLJ 19 at 25 (observing that discretion is "always bounded and informed by law" and including international law).

154. *Singh*, *supra* note 30 at 212 ("the concept of 'fundamental justice' as it appears in s 7 of the *Charter* includes the notion of procedural fairness"); *Suresh*, *supra* note 79 at para 113 (incorporating *Baker* on common law procedural fairness). In the refugee context, procedural fairness has required the right to an oral hearing (*Singh*) and higher requirements prior to removal to counter the risk inherent in deporting refugee claimants. See *Singh*, *supra* note 30 at 213-16; *Suresh*, *supra* note 79 at paras 115-23. This section does not address either the issue of *Charter* values, which have not achieved traction in deportation, or tribunals' authorities to decide constitutional questions. On the latter, see *Revell*, *supra* note 7.

common law or *Charter* origin.[155] Administrative fairness has been the most fruitful line of judicial recourse for non-citizens. The second framework takes shape in the various forms of statutory recourse and remedies. The judiciary refers to these statutory, administrative processes as "safeguards" or "safety valves."[156] The internal limits of these administrative remedies, and their discretionary, quasi-judicial, or judicial nature are examined in the next section. In what follows, I explore the jurisprudential contours of the public law webbing with respect to administrative fairness.

Immigration law is distinguished from other branches of administrative law by the number, variety, and expertise of administrative decision makers operating under its umbrella. From visa officers abroad to removal officers inland, from officers and tribunal members without formal legal education to appellate judges with decades of legal expertise, the labyrinth of immigration decision making is diverse.[157] The complexities stem from the variety of decisions and decision makers and the relationships between them. Those who administer procedural fairness may do so at various decision points throughout the deportation process. The same may be said of the invocation and adjudication of administrative safeguards. The content of administrative fairness varies according to the type of decision at issue and therefore often implicitly differs according to the status of the individual. Depending on the particular constellation of factors at issue, decision makers will be differently positioned, trained, and empowered. The categorical unity of this broad and deep administrative framework has elided significant distinctions between decision makers and their decisions at the same time that it has distinguished homologous acts and settings in order to attenuate levels and kinds of legal protections.[158]

The deportation framework is administered by the Minister of Immigration, Refugees and Citizenship, with some functions delegated to the Minister of Public Safety and Emergency Preparedness, their delegated departmental

155. I use the term "administrative fairness," following Heckman, *supra* note 5.

156. *Seklani v Canada (Citizenship and Immigration)*, 2020 FC 778 at paras 29-30; *Begum v Canada (Citizenship and Immigration)*, 2017 FC 409 at paras 107, 113 (on safeguards), 111 (on safety valves). See also *Revell*, *supra* note 7 at paras 52, 115-17; *Moretto*, *supra* note 7 at paras 59, 65; *Stables*, *supra* note 94 at para 56 (on safety valves).

157. Immigration decisions typically involve two government departments (Immigration, Refugees and Citizenship Canada (IRCC) and Canadian Border Services Agency (CBSA)) and sometimes three (Employment and Social Development Canada (ESDC)); immigration decision makers include officers (both overseas and in Canada), tribunals, and courts.

158. See Canada, Department of Manpower and Immigration, *Canadian Immigration Policy, 1966: White Paper on Immigration* (Queen's Printer, 1966) at para 84 ("the procedures leading to an order of deportation…are inseparable from any law enforcement activity").

decision makers, and independent agencies. Many of the powers delegated to the Ministers are discretionary, and discretionary decisions (together with judicial review of those decisions) form the bulk of deportation decision making. The authority for Ministerial designation and delegation is contained in sections 6(1) and (2) of *IRPA.*

> 6 (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.
>
> (2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.[159]

As a result, Richard Haigh and Jim Smith observe, the immigration statute is "a compendium of discretionary powers distributed among various governmental actors."[160] The Ministers turn quickly into Ministerial delegates, immigration and visa officers, and border services officers; each category has subcategories.[161] These expansive delegations are an essential part of immigration decision making, and their elaboration foreshadows the complexities of adjudicating discretion.[162]

It is helpful here to return to the Supreme Court's deportation canon to observe its administrative law underpinnings. Included this time is *Baker v. Canada (Minister of Citizenship and Immigration)* ("*Baker*"),[163] which provided the architecture for the early webbing. The Supreme Court's preference for administrative and statutory interpretation frameworks over constitutional ones was first visible in *Singh.* Although *Singh* had opened the proverbial gates of section 7 to "everyone," Justice Wilson found that if the procedural fairness issues

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159. *IRPA*, *supra* note 43, s 6(1)-(3). Section 6(3) refers to particular decisions that the Minister may not delegate (*i.e.*, powers conferred under ss 20.1, 22.1, 42.1, 77(1)).
160. "Return of the Chancellor's Foot? Discretion in Permanent Resident Deportation Appeals under the *Immigration Act*" (1998) 36 Osgoode Hall LJ 245 at 256.
161. See Department of Citizenship and Immigration, "Instrument of Designation & Delegation" (6 January 2021), online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/il/il3-eng.pdf>. For CBSA directions, see Canadian Border Services Agency, "Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations" (last modified 24 January 2018), online: *Government of Canada* <www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2016-07-eng.html>.
162. On the complexities of discretion, see Colleen M Flood & Jennifer Dolling, "A Historical Map for Administrative Law; There Be Dragons" [Flood & Dolling, "Historical"] in Flood & Sossin 2018, *supra* note 71, 1 at 37-38.
163. [1999] 2 SCR 817 [*Baker*].

raised by *Singh* were not excluded by the statute, then "there was no basis for resort to the *Charter*."[164] This preference for non-constitutional bases of decision making would prove portentous.

In 1999, Mavis Baker successfully challenged an immigration officer's refusal of her H&C application. Baker brought a motion to set a number of constitutional questions, which the Supreme Court denied. Accordingly, "[the case] was framed primarily in terms of the role of the *Charter of Rights and Freedoms* and the *CRC* [*Convention on the Rights of the Child*] in interpreting the limits of administrative discretion."[165] In *Baker*, the Supreme Court squarely addressed legal accountability for "ministerial exercises of discretion."[166] Justice L'Heureux-Dubé found that the officer's failure to consider the best interests of the children constituted an "unreasonable exercise of discretion," reinforcing the constitutional commitment that "all persons…must adhere to the rule of law and respect fundamental constitutional values."[167] From the perspective of the webbing, however, the decision circumscribed the role for those fundamental values by emphasizing the administrative nature of the decision. For the majority, Justice L'HeureuxDubé wrote, "the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised."[168] The Supreme Court would follow this order of operations three years later in *Chieu v. Canada (Minister of Citizenship and Immigration)*, solidifying the outsized importance of administrative law in deportation matters.[169]

Coming on the heels of *Baker*, the *Suresh* decision further developed the role of discretionary decision making in the webbing of the public law framework.

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164. This is the difference between procedural fairness under the common law versus procedural fairness under section 7: Statutory language cannot alter procedural fairness rights under the *Charter*. See Fox-Decent & Pless, *supra* note 71; *Singh*, *supra* note 30 at 188.
165. Sharryn Aiken & Sheena Scott, "*Baker v. Canada* and the Rights of Children" (2000) 15 J L & Soc Pol'y 211 at 219.
166. Flood & Dolling, "Historical," *supra* note 162 at 38.
167. Mary Liston, "Administering the Canadian Rule of Law" in Flood & Sossin 2018, *supra* note 71, 139 at 174 (discussing *Doré*'s contribution to this understanding).
168. *Baker*, *supra* note 163 at para 11.
169. 2002 SCC 3 at para 19 ("In my view, this appeal can be decided by applying principles of administrative law and statutory interpretation, as was the case in this Court's decision in *Baker v. Canada*") [*Chieu*]. *Chieu* was released on the same day as *Suresh*. See also Audrey Macklin, "The State of Law's Borders and the Law of States' Borders" in Dyzenhaus, *supra* note 5, 173 at 188-90 (observing that the common law principles of administrative law served *Baker* better than section 7 of the *Charter* and contrasting "the situated subject of administrative law and the deracinated constitutional subject").

The Supreme Court found that removing Suresh, a refugee, to Sri Lanka where he faced a substantial risk of torture violated his section 7 rights.[170] This finding, while based on section 7 engagement, is not as expansively protective or constitutional as it first appears. On the one hand, the Court located the constitutional problem in the exercise of Ministerial discretion rather than in the statutory provision granting the discretion.[171] On the other, the Court found that this exercise of Ministerial discretion violated Suresh's procedural rights to fundamental justice, which the Court proceeded to analyze using the common law test developed in *Baker*.[172] In the result, this "constitutionalized" Ministerial discretion entitled Suresh to a copy of the reports and memoranda underwriting his deportation, an opportunity to respond to them, and written reasons for the Minister's decision—an administrative answer to a human rights question.[173]

In 2007, the *Charkaoui* decision maintained this emphasis on administrative frameworks.[174] Charkaoui was detained as a threat to national security with no deportation date in sight and limited access to the evidence against him.[175] The Supreme Court expanded the scope of *Chiarelli* and *Medovarski*, finding that while it was bound to agree that deportation *itself* could not infringe constitutional liberty and security interests, *features* of the deportation process could do so. The procedures for determining the reasonableness of a security certificate and for detention review, both statutorily required to be performed by judges rather than exercises of Ministerial discretion, were found unconstitutional.[176] These infringements could be met by the requirements of a fair hearing and timely detention reviews, respectively.[177] *Charkaoui* was not concerned with delegated

170. *Suresh*, *supra* note 79 at para 130.
171. Peter J Carver, "Shelter From the Storm: A Comment on *Suresh v. Canada (Minister of Citizenship and Immigration)*" (2002) 40 Alta L Rev 465; Audrey Macklin, "Mr. Suresh and the Evil Twin" (2002) 20 Refuge 15 (arguing that the terms of the decision leave the state "wide scope to circumvent the spirit of the judgment").
172. Carver, *supra* note 171 at 479.
173. See Dauvergne, "Charter Failure," *supra* note 5 at 690; *Suresh*, *supra* note 79 at para 121-30.
174. *Charkaoui*, *supra* note 82.
175. *Medovarksi*, *supra* note 81 at para 46 [emphasis added]. Others have made compelling arguments about the misreading of *Chiarelli* and the ill-founded standards of engagement that underwrite section 7 reasoning. See Heckman, *supra* note 5; Liew & Galloway, *supra* note 77; Stewart, *supra* note 77.
176. *Charkaoui*, *supra* note 82.
177. *Ibid*.

discretionary decision making but it nonetheless relied on administrative frameworks to resolve constitutional problems.[178]

In recent cases, the courts have returned to the knotty relationship between statutory provisions and discretionary decisions. In 2015, in *R. v. Appulonappa* ("*Appulonappa*"), the Supreme Court found that *IRPA*, section 117, which criminalized the smuggling of non-citizens into Canada, was unconstitutionally overbroad and contrary to section 7 insofar as it also captured humanitarian efforts, mutual aid, and family members.[179] The residual prosecutory discretion of the Attorney General could not save the statutory provision because it did not preclude their consent in overbroad circumstances.[180] Immigration advocates argue that *Appulonappa* requires the statutory constraint of discretion in order to maintain the constitutionality of its exercise, but that line of argument has not achieved much traction. In the recent case of *Brown v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal was faced with the constitutionality of immigration detention without time limits.[181] Although Justice Rennie acknowledged shortcomings with the detention scheme, he characterized them as issues with the maladministration of detention. Distinguishing *Appulonappa* on the basis of the unconstitutionality of its underlying provision, he found that the "[t]he *Charter* does not require that the possibility of maladministration pursuant to a statutory grant of discretion be eradicated from statutes."[182] *Brown* is the most recent foothold in the ladder of judicial decisions that emphasize discretion, properly exercised, as a response to larger, often systemic, deficiencies.

The form that administrative law frameworks take in deportation cases will depend upon the specific constellation of factors: the nature of the decision, the terms of the statute, the identity of the decision maker, and the bounds of their discretion. The mechanisms through which the administrative frameworks of discretion and fairness figure decisively in the constitutionality of the statutory scheme is a key part of the connective tissue of public law. Problems that appear

178. Kent Roach, "*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue Between Courts and Legislatures" (2008) 42 SCLR 281. *Charkaoui* is often discussed as an instance of judicial comparative law, the Court is widely understood to have described the UK SIAC administrative regime in order to guide the legislature to implement a similar administrative framework.

179. *Supra* note 77.

180. *Brown v Canada (Minister of Citizenship and Immigration)*, 2020 FCA 130 at paras 71, 72 [*Brown*].

181. *Ibid*.

182. *Ibid* at para 80.

constitutional are solved through administrative fairness mechanisms: hearings, reasons, and opportunities to be heard and to know the case to be met. The significance of this constellation lies in the role of discretionary decisions, which are the basis for findings of prematurity and the grounds for articulating the content of fundamental justice.

B. ACCESS TO JUSTICE: ADMINISTRATIVE SAFEGUARDS

What is often decisive in the constitutional review of deportation is whether the person received enough administrative fairness. These administrative processes—which include the remaining stages in the removals process, potential statutory administrative safeguards, and procedural fairness *writ large*—play a role in the review of the decision itself, as well as in prematurity analysis and the principles of fundamental justice. Their roles differ and sometimes overlap. Heckman has provided significant precision about these contours.[183] In this section, I focus on the content of administrative safeguards as a powerful example of the webbing. The courts focus their principles of fundamental justice analyses on "the process as a whole," necessarily pivoting from the deportation decision under review to the broader idea of administrative fairness. This pivot relies upon the entirety of the deportation process to keep it from overbreadth, arbitrariness, and disproportionality. There are profound access to justice implications to requiring deportees to apply for more and different kinds of relief in order to preserve the fundamental justice of their own deportation.[184]

As mentioned in Part III(D), above, the phase *after* the issuance of the removal order opens into three broad portals of potential appeal, review, and administrative recourse.[185] The first is the possibility of limited internal appeals of removal orders to the IAD.[186] For those deportees who have access to the IAD, it is the final quasi-judicial adjudication of their claim. The second is judicial review *writ large*, which is available for most deportation-related decisions, and may be accompanied by a stay application. The third set of potential remedies

183. Heckman, *supra* note 5.

184. In the case of some administrative safeguards, such as H&C applications, deportees must pay the fees in order to trigger the exercise of discretion.

185. The removal order may be issued by the Minister's delegate or by the ID. The ID decides whether to issue a removal order based on a quasi-judicial process. Most permanent residents and some foreign nationals with more complicated grounds of inadmissibility will have an ID hearing.

186. This is available only to a small category of people, mostly permanent residents, and not those with a serious inadmissibility. See *IRPA*, *supra* note 43, ss 63-65.

covers separate processes for entry: H&C applications, PRRAs, and TRPs.[187] There is also the possibility of temporary deferral of removal. These decisions are made by differently positioned decision makers, ranging from tribunal members to judges to dedicated officers to generalized removals officers. They run the gamut from judicial to quasi-judicial to wholly discretionary in nature.

The TRP, often referred to as a "minister's permit," provides a temporary fix for inadmissibility.[188] TRPs are most often issued to provide exceptional entry and sometimes residence for foreign nationals who are otherwise inadmissible. The individual must present a compelling need to enter or remain in Canada.[189] Most often, the individual will need to be in Canada for economic or personal reasons. TRPs carry extra privileges and are not issued as a matter of course.[190] Inland applicants who are subject to removal must make written applications with supporting documents to the case processing centre, which may convoke an interview. TRP approval is a discretionary decision of an immigration officer.

H&C applications provide equitable relief to applicants who are not otherwise able to enter or remain in Canada.[191] Section 25 permits the Minister to provide an exemption from a requirement of the *IRPA* or an inadmissibility ground based on factors such as settlement, family ties, the best interests of the children, and hardship.[192] The determination is based on documentation submitted by the applicant, who is entitled to make submissions, although there is no requirement to conduct an oral interview.[193] The guideline criteria for

187. See *IRPA*, *supra* note 43, ss 25 (H&C), 112 (PRRA), 24 (TRP).
188. *Ibid*, s 24.
189. Immigration, Refugees and Citizenship Canada, "Temporary resident permits (TRPs)" (last modified 22 July 2020), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits.html>.
190. In terms of extra privileges, TRP holders may apply inland for permits, receive access to health care, and apply for permanent resident status after three years. An average of 9,537 TRPs were issued per year from 2014 to 2018, the vast number of which were issued at ports of entry. See Government of Canada, "Annual Reports to Parliament on Immigration" (2017-2019), online: *Immigration, Refugees and Citizenship Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals.html>; Immigration, Refugees and Citizenship Canada, "Evaluation of Temporary Resident Permits" (November 2016), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/temporary-resident-permits-2016.html>. See also *Lorenzo v Canada (Minister of Citizenship and Immigration)*, 2016 FC 37 at para 23 (calling the TRP "highly discretionary and exceptional in nature").
191. *Kanthasamy*, *supra* note 8.
192. *IRPA*, *supra* note 43, s 25.
193. *Baker*, *supra* note 163.

assessing humanitarian and compassionate considerations are detailed, focusing on establishment and hardship.[194] The Minister or their delegate makes the discretionary decision whether or not to grant the applicant permanent residence based on their application. However, the H&C application does not stay removal, so the individual may be removed while they await a decision. Their removal will sometimes negatively weigh against their establishment and community ties.[195]

The PRRA has the narrower task of protecting deportees from returning to a country where their life would be in danger, or they would be at risk.[196] It assesses whether the applicant is in need of protection in Canada in furtherance of Canada's international human rights obligations. It is possible to make a PRRA application only once one is subject to an enforceable removal order.[197] As part of the removal process, the removals officer will typically provide the individual with details for the PRRA application. Filing the application triggers a stay of removal until the PRRA decision is rendered.[198] The PRRA is a purely administrative review based on written submissions, although a hearing may be held if a person's credibility is in question.[199] The review is conducted by designated PRRA officers. In most circumstances, a successful PRRA entails permanent residence.[200]

The final administrative safeguard in the panoply is deferral of removal, which is contained in a small and unassuming statutory provision. *IRPA*, section 48(2) reads: "If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible."[201]

This provision has been interpreted to provide the removals officer with "limited but undefined discretion" to defer removal.[202] The decision to defer removal is a discretionary decision made by a removals officer which temporarily postpones removal. This discretion includes the travel arrangements for removal,

194. *Guide 5291*, *supra* note 105; *Kanthasamy*, *supra* note 8 (confirming hardship is not a standalone test).
195. Removals officers have discretion to wait for the H&C decision.
196. *Moretto*, *supra* note 7 at para 8 ("This process seeks to determine whether the removal of a person to their country of nationality would subject them to a danger of torture…to a risk to their life or, in certain circumstances, to a risk of cruel and unusual treatment"). It is concerned with risk determination and therefore plays a much larger role for unsuccessful refugee claimants than for other deportees.
197. *IRPA*, *supra* note 43, s 112(1).
198. *IRPR*, *supra* note 44, s 232.
199. *IRPA*, *supra* note 43, s 113(b); *IRPR*, *supra* note 44, s 167.
200. But see *IRPA*, *supra* note 43, s 112(3) (providing an exception for serious inadmissibility).
201. *IRPA*, *supra* note 43, s 48(2). This provision used to read "as soon as reasonably practicable."
202. *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16.

including timing. The case law has developed the bounds of this discretion.[203] As that case law observes, it is "not insignificant" that the grant of discretion, such as it is, is contained in the same section which imposes the obligation to execute the removal order.[204] As *Wang v. Canada (Minister of Citizenship and Immigration)* notes, "deferral for the mere sake of delay is not in accordance with the imperatives of the *Act*."[205] Instead, the Federal Court stated, "the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective."[206] Counsel will often file a written request to defer removal for health reasons or in the best interests of the children involved. In *Forde v. Canada (Minister of Public Safety and Emergency Preparedness)* ("*Forde*"), the Federal Court cautioned against the overuse of deferral, which erodes public confidence in the integrity of the immigration system and the rule of law.[207] Deferral, then, is not a standalone administrative safeguard and is arguably carrying much more weight than it was intended to bear in the statutory framework.

These administrative safety valves are all delegated discretionary decisions made by administrative (Immigration, Refugees and Citizenship Canada or Canadian Border Services Agency officers) or political (Minister or Minister's delegate) decision makers. They are discretionary decisions based primarily on written submissions. These applicants, at the moment of their application, are foreign nationals.[208] For those of them who are not at risk, the applicable level of procedural fairness is minimal. Moreover, some of these decision makers have limited scope. In *Revell*, Justice De Montigny agreed that the removals officer had "[a]dmittedly…only limited discretion," but countered that the Federal Court "has more leeway than an enforcement officer when considering a request for a stay" and when reviewing deferral decisions.[209] In order to access the greater "leeway" of the Federal Court, then, the deportee must judicially review the

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203. *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 [*Wang*]; *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 245; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81; *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 286.
204. *Wang*, *supra* note 203 at para 48, cited most recently in *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073 at para 156.
205. *Supra* note 203 at para 48.
206. *Ibid*.
207. *Forde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 3.
208. *IRPA*, *supra* note 43, ss 46-47 (setting out loss of permanent resident status).
209. *Revell*, *supra* note 7 at paras 50-51.

deferral decision, which re-presents the access to justice issue, as well as the need for haste.

These administrative safeguards operate in both prematurity analysis and fundamental justice analysis. While the prematurity analysis is prospective, looking forward to the remaining possible stages before the individual is deported, the fundamental justice analysis is broader, looking backward to the procedural fairness that came before the challenged decision and forward to the remainder of the process. This "process as a whole" or "total context" is then determined to be in accordance with fundamental justice. [210] How separate are these administrative processes from deportation? On the one hand, the safeguards are distinct from the removal process; to initiate them requires a hard turn off of the deportation road. They are not a necessary part of removal, and one could be deported without ever initiating any of them. In *Moretto*'s case, for example, the H&C application required Moretto to initiate a separate and expensive process with a different government department.[211] The application will not be processed until the fees are paid, there is no guarantee of processing before removal, and it may take years to obtain a decision.[212] On the other hand, in the background, these processes are interlocking and co-sustaining in problematic ways. Years ago, Haigh and Smith remarked that the same Minister who decides a danger opinion also decides an H&C application.[213] More recently, Grey observed that some decisions may inform one another, using the same underlying factual record, which repeatedly factors into future assessments and makes upstream findings in prior decisions difficult to displace.[214] Judicial use of administrative safeguards has not accounted for these nuances.

The common ground between the two sides of administrative safeguards is that they are not generally intended to save someone from deportation.[215] The administrative process that the courts use to ground deportation's separation

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210. *Powell*, *supra* note 94; *Stables*, *supra* note 94 at para 56; *Torre*, *supra* note 94; *Brar*, *supra* note 94.
211. *Moretto*, *supra* note 7. Removal falls under the purview of the CBSA, while H&C applications fall under the purview of the IRCC.
212. Applicants may request deferral of removal or file an emergency stay application, but these are not routinely granted. Only foreign nationals may file an H&C application, which means permanent residents subject to removal may only file between the time their removal order comes into force (the moment at which they lose status) and their request for deferral of removal. For someone in Moretto's position, this period was two weeks long.
213. *Supra* note 160 at 280.
214. Grey, *supra* note 5 at 136-37 (referring specifically to connections between findings made at the IRB and in the PRRA).
215. The exception to this is the PRRA.

from criminal and penal law and disengagement from constitutional law provides process protections to guard against mistakes, primarily mistakes of process; it does not address the nature, consequences, or proportionality of deportation.[216] The absurdity created by this webbing is visible in *Kreishan*, in which the same individual interests which warranted a hearing at the beginning of the refugee claim process warranted only a temporary deferral of removal or judicial stay assessment at its end.

V. SUSTAINING THE CITIZEN/NON-CITIZEN DISTINCTION

This article began with the observation that deportation exists at some remove from Canadian public law. Its central argument is that this remove is enabled and sustained by the webbing of public law. The webbing provides a third way into public law analysis, an opening between public law as legal governance in its higher register, and public law as judicial doctrine in its lower register. This third way explains why some legal contexts do not conform to either of those registers. In the deportation context, the webbing provides a framework for considering why like things are not treated alike.

The concept of webbing sheds light not only on the relationships *between* the individual fields but also on their evolution and thickening over time. Comparativists regularly draw connections between fields; the difference in the public law context is that the fields stand together under the umbrella of a meta-field of law. As fields of law, they are connected by the parties they co-implicate and the state they co-constitute and delimit. In the context of a meta-field such as public law, the challenge is to read the cases vertically in light of the meta-field's values as much as laterally in light of the mutual referents across specific fields. Indeed, the webbing in deportation matters belies both higher-order theoretical values and field-specific doctrinal values. Its thickening strands suggest that the connective tissue of public law affords a productive view of legal contexts that traverse public law generally, and a new site for materializing the citizen/non-citizen distinction in particular.

From a vertical perspective, the webbing is the means by which deportation law is held below the theoretical values of public law, primarily through its location on the periphery and in between the doctrinal fields of public law. From a horizontal perspective, the webbing is the mechanism by which deportation is shunted towards administrative law. When deportation is characterized as

216. This was argued by the applicant in *Revell* but dismissed by the Federal Court. See *supra* note 7 at para 112.

non-penal and analogized to individualized sentencing considerations, reduced to minute calculations of prematurity and engagement, or neutralized by administrative fairness and statutory administrative safeguards, each judicial decision may no longer be taken on its own terms. Close examination of the horizontal webbing reveals overreliance on the field of administrative law. Administrative law, however, evolved as "a set of common law principles for the purpose of supervising the regulatory state, ensuring its efficacy, and preventing arbitrariness."[217] It is concerned with regulation, deputized authority, and fairness. In contrast, in criminal and constitutional law contexts, the posture of the state towards the individual is adversarial. Both parties speak in the language of rights, liberties, and proportionality. By depriving deportees of criminal justice and constitutional rights protections, the webbing leaves some rights and freedoms of deportees, such as liberty, security, and freedom from cruel and unusual treatment or punishment, subject to a lesser law.

The age of migration and deportation presents new challenges for public law. Many of public law's core concepts emerged before sovereign statehood, citizenship, and passports achieved full form. Contemporary public law internalizes the dissonance presented by non-citizens through various mechanisms. In Canada, one of those mechanisms is the webbing that this article has described. From both vertical and horizontal perspectives, this webbing provides the citizen/non-citizen distinction with juridical form and content. The judiciary relies on various aspects of the webbing—deportation's administrative nature, its multi-stage processes and procedures, and its eleventh-hour safeguards—to legally express the state's continued commitment to the citizen/non-citizen distinction.

217. Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) at 132.