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De Facto Immigration Courts

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In Padilla v. Kentucky*, the Supreme Court recognized a noncitizen defendant's right to be informed by her attorney of any downstream immigration consequences that might flow from a proposed plea deal. In establishing this important right, the Court recognized a stark reality: that in many instances, a noncitizen's only meaningful opportunity to avoid removal arises in upstream criminal proceedings. This Article traces out the implications of a world where criminal courts (especially at the state level) operate as de facto immigration courts. This Article aims to do three things. First, it shows that local prosecutors operate as gatekeepers in the world of de facto immigration courts, a point the Court recognizes and embraces in* Padilla *and other cases. Second, it explains that prosecutors can exercise their gatekeeping power to deviate from or completely unsettle federal immigration enforcement priorities, a quality that distinguishes them from other local actors participating*

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in immigration enforcement. Third and finally, this Article explores how Congress and the Court might accommodate this nascent reality.

INTRODUCTION

The academic study of criminal law actors within the immigration universe is nothing new. A robust scholarly literature has grappled with precisely this issue.[1] But amidst the frenzy caused by the delegation of immigration power to local police,[2] jails, state and federal prisons,[3] and parole

1. For a useful sampling, see generally Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (explaining how federal officials are using the criminal prosecution of migration-related offenses to regulate the migration flow); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (exploring how the emerging practice of immigration crime prosecution is presenting challenges to the conventional frameworks used to describe the criminal justice system and the civil immigration system); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012) (explaining that the intertwining of criminal law and immigration law encourages the tendency to treat legal rules and legal procedures as interchangeable to be deployed on an ad hoc basis); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (exploring the causes and theoretical underpinnings of the criminalization of immigration law).

2. Under the 287(g) program, state and local officers can be cross designated as agents authorized to carry out certain federal immigration enforcement duties. *See* Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006); *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Mar. 6, 2013). For a critique of the 287(g) program, see Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1086–88 (2004) (describing the ways in which local law enforcement officers empowered to verify the immigration status of investigatory targets often engage in racial-subordinating police practices).

boards and probation officers,[4] we have missed an important point: that delegation is no monolith. Over the last several years, our nation's inferior criminal courts—and the 2,300 state and local prosecutors[5] who rule them—have been quietly accumulating immigration power of a different order. In many cases, a noncitizen's only meaningful chance to avoid removal is to negotiate a deal in upstream criminal proceedings that provides immunity against downstream removal. In other words, state courts have become de facto immigration courts.

This point was central to the Supreme Court's landmark decision, *Padilla v. Kentucky*, which held that a noncitizen defendant had the right to know of any clearly adverse immigration consequences flowing from any proposed plea deal.[6] The vast majority of convictions are achieved by plea bargain, which means prosecutors can set the terms of the negotiation through their broad charging discretion. The immigration code attaches immigration consequences to convictions, which means a system of conviction-based removals inevitably benefits prosecutors because they, more than any other actor in the criminal justice system, determine the content of the conviction. Thus, a prosecutor can leverage a noncitizen defendant's immigration status to achieve criminal justice outcomes, which can deviate from and sometimes outright displace federal immigration priorities. Consider the following examples:

- Reginald Gousse, a citizen of Haiti, had finished serving a twelve-year sentence for armed robbery when prosecutors assisted him in withdrawing his original plea conviction. In exchange for Gousse's willingness to serve as an informant in another case, the

3. *See Fact Sheet: Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/cap.htm (last visited Mar. 6, 2013) (explaining that a key component of the "Criminal Alien Program" includes immigration screening of local jails and state and federal prison inmates); Cindy Carcamo, *O.C. Jails Ready for Immigration Detainees*, ORANGE COUNTY REG., Oct. 1, 2010, http://www.ocregister.com/articles/detainees-269112-officials-ice.html.

4. A separate component of the Criminal Alien Program called "Joint Criminal Alien Removal Taskforces" apprehends at-large noncitizens who have been convicted of certain categories of crimes, and its apprehension strategy involves working with local agencies including probation and parole offices. *See Fact Sheet: Criminal Alien Program*, *supra* note 3.

5. *See* STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 1 tbl.1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf. Although states can vest prosecutorial power at both the state and local level, most criminal laws are enforced by prosecutors at the local level. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545–46 (2011) (noting that state-level prosecutors, like attorneys general, typically assume exclusive or concurrent jurisdiction over only a handful of matters). "Local" power can be further disaggregated between the county and city levels. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. (forthcoming 2013) (manuscript at 32–34) (on file with the *California Law Review*) (noting the difference between Los Angeles District Attorneys and City Attorneys). For purposes of this Article, I use the term "state prosecutor" and "local prosecutor" interchangeably.

6. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

prosecutors agreed to undo the criminal basis of his removability, and they did this even though it was "100 percent" the intention of Immigration and Customs Enforcement (ICE) officials to remove Gousse.[7]

- Troy Critchley was initially charged with several counts of involuntary manslaughter in relation to an accident at a car show. Upon learning that Critchley was a citizen of Australia, prosecutors dropped the felony charges and offered instead a plea conviction for several misdemeanor violations to enable the families of the victims to more easily pursue civil suits against Critchley and event organizers.[8]

These examples illustrate that while the federal government does not formally task state and local prosecutors with making immigration-related decisions, local prosecutors possess the authority to functionally do so. An increasingly large cross section of crimes simultaneously renders noncitizens removable and categorically precludes them from even applying for equitable relief. Therefore, by the time they reach removal proceedings, their best chance to avoid removal has already passed.[9] Thus, state courts have become de facto immigration courts—venues where the determinative decision for immigration purposes (the conviction) is negotiated even while the formal responsibility for implementing the consequences of those decisions (deportation) remains in removal proceedings.

Acknowledging the reality of de facto immigration courts pushes back on the notion that the Executive can oversee and correct all local enforcement decisions that deviate from federal priorities. In many of the more controversial immigration enforcement programs—like the 287(g) partnerships and the Secure Communities initiative[10]—the Executive creates and oversees immigration enforcement strategies involving state and local law enforcement officers.[11] For these local officers, what the Executive giveth, the Executive can taketh away. This has been the primary defense raised by the Department of Homeland Security (DHS) against a chorus of critics suspicious and fearful of

7. *See infra* p. 579.
8. *See infra* p. 579.
9. *See infra* Part I.
10. *See infra* Part II.A.
11. At least 1,144 local jurisdictions are now authorized to carry out immigration enforcement duties in some capacity. *See* AARTI KOHLI & DEEPA VARMA, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, BORDERS, JAILS, AND JOBSITES: AN OVERVIEW OF FEDERAL IMMIGRATION ENFORCEMENT PROGRAMS IN THE U.S. 15 fig.3 (2011), *available at* http://www.law.berkeley.edu/files/WI_Enforcement_Paper_final_web.pdf (accounting for 71 memoranda of agreement between local authorities and the federal government under the 287(g) program, 104 Fugitive Operations Teams, and 969 counties participating in the Secure Communities program).

the biases and incompetence of localities.[12] In these arrangements, the Executive can change the terms of the delegated authority,[13] take delegated power away altogether,[14] and bend the will of even the most defiant of local officers.[15] The Executive can do none of these things with local prosecutors.[16] Local prosecutors can ignore, embrace, or subvert federal immigration goals without fear of admonishment because unless and until they convict a noncitizen, DHS may not step in to deport noncitizens on criminal grounds.[17] Local prosecutors can influence (if not outright determine) immigration outcomes and local enforcement priorities can unsettle (if not outright displace) federal priorities. Thus, despite whatever promises of federal oversight the DHS offers, local rules, practices, and preferences developed in the halls of justice all across the country will continue to shape immigration law's project of selecting who may enter and remain a member of the national polity.

This Article explores the phenomenon of de facto immigration courts in three steps. Part I begins with a brief overview of the conviction-based removal system. It then turns to *Padilla v. Kentucky* and explains how the Court's holding rests on an acknowledgement that criminal courts function as de facto immigration courts. In other words, immigration law has effectively ceded at least some part of its project of member selection to criminal law. And because

12. On its ICE website, the DHS lists a variety of initiatives and practices it employs to ensure that local law enforcement officers do not engage in racial or ethnic profiling, including a 24-hour complaint line; the services of a "leading statistician" for analyzing outlier data; and the distribution of "outreach and awareness materials" to police. *See Secure Communities Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited Mar. 6, 2013).

13. *See infra* Part II.A (discussing the DHS's refinement of the Memoranda of Agreement governing 287(g) delegations of power to local officers).

14. *See* Alan Gomez, *Immigration Enforcement Program to Be Shut Down*, USA TODAY (Feb. 17, 2012), http://www.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1 (reporting that the DHS will not be renewing 287(g) agreements in certain jurisdictions); Randal C. Archibold, *Immigration Hard-Liner Has His Wings Clipped*, N.Y. TIMES, Oct. 7, 2009, at A14 (reporting that DHS withdrew much of the immigration enforcement authority it initially delegated to Maricopa County, Arizona, Sheriff Joe Arpaio).

15. *See infra* p. 574 (discussing the DHS's refusal to permit local jurisdictions to withdraw from the Secure Communities information-sharing program).

16. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

17. Of course, the DHS has created resources for prosecutors interested in creating plea convictions that facilitate removals. *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011), *available at* http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf. In its guide, the DHS states, in a tone that is as unassuming as it is deferential,

> Please note that simply because a conviction makes an alien removable, it does not mean the alien will be actually removed from the United States. In some cases, an alien may be subject to removal based upon a criminal conviction, but be eligible for relief from removal. If you have a specific question about a particular crime or offense, you may wish to contact the nearest ICE Office of Chief Counsel to discuss it.

Id. at 30.

prosecutors heavily influence criminal proceedings through their broad charging discretion, prosecutors can exercise gatekeeping power within the conviction-based removal system, a point the Court recognizes in *Padilla* as well as in other cases.

Part II turns to the task of assessing de facto immigration courts. The most common criticism levied against the Executive for partnering with local enforcement actors for immigration purposes is that such partnerships enable the abusive or incompetent enforcement of immigration laws. The Executive's primary defense has been that it can correct abuse and incompetence through a variety of oversight tools. But local prosecutors stand apart from other immigration enforcement partners in terms of the independence they enjoy over their enforcement decisions. This decisional independence undermines the Executive's promise that federal officials can correct any enforcement defects generated by local law enforcement partners. Of course, prosecutors do not enjoy completely unfettered gatekeeping power. Although prosecutors are largely free from Executive oversight, they cannot evade other constraints. This Part concludes by exploring the legal-status, political, and resource constraints within which prosecutors must work.

Assuming that decisions issued by state courts will continue to bind and displace federal immigration priorities into the near future, Part III explores how we might accommodate this reality. Congress created an enforcement system that attaches immigration consequences to criminal convictions without formally empowering any party within the criminal courts to make immigration-related decisions. By default, this has created a system in which prosecutors are empowered to control the conviction-based removal process. But Congress can change this default by expressly delegating immigration power to the criminal courts. It has done so in the past by empowering sentencing judges to prevent immigration officials from deporting certain noncitizens with strong equitable claims. A second accommodation can come from the Court itself. Now that the *Padilla* Court has required defense lawyers and prosecutors to negotiate deals that can avoid downstream removal, it should go the distance by providing a clear set of plea-bargaining rules for the parties. In recent years, the Court has deviated from the longstanding rule of requiring immigration judges to employ a "categorical approach" to interpreting the immigration consequences of convictions, enabling them to consider an increasingly wider array of documents and information when determining a noncitizen's removability. But the consequence of expanding this universe of documents is to introduce greater uncertainty into upstream criminal proceedings, which ultimately undermines the ability of prosecutors and defense lawyers to strike deals that can reliably insulate a noncitizen from removal. Thus, a return to the categorical approach may be in order. I then offer some concluding thoughts.

I.
ACKNOWLEDGING DE FACTO IMMIGRATION COURTS

As immigration scholars have thoroughly explained,[18] the immigration code saddles a wide range of convictions with the consequence of removal. As these scholars have also noted, the human costs of this conviction-based removal system can be devastating.[19] Moving forward, *Padilla v. Kentucky* promises to reduce some of these costs by giving noncitizen defendants better information about what exactly they are agreeing to when they accept a prosecutor's plea deal. As I explain here, whether *Padilla*'s promise can be fully realized depends in great part on the cooperation of local prosecutors who enjoy gatekeeping authority within the larger conviction-based removal system.

A. A Primer on Convictions and Their Immigration Consequences

Since the late nineteenth century, our nation's immigration laws have been structured so that a variety of criminal convictions can trigger some form of immigration consequence.[20] Immigration law divides the pool of migrants into classes: immigrants, nonimmigrants, and unauthorized immigrants, to name a few. Within each class, a conviction can either force migrants to sever their ties with the United States altogether or prevent them from developing any ties in the first place by excluding them at the border. For example, for those who reside lawfully in the United States, a drug-related conviction can lead to deportation.[21] This banishment can be permanent and makes very little room for countervailing equitable considerations like the duration of an immigrant's residence or the depth of her family ties in the United States.[22] For those who are abroad and are seeking to enter the United States, a conviction can render one "inadmissible"[23] and can foreclose the possibility of reapplying for admission.[24] Moreover, convictions can have a compounding effect: for those who are removed on the basis of serious crimes and who subsequently decide

18. *See, e.g.*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

19. *See generally* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (2012) (exploring the deleterious effects of deporting noncitizens with strong ties to the United States back to their countries of origin).

20. These range from a bar at entry to expulsion once inside the borders to bars on readmittance. For example, Congress prohibited the entry of several different classes of persons including those "who are undergoing a sentence for conviction in their own country of felonious crimes other than political[.]" Page Act, ch. 141, § 5, 18 Stat. 477 (1875).

21. *See* INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2006).

22. *See id.* § 237(a)(2)(A)(vi).

23. *See id.* § 212(a)(2)(A) (listing criminal and other related grounds for exclusion).

24. The immigration code permanently bars from reapplying for readmission those who have been removed and have been convicted of an "aggravated felony." *See id.* § 212(a)(9)(A)(i) ("Any alien who has been ordered removed . . . and who again seeks admission . . . at any time in the case of an alien conviction of an aggravated felony[] is inadmissible.").

to undertake the risky journey back into the United States through surreptitious channels, the type of conviction underlying their previous removal can mean the difference between spending two or twenty years in prison.[25]

As a model for member selection, conviction-based removals focus on post-entry conduct: acts committed by immigrants after lawful entry into the United States.[26] Thus, the 21 million noncitizens who are lawfully present in the United States[27] will typically have the privilege of continued residence revoked only in the event of a conviction. By contrast, the removal of unauthorized immigrants often only requires a mere arrest and investigation. Moreover, convictions are broadly defined for immigration purposes. The definition reaches convictions generated both by trials and plea agreements, and focuses on the term of imprisonment that is memorialized in the sentence (or possible statutory sentence).[28] It can include even noncriminal offenses for which sanctions are punitive only in the faintest sense of the term.[29]

Conviction-based removals have attracted their share of criticism, particularly in regard to the harsh results that they can produce.[30] As proof of

25. Congress imposes criminal sanctions on illegal reentry and the sanctions increase where the illegal reentrant was previously deported on criminal grounds. *Compare id.* § 276(a) (providing that illegal reentry after deportation shall not lead to a term of imprisonment in excess of two years), *with id.* § 276(b)(2) (providing that illegal reentry after removal for an aggravated felony can lead to a term of imprisonment of "not more than 20 years").

26. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5–6 (2007) (comparing the two basic types of deportation laws: extended border controls, which govern entry into the country, and postentry social controls, which govern conduct after admission into the country). A common justification of the postentry social control model of regulation is that the immigrant has broken the terms of admission to which the national community has consented (through its immigration officials). *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 35 (2006) (describing the "immigration as contract" rationale for deportation, according to which "the power to deport is part of the agreement to admit"). By contrast, the justification for other forms of removal is often grounded in the lack of initial consent, as is the case for admission through misrepresentation or entry without inspection, both of which lead to such an outcome. *See* INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (2006) (listing "[i]llegal entrants and immigration violators" as a category of removable immigrants); *id.* § 212(a)(6)(C) (listing "misrepresentation" as grounds for removal).

27. *See* Michael Hoefer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, DEP'T OF HOMELAND SEC. POPULATION ESTIMATES, Feb. 2011, at 1, 3, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

28. *See* INA § 101(a)(48)(A)–(B), 8 U.S.C. § 1101(a)(48)(A)–(B) (2006).

29. *See* THE ASS'N OF THE BAR OF THE CITY OF N.Y., THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY 2–3 (2007), *available at* http://www.nycbar.org/pdf/report/Immigration.pdf.

30. A growing body of work criticizes conviction-based removals on proportionality grounds. For a useful sampling, see generally Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1660–62 (2009); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482–86 (2007); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722–25 (2009); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012); Michael J.

the absurd concessions immigration law has made to criminal law, commentators often point out that a crime that is neither "aggravated" nor a "felony" can still qualify as an "aggravated felony" within the meaning of the immigration code.[31] For much of our country's history, only a limited list of serious crimes like drug trafficking, some weapons offenses, and crimes of moral turpitude[32] triggered deportation hearings.[33] Yet Congress in 1996 drastically expanded the grounds for removal such that minor drug-related crimes,[34] hair-pulling,[35] turnstile-jumping,[36] and shoplifting[37] could all serve as the basis for removal. And this is true even if the noncitizen served a deferred sentence.[38] As a result, even convictions for petty offenses and misdemeanors—a category of crimes where those convicted often serve no jail time—can lead to removal.[39]

Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011).

31. *See* Jennifer M. Chacón, Op-Ed., *The Immigration Consequences of Criminal Convictions*, L.A. DAILY J. (Apr. 6, 2010), http://www.law.uci.edu/pdf/djournal_chacon_040610.pdf.

32. *See* Stumpf, *supra* note 30 at 1722.

33. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1672 (2011).

34. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). For example, in one case, immigration officials charged as removable an LPR on the basis of a nearly nineteen-year-old drug conviction. The man was asked by someone at a party whether he sold cocaine; he replied that he did not, but noted that someone else at the party might be able to. He pleaded guilty to conspiracy to sell a controlled substance, paid a fine, and served five years of probation. Velasquez v. Reno, 37 F. Supp. 2d 663, 665 (D.N.J. 1999).

35. *See* Anthony Lewis, Op-Ed., *"This Has Got Me in Some Kind of Whirlwind,"* N.Y. TIMES, Jan. 8, 2000, at A13.

36. *See* Bryan Lonegan, Op-Ed., *Forced to Go Home Again*, N.Y. TIMES, Feb. 27, 2005, at 15 ("Since 1996, when Congress altered immigration laws, any noncitizen—including people who have legally lived in the United States since they were babies—convicted of a broad range of crimes including petty offenses like turnstile jumping, shoplifting or possession of a small quantity of marijuana may be subject to deportation."); N.Y. PENAL LAW § 165.15(3) (McKinney 2012) (stating that a person is guilty of theft of services when, "with intent to obtain . . . subway . . . service without payment of the lawful charge therefor, or to avoid payment of the lawful charge for such transportation service which has been rendered to him, he obtains or attempts to obtain such service or avoids or attempts to avoid payment therefor by . . . unjustifiable failure or refusal to pay")

37. *See* United States v. Pacheco, 225 F.3d 148, 150 (2d Cir. 2000).

38. *See* INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2006) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

39. For a useful summary of the expansion of crimes that can lead to removal, see Stumpf, *supra* note 30 at 1722–25; *see also* Banks, *supra* note 30 at 1662 ("The expansion of crime-related deportation grounds in the 1990s was motivated in part to punish noncitizens who violate U.S. criminal law."); Legomsky, *supra* note 30, at 485 (observing that immigration law's "expansions mean that an 'aggravated felony' need no longer be either aggravated or a felony").

The harshness of conviction-based removals is further compounded by the fact that convictions for a broad range of crimes also categorically preclude noncitizens from attaining equitable relief.[40] For many years, immigration judges (IJs) could dispense equitable relief to those noncitizens whose removal would be legally justifiable but morally questionable.[41] This, too, was eviscerated in 1996. The same year that Congress expanded the criminal grounds for removal (and by extension broadened the power of state and local prosecutors over immigration consequences), Congress also severely constrained the ability of IJs to issue equitable relief by imposing demanding threshold requirements that noncitizens must meet.[42] Specifically, to be eligible for cancellation of removal, a noncitizen must show that she has *not* been convicted of an aggravated felony.[43] The same is true for asylum relief.[44] And while an aggravated felon *is* eligible for withholding of removal (a less complete form of relief) she must still show that she has not been convicted of a "particularly serious crime."[45]

At the enforcement level, the DHS prioritizes the removal of immigrants with convictions. One of the "Morton Memos" issued by Director of Immigration and Customs Enforcement John Morton lists DHS removal priorities to be, in order of importance, immigrants convicted of the following: felonies (both the "aggravated" and "regular" variety); multiple misdemeanors; and single misdemeanors.[46] Therefore, convictions function as one of the federal government's sorting mechanisms for would-be members of society. Given that the DHS has the resources to remove less than 4 percent of the nation's unauthorized population,[47] convictions help immigration officials decide which lawful immigrants to pursue today in a way that ostensibly

40. INA §§ 240A(a)(3), 240A(b)(1)(C) (cancellation of removal); INA § 208(b)(2)(A)(ii) (asylum); INA § 241(b)(3)(B)(ii) (withholding of removal).

41. As Josh Bowers observes, "Law needs equitable discretion to 'mitigate or temper' broad statutes, and equity needs law to provide the superstructure. Thus, equity and law are not mutually exclusive; rather, equity may serve to refine law." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1671 (2010).

42. *See generally* Morawetz, *supra* note 18.

43. *See* INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2006). "Crimes of moral turpitude" is another category of crimes that has preclusive effect. *See id.* § 237(a)(2)(A)(i)(II).

44. *See id.* § 208(b)(2)(A)(ii) (excluding those who have been convicted of a "particularly serious crime" from asylum eligibility); *id.* § 208(b)(2)(B)(i) (defining "particularly serious crime" to include "aggravated felony").

45. *See id.* § 241(b)(3)(B)(ii). Whereas recipients of asylum relief may apply for permanent residence after one year, recipients of withholding of removal earn only the right not to be removed to the country of persecution.

46. *See* Memorandum from John Morton to All ICE Employees 1–2 (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

47. *Id.* at 1. There are over 13 million LPRs in the United States. *See* Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2011*, DEP'T HOMELAND SEC. POPULATION ESTIMATES, July 2012, at 1, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2011.pdf.

furthers the DHS's policy goals of deporting criminals. This priority is reflected in the DHS removal statistics, which state that in 2012, 55 percent of removals were of "known criminal aliens."[48]

Finally, criminal convictions also generate other procedural consequences which increase the likelihood of actual removal. For instance, convictions determine which immigrants will be detained without the possibility of release and which immigrants will retain the right to post bond pending removal proceedings.[49] Because noncitizens detained as a result of convictions are often transferred from one state to another on a moment's notice, the realities of geography can pose practical challenges to accessing counsel (if they have one) and preparing for removal defense more generally.[50]

B. Conscripting Defense Lawyers: Padilla v. Kentucky

It was this backdrop—the increasing number of crimes triggering deportation and the decreasing availability of equitable relief—that prompted *Padilla v. Kentucky*.[51] There, Mr. Padilla had pleaded guilty to a state controlled-substance crime on the advice of his lawyer, who assured him that he faced no immigration consequences "since he had been in the country so long."[52] Mr. Padilla's lawyer was patently wrong and Mr. Padilla claimed that he would have certainly gone to trial but for his lawyer's erroneous advice.[53] The Court held that a defense lawyer's misadvice as to the immigration consequences of a plea conviction could render that assistance ineffective in violation of the Sixth Amendment.[54] For many years, criminal defense lawyers could say nothing, offer the wrong advice, or just plead ignorance about the immigration consequences of a plea deal. *Padilla* changed that. It created an informational right for noncitizen defendants[55] and brought uniformity to an

48. In 2012, DHS effectuated over 400,000 removals, approximately 225,000 of which involved known criminal aliens. *See* News Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 21, 2012), *available at* http://www.ice.gov/news/releases/1212/121221washingtondc2.htm; *see also Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/removal-statistics/ (follow "Criminal Aliens" hyperlink).

49. *See* INA § 236, 8 U.S.C. § 1226(c) (2006); *see also* Demore v. Kim, 538 U.S. 510 (2003) (upholding the constitutionality of detaining criminal aliens pending their removal proceedings without bail).

50. *See* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 34–38 (2011).

51. 130 S. Ct. 1473 (2010).

52. *Id.* at 1478.

53. *Id.*

54. *Id.*

55. In describing the stakes raised by *Padilla v. Kentucky*, Jenny Roberts noted that the state court's denial of Padilla's habeas claim implicated "an important issue of constitutional informational

area previously governed by a patchwork of rules developed by the various states.[56] *Padilla* stood for the proposition that a mistake made in one regulatory setting (the criminal justice system) could not go uncorrected even if the cost of correction was unsettling an otherwise legitimate outcome sought in another regulatory setting (the immigration system).

Padilla's doctrinal seeds were planted in a case that came nearly a decade earlier. In 1996, Congress passed a pair of statutes restricting the availability of equitable relief to criminal noncitizens.[57] In *INS v. St. Cyr*, the Court addressed whether a provision of one of these statutes eliminating the availability of discretionary relief (which the Attorney General could implement at the request of an IJ) could be applied with retroactive effect.[58] Writing for the Court, Justice Stevens explained that those statutes could not be applied retroactively without unsettling the exchange in benefits each party incurred from the plea bargain, namely the defendant's lesser sentence and the prosecutor's conviction.[59] As a formal matter, *St. Cyr* was not an individual rights case. The

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rights in the guilty-plea context." Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 123 (2009). *Padilla* is a landmark decision and has already invited a slew of commentary. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011); César Cuauhtémoc García Hernández, *When State Courts Meet* Padilla*: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299 (2011); Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. Rev. 1515 (2011).

56. A few states recognized such an informational right, although the sources of the information varied. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 708 (2001) (noting that Colorado, Indiana, Ohio, and Oregon recognized the right of noncitizens to know of the immigration consequences of their plea conviction). Other states imposed on trial courts a duty to inform. *See* INS v. St. Cyr, 533 U.S. 289, 322 n.48 (2001). But the majority of states recognized no such right on the theory that the immigration consequences of a plea conviction were collateral to the conviction itself. Because the voluntariness of a plea for due process purposes demanded that defendants be apprised of only the direct consequences of their conviction, the collateral consequences doctrine allowed noncitizen defendants to blindly agree to the terms of a plea conviction even if those terms resulted in permanent banishment.

57. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009–546 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). For a useful overview of how those statutes curtail the availability of equitable relief to immigrants in removal proceedings, see *St. Cyr*, 533 U.S. at 293–98.

58. *Id.* at 292–93. Section 212(c) of the INA authorized the Attorney General to waive deportation of resident noncitizens as a matter of discretionary relief. *See* INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). In 1996, Congress repealed this provision through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009–597 (1996).

59. *St. Cyr*, 533 U.S. at 321–22. Enrico St. Cyr pleaded guilty to a state drug possession conviction and was, at the time of his plea, eligible for discretionary relief from the Attorney General. *Id.* at 293. *St. Cyr* was the first time the Court recognized the important role that state convictions play in generating immigration outcomes. As the Court observed:

> In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous "tangible benefits,

Court was interpreting a statute. But the principles guiding the Court's interpretation provided the *Padilla* Court with the foothold it needed (again through Justice Stevens) to resolve the Sixth Amendment issue in Mr. Padilla's favor.

Both *Padilla* and *St. Cyr* reflect the Court's evolving understanding of the role that convictions play in shaping immigration outcomes. The two decisions represent a judicial acknowledgement that what happens in criminal proceedings informs and constrains what happens in downstream removal proceedings. Moreover, a central part of the Court's reasoning in *Padilla* was the recognition that a noncitizen's only real opportunity to avoid removal was to challenge the conviction itself: "[I]mportantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."[60] Here, the Court acknowledges that criminal courts operate as de facto immigration courts. Although the formal authority to enter removal orders remains with immigration judges, because removal is often "an automatic result" for criminal noncitizens, the terms and conditions over which defense lawyers and prosecutors bargain and haggle effectively determine a noncitizen's immigration-related fate.

C. Plea Bargaining "Creatively"

As a Sixth Amendment case, *Padilla* had very little to say about prosecutors. Yet in reaching its decision, the Court was not unmindful of the gatekeeping role played by prosecutors. Even where a defense lawyer is able to identify whether a particular conviction will trigger deportation, such lawyerly acumen by itself will not necessarily carry that noncitizen to higher, more merciful ground. The Court noted:

> [A] criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able *to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation*, as by avoiding a conviction for an offense that automatically triggers the removal consequence.[61]

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such as promptly imposed punishment without the expenditure of prosecutorial resources." There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.

Id. at 322 (internal citations omitted).

60. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

61. *Id.* at 1486 (emphasis added).

In other words, once a defense lawyer identifies any clearly adverse immigration consequences that may flow from a proposed plea deal, she must still try to persuade a prosecutor of the benefits of leniency. As a judicial intervention, *Padilla* gave noncitizens the right to know what destiny awaited them in downstream immigration proceedings, but it did not anoint them keepers of their own destiny. That role went to prosecutors whose monopoly over prosecutorial power enables them to influence the pool of potentially removable immigrants.[62] As a practical matter, then, *Padilla* affects the plea-bargaining options of both defense lawyers and prosecutors.[63]

Two additional doctrinal developments fortify the gatekeeping role that local prosecutors play between the immigration and criminal justice bureaucracies. First, the Supreme Court has continued to elaborate on its vision of how extending the Sixth Amendment into the plea-bargaining arena might affect and empower prosecutors. In *Lafler v. Cooper*, the defendant was charged with a variety of offenses including assault with intent to murder.[64] The prosecutor twice offered to drop some of the charges and recommended a reduced sentence, but the defendant rejected both offers on advice of counsel, who convinced him that the prosecution would be unable to establish intent because the victim was shot below the waist.[65] The defendant proceeded to trial, was convicted, and received a sentence well above what the prosecutor initially offered.[66] The defendant challenged his conviction on Sixth Amendment grounds. The Court found counsel's performance at the plea-bargaining stage to be deficient (citing *Padilla* for support),[67] went on to find that counsel's deficient performance prejudiced the defendant (the second step in the *Strickland v. Washington*[68] inquiry for finding ineffective assistance of counsel),[69] and thus concluded that the defendant had established a Sixth

62. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2506 n.177 (2004) ("[P]rosecutors are monopolists who have the market power to price-discriminate in a way that sellers in a competitive market cannot. Defendants lack an equal countervailing monopsony power; prosecutors can bargain for pleas from other defendants and try the cases of the few holdouts."); Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

63. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting) (lamenting that the majority's opinion has burdened the plea-bargaining process by "constitutionalizing" it); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911–12 (1992) (explaining the various concessions offered and negotiated in the plea-bargaining process).

64. *Lafler*, 132 S. Ct. at 1380 (majority opinion).

65. *See id.* at 1383.

66. The defendant received a sentence of 185 to 360 months, which well exceeds the prosecutor's initial offer to recommend a sentence in the range of 51 to 85 months. *Id.*

67. *Id.* at 1384.

68. 466 U.S. 668 (1984).

69. *Lafler*, 132 S. Ct. at 1386.

Amendment claim.[70] Importantly, in discussing the kind of remedy that would be appropriate for such a violation, the Court had this to say:

> In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. *In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.* Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.[71]

Lafler embraces the position that assessing the effectiveness of counsel's performance will often prove impossible without first learning what plea bargain a prosecutor offered. This changes the dynamic between local prosecutors and noncitizen defendants, especially in the plea-bargaining process, on which prosecutors rely to resolve the bulk of their cases.[72] Justice Scalia's dissent only highlights this point. In objecting to the extension of the Sixth Amendment protections into the plea-bargaining context, Justice Scalia remarked: "[I]t would be foolish to think that 'constitutional' rules governing *counsel*'s behavior will not be followed by rules governing the *prosecution*'s behavior in the plea-bargaining process that the Court today announces '*is* the criminal justice system.'"[73] This expansion of the Sixth Amendment is significant. It not only requires defense attorneys to contemplate downstream immigration consequences when advising their clients, but also forces prosecutors to think carefully before making an initial plea offer given the possibility that such a plea may serve as the baseline for evaluating any subsequent Sixth Amendment challenge.

The Court continued to build on *Padilla* in *Missouri v. Frye*,[74] a companion case to *Lafler*. In *Frye*, the defendant was charged with driving with a revoked license after having been convicted previously of the same petty crime several times. The prosecutor sent defense counsel a letter, which included an offer to reduce the charge to a misdemeanor with a ninety-day sentence. Counsel never communicated this offer to the defendant. Less than a week before his preliminary hearing, Frye was once again arrested for driving

70. *Id.* at 1388.

71. *Id.* at 1389 (emphasis added) (internal citations omitted).

72. As the Court acknowledges, guilty pleas (as opposed to trials) are responsible for 97 percent of federal convictions and 94 percent of state convictions. *See id.* at 1388 (citing Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012)).

73. *Id.* at 1392 (Scalia, J., dissenting) (internal citations omitted).

74. 132 S. Ct. 1399 (2012).

with a revoked license. He subsequently pleaded guilty and was sentenced to three years in prison.[75] The question for the Court was whether counsel's failure to communicate the initial plea deal rendered that assistance ineffective. Importantly, the defendant was not challenging the conviction to which he actually pleaded, which was based on accurate information. Rather, his challenge went to the plea deal he *could have* obtained, outlined in the prosecutor's letter, and which he would have learned about but for counsel's lapse in communication. The Court held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[76]

The significant point is that *Frye* assessed counsel's performance, not in the abstract, but in relation to the prosecutor's actions. The Court's opinion builds out from the fact that the prosecutor in this case made the initial plea offer in a formal letter, as opposed to as a part of an informal and fluid process, which often governs plea bargaining.[77] In this vein, the Court encouraged prosecutors to embrace the habit of conveying plea offers through "formal" and "documented" channels to guard against any remorse a defendant might feel in electing to go to trial.[78] Taken together, *Padilla*, *Lafler*, and *Frye* reflect the Court's newfound appreciation for the realities surrounding the administration of criminal justice. They demonstrate just how much is decided between prosecutors and defense lawyers.[79] Although, as a formal matter, these cases foist new duties onto defense counsel, as a functional matter, they also implicate prosecutors and may even force them to reconsider their developed practices.

A second line of cases involving questions of immigration and federalism further illustrates the significant control local prosecutors can exert in relation to downstream immigration consequences. In *Lopez v. Gonzales*, a lawfully present noncitizen defendant pleaded guilty in state court to possession of cocaine, which resulted in a five-year felony sentence under South Dakota

75. *Id.* at 1404–05.

76. *Id.* at 1408.

77. *See id.* at 1407. Plea bargaining can be a dynamic process, and the parties can manipulate the parts comprising the record of conviction all the way up to the moment that the disposition is submitted to the court for approval. *See* KATHERINE BRADY, IMMIGRANT LEGAL RES. CTR., QUICK REFERENCE CHART AND NOTES FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES, at N-47 (2010), *available at* http://www.ilrc.org/files/cal_ch art_2.10.pdf (noting that "a complaint can, and frequently is, amended orally before the plea").

78. *See Frye*, 132 S. Ct. at 1409.

79. *See id.* at 1407 (recognizing that the "simple reality" is that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas"). Stephanos Bibas characterizes the *Padilla* Court's extension of the Sixth Amendment to the plea bargaining context as a rejection of formalism and a victory for realism. *See* Bibas, *supra* note 55 at 1148–51.

law.[80] But under federal law, mere possession is treated as a misdemeanor.[81] The federal government asked the IJ to deny Lopez's application for equitable relief, arguing that his (state) drug conviction was an "aggravated felony" that rendered him ineligible for cancellation or withholding of removal.[82] The government's position thus generated a strange set of circumstances: federal prosecutors argued that a state's definition of a crime can and should displace its federal counterpart for immigration purposes. The question was *whose* definition was determinative—federal or state. Eight justices rejected the government's argument by holding that the federal definition dictated the outcome. The majority explained, "Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them."[83] Thus, as a federalism case, *Lopez* suggested that where Congress and the South Dakota legislature impose different punishments for the same crime, Congress's version should prevail.

While *Lopez* evinced a healthy respect for the principle of federal supremacy, a subsequent case articulated an important limitation to this principle: where a federal-state conflict imperiled the broad discretion ordinarily enjoyed by local prosecutors, the federal interest would have to yield. In *Carachuri-Rosendo v. Holder*,[84] petitioner Carachuri-Rosendo was convicted of two misdemeanor drug possessions in Texas, leading to a total of thirty days spent in jail for both convictions.[85] Importantly, the prosecutor could have charged Carachuri-Rosendo with recidivist drug possession in light of his first conviction, which would have rendered that second conviction a felony. Declining to do so, the prosecutor chose instead to keep the charge for the second crime as a simple drug possession.[86] The government argued that the conviction Carachuri-Rosendo actually received in state court did not determine the matter. Following the logic of *Lopez*, the government argued that because Carachuri-Rosendo's conduct was "punishable" as a felony under federal law, he had committed an "aggravated felony" irrespective of whether he was actually punished as a felon.[87]

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80. 549 U.S. 47, 51 (2006). The specific crime for which he was convicted was aiding and abetting another person's possession of cocaine, *id.*, but state law treats that as the equivalent of possession. *Id.* at 53.

81. *See id.* (explaining that "mere possession" under federal law is treated as a misdemeanor).

82. In order to be eligible for cancellation of removal, a noncitizen must prove, among other things, that he has not been convicted of an "aggravated felony." INA § 240b(a)(3), 8 U.S.C. § 1229b(a)(3) (2006).

83. *Lopez*, 549 U.S. at 60.

84. 130 S. Ct. 2577 (2010).

85. *Id.* at 2580.

86. *See id.* at 2583.

87. *Id.* at 2582.

The Court rejected this argument, holding that the hypothetical federal punishment could not displace the punishment actually meted out at the state level. Although this holding generated some tension with *Lopez*, the Court reconciled its decisions by pointing to the important gatekeeping function played by prosecutors within the larger immigration system.[88] The "structure and design of our [nation's] drug laws" vest prosecutors with the discretion to pursue recidivist enhancements, the Court explained.[89] Indeed, the Court noted specifically that the prosecutor in Carachuri-Rosendo's case "abandoned" the recidivist enhancement—that is, the prosecutor declined to pursue the harsher set of penalties as a matter of prosecutorial discretion.[90]

The facts of this case do not indicate *why* the prosecutor opted for the lesser charge. It is unclear whether the prosecutor expressly considered the possibility of downstream removal, thought the underlying evidence was weak, or just had more pressing matters to worry about.[91] Some of the amicus briefs suggested that the Texas practice of offering lesser charges was designed to alleviate the courts' caseload.[92] For the Court, any of these reasons would do: "Were we to permit a federal immigration judge to apply his own recidivist enhancement after the fact so as to make the noncitizen's offense 'punishable' as a felony for immigration law purposes, we would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns."[93]

88. *See id.* at 2588. The Court also rejected this argument on statutory construction grounds. It observed that "the Government's abstracted approach" could not be squared with "the more concrete guidance" provided by the INA's cancellation of removal provision, which specifically limits the Attorney General's cancellation power to where a noncitizen has been "convicted" of an aggravated felony. *Id.* at 2587.

89. *Id.* at 2588.

90. *See id.* In some jurisdictions, prosecutors consciously work toward reaching deals with defense attorneys to craft convictions that avoid immigration consequences. *See* Tony Mauro & Daniel Wise, *ABA Task Force to Study How* Padilla *Alters Criminal Defense Lawyer's Role*, 203 N.J. L.J. 7 (Jan. 3, 2011) (noting that Brooklyn's District Attorney was "'very much aware' that unwarranted deportations can have an 'enormous' adverse impact upon families in the borough's many immigrant communities").

91. *See* Bowers, *supra* note 41, at 1656–57 (noting that, typically, a prosecutor declines to charge a defendant because she sees the underlying proof as weak, wishes to preserve precious resources, or does not believe that the defendant deserves it).

92. *See, e.g.*, Brief for the Nat'l Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 25–26, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (No. 09-60) (arguing that the prosecutor's discretionary authority to offer plea agreements for simple drug possession crimes represents one manifestation of a larger attempt by state criminal courts to manage ballooning caseloads). Amicus argued that eliminating the option for the prosecutor and defense attorney to reach a deal that avoids immigration consequences would "give[] the immigrant defendant little choice but to fight the possession charge, even if it means taking the case to trial." *See id.* at 27; Brief for the Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioner at 15–16, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (No. 09-60) (noting that charge discretion allows prosecutors to secure the assistance of informants through "cooperation agreements").

93. *Carachuri-Rosendo*, 130 S. Ct. at 2588.

Retreating from its position in *Lopez*, the Court clarified that local prosecutors act on the basis of independent authority, and that as a result, the Executive remains a bystander in the process by which convictions are generated.[94]

II.
ASSESSING DE FACTO IMMIGRATION COURTS

Thus far, I have performed mainly prefatory work by showing that (1) immigration sanctions are dispensed (and benefits withheld) on the basis of convictions; (2) criminal defense lawyers are constitutionally required to identify when such sanctions and benefits may be dispensed or withheld; and as a result (3) prosecutors now perform a gatekeeping function within the conviction-based removal system. In this Part, I set out to assess the system of de facto immigration courts *Padilla* recognized. I trace out the implications and consequences of a removal system where local prosecutors can control the pool of removable immigrants.

As an enforcement strategy, conviction-based removals fit within a larger set of strategies designed to harness criminal law tools and actors to achieve immigration goals.[95] A large number of state and local criminal law actors—most notably, the police, sheriff's departments, and other law enforcement officers—screen for potentially removable immigrants pursuant to delegated power they would not otherwise possess.[96] As a system of member selection,

94. To be clear, I am not suggesting that local prosecutors are engaging in gatekeeping in the concerted sense. Even if some local jurisdictions systematically undercharge noncitizen defendants to avoid immigration consequences, immigration officials will have access to a significant pool of immigrants with convictions to remove so long as a sizeable number of jurisdictions overcharge defendants or perhaps remain indifferent to immigration outcomes. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 760 (2003) (noting that "the overlap of prosecutorial authority inevitably reduces the ability of each office to control investigative agencies' access to federal court, and consequentially reduces the extent to which an office can leverage its gatekeeping power into control of those agencies' agendas").

95. Stephen Legomsky provides a useful taxonomy of the different models that use criminal law to achieve immigration goals. He observes that immigration enforcement has imported elements of criminal enforcement through at least "five ports of entry": by (1) attaching criminal consequences to immigration violations; (2) attaching immigration consequences to criminal convictions; (3) prioritizing criminal enforcement theory in immigration law; (4) importing strategies of criminal law enforcement; and (5) using traditional criminal law actors to carry out immigration duties. *See* Legomsky, *supra* note 30, at 475–500. I am primarily interested in arrangements falling within the second category—the attachment of immigration consequences to criminal convictions.

96. *See* KOHLI & VARMA, *supra* note 11, at 15 fig.3. According to the report, a number of local entities have entered partnerships with the federal government for immigration purposes: 71 local law enforcement agencies participate in the 287(g) program, another 104 local jurisdictions have Fugitive Operations Teams, and 37 states participate in the Secure Communities (S-Comm) initiative. *Id.* The report does not make clear whether and to what extent any local entities have agreed to participate in more than one of the federal partnership programs. It does note, however, 969 counties within the 37 states actively participate in S-Comm. *Id.* Even if DHS has no formal agreement with a particular jurisdiction, state and local officials are free to offer their assistance in identifying potentially removable noncitizens. *See* INA § 287(g)(10)(A)–(B), 8 U.S.C. § 1357(g)(10)(A)–(B) (2006); Jennifer

legal scholars have suggested that immigration law's reliance on criminal law reflects a rational design choice. Run-ins with the criminal justice system, these scholars suggest, enable immigration officials to gather more information about would-be members of society, empowering officials to make better membership choices.[97] Critics of subfederal immigration enforcement argue that such arrangements lead to the incompetent and abusive exercise of state and local police power.[98] In other words, any information that is gathered by immigration officials is skewed or tainted by local enforcement practices.

The Executive has reconciled these positions by insisting that it can cure local enforcement defects through a variety of oversight tools.[99] The Executive can adjust the scope of local officials' immigration power, withdraw it altogether, or shame them for their acts of mischief. This is so because local police typically derive whatever immigration authority they enjoy from an express delegation. Prosecutors, on the other hand, owe no fidelity to the Executive and operate independently of federal oversight. In this Part, I explain that the freedom from direct Executive oversight distinguishes prosecutors from other local law enforcement actors, and allows prosecutors to deviate from and, in some cases, completely undermine federal immigration enforcement priorities. While significant, this power is not unlimited. Thus, after providing some examples of this phenomenon, I lay out the limits of such gatekeeping power.

A. Limited Executive Oversight and Prosecutorial Gatekeeping

The conviction-based removal system tracks something of a division of labor.[100] Local prosecutors decide whom to charge and prosecute, while the

M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1575–98 (2010) (summarizing the major federal initiatives devolving immigration enforcement authority to state and local entities).

97. Adam Cox and Eric Posner have been the primary proponents of this view. They argue that the mechanism of admission attempts to carry out the very difficult task of identifying "desirable" candidates to join the polity, whereas the mechanism of deportation wrestles with the relatively easier task of identifying undesirable immigrants thus generating the kind of information most heavily prized by immigration officials. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 847 (2007); *see also* Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475 (2009).

98. *See, e.g.*, Wishnie, *State and Local Police Enforcement*, *supra* note 2.

99. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: STATISTICAL MONITORING (2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/statistical monitoring.pdf (explaining that fingerprints for individuals booked into jails by state and local police participating in the Secure Communities program are checked by ICE and the DHS Office for Civil Rights and Civil Liberties (CRCL), who "calculate statistics based on fingerprint submissions, alien identifications, and underlying demographic and crime data to identify jurisdictions whose arrest patterns appear unusual or anomalous").

100. A useful analogy might be the role that enforcement agents play in the federal system. In describing their relationship to federal prosecutors, Daniel Richman observes that one of the tangible benefits that agents offer prosecutors is "the informational networks that no U.S. Attorney's Office

Executive (through its immigration officials) decides which of those convicted it wants to deport. Unlike other examples of power-sharing in immigration law, conviction-based removals do not represent a transfer of power from a principal (Congress) to a single agent (the Executive), but rather to two separate agents: the Executive *and* local prosecutors. Therefore, prosecutors can control conviction-based removals through their discretion over whom and what to charge.

The 287(g) program provides the starkest contrast, in terms of Executive oversight, to the prosecutor-centered conviction-based removal model. In this program, local police officers incorporate immigration enforcement duties into their ordinary police work. They act as deputized ICE agents wielding a power that they would not have *but for* a delegation of such power.[101] Local police face consequences if they exercise that authority incompetently or abusively. This design feature allows the Executive to exercise oversight. For example, the DHS recently announced that it would not renew several 287(g) agreements in underperforming jurisdictions.[102] This move encourages participating jurisdictions to remain focused on furthering federal enforcement goals, and mitigates the ability of jurisdictions to opt into the program for purely strategic reasons, such as to curry favor with voters.[103] Furthermore, the 287(g) program allows the Executive to calibrate the efforts of those jurisdictions carrying out their duties indiscriminately or with too much zeal. For these kinds of enforcement defects, the DHS has instituted new standardized agreements "designed to provide closer federal oversight and focus the program on the detention and removal of 'dangerous' criminals,"[104] and in truly egregious cases, the Executive can withdraw the delegation altogether.

The Executive's ability to control local immigration practices is evident from the Supreme Court case *Arizona v. United States*[105] and its aftermath. In *Arizona*, the federal government sought to overturn four state immigration

possesses, and without which few cases could be brought . . . . [A] U.S. Attorney's Office generally will not even know that a crime has been committed until an agency informs it." Richman, *supra* note 94, at 768.

101. *See* RANDY CAPPS, MARC R. ROSENBLUM, CRISTINA RODRÍGUEZ & MUZAFFAR CHISHTI, MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf.

102. The DHS explains that it plans to terminate the "least productive" 287(g) agreements. The DHS compares the 287(g) program unfavorably to the Secure Communities program, which it describes as "more consistent, efficient and cost-effective in identifying and removing criminal and other priority aliens." DEP'T OF HOMELAND SEC., FY 2013 BUDGET IN BRIEF 16 (2012). *See* Gomez, *supra* note 14.

103. *See* Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 263 (2006) (noting that executive branch officials can use their powers of discretion "to create an appealing impression among the public").

104. *See* CAPPS, ET AL., *supra* note 101, at 11.

105. 132 S. Ct. 2492 (2012).

enforcement provisions on the ground that they were preempted by federal law.[106] After overturning three of the provisions, the Court let stand the fourth and final provision requiring local officers to verify the immigration status of investigative targets if "reasonable suspicion exists" as to the person's immigration status.[107] Although the Executive lost that particular battle on constitutional grounds,[108] it nevertheless achieved something of a "grand slam" through administrative channels. The same day the Court announced the *Arizona* decision, the DHS announced that it would cancel all active 287(g) agreements in Arizona and that it would refuse to respond to requests by Arizona officers to take an unauthorized immigrant into custody unless that immigrant had a criminal background or had repeatedly violated immigration laws.[109] Thus, the Executive has effectively narrowed the range of circumstances under which a local officer may verify a person's immigration status (by withholding 287(g) deputy status) and has mitigated the ability of Arizona officers to dictate under what circumstances DHS would detain immigrants for removal (by issuing a more narrow detainer policy than Arizona lawmakers and enforcement officers would have preferred).

The Secure Communities (S-Comm) program further exemplifies how the Executive can tap into and utilize local law enforcement entities for immigration purposes. S-Comm is an information-sharing system. Local law enforcement agencies routinely upload the fingerprints of arrestees to an FBI criminal justice database.[110] Under this program, those fingerprints are automatically cross-checked against a DHS immigration database, at which point federal immigration officials may contact the local detention facility to hold an individual in anticipation of removal proceedings.[111] S-Comm does not harness local law enforcement resources through a delegation, at least not in any formal sense. Rather, the Executive exploits the local enforcement agency's interest in accessing a suspect's information in the FBI database as a

106. *See id.* at 2497–98.

107. *See id.* at 2507 (citing ARIZ. REV. STAT. ANN. § 11-11051(B) (West 2012)).

108. *See id.* at 2510 (holding that this provision was not preempted on its face but leaving open the possibility of a subsequent as-applied challenge).

109. *See* Morgan Little, *Brewer Accuses Obama Administration of Telling Arizona to 'Drop Dead,'* L.A. TIMES, June 26, 2012, http://articles.latimes.com/2012/jun/26/news/la-pn-brewer-accuses-obama-administration-of-telling-arizona-to-drop-dead-20120626. It is also worth mentioning that the Department of Justice is pursuing a civil rights suit against Joe Arpaio, Sheriff of Arizona's Maricopa County, for alleged acts of racial profiling. *See* Richard A. Serrano & Ashley Powers, *Pattern of Civil Rights Abuses Alleged in Sheriff Joe Arpaio's Maricopa County*, L.A. TIMES, Dec. 15, 2011, http://articles.latimes.com/2011/dec/15/nation/la-na-justice-sheriff-20111216. These examples demonstrate the ways the Executive can regulate the acts of local enforcement partners beyond the delegation power.

110. *See* HOMELAND SEC. ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 4 (2011), *available at* http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf.

111. *See id.*

way of coercing local officials to simultaneously participate in immigration enforcement. Although several jurisdictions have attempted to withdraw from this program, the DHS insists that participation is mandatory.[112]

Both the 287(g) program and S-Comm stand in sharp contrast to local prosecutors' independent powers under the Tenth Amendment. Rather than delegating direct immigration enforcement power to the states (or empowering the Executive to so delegate), Congress has structured conviction-based removals so that immigration consequences *follow* from these independent prosecutorial decisions. It has divided enforcement power so that each half—prosecutors and immigration officials—works independently of the other.

The principle of executive oversight distinguishes federal prosecutors from their state and local counterparts. It would be tempting to group federal and state prosecutors in the same regulatory box, given their overlapping authority to regulate criminal activity. Federal prosecutors have long embraced a policy of declining to prosecute certain crimes where the state imposes adequate punishment.[113] And certainly, critiques of the American prosecutor have not drawn any serious distinctions between federal and state prosecutors.[114] Yet in the immigration universe—where policy-making and enforcement authority is centralized, federal, and largely plenary—federal and state prosecutors differ in important respects with regard to Executive oversight. In the federal context, the Executive can coordinate enforcement policies between Assistant United States Attorneys, who prosecute immigration crimes,[115] and ICE prosecutors, who initiate civil removal proceedings against noncitizens.[116] Because it oversees the affairs of agencies within the Departments of Justice and Homeland Security, the Executive creates a segmented but seamless removal pipeline that traverses both criminal and civil terrain. Ingrid Eagly describes the degree to which the Executive can manipulate the overlapping criminal and immigration spheres in order to reach the most efficient immigration outcomes. By her account, the Executive can direct federal prosecutors to either seek removal[117] or alternatively agree not to

112. *See* Paloma Esquivel, *Federal Immigration Enforcement Is Mandatory, Memo Says*, L.A. TIMES, Jan. 8, 2012, http://articles.latimes.com/2012/jan/08/local/la-me-ice-foia-20120109.

113. *See* Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 293 (1997) (describing cooperation and shared responsibilities between federal and county prosecutors in border law enforcement).

114. *See* DAVIS, *supra* note 16, at 93–122 (critiquing federal prosecutors and noting that "[a]ll the problematic issues that affect the prosecutorial function . . . apply to both state and federal prosecutors").

115. *See* Eagly, *Prosecuting Immigration*, *supra* note 1, at 1299.

116. *See* Bersin & Feigin, *supra* note 113, at 285 (describing the Southern District of California in the 1990s as "an integrated system of deterrence and punishment").

117. *See* Eagly, *supra* note 1, at 1330.

pursue removal[118] as a part of the sentencing process. The Executive can direct prosecutors to channel noncitizens through magistrate courts to secure low-cost misdemeanor convictions designed to facilitate expeditious removal.[119] It can even assign DHS officials to act as prosecutors, an area of enforcement traditionally reserved for U.S. Attorneys.[120]

The Executive can exercise none of the above options with regard to local prosecutorial activity because it lacks the full complement of oversight mechanisms it ordinarily deploys. When delegating enforcement authority to local law enforcement officers through the 287(g) program, DHS officials require participating jurisdictions to enter into a Memorandum of Agreement, which details the limits of their delegated authority.[121] In the context of immigration-related detention, the DHS employs similar methods of oversight through Intergovernmental Service Agreements, which are effectively contracts with local jails that agree to house detainees.[122] Furthermore, in response to reports of deteriorating and unsafe conditions at detention facilities, the DHS Inspector General generated a number of reports based on information gathered through audits. Yet these monitoring mechanisms all rest on two important assumptions:[123] first, that state and local partners act on the exclusive basis of federally delegated authority, and second, that the Executive possesses the authority to oversee and sometimes direct the way that the delegated authority is exercised (even if the powers of oversight and direction are imperfect). Neither assumption is true in the context of conviction-based removals and local prosecutors.

Finally, the range of cases over which state courts enjoy authority is considerable. Because the language in the immigration code is open ended, crimes triggering deportation are not limited to crimes arising within the federal

118. U.S. Attorneys are free to reach agreements with noncitizen defendants in which they decline to pursue deportation in exchange for certain concessions in the plea agreement. *See* UNITED STATES ATTORNEYS' MANUAL § 9-73.520; 28 C.F.R. § 0.197 (2011). Indeed, the Ninth Circuit has observed that these agreements can bind the entire U.S. government, highlighting the degree to which federal prosecutors are empowered to act on behalf of the Executive. *See* Thomas v. INS, 35 F.3d 1332, 1339 (9th Cir. 1994); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1160 (2002).

119. *See* Eagly, *supra* note 1, at 1326–27.

120. *See id*. at 1332–33.

121. *See* Press Release, Dep't of Homeland Sec., Sec'y Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

122. *See* Carcamo, *supra* note 3 (reporting that over eight hundred immigrant detainees will be held in Orange County jails through a program known colloquially as "beds for feds").

123. Several commentators have also raised important critiques about the efficacy of these monitoring methods. *See, e.g.*, CAPPS, ET AL., *supra* note 101, at 35 (finding that, while 287(g) sites are closely supervised by ICE, those supervisors do not "overrule state and local officers' decisions regarding who receives immigration detainers, even when detainers are placed on groups such as traffic violators and other people who are low enforcement priorities for ICE").

system. And the reality is that the vast majority of convictions within the United States arise from violations of state law. Nationwide, 99 percent of all arrests, 94 percent of felony convictions, and 93 percent of prison sentences can be traced to decisions by state and local actors.[124] Therefore, within the universe of immigrants who would not be removable but for a criminal conviction (like lawful permanent residents), state courts exercise a significant degree of control over this population.

B. Some Examples of Gatekeeping

The lack of federal oversight frees local prosecutors to charge defendants with crimes informed by their own enforcement priorities, a practice that can unsettle, dilute, or outright displace federal priorities. The ability to move charges downward, in a more equitable or merciful direction, provides a valuable bargaining advantage over noncitizen defendants. For example, prosecutors can offer lenience in exchange for a noncitizen's willingness to cooperate as an informant or witness in pursuit of a prosecutor's other enforcement goals. In this Section, I work through a set of illustrative examples to demonstrate how gatekeeping happens in the conviction-based removal context. As these examples demonstrate, prosecutors have the ability not only to manipulate and unsettle downstream immigration outcomes, but also to use the specter of these downstream consequences to enlarge their already significant power over criminal proceedings.

To start with, consider the immigration enforcement goals set out by the DHS. John Morton, the current director of ICE, recently issued a string of guidance documents based on the Obama administration's enforcement priorities.[125] Given that ICE possesses the resources to annually remove no more than 400,000 immigrants[126]—approximately 4 percent of the total unauthorized population—these "Morton Memos" articulate clear directives to ICE, Customs and Border Protection (CBP), and other immigration-related administrative bodies regarding the allocation of limited federal resources. These memos prioritize the removal of "aliens convicted of crimes" with a

124. *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 234184, FEDERAL JUSTICE STATISTICS, 2009, 17 tbl.14 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf.

125. *See* Memorandum from John Morton to All ICE Employees, *supra* note 46, at 1; Memorandum from John Morton to All Field Office Directors, et al. 4–5 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

126. One of the Morton Memos explains that ICE "only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States." Memorandum from John Morton to All ICE Employees, *supra* note 46, at 1. As a functional matter, the number of removable immigrants is actually higher because the 11.2-million figure does not account for those immigrants who have been lawfully admitted but who have committed crimes rendering them removable.

particular focus on "violent criminals, felons, and repeat offenders."[127] Just as importantly, they also highlight types of migrants who might be eligible for equitable relief, and are therefore a low removal priority.[128] For example, the administration has used prosecutorial discretion to allow otherwise removable noncitizens to remain in the United States when the noncitizen is the same-sex spouse of a U.S. citizen,[129] a high-achieving youth,[130] a civil rights plaintiff,[131] or someone who has been convicted of no more than traffic violations.[132] The systemic and explicit way in which the Obama administration has communicated its declination power to federal enforcement agents to achieve policy ends is indeed remarkable.[133] The publication of federal enforcement priorities not only increases the perceived legitimacy of the DHS's enforcement actions, but also identifies factors that could lead to (or stay) removal. It thus creates some semblance of membership rules by which authorized and unauthorized immigrants can organize their lives in order to avoid removal. And these rules strongly favor the removal of noncitizens with criminal convictions.

It is in this respect that local prosecutors can deviate from or unsettle federal immigration enforcement policy. If ICE officials rely on convictions to sort potential members, then local prosecutors can manipulate a noncitizen's removability by adjusting the charges supporting a conviction—by plea

127. *See id.* at 1–2. The DHS has identified those convicted of "aggravated felonies" or multiple felonies as a "Level 1 offenders." *See id.* at 2. Importantly, these priorities also include those convicted of petty crimes: Level 2 offenders include those convicted of "three or more crimes each punishable by less than one year," and Level 3 offenders include those "convicted of crimes punishable by less than one year." *See id.*

128. *See* Memorandum from John Morton to All Field Office Directors, et al., *supra* note 125, at 4–5.

129. *See* Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 29, 2011, http://www.nytimes.com/2011/06/30/us/30immig.html.

130. *See* Memorandum from Janet Napolitano to David V. Aguilar, et al., 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

131. *See* John Christoffersen, *Federal Authorities Say They Won't Deport Immigrants with Legitimate Civil Rights Claims*, ASSOCIATED PRESS, June 22, 2011; Mark Spencer, *Lawsuit Spurs New Policy on Deportation*, HARTFORD COURANT, July 5, 2011; Memorandum from John Morton to all Field Office Directors, *supra* note 125, at 4. For a useful analysis of an earlier memo issued by John Morton also addressing the use of prosecutorial discretion, see SHOBA SIVAPRASAD WADHIA, IMMIGRATION POLICY CTR., READING THE MORTON MEMO: FEDERAL PRIORITIES AND PROSECUTORIAL DISCRETION (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Reading_the_Morton_Memo_120110.pdf.

132. *See* Julia Preston, *Fewer Illegal Immigrants Stopped for Traffic Violations Will Face Deportation*, N.Y. Times, Apr. 28, 2012, at A14.

133. *See* Eric Posner, *The Imperial President of Arizona: The Supreme Court's Immigration Ruling Dramatically Expanded Executive Power*, SLATE (June 26, 2012, 12:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.single.html (noting that President Obama's use of prosecutorial discretion to achieve certain immigration outcomes is "notable" only for "how explicit he made it").

bargaining "creatively" with the noncitizen's lawyer. Thus, in certain instances, a noncitizen may avoid downstream removal despite engaging in precisely the kind of criminal conduct that would trigger removal. Consider the following examples.

In June 2007, a speeding dragster crashed into a crowd of spectators, killing six and injuring dozens more.[134] Nicknamed "the Burnout King," Troy Critchley was charged with six counts of vehicular homicide and twenty-two counts of reckless aggravated assault, netting him a potential sentence of ninety years in prison.[135] Upon learning that the driver was a noncitizen, the prosecutors dropped the charges and offered a plea deal of twenty-eight misdemeanor counts of reckless assault, eighteen months of probation, and a one-year suspended sentence, which Critchley accepted and the court adopted.[136] Importantly, prosecutors did this to immunize Critchley against the possibility of downstream deportation, thus preserving the opportunity for the victims' families to pursue a multimillion-dollar civil suit against Critchley.[137] Although convictions for vehicular homicide would have triggered any number of grounds for deportation,[138] the downgraded charges denied immigration officials the opportunity to deport a noncitizen who otherwise fit the federal government's highest priority of deportable "type."[139]

Prosecutors in Queens, New York traveled down a similar path with Reginald Gousse, a citizen of Haiti. Having served a twelve-year sentence for armed robbery, Gousse's conviction rendered him deportable.[140] Ever resourceful, Gousse quietly announced that he possessed information implicating another investigation, prompting state prosecutors to work with him to withdraw his twelve-year-old plea conviction.[141] This too was done to prevent federal officials from deporting Gousse, a fate he absolutely would have met but for the intervention of local prosecutors and the court.[142] Indeed,

134. *See Drag Driver Troy Critchley to Avoid U.S. Jail over Crash Deaths*, HERALD SUN (Aug. 13, 2008), http://www.heraldsun.com.au/news/national/drag-race-driver-dodges-us-jail/story-e6frf7l6-1111117180667.

135. *See id.*

136. *See id.*

137. *See id.*

138. *See* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2006) (listing "crimes of moral turpitude" as a ground for deportation). The immigration code also attaches removability to "aggravated felonies," *see id.* § 237(a)(2)(A)(iii), which is itself divided into several categories, many of which would certainly encompass Critchley's offense. *See id.* § 101(a)(43)(A) (murder); *id.* § 101(a)(43)(F) ("crime of violence" as defined by 18 U.S.C. § 16).

139. The DHS identifies noncitizens who "pose a serious risk to public safety" as "priority 1"-level targets for removal. *See* Memorandum from John Morton to All ICE Employees, *supra* note 46, at 1–2.

140. *See* Jim Dwyer, *Prosecutors Foiled Deportation of Man Now Held in L.I. Killing*, N.Y. TIMES, Mar. 7, 2005, at A1.

141. *See id.*

142. *See id.*

in response to the news that Gousse's conviction history had been revised, an ICE official quipped, "It was 100 percent our intention to deport this guy at the first available opportunity. . . . [The prosecutors] basically absolved the conviction."[143]

The underlying conduct—reckless driving and armed robbery—in the Critchley and Gousse examples suggests they are the type of noncitizen defendants that the Executive has prioritized removing.[144] Yet local prosecutors, in their capacity as gatekeepers for lawfully present noncitizens charged with crimes, are able to displace this federal priority. By rendering removal an automatic consequence of conviction for a broad array of crimes, Congress effectively gave local prosecutors the power to use a noncitizen defendant's immigration status as one basis for negotiating particular criminal justice outcomes. The "Balloon Boy" prosecution in Colorado further illustrates the leverage prosecutors enjoy over noncitizen defendants.[145] Richard and Mayumi Heene falsely reported their son floated away in a homemade helium balloon in order to boost their chances of getting on a reality television show.[146] Mayumi, a citizen of Japan, provided statements to the sheriffs incriminating herself and her husband, but the spousal privilege protected her husband against prosecution.[147] Prosecutors had only enough evidence to prosecute Mayumi. But Mayumi's immigration status provided prosecutors with leverage: allowing Richard to go unpunished would come at the cost of Mayumi's eventual removal on the basis of a felony conviction *unless* the prosecutors agreed to a downgrade. Thus, prosecutors were able to achieve a double conviction: against Mayumi for false reporting to the authorities (a misdemeanor) and against Richard for attempting to influence a public servant (a felony).[148]

These examples demonstrate that local prosecutors can allocate informant-based relief beyond what the immigration code formally allows. The "T" and "U" visas, for instance, allow unauthorized migrants to obtain immigration benefits in exchange for helping to prosecute bad actors, such as traffickers or other criminals on the federal government's radar.[149] Not many of these visas get issued, however. While local law enforcement agencies are empowered to

143. *Id.*

144. *See supra* notes 46–48, 127.

145. *See* Dan Frosch, *Guilty Pleas Expected in Balloon Hoax Case*, N.Y. TIMES, Nov. 12, 2009, http://www.nytimes.com/2009/11/13/us/13balloon.html?ref=richardheene.

146. *See* Kieran Nicholson, *Attorney: Balloon Boy Parents to Enter Guilty Pleas*, DENVER POST, Nov. 12, 2009, http://www.denverpost.com/ci_13771567?source=bb.

147. *Id.*

148. *Id.*

149. *See, e.g.*, INA § 101(a)(15)(T)(i)(II)(aa), 8 U.S.C. § 1101(a)(15)(T)(i)(II)(aa) (2006) (making temporary visas available to trafficking victims provided those victims comply with "any reasonable request for assistance in the Federal, State, or local investigation" of qualifying trafficking crimes); *id.* § 101(a)(15)(U)(i)(II) (making temporary visas available to victims of certain crimes provided those victims "possess[] information" about qualifying forms of criminal activity).

certify applications for these "informant" visas,[150] the immigration code prescribes a closed universe of crimes that may serve as the basis for this kind of relief.[151] Thus, a conviction-based removal system in which a broad range of convictions automatically lead to deportation allows local prosecutors to expand the boundaries of membership by enabling them to circumvent congressionally imposed visa limits (as is the case with T and U visas) and to allocate informant-based relief to those from whom ICE officials would rather withhold such relief (as is the case with unsavory informants like Gousse).

My claim that local prosecutors can unsettle federal immigration enforcement priorities merits an important qualification: the ability of local prosecutors to displace federal enforcement priorities is limited in that it runs in a single direction. Through their significant discretion to shift charges downwards, prosecutors can short-circuit the removal process. But the opposite is not true: an overzealous prosecutor cannot *ensure* a noncitizen's ultimate removal even where she invests an immense share of her resources to convicting a particular noncitizen.[152] Of course, these prosecutors are not left entirely without recourse. For local jurisdictions interested in structuring convictions to *increase* the likelihood of removal,[153] the DHS has developed guides and other resources laying out recommended courses of actions in cases involving noncitizens.[154] But these are just guides and the Executive cannot force local entities to adopt its enforcement goals. Ultimately, the Tenth

150. *See* U.S. DEP'T OF HOMELAND SEC., INFORMATION FOR LAW ENFORCEMENT OFFICIALS: IMMIGRATION RELIEF FOR VICTIMS OF HUMAN TRAFFICKING AND OTHER CRIMES, *available at* http://www.uscis.gov/USCIS/Resources/Humanitarian%20Based%20Benefits%20and%20Resources/TU_QAforLawEnforcement.pdf.

151. T-visa relief is limited to those victims of "trafficking" crimes. *See* INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2006) (citing Trafficking Victims Protection Act of 2000 § 103, 22 U.S.C. § 7102). U-visa relief is limited to a list of crimes contained in the immigration code. *See* INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2006) (listing qualifying crimes).

152. Although local prosecutors can operate without Executive oversight, nothing prevents prosecutors from coordinating their enforcement policies with immigration officials if they so desire. Ingrid Eagly provides two such examples. One involves prosecutors in Maricopa County, Arizona, inviting ICE officials to conduct trainings on how to ensure that convictions lead to removal. *See* Eagly, *supra* note 5 (manuscript at 82–83). The other example involves Los Angeles County district attorneys collaborating with the United States Attorney's Office on prosecuting immigration crimes in federal court. This program allows local prosecutors to prosecute felons and gang members under federal law—many of whom are immigrants who reenter the United States without authorization—while insulating other local prosecutorial decisions against federal incursion. *See id.* (manuscript at 59–60).

153. *See, e.g.*, Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1762–63 (2011) (explaining how Arizona's antismuggling laws have been structured and enforced in part to combat illegal immigration).

154. *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 17, at 29 ("In order to prevent [a Sixth Amendment] challenge, DHS recommends that all plea agreements include language warning individuals that if they are an alien, their guilty plea may subject them to removal from the United States.").

Amendment forces immigration officials to play the role of supplicant to the preferences of local prosecutors.[155]

Putting aside this qualification, it bears emphasizing that the phenomenon of prosecutorial gatekeeping within the larger removal system is more than just a simple story of aggrandizement or abuse of prosecutorial discretion. In jurisdictions with significant immigrant populations, exhibiting resistance or even indifference to the adverse immigration consequences of convictions can hamper a prosecutor's ability to secure convictions in other cases where immigration consequences are not at stake. This is because a reputation for taking a hard-line stance favoring adverse immigration outcomes will almost certainly impede a prosecutor's ability to gain the assistance of immigrants in other prosecutorial efforts.[156] If immigrant communities feel alienated by discriminatory policing and prosecutorial practices that secure large numbers of convictions with adverse downstream removal consequences, noncitizens may refrain from serving as informants and witnesses in large criminal cases.[157] Immigrant witnesses, especially unauthorized ones, may simply decline to cooperate or disappear for fear their participation might draw unwanted scrutiny, leading to reprisal at the hands of federal immigration officials.[158]

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155. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2588 (2010) (recognizing the "independent judgment of state prosecutors to execute the laws of those sovereigns" within the conviction-based removal system)

156. I do not mean to discount the possibility that a prosecutor could agree to a deal that avoids downstream immigration consequences for reasons of empathy rather than pragmatism, but such examples are harder to come by. Still, statements made by professional bar associations and their leaders seem to suggest that these types of prosecutors must exist. For example, Robert Johnson, former president of the National District Attorneys Association (NDAA), made remarks in his capacity as NDAA president addressing the inseparability of the criminal and immigration legal universes: "At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences." *See* Recommendation of Feb. 12, 2007, AM. BAR ASS'N 4–5 (Feb. 12, 2007), http://www.mnbar.org/convention/2011docs/2007%20ABA%20103E.pdf (quoting Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR (May–June 2001)). Significantly, Johnson goes on to explain that the prosecutorial challenge in this context "is not so much the existence of the consequences, *but the lack of the ability of prosecutors and judges to control the whole range of restrictions and punishment* imposed on an offender . . . ." *Id.* (emphasis added).

157. Even jurisdictions tending to embrace a punitive stance towards unauthorized migrants recognize the importance of fostering trust with immigrant communities in order to realize competing criminal justice goals. *See* Eagly, *supra* note 5 (manuscript at 39) (noting that Houston police accept foreign identification to facilitate cooperation from immigration crime victims and witnesses).

158. A recent national survey of sheriff's departments found that 74 percent of sheriffs believed that immigrants are "somewhat or much less likely" to contact law enforcement officers when they are victims or witnesses to a crime. *See* SCOTT H. DECKER ET AL., IMMIGRATION AND LOCAL LAW ENFORCEMENT: RESULTS FROM A NATIONAL SURVEY OF COUNTY SHERIFFS 3 (2010), *available at* http://ccj.asu.edu/about-us/research/immigration-research-section/current-project/im migration-and-local-law-enforcement-results-from-a-national-survey-of-county-sheriffs/view. As the authors observe: "Gaining cooperation in such ways from immigrants, whether in the country legally or not, can be a difficult issue for law enforcement, who may face distrust, fear, or hostility from such groups. This is a

Such a dynamic would exacerbate the difficulties prosecutors already face in securing the cooperation of lay witnesses, who as a general matter are much less reliable and easier to impeach than police witnesses.[159] For example, a teacher at a Los Angeles elementary school in a district with a largely latino student population was charged with several felonies for allegedly committing lewd acts on his students.[160] Because many of the students come from immigrant families, and several have parents who live and work without authorization, the local Sheriff's Department had to assure the public that it would not inquire as to the immigration status of parents to facilitate the investigation process.[161]

While prosecutors might proceed with a delicate hand in certain instances, they will apply a firmer hand in other instances in order to gain credibility in the eyes of immigrant communities. In New York, for example, distrust and suspicion towards lawyers within immigrant communities have grown in response to the predatory delivery of general legal services.[162] Often, *notarios* or "immigration consultants" exploit cultural blind spots, ethnic ties, and the common bond of language in order to dupe noncitizens into falsely believing they are entitled to immigrant benefits or relief.[163] In fact, not only do these

serious problem because immigrants are often victims of crimes and, as witnesses, can assist investigations in important ways." *Id.* at 3–4.

159. *See* Bowers, *supra* note 41, at 1713.

160. *See* Howard Blume, Sam Allen & Richard Winton, *Miramonte Could Cost L.A. Unified Millions*, L.A. TIMES, Feb. 9, 2012, at A1; Teresa Watanabe & Stephen Ceasar, *Arrests Shatter Recent Signs of Miramonte School's Progress*, L.A. TIMES, Feb. 12, 2012, http://articles.latimes.com/2012/feb/12/local/la-me-miramonte-20120212.

161. *See* Jennifer Medina, *Abuse Case Puts Los Angeles Schools Under Fire*, N.Y. TIMES, Feb. 16, 2012, http://www.nytimes.com/2012/02/17/education/abuse-cases-put-los-angeles-schools-under-fire.html (reporting that some parents have expressed reluctance to work with police because of fears surrounding their legal status); Sandra Lilley, *Miramonte School Reopens But Parents Still Worried*, NBC LATINO (Feb. 9, 2012, 12:58 PM), http://nbclatino.com/2012/02/09/17338886162/; William M. Welch & Marisol Bello, *Abusers Used School in Poor L.A. Area as Stalking Grounds*, USA TODAY (Feb. 10, 2012, 3:21 PM), http://usatoday30.usatoday.com/news/education/story/2012-02-09/miramonte-school-sex-abuse-case/53034154/1.

162. *See Resources for Victims of Immigration Fraud*, N.Y. CNTY. DISTRICT ATTORNEY'S OFFICE, http://manhattanda.org/resources-victims-immigration-fraud (last visited Mar. 7, 2013) (summarizing a variety of programs undertaken by New York prosecutors to deter and punish predatory acts targeting immigrants).

163. In certain countries, *notarios* are trained lawyers, leading to a misperception that *notarios* in the United States are similarly qualified. Legal service predators in the United States are able to exploit this confusion to their advantage. *See* Charles H. Kuck & Olesia Gorinshteyn, *Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in* Sperry v. Florida, 35 WM. MITCHELL L. REV. 340 346–50 (2008) (providing an overview of the *notario* phenomenon). As Susan Coutin observes, "[N]otarios charge high fees, submit fraudulent applications, mislead clients, refuse to give clients copies of their paperwork, and disappear into the woodwork overnight." SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY 81 (2000). She also notes that the private immigration bar ranges from those who are "highly skilled, conscientious attorneys" to those who are "shadier" and "incompetent." *Id.* at 81–82; *see also*

noncitizens have no such entitlement, when *notarios* file these fraudulent applications, they give immigration officials notice of potentially removable immigrants. In response, the Manhattan District Attorney's Office has made targeting *notarios* an enforcement priority.[164] Thus, the policy signals that prosecutors in that office take seriously the needs and interests of immigrant community members, and it deepens the bonds of trust between prosecutors and noncitizens.[165]

For similar reasons, prosecutors' offices may establish clear plea-bargaining policies to provide noncitizen community members (and their lawyers) with some sense as to when prosecutors might be willing to "creatively" structure plea deals. This is precisely the type of assurance provided by the "Morton Memos": they signal to noncitizens struggling through a "twilight" existence that coming out of the shadows does not inexorably lead to removal. At the state level, there is some evidence that prosecutors do publish guidance to inform noncitizens of what activities will subject them to removal. Ingrid Eagly's comparative examination of three state prosecutor's offices and the different approaches they take to processing noncitizen defendants provides an illuminating portrayal of how immigration-related legal practices can develop even in the absence of federal mandates or delegations.[166] Eagly's work depicts offices governed by an elaborate set of rules and practices, and develops observations about all three offices within a framework of organizational decision making.[167] Her work on the Los Angeles

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Hernandez v. Mukasey, 524 F.3d 1014 (9th Cir. 2008) (denying noncitizen's ineffective assistance of counsel claim where assistance was provided by a non-licensed immigration consultant).

164. *See* Press Release, New York County District Attorney's Office, District Attorney Vance Announces Guilty Plea in Fake Immigration Lawyer Case (May 12, 2010), *available at* http://manhattanda.org/press-release/district-attorney-vance-announces-guilty-plea-fake-immigration-lawyer-case. Private organizations have also worked to correct the information asymmetry that enables such predatory practices. *See* CATHOLIC LEGAL IMMIGRATION NETWORK, INC., IMMIGRATION CONSULTANT FRAUD: BASIC INFORMATION & WHAT YOU CAN DO IF YOU ARE A VICTIM OF FRAUD, *available at* http://cliniclegal.org/sites/default/files/Basicinfovictimoffraud.pdf (last visited Mar. 7, 2013). For examples of regulatory efforts at the federal level, see Press Release, U.S. Immigr. & Customs Enforcement, National Initiative to Combat Immigration Services Scams: DHS, DOJ and FTC Collaborate with State and Local Partners in Unprecedented Effort (June 9, 2011), *available at* http://www.ice.gov/news/releases/1106/110609washingtondc.htm.

165. Trust has been a minor but persistent theme animating discussions of lawyer-client relationships in the criminal setting, and criminal law scholars have noted that defense lawyers must often work against structural constraints to earn the trust of their clients. *See* Bibas, *supra* note 55, at 1153 ("Many cognitive deficits plague plea bargaining and merit fixing. . . . Many defendants also feel pressured to make hurried decisions based on advice by lawyers whom they may not yet have come to trust."); *id.* at 1158 (explaining the need for defendants to trust their lawyers given their expertise); Bibas, *supra* note 62, at 2534 (noting that in certain instances, "defendants who mistrust their court-appointed lawyers may (oddly enough) trust prosecutors more").

166. *See* Eagly, *supra* note 5.

167. For example, Marc Miller and Ronald Wright's work on prosecutors' offices suggests that *internal* regulations can provide defendants in criminal proceedings with some (and perhaps more) of the protections traditionally offered by *external* monitoring in other contexts. *See* Marc L. Miller &

District Attorney's Office is particularly useful for thinking about state courts as de facto immigration courts. In what she describes as an "alienage neutral" model of prosecution, as a general matter, Los Angeles district attorneys attempt to carry out their prosecutorial duties without regard to immigration status.[168] One exception to this rule arises in the plea-bargaining context. The District Attorney's Office has published a "special directive" on its website that articulates when line prosecutors may consider collateral consequences in the plea-bargaining process.[169] This formal directive brings clarity and uniformity to the bargaining process for criminal defense lawyers, thus highlighting the benefits that clear prosecutorial policies can offer.[170]

Importantly, publishing information about policies that tend to hurt noncitizen interests may also benefit noncitizen populations. The Harris County, Texas, District Attorney's Office has such an official policy regarding noncitizens: it does not permit standard plea-bargained benefits like probation for unauthorized noncitizen defendants in the United States.[171] While the normative vision underlying this policy differs from that of the Los Angeles District Attorney's office, publishing such a policy is equally useful from a guidance standpoint. Criminal defense lawyers thus have notice that for their unauthorized clients, their duty consists of negotiating a favorable outcome without divulging their client's unauthorized status.

Articulated and publicly available policies also help ensure that line prosecutors will embrace the mandate elected prosecutors have chosen to pursue. Even where elected officials stake out specific policy positions, individual prosecutors may have other motivations linked to competing policy mandates, funding sources, and administrative convenience.[172] Prosecutor's

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Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008). But the organizational approach is just one approach to prosecutorial decision making and different theories of decision making can lead to different conclusions about the same phenomenon. *See* Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 10 (2007).

168. *See* Eagly, *supra* note 5 (manuscript at 27–38).

169. *See* Special Directive 03-04, L.A. Cnty. Dist. Attorney's Office, Collateral Consequences (Sept. 25, 2003), http://da.co.la.ca.us/sd03-04.htm. Los Angeles prosecutors do not enjoy unfettered discretion. In California, all prosecutors are prohibited by statute from engaging in plea bargaining in certain categories of serious crimes with few exceptions. *See* CAL. PENAL CODE § 1192.7(a)(2)–(3) (West 2012) (prohibiting as a general matter the use of plea bargaining to dispose of cases involving firearms, DUIs, and violent sex crimes).

170. These sorts of policies are particularly helpful for non-repeat players in the criminal defense bar. It is probably the case that public defenders' offices pool information on the extent to which certain prosecutors make concessions in the interests of avoiding adverse immigration consequences. *See* Bibas, *supra* note 62, at 2481 (noting that public defenders have an institutional advantage over other types of criminal defense attorneys due to their ability to "pool information about judges and prosecutors with others in their offices").

171. *See* Eagly, *supra* note 5 (manuscript at 42–43).

172. *See* Ellen S. Podger, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 175–185 (2003) (listing a number of ways in which individual Justice Department prosecutors deviate from departmental guidelines). *See also* Mario Luis

offices must balance multiple priorities, raising the likelihood deputies might shirk on those cases deemed less urgent in their individual estimation.[173] Policies articulated at the organizational level can nudge deputies to develop at least a minimal level of familiarity with the world of conviction-based removals on the theory that officials learn when they must.[174] Indeed, this lack of incentives to learn about immigration law was at least part of what motivated the Los Angeles District Attorney's Office to establish the directive on collateral consequences. As Eagly found, "The purpose of issuing a directive was to more explicitly 'alert prosecutors to the possibility that there could be sanctions [for noncitizens] above and beyond the sanctions that would be applied to anyone else.'"[175]

C. Further Refinements

Prosecutorial gatekeeping power does not operate in a vacuum. Although prosecutors possess broad discretion over charging decisions, those decisions must still operate within a number of constraints. In this Section I explore how this gatekeeping power must work within legal-status, political, and resource constraints. In short, I demonstrate that (1) a prosecutor's leverage is largely limited to noncitizens with permanent residence (as opposed to those who lack such status, like unauthorized immigrants); (2) a prosecutor will typically be most open to bargaining "creatively" when a noncitizen has engaged in petty conduct (as opposed to those engaging in more serious conduct at the felonious end of the criminal spectrum); but (3) surrounding resource constraints often prevent prosecutors from fully appreciating the nuances and complexities associated with charging a noncitizen defendant.

1. Legal-Status Constraints

The emergence of state courts as de facto immigration courts will affect one cross section of the foreign-born population more than any other: legal permanent residents (LPR). The leverage that prosecutors hold over noncitizen defendants derives from their ability to control the pool of removable immigrants. Thus, their gatekeeping power is largely limited to LPRs and other immigrants who have the right to remain in the United States *but for* a

Small, *Neighborhood Institutions as Resource Brokers: Childcare Centers, Interorganizational Ties, and Resource Access among the Poor*, 53 SOC. PROBS. 274, 285 (2006) (discussing factors affecting the resource brokering in public service centers).

173. I have written about this dynamic in the context of ICE and workplace enforcement. *See* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011).

174. *See* Cuéllar, *supra* note 103, at 261 (arguing that one of the functions served by external monitoring is creating incentives for executive officials to learn with a certain level of intensity).

175. *See* Eagly, *supra* note 5 (manuscript at 33).

conviction. In other words, a prosecutor can only threaten to take away something (i.e., legal status) that a defendant actually possesses.

LPRs represent nearly one-third or 12.6 million of the total foreign-born population.[176] They occupy the most privileged category of noncitizens. LPRs can apply to naturalize after a relatively short period of years,[177] and for those who attain permanent residence through marriage, that period becomes even shorter.[178] Although the right to sponsor immigrants typically vests in citizens, permanent residents also possess this right in certain instances.[179] They have the right to work,[180] and they can come and go from the United States with minimal burden.[181] In many ways, LPRs are virtually indistinguishable from citizens. Yet the obvious difference between citizens and noncitizens remains: only citizens are protected against the possibility of deportation. Prosecutors' abilities to manipulate convictions allows them to enjoy a bargaining advantage over lawfully present noncitizen defendants, who would retain the right to remain in the United States *but for* a conviction rendering them removable. On the whole, prosecutors typically enjoy no analogous power over unauthorized migrants because they are removable on the basis of their presence alone.[182] A prosecutor can do very little to diminish or otherwise affect the immigration-related consequences an unauthorized migrant faces.[183] Moreover, many

176. *See* Rytina, *supra* note 47, at 3 tbl.3. The Census Bureau estimates the total foreign-born population to be around 39.9 million, which would make LPRs about 32 percent of the total foreign-born population. *See* U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 tbl.2 (2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf.

177. *See* INA § 316(a), 8 U.S.C. § 1427(a) (2006).

178. *See id.* § 319(a).

179. *See id.* § 203(a)(2) (granting permanent residents the right to sponsor spouses and children).

180. *See id.* § 274A(h)(3) (including in the definition of "unauthorized alien," someone who is not "an alien lawfully admitted for permanent residence").

181. *See id.* § 101(13)(C) (listing the instances where an LPR returning to the United States is treated as a first-time entrant).

182. The instances in which the contours of a conviction will affect that migrant's chances of removal are much narrower. Under certain circumstances, an unauthorized migrant may apply for equitable relief (such as cancellation of removal) despite her unauthorized status. *See id.* § 240A(b) (listing the prerequisites for "[c]ancellation of removal and adjustment of status for certain nonpermanent residents"). In those instances, unauthorized migrants have to demonstrate the absence of a conviction, which would grant a prosecutor similar power over unauthorized migrants as they would against an LPR. For example, an assault conviction with a sentence for 175, and not 180, days—a difference over which state prosecutors and judges have great control—represents the difference between having and losing the right to remain. *See id.* § 240A(b)(1)(C) (listing as a prerequisite for eligibility that the noncitizen has not been convicted of an offense listed in § 212(a)(2)); *id.* § 212(a)(2)(A)(ii)(II) (listing as an exception to an excludable crime one where the maximum penalty did not exceed "imprisonment for one year" and one where the sentence received was not "in excess of 6 months" (regardless of the extent to which the sentence was ultimately executed)).

183. This is not to say that prosecutors wield *no* influence over unauthorized migrants. Some immigration crimes trigger significantly harsher sentences where a noncitizen reenters the United

unauthorized migrants caught up in the criminal justice system will never even make it to the plea-bargaining stage. Screening programs, like S-Comm, are designed to sweep such migrants into the removal pipeline at the arrest stage.

Hiroshi Motomura has argued that because equitable relief is unavailable to most removable immigrants, the "discretion that matters" resides with local law enforcement officers.[184] Undoubtedly, this is true. But his account applies most persuasively to unauthorized migrants, those who often have only a tenuous legal claim to remain within the United States. When law enforcement officers stop and question community members pursuant to their 287(g) power, they are largely screening for unauthorized immigrants and others who have committed immigration violations, some of which are federal criminal offenses as well.[185] By contrast, a prosecutor's power is greatest over legal permanent residents, those noncitizens who typically possess the right to remain in the United States indefinitely but for a conviction. This point helps refine Motomura's observation. While the arresting decision may be the "discretion that matters" for unauthorized migrants, a prosecutor's charging decision is the "decision that matters" for determining whether an LPR will ultimately be removed. This distinction is important; while the police and prosecutors both possess significant discretion to carry out their jobs as they see fit, each group is subject to a different set of pressures, which affects how that discretion is exercised.

The story of de facto immigration courts fits within a larger story of how immigration law has had a destabilizing effect on permanent resident status. Recently, Kevin Lapp has explained how the expansion of immigration consequences flowing from convictions has begun to transform permanent residents into a community relegated to living permanently in the shadows. Just as convictions regulate admission, deportation, and eligibility for equitable relief, convictions also determine whether a permanent resident can apply to naturalize, which requires the applicant to demonstrate good moral character. Importantly, the immigration code's definition of "good moral character" excludes from its definition those who have been convicted of certain types of

States after having been removed for a criminal conviction. *See supra* note 25. Because an unauthorized migrant might reasonably want to avoid exposure to such severe immigration-related *criminal* penalties, in this regard, state prosecutors still enjoy influence over unauthorized immigrant defendants.

184. *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil- Criminal Line*, 58 UCLA L. REV. 1819, 1838–39 (2011).

185. One of the chief complaints lodged against these sorts of delegations of power has been that officers have confused unauthorized immigrants for lawfully present residents and citizens. *See* TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 7 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

convictions.[186] Thus, as years pass, these permanent residents may feel an increasing affinity with the United States but will never be able to naturalize because of their criminal record. They are relegated to a permanent secondary status without the possibility of redemption.[187]

2. Political Constraints

Darryl Brown has argued that "*Padilla* doesn't matter (much)."[188] He observes that the seriousness of Mr. Padilla's underlying conduct—possession of a large quantity of marijuana—suggests that any politically feasible alternative plea disposition would have led to the same outcome of downstream removal.[189] Thus, he contends, most defendants like Padilla will not get the benefit of Sixth Amendment relief.[190]

Brown makes the important point that charging decisions should be evaluated against political realities, but that point can be refined in two ways. First, the Gousse, Critchley, and Heene examples[191] demonstrate that determining what is politically feasible can be hard to predict. Those cases all implicated felonious conduct; and as a general matter, the deeper a defendant's conduct goes into felony territory, the less likely it will be that a prosecutor will agree to a misdemeanor charge—which is exactly what Gousse, Critchley, and Mayumi Heene received.[192] But those cases also presented prosecutors with the opportunity to go after bigger fish (with Gousse), to enable local victims to recover significant civil remedies (with Critchley), and to convert one conviction into two (with the Heenes). So there are at least some circumstances where the idiosyncrasies of a case can free a prosecutor to move a charge downward.

A second and more generalizable point is that a different set of political constraints operates on prosecutors when making charging decisions at the

186. *See* INA § 316, 8 U.S.C. § 1427 (listing "good moral character" as a requirement for naturalization; INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (excluding from the definition of "good moral character" those who have been convicted of an "aggravated felony"); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1593–1614 (2012) (documenting the different ways the good moral character requirement is marginalizing permanent residents).

187. *See* Lapp, *supra* note 186, at 1624–29.

188. *See* Brown, *supra* note 62, at 1400–04.

189. *See id*.

190. A defendant's conduct often implicates a variety of different potential conviction outcomes, ranging from misdemeanors to felonies. For a defendant found with a large amount of marijuana—as Padilla was—the range of conviction outcomes will generally reflect felony charges. As it turns out, despite this generally applicable observation, Mr. Padilla got the benefit of his own landmark decision. *See* Padilla v. Commonwealth, 381 S.W.3d 322 (Ky. Ct. App. 2012) (vacating Padilla's conviction).

191. *See supra*, Part II.B.

192. *See* Wright & Engen, *supra* note 167.

petty end of the criminal spectrum.[193] Or put another way: for defendants arrested for petty conduct, *Padilla* very much matters.[194] The criminal justice system generally relies on parties to plead out, and one foreseeable consequence of *Padilla* is that noncitizen defendants will be more willing to reject a plea offer.[195] Therefore, the doctrinal innovation of *Padilla* will matter most for petty crimes and misdemeanors, since the vast majority of convictions generated by our nation's courts are for petty crimes and misdemeanors.

Felonies command significant public and scholarly attention, but the vast majority of convictions are for misdemeanors and other petty offenses.[196] For every felony registered, the police register ten misdemeanors.[197] In 2010, nearly three-fourths of the arrests made in the state of New York were for misdemeanors.[198] Contrary to the popular belief that the bulk of criminal law consists of high-drama felony trials, everyday criminal law regulates daily life in many urban areas via the rather undiscerning prosecution of more mundane offenses.[199] This process is messy and inconsistent, and sometimes the process itself constitutes the punishment.[200] The number of arrests for petty offenses is

193. *See* Bowers, *supra* note 41 at 1713 (noting that petty charging decisions are largely shielded from public scrutiny).

194. For example, several provisions have pegged one year of imprisonment as a cut-off point to be eligible for some significant benefits. Similarly, the immigration code attaches the consequence of deportation to "controlled substance" violations *except* "a single offense involving possession for one's own use of 30 grams or less of marijuana . . . ." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

195. *See* Eagly, *supra* note 5 (manuscript at 60–61) (citing anecdotal evidence in Harris County, Texas, supporting the conclusion that noncitizen defendants are exhibiting a greater willingness to exercise the "nuclear option" of going to trial).

196. A precise definition of "petty" offenses and "misdemeanors" remains elusive, primarily because jurisdictions have great leeway in defining crimes. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 290 (2011) ("[L]egislatures deviate in different ways, resulting in a broad range of crimes that qualify as misdemeanors depending on the particular jurisdiction."). Examples of misdemeanors and petty offenses include suspended-license cases, disorderly conduct, DUIs, drug possession, and minor assault. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1321 (2012).

197. In 2006, there were approximately 1 million felonies. *See* Bureau of Justice Statistics, *2006—Statistical Tables*, 2009 FELONY SENTENCES IN STATE COURTS 3 tbl.1.1, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf. Thus, there are about 10 million misdemeanors registered.

198. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE STATISTICS, ADULT ARRESTS: 2001–2010 (2012), *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYork State.pdf (showing that, of the 584,558 arrests that New York recorded in 2010, 423,947 (or 73 percent) were for misdemeanors); Steven Zeidman, *Policing the Police: The Role of Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 315 (2005) (noting that misdemeanor arrests in New York increased by almost 50 percent between 1993 and 2003).

199. Malcolm Feeley's study of the Connecticut criminal courts remains one of the most useful studies of the administration of criminal justice. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

200. *See id.*

staggering. Drug arrests have "more than tripled" in the last quarter-century.[201] In New York City, misdemeanor arrests for marijuana possession rose ten-fold from 1997 to 2006.[202] As one scholar observes, "Never before have so many been arrested for so little."[203]

High-volume policing is no accident. Police forces have embraced order-maintenance policing in our nation's most populous cities.[204] Order-maintenance strategies seek to deter serious criminal activity by regulating low-level crimes on the theory that diffuse and relatively negligible problems like public disorder, if left unaddressed, eventually foment more serious crimes.[205] These strategies attack "disorderliness itself."[206] This approach to policing has met its share of criticism. Some opponents focus on its subordinating effects on communities of color.[207] Others take issue with the claim that order-

201. *See* MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2–3 (2007), *available at* http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

202. *See* HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007, at 4–5 (2008), *available at* http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf.

203. *See* Zeidman, *supra* note 198, at 317–18.

204. *See* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006) (noting that New York, Chicago, and Los Angeles have all adopted policing strategies predicated on "more aggressive enforcement of minor misdemeanor laws, also known as 'order maintenance' policing.").

205. *See* Bowers, *supra* note 41, at 1693; *see also* BERNARD E. HARCOURT, THE ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 23–27 (2001).

206. *See* Harcourt & Ludwig, *supra* note 204, at 281. William Bratton, one of the chief architects behind this approach to policing, introduced a "quality-of-life initiative" when he served as police chief in New York City during the 1990s. He targeted "gun possession, school violence, drug dealing, domestic violence, auto theft, and police corruption" and advanced a strategy of "flooding drug-infested neighborhoods with large numbers of police officers carrying out buy-and-bust operations, quality-of-life enforcement, and stops and frisks." HARCOURT, *supra* note 205, at 49. A constitutive feature of these programs has been using performance benchmarks as a way of holding commanders responsible for policing decisions in crime-prone areas.

207. Studies suggest that police arrest blacks and latinos for low-level crimes, like marijuana possession, at a much higher rate relative to their proportion of the population. *See* LEVINE & SMALL, *supra* note 202, at 4 (reporting that, in New York City between 1997 and 2006, blacks represented about 26 percent of the city's population but 52 percent of marijuana arrests; Hispanics represented about 27 percent of the population but 31 percent of marijuana arrests); Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813–14 (2007) (concluding that members of minority groups were stopped more often than whites under New York City's "stop and frisk" policies). Many of the crimes for which investigatory targets were initially arrested—like panhandling and public urination—do not themselves give rise to convictions triggering removal. But many of these targets carried contraband such as drugs, *see* Zeidman, *supra* note 198, at 317, which *does* give rise to convictions with adverse immigration consequences. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (stating that convictions related "to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" render a noncitizen removable). This disproportionate treatment, combined with emerging stories of citizens mistakenly apprehended for immigration reasons, works to alienate communities of color. *See* KOHLI

maintenance policing is responsible for the national decline in crime.[208] This shift in policing tactics combines with the expansion of the categories of crimes triggering immigration consequences to increase the number of noncitizen defendants subject to the possibility of removal.

An individual petty offense conviction typically offers little political payoff.[209] No single case assumes much importance, but cases matter a great deal in the aggregate. Petty offenses are valuable to prosecutors because they like to accumulate wins, and convictions denote success and often lead to advancement and promotion. For the prosecutors involved in the Gousse, Critchley, and Heene cases, the high-profile and heavily scrutinized nature of those cases undoubtedly tapped into what Alafair Burke calls a prosecutor's "prideful warrior mentality," whereby prosecutors "care not only about how many cases they win, but also *which* cases they win and *how* they are won."[210] But petty and low-level crimes rarely provoke the warrior within. And more to the point, few members of the public would *appreciate* a prosecutor's inner warrior in a low-level case. Suppose a prosecutor is deciding how to charge a long-time LPR who got tangled up in a street scuffle. Suppose further that a misdemeanor conviction for negligent assault would help the defendant avoid downstream deportation whereas a conviction for intentional assault would practically ensure it.[211] A prosecutor can make the choice in this case largely independent of surrounding political pressure because such a case is unlikely to attract meaningful public scrutiny. Thus, aside from the big, splashy cases—the Gousses, Critchleys, and Heenes of the world—prosecutors have an incentive to embrace practices that facilitate quick convictions.[212] One manifestation of this incentive is that prosecutors are much more likely to charge in misdemeanor cases than in other cases. Indeed, Josh Bowers found that,

& VARMA, *supra* note 11, at 4 (reporting that ICE has mistakenly apprehended approximately 3,600 U.S. citizens through the S-Comm initiative).

208. *See* Harcourt & Ludwig, *supra* note 204, at 291 (arguing that the decline in crime rates more likely reflects a "mean reversion" than it does the effectiveness of order-maintenance policing).

209. *See* Bowers, *supra* note 41 at 1703.

210. *See* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 188 (2007) (emphasis in original).

211. For a greater discussion of how this distinction avoids immigration consequences, see *infra* Part III.B.

212. One example of prosecutors trying to do more with less is the practice of offering a plea conviction at the arraignment stage. Such an offer at such an early stage of the conviction process, at a point when the defense attorney has almost certainly had no more than a few minutes or hours to confer with her client, hinders the defense attorney's ability to identify potential immigration consequences. In some jurisdictions, defender organizations have resorted to having immigration experts on call, even for night arraignments, or to hire contract attorneys at ally organizations. *See* Mauro & Wise, *supra* note 90. Not surprisingly, then, the vast majority of convictions secured by prosecutors are for misdemeanors and other petty offenses such as driving under the influence, driving with suspended licenses, minor assault, and minor controlled substance offenses. *See* Natapoff, *supra* note 196, at 1320–21; Roberts, *Why Misdemeanors Matter*, *supra* note 196, at 280–81.

counterintuitively, prosecutors are much less likely to decline to charge in misdemeanor cases than in other cases.[213]

3. Resource Constraints

Finally, prosecutor's offices, like all public agencies, must operate within a universe of finite resources,[214] and prosecutors face pressure to generate a high number of convictions.[215] This constraint works somewhat at odds with the political constraints prosecutors face, at least with regards to petty cases. On the one hand, prosecutors typically face little or no public scrutiny over their charging decisions in petty or low-level crimes. This gives prosecutors some measure of freedom to adjust charges to avoid downstream removal. On the other hand, the volume of petty and low-level cases prevents them from lingering too long on any individual case. This puts pressure on them to figure out the terms of the deal as quickly as possible, which is no easy feat given the complexities of immigration law. Thus, it is easy for prosecutors to gloss over the specifics of a particular case and instead view these petty cases in the aggregate.[216]

The sheer volume of misdemeanor cases passing through state criminal courts pressures parties to reach plea deals even where the underlying charges rest on weak or no evidence.[217] Additionally, institutional protections for

213. In examining declination rates in New York City from 2005 to 2008, Josh Bowers found that the three lowest declination rates were for crimes of theft of services, prostitution, and possession of forged instruments, and the three highest rates were for menacing, assault, and possession of stolen property. Bowers, *supra* note 41, at 1720 tbl.4. In addition to Bowers's conclusions grounded in empirical research, he also offers some pointed observations based on his own experiences as a criminal defense lawyer:

> In my former practice, public order cases went by the evocative title "disposables," because that is what institutional actors intended for them. For disposable cases, prosecutors' initial decisions of what and whether to charge are somewhat dispositive on the question of whether the defendant will ultimately end up with some type of conviction—even if some equitable play remains in the punishment joints.

Id. at 1709.

214. As Shoba Wadhia observes, prosecutorial decisions not to pursue a particular case rest in part on the notion that, "[b]ecause the government has limited resources to spend, permitting the agency and its officers to refrain from asserting the full scope of their enforcement authority against particular populations or individuals is cost saving and arguably allows the agency to focus their work on the 'truly' hazardous." Wadhia, *supra* note 131, at 244.

215. *See* Bowers, *supra* note 41, at 1703 ("[P]rosecuting petty cases is an effective way to net a high rate and absolute number of convictions—figures that serve as particularly salient measures of prosecutorial performance."); *id.* at 1707 ("Notably, cheap deals are readily had in petty cases where prosecutors maximize speed—not sentence length.").

216. *See id.* at 1703–04*; see also* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 455 (1992) (describing the modern criminal justice system as "emphasizing correctional programs in terms of aggregate control and system management rather than individual success and failure").

217. As Alexandra Natapoff observes:

> [F]or urban street control crimes such as loitering, trespassing, disorderly conduct, and gang injunction violations—a large and crucial subset of the docket—the conclusion that these

misdemeanor defendants can be less than robust. Alexandra Natapoff suggests that, while the procedural protections available in cases involving "serious felonies get closer to the ideals of due process," the reality is much bleaker in misdemeanor cases: "Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel."[218] This has membership consequences: noncitizen defendants who plead guilty where the underlying evidence is weak or non-existent end up comprising a "false removal"—those whose convictions render them removable but whose behavior ostensibly captured by the conviction greatly exaggerates or misrepresents their actual behavior.[219] The meaning of guilt has thus been diluted. While the label "misdemeanant" suggests conduct that is minimally offensive, it erroneously suggests that the punishment that follows will bear some proportional relation to that conduct.

In theory, *Padilla* can correct for these deficiencies. Defense lawyers can reject or make a counteroffer to a prosecutor's initial plea proposal, thus forcing a prosecutor to take a closer look at the underlying evidence. But defense lawyers often must contend with resource and time constraints as well. Anecdotal evidence suggests that after *Padilla*, criminal defense lawyers must often identify all potential immigration consequences that might flow from a proposed plea agreement in a matter of minutes on behalf of a client they barely know. One study found that part-time defenders in New Orleans handled the equivalent of almost 19,000 cases a year, which limits them to seven minutes per case.[220] In some cases, it appears that noncitizens are being denied the right to counsel altogether.[221]

> convictions are valid is more leap of faith than demonstrable fact. Much of urban policing consists of arrests made for purposes of street control, and the system has only weak postarrest mechanisms for checking whether such offenses are actually based on evidence of crime.

Natapoff, *supra* note 196, at 1330; *see also* FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 229 (Wesley Skogan & Kathleen Frydl eds., 2004) (suggesting that research does not support the perception held by policy makers that order maintenance policing caused the decline in crime).

218. Natapoff, *supra* note 196, at 1315.

219. These trends have been exacerbated by federal incentives, which provide remunerative awards to police departments that pursue drug law enforcement. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42–56 (1998) (discussing federal block grants and forfeiture laws, which incentivize police to prioritize the enforcement of drug violations); *see also* Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 287 (2000) (noting that some observers have argued that increases in drug enforcement can be linked to federal legislation allowing local police agencies to keep the proceeds from assets seized through drug enforcement activities).

220. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21 (2009), *available at* http://www.nacdl.org/public.nsf/

Some relatively minor structural and administrative changes might help lift the fog that currently covers many criminal proceedings. Defense lawyers do not typically keep track of where their clients end up and how they eventually fare once they exit the criminal justice system. Construction of a database containing the "immigration prices" associated with each negotiated criminal outcome can help ameliorate the information deficit inexperienced lawyers must overcome.[222] Many noncitizen defendants eventually get swept into removal proceedings, while others do not. Of those who are subject to removal proceedings, some are ultimately removed while others find some form of relief. For the current generation of defenders that is still learning the intricacies of the relationship between criminal law and immigration law, learning how their former clients fared downstream can facilitate the long, arduous process of developing expertise and mastery over a process filled with uncertainty.[223] Indeed, the Uniform Law Commission has made similar recommendations.[224] In its Uniform Collateral Consequences of Conviction Act, the Commissioners recommended that any state interested in achieving

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defenseupdates/misdemeanor/$FILE/Report.pdf. This same study observed that, "[b]ecause of the number of cases assigned to each defender, 'legal advice' often amounts to a hasty conversation in the courtroom or hallway with the client." *Id.* at 31. Defenders as a general matter, especially in urban centers, carry a misdemeanor caseload far in excess of recommended limits. For example, in Chicago, Atlanta, and Miami, defenders are forced to carry more than two thousand misdemeanor cases a year, well above the recommended limit of four hundred misdemeanor cases a year. *See id*. at 21; *see also* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 294 (2009) (explaining that in New York, a criminal defense attorney typically has 19.5 minutes to work on each case).

221. Apparently, judges in at least one state appear to receive explicit instructions to deny the right to counsel in petty offense cases. The NACDL report found that the Chief Justice of the South Carolina Supreme Court made the following statement at a South Carolina Bar Association event:

> *Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.

BORUCHOWITZ, BRINK & DIMINO, *supra* note 220, at 15.

222. *See* Bibas, *supra* note 62, at 2532 (explaining that a database filled with information on sentencing information and outcomes "could help nonrepeat players to understand the going rates or prices for crimes").

223. Though I have had informal conversations with many public defenders, all of whom have represented noncitizen defendants, nearly none of them knew what eventually happened to their noncitizen clients. Some confessed to receiving "thank you" notes from those noncitizens who managed to avoid removal. But learning who managed to avoid removal provides an incomplete data set and is much less useful than one that includes information about which noncitizens were subject to removal.

224. The Uniform Law Commission is a nonprofit, unincorporated association comprised of state-appointed commissioners whose purpose is to assist in the drafting of uniform state laws in subject areas where uniformity is desirable. *See Frequently Asked Questions*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Mar. 7, 2013).

collateral consequences reform should collect and make publicly available through the Internet the collateral consequences that flow from any individual criminal statute.[225] Such a solution would help reduce informational costs at the front end and represent a second-generation version of many of the resources that are starting to become available to criminal defense attorneys.[226]

A redistribution of the types of cases assigned to public defenders and prosecutors that allows more experienced attorneys to handle some immigration cases can also help noncitizen defendants reap the promise of *Padilla*. More experienced attorneys can help set organizational policies and train more junior attorneys on both sides to strike better plea bargains. Traditionally, in both public defender and prosecutor's offices, the most inexperienced attorneys have assumed responsibility over misdemeanor and petty-offense cases, while the more seasoned attorneys tend to felonies and other serious crimes. Misdemeanor cases thus provide a useful training ground for "rookie" attorneys to refine their skills before moving on to higher-stakes cases. But as immigration consequences have insinuated themselves into the practice of criminal law, especially in communities with a high population of noncitizens, having more experienced attorneys supervising the plea-bargaining process may improve downstream immigration consequences for noncitizen defendants.

III.
ACCOMMODATING DE FACTO IMMIGRATION COURTS

Immigration law's increasing dependence on criminal convictions to identify potentially removable migrants has transformed many state courts into de facto immigration courts. And because criminal courts are typically driven

225. Under this Act, the Commission recommends that states identify any law "which imposes a collateral sanction or authorizes the imposition of a disqualification, and any provision of law that may afford relief from a collateral consequence" and that this information "be available to the public on the Internet without charge . . . ." Uniform Collateral Consequences of Conviction Act of 2009 § 4(a), (c) (amended 2010), *available at* http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf; *see also* Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 42 (2010) (noting that in 2003, the ABA "urg[ed] jurisdictions to collect and codify collateral sanctions, to provide for their consideration in the plea bargaining and sentencing process, and to allow for their modification and removal").

226. For example, the Immigrant Legal Resource Center has put together a "Quick Reference" chart, which analyzes the immigration consequences of each California crime by code. A database would simply create an interactive method of accessing this information, and one that could more easily be updated. *See* BRADY, *supra* note 77, at N-30. Such a database could also improve the plea-bargaining process for prosecutors inclined to accommodate alternative dispositions that avoid adverse immigration consequences. Because charging documents set the baseline for the plea-bargaining process, a database can help the prosecutor set a charge that already achieves the desired outcome for the noncitizen defendant. Such a database thus would make the bargaining process more efficient, and allow the prosecutor to tend to other, more pressing matters.

by prosecutors, immigration outcomes are now being skewed by the priorities and pressures of those prosecutors. All of this cuts against the notion that the Executive can oversee how local law enforcement actors exercise their immigration-related authority. This fact alone generates an important insight on the institutional design of immigration enforcement: localities have the ability to affect the conviction-based removal system by controlling the pool of potentially removable immigrants.

In this Part, I explore how immigration law might accommodate this reality. For purposes of this analysis, I remain agnostic toward the notion that state criminal court decisions can bind or displace decisions in federal immigration proceedings. Therefore, I focus on ways of improving, rather than eliminating, the ability of state courts to issue decisions with a dispositive impact on immigration outcomes. With this in mind, this Part focuses on how Congress and the Supreme Court can facilitate the ability of criminal law actors to participate in this process.

As for Congress, it has become quite comfortable delegating immigration authority to localities, but has done so largely to law enforcement officials. Congress might consider delegating immigration power to other actors within the criminal courts—namely, sentencing judges. As I explain, this is an arrangement Congress utilized in the past and one that may be worth resuscitating in light of the Executive's heavy reliance on criminal convictions in sorting immigrants. As for the Court, *Padilla* will ensure that immigration consequences will arise with some regularity in the course of plea bargaining. Although the Court cannot reform the immigration code itself, it can control the rules dictating which types of information immigration judges (IJs) can consider when determining whether a particular conviction generates immigration consequences. Over the years, the Court has expanded the types of information IJs can consider, which has the effect of making it harder for prosecutors and defense lawyers to ensure that a particular conviction designed to avoid removal does in fact avoid it downstream. As more immigration-related power shifts to the plea-bargaining stage, the Court may be forced to rethink this trend in favor of a return to an era of the categorical analysis of criminal convictions.

A. Formalizing the Delegation of Authority

Until 1990, a procedure known as a judicial recommendation against deportation (JRAD) empowered sentencing judges at both state and federal levels to intervene on behalf of noncitizens who were removable as a matter of law but who deserved some measure of reprieve as a matter of equity.[227] The

227. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1479 (2010). The Court further noted: "[The JRAD] had the effect of binding the Executive to prevent deportation; the statute was

JRAD played a central part in the Court's analysis in *Padilla*. As the Court explained, "Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis."[228] Although a fuller treatment of this issue is better left for another day, the Court's reference to JRADs raises an intriguing alternative to the current prosecutor-centered world of de facto immigration courts.

The JRAD era represented the last time criminal courts *formally* operated within the interstitial space binding the immigration and the criminal justice systems. Amid growing public anxiety over the specter of "criminal aliens," Congress did away with JRADs, which left IJs to make equitable decisions as they (and only they) deemed fit. Even that form of equitable relief all but vanished in 1996 with the passage of a pair of statutes severely curtailing the ability of immigrants to obtain equitable relief for deportation.[229] The Court noted that as our nation's immigration laws increasingly moved toward a deportation-based immigration regime, JRADs provided a "critically important procedural protection to minimize the risk of unjust deportation."[230] Doing away with JRADs "raised the stakes of a noncitizen's criminal conviction" and elevated the "importance of accurate legal advice for noncitizens accused of crimes."[231] Within the Court's analysis, competent and accurate advice from counsel operates as a surrogate for the equitable protection provided by orders issued by judges. Because Congress withdrew from sentencing judges the power to expressly consider immigration-related issues of equity, the Court redirected such claims through the Sixth Amendment via criminal defense lawyers.

Delegating immigration authority to sentencing judges would open up oversight opportunities not currently available for local prosecutors. For one thing, Congress could set clear limitations on the extent to which sentencing judges could halt downstream removal proceedings. Under the previous version of the JRAD, Congress gave sentencing judges the ability to prevent immigration officials from removing a particular noncitizen on moral turpitude

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'consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.'" *Id.* (internal citations omitted).

228. *Id.*

229. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009–546 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). *See also* Morawetz, *supra* note 18 at 1940 ("For crimes that had previously been considered aggravated felonies, the new law bars relief regardless of the length of the prison sentence or whether the person received any prison sentence at all.").

230. *Padilla*, 130 S. Ct. at 1479.

231. *Id.* at 1480. Although the Court's reasoning is theoretically sound, there are some questions as to the extent of its empirical basis. *See* Taylor & Wright, *supra* note 118, at 1148 (noting that the use of JRADs was "virtually unheard of" in many jurisdictions).

grounds.[232] Depending on how much leeway Congress wanted to grant sentencing judges, a resuscitated version of the JRAD could give sentencing judges estoppel power over a greater or lesser number of grounds for removal.

A JRAD would also give immigration officials the opportunity to challenge those acts of local mercy which deviate from federal visions of equitable relief. The prosecutorial maneuvering in the Gousse example frustrated federal immigration enforcement efforts because Gousse's conduct—his previous armed robbery—placed him squarely within the type of "criminal alien" immigration officials seek to deport. Given the priorities set by the current administration, immigration officials might be less perturbed by the situation in which a defendant was arrested for a petty offense, for example, and the prosecutor shifted the charge downward because doing so preserved the defendant's ability to seek relief under the Deferred Action for Childhood Arrivals (DACA) program.[233] But the point is that ICE cannot affect a prosecutor's decision to place an armed robber on the same footing as a potential DACA recipient because prosecutorial charging decisions are largely unreviewable. By contrast, judicial orders are typically transparent, tethered to standards which are developed over time, and usually reviewable by appellate courts. Under the previous version of the JRAD, a sentencing judge could issue such a recommendation but only after giving immigration officials the opportunity to respond.[234] Not all JRAD recipients will so starkly belong in the DACA category or armed robber category. A range of hard cases will arise between these two extremes. But the point is that immigration officials would be able to challenge and correct for deviations that cut against federal priorities. Again, tinkering with the terms of the delegation can help Congress calibrate

232. A former version of 8 U.S.C. § 1251(b)(2) provided:

> The provisions of subsection (a)(4) [the grounds for removal for moral turpitude] respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such aliens for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interest State, the Service, and prosecution authority, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

See Taylor & Wright, *supra* note 118, at 1143 n.44 (2002) (including text for former 8 U.S.C. § 1251(b)(2) (1988)).

233. In 2012, the DHS announced a deferred-action program for those otherwise removable immigrants who arrived in the United States as children. This deferred action for childhood arrival (DACA) program sets threshold eligibility requirements, one of which is demonstrating that the applicant "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." *See* Memorandum from Janet Napolitano to David Aguilar, et al., *supra* note 130, at 1.

234. See Taylor & Wright, *supra* note 118, at 1143 n.44 (including text for former 8 U.S.C. § 1251(b)(2) (1988)).

how much it wishes to leave to sentencing judges and how much monitoring power it wishes to grant the Executive.[235]

Whether or not Congress chooses to consider more expressly involving sentencing judges in removal decisions, it is likely they will continue to play a role in the administration of immigration-related matters. In *Flores v. State*, defense counsel erroneously advised the noncitizen defendant, Jose Martinez Flores, that pleading to a misdemeanor conviction for possession of drug paraphernalia would not trigger removal proceedings.[236] When the defendant went to court to enter his plea, the sentencing judge warned him that the conviction could in fact lead to such consequences.[237] Without addressing the question of deficiency of counsel, the court held against Flores on prejudice grounds, concluding that "[the sentencing judge's] deportation warning in the plea colloquy cures any prejudice arising from counsel's alleged misadvice."[238] The court in *Flores* placed great faith in the restorative powers of in-court warnings, but the facts of the case cast some doubt on this conclusion. The court observed that Flores "understood what the judge said but did not believe this warning applied to him personally. He thought this was something the judge had to say to everyone and relied on what his attorney had told him instead."[239] This example raises interesting questions about what a defendant is supposed to do when receiving conflicting messages, and whose warning should prevail as binding and with legal effect.

Beyond the regulation of plea bargaining, sentencing judges can influence criminal proceedings in other ways to increase the focus on the underlying immigration-related equities of any given case. For example, judges control the allocation of legal defense services. But on what basis are these services being allocated? Some have suggested that given endemic resource constraints, courts might be incentivized to give preference to attorneys who work through and dispose of cases quickly.[240] But it seems that in jurisdictions where a significant number of defendants are likely to be exposed to downstream immigration consequences, judges may give preference to attorneys with relevant experience representing noncitizens. Indeed, states with large immigration

235. *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 612–14 (2006) (explaining how legal structures such as rules and case-by-case discretion can create a number of different possible deportation regimes).

236. 57 So. 3d 218 (Fla. Dist. Ct. App. 2010).

237. *Id.* at 218–19.

238. *Id.* at 219–20.

239. *Id*. at 220.

240. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812–13 (2004).

populations[241] may even consider immigration expertise as a factor in appointing the judges themselves.[242]

Even where a judge may not have any formal training on immigration issues, the judge is likely to begin developing such expertise moving forward.[243] In the past, sentencing judges might have been exposed to cases involving noncitizen defendants but the immigration consequences of those convictions were never scrutinized or evaluated. Thus, judges could opt out of the process by which judges accumulate expertise over time by grappling with similar cases. Post-*Padilla*, judges will be forced to face these issues and the repeated exposure to these types of issues can help educate the criminal courts. We have seen this already elsewhere. With the REAL ID Act of 2005, Congress consolidated judicial review in the federal circuit courts.[244] Predictably, the number of immigration-related petitions ballooned in the circuit courts. And while this jurisdictional rearrangement has certainly strained the courts, it has also transformed them into "quasi-specialized" courts on immigration issues.[245]

B. Clarifying the Bargaining Rules

One criticism of plea bargaining in the criminal justice context is that the parties must negotiate in the shadow of mandatory penalties and sentencing guidelines, which impose or recommend the same penalties onto a relatively broad range of conduct. As Stephanos Bibas explains, these penalties create "cliffs" rather than "smooth slopes," which can frustrate the process of fine-tuning the terms of a plea deal.[246] The process of crafting a deal to avoid downstream removal works against a similar dynamic. Juliet Stumpf has

241. Two-thirds of the national immigrant population is concentrated in California, New York, Florida, Texas, New Jersey, Illinois, Georgia, Massachusetts, Arizona, and Virginia. *See* STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUDIES, IMMIGRANTS IN THE UNITED STATES 2007: A PROFILE OF AMERICA'S FOREIGN BORN POPULATION 6 (2007), *available at* http://www.cis.org/articles/2007/back1007.pdf.

242. *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1551 (2010) (suggesting that Congress might profitably consider a judicial nominee's views on immigration issues when deciding whether to confirm those nominees).

243. As some have pointed out, many state courts have struggled to process *Padilla* claims. *See* Hernández, *supra* note 55, at 304–05.

244. *See* INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2006) ("Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal . . . .").

245. Lawrence Baum observes:

> If specialization enhances judges' expertise and thus improves efficiency and effectiveness, judges on the Second and Ninth Circuits likely have secured that benefit. Because the preponderance of petitions for review of BIA decisions today involve asylum, judges in these two circuits have an especially good opportunity to develop expertise on that issue.

Baum, *supra* note 242, at 1550–51.

246. See Bibas, *supra* note 62 at 2487–88.

characterized deportation as a consequence that is implemented through an "on-off switch,"[247] where two closely related and seemingly indistinguishable types of convictions may lead to divergent immigration outcomes. Where the defendant is a noncitizen, the parties not only confront cliffs, but they also have difficulty discerning how far they can wander in a certain direction before walking off one.

If a prosecutor leverages a defendant's immigration status to press a deal, a defendant's willingness to accept turns in part on a prosecutor's credibility. Can the prosecutor actually keep the defendant out of the removal pipeline as promised? Barring the unlikely scenario that the prosecutor drops all charges, the defendant will be convicted of *something*, which means that the defendant's criminal record very well may draw at least some scrutiny at some point from immigration officials. Even where noncitizen defendants (and their lawyers) enter into plea negotiations with prosecutors willing to accommodate immigration considerations, a specific problem arises: how can the parties be sure that their agreed-upon deal will in fact insulate the defendant against removal downstream? Thus, the challenge is making the shadow of removal as clear and discernible as possible. This challenge, in turn, implicates a body of law regulating how immigration officials implement the immigration consequences of criminal convictions.

Although the terms of this area of law can be quite technical, they merit some elaboration. For much of the twentieth century, in determining whether a particular conviction triggered immigration consequences, IJs examined the criminal statute (which was usually a state statute) to see whether the elements of that statute satisfied the conditions triggering deportation as defined by the federal immigration statute. This "categorical" method of interpretation permitted IJs to examine the underlying elements of the convicting statute but not the underlying documents (if any) generated by that criminal proceeding. This cautious view of immigration officials' authority reflected both the view that administrators should not engage in fact-finding (which was something left to the judicial branch)[248] and the belief that limiting the duties of immigration bureaucrats would better achieve Congress's pragmatic concerns with

247. *See* Stumpf, *supra* note 30, at 1691.

248. For example, in 1914, the Second Circuit addressed whether a conviction for libel under British law was a crime "involving moral turpitude" in order to determine whether immigration officials could properly exclude the appellee. In concluding that exclusion was unwarranted, the court explained: "[T]he immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude." United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914); *see also* Das, *supra* note 33, at 1689–95 (summarizing the early development of the categorical approach).

uniformity and efficiency.[249] By creating a statutory scheme that operated through categorical and legal (as opposed to case-specific and factual) modes of analysis, Congress evinced a preference for an immigration adjudication strategy unencumbered by resource-intensive collateral trials.[250] This preference led to the rule that issues already resolved in prior adversarial settings should not be relitigated before an IJ.[251]

Like a Russian nesting doll designed to fit inside a larger doll, the categorical approach requires IJs to focus on whether the relevant immigration code provision on which removal is based fully encompasses the elements of the convicting statute.[252] Thus, under a traditional categorical analysis approach, a conviction may properly provide the basis for a noncitizen's removal only where all of the conduct regulated by the convicting statute falls within the definition of the federal removal statute.[253] If some of the conduct criminalized by the convicting statute goes beyond the conduct covered by the removal statute, then a noncitizen may not be removed; in such a situation, the overbreadth suggests that Congress did not intend the activity or conduct for which the noncitizen was convicted to serve as the basis of removal.[254] In that instance, a conviction would suffer for lack of reliability by failing to guarantee that the noncitizen was *necessarily* convicted of the crime Congress designated as triggering removal.

The categorical approach creates the clearest set of bargaining rules for defense lawyers and prosecutors in upstream criminal proceedings. Let us

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249. *See Mylius*, 210 F. at 863 (citing the need for the law to be "uniformly administered" as another reason underlying the categorical approach).

250. *See* Shepard v. United States, 544 U.S. 13, 20 (2005) (explaining that the categorical approach represents "a pragmatic conclusion about the best way to identify generic convictions in jury cases, while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction").

251. From an informational standpoint, such a rule could at times prove to be strong medicine. As Rebecca Sharpless observes, immigration law's reliance on criminal convictions is "a two-way street." Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 980 (2008). The government is permitted to rely on a prior conviction as "conclusive proof of guilt, rendering irrelevant to immigration proceedings even the most persuasive proof of actual innocence. On the other hand, the immigrant is entitled to have her deportation depend only on the 'conviction' rather than on any extraneous fact." *Id.* A strict, bright-line rule helps ensure that any collateral consequence that flows from a conviction has a factual basis. *See* Das, *supra* note 33, at 1674 (noting that the categorical method of analysis prohibits immigration officials from considering extrinsic evidence beyond the record of conviction, regardless of "whether the underlying facts help or hurt the immigrant").

252. *See Shepard*, 544 U.S. at 21 (explaining that the relevant inquiry is whether "a later court could generally tell whether the plea had 'necessarily' rested on the [relevant fact]").

253. *See* Das, *supra* note 33, at 1688.

254. Although the categorical method has governed immigration law at the administrative level for the duration of the twentieth century, *see* Taylor v. United States, 495 U.S. 575 (1990), it is often credited as the Court-endorsed doctrinal basis for the approach in the modern era. *See* Sharpless, *supra* note 251, at 1002–06 (discussing Supreme Court decisions addressing the categorical approach).

suppose that after a successful post-*Padilla* plea bargain, a prosecutor wants to charge Vincent Chong, a hypothetical LPR and citizen of China, with a crime that is supported by the underlying evidence but which avoids removal. Under the INA, a noncitizen can be removed for committing a "crime of violence," which is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ."[255] The Supreme Court has held that a "crime of violence" has an intent requirement.[256] Under New York law, a prosecutor can secure a third-degree assault conviction on the basis of intentional, reckless, or negligent force.[257] Based on Chong's conviction, therefore, an IJ using a strict application of the categorical method knows only that Chong's conduct *may have been* intentional, reckless, or negligent. Looking only at the statute for third-degree assault, an IJ would not know the exact state of mind Chong had, and therefore would not know exactly whether Chong had met the Supreme Court's intent requirement. Therefore, in a categorical method jurisdiction, the prosecutor can prevent Chong's removal by charging him with third-degree assault. In this scenario, it would not matter if Chong, in fact, hid behind a tree, waited until his victim was within striking distance, and then decisively pounced on and pummeled the victim with rigor and intent. Because Chong's conviction could be based on something less than intentional force—either recklessness or negligence—there is no guarantee that the prior conviction *necessarily* satisfies the "crime of violence" basis for removal created by Congress. Therefore, an IJ may rule that Chong may not be removed.

Over the last several years, competing analytical approaches have displaced the simplicity and predictability that the categorical method offers. In 2005, the Court established the "modified" categorical approach: immigration officials could now peer behind the face of the criminal statute and examine the

255. Under the INA, an "aggravated felony" means, among other things, "a crime of violence (as defined in section 16 of Title 18[]) for which the term of imprisonment [is] at least one year." *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006). From an immigration perspective, the sounder course of action would be to seek an assault conviction that rests on a theory of negligence or even recklessness. *See* PETER L. MARKOWITZ, IMMIGR. DEF. PROJECT & N.Y. STATE DEFENDERS ASS'N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN 8 (2009), *available at* http://www.reentry.net/library/item.346413-Protocol_for_the_Development_of_a_Public_Defender_Immigration_Service_Plan.

256. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004). In *Leocal*, the Supreme Court interpreted the meaning of "crime of violence" in light of a state DUI statute which criminalized negligent conduct. The Court concluded that a "crime of violence" required "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* The Court left open the question of whether a statute criminalizing recklessness could amount to a "crime of violence." *See id.* at 13 ("This case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against the person or property of another qualifies as a crime of violence under 18 U.S.C. § 16."); *see also* N.Y. PENAL LAW § 120.00(2)–(3) (McKinney 2012).

257. *See* N.Y. PENAL LAW § 120.00 (1)–(3) (McKinney 2012).

supporting criminal proceeding documents.[258] While this modified categorical approach allows immigration officials to paint a fuller picture of the actual conduct that formed the basis for the conviction and possible removal, the availability of criminal proceeding documents also invites questions of procedural and factual trustworthiness. That is, some supporting documents on which IJs may now rely are not produced for immigration enforcement purposes, and thus may not paint completely accurate pictures. To allay concerns over the erosion of reliability, the Court has limited this universe of documents to the charging document, transcript of the plea colloquy, and other comparable judicial records.[259] By contrast, documents such as police reports (which are created before charges are filed) cannot be used for such purposes because they fall well short of the certainty a record of conviction offers.[260]

The modified categorical approach complicates the negotiation process for prosecutors and criminal defense lawyers because it introduces additional variables they must consider in crafting a deal that minimizes the likelihood of downstream removal. To tease out this point, consider a variant on the Chong example. Under the immigration code, a conviction for "possession of a firearm" can render a noncitizen removable.[261] Suppose that Chong is charged with "weapons possession" and the relevant criminal statute allows "weapons possession" convictions for possessing a wide cross section of weapons ranging from firearms and rifles (which are unquestionably "firearms" within the meaning of the immigration code) to "nunchakus" and brass knuckles (which

258. The modified categorical approach was established in a criminal sentencing case. *See* Shepard v. United States, 544 U.S. 13, 24–26 (2005) (explaining that, in certain cases, courts may consider examine documents associated with prior convictions). The Court imported and applied this approach to immigration proceedings in 2007. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 187 (2007) (approving the interpretative approach articulated in *Shepard* where courts may go "beyond the mere fact of conviction").

259. *See Shepard*, 544 U.S. at 26 (2005) (holding that the universe of permissible conviction-related documents that may be considered in the context of sentence enhancement "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"); *see also Duenas-Alvarez*, 549 U.S. at 185–87 (adopting the modern categorical approach, including *Shepard*, to resolve questions of documents from prior convictions).

260. The idea is that information contained within police reports is not trustworthy because they have not been channeled through the criminal adjudication process, which refines the information and increases its accuracy. Police officers make mistakes and not everyone who is arrested is eventually convicted. *See Shepard*, 544 U.S. at 23 (affirming *Taylor*'s conclusion that "evidence of generic conviction [must] be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State").

261. *See* 8 U.S.C. § 1227(a)(2)(C) (listing as deportable "[a]ny alien who at any time after admission is convicted under any law of . . . possessing . . . a firearm or destructive device (as defined in section 921(a) of Title 18)"). 18 U.S.C. § 921(a), in turn, defines a "firearm" as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive[.]"

are not).[262] If the police found brass knuckles in the defendant's possession, then the prosecutor and defense lawyer would have to establish this fact in the plea colloquy under the modified categorical approach in order to create an unassailable record of conviction and minimize the risk of the defendant being placed in removal proceedings. Thus, the specificity of the plea documents could minimize the likelihood that the defendant will be placed in removal proceedings, highlighting a possible benefit of the modified categorical approach.[263]

In recent years, the interpretive rules governing criminal convictions have become only murkier as some jurisdictions allow IJs to consider even more criminal documents in removal proceedings. In 2008, the Attorney General issued a decision stating that in removal cases based on a "crime involving moral turpitude,"[264] IJs may "consider *any additional evidence deemed necessary or appropriate* to resolve accurately the moral turpitude question" if the record is inconclusive.[265] In another case, the Attorney General took a similar position toward noncitizens ICE had sought to remove for committing a "crime of domestic violence."[266] The Attorney General argued, and the circuit court held, that immigration judges may consider "evidence generally admissible for proof of facts in administrative proceedings" in order to establish the existence of a domestic relationship.[267] This approach appears to do exactly what the categorical approach tried to avoid: it relitigates the criminal facts that emerged at the downstream administrative proceeding. Indeed, the Supreme Court has already weighed in and signaled a willingness to accommodate such a rule in an analogous context. In *Nijhawan v. Holder*, an IJ found the noncitizen petitioner removable on the basis of fraud in which the loss to the victims exceeded $10,000.[268] In doing so, the IJ relied on the

262. Prior to 2012, the California Penal Code listed the types of weapons for which possession would trigger criminal liability in a single statute. *See* CAL. PENAL CODE § 12020(a)(1) (West 2009) (repealed 2010).

263. Even if Chong had been found with a more serious weapon in his possession, the prosecutor could *still* achieve the same immunity effect so long as the defendant (likely on the advice of counsel) avoided attesting to any specific details about the weapon in the plea colloquy. So long as the record of conviction is comprised of the charging document identifying the overly broad convicting statute and the colloquy is *pro forma* absent of any details regarding the specific weapon in the defendant's possession, then the defendant is protected. This strategy of pleading with "vagueness" is endorsed by a reference guide for criminal defense attorneys. *See* BRADY, *supra* note 77, at N-45.

264. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006).

265. *See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008) (emphasis added).

266. *See* Bianco v. Holder, 624 F.3d 265, 267 (5th Cir. 2010).

267. *Id.* at 273.

268. 557 U.S. 29, 30–31, 41–43 (2009). The Court drew a distinction between cases where removal turned on the presence of a generic crime and where removal turned on factual findings specific to the particular conviction. A "generic crime" was one where Congress intended for certain collateral consequences to follow from a crime as that crime is "*generally* committed." *Id.* at 34 (emphasis added). When Congress passes a statute that makes a conviction for "burglary" grounds for removal, under the categorical approach, courts assume that Congress meant to implement a

defendant's stipulation of facts entered at his sentencing hearing, which included the factual finding that the loss exceeded $100 million.[269]

The rationale for relaxing the strict boundaries surrounding the categorical approach is that doing so leads to a more accurate result. Allowing immigration officials to consider a broader array of materials, so the theory goes, facilitates the removal of those noncitizens Congress intended to remove. It prevents those noncitizens engaging in prohibited conduct from evading removal on technical grounds.[270] But this rationale stands in tension with the rationale behind *Padilla*'s mandate that defense lawyers and prosecutors plea bargain "creatively" to forge deals avoiding downstream removal. Moving further away from the categorical framework increases the number of variables the parties must consider,[271] and for noncitizens engaging in pettier criminal conduct, these variables must be resolved by the parties in a relatively compressed amount of time.

These rules greatly expand the universe of documents that IJs may consider, allowing immigration officials to consider "any" additional information subject to a standard akin to the "probative value" standard that governs evidentiary disputes in federal court. While these less rigid rules are valuable to immigration officials resolving cases in the abstract, for cases involving conviction-based removals, such a lax standard makes it difficult for upstream criminal lawyers to discern the boundaries of removal's shadow. If criminal lawyers cannot be fairly certain of the immigration consequences that flow from their clients' convictions, they cannot strike bargains with enough specificity needed in a pleading document to guarantee their clients do not get deported.

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deportation policy that is triggered by burglary as that crime is generally defined among the various states. *See* Taylor v. United States 495 U.S. 575, 598 (1990) (holding that, in the sentencing enhancement context, "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States"); *see also Nijhawan*, 129 U.S. at 34; Gonzales v. Duenas-Alvarez, 549 U.S. 183, 194 (2007) (holding that Congress intended for courts to evaluate "theft offense" in the generic sense for immigration purposes).

269. *See Nijhawan*, 557 U.S. at 32. The INA's aggravated felony provision lists as a qualifying offense "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2006). As Alina Das argues, the problem with this "circumstance-specific approach" is that it "provides noncitizens with little notice as to what the government may allege as the basis of their removal proceedings, and hampers their ability to contest such allegations at the removal hearing." Das, *supra* note 33, at 1729.

270. Legal scholars have been largely critical of this move away from a purely categorical analysis. *See, e.g.*, Das, *supra* note 33, at 1688–89; Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 658–67 (2011); Sharpless, *supra* note 251, at 1034–35.

271. *See* Das, *supra* note 33, at 1729 (noting that a circumstance-specific approach introduces into removal proceedings "a potentially endless set of documents like police reports, witness statements, and other factual allegations that may have been untested or even contradicted in the previous criminal court process").

CONCLUSION

Padilla represents an important victory for those interested in the fair enforcement of laws against immigrants. But by expanding the role of defense lawyers to achieve a fair result, the Court also increased the ability of prosecutors to act as gatekeepers within the larger removal system. This reality forces us to reconsider the usual justifications for delegating immigration-related power to local law enforcement actors, and at the very least, it illustrates that prosecutors stand apart from other local law enforcement actors in some important ways within the universe of immigration enforcement. Although there is still much to learn about the nature and extent of de facto immigration decision making in the context of state courts, based on what we do know about prosecutors and state criminal courts, local enforcement preferences will undeniably continue to shape immigration law's member-selection process at least into the near future. And in their own ways, Congress and the Court are poised to respond.